[Cite as *State v. Hackathorn*, 2004-Ohio-6694.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
		CASE NO. 2004-A-0008
- vs -	:	
BRADEN HACKATHORN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Conneaut Municipal Court, Case No. 04 CRB 25.

Judgment: Reversed and remanded.

Lori B. Lamer, Conneaut Law Director, and *Luke P. Gallagher*, Assistant Conneaut Law Director, City Hall Building, 294 Main Street, Conneaut, OH 44030 (For Plaintiff-Appellee).

Richard R. Danolfo, Ashtabula County Public Defender, Inc., 4817 State Road, #202, Ashtabula, OH 44004 (For Defendant-Appellant).

DONALD R. FORD, P.J.

{¶1} This is an accelerated calendar appeal submitted on the briefs of the parties. Appellant, Braden Hackathorn, appeals the February 2, 2004 judgment entry of the Conneaut Municipal Court, in which he was found guilty of aggravated disorderly conduct and sentenced.

{¶2} On January 26, 2004, a complaint was filed in the Conneaut Municipal Court against appellant for aggravated disorderly conduct, a fourth degree

misdemeanor, in violation of R.C 2917.11(A)(2). At his initial appearance, appellant was not represented, and the prosecutor was not present. The court began by informing appellant of the charge against him and explaining the elements and maximum penalty under law for the offense. The court further stated all of appellant's rights, including the right to counsel and the right to appeal an adverse decision. Appellant indicated that he understood those rights, but did not know "your proceedings here in your courtroom."

{¶3} The court reiterated appellant's right to counsel and stated that appellant could "plead guilty or not guilty." The trial court did not give appellant the option of pleading no contest. The court then explained the meaning between pleading guilty or not guilty. Appellant entered a plea of guilty by stating that he was "definitely guilty." The court asked appellant what happened, and appellant indicated that he "was having some extreme emotional problems at the time and *** was telling [his] dad about the Lord Jesus and *** was saying joy, joy, joy, joy down in [his] heart ***." He proceeded to say that he was proclaiming the word of God and going to the other extreme by doing a lot of damage to his father's property.

{¶4} The court questioned appellant as to whether he was on any prescribed medication. Appellant replied that he was not, and the court asked him if he was supposed to be on any medication. Appellant responded that he "rose above that medication thing" and that he did not agree with medication, but agreed with self-discipline. Appellant explained that his medication is "taking a walk down a country road somewhere and looking at the trees and birds and stuff like that. *** I would highly recommend that for anybody in therapy ***. You know, get out of the city life and --."

{¶5} The court then asked if the Community Counseling Center ("CCC") had been called, and an officer in the courtroom stated that they had not. The court informed appellant that he entered a plea of guilty, and he agreed. The judge then indicated that CCC was going to be contacted to do an initial evaluation of appellant to see if he needed "to be seeing a counselor and be on medication or if the walk down the dirt road would be sufficient." Appellant explained that he did not agree with CCC and what they do for people, so the court asked appellant if he had a different doctor or agency whose recommendation he would follow. Appellant stated that his doctor is the Lord Jesus Christ. The court responded by saying that Jesus gives us the tools to get better, but we have to be willing to use the tools and "it sounds like [appellant has not] been using those tools." The court questioned appellant as to whether he had a case history with CCC, and he stated that he did, all his life. The court mentioned that CCC would be notified, and appellant would be sent there as soon as possible.

{¶6} A sentencing hearing was held on February 2, 2004. The court informed appellant that it would proceed with his sentencing because he had entered a plea of guilty to the offense. The court further noted that based on an evaluation done by Mr. Cancilliere, it had been recommended that appellant be allowed to go to a hospital and speak with a doctor about the need for medication. The court explained that a hospital would be able to regulate appellant's chemical levels, and that a hospital would be better than a jail. The court then told appellant that he would be held in jail until a space was available for him in the hospital.

{¶7} The court asked appellant if he had been on medication before, and appellant replied that he accepted the Holy Bible to be his new medication. The court indicated that it did not want to punish appellant severely.

{¶8} Appellant stated that he wanted to appeal the decision, so the court explained what he could do to appeal and told him to let the court know if he wanted an attorney appointed for that purpose. Appellant was appointed counsel.

{¶9} In an entry dated February 2, 2004, appellant was sentenced to thirty days in the Conneaut City Jail, but was to be released from jail to be hospitalized as soon as a bed in a mental health unit was available. Appellant timely filed the instant appeal and now presents a single assignment of error for our review:

{¶10} "The trial court erred in not ordering a competency evaluation of [a]ppellant prior to accepting his guilty plea in accordance with [R.C.] 2945.37."

{¶11} Under his lone assignment of error, appellant claims that the trial court erred by not ordering a competency evaluation before accepting his guilty plea pursuant to R.C. 2945.37.

{¶12} Preliminarily, we note that the record does not reflect that appellant was afforded his option to a no contest plea. Crim.R. 11(E) governs the proceedings in pleas of guilty and no contest in misdemeanor cases involving petty offenses. Crim.R. 11(E) provides that a court cannot accept a plea of not guilty or no contest "without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty."

{¶13} A no contest plea is "constitutionally infirm when the defendant is not informed in a reasonable manner at the time of entering his guilty plea of his rights to a trial by jury and to confront his accusers, and his privilege against self-incrimination, and his right of compulsory process for obtaining witnesses in his behalf." *State v. Ballard* (1981), 66 Ohio St.2d 473, 478. A defendant must be informed of the effects that pleading guilty or no contest will have on his constitutional rights.

{¶14} Failure to substantially comply with the dictates of Crim.R. 11(E) constitutes reversible error. *Euclid v. Muller* (1999), 134 Ohio App.3d 737, 744. In misdemeanor cases involving petty offenses, when a trial court accepts a defendant's plea of guilty or no contest, it complies with that particular aspect of Crim.R. 11(E) by informing the defendant of the effect of his pleading guilty or no contest as stated in Crim.R. 11(B). *State v. Lanton*, 2d Dist. No. 02CA124, 2003-Ohio-4715, at ¶23.

{¶15} In the case at bar, we conclude that the trial court did not substantially comply with Crim.R. 11(E). At his initial appearance on January 26, 2004, appellant was merely given the option to plead guilty or not guilty. He was not advised that he could enter a no contest plea. The plea colloquy among the court and appellant was as follows:

{¶16} "THE COURT: If you want to talk to a lawyer, you can. I you want one and you can't afford one, I can appoint one to represent you. And today you can plead guilty or not guilty. Guilty means you did it, and not guilty means you didn't – deny it. We would schedule your case for another court hearing. So…

{¶17} "[APPELLANT]: Well, I'm definitely guilty. I would like to enter that plea. ***"

{¶18} Because the record demonstrates that the trial court failed to engage in a meaningful colloquy with appellant by informing him of the option to plead no contest, the judgment is reversed, and the cause is remanded to the trial court for further proceedings consistent with this opinion.

{¶19} With specific reference to appellant's assignment of error, our analysis begins with the premise that all criminal defendants are presumed to be competent to stand trial. See R.C. 2945.37(G). A defendant will not be found incompetent simply

because he has received treatment for mental illness. R.C. 2945.37(F). This presumption is rebutted if the defendant shows he is unable to understand the proceedings or assist in his or her defense. *State v. Swift* (1993), 86 Ohio App.3d 407, 411. Accordingly, a person suffering with mental or emotional disability may possess the ability to understand the charges rendered against him and assist in his defense. *State v. Bock* (1986), 28 Ohio St.3d 108, 110. The dialogue between the trial court and a defendant required by Crim.R. 11 encompasses the constitutional due process requirements, including competence. *State v. Johnson* (1988), 40 Ohio St.3d 130, 133.

{¶20} "[T]he right to a hearing on the issue of incompetency rises to constitutional proportions only when the record contains sufficient indicia of incompetency *** such that a formal inquiry into defendant's competency is necessary to protect his right to a fair trial." *Bock* at 110, citing *Pate v. Robinson* (1966), 383 U.S. 375, and *Drope v. Missouri* (1975), 420 U.S. 162, 180. Therefore, a defendant who enters a plea of guilty is not entitled to a subsequent competency hearing when the record does not contain a sufficient indicia of incompetence.

{¶21} The procedure governing determination of competency is set forth in R.C. 2945.37(B) which states as follows:

{¶22} "In a criminal action in a court of common pleas *** the court, prosecutor, or defense *may raise* the issue of the defendant's competence to stand trial. If the issue is raised before the trial has commenced, the court shall hold a hearing on the issue as provided in this section. If the issue is raised after the trial has commenced, the court shall hold a hearing on the issue only for good cause shown or on the court's own motion." (Emphasis added.)

{¶23} A competency hearing is only mandatory under this provision if the issue is raised prior to the commencement of trial. *State v. Bekesz* (1991), 75 Ohio App.3d 436, 441; see, also, *State v. DeNiro* (Dec. 16, 1994), 11th Dist. No. 93-A-1775, 1994 WL 721641. The burden is on the defendant to submit enough evidence to put the question at issue. *State v. Bailey* (1992), 90 Ohio App.3d 58, 67. The decision whether to conduct a competency hearing pursuant to R.C. 2945.37(B) is relegated to the sound discretion of the trial court. *State v. Smith* (2000), 89 Ohio St.3d 323, 329.

{¶24} In the case sub judice, based on some comments made by appellant at his initial appearance, the trial court did submit questions to appellant regarding his mental health status. Specifically, the court asked appellant if he was on medication and indicated that CCC needed to be contacted. There was no dialogue at the initial appearance that constituted a clear and definitive request regarding the competency issue. Further, appellant made no explicit request to conduct a competency hearing or to conduct a mental evaluation. Therefore, since the issue of appellant's competency was not directly raised prior to trial, a hearing was not mandatory.

{¶25} It is our view that there was enough indicia shown during the colloquy appellant had with the trial court to indicate that the court should have gone beyond referring appellant to CCC. We note that the trial court expressed its salutary medical concerns regarding some evident medical problems manifested by appellant resulting in appellant's referral to that agency. Hence, we conclude that the trial court should have referred appellant, sua sponte, for a competency evaluation even though one was not requested by appellant.

{¶26} Furthermore, it is clear from the transcript at the initial appearance that appellant understood what the court had explained. Appellant even asked questions on

court proceedings. He admitted that he was guilty and was given the meaning of pleading guilty or not guilty. Accordingly, based on the foregoing, it is our position that the court was under no duty to order a competency hearing.

{¶27} Moreover, the trial court indicated that CCC was going to be contacted to do an initial evaluation of appellant to see if he needed "to be seeing a counselor and be on medication." It is our position that the trial court wanted the evaluation conducted for sentencing purposes and not because it was questioning appellant's competency.

{¶28} Even assuming arguendo that the competency issue had been properly raised prior to trial, and that a hearing was mandated by R .C. 2945.37(B), we would still conclude that the failure to hold such hearing was harmless error pursuant to Crim.R. 52(A).

{¶29} The Ohio Supreme Court has held that any error by a trial court in not conducting a mandatory hearing under R.C. 2945.37 is harmless if the record fails to reveal sufficient indicia of incompetency. *State v. Eley* (1996), 77 Ohio St.3d 174, 184; *Bock*, 28 Ohio St.3d at 110.

{¶30} For the foregoing reasons, appellant's sole assignment of error is not well-taken. However, because of the trial court's failure to substantially comply with Crim.R. 11(E), the judgment of the Conneaut Municipal Court is reversed, and the matter is remanded for further proceedings consistent with this opinion.

JUDITH A. CHRISTLEY, J.,

WILLIAM M. O'NEILL, J.,

concur.