

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-08-057

Appellee

Trial Court No. 08 CR 229

v.

Jeremy Henry

**DECISION AND JUDGMENT**

Appellant

Decided: October 30, 2009

\* \* \* \* \*

Paul A. Dobson, Wood County Prosecuting Attorney, and  
Gwen Howe-Gebbers, Assistant Prosecuting Attorney, for appellee.

David Klucas, for appellant.

\* \* \* \* \*

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas, following a plea, in which the trial court found appellant, Jeremy Henry, guilty of one count of endangering children, a second degree felony; one count of felonious assault, a second degree felony; and one count of possession of heroin, a fifth degree

felony, and sentenced him to serve a total of 17 years in prison. On appeal, appellant sets forth the following three assignments of error:

{¶ 2} "Assignment of Error No. 1

{¶ 3} "The trial court committed reversible error when it accepted the guilty pleas offered by Mr. Henry.

{¶ 4} "Assignment of Error No. 2

{¶ 5} "The trial court committed reversible error when it sentenced Mr. Henry to maximum, consecutive sentences.

{¶ 6} "Assignment of Error No. 3.

{¶ 7} "Defendant was denied effective assistance of counsel."

{¶ 8} On April 30, 2008, the Wood County Grand Jury indicted appellant on one count of endangering children, in violation R.C. 2919.22(B)(3) and (E)(3), a second degree felony, one count of felonious assault, in violation of R.C. 2903.11(A)(1), a second degree felony, and one count of possession of heroin, in violation of R.C. 2925.11(A) and (C)(6)(a), a fifth degree felony. The charges arose from an incident in which police in North Baltimore, Ohio, were called to appellant's home in response to a report that appellant was abusing his 18-month-old son. When police arrived, they found appellant's son, sitting in his high-chair. The child was crying, and had bruises on his face. Police arrested appellant and told the child's mother to take him to the hospital for treatment. At the hospital, doctors examined the child and found further evidence of bruising on his body, which they determined was indicative of child abuse. In addition,

police found drug paraphernalia in appellant's apartment, and appellant and the child's mother both admitted to using heroin shortly before police were called to the scene.

{¶ 9} On May 29, 2008, appellant entered a plea of not guilty to all three charges. However, on July 17, 2008, appellant withdrew his not guilty plea and entered a plea pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 ("*Alford* plea"). That same day, a plea hearing was held, at which the trial court addressed appellant directly, during which appellant stated that he was not under the influence of alcohol, drugs, or prescription medication. Appellant told the court that he had not received any threats or promises in exchange for his plea. The trial court then reviewed the charges against appellant, and stated that appellant could receive a prison sentence of up to 17 years if convicted of all three charges. The trial court further explained the conditions of postrelease control, and the consequences of violating a postrelease control sanction, if one was imposed, as well as his limited rights of appeal. The trial court then advised appellant of his constitutional rights to a trial by a 12-member jury; to have the elements of the offenses charged proven beyond a reasonable doubt; to have a unanimous verdict; to cross-examine witnesses at trial; to subpoena his own witnesses for trial; to have an attorney at all stages of the court proceedings; and not to testify in his own defense. After the recital of each constitutional right, appellant indicated that he understood and wished to give up that right as part of his plea.

{¶ 10} Following the above inquiry, appellant's court-appointed attorney represented that appellant had been advised as to the charges against him and the

possibility of consecutive sentences, and further stated that appellant was entering into his plea voluntarily, knowingly and intelligently. Thereafter, the prosecution recited the basis for the plea, which included the circumstances under which police were called to appellant's home, as well as the discovery by doctors of bruises on the child's body and the dehydration the child was suffering at the time of appellant's arrest. The prosecutor further stated that, at the time of the arrest, appellant and child's mother both tested positive for heroin and marijuana.

{¶ 11} After hearing the prosecutor's statements, the trial court found there was "a factual basis for the plea of guilty." The trial court then addressed appellant as follows:

{¶ 12} "The Court: And Mr. Henry, at the beginning of this proceeding you went over two documents with [defense attorney] Mr. Fech. The first document is captioned *Alford* Plea to Indictment and Waiver of Trial by Jury, and that consists of seven pages. Is that your signature on the seventh page?

{¶ 13} "[Appellant]: Yes, Your Honor.

{¶ 14} "\* \* \*

"The Court: Do you confirm to me at this time that you do voluntarily waive and relinquish your Constitutional right to have your case tried by a jury or judge?

{¶ 15} "[Appellant]: Yes, Your Honor.

{¶ 16} "The Court: Any questions at all about what's happening today?

{¶ 17} "[Appellant]: No, Your Honor

{¶ 18} "The Court: Do you understand that the Court can proceed immediately to sentencing once the plea of guilty is accepted?

{¶ 19} "[Appellant]: Yes, Your Honor

{¶ 20} "The Court: Do you understand as judge when [I] sentence you, I do not have to accept the recommendation of either Mr. Fech or the prosecuting attorney?

{¶ 21} "[Appellant]: Yes, Your Honor.

{¶ 22} "The Court: With that said, the Court accepts the plea of guilty."

{¶ 23} On August 18, 2008, a sentencing hearing was held at which appellant's defense attorney told the court that, in spite of an earlier indication that appellant was having second thoughts about entering a plea, appellant now wished to "maintain his plea." Appellant's attorney then stated that appellant's behavior was a "terrible, isolated incident" which, to some extent, was the result of his upbringing. Counsel also stated that appellant had no prior felony offenses and, in counsel's opinion, was an individual who could be rehabilitated. However, counsel admitted that appellant is addicted to heroin. Counsel asked the trial court to give appellant a "fair sentence" that will allow him the opportunity to rehabilitate himself and become a productive member of society in the future. Appellant's mother then asked the court, when fashioning a sentence, to consider that appellant was trying to care for his child when the incident occurred, but his judgment was distorted by drug use.

{¶ 24} Appellant apologized to his family for his drug use, and stated that he was ashamed of his actions. The prosecutor then presented photographs of the child's injuries

to the court, after which she reminded the court that appellant chose to use heroin. She also stated that the doctors who examined the child observed signs of both physical and sexual abuse. Based on these factors, as well as her belief that appellant showed no genuine remorse, the prosecutor recommended the maximum 17-year prison sentence.

{¶ 25} Before sentencing appellant, the trial court stated that it had reviewed the record of proceedings, which included the presentence investigation report, and stated that it considered the applicable factors in R.C. 2929.11 and 2929.12 regarding seriousness and recidivism. Specifically, the court noted the physical and mental injuries suffered by the victim; the relationship of the victim to appellant, his father; the tender age of the victim; and the fact that appellant's young daughter also was present when appellant abused the victim. The trial court also noted appellant's pattern of drug abuse, which played a role in his actions.

{¶ 26} The trial court found, as to the crimes of endangering children and felonious assault, that a prison term was necessary in order to comply with the principles and purposes of felony sentencing. Accordingly, appellant was sentenced to serve eight years in prison for each of those counts. Similarly, the trial court found that appellant was not amenable to community control for the crime of heroin possession, and sentenced him to serve 12 months for that count. All three sentences were made consecutive, for a total sentence of 17 years. In addition, the trial court imposed a postrelease control sanction of up to three years.

{¶ 27} On August 20, 2008, the trial court issued a judgment entry of sentencing. A timely notice of appeal was filed on August 28, 2008.

{¶ 28} Appellant asserts in his first assignment of error that the trial court erred by accepting his *Alford* plea, finding him guilty as charged in the indictment, and sentencing him to the maximum possible sentence. In support, appellant argues that his plea was not knowingly, intelligently and voluntarily made because: (1) the trial court did not attempt to resolve the conflict between appellant's waiver of trial and his claim of innocence; (2) appellant received nothing in exchange for his plea; and (3) the prosecution did not present an adequate factual basis for the plea.

{¶ 29} Crim.R. 11(C)(2), states, in pertinent part, that:

{¶ 30} "(2) In felony 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:

{¶ 31} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, \* \* \*

{¶ 32} "(b) Informing the defendant of and determining 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 sentence.

{¶ 33} "(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. \* \* \*

{¶ 34} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily." *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179. Accordingly, the underlying purpose of Crim.R. 11 "is to convey to the defendant certain information so he or she can make a voluntary and intelligent decision whether to plead guilty." *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶ 18, quoting *State v. Ballard* (1981), 66 Ohio St.2d 473, 479-480.

{¶ 35} "With respect to an explanation of constitutional rights, a trial court strictly must comply with the dictates of Crim.R. 11(C)(2)(c)." *State v. Freed*, 8th Dist. No. 90720, 2008-Ohio-5742, ¶ 37. (Other citations omitted.) The focus in such cases is whether or not the trial court explained the consequences of the plea "in a manner reasonably intelligible to that defendant." *State v. Ballard*, *supra*.

{¶ 36} A review of the record shows that the trial court explained appellant's constitutional rights and inquired as to whether he understood the nature and consequences of his "guilty" plea, as well as the possible sentence appellant could receive and the conditions of postrelease control. Accordingly, the trial court adequately complied with the dictates of Crim.R. 11 as to the "guilt" aspect of appellant's plea. However, appellant entered an *Alford* plea in this case.



{¶ 37} This court has recognized that an *Alford* plea is "a species of a guilty plea, which, in effect, waives a defendant's right to raise most issues on appeal." *State v. Ware*, 6th Dist. No. L-08-1050, 2008-Ohio-6944, ¶ 12, quoting *State v. Bryant*, 6th Dist. No. L-03-1359, 2005-Ohio-3352, ¶ 23. When a defendant enters an *Alford* plea, he effectively enters a plea of guilty while still maintaining that he is innocent. *State v. Grohowski*, 6th Dist. No. L-07-1203, 2009-Ohio-1464, ¶ 5. In such cases, certain determinations must be apparent from the record in order for an *Alford* plea to meet the requirements of Crim.R. 11.

{¶ 38} On appeal, an appellate court may determine that an *Alford* plea was voluntarily, knowingly and intelligently made if the record shows that the plea was: "(1) \* \* \* not the result of coercion, deception or intimidation; (2) counsel was present at the time of the plea; (3) his advice was competent in light of the circumstances surrounding the plea; (4) the plea was made with the understanding of the nature of the charges; and (5) the plea was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial, or both \* \* \*." *State v. Ware*, supra, at ¶ 12, quoting *State v. Piacella* (1971), 27 Ohio St.2d 92, 96. In reviewing an *Alford* plea, an appellate court must examine "the totality of the circumstances surrounding [the] plea \* \* \*." *State v. Hopkins*, 6th Dist. No. L-05-1012, 2006-Ohio-967, ¶ 14. (Other citations omitted.)

{¶ 39} The record reflects that appellant's plea was referred to as an *Alford* plea on several occasions during the plea hearing. The first reference was at the outset of the

hearing, when the prosecutor told the court that "the State has prepared plea papers pursuant to an *Alford* plea to all three counts contained in the indictment." Defense counsel then responded by stating that appellant wished to withdraw his guilty plea "and tender pleas of guilty pursuant to *North Carolina versus Alford* to all three charges in the indictment." The trial court then questioned appellant with regard to his constitutional rights, as set forth above. As part of that exchange, the trial court asked appellant if any promises had been made to him in exchange for his "guilty" plea. The trial court also asked appellant if he was willing to give up his constitutional rights "by pleading guilty."

{¶ 40} After the prosecution recited the facts of the case, the trial court found there was a "factual basis for the plea of guilty." The hearing then concluded, after the trial court had the following exchange with appellant:

{¶ 41} "And Mr. Henry, at the beginning of this proceeding you went over two documents with [your attorney] Mr. Fech. The first document is captioned *Alford* plea to Indictment and Waiver of Trial by Jury, and that consists of seven pages. Is that your signature on the seventh page?

{¶ 42} "[Appellant]: Yes, Your Honor.

{¶ 43} "The Court: And each of the pages are initialed in the lower right-hand corner. Are those your initials in the lower right-hand corner of page 6?

{¶ 44} "[Appellant]: Yes, Your Honor.

{¶ 45} "The Court: The second document in the packet is called Waiver of Trial by Jury or Judge. Is that your signature on that document?

{¶ 46} "[Appellant]: Yes, Your Honor.

{¶ 47} "The Court: Do you confirm to me at this time that you do voluntarily waive and relinquish your Constitutional right to have your case tried by a jury or judge?

{¶ 48} "[Appellant]: Yes, Your Honor.

{¶ 49} "The Court: Any questions at all about what's happening today?

{¶ 50} "[Appellant]: No, Your Honor.

{¶ 51} "The Court: Do you understand that the Court can proceed immediately to sentencing once the plea of guilty is accepted?

{¶ 52} "[Appellant]: Yes, Your Honor.

{¶ 53} "The Court: Do you understand as judge when [I] sentence you, I do not have to accept the recommendation of either Mr. Fech or the prosecuting attorney?

{¶ 54} "[Appellant]: Yes, Your Honor.

{¶ 55} "The Court: With that said, the Court accepts the plea of guilty,"

{¶ 56} At the sentencing hearing, defense counsel made the above-referenced comment that appellant, after having second thoughts, "wished to maintain his plea." After hearing statements from defense counsel, appellant, appellant's mother, and the prosecution, the trial court sentenced appellant to serve the maximum sentence of 17 years.

{¶ 57} In its judgment entry of sentencing, issued on August 20, 2008, the trial court stated that, at the plea hearing, it had "informed the defendant of the effect of the *Alford* plea as required by Criminal Rule 11(B) and read and reviewed the petition to

enter an *Alford* plea and jury waiver to the defendant." The trial court also stated that it had "determined, from the defendant's statements at that hearing, that \* \* \* there is a factual basis for the *Alford* plea and the *Alford* plea was accepted and defendant was adjudged guilty [of the charged offenses] \* \* \*."

{¶ 58} After considering the totality of circumstances under which appellant's *Alford* plea was made, this court determines that the rationale for appellant's plea is not apparent from the record, for several reasons. First, although the trial court, the defense attorney, and the prosecutor all referred to appellant's plea as an *Alford* plea, the record is devoid of any reference to appellant's claim of innocence. Second, the charges to which appellant entered a plea were the same as those charged in the indictment. Third, the prosecutor recommended the maximum sentence in exchange for appellant's plea. Accordingly, had appellant chosen to go to trial, either before a judge or a jury, he could not have received a longer sentence than the one recommended to and imposed by the trial court. Finally, the record shows that the trial court asked appellant if he signed the written plea document stating that he wished to enter an *Alford* plea.<sup>1</sup> However, the record does not support the trial court's statement that it either "*informed* the defendant of

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<sup>1</sup>The only reference to appellant's professed innocence is contained in the printed document signed by appellant on July 17, 2008, which is captioned "*Alford* Plea to Indictment and Waiver of Trial by Jury." That document contains the prosecutor's handwritten insertion, which states that: "I understand that a plea pursuant to *North Carolina vs. Alford* is a contract between yourself [sic] and the State of Ohio whereby you [sic] maintain your [sic] innocence but enter a guilty plea to avoid going to trial. \* \*

the effect of the *Alford* plea" or "*read and reviewed* the petition to enter an *Alford* plea and jury waiver to the defendant" before sentencing. (Emphasis added.)

{¶ 59} This court has reviewed the entire record that was before the trial court and, on consideration of the totality of circumstances present in this case, finds that the trial court failed to ascertain whether appellant's plea was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial, or both. Accordingly, appellant's first assignment of error, in which he asserts that his plea was not knowingly, voluntarily and intelligently made, is well-taken.

{¶ 60} In his second assignment of error, appellant asserts that the trial court erred when it sentenced him to serve maximum, consecutive sentences, for a total of 17 years in prison. In support, appellant states that, as a matter of Ohio law, consecutive sentences are not allowed unless they are mandated by statute.

{¶ 61} On consideration of our determination as to appellant's first assignment of error, we find that his second assignment of error is moot.

{¶ 62} In his third assignment of error, appellant asserts that he did not receive the effective assistance of court-appointed counsel. In support, appellant argues that the facts of the case indicate several defenses were available to appellant that, but for his *Alford* plea, would have been available to him at trial. In addition, appellant claims that his attorney "filed no motions, [and] advised [appellant] to offer mysterious, ill defined pleas of guilty as charged in the indictment for which the State was recommending a maximum, consecutive sentence of 17 years."

{¶ 63} In order to show that his Sixth Amendment right to counsel has been violated, appellant must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Strickland v. Washington* (1984), 466 U.S. 668, 688. In order to do so, "appellant must demonstrate that his defense was prejudiced by counsel's actions or omissions to such an extent that there is a reasonable probability that, but for counsel's errors, a different result would have occurred." *State v. Witcher* (Dec. 30, 1993), 6th Dist. No. L-92-354, citing *Strickland*, *supra*, at 681-696.

{¶ 64} The Ohio Supreme Court has held that "[a] defendant who enters a plea of guilty as part of a plea bargain waives all appealable errors '\* \* \* unless such errors are shown to have precluded the defendant from voluntarily entering into his or her plea pursuant to the dictates of Crim.R. 11(C).'" *State v. Witcher*, *supra*, quoting *State v. Kelley* (1991), 57 Ohio St.3d 127, paragraph two of the syllabus. (Other citations omitted.) Accordingly, appellant's claim of ineffective assistance of trial counsel will be considered only to the extent that it may have affected the voluntariness of his *Alford* plea.

{¶ 65} Finally, in Ohio a properly licensed attorney is presumed to be competent, "and the burden is on the appellant to show counsel's ineffectiveness." *Id.*, citing *State v. Hamblin* (1988), 17 Ohio St.3d 153, certiorari denied (1988), 488 U.S. 975, *State v. Lytle* (1976), 48 Ohio St.2d 391.

{¶ 66} As stated in our determination of appellant's first assignment of error, the trial court's failure to ascertain the rationale for appellant's *Alford* plea constituted a

violation of appellant's constitutional rights. The record contains no additional evidence to demonstrate any errors on the part of defense counsel that may have affected the voluntariness of appellant's plea. Accordingly, we cannot say that appellant received ineffective assistance of trial counsel in this case. Appellant's third assignment of error is not well-taken.

{¶ 67} The judgment of the Wood County Court of Common Pleas is reversed. The case is remanded to the trial court for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

Arlene Singer, J.

Thomas J. Osowik, J.  
CONCUR.

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JUDGE

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JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
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