

**IN THE COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
HANCOCK COUNTY**

**STATE OF OHIO**

**CASE NO. 5-2000-39**

**PLAINTIFF-APPELLEE**

**v.**

**GEORGE E. MILLER, JR.**

**OPINION**

**DEFENDANT-APPELLANT**

---

---

**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.**

**JUDGMENT: Judgment Affirmed.**

**DATE OF JUDGMENT ENTRY: May 24, 2001**

---

---

**ATTORNEYS:**

**JOHN C. FILKINS  
Attorney at Law  
Reg. #0046671  
320 South Main Street  
Findlay, Ohio 45840  
For Appellant**

**ROBERT A. FRY  
Prosecuting Attorney  
Reg. #0020664  
DREW A. WORTMAN  
Assistant Prosecuting Attorney  
Reg. #0072355  
222 Broadway, Suite 104  
Findlay, Ohio 45840  
For Appellee**

**SHAW, J.** This is an appeal from a sentencing hearing in which the Hancock County Common Pleas Court sentenced Defendant-Appellant George E. Miller to 11 months with the Ohio Department of Rehabilitation and Correction after his conviction for violating R.C. 2913.11(A), passing bad checks.

On June 19, 1999 and June 20, 1999 Miller wrote two checks to Walmart for \$540.44 and \$255.84, respectively. On August 26, 1999 Findlay Police Officers responded to a complaint by Walmart that the two checks written by Miller were returned by Fifth Third Bank, with “Hold” stamped on them. Findlay Police Detective Akers then went to Miller’s residence and questioned him regarding the bad checks. Miller admitted writing the checks. Detective Akers also contacted Fifth Third Bank, who told him that the Defendant had made a \$39.00 deposit on June 16, 1999 which left a balance of \$.39 in his account and that the account had since been closed because it was overdrawn. The bank sent a letter to Miller to notify him that the check bounced, however, Miller had apparently moved and did not receive the notice. Miller eventually learned that the checks had bounced, but did not reimburse the bank or the store.

Miller was charged with one count of passing bad checks, a fifth degree felony, for the \$540.44 check; however, the State did not prosecute for the passing of the \$255.84 check in return for his plea to the first check and the full restitution

of both checks. At the time of the offense, Miller was serving community control sanction out of Seneca County and municipal probation out of Bowling Green.

Miller pled guilty on June 1, 2000 and returned for sentencing on November 21, 2000. The Court sentenced him to 11 months in jail and ordered him to pay full restitution and all court costs.

Appellant asserts three assignments of error. The first two assignments will be discussed together.

**I. The Defendant-Appellant was denied the effective assistance of counsel, in violation of the Defendant's Sixth Amendment and Fourteenth Amendment Rights under the United States Constitution, and Section 10 Article 1, of the Ohio Constitution, when counsel did not discuss any defenses, full or partial, with the Defendant-Appellant.**

**II. The Trial Court erred as a matter of law when it accepted the Defendant-Appellant's plea based upon facts which did not support the indictment.**

In reviewing a plea submitted by a defendant, an appellate court should look at whether Crim. R. 11 has been followed. *State v. Kelley* (1991), 57 Ohio St.3d 127, 128. Crim R. 11(C) requires:

- (2) [In f]elony cases the court may refuse to accept a plea of guilty \* \* \* and shall not accept a plea of guilty \* \* \* without first addressing the defendant personally and doing all of the following;**
- (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved \* \* \*;**
  - (b) Informing the defendant of and determining that he understands the effect of the plea of guilty \* \* \*, and that the court, upon acceptance of the plea, may proceed with judgment and sentence;**

- (c) Informing the defendant and determining that the defendant understands that by the plea, the defendant is waiving his rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself or herself.**

Furthermore, the plea must be knowingly, intelligently, and voluntarily given. *State v. Engle* (1996), 74 Ohio St.3d 525. The essential question to be asked, however, is whether there was substantial compliance with Crim.R. 11(C). *State v. Ballard* (1981), 66 Ohio St.2d 473. "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." *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

In this case, the record reflects that the trial court engaged in an extensive discussion with Miller at the hearing covering all of the criteria set forth in Crim. R. 11(C)(2). The Judge also engaged in a dialog with Mr. Miller regarding Miller's understanding of his plea;

**The Court: Have you had sufficient time to think about and discuss with your attorney\* \* \* the agreement previously referred to and the plea of guilty that you are about to enter?**

**The Defendant: Yes, Your Honor.**

**The Court: Do you understand that a plea of guilty is a complete admission of your guilt?**

**The Defendant: Yes, Your Honor.**

**The Court: In other words you are telling the court you did exactly what you are charged with in the indictment in this case?**

**The Defendant: Yes, Your Honor.**

The testimony at the plea hearing indicates that after looking at the totality of the circumstances, Mr. Miller subjectively understood the implications of his plea and the rights he was waiving. Consequently, he knowingly, voluntarily, intelligently gave his plea and could not have been prejudiced by any alleged ineffective assistance of counsel. Cf. *Strickland v. Washington* (1984), 466 U.S. 668. Therefore, his first two assignments of error are overruled.

**III. The Trial Court abused its discretion in sentencing Appellant to a term of imprisonment, in light of R.C. 2929.11, 2929.12 and 2929.13.**

An appellate court may modify or vacate a sentence and remand to the trial court for re-sentencing if it finds by clear and convincing evidence that the record does not support the sentence or is otherwise contrary to law. *State v. Martin* (1999), 136 Ohio App.3d 355, *construing* R.C. 2953.08(G)(1). The purpose of felony sentencing is to “protect the public from future crime by the offender and others and to punish the offender.” R.C. 2929.11. Accordingly, the trial court has the “discretion to determine the most effective way to comply with the purposes and principles set forth in section 2929.11 of the Revised Code.” R.C. 2929.12(A). At

sentencing, a trial court is guided by R.C. 2929.12, which demands an inquiry into the seriousness of the defendant's conduct and the likelihood of recidivism by the defendant. R.C. 2929.12. In this case, the trial court made no findings as to the seriousness of the defendant's conduct; however, the trial court did make several findings regarding the defendant's likelihood of recidivism.

**The Court finds that you have a prior juvenile history. Under 2151 of the Revised Code, you also have a history of criminal convictions. [R.C. 2929.12(D)(2)] Specifically, two domestic violence convictions as a juvenile, violations of probation as a juvenile, and adult misdemeanor and felony record that are outlined in the pre-sentence report. The Court accordingly finds also that you have not been rehabilitated to a satisfactory degree after the Juvenile Court experience, or after the adult misdemeanor or felony experience. [R.C. 2929.12(D)(3)] In addition you were on supervision apparently out of the Bowling Green Municipal Court and the Seneca County Ohio Common Pleas Court during the pendency of this situation. [R.C. 2929.12(D)(1)].**

Miller claims that the trial court erred by finding municipal probation to be equivalent to community control,<sup>1</sup> and therefore asserts that he should not have been given a prison sentence. R.C. 2929.13 provides that a trial court may sentence a defendant who was under a community control sanction at the time of the offense to a term of imprisonment only if “after considering the factors set forth in section 2929.12 of the Ohio Revised Code, [the Court] finds that a prison term is consistent with the purposes and principles of sentencing set forth in 2929.12 of the Ohio

---

<sup>1</sup> Effective March 23, 2000, R.C. 2929.13(B)(1)(h) includes probation as well as community control.

Case No. 5-2000-39

Revised Code and finds that the offender is not amenable to an available community control sanction\* \* \*.” R.C. 2929.13(B)(2)(a).

The probation department’s pre-sentence report states that Miller was sentenced to three years of community control by the Seneca County Common Pleas Court on September 9, 1999. Furthermore, under R.C. 2929.13(B)(2)(b), a court is only required to give community control sanctions if after considering the factors set forth in R.C. 2929.12, the court “finds that a community control sanction or combination of community control sanctions is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code.” R.C. 2929.13(B)(2)(b).

In this case, the court considered and applied the factors in R.C. 2929.12, along with the purposes and principles of the felony sentencing law, and determined that Mr. Miller was not amenable to community control sanctions. Moreover, it cannot be said by clear and convincing evidence that the record does not support the sentence or that the sentence is otherwise contrary to law. Consequently, Miller’s third assignment of error is overruled.

For the foregoing reasons, the Appellant’s three assignments of error are overruled and the judgment of the trial court is affirmed.

***Judgment Affirmed.***

**BRYANT and HADLEY, JJ., concur.**

/jlr

Case No. 5-2000-39