

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-1080
David L. Jordan,	:	(C.P.C. No. 09CR-1689)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on June 29, 2010

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

Thomas A. Gjostein, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} David L. Jordan is appealing from his conviction for burglary as a felony of the third degree. He assigns three errors for our consideration:

ASSIGNMENT OF ERROR #1

THE TRIAL COURT ERRED FOR FAILURE TO COMPLY WITH CRIMINAL RULE 11, WHEN THE APPELLANT WAS NOT INFORMED OF HIS RIGHT OF COMPULSORY PROCESS TO OBTAIN WITNESSES.

ASSIGNMENT OF ERROR #2

THE TRIAL COURT ERRED WHEN IT DID NOT COMPLY WITH CRIM. R. 11, FOR FAILURE TO DETERMINE THAT THE APPELLANT UNDERSTOOD THE NATURE AND ELEMENTS OF THE CHARGE AGAINST HIM, AND FOR FAILURE TO INFORM THE APPELLANT ABOUT HIS ELIGIBILITY FOR PROBATION OR COMMUNITY CONTROL SANCTIONS.

ASSIGNMENT OF ERROR #3

THE TRIAL COURT ERRED IN FAILING TO VACATE THE APPELLANT'S GUILTY PLEA, WHICH WAS NOT ENTERED INTO KNOWINGLY AND VOLUNTARILY, IN VIOLATION OF CRIM. R. 11 AND THE DUE PROCESS CLAUSES OF OHIO AND FEDERAL CONSTITUTIONS, AFTER HIS MOTION AND HEARING TO WITHDRAW THAT PLEA.

{¶2} Jordan was arrested on March 13, 2009 when a Columbus Police Officer saw Jordan running between houses carrying a laptop computer with several wires hanging loose and a book bag. Initial questioning about who owned the computer resulted in responses in which Jordan claimed that he owned the computer. Jordan then fled and hid in a dumpster. Jordan was found in the dumpster, still in possession of the computer and the book bag. The true owner of the computer was located nearby and the fact that the computer had just been stolen in a burglary was established.

{¶3} Burglary is defined in R.C. 2911.12 as follows:

(A) No person, by force, stealth, or deception, shall do any of the following:

(1) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense;

(2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense;

(3) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense;

(4) Trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present.

(B) As used in this section, "occupied structure" has the same meaning as in section 2909.01 of the Revised Code.

(C) Whoever violates this section is guilty of burglary. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree. A violation of division (A)(4) of this section is a felony of the fourth degree.

{¶4} Jordan's guilt with respect to that charge does not seem to be in serious debate. Instead, Jordan expresses dissatisfaction with the way the guilty plea proceedings were conducted and the refusal of the trial court to set aside his guilty plea after he learned that a prison sentence was likely.

{¶5} Addressing the specific assignment of error, in the first assignment of error, counsel for Jordan asserts that the trial judge who accepted his guilty plea did not specifically advise him of his right to subpoena witnesses to testify on his own behalf.

{¶6} The transcript of the plea proceedings indicate that Jordan was asked:

THE COURT: Do you understand that you would have the right to call witnesses on your behalf?

MR. JORDAN: Yes, ma'am.

(Tr. 21.)

{¶7} This inquiry by the trial court approximates the requirement that Jordan be informed that he had the right "to have compulsory process for obtaining witnesses" in his favor. See Crim.R. 11(C).

{¶8} If this were the sole extent of the record on this issue, Jordan's complaint might have some merit. However, Jordan also reviewed with counsel a written guilty plea form which precisely mentions Jordan's right to have "compulsory subpoena process for obtaining witnesses" in his favor and points out that he is giving up that right by entering a guilty plea.

{¶9} Further, efforts by defense counsel to get defense witnesses to appear through the use of subpoenas had been discussed in open court shortly before the guilty plea was entered. The record, taken as a whole, clearly indicates that Jordan knew the particulars about how defense witnesses would be made available to the witness stand and that Jordan gave up that right.

{¶10} The first assignment of error is overruled.

{¶11} In the second assignment of error, counsel asserts that the trial judge did not determine that Jordan knew the nature and elements of the charge of burglary. Counsel also asserts that Jordan was not advised about his eligibility for community control sanctions.

{¶12} At the time of his guilty plea, Jordan was under a period of post-release control. This means that he had been in prison for one or more other offenses not long before he was arrested on this burglary charge. Still, the trial court had Jordan evaluated

for eligibility to participate in a community based correctional facility. At the time the guilty plea was entered, the trial court clearly had not decided what sentence or community control conditions would apply to Jordan. The failure of the trial judge to state affirmatively that Jordan would receive community control was not an error.

{¶13} Jordan was advised about the allegations against him and the underlying facts, as set forth in this decision earlier, immediately before he told the trial judge that he wanted the trial court to accept his guilty plea. Jordan clearly understood the nature of the offense to which he was pleading. He entered an apartment where someone lived and took several items, including the laptop computer and book bag. This corresponds with R.C. 2911.12(A)(3), which reads:

No person, by force, stealth, or deception, shall do any of the following:

* * *

(3) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense[.]

{¶14} Jordan knew what he did and knew he was pleading guilty to burglary as a felony of the third degree.

{¶15} The second assignment of error is overruled.

{¶16} The third assignment of error asserts that Jordan should have been permitted to withdraw his guilty plea.

{¶17} The trial judge conducted a full, evidentiary hearing on the issue. The trial court appointed new counsel to assist Jordan in the matter.

{¶18} Crim.R. 32.1 reads:

A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.

{¶19} The trial judge misinterpreted the requirements of this rule and therefore applied the wrong standard to Jordan's motion to withdraw his guilty plea. The trial judge felt that a guilty plea could be set aside only to correct a manifest injustice. If the motion had been filed after sentencing, the trial court would have applied the correct standard. However, the manifest injustice standard does not apply to motions under Crim.R. 32.1 which are filed before sentencing occurs.

{¶20} We, therefore, vacate the trial court's judgment and sentence and remand the case for the trial court to apply the correct legal standard to the motion.

{¶21} The third assignment of error is sustained.

{¶22} In summary, the first and second assignments of error are overruled. The third assignment of error is sustained. The judgment of the Franklin County Court of Common Pleas is vacated and the case is remanded for further appropriate proceedings.

*Judgment vacated and case
remanded for further proceedings.*

McGRATH J., concurs.
CONNOR, J., concurs in part and dissents in part

CONNOR, J., concurring in part and dissenting in part:

{¶23} Although I concur with the majority's conclusion that the judgment in this matter should be vacated and remanded as a result of the trial court's misapplication of the Crim.R. 32.1 requirements for withdrawing a guilty plea, I write separately because I

believe the trial court also failed to properly comply with Crim.R. 11 regarding appellant's right to compulsory process, as asserted in Jordan's first assignment of error.

{¶24} Crim.R. 11(C) governs the procedure that a trial court must follow in accepting a guilty plea. The rule requires the trial court to personally address the defendant. Crim.R. 11(C)(2)(c) further requires the trial court to inform the defendant and to determine that he understands that by entering a guilty plea, he is giving up certain rights, including the right to have compulsory process for obtaining witnesses in his favor. The right to compulsory process is a constitutionally protected right and thus is subject to strict compliance under Crim.R. 11(C)(2)(c). *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200. The trial court must explain that constitutional right to the defendant in a manner that is reasonably intelligible to the defendant. *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph two of the syllabus.

{¶25} In the instant case, the exchange between Jordan and the trial court was extremely limited:

THE COURT: Do you understand that you would have the right to call witnesses on your behalf?

MR. JORDAN: Yes, ma'am.

(Tr. 21.)

{¶26} I do not believe that this exchange was sufficient to inform Jordan of his right to compulsory process, nor do I believe this was sufficient to reasonably inform Jordan that he could employ the power of the court to compel witnesses to appear and give testimony on his behalf, even if those witnesses did not wish to participate in this process, as may have been the situation here. The instruction given here did not use the term "compulsory process" or "subpoena" or instruct Jordan that witnesses could be

forced, compelled, summoned, or otherwise required to appear. See *State v. Day*, 8th Dist. No. 88725, 2007-Ohio-4052 (simply informing defendant that he was giving up the right to call witnesses to appear and testify was insufficient because it implied that he could only proffer witnesses he could obtain himself); *State v. Wilson*, 8th Dist. No. 82770, 2004-Ohio-499 (trial court must inform a defendant of its power to force, compel, subpoena, or otherwise cause a witness to appear and testify on defendant's behalf because otherwise the notice implies a defendant could only present witnesses he was able to secure through his own efforts); and *State v. Neeley*, 12th Dist. No. CA2008-08-034, 2009-Ohio-2337 (although the court is not required to specifically use the term "compulsory process," it must inform a defendant that it has the power to force, compel, subpoena, or otherwise cause a witness to appear and testify on the defendant's behalf).

{¶27} Furthermore, unlike the majority, I do not believe the trial court can simply rely upon other sources, such as the entry of guilty plea form, which does use the term "compulsory process" to describe one of the rights waived by entering a guilty plea, to convey information regarding this important constitutional right or to fulfill its strict obligations under Crim.R. 11(C)(2)(c). See *Veney* at ¶29.

{¶28} Accordingly, while I concur with the majority's decision to sustain Jordan's third assignment of error, I dissent in part because I would also sustain Jordan's first assignment of error.
