[Cite as *State v. Robbins*, 2012-Ohio-3862.]

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

State of Ohio — Court of Appeals No. WM-11-012

Appellee — Trial Court No. 10 CR 103

v.

Barry A. Robbins — **DECISION AND JUDGMENT**

Appellant — Decided: August 24, 2012

* * * * *

Thomas A. Thompson, Williams County Prosecuting Attorney,
and Katherine J. Middleton, Assistant Prosecuting Attorney,
for appellee.

Clayton J. Crates, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from a judgment of the Williams County Court of Common Pleas finding appellant, Barry Robbins, guilty of one count of illegal assembly

or possession of chemicals for the manufacturing of drugs in violation of R.C. 2925.041(A), a felony of the third degree. We affirm.

A. Facts and Procedural Background

{¶ 2} The Williams County Grand Jury indicted appellant on seven counts of illegal assembly or possession of chemicals for the manufacturing of drugs, all felonies of the third degree. The charges stemmed from a series of purchases of pseudoephedrine, a chemical used in the manufacturing of methamphetamine.

{¶ 3} Appellant entered a plea of not guilty, and the matter was set for trial. On the morning of trial, appellant changed his plea to no contest to one of the counts. In exchange, the state dismissed the other six counts. The matter proceeded immediately to sentencing, and the court sentenced appellant to a mandatory three-year prison term.

B. Assignment of Error

{¶ 4} Appellant has timely appealed, and now raises a single assignment of error:

> The Trial Court Erred to the Prejudice of the Appellant by Accepting a No Contest Plea Without Determining That the Appellant Understood His Constitutional and Non-constitutional Rights as Required by Crim.R. 11 and Without an Adequate Recitation of Facts by the State.

II. Analysis

{¶ 5} In support of his assignment of error, appellant presents two arguments. First, appellant argues the trial court failed to ensure he was informed of his constitutional and non-constitutional rights as outlined in Crim.R. 11. Alternatively,

appellant argues that the trial court should not have found appellant guilty based on the state's factual basis. We disagree.

A. Appellant's Plea Was Knowing, Intelligent, and Voluntary

{¶ 6} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). Crim.R. 11(C) governs the process a trial court must use before accepting a felony plea of guilty or no contest. It provides, in relevant part,

> (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.

{¶ 7} The Ohio Supreme Court has held that a trial court must substantially comply with the non-constitutional notifications found in Crim.R. 11(C)(2)(a) and (b), and that it must strictly comply with the constitutional notifications in Crim.R. 11(C)(2)(c). *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 14-21. Strict compliance does not mean that the court must read Crim.R. 11(C)(2)(c) verbatim, but rather the court must advise the defendant, "in a manner reasonably intelligible to that defendant," of each right waived by the guilty or no contest plea. *Id.* at ¶ 27, quoting *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981), paragraph two of the syllabus.

{¶ 8} In the present case, appellant argues that the trial court failed to ensure that he understood the maximum penalties he was facing and that he had a constitutional right to a jury trial. Specifically, appellant contends that the transcript of the hearing does not support a conclusion that he understood these concepts because, after the trial court recited the information, appellant's response was recorded as "inaudible."

{¶ 9} "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record." *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). Here, appellant claims the court erred by accepting his no contest plea. To demonstrate this, he must show that his plea was not knowingly, intelligently, or voluntarily made in that he did not fully understand the consequences he faced and the rights he was waiving. However, on this record, appellant cannot satisfy his burden because although the transcript does not record a response to the court's inquiry affirming his understanding, it also does not record a response indicating a lack of understanding. The transcript states, in part,

> THE COURT: Let me explain to you the maximum penalties you face and the mandatory minimum penalties you face for this offense. You could be sentenced to a mandatory prison term of five years, that's the maximum. There's a mandatory minimum prison term of two years. During that time you would not be eligible for judicial release. It's a mandatory prison term. You could be fined in an amount up to $10,000.00 and you must pay a mandatory minimum fine of $5,000.00 unless you would file an affidavit with the Court indicating that you are indigent and without funds to pay that cost. Your right to drive has to be suspended for a minimum of six months and could be suspended for up to five years. Do you have any questions about those penalties?

[APPELLANT]: (inaudible)

THE COURT: Any prison term stated would be the term you'd serve without good time reduction. After prison release, you may have up to three years post release control. The Parole Authority could return you to prison for up to nine months if you violated conditions of your post release control to a maximum of fifty percent additional prison time. If the violation is a new felony, you could receive a new prison term of the greater of one year or the time remaining on your post release control. Do you understand that in addition to ordering you to pay a fine in this case, I'm also, I've already mentioned the mandatory minimum license suspension and the maximum suspension up to five years. You also, I'm not certain if this applies, could be ordered to make restitution if the Court deems it appropriate.

Now again, your prison time is mandatory meaning that no judicial release is possible, understand?

[APPELLANT]: Yes, sir.

* * *

THE COURT: Before I accept your plea, I want to make certain that you understand the rights you're giving up. First, do you understand that you are presumed to be innocent and that you have a right to a jury trial in this case?

[APPELLANT]: Yes, sir.

THE COURT: Do you understand that you have the right to have a jury of twelve people or me as the Judge determine your guilt or innocence?

[APPELLANT]: Inaudible

THE COURT: Do you understand that at trial, the Prosecutor would have had to prove you guilty beyond a reasonable doubt on each and every element of the crimes for which you're charged.

[APPELLANT]: Yes, sir.

{¶ 10} Notably, appellant did not seek to invoke the procedures of App.R. 9(C) or (E) to reconstruct what he said or to establish that he lacked understanding. "In the absence of an attempt to reconstruct the substance of the remarks and demonstrate prejudice, the error may be considered waived." *State v. Brewer*, 48 Ohio St.3d 50, 61, 549 N.E.2d 491 (1989) (rejecting defendant's argument that failure to record several sidebar conferences warranted reversal of his conviction). Further, "[a] criminal defendant must suffer the consequences of nonproduction of an appellate record where such nonproduction is caused by his or her own actions." *State v. Jones*, 71 Ohio St.3d 293, 297, 643 N.E.2d 547 (1994). Therefore, having pointed to nothing in the record that would evince that he did not understand the penalty he was facing or the rights he was waiving, and having failed to utilize App.R. 9(C) or (E) to correct those portions of the

transcript that were inaudible, appellant cannot demonstrate that he did not make his plea knowingly, intelligently, and voluntarily.

{¶ 11} Moreover, we are convinced from the context of the proceedings that appellant was fully apprised of, and understood, his right to a jury trial and the maximum penalty he faced. As to appellant's right to a jury trial, the transcript directly evinces his understanding that he was waiving that right:

> THE COURT: Before I accept your plea, I want to make certain that you understand the rights you're giving up. First, do you understand that you are presumed innocent and that *you have a right to a jury trial in this case*? (Emphasis added.)
>
> [APPELLANT]: Yes, sir.

{¶ 12} As to his understanding of the maximum penalty he was facing, the court explained the possible penalties, including the maximum penalty. It then asked appellant if he had any questions, to which the response was inaudible. Following an explanation of postrelease control, the court asked, "Now, again, your prison time is mandatory meaning that no judicial release is possible, understand?" Appellant replied, "Yes, sir."

{¶ 13} Relatedly, appellant asserts that his no contest plea was not knowingly, intelligently, and voluntarily made because although the court informed him of the rights he was waiving by entering a guilty plea, it did not repeat that information prior to him entering a no contest plea. To put this argument in context, throughout the hearing, appellant expressed his dissatisfaction with the situation. Shortly before trial, the court

indicated that it would allow testimony regarding appellant's past acts regarding methamphetamine use and production. Consequently, appellant decided to enter into the plea agreement to plead guilty to one count and have the six remaining counts dismissed. After the trial court finished its colloquy, appellant stated, "I'm not doing this. I'm not guilty. You will fight for me." The court then asked appellant if he wished to enter a no contest plea. Counsel and the court then explained what a no contest plea was. Appellant indicated that he wanted to plead no contest, and that he did not have any further questions about the plea. Based on these facts, the trial court did not err by not repeating the plea colloquy it engaged in with appellant only moments before. Appellant was well aware of the consequences of the plea, including the rights he was waiving, and thus his plea of no contest was knowing, intelligent, and voluntary.

B. The Allegations in the Indictment Were Sufficient to Find Appellant Guilty

{¶ 14} As his second argument, appellant contends that the state's recitation of the facts it would have proven at trial could not sustain a finding of guilty. In particular, appellant argues that R.C. 2925.041 requires "possession" of chemicals to complete the offense, however, the state only indicated that appellant "purchased" the chemicals. R.C. 2925.041(A) provides, "No person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II in violation of section 2925.04 of the Revised Code." In contrast, the state offered that, "Between August, 2009 and April, 2010 in Williams County, the Defendant, Barry Robbins, made several

pseudoephedrine purchases at various pharmacies in Williams County with the intent to manufacture methamphetamine."

{¶ 15} However, the state cites to the rule that "where the indictment, information, or complaint contains sufficient allegations to state a felony offense and the defendant pleads no contest, the court must find the defendant guilty of the charged offense." *State v. Bird*, 81 Ohio St.3d 582, 584, 692 N.E.2d 1013 (1998); *see also* Crim.R. 11(B)(2) ("The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding"). Here, the indictment states in relevant part,

> Barry A. Robbins * * * [d]id knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II, to-wit: Barry A. Robbins was in possession of one or more chemicals used in the manufacturing of methamphetamine, a schedule II controlled substance.

{¶ 16} Therefore, applying the rule from *State v. Bird*, we hold that the trial court did not err in finding appellant guilty because the indictment contained sufficient allegations to constitute a violation of R.C. 2925.041(A), a felony of the third degree.

III. Conclusion

{¶ 17} Based on the foregoing, appellant's assignment of error is not well-taken. The judgment of the Williams County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs 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.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE