[Cite as *State v. Drzayich*, 2016-Ohio-1398.]

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

State of Ohio — Court of Appeals No. L-15-1113

Appellee — Trial Court No. CR0201401955

v.

Nicholas Drzayich — **DECISION AND JUDGMENT**

Appellant — Decided: March 31, 2016

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

James J. Popil, for appellant.

* * * * *

JENSEN, P.J.

{¶ 1} Defendant-appellant, Nicholas Drzayich, appeals the March 13, 2015 judgment of the Lucas County Court of Common Pleas. For the reasons that follow, we affirm the trial court judgment.

I. Background

{¶ 2} Nicholas Drzayich was indicted on charges of aggravated burglary, a violation of R.C. 2911.11(A)(1), aggravated robbery, a violation of R.C. 2911.01(A)(3), and two counts of rape, a violation of R.C. 2907.02(A)(2) and (B), after allegedly attacking, sexually assaulting, and stealing cash from K.V., the victim in this case, on May 6, 2014. A fifth count of felonious assault, a violation of R.C. 2903.11(A)(1), was later added by information.

{¶ 3} According to the state, K.V. lived next door to Drzayich's friend at Renaissance Apartments in Toledo. Drzayich often visited his friend and through those visits, he and K.V. became acquainted with one another. On the evening in question, Drzayich and K.V. began talking about a topic of mutual interest, and K.V. invited Drzayich to her apartment for a cup of coffee so they could continue their discussion.

{¶ 4} K.V. brewed a pot of coffee and Drzayich smoked a couple of cigarettes. He then forced K.V. into the washroom where he removed her clothing and forced her to perform fellatio. K.V., who was 57 years old, suffered from cancer and recently had a mastectomy. She was undergoing chemotherapy and had a tube in her chest at the time of the incident.

{¶ 5} After forcing her to perform fellatio, Drzayich then had vaginal intercourse with K.V. At some point, K.V. was able to pull a cord in her apartment that automatically alerted medical services to the location. When she did that, Drzayich took his clothes and fled. K.V. called 9-1-1 and was treated at the hospital. She suffered a

fractured nose and trauma to her vaginal area. A sexual assault evaluation revealed Drzayich's semen inside of her.

{¶ 6} Drzayich absconded to Michigan where he was ultimately apprehended. He had to be extradited back to Ohio. He admitted having sex with K.V., but insisted that it was consensual.

{¶ 7} On January 5, 2015, Drzayich entered a plea of guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to the lesser-included offense of attempted rape, a violation of R.C. 2923.02 and 2907.02(A)(2) and (B), and felonious assault. Before proceeding to sentencing, the court ordered a presentence investigation. On March 11, 2015, after reviewing the PSI, hearing from Drzayich, and hearing a victim's advocate read a letter from K.V., the court sentenced Drzayich to a term of seven years' imprisonment on each count, to be served consecutively. In addition, because Drzayich was on postrelease control in connection with convictions of burglary and attempted aggravated arson in another Lucas County Court of Common Pleas case, No. CR200901917, the court imposed an additional prison term of 478 days, to be served consecutively to the sentence imposed in the present case.

{¶ 8} Drzayich appealed, and assigns the following errors for our review:

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ACCEPTED APPELLANT'S GUILTY PLEA[.]

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO ADVISE APPELLANT OF ALL SENTENCING OPTIONS INCLUDING COMMUNITY CONTROL[.]

II. Law and Analysis

A. First Assignment of Error: Whether the Trial Court Properly Accepted Drzayich's Plea

{¶ 9} In his first assignment of error, Drzayich claims that the trial court erred in accepting his plea because at the plea hearing, the state identified the date of the offense as "May 6" without providing the year that the incident occurred. He also claims that while the state indicated that K.V. arrived at the hospital with a broken nose, it did not present any evidence that Drzayich was responsible for breaking her nose.

{¶ 10} The state counters that (1) the precise date and time of an offense are not essential elements of the crime; (2) the year of the offense was indicated by reference to the indictment; and (3) in common parlance it is understood that when a speaker references a day and month without also referencing the year, the speaker is referring to the year in which that day and month most recently occurred, which, in this case, was 2014. It also contends that the prosecutor's statement describing Drzayich's attack of K.V. and K.V.'s injuries sufficiently conveyed that it was Drzayich who inflicted those injuries.

{¶ 11} Crim.R. 11(C)(A) provides, in pertinent part, that "[a] defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no

contest." A "plea of guilty is a complete admission of the defendant's guilt." Crim.R. 11(B)(1). Under *Alford*, 400 U.S. 25, however, a criminal defendant may enter a plea of guilty while maintaining his or her innocence. A guilty plea entered under *North Carolina v. Alford* "is predicated upon the defendant's desire to obtain a lesser penalty rather than risk the consequences of a jury trial." *State v. Krieg*, 9th Dist. Lorain No. 04CA008442, 2004-Ohio-5174, ¶ 9, citing *State v. Piacella*, 27 Ohio St.2d 92, 271 N.E.2d 852 (1971), syllabus. It is a "species" of guilty plea. *State v. Watson*, 6th Dist. Lucas No. L-13-1089, 2014-Ohio-2839, ¶ 16.

{¶ 12} A plea of guilty is generally regarded as an admission of every material fact well-pleaded in the indictment and dispenses with the necessity of proving those facts. *State v. Moreno*, 6th Dist. Wood No. WD-86-52, 1987 WL 8919, *2 (Mar. 31, 1987), citing *Craig v. State*, 49 Ohio St. 415, 418, 30 N.E. 1120 (1892). Once a guilty plea is offered and accepted and judgment is rendered on the basis of that guilty plea, the ability to challenge the judgment on appeal is limited to issues involving the subject-matter jurisdiction of the court which accepted the plea, and the extent to which the plea was made knowingly, voluntarily, and intelligently. *State v. Burgette*, 6th Dist. Lucas No. L-89-146, 1990 WL 31763, *3 (Mar. 23, 1990).

{¶ 13} An *Alford* plea is procedurally indistinguishable from a guilty plea in that it severely limits the errors which may be claimed on appeal. *State v. McDay*, 6th Dist. Lucas No. L-96-027, 1997 WL 243584, *2 (May 9, 1997). It differs, however, in that before accepting an *Alford* plea, the trial court must evaluate the reasonableness of the

defendant's decision to plead guilty notwithstanding the protestation of innocence. *State v. Karsikas*, 11th Dist. Ashtabula No. 2014-A-0065, 2015-Ohio-2595, ¶ 18. This requires a presentation of some basic facts surrounding the charge from which the court may determine whether the accused has made an intelligent and voluntary guilty plea. *Krieg* at ¶ 14.

{¶ 14} Drzayich in his first assignment of error essentially argues that by failing to reference the year in its statement to the court, the state failed to provide a sufficient factual basis to support each and every element of the charges. Drzayich's argument fails for a number of reasons.

{¶ 15} First, in *State v. Battitaglia*, 6th Dist. Ottawa Nos. OT-09-009, OT-09-010, 2010-Ohio-802 , ¶ 21, 24, we rejected the defendant's contention that the state was required to present facts going to each element of the offense where he had entered an *Alford* plea, observing that Crim.R. 11 contains no such requirement. Second, the precise date and time is not an element of the offenses of which Drzayich was convicted. And in any event, while the oral presentation of facts did not include the year, the year was set forth in the indictment and information, which were part of the record. *See State v. Remines*, 9th Dist. Lorain No. 97CA006700, 1998 WL 103350, *2 (Feb. 25, 1998) (concluding that factual basis for *Alford* plea was presented where trial court had before it a bill of particulars).

{¶ 16} With respect to the felonious assault charge, the state in its oral presentation of facts indicated that Drzayich attacked K.V. and that the sexual assault

examination revealed that K.V. suffered both a fractured nose and injury to her vaginal area. This information was sufficient to apprise the court of the "basic facts" surrounding the charges.

{¶ 17} We find Drzayich's first assignment of error not well-taken.

B. Second Assignment of Error: Whether the Trial Court Properly Advised Drzayich of the Potential Sentence.

{¶ 18} In his second assignment of error, Drzayich claims that the trial court failed to properly advise him of the maximum potential sentence he was facing and the effect of his plea. First, he contends that the court failed to tell him that he was eligible for community control, what the potential penalties would be if he was granted community control and violated it, and what the possible maximum length of community control would be. Second, he contends that the court did not make clear whether additional prison time for violating the terms of postrelease control was merely possible or whether it would definitely be imposed.

{¶ 19} In response, the state counters that Drzayich was properly advised of his potential sentence, and even if he was not, there was no prejudice. It claims that the alleged failure to advise Drzayich about the potential for community control would prejudice him only if he had been advised that he was eligible for community control when he, in fact, was not eligible. The state reasons that in that situation, Drzayich may have been more likely to have been coerced into a plea because of the possibility of probation.

{¶ 20} Community control was explained in the plea form Drzayich signed after consulting with his attorney. It states: "I understand the MAXIMUM penalty COULD be a maximum basic prison term of 16 years of which -0- is mandatory, during which I am ~~NOT~~ eligible for judicial release or community control." It goes on to say that "If I am eligible and am granted community control at any point in my sentence, and if I violate any of the conditions imposed, I could receive a longer period under court control, greater restrictions, or a prison term from the basic range. Community Control could last five years."

{¶ 21} But under Crim.R. 11(C)(2)(a), the trial court:

> shall not accept a plea of guilty or no contest without first addressing the defendant personally and * * * [d]etermining 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.

{¶ 22} Thus, the rule makes clear that the trial court must orally advise a defendant of his or her *ineligibility* for community control. There is no converse requirement that the trial court advise the defendant that he or she is *eligible* for community control. *See State v. Floyd,* 4th Dist. Scioto No. 92CA2102, 1993 WL 415287, *6 (Oct. 13, 1993) ("[A] trial court is under no duty pursuant to Crim.R. 11(C)(2) to inform a defendant about his eligibility for probation; Crim.R. 11(C)(2) only

requires the court to advise a defendant entering a guilty plea of his/her *ineligibility* for probation."). Moreover, because the trial court did not impose community control, it had no obligation to inform Drzayich of the length of community control or the consequences of violating community control.

{¶ 23} In addition to advising a defendant of the maximum penalty involved under Crim.R. 11(C)(2)(a), section (b) requires the court to advise the defendant of the effect of his or her plea. The trial court must substantially comply in carrying out this obligation. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 14. "'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.* at ¶ 15, quoting *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶ 24} Although not entirely clear, Drzayich seems to be arguing that the trial court failed to properly advise him of the effect of his plea because it did not make clear whether the maximum sentence to be imposed was "16 years prison plus potential post release control time or 16 years plus post release control time." The written plea form indicated that if he was "now on felony probation, parole, or community control, this plea may result in revocation proceedings and any new felony sentence shall be imposed consecutively."

{¶ 25} In *State v. Dotson*, 8th Dist. Cuyahoga No. 101911, 2015-Ohio-2392, ¶ 13, the court held that the trial court did not violate Crim.R. 11(C) by failing to inform the defendant that by pleading guilty to a new felony offense while on postrelease control for

a prior felony conviction, the court was authorized to terminate the remainder of the postrelease control, impose a prison term for the violation, and run the prison term consecutive to the new sentence. Here, in fact, the trial court did advise Drzayich of this potential, and this was made even clearer in the plea form that he signed after consultation with his attorney. In addition, the court advised Drzayich that he faced a maximum potential prison sentence of 16 years; he received a sentence of 14 years for the new offense, plus 478 days for the postrelease control violation—less than 16 years.

{¶ 26} We find Drzayich's second assignment of error not well-taken.

III. Conclusion

{¶ 27} For the foregoing reasons, we find Drzayich's assignments of error not well-taken and affirm the March 13, 2015 judgment of the Lucas County Court of Common Pleas. The costs of this appeal are assessed to Drzayich under 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.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, P.J. _____
CONCUR.
JUDGE