

**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. 2011-L-023
KENNETH DAVIS, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Willoughby Municipal Court, Case No. 10 CRB 03700.

Judgment: Affirmed.

Richard J. Perez, City of Willoughby Prosecutor, One Public Square, Willoughby, OH 44094 (For Plaintiff-Appellee).

Kenneth Davis, Jr., pro se, 1460 East 196th Street, Euclid, OH 44117 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Kenneth Davis, Jr., appeals his conviction in the Willoughby Municipal Court for Obstructing Justice. The issue to be determined in this case is whether a defendant who is not advised by the trial court of the effect of a guilty plea, pursuant to Crim.R. 11(E), is prejudiced when he fails to assert innocence and does not advance any argument that he would not have pled guilty but for the trial court's failure to comply with Crim.R. 11(E). For the following reasons, we affirm the decision of the court below.

{¶2} On December 2, 2010, in Willoughby Municipal Court case number 10CRB03700, Davis was charged with one count of Obstructing Justice, a misdemeanor of the first degree, in violation of R.C. 2921.32(A)(5). The record also indicates that Davis was charged with two additional counts, Complicity to Trafficking in Drugs, a felony of the fourth degree, in violation of R.C. 2923.03(A)(2) and 2925.03(A)(1), and Possessing Criminal Tools, a felony of the fifth degree, in violation of R.C. 2923.24(A), in a separate case, number 10CRA03539.

{¶3} The report of pre-trial discussions, filed on December 2, 2010, indicates that the prosecutor recommended “reducing” the two charges in 10CRA03539 to only the Obstructing Justice charge. On the same date, Davis entered a plea of guilty to Obstructing Justice. The transcript of the plea hearing indicated that the prosecution recommended dismissing “the other two charges.” The court dismissed those charges and found Davis guilty of Obstructing Justice.

{¶4} On January 19, 2011, Davis was sentenced to 180 days in jail, with 90 days suspended, 45 to be served and 45 to be deferred for review in 120 days. The court ordered Davis to pay a \$1,000 fine, with \$700 suspended. Davis was also ordered to complete one year of probation.

{¶5} On February 1, 2011, the Judgment Entry of conviction was amended, nunc pro tunc, to include the Ohio Revised Code section number that was violated, R.C. 2921.32(A)(5).

{¶6} On February 3, 2011, the trial court granted a stay of the sentence during the pendency of the appeal before this court.

{¶7} Davis timely appeals and asserts the following assignment of error:

{¶8} “Trial court erred by accepting guilty plea without explaining the charge and without stating the maximum penalty via Ohio Rule 11(D).”

{¶9} Davis argues that the trial court failed to comply with Crim.R. 11(D) and did not determine that he was aware of his constitutional rights and gave his guilty plea knowingly, intelligently, and voluntarily.

{¶10} The State argues that Crim.R. 11(E), not 11(D), is the applicable rule and that Davis is unable to show that he suffered any prejudice as a result of the trial court’s failure to inform him of the effect of his guilty plea.

{¶11} “When reviewing a plea under Crim.R. 11, an appellate court uses a substantial compliance standard, meaning that ‘under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.’” *State v. Hughley*, 11th Dist. No. 2011-A-0012, 2011-Ohio-6206, ¶ 6, citing *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990) (citations omitted).

{¶12} Crim.R. 11(D) states that “[i]n misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily.”

{¶13} We initially note that Crim.R. 11(D) is not applicable to the present case, as it applies only to “serious offenses.” A “serious offense” is defined by Crim.R. 2(C) as “any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months.” Davis pled guilty to Obstructing Justice, a misdemeanor of the first degree, which is subject to a maximum sentence of 180 days.

R.C. 2929.24(A)(1). There is no indication that Obstructing Justice is a “serious offense.”

{¶14} The applicable provision regarding the entry of a plea in this case is Crim.R. 11(E). It states that “[i]n misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty.” As stated in Crim.R. 2(D), a petty offense is a “misdemeanor other than a serious offense.”

{¶15} “In accepting a plea to a misdemeanor involving a petty offense, a trial court is required to inform the defendant only of the effect of the specific plea being entered.” *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, paragraph one of the syllabus. In order to satisfy this requirement, the trial court “must inform the defendant of the appropriate language under Crim.R. 11(B).” *Id.* at paragraph two of the syllabus. In the present case, since Davis entered a plea of guilty, the trial court was required to inform him that “[t]he plea of guilty is a complete admission of the defendant’s guilt.” Crim.R. 11(B)(1).

{¶16} The record reveals, and the State concedes, that the trial court did not inform Davis, either orally or in writing, of the effect of his guilty plea. The transcript of the hearing shows that no such information was given to Davis by the trial court. Thus, we find that the trial court did not comply with Crim.R. 11(E), since it failed to inform Davis of the effect of his guilty plea to a misdemeanor involving a petty offense, Obstructing Justice.

{¶17} “The right to be informed that a guilty plea is a complete admission of guilt is nonconstitutional.” *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12 (“[t]he right to be informed that a guilty plea is a complete admission of guilt *** is subject to review under a standard of substantial compliance,” under which “we review the totality of circumstances surrounding [the appellant’s] plea and determine whether he subjectively understood that a guilty plea is a complete admission of guilt”). Although the trial court did not comply with Crim.R. 11(E), the Supreme Court of Ohio has found that the “failure to comply with nonconstitutional rights [such as the information in Crim.R. 11(B)(1)] will not invalidate a plea unless the defendant thereby suffered prejudice.” (Citation omitted.) *Jones* at ¶ 52. The test for prejudice is “whether the plea would have otherwise been made.” *Griggs* at ¶ 12. We note that Davis failed to file a motion to withdraw his plea in the trial court, such that he could establish any prejudice suffered. Therefore, we must base our analysis of whether prejudice was suffered on the evidence in the record before us, including the original plea hearing.

{¶18} The Ohio Supreme Court has found that “[a] defendant who has entered a guilty plea without asserting actual innocence is presumed to understand that he has completely admitted his guilt. In such circumstances, a court’s failure to inform the defendant of the effect of his guilty plea as required by Crim.R. 11 is presumed not to be prejudicial.” *Griggs* at syllabus. In *Jones*, the court similarly found that when the trial court failed to comply with Crim.R. 11(B)(1), and the defendant did not claim innocence at the time of his plea hearing, the defendant “presumably understood the effect of his

guilty plea, to wit: that a plea of guilty is a complete admission of guilt.” (Citation omitted.) *State v. Parish*, 11th Dist. No. 2010-T-0105, 2011-Ohio-3751, ¶ 11.

{¶19} In the present case, there is no indication that Davis asserted his innocence at the plea hearing or at any other time in the proceedings. Moreover, Davis provides no explanation in his brief as to how he suffered prejudice and makes no claim that he would not have pled guilty had he been informed of the effect of his guilty plea. Instead, he asserts only that he pled guilty because the other charges would be dropped and he believed he would receive a reduced sentence. The record confirms that Davis gained a benefit from entering a guilty plea, as the trial court dismissed the two other drug-related charges, supporting the finding that Davis was aware of the effect of a guilty plea, made such a plea in anticipation of the dismissal of charges, and that the plea would have “otherwise been made.” *Griggs* at ¶ 12

{¶20} In the absence of a claim of innocence, in light of the benefit acknowledged by Davis himself, and due to Davis’ failure to assert any argument that the plea would not have been made but for the trial court’s failure to inform Davis of the effect of his plea, the totality of the circumstances show that Davis was not prejudiced by the trial court’s failure to inform him of the effect of pleading guilty. *See Parish* at ¶ 12 (where defendant did not claim her innocence and gained a benefit from not going to trial, i.e., avoiding the stress of trial, she suffered no prejudice); *State v. Green*, 10th Dist. No. 10AP-934, 2011-Ohio-6451, ¶ 12 (where the appellant failed to make a showing that he would not have entered his guilty plea “but for the trial court’s failure to comply with Crim.R. 11” and the record provides no support for such a finding, no prejudice occurred and the conviction must be upheld).

{¶21} Although Davis does not raise any error as to his sentence or regarding a breach of a plea agreement relating to this sentence, we note that he references the fact that he believed he would not receive any jail time if he pled guilty. However, Davis does not point to any evidence in the record that the State made promises to him regarding his sentence or that such promises were part of any plea agreement, thereby warranting the finding that the State breached a plea agreement with Davis. See *State v. Story*, 11th Dist. No. 2006-A-0085, 2007-Ohio-4959, ¶ 44 (statements by a prosecutor not made part of a negotiated plea are not a binding contract on the prosecution); *State v. Olivarez*, 11th Dist. No. 97-L-288, 1999 Ohio App. LEXIS 1434, *8 (Mar. 31, 1999) (it is not possible to determine whether a party breached a plea agreement if its terms cannot be ascertained).

{¶22} The sole assignment of error is without merit.

{¶23} Based on the foregoing, Davis' conviction in the Willoughby Municipal Court, for Obstructing Justice, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.