

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

State of Ohio

Court of Appeals No. L-11-1050

Appellee

Trial Court No. CR0201001845

v.

Michael Cunningham

DECISION AND JUDGMENT

Appellant

Decided: April 27, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Timothy F. Braun, Assistant Prosecuting Attorney, for appellee.

Adam Houser, for appellant.

* * * * *

YARBROUGH, J.

I. INTRODUCTION

{¶ 1} Appellant, Michael Cunningham, appeals a judgment of the Lucas County Court of Common Pleas in which he was sentenced to a five-year term of imprisonment for his conviction of one count of attempted felonious assault in violation of R.C. 2923.02 and 2903.11(A)(1), a felony of the third degree.

A. Facts and Procedural Background

{¶ 2} On May 27, 2010, Cunningham was arraigned on one count of attempted felonious assault, a violation of R.C. 2923.02¹ and 2903.11(A)(1)², and a third degree felony, for an incident that occurred on May 27, 2010. Cunningham remained incarcerated throughout the proceedings with bail set at \$250,000. Defense counsel was eventually appointed, and on July 8, 2010, the trial court granted the defense's motion for a competency examination to be conducted on Cunningham.

{¶ 3} On July 15, 2010, Cunningham entered a plea of not guilty by reason of insanity. However, on August 5, 2010, following a competency hearing and the admission of a competency report prepared by Dr. Mark Pittner of the Court Diagnostic & Treatment Center, Cunningham was found competent to stand trial.

{¶ 4} On September 20, 2010, Cunningham entered a plea of guilty to a lesser charge of attempted felonious assault. Following Cunningham's plea, the trial court ordered a presentence investigation report and continued sentencing to October 12, 2010.

{¶ 5} At sentencing, Cunningham's attorney read the notice and acknowledgement pursuant to R.C. 2929.19(B)(3) and 2947.23. Cunningham signed the forms and

¹ The version of R.C. 2923.02(A), in effect at the time of the incident, states: "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.

² The relevant portion of R.C. 2903.11, in effect at the time of the incident, requires that "(A) No person shall knowingly do either of the following: (1) Cause serious physical harm to another or another's unborn; (2) * * *."

acknowledged his understanding of them. The trial court again insured that Cunningham understood the maximum period of incarceration in addition to the terms of postrelease control. Cunningham again acknowledged that he understood. After making Cunningham aware of his responsibility for payment of restitution, Cunningham's attorney offered the following in mitigation: (1) Cunningham is 20 years old with no juvenile record, (2) he has two prior misdemeanor convictions as an adult, both of which involved alcohol, (3) several others also hit the victim during the incident, (4) Cunningham has never been charged with a violent offense, and (5) he appears to have come from a "really good family."

{¶ 6} Thereafter, Cunningham apologized to the victim, the victim's family, and informed them that he "had enough time to think." The trial court then heard from the victim's grandmother by way of a victim's impact statement. In her statement, the victim's grandmother explained that the victim suffered serious injury to his brain and was in intensive care and on life support for a week, the victim was beaten so badly that he could not be identified, and that the victim still undergoes treatment for the injuries to his brain which could affect him for the rest of his life.

{¶ 7} Prior to imposing Cunningham's sentence, the trial court remarked that his two recent prior criminal convictions were for disorderly conduct while intoxicated, and were only six weeks apart. The trial court went on to state:

The facts surrounding this case are very serious. Approximately two and a half months [after Cunningham's second disorderly conduct offense] there's a party that is going on here in Toledo, and among the people at the

party was the victim of the offense as well as the defendant, Michael Cunningham. There had been some alcohol drank and also there had been smoking of marijuana. And then the victim of the case, what happened was [the victim] was very intoxicated, and as his grandmother said, he vomited on a couch at the house. And according to all the participants in this matter it was the defendant who got very upset with him. And at that point in time here's [the victim] who is barely conscious to begin with, because of the ingestion of alcohol, then what happens is the defendant starts hitting him with his fist and kicks this young man in the head. He beat him with a wooden chair. And the witnesses also observed the defendant stomp on Mr. Coleman's head. Then the defendant dragged Mr. Coleman through the house and on to the back yard, depositing him in an alley behind the house as if he was discarded as trash to fend for himself.

The evidence also would establish that two individuals had stopped the defendant from continuing to beat [the victim]. And someone, as the grandmother has indicated, in fact, took a hose and sprayed it over [the victim]. And it certainly could be argued that it could be an attempt to clean up the victim who is now in dire straits physically.

Then someone called the person who actually resides at this location where this offense took place, and the woman came back and immediately upon seeing [the victim] called 911. [The victim] wasn't responsive and he

didn't have any identification on him when he was admitted to the hospital.

The victim in this case was near death * * *.

* * *

He was in intensive care for a great deal of time and still when we want to talk about incapacitated, losing one's freedom for this offense, this young man innocently will be in captivity based upon the subsequent brain injury.

* * *

When we look at all of these matters pursuant to the statute and rule we find that the violence perpetrated on that evening rises to the highest level of absolute criminal activity when we look at the offense of attempted felonious assault.

{¶ 8} Cunningham was thereafter sentenced to the maximum of five years' incarceration and three years of mandatory postrelease control. Cunningham was granted credit for time served, and was ordered to pay the costs of the proceedings. This appeal followed.

B. Assignments of Error

{¶ 9} Appellant now asserts the following two assignments of error:

I. The Sentencing Court abused its discretion while sentencing Appellant to the maximum prison term of Five years.

II. The Appellant's guilty plea was not made knowingly, intelligently, and voluntarily.

II. ANALYSIS

A. Imposition of the maximum prison term was not an abuse of discretion

{¶ 10} In reviewing a felony sentence, we utilize the two-step analysis set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 4. First, we examine the trial 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. *Id.* If we determine that the first prong is satisfied, a trial court's decision will be reviewed for an abuse of discretion. *Id.* "The term "abuse of discretion" * * * implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 11} Based on the facts in this case, we uphold Cunningham's sentence. The trial court sentenced appellant within the range of sentences permitted by R.C. 2923.02 and 2903.11(A)(1), which define the offense as a third degree felony.³ Pursuant to R.C. 2929.14(A)(3)⁴, as it existed at the time of the offense, appellant was required to be

³ Although R.C. 2903.11(D) defines felonious assault as a second degree felony, because Cunningham was convicted of attempted felonious assault, R.C. 2923.02(E)(1) states, "An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted." Thus, Cunningham was convicted of a third degree felony.

incarcerated for a term of one, two, three, four, or five years. Trial courts have discretion to impose a prison sentence within the statutory range for the offense. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of the syllabus. Thus, we must give substantial deference to the General Assembly, which has established a specific range of punishment for every offense and authorized consecutive sentences for multiple offenses. *State v. Weitbrecht*, 86 Ohio St.3d 368, 373-374, 715 N.E.2d 167 (1999). Cunningham’s sentence is a penalty provided by statute thereby satisfying the first prong articulated in *Kalish*.

{¶ 12} We next turn to the second prong of the analysis as articulated in *Kalish* which directs us to review the trial court’s “exercise of its discretion in selecting a sentence within the permissible statutory range * * *.” *Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at ¶ 17. A review of the record demonstrates that the trial court considered the factors enumerated in R.C. 2929.11 and 2929.12 prior to sentencing appellant. In its judgment entry, the trial court stated that it had “considered the record, oral statements, any victim impact statement, and presentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12.” We note that there is no

⁴ Former R.C. 2929.14(A)(3) provides: “For a felony of the third degree, the prison term shall be one, two, three, four, or five years.”

mandate for judicial fact-finding in the general guidance statutes.⁵ Rather, the court is merely to *consider* the statutory factors. *Foster* at ¶ 42.

{¶ 13} R.C. 2929.11(A) provides:

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.

{¶ 14} Furthermore, R.C. 2929.12 sets forth a non-exhaustive list of factors that the trial court must consider when determining whether the defendant's conduct is more or less serious than conduct normally constituting the offense. Pursuant to this statute, the trial court must also consider the likelihood that the offender will commit future crimes.

{¶ 15} In this case, the record contained a presentence investigation report and a victim impact statement for the trial court's consideration. This report included

⁵ A sentencing court need not give any reason for the sentence selected within the permissible range and a sentence imposed on a silent record will be presumed compliant with R.C. 2929.11 and 2929.12. *See Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at ¶ 12 and 18, fn. 4.

Cunningham's criminal history, which showed appellant's recent pattern of alcohol related offenses.

{¶ 16} Thus, applying the second prong of the *Kalish* analysis, we do not find that the trial court abused its discretion in selecting a sentence within the permitted statutory range. We are satisfied that the trial court made the relevant statutory considerations. Nothing in the record indicates that the court's imposition of a five-year sentence was unreasonable, arbitrary, or unconscionable. Accordingly, appellant's first assignment of error is not well-taken.

B. Appellant's guilty plea was made knowingly, intelligently, and voluntarily

{¶ 17} Cunningham next argues that his plea was not given knowingly, intelligently, and voluntarily, that he did not understand the nature of the charges, the maximum penalty involved, and the effects of the guilty plea and waiving his rights at trial.

{¶ 18} In accepting a felony plea of guilty or no contest, the trial court must comply with Crim.R. 11(C)(2), which provides:

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum

penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(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.

{¶ 19} Crim.R. 11(C)(2) creates two sets of requirements for a court to accept a guilty plea in a felony case to ensure that the plea is entered into knowingly, intelligently, and voluntarily. The first set addresses constitutional rights and the second set does not. *See State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 6; *State v. Oliver*, 6th Dist. No. S-10-1040, 2011-Ohio-5305, ¶ 10. To comply with the constitutional requirements, the court must explain to the defendant that he is waiving: (1) the Fifth Amendment privilege against self-incrimination, (2) the right to a trial by jury, (3) the right to confront one's accusers; (4) the right to the compulsory process for obtaining witnesses; and (5) the right to be proven guilty beyond a reasonable doubt.

State v. Veney, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 18; Crim.R. 11(C)(2)(c); *see also State v. Nero*, 56 Ohio St.3d 106, 564 N.E.2d 474 (1990), citing *Boykin v. Alabama*, 395 U.S. 238, 242-243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The court must strictly comply with these requirements, and the failure to strictly comply invalidates a guilty plea. *Veney* at ¶ 31; *State v. Ballard*, 66 Ohio St.2d 473, 477, 423 N.E.2d 115 (1981).

{¶ 20} It is clear from the record that the trial court strictly complied with the constitutional requirements of Crim.R. 11(C) by informing appellant of his constitutional rights and ascertaining that he understood that he was giving up these rights in both cases by entering a plea of guilty. Nevertheless, Cunningham argues that, because he “has a history of mental health issues, has trouble understanding the English language and in certain situations loses focus, and that he is taking Prozac to help with his mental health problems,” he was not able to knowingly enter a guilty plea.

{¶ 21} R.C. 2945.37(G) states that a criminal defendant is presumed competent to stand trial unless it is established that he is unable to understand the nature of the proceedings and cannot assist in his defense. In this case, the trial court ordered a competency evaluation from the Court Diagnostic & Treatment Program. When the report was completed, a competency hearing was held on August 5, 2010, at which time the prosecution and defense made a joint request for its admission.

{¶ 22} In *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), the United States Supreme Court explained the test for determining a defendant’s

competency to stand trial. A trial court must determine 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.” (Internal quotations omitted.) *Id.* at 402. Eventually, in *Godinez v. Moran*, 509 U.S. 389, 397-398, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993), the United States Supreme Court held that the standard for determining competency to stand trial and the standard for determining competency to enter a plea were the same. *See also State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 57 (“The competency standard for standing trial is the same as the standard for pleading guilty or waiving the right to counsel”).

{¶ 23} In order to determine the nature of the defendant’s waiver of his rights, the trial court has a duty under Crim.R. 11(C) to speak directly to him about the matter on the record. *State v. Combs*, 11th Dist. No. 2007-P-0075, 2008-Ohio-4158, ¶ 40. In addition to informing the defendant of his constitutional rights, the trial court is required to:

- (1) inform the defendant of the nature of the underlying charges and the maximum penalty possible, which includes, if applicable, an advisement on postrelease control,
- (2) inform him of the exact effect of entering a guilty plea, and that the trial court can proceed directly to judgment and sentencing, and (3) determine if the defendant is acting voluntarily at the time. *Id.* citing *State v. Eschbaugh*, 11th Dist. No. 2003-T-0110, 2004-Ohio-6949, ¶ 29; *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 19-26 (postrelease control is a nonconstitutional advisement). *See also* Crim.R.

11(C)(2)(a)(b). The failure to accurately explain nonconstitutional rights is reviewed under the substantial compliance standard. *Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, at ¶ 12. “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.” *Nero*, 56 Ohio St. at 108, 564 N.E.2d 474. A review of the record reveals that the trial court went to great lengths to ensure Cunningham understood the nature of the court proceedings and ensured that he understood the nature of his guilty plea. When the trial court proceeded to inform Cunningham of his rights, pursuant to Crim.R. 11, and after a lengthy recitation of the events that occurred on the evening of the crime, it eventually accepted Cunningham’s plea as follows:

THE COURT: And you acknowledge that you assaulted him and struck him in the head several times; is that correct?

MR. CUNNINGHAM: I didn’t hit him in the head several times, but I hit him in his head though.

THE COURT: Okay. Well, just give me a guess.

MR. CUNNINGHAM: Yes.

THE COURT: But guess how many times you hit him in the head?

MR. CUNNINGHAM: A couple of times.

THE COURT: All right. And do you agree that as a result of your conduct and one could argue it [sic] what we call them are co-complicitors or people, other people joining in, encouraging others in the assault on this

man who is unconscious, that he suffered serious physical harm, do you agree?

MR. CUNNINGHAM: Yes.

THE COURT: All right. Is there anything else with [sic] from the State?

[Prosecutor]: No, Your Honor.

THE COURT: All right. I would like, [Cunningham's attorney], that you read the plea form to your client. And if you have any questions, Mr. Cunningham, please ask the Court or your lawyer.

[Cunningham's attorney]: Prior to commencement of court this morning, Your Honor, I had an opportunity to read the plea form and every bit of it to [Cunningham], and we went over the whole thing. He asked some questions, I answered them. I believe that you were satisfied, you didn't have any further questions, is that right [Cunningham]?

MR. CUNNINGHAM: Yes.

[Cunningham's attorney]: Okay. And this is the form we went over this morning?

MR. CUNNINGHAM: Yes.

[Cunningham's attorney]: Okay. I need your signature here.

* * *

THE COURT: Did you listen carefully as your lawyer read this form to you?

MR. CUNNINGHAM: Yes, Ma'am.

THE COURT: Do you have any questions concerning the form you signed?

MR. CUNNINGHAM: No, ma'am.

THE COURT: Do you have any questions of me relative to what I talked to you about this morning?

MR. CUNNINGHAM: No, ma'am.

{¶ 24} The court then accepted Cunningham's plea of guilty, ordered a presentence investigation report, and continued the case for sentencing.

{¶ 25} Cunningham points to the following testimony from the plea hearing to demonstrate that he did not "understand the effects of him entering a guilty plea, the maximum sentence that could be imposed, and the rights that he was waiving and the sentencing court accepting his guilty plea was in violation of Rule 11(C)(2) of the Ohio Rules of Criminal Procedure":

THE COURT: All right. Can you understand me when I am talking to you?

MR. CUNNINGHAM: Yeah, a little bit.

THE COURT: A little bit?

MR. CUNNINGHAM: Yeah, I can understand you but I just won't be focusing.

* * *

THE COURT: All right. If you have any questions about what I am saying to you, will you tell me I don't understand that, can you explain it to me. Will you do that?

Mr. Cunningham: Yes, ma'am.

THE COURT: Have you understood everything I have said up to this point?

MR. CUNNINGHAM: Yes.

THE COURT: All right. And if you have any questions whatsoever, you just stop, either ask your lawyer or ask the Court, and we'll explain it in a different way, all right?

MR. CUNNINGHAM: Okay.

{¶ 26} Alone, this testimony does not demonstrate that Cunningham lacks the requisite mental capacity to enter into a guilty plea, nor does it suggest that the trial court should not have accepted his guilty plea. After reviewing the entire transcript of proceedings for the plea hearing, it is apparent that the trial court went through great lengths to ensure that Cunningham fully understood the proceedings, and that his plea was entered into knowingly, intelligently, and voluntarily as required by Crim.R. 11(C). At certain times, the trial court permitted Cunningham's attorney to read documents, and

affirmed by way of addressing Cunningham directly, that Cunningham understood those documents. In addition, after explaining postrelease control, Cunningham indicated that he did not understand. The trial court then repeated the explanation of postrelease control, and the consequences of violating postrelease control in a different manner until Cunningham indicated that he understood. That was the only instance in the transcript of proceedings where Cunningham indicated a lack of understanding, and the trial court took the necessary steps to ensure that he fully understood this concept prior to accepting his guilty plea.

{¶ 27} Furthermore, Cunningham makes an argument that because he was taking the prescription medication Prozac at the time of the plea agreement “to help with his mental health problems,” he was somehow not competent to enter a plea of guilty. We find this argument without merit. First, there was no objection to the trial court’s finding that Cunningham is competent to stand trial. The record reflects that Cunningham’s use of Prozac was noted as part of his competency evaluation. Despite Cunningham’s use of Prozac, Dr. Pittner determined that Cunningham was competent to stand trial. The trial court could reasonably assume that Prozac did not affect Cunningham’s competency, or Dr. Pittner would have said so in his evaluation. Second, there is nothing in the record indicating that Cunningham was unable to understand the nature of his guilty plea.

{¶ 28} Accordingly, Cunningham’s second assignment of error is not well-taken.

III. CONCLUSION

{¶ 29} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed.

{¶ 30} Pursuant to App.R. 24, costs are taxed to Cunningham.

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

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

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| <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: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p> |
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