[Cite as *State v. Garr*, 2009-Ohio-6241.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-01-014
	:	O P I N I O N
- vs -		11/30/2009
	:	
DUANTE JASON GARR,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAIRFIELD MUNICIPAL COURT
Case No. 2008CRB03505

Stephen J. Wolterman, 530 Wessel Drive, Suite 2A, Fairfield, Ohio 45014, for plaintiff-appellee

Terence M. McNamara, P.O. Box 984, Union, KY 41091, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Duante Jason Garr, appeals a decision of the Fairfield Municipal Court convicting him of petty theft. For the reasons outlined below, we affirm the decision of the trial court.

{¶2} On November 18, 2008, appellant was charged with petty theft in violation of Fairfield Municipal Code 545.05, a first-degree misdemeanor. The charge stemmed from a dispute between appellant and his girlfriend, Stephanie Wattenhofer, which took place after she discovered that another woman called appellant's cell phone. Appellant

left the residence with Stephanie's car keys and cell phone. He returned a few hours later, at which time he gave Stephanie's property back to her.

{¶3} Appellant pled no contest to the petty theft charge and was sentenced accordingly. This appeal followed.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ERRED WHEN IT FAILED TO CONDUCT A PLEA COLLOQUY THAT SATISFIES THE REQUIREMENTS OF OHIO CRIMINAL RULE OF PROCEDURE 11(E)."

{¶6} Appellant argues that the plea colloquy did not satisfy the requirements imposed by Crim.R. 11(E) because the court failed to inform him that his no contest plea could not be used against him in any subsequent civil or criminal proceeding. Appellant maintains that this omission prejudiced him due to the potential impact a conviction could have on his real estate license. According to appellant, the trial court should have informed him that he must disclose his theft conviction when he renewed his real estate license.

{¶7} As stated, appellant was convicted of petty theft. Crim.R. 11(E) provides that, prior to accepting a guilty or no contest plea in misdemeanor cases involving petty offenses, a trial court must first inform a defendant of the effect of the chosen plea. Crim.R. 11(B)(2) delineates the effect of a no contest plea, providing that such a plea is not an admission of guilt, but is an admission of the truth of the facts alleged in the charging instrument. See *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, paragraph two of the syllabus. The rule also provides that a plea of no contest "shall not be used against the defendant in any subsequent civil or criminal proceeding." It is the omission of this notification that appellant highlights, claiming that its absence invalidates his plea.

{¶8} We now turn to the record to ascertain whether the trial court informed appellant of the effect of a no contest plea in accordance with Crim.R. 11(E) and (B)(2). The transcript for the plea hearing contains the following colloquy:

{¶9} "THE COURT: It says plea or trial setting, what am I doing?

{¶10} "MR. NEWLAND: At this time, Your Honor, we will be entering a no contest plea to the charge.

{¶11} "THE COURT: Sir, you understand when you plead no contest, you are admitting the facts?

{¶12} "THE DEFENDANT: Yes, Ma'am.

{¶13} "THE COURT: Waive reading of the facts on the record?

{¶14} "MR. NEWLAND: Yes, we do, Your Honor[.]

{¶15} "THE COURT: Acknowledge the elements and the defense set forth in the Complaint?

{¶16} "MR. NEWLAND: They are – yes.

{¶17} "THE COURT: Let me read the facts. Is Mrs. Whottenhoffer [sic] here?

{¶18} "MR. NEWLAND: She is present as well, Your Honor.

{¶19} "THE COURT: Do you want to come forward? There will be a finding of guilty. Any legal reason not to proceed?

{¶20} "MR. NEWLAND: No reason, Your Honor."

{¶21} As quoted, the transcript confirms that the trial court informed appellant only that his no contest plea amounted to an admission of the facts. The court neglected to inform appellant that his plea was not an admission of guilt, though appellant raises no argument regarding this omission on appeal. The court additionally failed to advise appellant that his plea could not be used against him in any subsequent civil or criminal proceeding.

{¶22} Admittedly, this omission runs afoul of Crim.R. 11(E) and (B)(2). See *Jones* at paragraph two of the syllabus. Nonetheless, the failure to conduct a full plea colloquy does not invalidate a plea unless the defendant demonstrates he was prejudiced as a result. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶12. The test for prejudice is "whether the plea would have otherwise been made." *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

{¶23} In an attempt to salvage the deficient plea colloquy, the state offers a written narrative depicting the contents of a prerecorded message employed by the Fairfield Municipal Court to inform defendants of the significance of each type of plea. The state insists that this recording was played at a time when appellant "should have been present in the Courtroom unless excused." However, we note that an appellate court is confined to the record, and cannot consider evidence offered for the first time on appeal. See, e.g., *State v. Callihan* (1992), 80 Ohio App.3d 184, 197. See, also, App.R. 9(A). There is no mention of this recording or whether appellant actually listened to it in the record. Therefore, we decline to consider the written narrative submitted by the state on appeal. In order to avoid frivolous appeals and the unnecessary expenditure of judicial resources in the future, trial courts should make certain that the record contains the notifications required by Crim.R. 11 to ensure the validity of a guilty or no contest plea. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶26.

{¶24} As stated, a deficient plea colloquy will not be grounds for reversal absent prejudice. Appellant insists he was prejudiced by the trial court's omission during the plea colloquy because the court "did not inform him of the possibilities of other civil proceedings, which would include relicensure proceedings, and the ongoing duty to report any convictions for crimes of moral turpitude, including a misdemeanor theft * * *." (Emphasis omitted.) This argument misses the mark for two reasons.

{¶25} First, appellant incorrectly equates the renewal of his real estate license with a "civil proceeding." Appellant offers no legal support for his contention that an application to renew a real estate license is a "civil proceeding" as referenced in Crim.R. 11(B)(2). Generally, a "civil proceeding" contemplates some act or event which takes place before a civil tribunal. See Black's Law Dictionary (7th Ed.Rev.1999) 1221. Clearly, an application for the issuance or renewal of a real estate license does not qualify as a "civil proceeding."

{¶26} Second, appellant's argument misconstrues the trial court's obligations during a plea colloquy. Appellant presumes that it was incumbent upon the trial court to inform or remind him of his duty to disclose a conviction for a felony or a crime of moral turpitude when renewing his real estate license. See R.C. 4735.09(F) and Ohio Adm.Code 1301:5-1-19(B). However, placing such a burden on the trial court exceeds the bounds of the court's duties under Crim.R. 11(B)(2). The trial court is not required to inform a defendant of every possible collateral consequence of pleading no contest to a charge. Cf. *State v. Wilkinson*, Montgomery App. No. 20365, 2005-Ohio-314, ¶9. Crim.R. 11(B)(2) does not impose a duty on the court to inform a criminal defendant of the effect of a no contest plea beyond the notification requirements specifically enumerated in the rule. Therefore, we hold that a trial court is not obligated to inform or remind a defendant during a plea colloquy of the defendant's duty to disclose criminal convictions when applying for or renewing his professional license.

{¶27} Appellant's argument, in addition to being meritless, is also illogical. Appellant maintains that, had he been informed that a no contest plea could *not* be used against him in a subsequent civil or criminal proceeding, he would have refrained from entering the plea. That is, had he known that this safeguard was in place – that a no contest plea could *not* be used against him in a later proceeding – he would not have

entered the plea. This argument is nonsensical. If anything, knowledge of such a safeguard would encourage a no contest plea rather than causing alarm.

{¶28} We conclude that appellant cannot demonstrate he was prejudiced by the trial court's failure to advise him that his no contest plea could not be used against him in a subsequent civil or criminal proceeding. Appellant cannot show that, but for this omission, he would not have pled no contest to the charge. *Nero*, 56 Ohio St.3d at 108.

{¶29} Appellant's first assignment of error is overruled.

{¶30} Assignment of Error No. 2:

{¶31} "THE TRIAL COURT ERRED WHEN IT TOOK A NO CONTEST PLEA IN THE FACE OF INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶32} Appellant contends that he suffered ineffective assistance of counsel due to defense counsel's failure to object to the deficient plea colloquy. Absent this deficiency, appellant maintains, he would not have pled no contest due to the risk of losing his real estate license. Appellant further insists that defense counsel should have made clear on the record that appellant possessed a real estate license that was susceptible to permanent revocation upon his conviction.

{¶33} To establish ineffective assistance, appellant must show that counsel's actions fell below an objective standard of reasonableness and that appellant was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 687-88, 693, 104 S.Ct. 2052. Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 694. A strong presumption exists that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, citing *Strickland* at 689.

{¶34} The record indicates that defense counsel knew appellant was involved in

the real estate business, but does not detail whether counsel was aware appellant's position in the industry required licensure. At the plea hearing, defense counsel spoke in mitigation and stated that appellant was employed in real estate, but was in the process of enrolling in college to further his education because his real estate employment "hadn't panned out very well."

{¶35} Assuming, arguendo, that defense counsel knew appellant was a licensed real estate agent, we still decline to find that appellant suffered ineffective assistance of counsel. As stated, the omission of the notification that appellant's conviction could *not* be used against him in any subsequent civil or criminal proceeding is unrelated to his real estate license renewal. Moreover, a licensed professional is presumably aware that his license is put at risk by reason of a criminal conviction. As implicated in the above analysis, the onus is on appellant to keep abreast of the duties and consequences associated with possessing and retaining his real estate license. Such considerations do not involve a complex legal analysis outside the realm of a layman's understanding. Furthermore, a defendant's attorney is not obliged to inform the defendant of every possible collateral consequence of pleading no contest to a charge. Cf. *Wilkinson*, 2005-Ohio-314 at ¶9.

{¶36} Finally, as our analysis under the first assignment of error indicates, appellant cannot show he was prejudiced by defense counsel's failure to object to the supposedly deficient plea colloquy. That is, appellant cannot demonstrate that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled no contest. Cf. *State v. Degaro*, Butler App. No. CA2008-09-227, 2009-Ohio-2966, ¶12.

{¶37} Appellant's second assignment of error is overruled.

{¶38} Judgment affirmed.

BRESSLER, P.J., and POWELL, J., concur.