[Cite as *State v. Ellis*, 2009-Ohio-3639.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22864
v.	:	T.C. NO. 2007 CR 4474/3
NADA J. ELLIS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 24th day of July, 2009.

. . . . . .

MICHELE D. PHIPPS, Atty. Reg. No. 0069829, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

ADRIAN KING, Atty. Reg. No. 0081882, 36 N. Detroit Street, Suite 104, Xenia, Ohio 45385
Attorney for Defendant-Appellant

. . . . . .

HARSHA, J. (by assignment)

{¶ 1} As a result of negotiations with the State, Nada J. Ellis pled no contest to one count of passing bad checks, a felony of the fifth degree. At the same hearing, she also entered an Alford plea to four other felonies, two of which were felonies of the third degree. Part of the plea negotiations included Ellis's understanding that she would receive community control sanctions rather than imprisonment in a penal

institution. After accepting her pleas, the court sentenced her to concurrent five-year terms of community control with each sanction including the condition that she spend four months incarceration in the county jail.

{¶ 2} Ellis now appeals on the basis that her pleas were involuntary because she did not understand the combined effects of her pleas, i.e., she did not expect to be incarcerated. Because the trial court literally complied with Crim.R. 11(C) and explained that each community control sanction could include a maximum six-month period of incarceration in a local facility, we conclude her pleas were voluntary and affirm her convictions.

I. FACTS

{¶ 3} In Case No. 07-CR-04474, the State charged Ellis with multiple counts of passing bad checks, all felonies of the fifth degree. In a separate indictment bearing Case No. 07-CR-05279, the State charged her with two counts of identity theft, felonies of the third degree, and two counts of telecommunications fraud, felonies of the fifth degree. After negotiating a plea with the State, Ellis withdrew her previous not guilty pleas and pled no contest to one count of passing bad checks in Case No. 07-CR-04474 in exchange for the dismissal of the remaining charges in that case. At the same hearing, where she was represented by counsel, Ellis also entered Alford pleas to all four charges in the second indictment.

{¶ 4} Prior to accepting the pleas in each case, the trial court entered into a detailed dialogue with Ellis concerning the implication of her pleas and the possible consequences. After asking Ellis if she understood the court's explanation and receiving "yes" for an answer, the court accepted her pleas and found her guilty. At a

separate hearing, the court imposed a sanction of community control in each case and ordered the sanctions to run concurrently with each other. Part of the sanctions was that Ellis had to serve four months incarceration in a local facility. Neither Ellis nor counsel objected to or voiced any surprise at the sentence during this hearing. Nor did Ellis file a motion to withdraw her plea under Crim.R. 32.1. Nonetheless, she now appeals and claims her pleas were involuntary in the sense they were made without a proper understanding of the "combined" effects of the pleas.

II. ASSIGNMENT OF ERROR

{¶ 5} Ellis presents one assignment of error:

{¶ 6} "Under United States and Ohio Law, whether a Defendant who enters during the same docket two pleas, one of which is an Alford plea for the purpose of receiving community control, with the mistaken belief that the sentence for the highest degree offense acts as a cap to the total sentence possesses sufficient understanding of the pleas' effects to enter them and for the Court to accept them? In other words, whether a Court should accept multiple pleas from a Defendant who does not understand the 'combined' effects of multiple pleas offered during the same docket?"

III. CRIM.R. 11 & VOLUNTARINESS

{¶ 7} Crim.R. 11(C)(2)(a) provides:

{¶ 8} "(C) **Pleas of guilty and no contest in felony cases.**

{¶ 9} ***** * *

{¶ 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} * * *

{¶ 13} Crim.R. 11(C)(2) contains both constitutional and nonconstitutional rights to insure that a plea is voluntary and made with an understanding of its consequences. The right to be informed of the maximum penalty for an offense is a nonconstitutional protection provided by Crim.R. 11(C)(2)(a). *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, at ¶31, citing *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, at ¶12. The Supreme Court of Ohio has expressed its preference for literal compliance with Crim.R. 11, *Clark* at ¶29. However, substantial compliance is sufficient in the nonconstitutional context. There, "a slight deviation from the text of the rule is permissible; so long as the totality of the circumstances indicates 'the defendant subjectively understands the implications of his plea * * *.'" *Clark* at ¶31, quoting *State v. Nero* (1990), 56 Ohio St.3d 106, at 108. We review potential errors under Crim.R. 11 on a de novo basis.

{¶ 14} Ellis does not argue that the trial court failed to advise her of the maximum penalty for any of the offenses or even that it failed to advise her about consecutive sentencing options.[1] Rather, she asserts there is a reasonable probability

[1]In *State v. Johnson* (1988), 40 Ohio St.3d 130, the court held that failure to inform the defendant that the court may impose consecutive sentences, rather than concurrent sentences, does not render a plea involuntary in violation of Crim.R. 11(C).

that she did not understand the combined effects of her pleas because she presumed the maximum sentence she would receive would be that imposed for the felony of the higher degrees – the third-degree felonies. While it is not entirely clear from her brief, Ellis seems to argue that she believed the terms of the plea agreement for the more serious charges in the second indictment precluded the possibility of incarceration. In other words, if the court was not going to impose jail time for the more serious offenses, it logically follows there would be no jail time for the less serious offense of passing bad checks.

{¶ 15} Ellis's version of the plea agreement is not consistent with either the transcript of the plea hearing or the text of the sentencing entries. In contrast to her contention that the only period of incarceration she received was for the fifth-degree felonies, passing bad checks, a separate sentencing entry for the third-degree felonies, identity theft, also indicates Ellis is to serve four months incarceration in a local facility for those charges. Likewise, as we discuss below, the court advised her that a period of incarceration was possible under each plea she entered. Therefore, her characterization of the substance of the agreement and the factual context of her argument are incorrect.

{¶ 16} In any event, we look first to see if the trial court literally complied with Crim.R. 11(C)(2)(a). If it did, that ends our analysis regardless of any unilateral expectations Ellis might now claim she possessed when she entered her pleas. See, *Clark*, supra, at ¶30 (if a trial court fails to literally comply with Crim.R. 11, reviewing courts must engage in a multitiered analysis * * *). Here the court's colloquy satisfies the literal compliance standard urged by the Supreme Court of Ohio.

{¶ 17} Before accepting the no contest plea in Case No. 07-CR-5279, the court informed Ellis that passing bad checks was felony of the fifth degree that carried a potential maximum penalty of twelve months in prison. It explained to Ellis that she was eligible for community control sanctions that could last for as long as five years and "could also include six months incarceration in a local facility." Upon being asked, Ellis informed the court she understood those facts. Only after explaining those matters and the other requirements of Crim.R. 11(C), which are not at issue here, did the court accept her no contest pleas to the charge of passing bad checks.

{¶ 18} Moving on to Case No. 07-CR-4474, which involved identity theft and telecommunications fraud, the court went through a similar colloquy before accepting Ellis's Alford plea. The court specifically inquired, "Is the Alford plea to be that she would plead to all of the charges, but the agreement would be community control sanctions(.)" [sic] The assistant prosecutor responded, "Yes, your Honor." There was no response from Ellis or her counsel.

{¶ 19} The court went on to explain that identity theft was a felony of the third degree with a potential maximum sentence of five years on each of the counts. It also explained that if the sentences on those two counts were imposed consecutively, Ellis could serve ten years. The court then addressed the two counts of telecommunications fraud and indicated the maximum sentence on each count was twelve months. The court also indicated that if all those sentences were imposed consecutively, Ellis could serve twelve years. Ellis indicated she understood the consequence of maximum consecutive sentences. Finally, the trial court informed Ellis she was eligible for community control on those charges and that this sanction "could

include six months incarceration in a local facility * * * ." Again, Ellis responded, "Yes" when asked if she understood.

{¶ 20} Because the court properly informed Ellis that she could face a maximum penalty of six months confinement in a local facility under the community control sanctions for each charge, it has complied with Crim.R. 11(C)(2).

IV. CONCLUSION

{¶ 21} We conclude that the trial court engaged in literal compliance with Crim.R. 11(C)(2), and thus need not proceed to a substantial compliance analysis. Likewise, because we have found no error, we also dispense with any analysis of the plain error doctrine. Accordingly, we reject Ellis's assignment of error.

Judgment affirmed.

. . . . . .

BROGAN, J. and FROELICH, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Michele D. Phipps
Adrian King
Hon. Frances E. McGee