

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

State of Ohio

Court of Appeals Nos. OT-09-009
OT-09-010

Appellee

Trial Court Nos. 09-CR-030
08-CR-127

v.

Sammy Battigaglia

DECISION AND JUDGMENT

Appellant

Decided: March 5, 2010

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney,
for appellee.

Sarah A. Nation, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This cause comes on appeal from the Ottawa County Court of Common Pleas. On September 10, 2008, appellant, Sammy Battigaglia, was indicted on one count of rape in violation of R.C. 2907.02, two counts of kidnapping in violation of R.C. 2905.01(A)(3), two counts of abduction in violation of R.C. 2905.02, and one count of

felonious assault in violation of R.C. 2903.11. Upon arraignment on September 19, 2009, appellant pleaded not guilty to all charges. Subsequently, appellant was charged in a new case with one count of attempted abduction. On March 5, 2009, both cases came before the trial court. At that hearing, appellant withdrew his not guilty pleas to the offenses charged on September 10, 2008, and entered a guilty plea pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25, 27 L.Ed.2d 162, to the one count of attempted abduction, a felony of the fourth degree carrying a maximum prison sentence of 18 months.

{¶ 2} Prior to accepting the plea change, the trial court determined appellant's level of education, that he was not under the influence of any drugs or alcohol, that he had never been treated for any mental illness, that no one had threatened him or coerced him or offered him anything of value to enter into the plea agreement, and that he was not promised he would receive a specific sentence such as probation or judicial release as a result of his plea. Furthermore, the trial court questioned appellant's rationale for his *Alford* plea. Both appellant and his attorney stated in response that he entered his guilty plea to avoid the risks of a trial and a greater penalty.

{¶ 3} In colloquy, the court also informed appellant of the need to talk about the constitutional rights he was waiving by entering a guilty plea. The court explained to appellant that his *Alford* plea waived five constitutional rights: the right to jury trial, the right to require the state to prove his guilt beyond a reasonable doubt, the right to cross-examine witnesses, the right to subpoena people to testify on his behalf, and the right to

remain silent at trial. The court discussed with appellant each of these rights, stopping on several occasions to determine appellant understood the consequences of his plea. At the end of the colloquy, the court asked appellant whether he waived all those rights.

Appellant responded that he did. The court therefore found that appellant's decision to withdraw his plea of not guilty and enter a plea of guilty pursuant to *Alford* was made knowingly, intelligently and voluntarily. Based on evidence presented by the state prosecutor, the trial court also determined that the facts were sufficient for the finding of guilty. The court accepted appellant's guilty plea, and found appellant guilty of the offense of attempted abduction. Appellant consented to immediate sentencing, which the trial court then postponed.

{¶ 4} On April 13, 2009, the case proceeded to a sentencing hearing. The court heard from the victim and the victim's mother, heard statements by the defendant and his trial counsel, evaluated the seriousness and recidivism factors that it found applicable, and determined that this was a fourth degree felony offense. The trial court also concluded that a prison term was consistent with the purposes and principles of sentencing. In light of these considerations, the court sentenced appellant to 17 months incarceration.

{¶ 5} On timely appeal, appellant sets forth the following three assignments of error:

{¶ 6} "Assignment of Error No. 1

{¶ 7} "The trial court committed prejudicial error in failing to properly advise Appellant that he was giving up his constitutional rights by entering a plea.

{¶ 8} "Assignment of Error No. 2

{¶ 9} "The trial court erred in accepting Appellant's plea where there was not a factual basis for the plea.

{¶ 10} "Assignment of Error No. 3

{¶ 11} "The trial court erred at the sentencing hearing in permitting the victim's mother to speak regarding sentence."

{¶ 12} Appellant's first assignment of error asserts that the trial court committed a prejudicial error when it failed to strictly comply with Crim.R. 11(C)(2)(c) in accepting appellant's plea.

{¶ 13} Before accepting a guilty plea, Crim.R. 11(C)(2) demands that the trial court inform a defendant of the constitutional rights he is waiving by entering the plea. In that regard, the rule provides, in pertinent part, that:

{¶ 14} "(2) In felony cases the court * * * shall not accept a plea of guilty * * * without first addressing the defendant personally and doing all of the following:

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

{¶ 16} "(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.

{¶ 17} "(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."

{¶ 18} The purpose of Crim.R. 11(C)(2) is to ensure the defendant has the information needed to make a voluntary and intelligent decision regarding whether to plead guilty. *State v. Ballard* (1981), 66 Ohio St.2d 473, 479-480. When advising a defendant of his constitutional rights, a trial court must strictly comply with Crim.R. 11(C)(2)(c). *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶ 21. Substantial compliance is insufficient. *Id.* Failure of the trial court to comply strictly with Crim.R. 11(C)(2)(c) constitutes a reversible or prejudicial error which renders the plea invalid. *Id.* at ¶ 29. This court has held that a guilty plea entered pursuant to *Alford*, supra, is procedurally indistinguishable from a guilty plea. *State v. McDay* (May 9, 1997), 6th Dist. No. L-96-027. Accordingly, the requirements of Crim.R. 11(C)(2) apply equally to this case.

{¶ 19} A court strictly complies with Crim.R. 11(C)(2)(c) when, at the time the defendant enters his guilty plea, the court informs the defendant "in a reasonable manner" of his constitutional rights. *Ballard* at 478; *Veney* at ¶ 26. The trial court therefore need not recite the rule word-for-word as long as the "record shows that the trial court explained these rights in a manner reasonably intelligible to that defendant." *Ballard* at 473.

{¶ 20} A review of the record shows that the trial court strictly complied with Crim.R. 11(C)(2)(c). Even though the trial court did not explicitly and separately advise appellant that his *Alford* plea waived the right that the state must prove his guilt beyond a reasonable doubt or his right against compulsory self-incrimination, the trial court explained to appellant in a reasonably intelligible manner all five constitutional rights and appellant understood his *Alford* plea constituted a waiver of these constitutional rights. The trial court began the colloquy by stating to appellant the need to talk about the constitutional rights his *Alford* plea waived. The trial court discussed with appellant the five rights, stopping on several occasions to ensure that appellant understood the legal consequences of his guilty plea. The trial court also received at the end of the colloquy appellant's affirmation that he waived all five constitutional rights. The record thus supports the conclusion that the trial court did not commit a prejudicial error because, prior to acceptance of the guilty plea, it explained to appellant all the constitutional rights his *Alford* plea waived and appellant's plea was knowing, voluntary, and intelligent. Hence, we find the first assignment of error without merit.

{¶ 21} In his second assignment of error, appellant asserts that the trial court erred in accepting his plea without a factual basis for the plea. Appellant construes the court's duty here to demand it ensure that the state prosecutor recite each and every element of the offense. Because the state's recitation of facts failed to mention that appellant did not have the "privilege" to restrain the victim's liberty as one element of "attempted abduction" under R.C. 2905.02, appellant maintains the trial court lacked the factual basis for the plea, thus rendering the plea invalid.

{¶ 22} In an *Alford* plea, the trial court must ensure that a defendant has made a rational calculation to plead guilty despite protestation of innocence by inquiring into the factual basis for the plea. *Alford* at 38. This court has held, therefore, that "before accepting a guilty plea, a court must: '1) question the defendant as to his reasons for deciding to plead guilty and 2) inquire into the state's evidence in order to determine that the likelihood of a conviction on offenses of equal or greater magnitude than the offenses to which the defendant entered a plea is great enough to warrant such a decision.'" *State v. Bryant*, 6th Dist No. L-03-1359, 2005-Ohio-3352, ¶ 9, citing *State v. Nicely* (June 3, 2000), 6th Dist. No. F-99-014.

{¶ 23} A review of the record shows that upon questioning by the trial court both appellant and his attorney explained he entered his *Alford* plea to avoid the risk of a trial and to seek a lesser penalty. Furthermore, upon the trial court's request, the state prosecutor proffered the facts of the case, were it to proceed to trial. Based on the state's evidence the trial court determined that the facts were sufficient to support a finding of

guilty. The trial court's inquiry into the evidentiary basis of the case was sufficient to determine that appellant's *Alford* plea was warranted.

{¶ 24} Moreover, this court has held that Crim.R. 11 does not require the trial court to ensure that a factual basis for the plea exists, provided a defendant voluntarily, knowingly and understandingly consents to sentencing on a charge. *State v. Rice*, 6th Dist. No. L-06-1343, 2007-Ohio-6529, ¶ 25. The record shows appellant consented to immediate sentencing by the court. For the foregoing reasons, we find the second assignment of error not well-taken.

{¶ 25} In his third assignment of error, appellant contends the trial court erred by permitting the victim's mother to speak regarding sentence at the sentencing hearing. Appellant's argument is unfounded. The Ohio statute governing sentencing hearings provides that "the offender, the prosecuting attorney, the victim or the victim's representative in accordance with section 2930.14 of the Revised Code, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case." R.C. 2929.19(A)(1). The court therefore has discretion "to hear statements from *anyone* with information relevant to the imposition of a sentence in the case." *State v. Hough*, 11th Dist. No. 2001-T-0009, 2002-Ohio-2942.

{¶ 26} This court has held, furthermore, that a trial court may consider relevant statements regarding the impact of the offense on a victim, the victim's family and friends so long as those persons addressing the court do not express an opinion as to the sentence that should be imposed. *State v. Houston*, 6th Dist. No. E-03-059, 2004-Ohio-6462, ¶ 11.

The trial court is presumed to have considered only relevant, material and competent evidence in determining the sentence unless it affirmatively appears to the contrary.

Houston at ¶ 11; see, also, *Hough* (holding that "it is presumed that a judge will consider only proper evidence when arriving at its judgment, unless it affirmatively appears to the contrary, and the admission of these comments is not reversible error without an indication that the judge was influenced or relied on the information when making his sentencing decision.")

{¶ 27} At the sentencing hearing, the victim's mother recommended appellant receive the maximum sentence allowed by law. A review of the record, however, shows no indication that, prior to sentencing, the trial court gave any consideration to the statement of the victim's mother. Notably, appellant did not receive the maximum sentence requested by the victim's mother. The trial court therefore did not commit reversible error by allowing the victim's mother to speak at the sentencing hearing. We therefore find appellant's third assignment of error without merit.

{¶ 28} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Ottawa County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is assessed the costs of this appeal.

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

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:
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