

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-292 (C.P.C. No. 09CR-07-4288)
Kendrick Young,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 2, 2010

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*,
for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Kendrick Young ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty of three counts of aggravated robbery in violation of R.C. 2911.01 pursuant to appellant's guilty plea. Because the trial court properly advised appellant, pursuant to Crim.R. 11, we affirm.

{¶2} On July 20, 2009, a Franklin County Grand Jury indicted appellant and co-defendant Jonathan Elkran Leon, II on 14 felony counts arising out of the robbery of three women on July 11, 2009. The indictment charged the two men with three counts of first-degree felony aggravated robbery in violation of R.C. 2911.01; three counts of second-degree felony robbery in violation of R.C. 2911.02; three counts of third-degree felony robbery in violation of R.C. 2911.02; three counts of first-degree felony kidnapping in violation of R.C. 2905.01; one count of third-degree felony having a weapon while under disability in violation of R.C. 2913.13; and one count of third-degree felony tampering with evidence in violation of R.C. 2921.12. The aggravated robbery, second-degree felony robbery, and kidnapping charges included firearm and repeat violent offender specifications. The third-degree felony robbery and tampering with evidence charges included firearm specifications.

{¶3} Appellant initially entered a not guilty plea to the charges. However, on the day trial was to commence, appellant entered a plea of guilty to three counts of aggravated robbery, felonies of the first degree, without the firearm and repeat violent offender specifications. Following inquiry, pursuant to Crim.R. 11, the trial court accepted appellant's guilty plea, dismissed the remaining charges, and sentenced appellant to an aggregate term of 13 years on the joint recommendation of the state and defense counsel.

{¶4} Pursuant to a motion for delayed appeal granted by this court on May 11, 2010, appellant appeals, assigning one error:

The trial court erred in accepting Appellant's guilty plea in violation of Crim.R. 11 and due process guarantees under the state and federal Constitutions.

{¶5} Appellant's single assignment of error contends the trial court erred in accepting his guilty plea in violation of Crim.R. 11 and due process protections under the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution. Appellant asserts several arguments to support his claim that his guilty plea was not knowingly, voluntarily, and intelligently entered. Appellant maintains that the trial court did not make a full inquiry into appellant's understanding of the nature of the charges and possible defenses, that appellant's monosyllabic responses to the court's questions demonstrated that he did not have a meaningful understanding of the rights involved, that appellant's request for further consultation with counsel before entering his plea evidenced his uncertainty about the plea process, and that appellant's pretrial pro se filings indicated his lack of confidence in trial counsel's defense and the extent of preparation engaged in by trial counsel.

{¶6} " 'When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution.' " *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶7, quoting *State v. Engle* (1996), 74 Ohio St.3d 525, 527. A determination of whether a plea was knowingly, intelligently, and voluntarily entered is based upon a review of the record. *State v. Vinson*, 10th Dist. No. 08AP-903, 2009-Ohio-3240, ¶7, citing *State v. Spates* (1992), 64 Ohio St.3d 269, 272.

{¶7} Crim.R. 11(C) addresses guilty pleas in felony cases and provides, in pertinent part, the following:

(2) In felony cases the court may refuse to accept a plea of guilty * * * and shall not accept a plea of guilty * * * 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 * * * 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.

{¶18} "A trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid. (Crim.R. 11(C)(2)(c) applied.)" *Veney* at syllabus. A defendant "need not be advised of those rights in the exact language of Crim.R. 11(C), but he must be informed of them in a reasonably intelligible manner." *Vinson* at ¶16, citing *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph one of the syllabus.

{¶9} Although the trial court must strictly comply with Crim.R. 11 regarding federal constitutional rights, the trial court need only substantially comply with the nonconstitutional provisions of the rule. *State v. Enyart*, 10th Dist. No. 08AP-184, 2008-Ohio-6418, ¶15, citing *Veney* at ¶14-17. The nonconstitutional rights about which a defendant must be informed are the nature of the charges with an understanding of the law in relation to the facts, the maximum penalty, and that, after entering a guilty plea, the court may proceed to judgment and sentence. Crim.R. 11(C)(2)(a) and (b). " 'Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implication of his plea and the rights he is waiving.' " *Enyart* at ¶16, quoting *State v. Nero* (1990), 56 Ohio St.3d 106, 108. Moreover, "a defendant who challenges a guilty plea on a nonconstitutional basis must demonstrate a prejudicial effect." *State v. Brooks*, 10th Dist. No. 02AP-44, 2002-Ohio-5794, ¶22, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 92-93, and *Nero* at 108. "The test is whether the plea would otherwise have been made." *Id.* at ¶22, citing *Stewart*.

{¶10} " 'In determining whether a defendant understood the charge a court should examine the totality of the circumstances.' " *Enyart* at ¶17, quoting *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, ¶56. "For a trial court to determine whether a defendant is making a plea with understanding of the nature of the charge, 'it is not always necessary that the trial court advise the defendant of the elements of the crime, or to specifically ask the defendant if he understands the charge, so long as the totality of the circumstances are such that the trial court is warranted in making a determination that the defendant understands the charge.' " *Id.* at ¶17, quoting *State v. Rainey* (1982), 3 Ohio App.3d 441, 442.

{¶11} Here, the totality of the circumstances demonstrates that appellant entered his guilty plea knowingly, intelligently, and voluntarily. At the plea hearing, in the presence of appellant, plaintiff-appellee, state of Ohio ("state"), set forth the charges upon which appellant was indicted, and thereafter summarized the facts of the case as follows. On July 11, 2009, three women pulled into the parking lot of a bar and exited their vehicle. Two men, later identified as appellant and Leon, exited a gold Ford Explorer and approached the women from behind. Appellant produced a handgun, placed it against the neck of one of the women, and demanded her property. After the women surrendered their purses, appellant and Leon ran to their car and sped away. The women noted the car's license plate number and called the police.

{¶12} With this information, the police identified the owner of the vehicle and drove to the owner's residence. Approximately 20 minutes later, appellant and Leon arrived at that residence in the gold Explorer. The police ordered them out of the vehicle. Leon surrendered without incident; however, appellant fled on foot. Appellant was later apprehended as he exited a house in the neighborhood. The three women independently identified appellant and Leon as the robbers. The women specifically identified appellant as the gunman based upon a tattoo on his neck. The police recovered a gun from behind the house appellant exited. The gun was later determined to be an operable firearm.

{¶13} Appellant voiced no objection to the state's recitation of the facts, and trial counsel declined the trial court's invitation to assert any additions or exceptions to those facts. Defense counsel also represented to the court that she was satisfied that appellant was proceeding with the guilty plea in a knowing, intelligent, and voluntary manner.

{¶14} The court then asked appellant if he would like to change his previously entered not guilty plea and enter a guilty plea to three counts of aggravated robbery. Appellant responded in the affirmative. Thereafter, upon the court's questioning, appellant acknowledged that he was a United States citizen and had no difficulty reading or writing English. He also acknowledged that he signed his guilty plea form after having read it and reviewing it with his attorney, and that he understood all the material contained therein. The trial court fully explained the nature of the charges to which appellant was pleading guilty. Specifically, the court explained that appellant was pleading guilty to three counts of aggravated robbery, all first-degree felonies, without the attached firearm and repeat violent offender specifications. Appellant indicated that he understood the nature of the charges to which he was pleading guilty. Appellant averred that he was not under the influence of any drugs or medication and that no court had ever found him to be mentally ill.

{¶15} The trial court then informed appellant that he had a right to trial by jury, that he had a right to require the state to prove him guilty of the charges beyond a reasonable doubt, that he had a right to confront witnesses called against him, that he had a right to compulsory process, and that he had a right against self-incrimination. Following a brief off-the-record discussion with defense counsel, appellant indicated that he understood he was waiving all these rights by pleading guilty.

{¶16} The trial court noted that it was not required to follow the joint recommendation on sentence proposed by the state and defense counsel. The court

thereafter informed appellant about the maximum penalty on each charge, the terms of post-release control, and the fact that his pleading guilty would constitute a violation of his parole. Appellant indicated that he understood this information.

{¶17} Upon further inquiry by the court, appellant indicated that no one had promised him anything in return for his guilty plea, that he had not been pressured or forced to enter a guilty plea, and that he understood that the trial court was the final arbiter of sentence. Appellant indicated that he would like the court to accept his guilty plea. Thereafter, the trial court accepted appellant's guilty plea after determining that it was entered knowingly, intelligently, and voluntarily.

{¶18} Appellant argues that the fact he acknowledged the court's questions with only minimal responses, such as "yes, your honor," and "no, your honor," indicates that he failed to understand the nature of the charges with any depth. However, this court has held that a defendant simply responding "yes" and "no" to a court's questions during plea proceedings is sufficient to render a guilty plea valid. *State v. Marcum*, 10th Dist. No. 07AP-905, 2008-Ohio-2292, ¶8. Indeed, we stated in *Marcum* that "it is not unusual for defendants to respond to a trial judge's questions during the plea discourse with a simple 'yes,' and 'no,' and we cannot assume that these defendants actually desired to say something else." *Id.*, citing *State v. Davis*, 10th Dist. No. 07AP-356, 2008-Ohio-107, ¶19.

{¶19} In *Marcum*, we found a discussion similar to that which transpired between the trial court and the appellant in the instant case constituted a "meaningful colloquy" for purposes of accepting a guilty plea. As noted above, at the commencement of the dialogue, the trial court asked appellant if he could read and write English, an inquiry

clearly intended to gauge appellant's ability to understand his plea and the ensuing proceedings. The court then asked appellant a number of questions aimed at ensuring that he understood the nature of the charges to which he was pleading guilty.

{¶20} We further note that appellant signed a written plea agreement that expressly stated he was entering his plea voluntarily. "A written waiver is presumptively voluntary, knowing, and intelligent." *Marcum* at ¶10, citing *Fitzpatrick* at ¶37. The record before us provides no reason to question whether appellant's written guilty plea was voluntary, knowing, and intelligent, and appellant fails to indicate any evidence to rebut those presumptions.

{¶21} In addition, this court has generally determined that a defendant enters a guilty plea with an understanding of the nature of the charges when: (1) the trial court personally addresses the defendant and the defendant indicates that he understands the charges to which he is pleading guilty; (2) his signed guilty plea indicates that he has reviewed the law and the facts with his counsel; and (3) counsel advises the court that he or she has reviewed the facts and the law with his client and that his client has read the plea form. *Marcum* at ¶11, citing *State v. Cantrell* (Mar. 26, 2002), 10th Dist. No. 01AP-818, citing *State v. Ellis* (June 20, 1996), 10th Dist. No. 95APA10-1399. In the instant case, appellant averred that he understood he was pleading guilty to three counts of aggravated robbery, that he signed and understood the guilty plea form, and that his counsel reviewed the guilty plea form with him. Although trial counsel did not expressly state on the record that she reviewed the facts and law with appellant or that appellant had read the plea form, counsel implicitly indicated as much when she represented to the

court that she was satisfied that appellant was making a knowing, intelligent, and voluntary change in his plea. In addition, the guilty plea form, signed by appellant's counsel, indicates that she counseled appellant regarding the facts and law of the case.

{¶22} We find no merit to appellant's contention that he was confused as to which crimes he was entering guilty pleas. Although the indictment charged appellant with a significant number of crimes and specifications, appellant entered guilty pleas to only three counts of aggravated robbery without any specifications. As noted above, the trial court thoroughly explained the nature of the charges to which appellant was entering a plea, and appellant indicated that he understood the nature of those charges. Nothing in the record suggests that appellant was confused about the crimes to which he entered his plea.

{¶23} As to appellant's contention that the trial court did not advise him of possible defenses, we note initially that appellant does not disclose what potential defenses he could have asserted. Furthermore, Crim.R. 11(C)(2) does not require that a trial court advise a defendant concerning all existing affirmative defenses or make a determination that the defendant is aware of the available defenses. Thus, the Supreme Court of Ohio has held that a trial court is not required to apprise a pleading defendant of the availability of defenses, even in circumstances where the same statute that defines the offense defines various affirmative defenses. *State v. Ingram*, 7th Dist. No. 09 MA 98, 2010-Ohio-1093, ¶22, citing *State v. Reynolds* (1988), 40 Ohio St.3d 334, 335-36.

{¶24} Moreover, we reject appellant's contention that his request to consult with counsel during the proceedings suggested his uncertainty about the plea process. The

discussion between appellant and his counsel occurred off the record and is not transcribed, and we refuse to speculate as to the substance of that conversation. Further, following consultation with trial counsel, appellant gave no indication that he did not understand the process or that he did not wish to enter a guilty plea. Indeed, immediately following the discussion, appellant averred that he understood that he was waiving very important rights by pleading guilty.

{¶25} Finally, as noted above, a defendant who challenges a guilty plea on a nonconstitutional basis must demonstrate a prejudicial effect. *Brooks*. Appellant has not demonstrated, nor has he even argued, that he would not have pleaded guilty had he been more thoroughly advised by the court regarding his nonconstitutional rights.

{¶26} We also note that appellant asserts that his pretrial pro se filings suggest his lack of confidence in trial counsel's defense and the extent of trial counsel's preparation. This allegation is obviously an attempt to demonstrate that appellant did not have all the facts before him so that he could enter a voluntary, knowing, and intelligent waiver of his rights. However, ineffectiveness of trial counsel is not subject to review in the present appeal, as this assertion must necessarily be supported by evidence outside the record and is not included as an assignment of error herein. *Marcum* at ¶12. Further, this argument has no effect on whether the trial court complied with the requirements of Crim.R. 11, as there was no allegation made before the trial court at the plea hearing or the sentencing hearing as to deficiencies of appellant's trial counsel for the court to consider. *Id.* Accordingly, this argument is without merit.

{¶27} Appellant also argues that his sentence is disproportionate to the sentence imposed upon his accomplice, Leon. We first note that the trial court record before us

does not divulge Leon's sentence. In addition, the issue of disproportionate sentencing must first be raised in the trial court and supported by sufficient evidence to preserve the error for appeal. *State v. Elkins*, 6th Dist. No. S-08-014, 2009-Ohio-2602, ¶16. Appellant raised no such argument at the plea hearing or the sentencing hearing. Indeed, at the sentencing hearing, appellant accepted full responsibility for his actions and apologized for involving his 19-year-old accomplice in the robbery. Moreover, this argument is irrelevant to the issue of whether the trial court complied with the requirements of Crim.R. 11.

{¶28} Based upon the totality of the circumstances, we conclude that appellant entered his guilty plea knowingly, intelligently, and voluntarily, and that the trial court properly determined as much through a meaningful colloquy with appellant. The court engaged in an extensive inquiry with appellant regarding the crimes to which he was pleading guilty. The state recited the underlying facts in great detail and appellant offered no objection to those facts. Not only did the guilty plea form indicate review with defense counsel, but appellant in open court admitted he reviewed the document with his attorney and understood it. The trial court provided appellant the opportunity to speak, and appellant expressed no confusion about the plea process. The trial court clearly complied with the mandates of Crim.R. 11(C).

{¶29} Finally, we decline appellant's invitation to consider other potential errors pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396. Where, as here, appellate counsel has found one or more issues worthy of appellate review, it is not appropriate to discuss or present non-meritorious issues, as if this were an *Anders* brief when it is not. *State v. Padgett* (June 30, 2000), 2d Dist. No. 99 CA 87.

{¶30} For the foregoing reasons, we overrule appellant's sole assignment of error, and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

McGRATH and CONNOR, JJ., concur.
