[Cite as *State v. Wombles*, 2010-Ohio-4273.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2009 CA 46
v.	:	T.C. NO. 2009CR53
JAMES M. WOMBLES	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 10th day of September, 2010.

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JAMES M. WOMBLES, #608-874, P. O. Box 69, London, Ohio 43140
Defendant-Appellant

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FROELICH, J.

{¶ 1} James M. Wombles pled no contest in the Miami County Court of Common Pleas to five counts of burglary in violation of R.C. 2911.12(A)(2), one count of burglary in violation of R.C. 2911.12(A)(3), and one count of breaking and entering in violation of R.C. 2911.13(A). The trial court found him guilty of all counts and sentenced him to eight years for each count of

burglary under R.C. 2911.12(A)(2), two years for burglary under R.C. 2911.12(A)(3), and one year for breaking and entering. The two-year burglary sentence was to be served consecutively to the eight-year burglary sentences; the one-year sentence was to be served concurrently to all sentences, for an aggregate sentence of ten years.

{¶ 2} At the time of his combined plea and sentencing hearing, Wombles was on parole for a prior conviction in the Commonwealth of Kentucky, and he had pled guilty in the Greene County Court of Common Pleas to one count of felonious assault, one count of burglary, two counts of receiving stolen property, and one count of possession of criminal tools, although he had not yet been sentenced for those charges.

{¶ 3} Wombles, pro se, appeals from his convictions, claiming that his pleas were not knowing, intelligent, and voluntary.

I

{¶ 4} In his sole assignment of error, Wombles claims that his no contest pleas were not made knowingly, intelligently, and voluntarily. He argues that he entered the pleas after reaching an agreement with the State that his sentence would run concurrently with the sentences imposed by Greene County and the Commonwealth of Kentucky. Wombles states that he was never informed that, if Kentucky did not take immediate custody of him, his Ohio sentences would run consecutively to his Kentucky sentence. Wombles claims that he would not have entered the pleas if he had been told that the Ohio and Kentucky sentences would be concurrent only if Kentucky took immediate custody of him.

{¶ 5} In order for a plea to be knowing, intelligent, and voluntary, the trial court must

comply with Crim.R. 11(C). *State v. Greene*, Greene App. No. 2005 CA 26, 2006-Ohio-480, ¶8. "Crim.R. 11(C)(2) requires the court to (a) determine that the defendant is making the plea voluntarily, with an understanding of the nature of the charges and the maximum penalty, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions; (b) inform the defendant of and determine that the defendant understands the effect of the plea of guilty and that the court, upon acceptance of the plea, may proceed with judgment and sentencing; and (c) inform the defendant and determine that he understands that, by entering the plea, the defendant is waiving the rights to a jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself." *State v. Brown*, Montgomery App. No. 21896, 2007-Ohio-6675, ¶3. See, also, *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶27.

{¶ 6} The Supreme Court of Ohio has urged trial courts to literally comply with Crim.R. 11. *Clark* at ¶29. However, because Crim.R.11(C)(2)(a) and (b) involve non-constitutional rights, the trial court need only substantially comply with those requirements. E.g., *State v. Nero* (1990), 56 Ohio St.3d 106, 108; *Greene* at ¶9. The trial court must strictly comply with Crim.R. 11(C)(2)(c), as it pertains to the waiver of federal constitutional rights. *Clark* at ¶31.

{¶ 7} At the beginning of the July 14, 2009, plea and sentencing hearing, Wombles's counsel informed the court that the parties had reached an agreement that Wombles would plead no contest to all seven counts in the indictment, that he would receive a sentence of ten years, and that the sentence would run concurrently with any sentence he received in Greene County and the Commonwealth of Kentucky. Counsel further stated that Wombles understood that the

court was not bound by the agreement and that he wished to waive a pre-sentence investigation and proceed immediately to sentencing.

{¶ 8} The court questioned Wombles about the agreement and his intent to plead no contest. Wombles informed the court that he was 38 years old, had eleven years of schooling, and was able to read and understand English. Wombles denied taking any drugs or alcohol that might affect his thinking at the hearing, and he stated that he had never been found to be mentally ill or judged incompetent by a court.

{¶ 9} Wombles stated that he had not been promised anything other than what appeared in the agreement and that he understood the court was not bound by the agreement. Wombles denied that he had been threatened regarding the case or the plea. Wombles stated that his counsel had "explained everything to [him] and answered all [his] questions." Wombles was satisfied with his counsel's representation. The court further inquired:

{¶ 10} "THE COURT: At the time of these offenses were you on probation, parole, community control or post-release control for a felony?

{¶ 11} "MR. WOMBLES: Parole.

{¶ 12} "THE COURT: Parole out of Kentucky, right?

{¶ 13} "MR. WOMBLES: Yes, sir.

{¶ 14} "THE COURT: So if I thought it was the right and proper thing to do I could run this sentence consecutive to whatever tail is hanging over your head from the prior sentence from Kentucky, right?

{¶ 15} "MR. WOMBLES: Yes, sir."

{¶ 16} Mr. Wombles stated that he had read the charges in the indictment, had discussed

them with his attorney, understood the meaning and nature of the charges, and that he had no questions about the charges. The court explained the effect of a no contest plea and indicated that the court could proceed directly to sentencing; Wombles indicated that he understood. The court informed Wombles of the maximum penalty for each offense, the required post-release control, and the consequences of violating post-release control.

{¶ 17} Wombles acknowledged that he had read, understood, and signed both pages of the plea form. The form listed the seven charges, the possible prison sentences and fines, and it included, among other things, a sentence, reading, "If I am now on felony probation, parole, or community control, this plea may result in revocation proceedings and any new sentence could be imposed consecutively." The form stated the agreement between the parties as "Agreed 10 yr sentence concurrent with Greene Co. C.P. and State of Kentucky."

{¶ 18} The court informed Wombles of his constitutional rights and that he would be waiving those rights if he entered a plea. Wombles stated that he still wished to enter pleas of no contest and that he was doing so voluntarily.

{¶ 19} The trial court accepted his pleas and found him guilty of the charges. The court imposed the aggregate ten-year sentence, as detailed above. The trial court did not address whether this sentence was to be served consecutively or concurrently with any sentence later imposed by Greene County or the Kentucky sentence. The trial court's judgment entry, filed on July 17, 2009, also did not mention pending or future criminal proceedings in Greene County or Kentucky.

{¶ 20} Although the trial court conducted a thorough Crim.R.11(C) hearing in most respects, we conclude, under the facts of this case, that the trial court failed to ensure that

Wombles understood the extent of the court's authority to impose a sentence concurrent with Wombles' existing Kentucky sentence, for which he was on parole. The trial court merely informed Wombles that it was not bound by the agreement between the State and Wombles. Upon being informed by Wombles that he was on parole in Kentucky, the court expressly told Wombles – and Wombles agreed – that the court could order that the Miami County sentence run consecutively to "whatever tail is hanging over your head from the prior sentence from Kentucky." Implicit in this explanation was that the court would consider the plea agreement and could – if it so decided in its discretion – order the sentence to be concurrent.

{¶ 21} Although Wombles was aware when he entered his plea that the trial court might not order the Miami County sentence to run concurrently with his Kentucky sentence, Wombles was not informed that the Miami County court had no control over when Kentucky might revoke his parole and require him to serve the remainder of his Kentucky sentence and that, even if the trial court had ordered the sentences to run concurrently, that order might not have any legal or practical effect.

{¶ 22} Indeed, the Supreme Court of Kentucky has held that time spent incarcerated in another state for a crime committed while on parole does not count toward a parolee's Kentucky sentence, even though the other state had ordered that its sentence run concurrently with the Kentucky sentence. *Kassulke v. Briscoe-Wade* (Ky., 2003), 105 S.W.3d 403. The Court of Appeals of Kentucky has further held that, even when parole had been revoked, a parolee was not entitled to have the time served in another state credited toward the completion of his Kentucky sentence. *O'Connor v. Schneider* (Ky. App., 2003), 117 S.W.3d 666, 669, citing *Anglian v. Sowders* (Ky. App., 1978), 566 S.W.2d 789. Rather, "before a parolee can be given credit for

time served on a Kentucky sentence after his parole has been revoked, the parolee must be within the *custody* of Kentucky." (Emphasis in original). Id. at 669; see *Kassulke*, 105 S.W.3d at 409 (stating that "the only way that the Missouri trial court's order for a concurrent sentence could have been given its intended effect was if Missouri tendered, and Kentucky accepted, custody of Appellee. Kentucky and Missouri are separate sovereigns, and Kentucky is not required to extend any full faith and credit to Missouri's decision to run its sentence concurrently").

{¶ 23} Precisely because we do not expect an Ohio judge (let alone a defendant) to be knowledgeable of Kentucky law, Wombles should have been informed by the court that it could not assure him that the Miami County sentence and the Kentucky sentence would be served concurrently, even if so ordered by the court. As stated in *O'Connor*: "[W]hile the Ohio trial court had the authority to order [defendant's] Ohio sentences to run concurrently with his Kentucky sentences, the Ohio court order does not require Kentucky to run [defendant's] Kentucky sentences concurrently with his Ohio sentences." Id. at 670. Without some disclaimer, Wombles might have reasonably believed that Miami County could legally order that his various sentences be served concurrently and that the Commonwealth of Kentucky would honor such an order. Because the trial court did not inform Wombles that it may not have the authority to affect his Kentucky sentence and, accordingly, that it could not guarantee that his Miami County sentence would be served concurrently with his Kentucky sentence, even if ordered by the court, Wombles's pleas were not knowing, intelligent, and voluntary.[1]

[1] In a separate case, Wombles challenged his convictions in Greene County, also claiming that his pleas were not knowing, intelligent, and voluntary because he did not know that his sentence would be served concurrently with his Kentucky sentence only if he were immediately placed in the custody of Kentucky. *State v. Wombles*, Greene App. No. 2010-CA-12, 2010-Ohio-4050.

{¶ 24} The assignment of error is sustained.

II

{¶ 25} The trial court's judgment will be reversed, and the matter will be remanded for further proceedings.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

Anthony E. Kendell
James M. Wombles
Hon. Jeffrey M. Welbaum

In contrast to the facts before us here, the Greene County Common Pleas Court told Wombles at the plea hearing that it was willing to order his Greene County sentence to be served concurrently with his Kentucky and Miami County sentences, "but I guess my point is, if they choose not to do that, I don't control those other authorities. Do you understand that?"

At the subsequent sentencing hearing, Wombles's counsel again requested that the trial court make the sentence concurrent to any sentence from Miami County and the Commonwealth of Kentucky. The court responded:

"THE COURT: Let me understand, and I guess – and I'm going to presume this since I don't know Kentucky law, that's their call, not my call?

"[DEFENSE COUNSEL]: Absolutely. I just ask that in your entry you note that."

Considering that Wombles had chosen to plead guilty despite being informed that the trial court did not know Kentucky law and that it had no control over whether the sentences would be served concurrently even if ordered, we held that Wombles's pleas were made knowingly, intelligently, and voluntarily.