

[Cite as *State v. McNeil*, 2010-Ohio-6106.]

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO	:	
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Plaintiff-Appellee	:	C.A. CASE NO. 09CA0117
vs.	:	T.C. CASE NO. 09CR0658
	:	
ANTHONY MCNEIL	:	(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 December, 2010.

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GRADY, J.:

Defendant, Anthony McNeil, appeals from his conviction and sentence for felonious assault.

On June 26, 2009, Defendant, who was a passenger in a motor vehicle that stopped near South Fountain Avenue and East Singer

Street in Springfield, exited that vehicle and fired shots toward 1783 S. Fountain Avenue. Those shots struck Jordan Scott and Stefan Strauder. Defendant was indicted on two counts of felonious assault, R.C. 2903.11(A)(2), with a firearm specification, 2941.145, one count of improperly handling a firearm in a motor vehicle, R.C. 2923.16(B), two counts of discharging a firearm on or near prohibited premises, R.C. 2923.162(A)(3), and one count of improperly discharging a firearm at or into a habitation, R.C. 2923.161(A)(1).

Defendant entered a guilty plea to the two counts of felonious assault with the firearm specifications. In exchange, the State dismissed the other pending charges. The parties agreed that the sentences imposed on the felonious assault charges would run concurrently, and that the firearm specifications would merge. The trial court sentenced Defendant to concurrent seven year prison terms on the felonious assault charges, and merged the firearm specifications and imposed one additional and consecutive three year term on those for a total sentence of ten years.

Defendant timely appealed to this court from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED WHEN IT IMPROPERLY ASSIGNED A PROBATE COURT JUDGE TO THE DEFENDANT'S CRIMINAL CASE."

Defendant argues that Judge Richard P. Carey, the Clark County Probate Judge, was improperly assigned to handle this criminal case because Judge Carey is not a judge of the general division of the court of common pleas. In support of his argument, Defendant points out that the court of common pleas has original jurisdiction of all crimes and offenses, except minor offenses the exclusive jurisdiction of which is vested in courts inferior to the court of common pleas, R.C. 2931.03, and that as used in Chapter 2931 of the Ohio Revised Code, "judge" does not include the probate judge and "court" does not include the probate court. R.C. 2931.01(B) and (C).

Judge Carey is the judge of the probate division of the Clark County Court of Common Pleas. Effective January 6, 2009, Judge Richard J. O'Neill was elected the presiding judge of the Clark County Court of Common Pleas. The presiding judge of a court of common pleas can temporarily assign a judge from one division of the same court to another division, as needed. Rule 3(B)(2) of the Rules of Superintendence for the Courts of Ohio; *Knoop v. Knoop*, Montgomery App. No. 22037, 2007-Ohio-5178. The Order of Transfer filed in this case on October 1, 2009, demonstrates that Presiding Judge O'Neill assigned Judge Carey to the general division of the Clark County Court of Common Pleas, effective October 1, 2009, and assigned this case to Judge Carey for that purpose.

Defendant's argument is without merit.

Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT COMMITTED ERROR BY ACCEPTING APPELLANT'S PLEA OF GUILTY BECAUSE IT WAS NOT VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY MADE."

Defendant argues that the trial court erred in accepting his guilty pleas because those pleas were not entered knowingly, intelligently, and voluntarily.

In *State v. McGrady*, Greene App. No. 2009CA60, 2010-Ohio-3243, at ¶11-13, this court stated:

"In order for a plea to be given knowingly and voluntarily, the trial court must follow the mandates of Crim. R. 11(C). If a defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and is void. *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274.

"A defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. *State v. Stewart* (1977), 51 Ohio St.2d 86, 93; Crim. R. 52(A). The test is whether the plea would have been otherwise made. *Id.* at 108.

"A trial court must strictly comply with Crim. R. 11 as it pertains to the waiver of federal constitutional rights. These

include the right to trial by jury, the right of confrontation, and the privilege against self-incrimination. *Id.* at 243-44. However, substantial compliance with Crim. R. 11(C) is sufficient when waiving non-constitutional rights. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. The non-constitutional rights that a defendant must be informed of are the nature of the charges with an understanding of the law in relation to the facts, the maximum penalty, and that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence. Crim. R. 11(C)(2)(a), (b); *State v. Philpott*, Cuyahoga App. No. 74392, citing *McCarthy v. U.S.* (1969), 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418. Substantial compliance means that under the totality of the circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving. *Nero*, 56 Ohio St.3d at 108."

A review of the plea hearing demonstrates that the trial court complied with all of the requirements in Crim.R. 11(C)(2) in accepting Defendant's guilty pleas. Defendant does not argue that the trial court failed to comply with Crim.R. 11 in accepting his pleas. What Defendant does claim is that he was pressured by outside parties to accept the plea agreement. However, when asked by the trial court if anyone was forcing him to enter guilty pleas, or threatening or coercing him, Defendant responded, "No sir."

Defendant also claims that there was "extreme hesitation" on his part to enter guilty pleas. The record of the plea colloquy refutes this claim. At several points during the plea colloquy, after the court had finished explaining to Defendant various matters the court was required to discuss with Defendant pursuant to Crim.R. 11(C)(2), the court asked Defendant if he still wanted to plead guilty in light of everything the court had said. In each and every instance, Defendant responded, "Yes," without hesitation.

Finally, Defendant claims that he was innocent because he was not the shooter. But, when the trial court asked Defendant if he understood that by pleading guilty he was admitting the two felonious assault charges, Defendant responded, "Yes, sir." At no time during the plea hearing did Defendant claim that he was innocent. We further note that although Defendant claims his guilty plea was not made knowingly, intelligently and voluntarily, he fails to allege any prejudicial effect. *McGrady*.

We additionally note that prior to the sentencing hearing Defendant sent a letter to the trial court indicating that he wanted to withdraw his guilty pleas because he was scared into accepting the State's plea offer. At sentencing, and despite defense counsel's assurances that Defendant had reconsidered and was comfortable with his guilty pleas and wanted to proceed to sentencing, the trial court discussed the matter with Defendant.

The court received assurances from Defendant that he wanted to maintain and go forward with the guilty pleas he had entered and proceed to sentencing, and that he was doing this voluntarily.

In light of the record in this case, Defendant has failed to demonstrate that his guilty pleas were not knowingly, intelligently and voluntarily made.

Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED WHEN IT DID NOT CONSIDER THE PRINCIPLES AND PURPOSES OF SENTENCING UNDER R.C. 2929.11 OR THE SERIOUSNESS AND RECIDIVISM FACTORS AS SET FORTH IN R.C. 2929.12."

Defendant argues that his sentence is contrary to law because the trial court failed when imposing its sentence to consider the applicable sentencing statutes; specifically, the purposes and principles of sentencing in R.C. 2911.11 and the seriousness and recidivism factors in R.C. 2929.12.

In *State v. Jeffrey Barker*, Montgomery App. No. 22779, 2009-Ohio-3511, at ¶36-37, we wrote:

"The trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum, consecutive, or more than minimum sentences. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at paragraph 7 of

the syllabus. Nevertheless, in exercising its discretion the trial court must consider the statutory policies that apply to every felony offense, including those set out in R.C. 2929.11 and 2929.12. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, at ¶ 37.

"When reviewing felony sentences, an appellate court must first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence, including R.C. 2929.11 and 2929.12, in order to find whether the sentence is contrary to law. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. If the sentence is not clearly and convincingly contrary to law, the trial court's decision in imposing the term of imprisonment must be reviewed under an abuse of discretion standard. *Id.*"

"'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, 19 OBR 123, 126, 482 N.E.2d 1248, 1252. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

"A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that

the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprises, Inc. v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

In its journalized Judgment Entry of Conviction, the trial court indicated that it had considered the record, oral statements by the parties, any victim impact statement, the presentence investigation report, the principles and purposes of sentencing under R.C. 2929.11, and the seriousness and recidivism factors under R.C. 2929.12. The record also demonstrates that the court informed Defendant about post-release control requirements. The trial court complied with all applicable rules and statutes in imposing its sentence. Furthermore, the concurrent seven year prison terms the court imposed on the felonious assault charges are clearly within the authorized range of available punishments for a felony of the second degree. R.C. 2929.14(A)(2). Defendant's sentence is not clearly and convincingly contrary to law. *Kalish*.

Furthermore, no abuse of discretion is demonstrated. Defendant has a prior record as a juvenile that includes delinquency adjudications for disorderly conduct, criminal damaging, and possession of a firearm on school premises. R.C. 2929.12(D)(2).

With respect to the serious nature of the offenses in this case, two people were shot, receiving injuries to their legs. A total of thirteen shots were fired at a group of approximately twenty people who were gathered in the front yard of a house where a barbeque was in progress. Some of the shots struck that house.

Other people inside and outside that home could have been injured or killed. The court noted that "two young men were rather significantly and seriously injured here and probably will suffer some long term consequences as a result . . ." R.C. 2929.12(B)(2).

Defendant did apologize at sentencing for what happened. R.C. 2929.12 (E)(5). No abuse of discretion on the part of the trial court in imposing a seven year sentence on the felonious assault charges has been demonstrated.

Defendant's third assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J., And MCFARLAND, J., concur.

(Hon. Matthew W. McFarland, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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