

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-143 (C.P.C. No. 09CR-04-2547)
General Smith, III,	:	(ACCELERATED CALENDAR)
Defendant-Appellant.	:	
State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-144 (C.P.C. No. 03CR-05-3195)
General Smith, III,	:	(ACCELERATED CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 30, 2010

Ron O'Brien, Prosecuting Attorney, and *John Cousins, IV*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} General Smith, III, defendant-appellant, appeals from two judgments of the Franklin County Court of Common Pleas. In one judgment, the court found him guilty,

pursuant to a plea of guilty, of attempted felonious assault, in violation of R.C. 2923.02 as it relates to R.C. 2903.11, which is a felony of the third degree. In the other judgment, the trial court revoked appellant's community control.

{¶2} In case No. 03CR-05-3195, appellant was found guilty on February 20, 2004, of aggravated robbery and a one-year firearm specification. On October 18, 2007, appellant filed a motion to vacate his guilty plea or, in the alternative, motion for new trial. On November 29, 2007, the parties disposed of the motion by entering into an agreement, in which it was agreed, among other things, that appellant would plead guilty to aggravated robbery without firearm specification and attempted having a weapon while under a disability, and the parties would enter a joint recommendation as to a total sentence of nine years and six months. The trial court issued a judgment entry on December 6, 2007, with regard to such. On December 1, 2008, appellant was granted judicial release with community control for a period of two years.

{¶3} On April 30, 2009, appellant was charged with four counts of robbery in case No. 09CR-04-2547. On May 27, 2009, the probation department requested revocation of appellant's community control in case No. 03CR-05-3195 due to the offenses in case No. 09CR-04-2547. On January 27, 2010, with regard to case No. 09CR-04-2547, a judgment was entered in which appellant pleaded guilty to attempted felonious assault, which was characterized as a lesser-included offense of robbery. The trial court sentenced appellant to a prison term of four years.

{¶4} Also on January 27, 2010, the trial court issued a judgment revoking appellant's community control in case No. 03CR-05-3195. The court imposed a prison term of nine years on the aggravated robbery charge to be served consecutively to a six-

month term on the attempted having a weapon while under disability charge. The trial court also ordered the sentence in case No. 03CR-05-3195 to be served consecutively to the term imposed in case No. 09CR-04-2547. In this consolidated appeal, appellant appeals the judgments of the trial court. Through counsel, appellant asserts the following assignments of error:

[I.] The trial court erred by accepting a guilty plea to an offense that is not a lesser included offense to the specified count within the indictment. Doing so denied appellant his right to indictment by a grand jury, as guaranteed by Article I, Section 10, of the Ohio Constitution, and due process as guaranteed by the Fourteenth Amendment to the United States Constitution.

[II.] The hearing at which appellant's guilty plea was entered did not conform with the requirements of Criminal Rule 11 or due process.

[III.] The trial court erred by imposing consecutive sentences without making statutorily required findings in accordance with R.C. 2929.14(E)(4).

{¶5} Appellant also asserts the following pro se assignments of error:

[IV.] Trial counsel was ineffective because he allowed petitioner to plea to an offense that was neither indicted or properly waved pursuant to Criminal Rule 7A.

[V.] Defendant's plea is void because his sentence is void.

[VI.] The court was with out subject matter jurisdiction to enter to entertain defendant plea or sentence him[.] R.C. 2941.021 allows the court jurisdiction to hear a non indicted charge[.]

[VII.] The court's journal entry does not reflect the truth of the plea colloquy.

[VIII.] The court failed to give credit for time served against reimposed sentence pursuant to §2929.20(I).

{¶6} We will address appellant's first and sixth assignments of error together. Appellant generally argues in both of these assignments of error that the trial court erred by accepting a guilty plea to attempted felonious assault because it is not a lesser-included offense to robbery. Count 1 of the indictment alleged the offense of robbery, as follows:

General Smith III * * * on or about the 23rd day of March in the year of our Lord, 2009, within the County of Franklin aforesaid, in violation of section 2911.02 of the Ohio Revised Code, in attempting or committing a theft offense in respect to United Dairy Farmers, or in fleeing immediately after the attempt or offense, did recklessly inflict, attempt to inflict, or threaten to inflict physical harm on another[.]

{¶7} R.C. 2903.11(A), entitled "Felonious Assault," provides, in pertinent part:

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another or to another's unborn;

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

{¶8} Appellant maintains that he could not be found guilty of attempted felonious assault as a lesser-included offense of robbery because the grand jury did not include language in the indictment that could comprise the elements of attempted felonious assault and no effort was made to obtain a waiver of his rights to indictment by grand jury. Appellant asserts the trial court's actions violated Section 10, Article I of the Ohio Constitution, which provides, that "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury." Likewise, Crim.R. 7(A) requires that all felonies, absent proper waiver, be prosecuted by

indictment. Indictments may be amended "before, during, or after a trial * * *, provided no change is made in the name or identity of the crime charged." Crim.R. 7(D).

{¶9} In support of his argument, appellant cites *State v. Rohrbaugh*, 178 Ohio App.3d 211, 2008-Ohio-4781, the facts of which appellant asserts are comparable with those in the present case. The case was appealed to and pending before the Supreme Court of Ohio at the time of briefing in the present matter. The Supreme Court has since issued a decision in *State v. Rohrbaugh*, ___ Ohio St.3d ___, 2010-Ohio-3286 ("*Rohrbaugh*"). In *Rohrbaugh*, the defendant was indicted for breaking and entering, but, after plea negotiations, the indictment was amended to receiving stolen property, and appellant plead guilty to receiving stolen property. On appeal, the appellate court reversed, finding the amendment of the indictment amounted to plain error because it violated the defendant's right to indictment by grand jury by changing the name or identity of the crime without the defendant's waiver of his right to indictment.

{¶10} The state appealed, and the Supreme Court accepted the discretionary appeal and certified a conflict existed. The court certified the following question: " 'May a defendant consent to a negotiated plea to an offense that was neither indicted, nor a lesser included offense of the indicted offense, without a waiver of indictment pursuant to Criminal Rule 7(A) and Section 10, Article I of the Ohio Constitution?' " Id. at ¶4. The court reversed the court of appeals. The court found that the trial court erred because the amendment to the indictment changed the name or identity of the crime charged without presentment to a grand jury, the error was plain because Crim.R. 7(D) clearly bans such amendments, and the error also affected the outcome of the trial. However, the court found that the error was not reversible plain error because there was no miscarriage of

justice, given the defendant was not prejudiced by the amendment, gained a benefit when the prosecutor dismissed six charges against him, was represented by counsel, and signed a statement that he reviewed and understood the amended indictment. The court also found no reversible error because the defendant invited the error by negotiating for the amended indictment and agreeing to plead guilty to the amended charge.

{¶11} Although in *Rohrbaugh* the indictment was amended to reflect the charge to which the defendant pleaded guilty, we find the case comparable to the present case and find the decision dispositive of appellant's argument. As in *Rohrbaugh*, we believe the trial court here erred because appellant pleaded guilty to an offense that was different in name and identity to the crime charged, the error was plain because Crim.R. 7 clearly bans such, and the error also affected the outcome of the trial. However, similar to *Rohrbaugh*, appellant was not prejudiced, gained a benefit when the prosecutor dismissed the three remaining charges and specifications against him, and appellant was represented by counsel. Appellant also signed a statement that he understood the offense to which he was pleading guilty. Thus, while we agree there was error, it was not reversible plain error because there was no miscarriage of justice, appellant agreed to plead guilty to the amended charge, and appellant cannot take advantage of an error that he invited through the plea negotiations. Accordingly, appellant could plead guilty to attempted felonious assault, even though it was not in the indictment and was not a lesser-included offense of robbery. For these reasons, appellant's first and sixth assignments of error are overruled.

{¶12} Appellant argues in his second assignment of error that the hearing at which appellant's guilty plea was entered did not conform to the requirements of Crim.R.

11(C)(2)(a) or due process because the court failed to properly ascertain whether appellant understood the nature of the charge of attempted felonious assault.

{¶13} Crim.R. 11 provides, in pertinent part:

(C) Pleas of guilty and no contest in felony cases

* * *

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶14} The mandate that the defendant must be informed of the nature of the charges is a non-constitutional right. See *State v. Ericson*, 7th Dist. No. 09 MA 109, 2010-Ohio-4315, ¶14. For the non-constitutional rights in Crim.R. 11, the trial court must substantially comply with the mandates of Crim.R. 11. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. "Substantial compliance" means that, under the totality of the circumstances the

defendant subjectively understands the implications of his plea and the rights he is waiving. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶15, citing *Nero* at 108. Furthermore, a defendant who challenges his guilty plea on the basis that the advisement for the non-constitutional rights did not substantially comply with Crim.R. 11(C)(2)(a) must also show a prejudicial effect, meaning the plea would not have been otherwise entered. *Id.*

{¶15} In the present case, appellant's second assignment of error focuses on the trial court's alleged failure to ascertain whether appellant understood the nature of the charges, as set forth in Crim.R. 11(C)(2)(a). Appellant contends the trial court did not discuss with appellant the elements of attempted felonious assault or what the State of Ohio, plaintiff-appellee, would have to prove in order to obtain a conviction.

{¶16} However, Crim.R. 11(C)(2)(a) does not require a trial court to provide a detailed explanation of the elements of the charges against a defendant. *State v. Fitzpatrick*, 102 Ohio St.3d 331, 2004-Ohio-3167, ¶56-57, citing *Henderson v. Morgan* (1976), 426 U.S. 637, 96 S.Ct. 2253. It is not the court's duty to provide this information where the record contains evidence that the defendant is aware of the nature of the offense. *State v. Harris*, 7th Dist. No. 08MA30, 2008-Ohio 6298, ¶22 ("the trial court does not itself need to inform the accused of the actual elements of the charged offense; a defendant can obtain this information from whatever source, be it from the trial court, the prosecutor, or some other source"). The test is whether the totality of the circumstances shows that the defendant was provided with notice of the nature of the charge from some source. *Id.* See also *State v. Carter* (1979), 60 Ohio St.2d 34, 38-40 (noting a presumption that defense counsel informed the client of the nature of the charge).

{¶17} Here, the prosecutor stated that appellant was pleading guilty to attempted felonious assault, violations of R.C. 2903.11 and 2923.02, which was a felony of the third degree, as part of the plea agreement. Appellant told the court that, before he signed the entry of guilty plea, he discussed the plea with his counsel. Appellant said he understood the entry of guilty plea. The trial court then asked appellant if he understood he was pleading guilty to attempted felonious assault, which was a third-degree felony, and appellant responded that he understood. The trial court asked appellant if he understood the nature of his offense, and appellant responded that he did. The prosecutor then recited the facts of the case and added that the state was agreeing to a guilty plea to attempted felonious assault because the victim was not gravely injured. The trial court gave appellant a chance to speak, and appellant expressed no confusion as to the nature of the offense. In addition, the written plea was signed by appellant and his attorney and indicated that appellant had reviewed the facts and law of his case with his counsel. The existence of this statement combined with appellant's answers to the court's questions and the recitations at the plea hearing establishes that appellant understood the nature of the attempted felonious assault offense. Under the totality of the circumstances, we conclude that the court substantially complied with the requirement of Crim.R. 11(C)(2)(a) that the court determine that appellant had an understanding of the nature of the charges. Appellant's second assignment of error is overruled.

{¶18} Appellant argues in his third assignment of error that the trial court erred by imposing consecutive sentences without making statutorily required findings in accordance with R.C. 2929.14(E)(4). In essence, appellant argues that the United States Supreme Court's decision in *Oregon v. Ice* (2009), 129 S.Ct. 711, resurrected the

statutory finding requirement severed by the Supreme Court of Ohio in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Because appellant failed to raise before the trial court that the court was required to make the findings required by R.C. 2929.14(E)(4) before imposing consecutive sentences and did not object to the imposition of consecutive sentences, appellant has waived all but plain error. Crim.R. 52(B).

{¶19} This court has held in a number of cases that, notwithstanding the apparent abrogation of the Supreme Court of Ohio's decision in *Foster* by the United States Supreme Court's decision in *Ice*, we are bound to continue to follow *Foster* unless and until *Foster* is specifically overruled by the Supreme Court of Ohio. See, e.g., *State v. Anderson*, 10th Dist. No. 09AP-631, 2010-Ohio-626; *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554; *State v. Crosky*, 10th Dist. No. 09AP-57, 2009-Ohio-4216. We continue to adhere to this tenet. Therefore, appellant's third assignment of error is overruled.

{¶20} Appellant argues in his fourth assignment of error that his trial counsel was ineffective because he allowed appellant to enter a plea to an offense that was neither indicted nor properly waived pursuant to Crim.R. 7(A). Appellant argues that his trial counsel failed to assure that he understood he had a right to an indictment by a grand jury and such had an adverse effect on the outcome of the proceedings, as he pleaded guilty to a crime he could have never been found guilty of by a jury under the facts alleged in the original indictment.

{¶21} It is well-established that, in order to prevail on a claim of ineffective assistance of counsel, appellant must demonstrate that trial counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be

relied upon as having produced a just result. *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052. The standard of proof requires appellant to satisfy a two-pronged test. First, the defendant must show that counsel's performance was deficient. *Id.* at 687. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *Id.*

{¶22} Thus, to demonstrate ineffective assistance of counsel, appellant must show that the representation provided by his counsel fell below an objective standard of reasonableness and that, as a result, there is the reasonable probability that, but for such errors, the result of the trial would have been different. *State v. Lytle* (1976), 48 Ohio St.2d 391, vacated in part on other grounds, *Lytle v. Ohio* (1978), 438 U.S. 910, 98 S.Ct. 3135.

{¶23} Within the context of entering a guilty plea, the element of prejudice focuses on whether the attorney's constitutionally ineffective performance affected the outcome of the plea process. *Hill v. Lockhart* (1985), 474 U.S. 52, 106 S.Ct. 366. A plea of guilty waives the right to claim ineffective assistance of counsel, except to the extent the defects complained of caused the plea to be less than voluntarily or knowingly made. *State v. Spates* (1992), 64 Ohio St.3d 269.

{¶24} In the present case, even if appellant could show that his trial counsel's performance was deficient because counsel failed to assure that he understood he had a right to an indictment by a grand jury for the crime of attempted felonious assault, we find

appellant has failed to show prejudice. Appellant fails to explain why he would not have, nevertheless, pleaded guilty, even if he knew he had the right to be first indicted on the charge. As detailed above, appellant received a significant benefit by pleading guilty to attempted felonious assault, as the state dismissed other charges against him in exchange. Furthermore, as the state points out, if his counsel had objected, the state could have obtained another indictment, and appellant would have been faced with the same circumstances. Appellant does not assert that he would have made a different decision had he been properly indicted for attempted felonious assault. Therefore, because we can find no prejudice, appellant's counsel did not render ineffective assistance. Appellant's fourth assignment is overruled.

{¶25} Appellant argues in his fifth assignment of error that his plea is void because his sentence was void in case No. 03CR-05-3195. Appellant asserts that his plea was void because, at the hearing granting appellant judicial release, the trial court indicated it could send appellant back to prison for the balance of his 15-year sentence if appellant violated the terms of his community control. It appears the trial court mistakenly indicated 15 years, when the balance was actually nine years for the aggravated robbery count and six months (not years) for the attempted having a weapon while under a disability count.

{¶26} Initially, we note appellant failed to object to the trial court's statement. Consequently, appellant has waived all but plain error with respect to this issue. *State v. Newcomb*, 10th Dist. No. 03AP-404, 2004-Ohio-4099, ¶23. Nevertheless, we find any error in making this statement was harmless. After appellant violated the terms of his community control, the trial court imposed the correct term of nine years for the

aggravated robbery count and six months for the attempted having a weapon while under a disability count. Therefore, because any error was harmless, we overrule appellant's fifth assignment of error.

{¶27} Appellant argues in his seventh assignment of error that the court's journal entry does not reflect the truth of the plea colloquy. The exact nature of appellant's argument is difficult to discern. Appellant claims that the stipulated lesser-included offense of attempted felonious assault was never mentioned in either the plea agreement or plea colloquy. However, a review of the transcript from the plea hearing reveals the trial court, in fact, informed appellant he was pleading guilty to the lesser-included offense of attempted felonious assault. Likewise, the entry of guilty plea also indicated that appellant was pleading guilty to the lesser-included offense of attempted felonious assault. Insomuch as appellant's arguments reiterate the same arguments in his first and sixth assignments of error, we reject them based upon the same reasoning. Therefore, appellant's seventh assignment of error is overruled.

{¶28} Appellant argues in his eighth assignment of error that the trial court failed to give credit for time served. Appellant claims he was entitled to additional jail credit in case No. 03CR-05-3195 when the court revoked his community control on January 25, 2010. In that case, the trial court granted appellant jail credit of 2,312 days. Appellant contends he is actually entitled to jail credit of 2,466 days.

{¶29} Alleged errors regarding jail-time credit may be raised in a defendant's direct appeal of his criminal case. *State v. Young*, 5th Dist. No. 03-CAA-10051, 2004-Ohio-4002, ¶13, citing *State ex rel. Jones v. O'Connor*, 84 Ohio St.3d 426, 1999-Ohio-470. R.C. 2967.191 requires that a felony offender's prison term be reduced by the total

number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced, including confinement in lieu of bail while awaiting trial. The number of days the defendant spent in jail prior to his guilty plea and sentencing is confinement arising out of the offense for which he was convicted and sentenced within the express parameters of R.C. 2967.191. *Young* at ¶10. Accordingly, defendant is entitled to jail-time credit for the number of days of that confinement.

{¶30} The trial court is responsible for properly calculating the number of days for which jail-time credit should be given. *State ex rel. Corder v. Wilson* (1991), 68 Ohio App.3d 567; *Young* at ¶12; R.C. 2949.12. The trial court's failure to properly calculate a felony offender's jail-time credit, pursuant to R.C. 2967.191, and to include the amount of jail-time credit in the body of the offender's sentencing judgment is plain error. *State v. Miller*, 8th Dist. No. 84540, 2005-Ohio-1300, ¶10.

{¶31} We have reviewed the record and agree that appellant's jail credit may have been miscalculated. At the November 29, 2007 sentencing hearing, the trial court indicated that appellant had jail credit of 1,825 days as of that date. On December 1, 2008, the trial court granted judicial release. At the bottom of the December 1, 2008 entry granting judicial release, there is an indication that appellant had jail credit of 2,034 days, which appears to be in error, as 368 days had passed between November 29, 2007 and December 1, 2008. The record also represents that appellant was arrested on April 22, 2009, for the crimes in case No. 09CR-04-2547. The trial court applied the jail time served after April 22, 2009, as time served for violation of judicial release in case No. 03CR-05-3195. The revocation of judicial release occurred in this case on January 25, 2010, the same date of the plea and sentencing in case No. 09CR-04-2547. There is no indication

in the record that appellant was not imprisoned during this entire period. Two hundred and seventy-eight days elapsed between April 22, 2009 and January 25, 2010. Therefore, given the state of the record, it appears the trial court's calculation of jail credit of 2,312 days was incorrect. Therefore, we sustain appellant's eighth assignment of error.

{¶32} Accordingly, appellant's first, second, third, fourth, fifth, sixth, and seventh assignments of error are overruled, appellant's eighth assignment of error is sustained, and the judgments of the Franklin County Court of Common Pleas are affirmed in part and reversed in part. These matters are remanded to the trial court to re-examine and recalculate, if necessary, the jail-time credit entitled in case No. 03CR-05-3195.

*Judgments affirmed in part; reversed in part;
causes remanded with instructions.*

TYACK, P.J., and FRENCH, J., concur.
