

[Cite as *State v. Fuller*, 2009-Ohio-5068.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-09-240
- vs -	:	<u>OPINION</u> 9/28/2009
SHAREEF FULLER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2007-12-2176

Robin N. Piper, III, Butler County Prosecuting Attorney, Lina N. Alkamdawi,
Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45011-
6057, for plaintiff-appellee

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YOUNG, P.J.

{¶1} Defendant-appellant, Shareef Jamal Fuller, appeals his conviction, in
the Butler County Court of Common Pleas, for cocaine possession and robbery. We
affirm appellant's conviction.

{¶2} On December 7, 2007, police approached appellant who began walking

away. Appellant continued to evade the police, even after the officers ordered him to stop several times. Appellant then jumped over a fence, took a black bag from under his jacket and threw it on the roof of a nearby house. While the police were attempting to subdue appellant, he repeatedly grabbed at one of the officer's holster and weapon. Upon a search of appellant's person, and the black bag the officers retrieved from the roof, the police found \$8,570 in cash and more than 173 grams of powdered cocaine.

{¶13} A grand jury indicted appellant for possession of cocaine in violation of R.C. 2925.11, a felony of the second degree; assault in violation of R.C. 2903.13(A), a felony of the fourth degree; and aggravated robbery in violation of R.C. 2911.01(B), a felony of the first degree.¹ As part of a plea agreement, appellant pled guilty to the charge of possession of cocaine, and to an amended robbery charge in violation of R.C. 2911.02(A)(3), a felony of the third degree.² The assault charge was merged into the robbery charge. After completing a plea colloquy pursuant to Crim.R. 11, the trial court accepted appellant's plea. The trial court sentenced appellant to four years for the possession and three years on the robbery, to run concurrent. The \$8,570 in cash was forfeited. Appellant filed a timely appeal raising three assignment of error.

{¶14} Because the third assignment of error has bearing on the remaining

1. Aggravated robbery under R.C. 2911.01(B) states: "[n]o person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply: (1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties; (2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

2. Robbery under R.C. 2911.02(A)(3), states: "[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following * * * [u]se or threaten the immediate use of force against another."

assignments of error we have elected to address appellant's assignments of error out of order.

{¶15} Assignment of Error No. 3:

{¶16} "THE TRIAL COURT ERRED IN ACCEPTING APPELLANT'S PLEA TO A CHARGE NOT SUPPORTED BY THE FACTS."

{¶17} In his third assignment of error, appellant challenges the trial court's acceptance of his plea, arguing that the plea was not knowingly and voluntarily made.

{¶18} It is axiomatic that a guilty plea must be knowingly, intelligently, and voluntarily made. *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179. In order to ensure that the plea conforms to these standards, the trial court must engage in a colloquy with the defendant, in accordance with Crim.R. 11, to "convey accurate information to the defendant so that the defendant can understand the consequences of his or her decision and enter a valid plea." *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶26. A trial court "may not accept a plea of guilty * * * without addressing the defendant personally and (1) '[d]etermining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved * * * (2) informing the defendant of the effect of the specific plea and that the court may proceed with judgment and sentencing after accepting it, and ensuring that the defendant understands these facts, and (3) informing the defendant that entering a plea of guilty * * * waives the constitutional rights to a jury trial, to confrontation, to compulsory process, and to the requirement of proof of guilt beyond a reasonable doubt and determining that the defendant understands that fact.'" *Id.* at ¶27, quoting Crim.R. 11(C)(2).

{¶9} At the June 23, 2008 plea hearing, the following colloquy took place:

{¶10} "MR. KASH [state's attorney]: You Honor, this is case No. CR07-12-2176. It is my understanding Mr. Fuller today will be entering a plea to Count 1, as he is indicted, possession of cocaine, a felony of the second degree and Count 3, which is amended to robbery, a felony of the of the third degree. Count 2 will be merged into Count 3.

{¶11} "MR. ATKINS [appellant's attorney]: That's correct, your Honor.

{¶12} "* * *

{¶13} "THE COURT: Mr. Fuller, how old are you?

{¶14} "THE DEFENDANT: I'm 31.

{¶15} "THE COURT: Sir, can you read and write?

{¶16} "THE DEFENDANT: Yes, ma'am.

{¶17} "THE COURT: Are you under the influence of alcohol or drugs?

{¶18} "THE DEFENDANT: No, Ma'am.

{¶19} "THE COURT: Are you on probation or community control from any court or any state.

{¶20} "THE DEFENDANT: Yes, I am.

{¶21} "* * *

{¶22} "THE COURT: Do you understand, sir, that you're being found guilty of this could be grounds to revo[ke] your probation in Warren County and if they decide to do that, they could turn around and sentence you. Do you understand that?

{¶23} "THE DEFENDANT: Yes.

{¶24} "THE COURT: And either one of these courts if you're sent to prison, could make these sentences consecutive to another one. Do you understand that?

{¶25} "THE DEFENDANT: Yes.

{¶26} "THE COURT: All right. Are you on post-release control or parole from any state parole authority?

{¶27} "THE DEFENDANT: No.

{¶28} "* * *

{¶29} "THE COURT: Do you know what you're doing here today?

{¶30} "THE DEFENDANT: Yes.

{¶31} "THE COURT: Are you a citizen of the United States?

{¶32} "THE DEFENDANT: Yes, ma'am.

{¶33} "THE COURT: What city were you born in?

{¶34} "THE DEFENDANT: Columbus, Ohio.

{¶35} "THE COURT: All right. You have a right to a trial. Even if you're guilty you have a right to trial. You can try it to the judge or try it to a jury. Do you understand that?

{¶36} "THE DEFENDANT: Yes.

{¶37} "THE COURT: In any trial the burden is on the State of Ohio. The State has to prove each and every element of the offense beyond a reasonable doubt. If they fail to do that there is a finding of not guilty. Do you understand that?

{¶38} "THE DEFENDANT: I do.

{¶39} "THE COURT: You have a right during the course of the trial that the State has to bring their witnesses in and have them testify from the witness stand. You have a right to have your attorney question them. Do you understand that?

{¶40} "THE DEFENDANT: Yes.

{¶41} "THE COURT: You have a right to bring your own witnesses to Court.

You have a right to have those witnesses subpoenaed to be here and if you give the name and address of those witnesses to your attorney, this Court will subpoena those witnesses. A subpoena is a court order which tells someone they have to be here. If they don't obey that, this Court is going to issue a material witness warrant and immediately send the police out right away to pick them up. We'll hold them in jail until you get them here for you. Do you understand that?

{¶42} "THE DEFENDANT: Yes.

{¶43} "THE COURT: And in any trial you have a right to remain silent. That means the prosecution cannot make you take the stand and testify. The only person who can decide whether you take the stand and testify is yourself, based on advice from your attorney. Do you understand that?

{¶44} "THE DEFENDANT: Yes.

{¶45} "THE COURT: You have a right to a trial by jury of 12 people and they cannot come back with a guilty verdict unless all 12 vote guilty. Do you understand that?

{¶46} "THE DEFENDANT: Yes.

{¶47} "THE COURT: I have a jury waiver form. Did you read that?

{¶48} "THE DEFENDANT: Yes.

{¶49} "THE COURT: Did you discuss that with your attorney?

{¶50} "THE DEFENDANT: Yes.

{¶51} "THE COURT: Is this your signature?

{¶52} "THE DEFENDANT: Yes.

{¶53} "THE COURT: This says you're waiving your right to a jury trial. Is that what you want to do?

{¶154} "THE DEFENDANT: Yes.

{¶155} "THE COURT: You sure?

{¶156} "THE DEFENDANT: Yeah.

{¶157} "THE COURT: Positive?

{¶158} "THE DEFENDANT: Yeah.

{¶159} "THE COURT: I have here that you're entering a plea to the following charges, on Count 1, possession of cocaine a felony two. It carries a possible sentence anywhere from two to eight years, a possibly maximum fine of \$15,000, a mandatory minimum fine of [\$]7,500, a mandatory driver's license suspension anywhere from six months to five years. And it is presumed that not only is prison necessary, but it is mandatory in this case. Do you understand that?

{¶160} "THE DEFENDANT: Yes.

{¶161} "THE COURT: On Count 3, a felony three robbery, I have it that you're entering a plea to robbery. It carries a possibility of one to five years in the Ohio Department of Rehabilitation and Control, a fine of up to \$10,000 and these sentences could be consecutive. Do you understand that?

{¶162} "THE DEFENDANT: Yes.

{¶163} "THE COURT: And they could be maximum. I could give you 13 years. Do you understand that?

{¶164} "THE DEFENDANT: Yes.

{¶165} "THE COURT: Have any threats or promises been made to you other than the plea bargain to get you to plead to this?

{¶166} "THE DEFENDANT: No.

{¶167} "THE COURT: If I sent you to prison and on the one it's mandatory,

which means I must, the parole authority – and post-release control * * * It's a mandatory three years. Do you understand that?

{¶168} "THE DEFENDANT: Yes.

{¶169} "THE COURT: That means that they – once you're released from prison, they will put you under the supervision of the parole authority, reporting to a parole officer. Do you understand that?

{¶170} "THE DEFENDANT: Yes.

{¶171} "THE COURT: And that's important to you because if you violate their rules and regulations, they can send you back and give you more time on top of my sentence. They can send you back in increments of 30, 60, 90 days and they can send you back for an additional one-half of whatever I sentenced you to. Worse case scenario if I give you 13 years and you're on post-release control and you mess up, they can give you an additional six and a half years. Do you understand that?

{¶172} "THE DEFENDANT: Yes.

{¶173} "THE COURT: So you could end up doing 19 and a half years on this. Do you understand that?

{¶174} "THE DEFENDANT: Yes.

{¶175} "THE COURT: Okay. The second option is this Court could send you to prison and bring you back at a later time on judicial release and set you up under the supervision of our probation department. If you violated the rules and regulations, this Court could then impose the remaining balance of the prison sentence and send you back to prison. Do you understand that?

{¶176} "THE DEFENDANT: Yes.

{¶177} "THE COURT: I will caution you that judicial release is only very rarely

granted and there is a time period of mandatory sentence that is not eligible to be filed. Do you understand that?

{¶178} "THE DEFENDANT: Yes, ma'am.

{¶179} "THE COURT: I am not going to go though community control because it's a mandatory sentence. I'm not going to do that. I have here a plea form and it has information on it that I have been talking to you about. Did you read this?

{¶180} "THE DEFENDANT: Yes.

{¶181} "THE COURT: Did you discuss this with your attorney?

{¶182} "THE DEFENDANT: Yes.

{¶183} "THE COURT: You satisfied with your attorney's advice?

{¶184} "THE DEFENDANT: Yeah.

{¶185} "THE COURT: Is this your signature?

{¶186} "THE DEFENDANT: Yes.

{¶187} "THE COURT: It says you're pleading guilty to a possession of drugs, a Felony two and robbery, a felony three; is that right?

{¶188} "THE COURT: Is this what you want to do?

{¶189} "THE DEFENDANT: Yes.

{¶190} "THE COURT: You sure?

{¶191} "THE DEFENDANT: Yes.

{¶192} "THE COURT: Positive?

{¶193} "THE DEFENDANT: Yes.

{¶194} "THE COURT: What is your plea, sir?

{¶195} "THE DEFENDANT: Guilty.

{¶196} "* * *

{¶197} "THE COURT: Okay. Mr. Kash?"

{¶198} "MR. KASH: Counts 1 and 3 occurred in December 7th, 2007 in the city of Middletown, Butler County, Ohio. Count 1, Shareef Fuller did knowingly obtain, possess of use 173.02 grams of powder cocaine, a Schedule II controlled substance. That offense is a possession of cocaine, a second degree felony in violation of Revised Code Section 2925.11.

{¶199} "In Count 3, Shareef Fuller while attempting or committing a theft offense or in fleeing immediately after the attempt of offense, used or threaten[ed] to use force against a police officer, who was involved in the case. That offense is robbery, a third degree felony in violation of Revised Code Section 2911.02(A)(3).

{¶100} "THE COURT: Anything on the facts?"

{¶101} "MR. ATKINS: No, your honor.

{¶102} "THE COURT: On that basis the Court is going to make a finding of guilty on Count 1, possession of cocaine, a felony two and a finding of guilty on Count 2, robbery a felony three."

{¶103} After careful review of the trial court's plea colloquy with appellant, we find that the court diligently complied with the requirements of Crim.R.11 in accepting appellant's plea. Appellant was advised six times that he was pleading guilty to a robbery, rather than the aggravated robbery with which he had been charged. In addition, appellant read and signed a plea of guilty form and jury waiver that stated he was pleading guilty to robbery, rather than aggravated robbery. Finally, appellant also stated that he discussed the plea with his attorney. Because appellant was given the proper information, we may assume that he understood the information, including the fact that he was pleading guilty to a robbery. See *State v. Carter*

(1979), 60 Ohio St.2d 34, 38. Thus, we find that appellant's plea was properly accepted by the trial court and was knowingly, intelligently, and voluntarily made by appellant.

{¶104} Appellant argues that the trial court should have refused to accept his plea, because he did not commit the crime of robbery for which his was convicted. Appellant maintains that the charges against him were based on, "his alleged attempt to gain control of an officer's weapon," rather than a commission of a "theft offense." Appellant argues that the state failed to offer facts or an explanation of circumstances, to support the essential elements of the crime of robbery; citing to *State v. Alexander*, Hamilton App. No. C-030647, 2004-Ohio-5995; and *State v. Hoskins* (June 14, 1999), Butler App. No. CA98-07-143 in support of his argument.

{¶105} Crim.R. 11(B)(1) states "[t]he plea of guilty is a complete admission of the defendant's guilt." When he entered the guilty plea, "appellant waived the right to require the state to prove his guilt beyond a reasonable doubt." *State v. Isbell*, Butler App. No. CA2003-06-152, 2004-Ohio-2300, ¶16. "Consequently, there is no evidence to consider, and the trial court was not required to determine whether a factual basis existed to support the guilty plea, prior to entering judgment on that plea." *Id.*, citing *State v. Caldwell* (Aug. 13, 2001), Butler App. No. CA99-08-144, and *State v. Wood* (1976), 48 Ohio App.2d 339, 344. Thus, "[a]ppellant's plea provides the necessary proof of the elements of the crime and sufficient evidence to support the conviction." *Isbell* at ¶16. See, also, *Stacy v. Van Coren*, (1969), 18 Ohio St.2d 188, 189 (finding that even though a defendant was indicted for one crime, but pled guilty to another, it did not warrant voiding the conviction); *United State v. Broce* (1989), 488 U.S. 563, 570, 109 S.Ct. 757 ("[b]y entering a plea of guilty, the accused

is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime").

{¶106} It is clear based on *Isabel*, *Stacy* and *Broce* that appellant's conviction must stand because his plea of guilty to the crime of robbery provided the necessary proof of elements of the crime, including the "theft offense" element. Furthermore, appellant's reliance on *Alexander* and *Hoskins* is misplaced as the requirements for a trial court's acceptance of "no contest pleas" are fundamentally different from a court's acceptance of "guilty pleas." As noted above, guilty pleas are an admission of guilt and do not require the same explanation of circumstances that no contest pleas require, because in the latter the defendant is not admitting guilt but is admitting the truth of the facts asserted. Crim.R. 11(B)(1) and (2).

{¶107} Finally, we observe that a trial court is not required to explain the various elements of an offense. *State v. Fitzpatrick* (2004), 102 Ohio St.3d 321, 2004-Ohio-3167, ¶57. We do recognize, however, that a trial court may need to clarify a defendant's misunderstanding where he or she indicates confusion regarding the charges. *Id.* at ¶61. But as this court recently stated, "[t]here is * * * no requirement that a court enter into a discussion with a defendant or defendant's counsel to ensure there is an understanding where no uncertainty is otherwise indicated." *State v. Dotson*, Preble App. No. CA2007-11-025, 2008-Ohio-4965, ¶10.

{¶108} There is nothing in the record that suggests that appellant's plea was not knowing or voluntary; therefore we overrule appellant's third assignment of error.

{¶109} Assignment of Error No. 1:

{¶110} "APPELLANT'S CONVICTION FOR ROBBERY IS AGAINST THE SUFFICIENCY OF THE EVIDENCE."

{¶1111} In his first assignment of error, appellant argues that because there was no allegation of an underlying "theft offense" his conviction under R.C. 2911.02(A)(3) is unsupported by the evidence.

{¶1112} Where a defendant enters a plea of guilty, he waives the right to appeal all non-jurisdictional defects in the proceedings, provided the plea is made knowingly, voluntarily and intelligently. *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, ¶78; *Ross v. Court* (1972), 30 Ohio St.2d 323-24. This includes any challenges regarding the sufficiency of the evidence. *State v. Siders* (1992), 78 Ohio App.3d 699, 701. See, also, *State v. Moree*, Cuyahoga App. No. 90894, 2009-Ohio-472, ¶16; *State v. Shaffer*, Muskingum App. No. CT2007-0018, 2008-Ohio-2688, ¶42; *State v. Hurt*, Greene App. No. 21009, 2006-Ohio-990, ¶35; *State v. White*, Jefferson App. No. 01-JE-03, 2002-Ohio-5226, ¶25.

{¶1113} As discussed in the previous assignment of error, appellant's plea was knowing, voluntary and intelligent. We also note that appellant makes no arguments regarding the trial court's jurisdiction in this matter. Thus, we find that appellant waived his right to challenge the sufficiency of the evidence underlying his conviction by pleading guilty to robbery. Moreover, we also observe that a conviction resulting from a guilty plea is not subject to a sufficiency of the evidence review, because the conviction depends upon the plea of guilty and not upon any evidence submitted to, or before, the trial court. See *State v. Moore*, Montgomery App. No. 22365, 2008-Ohio-4322, ¶22. Appellant's first assignment of error is overruled.

{¶1114} Assignment of Error No. 2:

{¶1115} "APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL."

{¶1116} In his second assignment of error, appellant argues that his attorney permitted him to plead guilty to the charge of robbery which was unsupported by the evidence because he did not commit a theft offense.

{¶1117} Appellate review of an ineffective assistance of counsel claims require this court to determine: (1) whether counsel's performance fell below an objective standard of reasonable representation, and (2) if so, whether there is a reasonable probability that counsel's errors affected the outcome of the proceedings. *Strickland v. Washington* (1984), 466 U.S. 668, 690, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, syllabus.

{¶1118} However, "[i]t is well-established that a guilty plea waives the right to claim the defendant was prejudiced by the ineffective assistance of counsel, except to the extent that the defects complained of caused the plea to be less than knowing and voluntary." *State v. Neeley*, Clinton App. No. CA2008-08-034, 2009-Ohio-2337, ¶33. See, also, *State v. Barnett* (1991), 73 Ohio App.3d 244, 248. In addition, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart* (1985), 474 U.S. 52, 58, 106 S.Ct. 366.

{¶1119} As we have already determined appellant's plea was knowingly, intelligently and voluntarily made; therefore appellant has waived his right to claim he was prejudiced by ineffective assistance of counsel. Furthermore, as pointed out by the state, appellant was indicted for possession, assault and aggravated robbery. Appellant, with the assistance of his trial counsel, was able to reach an agreement with the state to plead to possession and a felony three robbery. In light of this, we

find that appellant's trial counsel advice was reasonable in recommending appellant plead guilty to robbery rather than an aggravated robbery. Finally, we observe that during the plea colloquy, appellant indicated his satisfaction with his trial counsel's advice. While not dispositive, we find it lends further credence to appellant's counsel's reasonable performance in the court below. Appellant's second assignment of error is overruled.

{¶120} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.