

[Cite as *State v. Penna*, 2009-Ohio-4967.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 08 MA 142
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
KEITH PENNA,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 07 CR 1500.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Attorney Paul J. Gains
Prosecuting Attorney
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For Defendant-Appellant: Attorney Katherine E. Rudzik
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JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: September 11, 2009

[Cite as *State v. Penna*, 2009-Ohio-4967.]
DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this court. Defendant-Appellant, Keith Penna, appeals the decision of the Mahoning County Court of Common Pleas convicting him of one count of criminal damaging, and sentencing him accordingly. On appeal, Penna argues that his plea was not knowing, voluntary, and intelligent because the trial court (1) failed to inform him of all the elements of criminal damaging, and (2) allegedly "led him to believe" he would only receive probation as a sentence.

{¶2} Upon review, Penna's arguments are meritless. Penna pled guilty to criminal damaging, pursuant to R.C. 2909.06(A)(1)(B), which is a petty offense. Crim.R. 2(D). The trial court's acceptance of his plea to that charge is thus governed by Crim.R. 11(E). In accepting Penna's guilty plea, the trial court substantially complied with Crim.R. 11(E). Penna was informed of the effect of a guilty plea, both in writing and during the plea hearing. Contrary to Penna's contentions, the trial court was not required to inform him about each and every element of criminal damaging during the plea hearing. All that is required by Crim.R. 11(E) is that the trial court inform the criminal defendant about the effect of his plea.

{¶3} In addition, Penna's argument that his plea was not knowing, voluntary and intelligent because the trial court led him to believe he would receive a sentence of probation is meritless. During the plea hearing, the trial court clearly forewarned Penna that it was not bound by the sentence recommended in the plea agreement, and also advised Penna he could receive the maximum sentence of six months in jail. Penna's plea was knowing, voluntary and intelligent. Accordingly, the judgment of the trial court is affirmed.

Facts

{¶4} On October 3, 2007, Penna was charged by complaint in the Youngstown Municipal Court, with one count of vandalism, pursuant to R.C. 2909.05(B)(1)(a), a fifth degree felony, for damaging a laptop computer owned and used for business purposes by Robert Mocker. Penna subsequently appeared in Municipal Court, waived a preliminary hearing, and requested the matter be bound

over to the Mahoning County Common Pleas Court for further action by the Grand Jury.

{¶15} On December 20, 2007, Penna was indicted by the Mahoning County Grand Jury on one count of vandalism, pursuant to R.C. 2909.05(B)(1)(b)(E), also a fifth-degree felony. Penna initially pled not guilty and counsel was appointed. After a pre-trial, the matter was set for a change of plea hearing on February 28, 2008. Penna failed to appear at that hearing, and a bench warrant was issued. Following his eventual apprehension, a plea hearing was held on July 3, 2008, during which the State indicated the parties had reached a Crim.R. 11(F) plea agreement. Pursuant to that agreement, Penna agreed to plead guilty to one amended count of criminal damaging, a misdemeanor of the first degree. R.C. 2909.06(A)(1)(B). In exchange, the State agreed to dismiss the vandalism charge and to recommend two years of community control, \$1,500.00 in restitution, and that Penna have no contact with the victim in this case. The trial court then held a colloquy with Penna, where it explained the nature of the charge, the effect of a guilty plea thereto, and the rights Penna waived by so pleading. Penna indicated his complete understanding. The trial court then accepted the guilty plea as knowing, voluntary and intelligent.

{¶16} The case proceeded immediately to sentencing. Both sides indicated that Penna had already paid the \$1,500.00 in restitution to the victim. The trial court asked Penna if he had anything to say in mitigation of his sentence and Penna made a brief statement of apology. The trial court then questioned Penna about why he had failed to appear for the plea hearing that was scheduled on February 28, 2008. Penna replied that he had travelled to Las Vegas to get married. The court noted that Penna did not have permission to do so, and that a bench warrant for his arrest had been pending for five months. The trial court further noted that Penna had prior criminal convictions in several other states. At the close of the hearing, the court sentenced Penna to the maximum term of six months in the Mahoning County Justice Center. The court did not order any fines since Penna had paid restitution, however, the court ordered Penna to pay costs. After the trial court pronounced its sentence, Penna

stated: "I thought I was going to get probation for this."

{¶7} Subsequently, Penna filed a motion to stay the execution of his sentence pending appeal, and a motion to modify his sentence, both of which were overruled by the trial court. Penna then requested a stay of execution of sentence pending appeal with this court, which we granted pursuant to Local Rule I(B)(2).

Guilty Plea

{¶8} Penna asserts as his sole assignment of error on appeal:

{¶9} "The trial court erred when it accepted the Defendant-Appellant's guilty plea as it was not knowing, willing, and voluntary."

{¶10} In a criminal case, a plea must be made "knowingly, intelligently, and voluntarily." *State v. Engle* (1996), 74 Ohio St.3d 525, 527, 660 N.E.2d 450. Failure on any of these points "renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *Id.* A determination of whether a plea is knowing, intelligent, and voluntary is based upon a review of the record. *State v. Spates* (1992), 64 Ohio St.3d 269, 272, 595 N.E.2d 351.

{¶11} To help ensure that guilty pleas are knowingly, intelligently, and voluntarily made, Crim.R. 11 sets forth specific procedural requirements the trial judge must follow when accepting a guilty plea from a defendant. "A trial court's obligations in accepting a plea depend upon the level of offense to which the defendant is pleading." *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, at ¶6. There are distinct procedures required depending on the classification of the offense involved. Crim.R. 11(C)(2) applies to felony cases only. *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, 788 N.E.2d 635, at ¶27. Crim.R. 11(D) applies to cases involving "serious offenses." See *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, at ¶2. A "serious offense" means "any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months." Crim.R. 2(C). Finally, Crim.R. 11(E) applies to misdemeanors involving "petty offenses." A "petty offense" means "a misdemeanor other than [a] serious offense." Crim.R. 2(D).

{¶12} This case involved a guilty plea to first-degree misdemeanor criminal damaging. R.C. 2909.06(A)(1)(B). A first-degree misdemeanor is punishable by a definite term of not more than 180 days in jail. R.C. 2929.24(A)(1). Therefore, the trial court was only required to adhere to Crim.R. 11(E) when accepting Penna's guilty plea.

{¶13} Crim.R. 11(E) provides:

{¶14} "In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty." Crim.R. 11(E).

{¶15} Advising the defendant of the effect of his plea pursuant to Crim.R. 11(E) means the trial court must "inform the defendant of the appropriate language under Crim.R. 11(B)." *Jones* at ¶25. Crim.R. 11(B)(1) defines the effect of a plea of guilty, as "a complete admission of the defendant's guilt." Crim.R. 11(B)(1). This information must be given to the defendant either orally or in writing, prior to the acceptance of his plea. *Jones* at ¶51.

{¶16} "The right to be informed that a guilty plea is a complete admission of guilt is nonconstitutional and therefore is subject to review under a standard of substantial compliance. *State v. Nero* [1990], 56 Ohio St.3d [106], 107, 564 N.E.2d 474. Though failure to adequately inform a defendant of his constitutional rights would invalidate a guilty plea under a presumption that it was entered involuntarily and unknowingly, failure to comply with nonconstitutional rights will not invalidate a plea unless the defendant thereby suffered prejudice. *Id.* at 108, 564 N.E.2d 474. The test for prejudice is 'whether the plea would have otherwise been made.' *Id.* Under the substantial-compliance standard, we review the totality of circumstances surrounding [the defendant's] plea and determine whether he subjectively understood that a guilty plea is a complete admission of guilt. *Id.*" *Griggs* at ¶12.

{¶17} In this case, the written plea agreement signed by Penna and the prosecutor explained the effect of a guilty plea. Specifically, it stated: "I understand

that a plea of guilty is a complete admission of guilt as to the charge(s) contained herein." In addition, during the plea hearing, the trial court had the following colloquy with Penna:

{¶18} "THE COURT: Okay. By entering a plea - - I'm required to go over this with you one more time. By entering a plea, you're admitting that's what you did. Understand that?

{¶19} "THE DEFENDANT: (Nods head)

{¶20} "THE COURT: You have to answer out loud.

{¶21} "THE DEFENDANT: Oh. Yes."

{¶22} Based on the foregoing, the trial court substantially complied with Crim.R. 11(E). Nonetheless, Penna contends his plea was unknowing because the trial court failed to recite to him the precise elements of first-degree-misdemeanor criminal damaging, the amended charge to which he pled guilty. During the plea hearing, Penna did inform the trial court that he was not entirely familiar with the meaning of the offense of criminal damaging. After attempts by both defense counsel and the prosecutor to define the offense, the trial court offered the following definition: "[h]e intentionally damaged another person's property without privilege." As Penna correctly points out, this definition is technically incomplete in that it leaves out an element of first-degree misdemeanor criminal damaging.

{¶23} The offense of criminal damaging is defined by R.C. 2909.06, which states in pertinent part:

{¶24} "(A) No person shall cause, or create a substantial risk of physical harm to any property of another without the other person's consent:

{¶25} "(1) Knowingly, by any means;

{¶26} "(2) * * *;

{¶27} "(B) Whoever violates this section is guilty of criminal damaging or endangering, a misdemeanor of the second degree. *If a violation of this section creates a risk of physical harm to any person, criminal damaging or endangering is a misdemeanor of the first degree.* * * *" R.C. 2909.06(A)(1)(B) (emphasis added).

{¶28} In this case, Penna pled guilty to first-degree misdemeanor criminal damaging, which differs from second-degree misdemeanor criminal damaging in that it requires the additional element of "a risk of physical harm to any person." R.C. 2909.06(B). The trial court omitted this element when defining the offense, and instead provided a definition that more closely mirrors second-degree misdemeanor criminal damaging. This distinction is significant because a change in the degree of the offense changes the maximum sentence. A first-degree misdemeanor carries a maximum sentence of six months in jail, whereas a second-degree misdemeanor carries a maximum sentence of three months in jail. R.C. 2929.24(A)(1)-(2). Penna contended at oral argument that this distinction is prejudicial.

{¶29} However, the trial court in this case explained to Penna, both orally and in writing, that the crime to which he pled carried a maximum sentence of six months in jail. Moreover, all that is required by Crim.R. 11(E) is that the trial court inform the defendant of the effect of his plea, which was done in this case, both orally and in writing. Although we find the trial court's incomplete definition troubling, we cannot conclude that Penna's plea was unknowing for this reason. Although the trial court omitted an element of the crime, the elements it did recite were correct, and they sufficiently conveyed the essence of the crime to which Penna pled. Finally, the crux of Penna's challenge is that the trial court *imposed* a jail sentence, not its length.

{¶30} Penna also argues that his plea was not knowing, voluntary and intelligent because the trial court somehow "led him to believe" he would receive probation during the plea hearing. This argument is also meritless. As part of the written Crim.R. 11(F) plea agreement, the State agreed to recommend that Penna receive as a sentence two years of community control, pay \$1,500.00 in restitution and have no contact with the victim. Following a sentencing hearing, the trial court chose to deviate from that recommended sentence, and sentenced Penna to the maximum sentence of six months in jail.

{¶31} Deviation from the jointly recommended sentence does not necessarily constitute error. "A trial court does not err by imposing a sentence greater than 'that

forming the inducement for the defendant to plead guilty when the trial court forewarns the defendant of the applicable penalties, including the possibility of imposing a greater sentence than that recommended by the prosecutor." *State v. Buchanan*, 154 Ohio App.3d 250, 2003-Ohio-4772, 796 N.E.2d 1003, at ¶13, quoting *State v. Pettiford* (Apr. 22, 2002), 12th Dist. No. CA2001-08-014, at 3, citing *State v. Darmour* (1987), 38 Ohio App.3d 160, 529 N.E.2d 208. See also, *State v. Martinez*, 7th Dist. No. 03MA196, 2004-Ohio-6806 at ¶7-9.

{¶32} In the instant case, the trial court fully forewarned Penna about the penalties for his crimes, including the possibility that the court may deviate from the sentence recommended by the State. The following exchange took place during the plea hearing:

{¶33} "THE COURT: Also, by entering a plea, no matter what's agreed upon, I'm the one that determines sentence.

{¶34} "THE DEFENDANT: Yes.

{¶35} "THE COURT: I do not have to follow any agreement. Do you understand that?

{¶36} "THE DEFENDANT: Yes.

{¶37} "THE COURT: And the maximum penalty for criminal damaging is six months in the Mahoning County Justice Center and a \$1,000 fine. Do you understand that?

{¶38} "THE DEFENDANT: Yes."

{¶39} Penna argues he believed the trial court's above statements were merely "boilerplate," and that the trial court somehow led him to believe he would only receive probation. He likens this case to *State v. Asberry*, 173 Ohio App.3d 443, 2007-Ohio-5436, 878 N.E.2d 1082, where the Eighth District vacated the defendant's plea as unknowingly made. However, *Asberry* is distinguishable because that case turned on the fact that the defendant was not forewarned during the plea hearing that the sentencing court would not be bound by the terms of the plea agreement. *Id.* at ¶42. By contrast, in the present case, the trial court clearly forewarned Penna, several

times, that it was not bound by the State's sentencing recommendation contained in the plea agreement. Accordingly, this argument is also meritless.

Conclusion

{¶40} Penna's sole assignment of error is meritless. Penna pled guilty to criminal damaging, which is a petty offense. The trial court's acceptance of Penna's plea to that charge is thus governed by Crim.R. 11(E). The trial court substantially complied with Crim.R. 11(E) by informing Penna of the effect of a guilty plea, both in writing and during the plea hearing. Contrary to Penna's contentions, the trial court was not required to inform him about each and every element of criminal damaging during the plea hearing. All that is required by Crim.R. 11(E) is that the trial court inform the criminal defendant as to the effect of his plea. In addition, Penna's argument that his plea was not knowing, voluntary and intelligent because the trial court supposedly led him to believe he would receive a sentence of probation is meritless. During the plea hearing, the trial court clearly forewarned Penna that it was not bound by the sentence recommended in the plea agreement, and also advised him he could receive the maximum sentence of six months in jail. Penna's plea was knowing, voluntary and intelligent. Accordingly, the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.