

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

State of Ohio

Court of Appeals No. WM-09-012

Appellee

Trial Court No. CRB0900378

v.

Jeremy A. Gearig

DECISION AND JUDGMENT

Appellant

Decided: March 12, 2010

* * * * *

Rhonda L. Fisher, Bryan Municipal Prosecutor, for appellee.

Joseph R. Kiacz, for appellant.

* * * * *

COSME, J.

{¶1} Appellant, Jeremy Gearig, appeals from a judgment issued by the Bryan Municipal Court, Williams County, following his no contest plea to domestic violence. For the reasons set forth below, the judgment of the trial court is reversed.

I. BACKGROUND

{¶2} Appellant's wife, Stephanie Gearig, alleged that on May 26, 2009, appellant grabbed her by the throat and threw her on the bed, grabbed her arms, threw her on the bed again and then held her down on the bed by the back of her neck. Mrs. Gearig alleged that appellant also turned the couch on its backside then went into the garage and threw his tools around.

{¶3} The next day, appellant was arrested and charged with one count of domestic violence. He was held at the Corrections Center of Northwest Ohio ("CCNO"). That same day, appellant appeared for arraignment via video feed. Prior to the arraignment, an audio CD was played that, according to the trial court, informed appellant of his "constitutional rights." At the time the audio CD was played, appellant was in a small holding cell with two other prisoners. Appellant asserts that he could not hear and did not understand the importance of the audio feed. The audio CD was being played over an intercom system located in the hallway. However, at the time the audio CD was being played, the door to the holding cell was closed, and the other two prisoners were conversing, making it difficult for appellant to understand the recording. Consequently, appellant claims he could not hear the reading of his rights that was broadcast out in the hall.

{¶4} The assignments of error presented to the court challenge: (1) whether appellant was fully informed of his rights as required by Crim.R. 5(A), 10(C), 11(E), such that he was able to knowingly, voluntarily and intelligently enter a plea; (2) whether

the trial court abused its discretion in denying appellant's motion to withdraw his no contest plea; and (3) whether appellant was prejudiced by the trial court's failure to advise him of the effect of a no-contest plea pursuant to Crim.R. 11(E).

{¶5} Because appellant's first and third assignments of error overlap as to the issue of Crim.R. 11(E), we will address first the trial court's alleged failure to comply with the mandatory recitation of rights established by Crim.R. 5(A) and 10(C), and the resulting prejudice to the appellant under Crim.R. 11(E). This court will then address appellant's second assignment of error.

II. DUTY TO INFORM

{¶6} In his first and third assignments of error, appellant asserts that:

{¶7} I. "The Trial Court erred to the prejudice of the Defendant-Appellant by accepting his no contest plea where the trial court did not properly advise the Defendant-Appellant of his rights under Ohio Criminal Rules 5, 10, and 11, resulting in the plea not being knowingly, voluntarily and intelligently made;" and

{¶8} III. "That the Trial Court erred to the prejudice of the Defendant-Appellant by not advising the Defendant-Appellant of the meaning of a no contest plea of the Defendant-Appellant before taking such plea, resulting in the plea not knowingly, voluntarily and intelligently being given."

1. Crim.R. 5

{¶9} Crim.R. 5(A) requires that at the arraignment, the court shall inform the defendant of: (1) the nature of the charges against him; (2) his right to counsel, and the

right to a reasonable continuance to secure counsel; (3) his rights pursuant to Crim.R. 44 to have counsel assigned without cost if he is unable to employ counsel; (4) his right to refrain from making statements and that any statement made might be used against him; and (5) his right to jury trial, and the necessity to demand one in petty offense cases. Additionally, when a defendant is called upon to enter a plea without the assistance of counsel, "the judge or magistrate shall cause him to be informed and shall determine that he understands" certain other enumerated rights. Crim.R. 10(C).

{¶10} The state asserts that it complied with the requirements by playing an audio CD that contains a recitation of the appellant's rights. The state relies on the testimony of corrections officer Diane Scherer to verify appellant was informed of his rights. But Officer Scherer was not present in the holding cell at the time the audio CD was played. Consequently, though the state established that the reading of rights was broadcast, it could not rebut the evidence presented by appellant that the broadcast was ineffectual inside the cell due to noise by other inmates and the fact that the door was closed.

{¶11} Compliance with Crim.R. 5 is mandatory. If the state fails to effectively communicate a criminal defendant's rights, it deprives him of the ability to make a knowing and voluntary waiver of them. We hold that the trial court did not comply with Crim.R. 5(A).

2. Crim.R. 10

{¶12} Similarly, Crim.R. 10(C) requires that a defendant who is not represented by counsel and who is called upon to plead, shall be informed of certain enumerated

rights. The record does not contain any evidence that the trial court engaged in a full discussion of appellant's rights. The trial court inquired of appellant only if he had listened to his "rights." The trial court did not specifically mention appellant's right to counsel, the right to court-appointed counsel (other than in reference to the form to be signed by appellant), or the right to a continuance to secure counsel. The trial court did not address bail. The trial court also did not note the right to a trial and did not advise appellant of the right to a jury trial, or the need to demand one to preserve that right. Finally, the trial court made no reference to the fact that appellant could remain silent and that all statements could be used against him.

{¶13} Although the state claims the audio CD contains these mandatory recitations, it was not included in the record. Besides, even if it does, we have already concluded that the conditions under which the audio CD was played fail to assure effective notification of these rights. And in this case, appellant was not informed because he could not understand the audio CD.

{¶14} The mere playing of an audio CD does not satisfy the requirement in Crim.R. 10(C) prescribing a determination by the trial court that the defendant actually understood his rights. This provision requires an individualized inquiry. See *State v. Donkers*, 170 Ohio App.3d 509, 2007-Ohio-1557. A "one-sided rights colloquy to all defendants does not provide the discourse required by the rules concerning initial appearances to ensure comprehension of the rights." *State v. Bayer* (1995), 102 Ohio App.3d 172, 180.

{¶15} In *State v. Diroll*, the Eleventh District Court of Appeals emphasized, "We believe, as a general matter, that a trial court is permitted to use a videotape to inform defendants of their rights. However, it is crucial to remember that the trial court is ultimately responsible for ensuring that defendants are informed of their rights and understand those rights, regardless of the specific method utilized. If the court cannot make the record clear in this regard, there will be a risk of reversal for failure to properly advise." *Id.*, 11th Dist. No. 2006-P-0110, 2007-Ohio-6930, ¶ 37.

{¶16} Like Crim.R. 5, Crim.R. 10(C) is mandatory and not merely a procedural guideline. It sets forth fundamental and constitutionally protected rights that must be observed by the court. *State v. Groner* (Mar. 31, 1998), 7th Dist. No. 96 C.A. 144. Failure to comply with Crim.R. 10(C) constitutes "prejudicial error." *State v. Orr* (1985), 26 Ohio App.3d 24, 25. We hold that the trial court did not properly advise appellant of his rights under Crim.R. 10(C).

3. Crim.R. 11

{¶17} Appellant also asserts he was prejudiced by the trial court's failure to advise him of the effect of his no contest plea, in violation of Crim.R. 11. For the reasons that follow, we agree.

{¶18} Crim.R. 11 sets forth distinct procedures depending on the classification of the offense involved. For a petty offense, defined in Crim.R. 2(D) as "a misdemeanor other than [a] serious offense," the court 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 "ensures that defendants enter pleas with knowledge of rights that they would forgo and creates a record by which appellate courts can determine whether pleas are entered voluntarily." *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶ 11.

{¶19} Appellant entered a plea of no contest to a charge of domestic violence, a first-degree misdemeanor under R.C. 2919.25(A), with a maximum sentence of 180 days. R.C. 2929.24(A)(1). Because domestic violence is a petty offense, Crim.R. 11(E) required the trial court to inform appellant of the effect of his plea. The transcript is devoid of any such discussion. We acknowledge that Crim.R. 11(E) does not require a lengthy inquiry, but the court must, at a minimum, engage in some discussion of the effect of the plea. Here, the language of Crim.R. 11(B)(2) is missing from the record.

{¶20} Having concluded that the trial court failed to comply with the mandate of Crim.R. 11(E), we must now turn to the question of whether appellant has shown that he was prejudiced by the trial court's failure to do so.

{¶21} The test for prejudice is "whether the plea would have otherwise been made." *State v. Nero* (1990), 56 Ohio St.3d 106, 108. In *City of Eastlake v. DeNiro* (1984), 21 Ohio App.3d. 102, at paragraph one of the syllabus, the Eleventh District Court of Appeals observed that "[p]rejudice inheres in the failure to comply with Crim.R. 11(E), for non-compliance deprives the defendant of the rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of the plea."

{¶22} Since the record does not contain any evidence that the trial court informed appellant of the effect of a no contest plea, and it appears that appellant would not have otherwise entered such a plea, the trial court's failure to comply with Crim.R. 11(E) was prejudicial.

{¶23} Accordingly, appellant's first and third assignments of error are well-taken.

III. WITHDRAWAL OF PLEA

{¶24} In his second assignment of error, appellant claims that:

{¶25} II. "The Trial Court abused its discretion in failing to allow the Defendant-Appellant to withdraw his plea of no contest pursuant to an Ohio Criminal Rule 32.1 Motion."

{¶26} For the reasons that follow, we agree.

{¶27} In *State v. Xie* (1992), 62 Ohio St.3d 521, 526, the Ohio Supreme Court stated that "a pre-sentence motion to withdraw a guilty plea should be freely and liberally granted. But there is no absolute right to withdraw a plea prior to sentencing. The trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea."

{¶28} When reviewing a trial court's judgment with respect to a motion to withdraw a guilty plea, an appellate court must use the abuse of discretion standard. *Id.* The term "abuse of discretion" connotes more than error of law or of judgment; it implies that the court's attitude is "unreasonable, arbitrary, or unconscionable." *Id.*, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶29} In the instant matter, the trial court conducted a hearing to determine whether there was a reasonable and legitimate basis for the withdrawal of appellant's plea. Appellant claimed he was not informed of his rights under Crim.R. 5, 10 and 11. Appellant testified that he changed his answer regarding whether he heard his rights because he could see that the judge "had a stern look on his face and he got a little stern and I just didn't know how long I was going to be in jail and I wanted to hurry up and get out so I told him what he wanted to hear so I could hurry up and get out." Appellant also revealed that he chose to enter a no contest plea because a few of his friends had been in court and they had entered no contest pleas. Therefore, appellant thought that was the thing to do.

{¶30} Applying the factors set forth in *State v. Griffin*, 141 Ohio App.3d 551, 2001-Ohio-3203, this court finds that: (1) there is no prejudice to the state; (2) appellant did not have the benefit or expertise of counsel in making his decision to enter a plea of no-contest; (3) the trial court did not comply with Crim.R. 11(E) in informing appellant of the effect of his plea of no contest; (4) the motion to withdraw was made within a reasonable period of time; (5) appellant was not fully informed of his rights as required by Crim.R. 5(A), 10(C), and 11(E); and (6) appellant was asserting his innocence.

{¶31} Because the trial court did not carefully address appellant's understanding of the rights he was waiving prior to entering the no contest plea, we find that appellant's plea was not a rational decision, made knowingly, voluntarily, and intelligently, *State v. Kirigiti*, 10th Dist. No. 06AP-612, 2007-Ohio-6852, and the trial court abused its

discretion in denying appellant's motion to withdraw his plea of no contest. Appellant's second assignment of error is well-taken.

IV. CONCLUSION

{¶32} The trial court failed to observe the mandatory recitation of rights established by Crim.R. 5(A) and 10(C). The trial court failed to inform appellant of the effect of his plea pursuant to Crim.R. 11(E). The trial court abused its discretion in denying appellant's motion to withdraw his plea. Accordingly, appellant's first, second and third assignments of error are sustained.

{¶33} Wherefore, based upon the foregoing, we find that substantial justice was not done in this matter. We find appellant's three assignments of error well-taken. The matter is reversed in its entirety and remanded for further proceedings consistent with this decision and judgment. 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.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Keila D. Cosme, 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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