[Cite as *State v. Petway*, 2014-Ohio-4439.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
JOHN W. PETWAY	:	Case No. 13 CAA 12 0084
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 13 CRI 07 0343
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	September 29, 2014

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
MARK C. SLEEPER 140 North Sandusky Street Delaware, OH 43015	ELIZABETH E. OSORIO 2211 U.S. Highway 23 North Delaware, OH 43015

Farmer, J.

{¶1} On July 31, 2013, the Delaware County Grand Jury indicted appellant, John Petway, on eleven counts of rape in violation of R.C. 2907.02, eleven counts of sexual battery in violation of R.C. 29 07.03, one count of menacing by stalking in violation of R.C. 2903.211, and two counts of importuning in violation of R.C. 2907.07. Said charges arose from incidents involving appellant and his stepdaughter. The incidents started when the victim was five years old and occurred for over thirteen years.

{¶2} On October 10, 2013, appellant entered an agreed to *Alford* plea to two of the rape counts. The trial court accepted his *Alford* plea and found him guilty. The remaining counts were dismissed. By judgment entry filed October 16, 2013, the trial court sentenced appellant to an aggregate term of twenty years in prison pursuant to the plea agreement, and classified him as a Tier III sex offender.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL DID NOT CONDUCT AN INVESTIGATION INTO THE MEDICAL, EDUCATIONAL, AND SOCIAL HISTORY OF THE DEFENDANT-APPELLANT PRIOR TO ENTERING A GUILTY PLEA PURSUANT TO A PLEA BARGAIN."

II

{¶5} "TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO REQUEST A PRESENTENCE INVESTIGATION TO INQUIRE INTO THE EXTENT OF THE DEFENDANT-APPELLANT'S DOCUMENTED PHYSICAL AND MENTAL DISABILITIES AND FURTHER FAILED TO PROVIDE ANY MITIGATION INFORMATION AT SENTENCING."

III

{¶6} "THE TRIAL COURT'S FINDING THAT THE DEFENDANT-APPELLANT'S GUILTY PLEA PURSUANT TO *NORTH CAROLINA V. ALFORD* WAS ENTERED KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAS AN ERROR IN VIOLATION OF CRIM.R. 11(C) DUE TO TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE OF COUNSEL AND THE DEFENDANT-APPELLANT'S INABILITY TO COMPREHEND THE PROCEEDINGS."

I, II

{¶7} Appellant claims his trial counsel was ineffective for failing to investigate his medical, educational, and social history prior to the plea, and failed in not requesting a presentence investigation. We disagree.

{¶8} The standard this issue must be measured against is set out in *State v. Bradley,* 42 Ohio St.3d 136 (1989), paragraphs two and three of the syllabus. Appellant must establish the following:

2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

{¶9} In support of his arguments, appellant has filed with this court an affidavit. This affidavit is dehors the record and is therefore not within the scope of this review under App.R. 9(A).

{¶10} Appellant's arguments must be considered in light of the record on review. The record includes a written text of the Crim.R. 11(F) agreement and a formal journalized plea of guilty with an acknowledgment of the Alford plea, both signed by appellant, and the judgment entry of sentence, all filed on October 16, 2013. The record also includes a transcript of the plea hearing which was held on October 10, 2013.

{¶11} Crim.R. 11(F) governs negotiated plea in felony cases and states: "When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses

charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court."

{¶12} During the plea hearing, appellant was placed under oath, and the trial court explained to him that he could interrupt him at anytime if he did not understand an explanation or question or wished a clarification. T. at 4-5. The trial court emphasized that he wanted to make sure appellant was "completely understanding of everything going on." T. at 4.

{¶13} Appellant informed the trial court that he had a tenth grade education, could read and write, and the only special education courses he had taken were a result of his impaired hearing. T. at 5-6, 7. Appellant stated he could hear the judge. T. at 6. The trial court offered appellant hearing devices to help him, but he declined. T. at 6-7.

{¶14} The trial court asked appellant if he was on any medications and appellant stated, "I am taking Diovan for high blood pressure. I am taking Propanolol to slow my heart down. And I'm taking metformin for diabetic, and I am taking another meds for cholesterol." T. at 8. The trial court found appellant to be alert and not under the influence of alcohol or drugs. *Id.*

{¶15} Appellant admitted he was entering his plea on the advice of counsel, and he was one hundred percent satisfied with his trial counsel's representation. T. at 12, 19.

{¶16} From the record before this court, we find the trial court was aware of appellant's medical, educational, and social history prior to accepting the plea. The trial court was aware of appellant's hearing disability and took the time to offer assistance

and to make further explanations and clarifications if necessary. We find no ineffective assistance of counsel on this issue.

{¶17} Appellant also argues his trial counsel should have requested a presentence investigation. Pursuant to R.C. 2951.03 and Crim.R. 32.2, a presentence investigation is only required if community control is available. In this case, appellant entered into a Crim.R. 11(F) plea with full understanding that he was going to prison and judicial release was not available. In addition, the judgment entry of prison sentence filed October 16, 2013 states, "[t]he defendant waived the preparation of a Pre-sentence Report." We find no ineffective assistance of counsel on this issue.

{¶18} Assignments of Error I and II are denied.

III

{¶19} Appellant claims the trial court erred in finding his plea was entered into knowingly, intelligently, and voluntarily because of his trial counsel's ineffectiveness and his own inability to comprehend the proceedings. We disagree.

{¶20} Crim.R. 11 governs pleas. Subsection (C)(2) states the following:

> (2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest 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 charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for

probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, 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 the 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 the defendant cannot be compelled to testify against himself or herself.

{¶21} In entering an *Alford* plea, a defendant maintains innocence, but consents to punishment: "An individual accused of 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." *North Carolina v. Alford,* 400 U.S. 25, 37 (1970). As explained by our brethren from the Second District in *State v. Padgett,* 67 Ohio App.3d 332, 338-339 (2nd Dist.1990):

Because an *Alford* plea involves a rational calculation that is significantly different from the calculation made by a defendant who admits he is guilty, the obligation of the trial judge with respect to the

> taking of an *Alford* plea is correspondingly different. The trial judge must ascertain that notwithstanding the defendant's protestations of innocence, he has made a rational calculation that it is in his best interest to accept the plea bargain offered by the prosecutor.

{¶22} As noted above, appellant signed a Crim.R. 11(F) agreement and a formal journalized plea of guilty with an acknowledgment of the Alford plea, and the trial court was aware of appellant's medical, educational, and social history, including his hearing disability. In his journalized plea of guilty, appellant acknowledged, "that my pleas of Guilty are freely, voluntarily, and intelligently made with my full and complete understanding of the nature of the charge and the consequences, including the maximum penalty." Appellant agreed that he was "not under the influence of drugs and alcohol," and "I enter this guilty plea (s) within the context of North Carolina v. Alford, supra voluntarily."

{¶23} After a thorough examination of the Crim.R. 11(F) agreement, the journalized plea of guilty, and the transcript of the trial court's Crim.R. 11 colloquy with appellant, we cannot find any indication that the trial court was incorrect in finding a knowing, intelligent, and voluntary plea.

{¶24} Assignment of Error III is denied.

{¶25} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Wise, J. concur.

SGF/sg 919