[Cite as *State v. Mapes*, 2010-Ohio-4042.]

IN THE COURT OF APPEALS OF CHAMPAIGN COUNTY, OHIO

STATE OF OHIO	**:**	
Plaintiff-Appellee	**:**	**C.A. CASE NO. 09CA19**
vs.	**:**	**T.C. CASE NO. 08CR232**
LARRY J. MAPES	**:**	**(Criminal Appeal from Common Pleas Court)**
Defendant-Appellant	**:**	

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O P I N I O N

Rendered on the 27th day of August, 2010.

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GRADY, J.:

{¶ 1} Defendant, Larry Mapes, appeals from his conviction and sentence for abduction and felonious assault.

{¶ 2} As a result of several physical altercations with his wife over a period of time, Defendant was indicted on four counts of abduction, R.C. 2905.02(A)(2), felonies of the third degree, four counts of aggravated menacing, R.C. 2903.21, misdemeanors

of the first degree, and two counts of felonious assault, R.C. 2903.11(A)(2), felonies of the second degree. A three year firearm specification, R.C. 2941.145, was attached to the abduction and felonious assault charges. Competency and sanity evaluations were ordered by the trial court at Defendant's request. Subsequently, Defendant accepted the State's offer and entered guilty pleas pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed. 2d 162, to counts one and two, abduction, and counts six and nine, felonious assault. In exchange, the State dismissed the other charges and the firearm specifications. The trial court accepted Defendant's pleas and found him guilty.

{¶ 3} On March 2, 2009, Defendant filed a motion to withdraw his guilty pleas. A hearing was held on March 10, 2009. On March 27, 2009, the trial court overruled Defendant's motion to withdraw his pleas, finding that Defendant had a mere change of heart. On April 21, 2009, the trial court sentenced Defendant to concurrent four year prison terms on the abduction charges and concurrent six year terms on the felonious assault charges. The court ordered the sentences on the abduction and felonious assault charges to run consecutively, for a total sentence of ten years.

{¶ 4} Defendant timely appealed to this court from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 5} "THE TRIAL COURT ERRED BY ACCEPTING APPELLANT'S GUILTY PLEA WHEN IT FAILED TO COMPLY WITH THE PROCEDURAL REQUIREMENTS OF BOTH CRIM.R. 11 AND *ALFORD*."

{¶ 6} A plea of guilty to a criminal offense is a complete admission of criminal liability that is sufficient to support a conviction. Crim.R. 11(B)(1); *State v. Gossard*, Montgomery App. No. 19494, 2003-Ohio-3770. However, the plea must be knowing, intelligent and voluntary. *State v. Kelley* (1991), 57 Ohio St.3d 127. Compliance with the requirements in Crim.R. 11(C) portrays those qualities, subject to any further specific qualification. *Gossard*.

{¶ 7} In accepting Defendant's guilty pleas, the trial court complied with Crim.R. 11(C)(2). That, however, is not sufficient where, as here, *Alford* pleas are involved. In *Gossard*, we stated:

{¶ 8} "{¶7} An *Alford* plea represents a qualification to the assurances created by a proper Crim.R. 11(C) inquiry. It permits a plea of guilty when the defendant nevertheless denies a necessary foundation of criminal liability, either with respect to the truth of the act or omission charged or the degree of culpability which the offense requires. 'An individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.'

Alford, 400 U.S., at 37.

{¶ 9} "{¶8} Interpreting and applying *Alford,* the Supreme Court of Ohio has held: 'Where the record affirmatively discloses that: (1) defendant's guilty plea was not the result of coercion, deception or intimidation; (2) counsel was present at the time of the plea; (3) counsel's advice was competent in light of the circumstances surrounding the indictment; (4) the plea was made with the understanding of the nature of the charges; and, (5) defendant was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial, or both, the guilty plea has been voluntarily and intelligently made.' *State v. Piacella* (1971), 27 Ohio St.2d 92, 271 N.E.2d 852, syllabus; *State v. Padgett* (1990), 67 Ohio App.3d 332, 338, 586 N.E.2d 1194.

{¶ 10} "* * *

{¶ 11} "{¶11} The proper taking of a guilty plea requires 'a meaningful dialogue between the court and the defendant.' *Garfield Heights v. Brewer* (1980), 17 Ohio App.3d 218, *State v. Bowling* (March 10, 1987), Montgomery App. No. 9925. In *Padgett,* we explained that where a defendant protests innocence but nevertheless is willing to plead guilty, the trial court 'must determine that the defendant has made a rational calculation to plead guilty notwithstanding his belief that he is innocent.' *Padgett, supra,* at 338-39, 586 N.E.2d 1194. At a minimum, this requires an 'inquiry

of the defendant concerning his reasons for deciding to plead guilty notwithstanding his protestations of innocence; it may require, in addition, inquiry concerning the state's evidence in order to determine that the likelihood of the defendant's being convicted of offenses of equal or greater magnitude than the offenses to which he is pleading guilty is great enough to warrant an intelligent decision to plead guilty.' *Id.*

{¶ 12} "{¶12} The essence of an *Alford* plea is that a Defendant's decision to enter the plea against his protestations of factual innocence is clearly and unequivocally supported by evidence that he exercised that calculus for the purpose of avoiding some more onerous penalty that he risks by, instead, going to trial on the charges against him. A basis for that calculation is apparent here; Gossard avoided five life sentences in favor of one, for which he would be eligible for release after serving ten years. Nevertheless, the evidence must be clear and unequivocal that he made that choice with a full understanding of the risks of conviction and a desire to avoid them. *Padgett, supra.* Lacking that, the record fails to affirmatively demonstrate that the plea was knowing, intelligent, and voluntary. *Piacella.*"

{¶ 13} At the plea hearing in this case the following exchanges occurred:

{¶ 14} "THE COURT: There is a procedure in the law that allows

an individual to plead guilty but still deny guilt. And the reason for that procedure is because individuals may be concerned about penalties that would be involved if they don't plead guilty. And we're involved in a procedure where your lawyer and the Prosecutor are asking this Judge to let you plead guilty to these crimes even though you continue to maintain your innocence.

{¶ 15} "THE WITNESS: As long as I'm maintaining my innocence, okay.

{¶ 16} "THE COURT: That's what this procedure does.

{¶ 17} "THE WITNESS: Okay. As long as I'm maintaining my innocence, okay. Especially three of them.

{¶ 18} "THE COURT: But you need to understand that when this procedure is completed, if your plea is accepted, the Court is going to treat you as guilty because you pleaded guilty. Even though you say you're innocent, the Court is going to handle your case as a guilty case.

{¶ 19} "THE WITNESS: Wow. Okay. All right. Yes, Your Honor.

{¶ 20} "THE COURT: Do you understand that?

{¶ 21} "THE WITNESS: I guess so." (T. 11-12).

{¶ 22} "* * *

{¶ 23} "THE WITNESS: But he (Defendant's trial counsel) did make it very clear that if I took it to trial, I would lose and

go to prison for the rest of my life no ifs, ands, or buts. I was told that. Now, whether fry was the word – but I was told that.

{¶ 24} "THE COURT: How old are you?

{¶ 25} "THE WITNESS: 60 years old.

{¶ 26} "THE COURT: I believe what your lawyer would have told you is that he is aware of the information the State has to prove the case. And that if you were found guilty in a jury trial, that the penalty you would face, the total penalty, would be a $50,000 and 26 years in jail. Tell me, again, how old are you?

{¶ 27} "THE WITNESS: I'm 60, sir.

{¶ 28} "THE COURT: 60 plus 26 is how much?

{¶ 29} "THE WITNESS: It's not too good, is it.

{¶ 30} "THE COURT: Do you know how much that is?

{¶ 31} "THE WITNESS: Yes, sir.

{¶ 32} "THE COURT: How much?

{¶ 33} "THE WITNESS: 86 years.

{¶ 34} "THE COURT: Yeah. And not everybody lives to 86, do they?

{¶ 35} "THE WITNESS: No, sir.

{¶ 36} "THE COURT: So you would be spending a good portion of your life behind bars if you lost your case and if the Judge imposed

a maximum sentence.

{¶ 37} "THE WITNESS: Yes, sir.

{¶ 38} "THE COURT: Your lawyer has a responsibility to tell you all the bad things that can happen to you.

{¶ 39} "MR. SELVAGGIO: Excuse me, Judge?

{¶ 40} "THE COURT: Counsel?

{¶ 41} "MR SELVAGGIO: I think what you really are looking to refer to is the indictment, which has a greater number of years than just those 26. The 26 that I believe you were looking at would be a maximum consecutive sentence under the current plea agreement.

{¶ 42} "THE COURT: You are absolutely correct. And thank you for the clarification. I have not computed what the penalty would be for the charges that are being dismissed and I'll be required to do so at some point. Have you?

{¶ 43} "MR. SELVAGGIO: No.

{¶ 44} "THE COURT: And Counsel for the Defendant, have you?

{¶ 45} "MR. BUCCI: Your Honor, I have. I can't recall the exact number, but I think it's 43 or 44 years.

{¶ 46} "THE COURT: And if it's 44 years, that means that it's highly unlikely that you would survive prison because of age. Are you agreed?

{¶ 47} "THE WITNESS: Yes, I sir. I would have to be like Moses.

{¶ 48} "THE COURT: Do you want the Court to accept your plea of guilty even though you are maintaining your innocence?

{¶ 49} "THE WITNESS: Yes, Your Honor." (T. 16-18).

{¶ 50} "* * *

{¶ 51} "THE COURT: Does the Prosecutor believe he has information to uphold a finding of guilty?

{¶ 52} "THE WITNESS: I do, Judge. And with regard to your earlier question if the Defendant went to trial, he's facing 53 years. This plea agreement – well 53 years and there is mandatory prison involved. This plea agreement if he enters an Alford plea and maintains his innocence, is providing him with a maximum of 26 years and no mandatory prison.

{¶ 53} "THE COURT: I computed 52 and a half years just because of the limitation on the number of misdemeanor sentences. It would make it 18 months instead of two years. I believe there were four misdemeanors. Six months each.

{¶ 54} "MR. SELVAGGIO: That's correct.

{¶ 55} "THE COURT: Thank you.

{¶ 56} "MR. SELVAGGIO: But if there are four of them – oh, I see what you're saying. Okay.

{¶ 57} "THE COURT: Do you understand that the Prosecutor

believes that he can prove you guilty?

{¶ 58} "THE WITNESS: Yes, sir. I think he thinks he can.

{¶ 59} "THE COURT: Do you understand that if you don't accept the plea of guilty and if you go to trial and if you're found guilty of all the charges, that the possible penalty is a maximum of 52 and a half years behind bars?

{¶ 60} "THE WITNESS: Yes, sir. I heard that." (T. 22-23).

{¶ 61} The court's colloquy with Defendant demonstrates that, his claim of actual innocence notwithstanding, Defendant decided to enter guilty pleas in order to avoid the more onerous penalties to which he would be subject should he be convicted of all the charges against him, following a trial. That is a valid motive for entering an *Alford* plea. However, lacking from the record is any clear and unequivocal evidence that Defendant made that choice with a full understanding of the risks of his conviction should he go to trial. *Padgett; Gossard*

{¶ 62} In explaining the nature of the charges, the trial court recited the language in the indictment, and the prosecutor, when asked by the trial court, indicated only that he believed he had sufficient information to uphold a finding of guilt. There was no proffer of what the State's evidence would be. In other words, the State provided no factual basis for its case against Defendant from which the court could conclude that Defendant had rationally

calculated that it was in his best interest to accept the State's plea offer because he would be convicted if he did not. *State v. Dunnier*, Montgomery App. No. 21762, 2007-Ohio-4891; *Gossard, supra*.

{¶ 63} The trial court's extensive colloquy with Defendant never elicited from him any reason or reasons, in relation to the evidence against him, why Defendant believed he would be convicted should he go to trial, his claims of innocence notwithstanding. *Gossard*. Defendant's statement that his attorney told him "I would lose" is insufficient to demonstrate the full and subjective understanding of his risks of conviction that an *Alford* plea requires. Furthermore, the record fails to portray what, if anything, Defendant's counsel did to investigate the strength of the State's case and whether he interviewed the victim or other State's witnesses. In short, the record fails to demonstrate compliance with the procedural requirements for accepting Defendant's *Alford* pleas. Accordingly, we necessarily find that his pleas were not knowing, intelligent and voluntary. *Gossard; Dunnier; State v. Padgett* (1990), 67 Ohio App.3d 332.

{¶ 64} Defendant's first assignment of error is sustained. Defendant's conviction and sentence will be reversed and this matter remanded to the trial court for further proceedings consistent with this opinion.

SECOND ASSIGNMENT OF ERROR

{¶ 65} "THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION TO WITHDRAW HIS PLEA WHERE SUCH REQUEST WAS MADE PRIOR TO THE IMPOSITION OF SENTENCE."

THIRD ASSIGNMENT OF ERROR

{¶ 66} "THE APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 67} Our disposition of Defendant's first assignment of error renders these assignments of error moot. Accordingly, we need not address them. App.R. 12(A)(1)(c).

{¶ 68} Having sustained Defendant's first assignment of error, Defendant's conviction and sentence will be reversed and the matter remanded to the trial court for further proceedings.

DONOVAN, P.J. And FROELICH, J., concur.

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