

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2010-L-105
LAFAYETTE L. KIRK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 10 CR 000301.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Aaron T. Baker and *William L. Summers*, Summers & Baker Co., L.P.A., One Chagrin Highlands, 2000 Auburn Drive, Suite 200, Beachwood, OH 44122 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Lafayette L. Kirk, appeals from the July 30, 2010 judgment of the Lake County Court of Common Pleas, in which he was sentenced for attempted rape and gross sexual imposition, and was found to be a Tier III sex offender.

{¶2} Appellee, the state of Ohio, filed a bill of information charging appellant with two counts: count one, attempted rape, an aggravated felony of the second degree;

and count two, gross sexual imposition, a felony of the third degree, with a physical harm specification. The instant charges stem from appellant's sexual abuse against his daughter and her friend. Both girls were under the age of 12 when the crimes began in 1987 and occurred over the course of several years. Appellant subsequently waived his right to proceed by way of a grand jury indictment and bond was set.

{¶3} Following a plea hearing, appellant entered an oral and written plea of guilty to both counts. The trial court accepted appellant's guilty plea and deferred sentencing pending completion of a presentence investigation and report, a victim impact statement, and a psychological evaluation.

{¶4} The trial court sentenced appellant to an indefinite term of incarceration pursuant to the sentencing statutes effective at the time appellant committed the offenses. Appellant received six to 15 years on count one and three to 10 years on count two, to run consecutive to each other for a total of nine to 25 years in prison. The trial court found appellant to be a Tier III sex offender, subjecting him to the registration and verification provisions of R.C. Chapter 2950. It is from that judgment that appellant filed a timely appeal, asserting the following assignment of error:

{¶5} "The trial court did not substantially comply with Criminal Rule 11 when it failed to conduct a thorough inquiry into all prescription medications being used by appellant as well as their affects (sic) upon the appellant."

{¶6} In his sole assignment of error, appellant argues that his plea was not knowing, intelligent, and voluntary because the trial court failed to make a thorough inquiry with regard to prescription medications being used by him as well as their effect on his mental state.

{¶7} “A criminal defendant’s choice to enter a plea of guilty or no contest is a serious decision. The benefit to a defendant of agreeing to plead guilty is the elimination of the risk of receiving a longer sentence after trial. But, by agreeing to plead guilty, the defendant loses several constitutional rights.” *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, at ¶25, citing *Boykin v. Alabama* (1969), 395 U.S. 238, 243; *State v. Nero* (1990), 56 Ohio St.3d 106, 107. “The exchange of certainty for some of the most fundamental protections in the criminal justice system will not be permitted unless the defendant is fully informed of the consequences of his or her plea. Thus, unless a plea is knowingly, intelligently, and voluntarily made, it is invalid.” *Id.*, citing *State v. Engle* (1996), 74 Ohio St.3d 525, 527.

{¶8} “To ensure that pleas conform to these high standards, the trial judge must engage the defendant in a colloquy before accepting his or her plea.” *Id.* at ¶26, citing *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph one of the syllabus; Crim.R. 11 (C), (D), and (E). “It follows that, in conducting this colloquy, the trial judge must convey accurate information to the defendant so that the defendant can understand the consequences of his or her decision and enter a valid plea.” *Id.*

{¶9} Crim.R. 11(C)(2) sets forth the requirements for guilty pleas. It provides:

{¶10} “(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:

{¶11} “(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.

{¶12} “(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.

{¶13} “(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 matters subject of Crim.R. 11(C)(2)(c) are constitutional, and strict compliance by the trial court with the rule is required in presenting them to a defendant. *State v. Woodliff*, 11th Dist. No. 2004-P-0006, 2005-Ohio-2257, at ¶51. However, the requirements of Crim.R. 11(C)(2)(a) and (b) are not constitutional. Thus, substantial compliance by the trial court in presenting the matters subject of these portions of the rule is sufficient. *Id.*

{¶15} “If a trial court fails to literally comply with Crim.R. 11, reviewing courts must engage in a multitiered analysis to determine whether the trial judge failed to explain the defendant’s constitutional or nonconstitutional rights and, if there was a failure, to determine the significance of the failure and the appropriate remedy.” *Clark*, *supra*, at ¶30.

{¶16} In our case, appellant does not assert that his constitutional rights were violated. Rather, he contends the trial court failed to substantially comply with Crim.R. 11(C)(2)(a) and (b). Specifically with respect to the issue of prescription medications, the following colloquy occurred at the plea hearing between the trial judge, appellant, and his counsel:

{¶17} “THE COURT: Now prior to coming into court here this morning, have you had any drugs or alcohol of any kind?

{¶18} “THE DEFENDANT: No, Your Honor.

{¶19} “THE COURT: What about within the last 48 hours?

{¶20} “THE DEFENDANT: No, Your Honor.

{¶21} “THE COURT: Not even prescribed medications, nothing?

{¶22} “THE DEFENDANT: I took my regular prescriptions from the Veterans.

{¶23} “THE COURT: What is it?

{¶24} “THE DEFENDANT: I have Chronic Pain Disorder. I have to take my medicine every day.

{¶25} “THE COURT: What is it that you take?

{¶26} “THE DEFENDANT: I have a nerve block for my –

{¶27} “THE COURT: What is the name of the medication?

{¶28} “THE DEFENDANT: One medication I take is called Tramadol.

{¶29} “THE COURT: Okay.

{¶30} “MR. LEACH: There are other –

{¶31} “THE DEFENDANT: The nerve blocks, I can’t think of the name of it.

{¶32} “THE COURT: That’s all right. So Tramadol and nerve block?

{¶33} “THE DEFENDANT: Yes. For my back and I have stomach problems with medication. So I take stomach pills.

{¶34} “THE COURT: Have you taken any of these medications within the last 48 hours?

{¶35} “THE DEFENDANT: Yes. Yes, sir.

{¶36} “MR. LEACH: Your Honor, we will provide the prescriptions to probation.

{¶37} “THE COURT: Okay. That’s fine. The purpose now, just want to make sure Mr. Kirk, so you know why I’m asking these questions, I need to make sure you’re of clear mind, that you know what is going on. Not under the influence of any type of medication or anything legitimate or illicit which could cloud your judgment. Right now are you able to appreciate your surroundings? Is the medication you are taking affecting your ability to understand what is going on?

{¶38} “THE DEFENDANT: No, sir. Sir, I am fine. I mean, Your Honor.”

{¶39} In addition to the foregoing colloquy from the plea hearing, the written guilty plea, signed by appellant and his counsel, states in part:

{¶40} “I am voluntarily pleading ‘Guilty’ of my own free will. ***

{¶41} “I am not under the influence of drugs or alcohol, and I have not taken any drugs or alcohol in a 48 hour period preceding this hearing, except for Tramadol, nerve block, and stomach medication. ***”

{¶42} Appellant acknowledged at the plea hearing that he reviewed the written guilty plea with his counsel; indicated that he understood everything in it; had no questions; signed it freely and voluntarily without any threats or promises; and was satisfied with the services of his attorney. Appellant now alleges, however, that his plea

was not made knowingly, intelligently, and voluntarily because the trial court did not make a thorough inquiry with regard to his use of prescription medications and their effect upon his mental state.

{¶43} This court has previously held that a defendant's guilty plea is valid and proper if there is no indication from the record that his understanding of the proceeding was in any way impaired by the adverse effects of any prescribed medication. *State v. Washington* (Apr. 4, 1997), 11th Dist. No. 95-P-0025, 1997 Ohio App. LEXIS 1340, at *11.

{¶44} We determine that the trial court conducted a thorough colloquy with appellant and substantially complied with Crim.R. 11(C)(2)(a) and (b). Again, appellant pleaded guilty to a bill of information. At the plea hearing, the trial court specifically asked appellant about his prescription medications and their effects upon him. Appellant answered the trial court's questions, indicating that his prescription medications did not affect his understanding of the plea proceedings. Appellant fails to establish that his prescription medications prejudicially impacted or interfered with his ability to make a knowing, intelligent, and voluntary plea. Further, the record contains no evidence suggesting that appellant was confused or that he did not understand the nature or significance of the proceeding or his plea.

{¶45} Thus, the record demonstrates that the trial court complied with the requirements of Crim.R. 11(C)(2)(a) and (b) and the totality of the circumstances shows appellant understood the implications of his plea. We find no error in the trial court's acceptance of appellant's plea, despite his assertion that he was on prescription medications, as there is no indication from the record that his understanding of the

proceeding was in any way impaired. *Washington*, supra, at *11. Therefore, the trial court did not err in concluding that appellant's plea was made knowingly, intelligently, and voluntarily.

{¶46} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDALL, J.,

MARY JANE TRAPP, J.,

concur.