[Cite as *State v. Apple*, 2010-Ohio-3527.]

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

State of Ohio — Court of Appeals No. L-09-1266

Appellee — Trial Court No. CR0200902435

v.

Michael Apple — **DECISION AND JUDGMENT**

Appellant — Decided: July 30, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and Frank H. Spryszak, Assistant Prosecuting Attorney, for appellee.

Eric Allen Marks, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Michael Apple, appeals a September 25, 2009 judgment of the Lucas County Court of Common Pleas convicting him of one count of assault of a police officer, a violation of R.C. 2903.13(A) and (C)(3) and a fourth degree felony, and sentencing him to a 14 month prison term. The conviction is based on a no contest plea.

The state dismissed the original charge of robbery, a violation of R.C. 2911.02 and a second degree felony, under a plea agreement.

{¶ 2} In a narrative statement of fact made at the time of the no contest plea, the state asserted that the evidence at trial would establish beyond a reasonable doubt that on May 29, 2009, Apple knowingly attempted to cause physical harm to Patrolman James Moore when Moore responded to a reported theft and verbal threats to store employees at a Meijer store.

{¶ 3} Upon arrival, Moore activated the overhead lights of his patrol car and stepped out of the car in the store parking lot. The state contended that the evidence would show that Apple then advanced towards Moore, shouted profanities, and threw a bottle of Southern Comfort whiskey in Moore's direction. The bottle missed Moore and struck the windshield of Moore's patrol car.

{¶ 4} Appellant raises two assignments of error on appeal:

{¶ 5} "First Assignment of Error

{¶ 6} "The trial court abused its discretion under the sentencing guidelines of R.C. § 2929.11 and § 2929.12 by sentencing appellant to fourteen months. "Second Assignment of Error

{¶ 7} "The trial court erred in accepting appellant's plea of no contest because it was not made knowingly, intelligently, and voluntarily."

{¶ 8} As the second assignment of error challenges the validity of the no contest plea, we consider it first. Appellant argues that his plea was not knowingly, intelligently,

and voluntarily made. He contends that the record demonstrates that he had little understanding that the charge to which he pled charged assault of a police officer. Appellant argues that although he stated that he wanted to plead to the assault charge, he nevertheless also denied that he assaulted or attempted to assault a police officer.

{¶ 9} Appellant suffers from schizophrenia. Appellant also contends under the assignment of error that the trial court erred in failing to question whether appellant had taken medication necessary to control the disorder.

{¶ 10} When entering a no contest plea, a defendant must do so knowingly, intelligently, and voluntarily. *State v. Engle* (1996), 74 Ohio St.3d 525, 527. "Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." Id.

{¶ 11} At the beginning of the plea hearing, the trial court informed counsel that appellant banged his head against the wall in the courtroom while waiting for the hearing to begin. The court stated that appellant appeared agitated and that the incident occurred three to four minutes before the hearing. The court stated it was "concerned about competency."

{¶ 12} After the discussion with counsel, the trial court spoke to appellant. The court told appellant that he appeared "pretty agitated" before the hearing, and inquired as to his concerns. The defendant apologized to the court and expressed frustration that he had been in jail 82 days and felt "this is taking a big chunk of my life."

{¶ 13} The trial court discussed with the defendant the nature of the charges against him, the proposed plea bargain, appellant's understanding of the nature of the proceedings and his mental health:

{¶ 14} "The Court: You do have to be – yeah, that's what you're charged with now, this robbery. And they offered you a plea bargain to another charge, assault on a police officer. So you understand you have a right to have a trial?

{¶ 15} "The Defendant: Yes.

{¶ 16} "The Court: Do you know what a trial is?

{¶ 17} "The Defendant: Well, I've never had a jury trial but I –

{¶ 18} "The Court: Yeah. You've been in court today?

{¶ 19} "The Defendant: Oh - -

{¶ 20} "The Court: How many times?

{¶ 21} "The Defendant: Too many. It's all been for mostly taking things from stores and not having any money. I'm used to it. * * *.

{¶ 22} "* * *

{¶ 23} "The Court: What's a jury trial?

{¶ 24} "The Defendant: The jury decides whether you're guilty of a crime or not.

{¶ 25} "The Court: What's the man over there?

{¶ 26} "The Defendant: It looks like the prosecuting attorney.

{¶ 27} "The Court: What's the prosecutor's job?

{¶ 28} "The Defendant: He's a – he's a – for the – he's prosecuting the assault.

{¶ 29} "The Court: He's – in this case he would be on behalf of the police officer and the victim?

{¶ 30} "The Defendant: Yeah.

{¶ 31} "The Court: He would be the lawyer. And who is the man sitting next to you?

{¶ 32} "The Defendant: That's my attorney.

{¶ 33} "The Court: What's his job?

{¶ 34} "The Defendant: To defend my case.

{¶ 35} "The Court: What's my job?

{¶ 36} "The Defendant: As the prosecutor. Your job is to – I know that you sentence. I thought that in some cases that the jury would sentence and you –

{¶ 37} "The Court: Well, in Ohio the judge sentences.

{¶ 38} "The Defendant: Yeah.

{¶ 39} "The Court: So you have any problems at all? Have you before been treated at all for any mental illnesses?

{¶ 40} "The Defendant: Yeah. But I think it hindered me quite a bit. I was on shots for about five years.

{¶ 41} "The Court: You were on what?

{¶ 42} "The Defendant: Shots. I couldn't get out of the house. I would walk down to the soup kitchen for lunch. That's all I did. Lunch every day for five years.

{¶ 43} "The Court: How you feeling today? How you feeling today?

{¶ 44} "The Defendant: Well, I'm agitated, but I'm okay but –

{¶ 45} "The Court: You understand what's going on here in court?

{¶ 46} "The Defendants: Yeah. Basically I didn't know that I still got to have a trial over the – over the taking the –

{¶ 47} "The Court: No. There's only two ways a case can be concluded here in this court and one is by way of plea and the other is by way of a trial."

{¶ 48} During this discussion, appellant stated concerns about pleading to assault: "And the thing is, I got mad and I threw the bottle at the cop car. I didn't hit the car with it. I don't know how I can even plead to attempted assault, even attempted assault * * *."

{¶ 49} Counsel for appellant addressed the court to clarify the nature of the state's plea offer and to express appellant's concerns over whether to plead to an assault. Counsel stated his opinion that the plea bargain offered a "substantial reduction from the original charge." The original charge was robbery, a second degree felony. Ultimately appellant stated he decided to accept the plea bargain and to plead to a charge of assault on a police officer:

{¶ 50} "The Defendant: And now I'm here, but I think what he was saying is maybe if they can dismiss the – like I said, I've been here 82 days. If they can dismiss the robbery, it seems like a hard term, but I guess it's if I could plead guilty to the assault and hope that you would be as lenient as you could –

{¶ 51} "The Court: So you want –

{¶ 52} "The Defendant: -- in your sentencing of me.

{¶ 53} "The Court: You want to plead guilty to an assault on the police officer charge?

{¶ 54} "The Defendant: Yeah.

{¶ 55} "The Court: You want to take the plea offer?

{¶ 56} "The Defendant: Yeah.

{¶ 57} "The Court: Okay. You've thought about this?

{¶ 58} "The Defendant: Yeah.

{¶ 59} "The Court: All right. We'll go ahead and take the plea. I'll make a finding here based on my colloquy with the defendant that he certainly does appear to be this morning competent. I think most of the questions I asked him would be the questions that a psychologist would ask. And he certainly does seem at this point to be lucid and competent and he seemed agitated before, but he is—for the last ten minutes or so, he certainly does appear to me to understand exactly what's going on here so—all right."

{¶ 60} The standard to determine a defendant's competency to stand trial is set forth in the United States Supreme Court's decision in *Dusky v. United States* (1960), 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824; *State v. Berry* (1995), 72 Ohio St.3d 354, 359. The test is whether the defendant "'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him.'" *Dusky v. United States*, 362 U.S. at 402; *State v. Berry*, 72 Ohio St.3d at 359. The same test is applied to determine whether a defendant is competent to enter a plea. *Godinez v. Moran* (1993),

509 U.S. 389, 399, 113 S.Ct. 2680, 125 L.Ed.2d 321 (guilty plea); *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, ¶ 57 (guilty plea); *State v. Bryant*, 6th Dist. Nos. L-08-1138 and L-08-1139, 2009-Ohio-3917, ¶ 8 (no contest plea); *State v. Spivey* (Mar. 15, 2002), 7th Dist. No. 00 CA 106 (no contest plea).

{¶ 61} The fact that appellant has suffered from schizophrenia is not determinative as to competency. The Supreme Court of Ohio has recognized that "[a] defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and assisting his counsel." *State v. Bock* (1986), 28 Ohio St.3d 108, 110.

{¶ 62} Before proceeding with the change of plea, the trial court found appellant to be "lucid and competent" and concluded that "he certainly does appear to me to understand exactly what's going on here ***."

{¶ 63} We agree. Under the *Dusky* analysis, appellant demonstrated a rational as well as factual understanding of the proceedings against him. His description of his conflict over pleading to an assault, his belief that the proposed plea bargain was "hard," and that the plea bargain presented a "hope" of a lesser sentence demonstrated that he held a reasonable degree of rational understanding of the proceedings. It also demonstrated an ability to assist counsel in defense of the case and to understand and to participate in evaluating the advantages to the plea bargain.

Whether plea knowingly, intelligently, and voluntarily made

{¶ 64} Appellant claims that his no contest plea was not knowingly, intelligently and voluntarily made because appellant "demonstrated a limited understanding of why he was being charged by way of a bill of information with assault on a police officer." When appellant stated to the court he had thrown the bottle at the police car, not at the police officer, the trial court presented appellant with the choice to proceed to trial or to plead:

{¶ 65} "The Court: Well, Mr. Apple, I understand what your position is, but if you wish we can proceed and we can bring a jury in here. We can go to trial on the robbery charge."

{¶ 66} After further discussion, appellant stated his choice to change his plea, acknowledging a desire to plead to the offense of assault of a police officer. During the plea colloquy, the trial court instructed appellant twice that the plea bargain required a no contest plea to the charge of assault of a police officer. The court also conducted a full Crim.R. 11(C)(2) inquiry before accepting the plea. This included assuring that appellant understood the nature of the charge and the maximum penalty involved:

{¶ 67} "The Court: Okay. I want to make sure you understand the nature of the charge that you're pleading no contest to. The charge is that you, on or about May 29, in Lucas County, Ohio, did knowingly cause or attempt to cause physical harm to another and the victim is a peace officer while in the performance of their official duties, all contrary to the law.

{¶ 68} That's a charge of assault. Do you understand the nature of the charge that you're pleading no contest to?

{¶ 69} "The Defendant: Yes.

{¶ 70} "The Court: Okay. The maximum penalty provided by law is a basic prison term of 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, or 18 months in jail and a fine of up to $5,000. Do you understand that?

{¶ 71} "The Defendant: I understand.

{¶ 72} "The Court: That's the maximum. Do you understand that?

{¶ 73} "The Defendant: Yes."

{¶ 74} Earlier in the hearing, the trial court had informed appellant that the robbery charge carried a penalty of up to eight years in prison.

{¶ 75} Appellant signed a written plea agreement at the plea hearing and acknowledged that he had discussed the plea agreement with his attorney.

{¶ 76} In *State v. Fitzpatrick,* 102 Ohio St.3d 321, 2004-Ohio-3167, ¶ 56, the Ohio Supreme Court outlined the analysis required to consider a challenge to a plea based upon the claim that the defendant lacked a complete understanding of the charge:

{¶ 77} "'A plea may be involuntary either because the accused does not understand the nature of the constitutional protections he is waiving * * * or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt.' *Henderson v. Morgan* (1976), 426 U.S. 637, 645, 96 S.Ct. 2253, 49 L.Ed.2d 108, fn. 13. In determining whether a defendant understood the charge, a court

should examine the totality of the circumstances. *Henderson* at 644, 96 S.Ct. 2253, 49 L.Ed.2d 108; *State v. Rainey* (1982), 3 Ohio App.3d 441, 442, 3 OBR 519, 446 N.E.2d 188."

{¶ 78} In our view, the totality of the circumstances demonstrates that appellant understood that he was pleading no contest to the charge of assault on a police officer and that he struggled with that decision. Whether a fact finder would find that Apple threw the bottle at the officer and missed or, instead, find that he threw it at the patrol car was a risk presented by rejecting the proposed plea bargain and proceeding to trial for the offense of robbery. The trial court properly presented appellant with that choice.

{¶ 79} The advantages to a plea bargain were clear. The plea bargain charge of assault on a police officer presented a maximum penalty of an 18 month prison term, while a conviction for robbery carried a penalty of up to eight years in prison.

{¶ 80} Appellant also contends that his no contest plea was not knowingly, intelligently and voluntarily made due to the scope of the court's inquiry concerning medication required to control appellant's schizophrenia. The trial court addressed mental illness and medication at the plea hearing both in questioning addressed to competency and in the Crim.R. 11 plea colloquy. When the court questioned appellant as to whether he had treated for any mental illness, appellant described past problems. He described his mental illness as hindering him "quite a bit" in the past and stated that there was a five year period in which he was on shots and left the house only once a day – for lunch. He indicated at the hearing, however, that he was agitated but okay. In the

Crim.R. 11 colloquy, appellant indicated that he was not under the influence of drugs or alcohol at the time of the hearing and that the only medication he was taking was a daily pill to help him sleep.

{¶ 81} Appellant argues that the trial court erred in failing to inquire whether appellant required medication in order to keep his schizophrenia stable. Appellant argues that the failure prevented the trial court from adequately determining appellant's ability to waive his constitutional rights. In making this competency argument, appellant relies on a September 10, 2009 psychiatric evaluation presentence report prepared by Thomas G. Sherman, M.D., a psychiatrist and the Medical Director of the Court Diagnostic & Treatment Center.

{¶ 82} At sentencing, the trial court indicated that it had requested the psychiatric evaluation and that there was nothing in the report to suggest appellant was not competent. Based upon the psychiatric report, the court concluded that appellant would benefit taking medications to treat schizophrenia.

{¶ 83} We have reviewed the record, including Dr. Sherman's report. In our view, whether medication would better treat appellant's mental illness does not reach the issue of whether he was competent to accept the plea bargain and to plead no contest to assaulting a police officer. There is competent, credible evidence in the record to support the trial court's determination that appellant was competent to plead no contest to the assault on a police officer offense and that under the totality of the circumstances the plea

was knowingly, intelligently, and voluntarily made. Accordingly we find appellant's second assignment of error is not well-taken.

Consideration of R.C. 2929.11 Purposes of Felony Sentencing and R.C. 2929.12 Sentencing Factors

{¶ 84} Under appellant's first assignment of error, he claims the trial court abused its discretion by imposing a 14 month sentence

{¶ 85} After the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id. at paragraph seven of syllabus.

{¶ 86} Sentencing courts, however, remain required to "carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender. In addition, the sentencing court must be guided by statutes that are specific to the case itself." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶ 87} The Ohio Supreme Court's decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26, sets forth the standard of review on appeal of felony sentencing. Appellate courts "must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision

in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." Id.

{¶ 88} Appellant does not contend that his sentence is clearly and convincingly contrary to law. The sentence is within the range of sentences for assault on a police officer. See R.C. 2903.13(A) and (C)(3); R.C. 2929.14(A)(4). Appellant claims that the trial court abused its discretion in considering the principles of felony sentencing under R.C. 2929.11 and sentencing factors under R.C. 2929.12.

{¶ 89} The state argues that the trial court did not abuse its discretion by imposing a 14 month sentence. It argues that the trial court noted at sentencing that appellant's criminal history included three prior felony and 29 prior misdemeanor convictions and that appellant presents a risk of harm both to himself and to others.

{¶ 90} An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 91} R.C. 2929.11(A) provides:

{¶ 92} "A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime,

rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

{¶ 93} R.C. 2929.12 sets forth a non-exhaustive list of "factors to consider in felony sentencing" including factors relating to the seriousness of the conduct and factors relating to the likelihood of recidivism. R.C. 2929.12(A). Under the statute, a sentencing court may consider factors not listed in the statute where relevant to the principles and purposes of felony sentencing. Id.

{¶ 94} Protection of the public from future crime by an offender is a purpose of felony sentencing under R.C. 2929.11. The likelihood of recidivism is a sentencing factor under R.C. 2929.12. The record demonstrates that the trial court considered sentencing guidelines under R.C. 2929.11 and 2929.12 in imposing sentence. We find no abuse of discretion by the trial court under R.C. 2929.11 or R.C. 2929.12 in imposing a 14 month sentence. We find appellant's first assignment of error is not well-taken.

{¶ 95} On consideration whereof, the court finds that substantial justice was done the party complaining and appellant was not denied a fair trial. The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay costs pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE