

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

State of Ohio

Court of Appeals No. L-12-1079

Appellee

Trial Court No. CR0201201308

v.

James Gilmer

DECISION AND JUDGMENT

Appellant

Decided: July 12, 2013

* * * * *

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

Neil S. McElroy, for appellant.

* * * * *

OSOWIK, J.

{¶1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that found appellant guilty of two counts of rape in violation of R.C. 2907.01(A)(2) and (B).

{¶2} Appellant was initially indicted on the two rape charges underlying this case in January 2011. In March 2011, appellant filed a motion for the trial court to determine whether the complaining witness, a child five years of age, was competent to testify. The trial court conducted a hearing on April 8, 2011, and questioned the child pursuant to Evid.R. 601. The court took the matter under advisement and, on April 18, 2011, ruled that the child was competent to testify. The indictment subsequently was nollied and a bill of information was filed on February 24, 2012. On that same date, appellant entered pleas of guilty in accordance with *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Appellant's pleas were accepted and his sentencing hearing was held immediately.

{¶3} The trial court addressed appellant, explaining the consequences of entering an *Alford* plea. After the prosecutor set forth the basis for the charges against appellant, the trial court found that appellant had made a knowing, intelligent and voluntary waiver of his constitutional rights, accepted the *Alford* plea, and found appellant guilty of the two counts of rape. Appellant was sentenced to ten years on each count, to be served consecutively.

{¶4} Appellant now sets forth the following assignments of error:

Assignment of Error No. 1:

The trial court failed to adequately determine whether the child-victim was competent to testify as required by Evid.R. 601(A), R.C. § 2317.01, and the Ohio Supreme Court’s decision in *State v. Frazier*.

Assignment of Error No. 2:

Trial counsel’s failure to object to the trial court’s ruling regarding the competency of the child-witness resulted in a deprivation of Mr. Gilmer’s right to the effective assistance of counsel as guaranteed by the United States Constitution.

{¶5} In support of his first assignment of error, appellant asserts that there was no verification of the truth or accuracy of the answers provided by the witness in response to the trial court’s questions and that, therefore, the trial court failed to adequately determine whether the child victim was competent to testify as required by Ohio law. In support of his second assignment of error, appellant asserts that trial counsel was ineffective for failing to object to the trial court’s competency ruling. These arguments will be considered together.

{¶6} This court has recognized that an *Alford* plea is “a species of a guilty plea, which, in effect, waives a defendant’s right to raise most issues on appeal.” *State v. Ware*, 6th Dist. No. L-08-1050, 2008-Ohio-6944, ¶ 12, quoting *State v. Bryant*, 6th Dist. No. L-03-1359, 2005-Ohio-3352, ¶ 23. The Ohio Supreme Court has held that “[a] defendant who enters a plea of guilty as part of a plea bargain waives all appealable

errors “* * * unless such errors are shown to have precluded the defendant from voluntarily entering into his or her plea pursuant to the dictates of Crim.R. 11(C).” *State v. Witcher*, 6th Dist. No. L-92-354, 1993 WL 558859 (Dec. 30, 1993), quoting *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991), paragraph two of the syllabus. (Other citations omitted.) Accordingly, appellant’s claimed errors are considered herein only to the extent that they may have affected the voluntariness of his *Alford* plea.

{¶7} This court has reviewed the transcript of appellant’s plea hearing, which reveals that the trial court carefully and thoroughly complied with all of the notifications and determinations of Crim.R. 11 prior to finding that appellant knowingly, intelligently and voluntarily entered his plea. *See Ware*, supra. Appellant has not shown that the trial court’s determination affected the voluntariness of his plea. Upon questioning by the trial court, appellant responded repeatedly that he wished to enter the plea. As to appellant’s claim of ineffective assistance of counsel, the record reflects that appellant responded affirmatively when the trial court inquired as to whether he was satisfied with counsel’s representation and competence. Appellant has not shown that trial counsel’s failure to object to the trial court’s determination that the child witness was competent to testify impacted the voluntariness of his *Alford* plea.

{¶8} Based on the foregoing, we find that appellant’s first and second assignments of error are not well-taken.

{¶9} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant 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

<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>
