

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-458
	:	(C.P.C. No. 10CR-07- 4300)
Jonathan T. Thomas,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 6, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for
appellee.

Siewert & Gjostein Co., L.P.A., and *Thomas A. Gjostein*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Jonathan T. Thomas is appealing from the judgment and sentence entered in his case following his guilty plea to a single charge of rape. He assigns three errors for our consideration:

[I.] APPELLANT'S SENTENCE WAS CONTRARY TO LAW
AND CONSTITUTED AN ABUSE OF DISCRETION.

[II.] TRIAL COUNSEL RENDERED INEFFECTIVE
ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH

AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE
I, SECTIONS 10, 16 OF THE OHIO CONSTITUTION.

[III.] 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.

{¶2} Thomas was indicted on charges alleging that he raped a six-year old girl. As a part of a plea bargain, he pled guilty to a felony of the first degree without the specification that would have caused him to possibly spend the rest of his life in prison. The trial judge assigned to the case gave Thomas a sentence of ten years of incarceration, the maximum possible for a felony of the first degree. The judge expressed his distaste for a person who would rape a six-year old.

{¶3} The trial court judge was clearly within his discretion to give a ten-year sentence to Thomas. Thomas was at risk of giving the victim a serious disease. He caused her physical harm through the sheer force he used. The emotional harm he caused is difficult to assess at this time, but could be life-long, for several reasons. The fact he was a trusted family member, is one of those reasons.

{¶4} Nothing about the sentence Thomas received is contrary to law. Nothing about the sentence is an abuse of discretion. Applying either standard for evaluating the sentence, the sentence was not inappropriate.

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

{¶6} In the second assignment of error, appellate counsel alleges that the two attorneys who represented Thomas in the trial court rendered ineffective assistance of counsel. Nothing in the record before us supports that allegation. Trial counsel arranged a plea bargain which capped Thomas's incarceration at ten years.

{¶7} Trial counsel did not have the ability to avoid the distaste the trial court judge, or any trial court judge would feel for a man with a life-threatening disease raping a six-year old child.

{¶8} Thomas had a significant criminal record demonstrating a history of violence. Had he gone to trial and chosen to testify, his credibility was automatically going to be suspect. If he did not testify, the evidence in his defense was going to be limited.

{¶9} The standard we are to apply is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. Defense counsel here was clearly acting as counsel. A different and better outcome of the charges was unlikely. Nothing about the proceedings indicates any unfair outcome. Based upon the record before us, none of the standards for determining that trial counsel rendered ineffective assistance of counsel under the Sixth Amendment to the United States Constitution have been met.

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

{¶11} In the third assignment of error, appellate counsel alleges that the trial court judges who accepted Thomas's guilty plea did not sufficiently comply with Crim.R. 11 because the trial court did not sufficiently address Thomas's right to subpoena witnesses.

{¶12} Crim.R. 11(C)(2) reads:

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.

{¶13} Crim.R. 11 has recently been addressed by the Supreme Court of Ohio in

State v. Barker, 129 Ohio St.3d 472, 2011-Ohio-4130. The syllabus for *Barker* reads:

1. A trial court complies with Crim.R. 11(C)(2)(c) when its explanation of the constitutional right to compulsory process of witnesses is described to the defendant during the plea colloquy as the "right to call witnesses to speak on your behalf."

2. An alleged ambiguity during a Crim.R. 11 oral plea colloquy may be clarified by reference to other portions of the record, including the written plea.

{¶14} Thomas read a two-page plea of guilty form which specifically lists his right to subpoena witnesses on his own behalf. Thomas told the trial court that he had reviewed the form with his counsel and that he understood it. Thomas was given an opportunity to ask questions about the plea proceedings and matters related to it, including the guilty plea form.

{¶15} The transcript of the plea proceeding indicates that the trial court judge told Thomas "[y]ou could subpoena witnesses to appear and testify in your behalf and in your defense." (Tr. 7.)

{¶16} The trial court judge scrupulously followed Crim.R. 11, including the right to compulsory subpoenas, expressed in appropriate lay terms.

{¶17} The third assignment of error is overruled.

{¶18} All three assignments of error having been overruled, the judgment and sentence of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and DORRIAN, JJ., concur.
