

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

State of Ohio

Court of Appeals No. WD-10-001

Appellee

Trial Court No. 2009CR0097

v.

Kyiona Coley

DECISION AND JUDGMENT

Appellant

Decided: February 11, 2011

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
David E. Romaker, Jr., Assistant Prosecuting Attorney, for appellee.

Judith A. Myers, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas, which found appellant guilty of receiving stolen property in violation of R.C. 2913.51(A), a felony in the fifth degree, and theft, in violation of R.C. 2913.02(A)(1), a felony in the fifth degree. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Kyiona Coley, sets forth the following two assignments of error:

{¶ 3} "First assignment of error: Appellant's guilty plea should be vacated because it was not made knowingly, intelligently and voluntarily.

{¶ 4} "Second assignment of error: Appellant was denied effective assistance of counsel, thereby rendering her conviction void under the Sixth and Fourteenth Amendment[s] to the United States Constitution and Article One, Section Sixteen of the Constitution of the State of Ohio."

{¶ 5} The following undisputed facts are relevant to the issues raised on appeal. On or about October 11, 2008, appellant was in possession of a stolen credit card taken out of Lucas County. Appellant made in excess of \$500 in illicit purchases with the stolen card at a Wood County Wal-Mart.

{¶ 6} On February 19, 2009, appellant was indicted on one count of receiving stolen property, with a specification that the stolen property was a credit card, in violation of R.C. 2913.5(A), and one count of theft, in violation of R.C. 2912.02(A)(1). Both counts are fifth degree felonies, punishable by a six to twelve month term of imprisonment, fines up to \$2,500, and postrelease control. On March 13, 2009, appellant pled not guilty to both counts.

{¶ 7} Subsequent negotiations resulted in a plea agreement. On May 1, 2009, appellant pled guilty to the charges. The record reflects that the trial court asked appellant if she understood that the court was not a party to the plea agreement. Appellant affirmed her understanding. The record unambiguously reflects an exhaustive and precise colloquy between the trial court and appellant.

{¶ 8} Having determined that the appellant properly understood the plea agreement, the court accepted her plea, and found appellant guilty on both charges. The trial court referred the case for a pre-sentence investigation.

{¶ 9} On June 19, 2009, the trial court sentenced appellant. At this time, appellant's counsel alleged that there had been some confusion as to the terms of the plea agreement. He stated that appellant expressed some confusion during the presentence investigation as to how many counts she was pleading guilty to and the length of sentence that could be imposed. Appellant's counsel met with her to reiterate the previously agreed upon terms and verify her understanding of the same.

{¶ 10} At this post-plea meeting, appellant's counsel delineated her options, including the possibility of withdrawing her plea. Counsel also advised appellant on the consequences of a plea withdrawal, including the possibility that the prosecutor could elect to file additional charges. Upon being presented with her options, appellant chose to adhere to the plea agreement.

{¶ 11} Appellant was sentenced to 11 months on both counts, to be served consecutively, and ordered to pay restitution in the amount of \$131.50 and \$891.63, respectively. On February 4, 2010, this court granted the appellant's motion for leave to file a delayed appeal. This appeal ensued.

{¶ 12} Appellant's first assignment of error claims that her plea was not made knowingly, intelligently, and voluntarily. In support of this contention, appellant advances three arguments: (1) That the written plea agreement did not reflect the agreement reached between the prosecutor and the appellant; (2) That the court did not

adequately instruct appellant that it was not bound by the terms of the plea agreement; and (3) That the underlying agreement upon which appellant's plea was based was not stated on the record in open court as required by Crim.R. 11(F).

{¶ 13} In reviewing a trial court's acceptance of a guilty plea, this court will find the guilty plea to be knowing, intelligent, and voluntary so long as the trial court substantially complied with Crim.R. 11(C) as to its non-constitutional elements. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *Id.*

{¶ 14} Appellant argues that she believed that she was pleading guilty to one count with a maximum sentence of 11 to 12 months. She points to her counsel's original statements pertaining to the plea agreement to support this assertion. However, the record belies her implication that she was in some way misled, or not fully apprised of all relevant information.

{¶ 15} Appellant's plea agreement clearly states that she was pleading guilty to two separate counts and that the trial court was free to impose any sentence within the statutory range. In conformity with this, the record states in relevant part:

{¶ 16} "The Court: The offense you're entering a plea to is receiving stolen property which is a felony of the fifth degree, and theft which is a felony in the fifth degree; and you understand that *each* (emphasis added) of those carries with them a potential penalty of 6 to 12 months, a fine up to \$2500, and potential for post release control of three years; you understand that?"

{¶ 17} "The Defendant: Yes."

{¶ 18} The record established that appellant never conveyed any confusion or concern during this exchange. On the contrary, appellant unambiguously affirmed her understanding and assent.

{¶ 19} In conjunction with this, the record shows that when appellant subsequently claimed confusion, her counsel took ample measures to affirm her understanding. The record reflects that appellant chose to proceed as originally planned.

{¶ 20} Appellant next contends that she was not adequately forewarned that the court was not bound by the agreement. This claim does not comport with the record. The record states in pertinent part:

{¶ 21} "The Court: You understand that agreement is between yourself and the prosecutor?"

{¶ 22} "The Defendant: Yes.

{¶ 23} "The Court: And that I'm not a party to that agreement?"

{¶ 24} "The Defendant: Yes."

{¶ 25} Appellant's final argument is that the court did not explain to her that the sentences for her two offenses could be ordered to be served consecutively. The Supreme Court addressed this issue in *State v. Johnson* (1988), 40 Ohio St.3d 130. There, the court stated that the "[f]ailure to inform defendant who pled guilty to more than one offense that the court may order him to serve any sentences it imposed consecutively, rather than concurrently, is not a violation of Crim.R. 11(C)(2), and does

not render the plea involuntary." Here, appellant was notified of the maximum sentence that she could receive for each offense. There is no further requirement.

{¶ 26} Based upon the forgoing, we find that the trial court substantially complied with Crim.R. 11(C) in accepting appellant's plea. It was made knowingly, intelligently, and voluntarily. Appellant's first assignment of error is not well-taken.

{¶ 27} Appellant's second assignment of error is that she was denied effective assistance of counsel. To establish that appellant's counsel was ineffective, she "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington* (1984), 466 U.S. 668, 688. Once appellant satisfies this burden, appellant must then "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

{¶ 28} Appellant argues that ineffective assistance of counsel is shown by her claim that counsel represented that she would be subject to a sentence of 11 to 12 months, and that she was never advised that the trial court could impose a lengthier sentence.

{¶ 29} This contention is refuted by the record. The record shows that the trial court clearly laid out all the potential penalties to appellant, and appellant confirmed that she understood those potential penalties. Appellant also affirmed her satisfaction with her counsel.

{¶ 30} We find no evidence that but for claimed errors of counsel the outcome would have been different. The record shows that appellant received effective assistance of counsel. Appellant's second assignment of error is not well taken.

{¶ 31} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the cost of this appeal 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.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, 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:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.