[Cite as *State v. O'Rourke*, 2015-Ohio-670.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	
	:	Case No. 14CA11
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
JEREMIAH O'ROURKE,	:	
	:	
Defendant-Appellant.	:	**Released: 02/19/15**

APPEARANCES:

Timothy Young, Ohio State Public Defender, and Allen Vender, Assistant State Public Defender, Columbus, Ohio, for Appellant.

Patrick J. Lang, Law Director, and Tracy W. Meek, City Prosecutor, Athens, Ohio, for Appellee.

McFarland, A.J.

{¶1} Jeremiah O' Rourke (Appellant) appeals his conviction in the Athens County Municipal Court after he pled no contest to an amended charge of assault, R.C. 2903.13. Appellant contends his conviction should be vacated because: (1) he was denied the effective assistance of counsel due to erroneous advice about Ohio law, causing him to enter his no contest plea; and, (2) because he entered his plea based on an erroneous belief about Ohio law, his plea was not knowingly or intelligently entered. Upon review, we

find no merit to Appellant's arguments. Accordingly, we overrule both assignments of error and affirm the judgment of the trial court.

FACTS

{¶2} On October 17, 2013, Appellant was charged with domestic violence, a violation of R.C. 2919.25, a misdemeanor of the first degree. The charge arose from an incident involving his live-in girlfriend's daughter. The usual pretrial proceedings ensued. At the final pretrial conference held on February 20, 2014, defense counsel requested the Court to give the jury a "reasonable parental discipline" instruction. After discussion, recess for the parties to do legal research, and further discussion, the trial court denied counsel's request.

{¶3} After the denial, defense counsel again requested a recess in order to confer with Appellant. When the proceedings resumed, defense counsel indicated a plea agreement had been reached. The State amended the domestic violence charge to one of assault, a violation of R.C. 2903.13, also a misdemeanor of the first degree.

{¶4} Appellant pled no contest and was sentenced. This timely appeal followed. Additional relevant facts will be set forth below.

ASSIGNMENTS OF ERROR

"I. O'ROURKE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO DEFENSE

COUNSEL'S ERRONEOUS ADVICE THAT HE ENTER A NO-CONTEST PLEA TO PRESERVE THE RIGHT TO APPEAL THE TRIAL COURT'S DENIAL OF THE JURY INSTRUCTION FOR APPELLATE REVIEW. SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION; STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S.CT. 2052, 80 L.Ed.2d 674 (1984); TR. 20-25.

II. O'ROURKE ENTERED HIS PLEA BASED ON THE ERRONEOUS BELIEF OHIO LAW PERMITTED HIM TO APPEAL THE TRIAL COURT'S DENIAL OF THE REQUESTED JURY INSTRUCTION. CONSEQUENTLY O'ROURKE'S PLEA WAS NOT KNOWINGLY OR INTELLIGENTLY ENTERED. FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION; CRIM.R. 11, TR. 20-27."

ASSIGNMENT OF ERROR TWO

{¶5} For ease of analysis, we first consider Appellant's second assignment of error, that his plea was not entered knowingly or intelligently.

A. STANDARD OF REVIEW

{¶6} " 'When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution.' " *State v. Felts,* 4th Dist. Ross No. 13CA3407, 2014-Ohio-2378, ¶ 14, quoting *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 7, quoting *State v. Engle,* 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). In determining

whether a guilty or no contest plea was entered knowingly, intelligently, and voluntarily, an appellate court examines the totality of the circumstances through a de novo review of the record to ensure that the trial court complied with constitutional and procedural safeguards. *Felts, supra*, citing *State v. Cooper,* 4th Dist. Athens No. 11CA15, 2011-Ohio-6890, ¶ 35.

B. LAW AND ARGUMENT

{¶7} A trial court's obligations in accepting a plea depend upon the level of offense to which the defendant is pleading. *State v. Hilderbrand,* 4th Dist. Adams No. 08CA864, 2008-Ohio-6526, ¶ 10; *State v. Jones,* 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, ¶ 6. Crim.R. 11 governs the entering of pleas. *Id*. Subsection (A) explains the types of pleas available. *Id.* Crim.R. 11 sets forth distinct procedures depending upon the classification of the offense involved. Crim.R. 2(C) defines a "serious offense" as "any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months." *State v. Guerriero,* 7th Dist. Mahoning No. 12MA48, 2012-Ohio-5990, at ¶ 11. For a petty offense, defined in Crim.R. 2(D) as "a misdemeanor other than [a]serious offense," the court is instructed that it "may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first

informing the defendant of the effect of the plea of guilty, no contest, and not guilty." Crim.R. 11(E). *Jones*, *supra*, at ¶ 11.

{¶8} Appellant herein entered a plea of no contest to a charge of assault, in violation of R.C. 2903.13. He was subject to a maximum sentence of 180 days. Because he was pleading to a petty offense, the trial court was required to inform him of the effect of the plea. *Jones*, *supra*, at ¶ 21; Crim.R. 11(C)(2)(b), (D), and (E).

{¶9} Crim.R. 11(B) explains the meaning of the various pleas: "(2) The plea of no contest is not an admission of the defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admissions shall not be used against the defendant in any subsequent civil or criminal proceeding." Therefore, for a no contest plea, the effect of the plea that defendant must be informed of is that the plea is not an admission of guilt but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admissions shall not be used against the defendant in any subsequent civil or criminal proceeding. *Guerriero*, *supra*, at ¶ 13, citing *Jones*, *supra*, at 23. Crim.R. 11(E) does not require the court to determine whether a defendant is entering into the plea voluntarily. *Guerriero*, *supra*.

{¶10} Appellant argues his plea was not knowingly or intelligently

entered because the trial court permitted him to enter it based on the erroneous belief that he could appeal the trial court's ruling denying his requested jury instruction. In *State v. Riffle,* 4th Dist. Vinton No. 00CA543, 2001-Ohio-2605, we noted Crim.R. 11(B)(2) "provides that a plea of 'no contest' constitutes a waiver of the right to jury trial." *Id.* at *2, quoting *Chardon v. Moyer*, 33 Ohio App.3d 154, 155, 514 N.E.2d 929, 930 (1986) (internal citations omitted.). In *Riffle,* this court held that an appellant's waiver of his or her jury trial rights waives any error in regard to the trial court's denial of a motion for jury instructions. *Riffle, supra,* citing *State v. Prince,* 71 Ohio App.3d 694, 595 N.E.2d 376 (1991). Appellant correctly summarizes the law regarding his right to appeal the denial of a requested jury instruction upon entering a no contest plea.

{¶11} Appellant's brief urges at pages 5-8:

> "The trial court was aware that O'Rourke was entering his no-contest plea in order to appeal its denial of the requested jury instructions, and the court discussed the issue with defense counsel in front of O'Rourke. Tr. 23. But the trial court never advised O'Rourke that he would be waiving that issue if he pleaded no contest. * * * Immediately after the trial court denied O'Rourke's pretrial request for a jury instruction pertaining to the affirmative defense of reasonable-parental discipline, the following exchange took place: [the colloquy we have set forth below]. * * * The trial court never informed O'Rourke that he would be giving up any appellate rights. * * * The trial court understood that O'Rourke was pleading no contest to appeal its ruling regarding a particular jury instruction. But the trial court never informed O'Rourke that he

> would be waiving the right to appeal the very issue that he pleaded no contest to appeal. * * * Accordingly, this Court should vacate O'Rourke's conviction with instructions to the trial court to allow him to withdraw his no-contest plea."

Although Appellant's brief urges that Appellant's desire to enter his plea was only in order to preserve the right to appeal the requested jury instruction, the record does not bear this out. The record herein does not reveal the trial court was specifically "aware that O'Rourke was entering his no-contest plea in order to appeal its denial of the requested jury instructions." The colloquy surrounding Appellant's no contest plea proceeded as follows:

> Court: And you do want to enter a plea of no contest?
>
> Defense: Yes, Your Honor.
>
> Court: Okay. For purposes of appeal?
>
> Defense: Yes, Your Honor.
>
> Court: Well, I'll allow you to do it but I'll tell you you're going to waste a year doing it. Not because you're right or you're wrong, but because there's nothing on the record that will give the Court of Appeals anything to decide. In this case. And they'll sit on it for a year, then they'll send it back to us.
>
> Defense: Um, that is, I guess, the risk we will run, Your Honor.
>
> Court: Cause there's no facts on the record.
>
> Defense: I think I've run into this, uh, issue before, so we'll…

Court: And you know that's what they'll do.

Defense: [Aside to Defendant].

Court: And I'm not going to grant a stay.

Defense: Uh, we understand that, Your Honor. Uh, so at this time, we'll enter a plea of no contest, Your Honor.

* * *

Court: Okay. Mr. O'Rourke, you understand if you plea, uh, no contest to the assault, that's an admission to the facts contained in the complaint for today's purposes only, not considered an admission for any subsequent civil or criminal proceedings that might come out of the same incident, but if you plead no contest, the Court will find you guilty based on the allegation in the complaint. * * * I'll accept those, uh, facts as true for the purpose of accepting your plea of no contest to the assault, I will find you guilty of the assault, and I will sentence you today. You understand all that?

Defendant: Yes, Your Honor.

Court: And you signed a waiver of jury form on the assault? Do you understand, by signing that, you're giving up your right to a jury trial?

Defendant: Yes.

{¶12} In *Guerriero, supra*, the defendant entered a no contest plea to one count of domestic violence. On appeal, she argued the trial court did not adequately inform her of her rights or inquire into the voluntariness of her plea. The 7th District appellate court held in doing so, she misstated the Crim.R. 11 requirements as to her misdemeanor offense and no contest plea.

Guerriero urged that the trial court should have engaged in a full Crim.R. 11(C) colloquy to determine whether her plea was knowing and voluntary. The appellate court observed:

> "[T]he Ohio Supreme Court specifically considered the information the trial court is required to communicate to a defendant entering a no contest plea to a first degree misdemeanor in *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677. The Court concluded that 'in accepting a plea to a misdemeanor involving a petty offense, a trial court is required to inform the defendant only of the effect of the specific plea being entered.' "

{¶13} This court has recently considered an appeal of a no contest plea based on a mistaken understanding of current law in *State v. Felts*, 4th Dist. Ross No. 13CA3407, 2014-Ohio-2378. In *Felts*, the grand jury returned an indictment charging one count of gross sexual imposition. During pretrial proceedings, the trial court denied Felts' motion in limine to exclude certain statements. Felts changed his plea to no contest in accordance with a plea agreement. On appeal, he argued the trial court erred in accepting his no contest plea because it was not knowingly and intelligently entered, but rather predicated on an erroneous belief shared by the parties and the trial court about Felts' appellate rights. In our decision, we held Felts' no contest plea was not knowingly and intelligently entered, and we noted the record was replete with references by Felts' counsel and the state that they believed Felts could appeal the trial court's ruling on his

motion in limine. We also pointed out the trial court specified at sentencing that Felts had the right to appeal the rulings made in the case.

{¶14} However, the situation in this case is not similar to that in *Felts, supra.* Felts was facing a felony and the obligations when accepting a plea, as indicated above, differ according to the charge. Furthermore, the record in *Felts* indicated there was an erroneous belief held by all parties about Felts' ability to appeal the trial court's ruling. In this case, admittedly, all parties in the courtroom may have understood Appellant was entering his plea for the sole purpose of appealing the requested jury instruction. However, on a stale and bare record, this is not evident to us.

{¶15} We observe that "purposes of appeal" was discussed in a vague fashion. Pleading for "purposes of appeal" was discussed between the trial court and defense counsel. The trial court did not speak directly to defendant. Nor did the defendant assert to the trial court that his sole reason in pleading no contest, as urged now in his brief, was for the purpose of appealing the jury instruction issue. And, if that purpose was explicitly discussed between Appellant and his counsel during recess, it is not properly made part of this record.

{¶16} The trial court explained the effect of Appellant's plea. Nothing further was required. The trial court also explained Appellant was

waiving his right to a jury trial and Appellant indicated he understood this explanation. He signed a waiver of jury trial which acknowledged his waiver was "knowingly, voluntarily, and intelligently done." Based on a totality of the circumstances, we find Appellant's no contest plea was knowingly and intelligently entered. As such, we find no merit to Appellant's second assignment of error and we affirm the judgment of the trial court.

ASSIGNMENT OF ERROR ONE

A. STANDARD OF REVIEW

{¶17} Criminal defendants have a right to counsel, including a right to the effective assistance from counsel. *McMann v. Richardson,* 397 U.S. 759, 770, 90 S.Ct. 1441 (1970); *State v. Stout*, 4th Dist. No. 07CA5, 2008-Ohio-1366, ¶ 21. To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Issa,* 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Goff,* 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). "In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable

representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *State v. Conway,* 109 Ohio St.3d 412, 2006 Ohio-2815, 848 N.E.2d 810, ¶ 95 (citations omitted). "Failure to establish either element is fatal to the claim." *State v. Jones*, 4th Dist. No. 06CA3116, 2008-Ohio-968, ¶ 14. Therefore, if one element is dispositive, a court need not analyze both. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (stating that a defendant's failure to satisfy one of the elements "negates a court's need to consider the other").

{¶18} When considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* "A properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor*, 4th Dist. No. 07CA1, 2008-Ohio-482, ¶ 10, citing *State v. Smith,*17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were so serious that he or she failed to

function as the counsel guaranteed by the Sixth Amendment. *State v. Gondor,* 112 Ohio St.3d 377, 2006 Ohio-6679, 860 N.E.2d 77, ¶ 62; *State v. Hamblin,* 37 Ohio St.3d 153, 524 N.E.2d 476 (1988).

{¶19} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that but for counsel's errors, the result of the trial would have been different. *State v. White,* 82 Ohio St.3d 15, 23, 693 N.E.2d 772 (1998); *State v. Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), at paragraph three of the syllabus. Furthermore, courts may not simply assume the existence of prejudice, but must require that prejudice be affirmatively demonstrated. See *State v. Clark,* 4th Dist. No. 02CA684, 2003-Ohio-1707, ¶ 22; *State v. Tucker,* 4th Dist. No. 01CA2592 (Apr. 2, 2002); *State v. Kuntz,* Ross App. No. 1691 (Feb. 26, 1992).

B. LEGAL ANALYSIS

{¶20} Appellant argues he was denied the effective assistance of Counsel because his plea was not knowingly or intelligently entered in that it was based on the erroneous advice of counsel. However, we have previously determined that: the trial court explained the effect of Appellant's plea; the trial court informed Appellant he was waiving his right to jury trial; and based on the totality of the circumstances, Appellant's plea was knowingly and intelligently entered. Under this assignment of error,

Appellant does not argue he would have insisted on proceeding to trial on the domestic violence charge. We further note Appellant's plea was the result of an agreement where the domestic violence charge was amended to an assault charge. This amendment inured to Appellant's considerable benefit.[1] On this record, we have difficulty finding Appellant has affirmatively demonstrated prejudice or that his counsel's assistance was ineffective.

{¶21} Appellant urges that he entered the plea solely for the purpose of appealing the ruling denying his requested jury instruction. However, this reason is not contained in the transcript of the final pretrial hearing. And, if Appellant did enter his plea based on the alleged erroneous advice of counsel, that discussion was not made part of the record. We reiterate that matters outside the record are not properly before us on a direct appeal. We therefore overrule Appellant's second assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

[1] In Ohio, a second conviction for domestic violence is elevated to a felony offense. See R.C. 2925.19(D)(2) to (6). Also one subject to a civil protection order or a temporary protection order, as usually accompanies a pending charge or conviction of domestic violence, has significant restraints on his or her ability to carry weapons. See R.C. 2923.1210, application form; see also R.C. 2923.13.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.