[Cite as *State v. Crowder*, 2009-Ohio-6389.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23184
v.	:	T.C. NO. 2008 CR 3146
DENNIS D. CROWDER	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 4th day of December, 2009.

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Defendant-Appellant

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FROELICH, J.

{¶ 1} Appellant was indicted for one count of possession of drugs in violation of

R.C. 2925.11(A) involving five grams, but less than ten grams of crack cocaine, a felony of the third degree, which carries a mandatory prison sentence; he was indicted at the same time on one count of possession of drugs involving less than one gram of heroin, a felony of the fifth degree.

{¶ 2} The drugs were found on the defendant during a pat down search when the police, with his permission, entered a motel room. The defendant filed a motion to suppress the drugs and, after a hearing, the motion to suppress was denied. Appellant entered into a plea agreement whereby he entered a plea of guilty to the mandatory crack offense and the heroin count was dismissed. The defendant was sentenced to the minimum mandatory prison sentence of one year.

{¶ 3} A timely notice of appeal was filed and counsel was appointed. Counsel has filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, advising the court that he believes the appeal to be without merit and furnishing the court with a brief elaborating his reasoning. The State filed a responsive brief requesting an opportunity to respond, should the court determine that an appealable issue may exist. On June 23, 2009, the appellant was advised that he was granted sixty days in which to file a pro se brief assigning any errors for review by this court and that, absent such a brief, the appeal will be submitted for decision on the merits. No such brief has been filed.

{¶ 4} The case is now before us for our independent review of the record. *Penson v. Ohio* (1988), 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed. 2d, 300.

{¶ 5} The transcript of the plea reflects that the defendant was informed of his right to confront witnesses, subpoena witnesses in his own behalf, to remain silent, and to require

the State to prove the case against him beyond a reasonable doubt.

{¶ 6} The court also stated: "Do you understand that by pleading guilty you give up your right to a jury trial?" And the defendant answered "yes." The court did not inform the defendant that the jury verdict in Ohio must be unanimous. Crim.R. 31(A). We note that the standard plea form also does not state anything about the unanimous jury verdict requirement.

{¶ 7} "Initially, there is no explicit requirement under Crim.R. 11(C)(2)(a) that a defendant be informed of his right to a unanimous verdict....Further, several courts, including the Ohio Supreme Court have held there is no requirement that a trial court inform a defendant of his right to a unanimous verdict...." *State v. Wesaw*, Fairfield App. No. 2008 CA 12, 2008-Ohio-5572, ¶ 29, internal citations omitted.

{¶ 8} Citing *State v. Bays* (1999), 87 Ohio St.3d 15, which in turn cited *United States v. Martin* (C.A. 6, 1983), 704 F.2d 267, *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283

{¶ 9} at ¶ 68, held that the trial court was not required to specifically advise the defendant on the need for jury unanimity. See, also *State v. Rogers*, Muskingum App. No. CT 2008-0066, 2009-Ohio-4899, ¶ 11, for a list of cases including our holding in *State v. Goens*, Montgomery App. No. 19585, 2003-Ohio-5402, ¶ 19.

{¶ 10} The court also did not inquire of the defendant as to whether there were any threats or promises made to him in order to get him to plead guilty. "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void." *State v. Milanovich* (1975), 42 Ohio St.2d, 46, 49. However, it is clear from the record that

there was a promise and that the defendant understood that promise - the one-year sentence - and had no questions concerning it. The only other promise, although not reflected in the plea colloquy, was that the felony five heroin charge would be dismissed, which it was.

{¶ 11} The court also did not ask the defendant whether the statement of facts by the prosecutor were true, but rather asked ". . .based on those facts how do you plead to possession of crack cocaine greater than five, less than ten grams," and the defendant responded "guilty." The court did find that "there's a factual basis to support the charge on the plea." Similarly, the court did not explain the effect of a plea of guilty to the defendant although it did find that he ". . .understood. . .the effect of his plea. . . ." Crim.R. 11(C)(2)(b) requires the court to inform the defendant of and determine that he understands "the effect of the plea of guilty. . . ."

{¶ 12} *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, held that this right is "non-constitutional and therefore is subject to review under a standard of substantial compliance." Id. at ¶ 12. The court 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; therefore the failure to so inform him as required by Crim.R. 11 is presumed not to be prejudicial. Id at ¶ 19.

{¶ 13} Mr. Crowder told the judge he was not under the influence of drugs or alcohol, that he had completed twelve years of school, that he had no problem reading the plea form, and he had no response to the judge's request that he ask any questions before he signed the entry of waiver and plea form. In accepting a guilty plea, a trial court must substantially comply with Crim.R. 11. *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

Substantial compliance with Crim.R. 11(C) is determined upon a review of the totality of the circumstances. *State v. Carter* (1979), 60 Ohio St.2d 34, 38.

{¶ 14} We have reviewed the transcript and viewed the electronic record; we can find no arguable issue for appeal concerning whether, despite R. 11's not being explicitly complied with, the defendant's plea was made knowingly, intelligently, and voluntarily.

{¶ 15} Defendant's trial counsel also lists "illegal patdown as a probable issue for review" on this court's docket statement. However, the defendant entered a plea of guilty, thus waiving any argument concerning the court's ruling on the motion to suppress. *State v. Perez-Diaz*, Clark App. No. 06 CA 0130, 2008-Ohio-2722, ¶ 4 (internal citations omitted).

{¶ 16} Acknowledging this, defendant's appellate counsel's *Anders* brief asks whether trial counsel was "effective in promoting the guilty plea pursuant to plea agreement, which waived appellant's right to appeal the motion to suppress ruling?" The transcript of the plea reflects a plea and sentencing agreement whereby the defendant received a one-year sentence with credit for all time served. However, there is nothing in the record to make a non-frivolous argument concerning ineffective assistance of counsel.

Judgment affirmed.

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DONOVAN, P.J. and FAIN, J., concur.

Copies mailed to:

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