[Cite as *State v. Exline*, 2007-Ohio-272.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87945

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GEORGE EXLINE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-474827

BEFORE: McMonagle, J., Sweeney, P.J., and Calabrese, J.

RELEASED: January 25, 2007

JOURNALIZED:

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CHRISTINE T. McMONAGLE, J.:

{¶1} George Exline, defendant-appellant, was indicted in September 2005 by a Cuyahoga County Grand Jury on one count of felonious assault, a felony of the second degree in violation of R.C. 2903.11 and one count of domestic violence with notice of a prior conviction, a felony of the fourth degree in violation of R.C. 2919.25.

{¶2} On February 27, 2006, appellant withdrew his previously entered not guilty plea and pled guilty to count one, amended to attempted felonious assault, a felony of the third degree, and count two as indicted. The State and

the defense agreed to a recommended three-year sentence as part of the plea negotiation.

{¶3} The court accepted appellant's plea and immediately proceeded to sentencing. After noting the agreed recommended sentence, the court stated that it was not going to adopt it and sentenced appellant to the maximum five-year term on the felonious assault and 18 months on the domestic violence, to be served concurrently. Appellant now appeals, challenging the court's acceptance of his plea and his maximum sentence. For the reasons that follow, we affirm the judgment of the trial court.

{¶4} In his first assignment of error, appellant contends that his plea was not knowingly, voluntarily and intelligently made.[1] In particular, appellant challenges the plea on two grounds: the trial court's failure to advise him that he was waiving the right to testify at trial and the trial court's failure to advise him that was waiving the right to assert self-defense. We are not persuaded by appellant's arguments.

{¶5} In *State v. Nero* (1990), 56 Ohio St.3d 106, 564 N.E.2d 474, the Supreme Court of Ohio discussed the requirements for a voluntary plea:

{¶6} "Ohio Crim.R. 11(C) was adopted in order to facilitate a more accurate determination of the voluntariness of a defendant's plea by ensuring an adequate record for review. *State v. Stone* (1975), 43 Ohio St.2d 163, 167-168, 72

[1]Appellant did not file a motion to vacate his plea at the trial court level.

O.O.2d 91, 94, 331 N.E.2d 411, 414; *State v. Stewart* (1977), 51 Ohio St.2d 86, 92-93, 5 O.O.3d 52, 56, 364 N.E.2d 1163, 1167; *State v. Scott* (1974), 40 Ohio App.2d 139, 144, 69 O.O.2d 152, 155, 318 N.E.2d 416, 420. Crim.R. 11(C)(2) requires the trial judge to personally inform the defendant of the constitutional guarantees he waives by entering a guilty plea. The United States Supreme Court held in *Boykin v. Alabama* (1969), 395 U.S. 238, 242-243, 23 L. Ed. 2d 274, 89 S. Ct. 1709, that in order for a reviewing court to determine whether a guilty plea was voluntary, the United States Constitution requires the record to show that the defendant voluntarily and knowingly waived his constitutional rights. The court specified these rights as (1) the Fifth Amendment privilege against compulsory self-incrimination, (2) the right to trial by jury, and (3) the right to confront one's accusers. Id. at 243.

{¶7} "In addition to the constitutional duty to inform, Crim.R. 11(C) requires the trial judge to tell the defendant certain other matters before accepting a guilty plea. *State v. Johnson* (1988), 40 Ohio St.3d 130, 132-133, 532 N.E.2d 1295, 1297-1298, certiorari denied (1989), 489 U.S. 1098, 103 L. Ed. 2d 940, 109 S. Ct. 1574. Specifically, Crim.R. 11(C)(2) requires:

{¶8} "'(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:

{¶9} "'(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.

{¶10}"'(b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.

{¶11}"'(c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself.'" *Nero* at 107-108, quoting Crim.R. 11(C)(2).

{¶12}In *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, the Supreme Court of Ohio distinguished between advising a defendant of constitutional rights and nonconstitutional rights under Crim.R. 11, stating:

{¶13}"The information *** required by Crim.R. 11 ensures that defendants enter pleas with knowledge of rights that they would forego and creates a record by which appellate courts can determine whether pleas are entered voluntarily. See *Nero* [supra]; see, also, *State v. Ballard* (1981), 66 Ohio St.2d 473, 479-480, 20 O.O.3d 397, 423 N.E.2d 115.

{¶14}"*** 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. [*Nero*] at 108. The test for prejudice is 'whether the plea would have otherwise been made.'" *Griggs* at ¶11-12, quoting *Nero* at 108.

{¶15}In this case, the trial court personally addressed appellant and advised him of all the rights set forth under Crim.R. 11 before accepting his guilty plea. The court advised him of his right to a jury trial, to have his attorney cross-examine witnesses against him, and to have his attorney subpoena or bring forth witnesses on his behalf, and that the State was required to prove his guilt beyond a reasonable doubt at a trial at which he could not be forced to testify against himself. Appellant responded that he understood all of the above.

{¶16}The court also advised appellant of the potential prison term and fine that could be imposed upon him. Appellant indicated that he understood. Moreover, the court asked appellant if he understood that it was not under any obligation to impose the agreed recommended sentence, and appellant responded that he understood. The court reiterated its position on sentencing at the conclusion of the plea hearing, asking appellant if he understood "that I am not promising you any particular sentence in order to get you to enter into this plea agreement?" Appellant responded that he understood.

{¶17}In regard to appellant's argument that his plea was invalid because the trial court failed to advise him that he was waiving the right to testify at trial, this court addressed this issue in *State v. Ip*, Cuyahoga App. No. 86243, 2006-Ohio-2303. Specifically, this court noted the following:

{¶18} "Crim.R. 11 requires the trial court to, among other things, advise defendant he 'cannot be compelled to testify against himself.' The trial court specifically advised defendant 'you have the right to remain silent, not to testify at trial and no one can comment on the fact that you did not testify at trial.' Accordingly, the trial court strictly complied by informing defendant of the constitutional rights enumerated in Crim.R. 11.

{¶19}"The right to testify is not specifically enumerated in Crim.R. 11 ***." Id. at ¶30-31. (Internal citations to record omitted.)" See, also, *State v. Anderson*, Cuyahoga App. No. 87309, 2006-Ohio-5431.

{¶20}Accordingly, appellant's argument that his plea was invalid because the court did not inform him that he had the right to testify at trial is without merit.

{¶21}Similarly, appellant's argument that his plea was invalid because the trial court failed to advise him that he was waiving the right to assert self-defense is meritless. In *State v. Black*, Cuyahoga App. No. 87641, 2006-Ohio-5720, this court addressed this issue, stating that:

{¶22}"Crim R. 11 does not require a trial court to inform a defendant of possible affirmative defenses prior to accepting a plea. *State v. Reynolds* (1988), 40 Ohio St.3d 334, 533 N.E.2d 342. In particular, in *Reynolds*, the Supreme Court of Ohio noted that affirmative defenses are not elements of a charge and, thus, 'the trial court is not required to apprise [a] defendant of the availability of *** defenses prior to accepting a guilty plea to the charge and its failure to do so will not defeat a finding of 'substantial compliance' with Crim.R. 11(C).' Id. at 336." *Black* at ¶20.

{¶23}Based upon the Supreme Court's holding in *Reynolds* and this court's holding in *Black*, appellant's argument that his plea was invalid because the trial court failed to advise him that he was waiving the right to claim self-defense is without merit.

{¶24}Accordingly, appellant's first assignment of error is overruled.

{¶25}In his second assignment of error, appellant contends that the trial court sentenced him to the maximum term without considering the mitigating factors pursuant to R.C. 2929.12. Appellant bases his argument on the fact that the trial court did not have a presentence investigation report, which would have set forth the mitigating factors, if any. We are not persuaded.

{¶26}Initially, we note that appellant neither requested a presentence investigation report nor objected to the court sentencing him without one. Moreover, Crim.R. 32.2, governing presentence investigations, mandates that

such reports are required only in instances when the court imposes community control sanctions or probation. Thus, as appellant was sentenced to a prison term, there was no requirement that the court order a presentence investigation report.

{¶27}A trial court has broad discretion in sentencing within the statutory limits and a reviewing court will not interfere with the sentence unless the trial court abused its discretion. *State v. Dultmeyer* (1993), 85 Ohio App.3d 81, 83, 619 N.E.2d 91. R.C. 2929.12(C) requires the trial court to consider certain criteria before imposing sentence. Those factors include whether the victim induced or facilitated the offense, whether the offender acted under strong provocation, whether the offender did not cause or expect to cause physical harm to any person or property, and whether there are substantial grounds to mitigate the offender's conduct. The court need not state in the record that it considered the criteria. *State v. Koons* (1984), 14 Ohio App.3d 289, 470 N.E.2d 922. It is presumed the factors were considered and it is for the defendant to rebut this presumption. *State v. Cyrus* (1992), 63 Ohio St.3d 164, 166, 586 N.E.2d 94.

{¶28}The trial court did not specifically state that it was making findings pursuant to R.C. 2929.12(C). However, appellant in essence argued the R.C. 2929.12(C) mitigating factors when he addressed the court. Specifically, he argued that the victim's (his wife) mental health issues precipitated his conduct, that he was defending himself from the victim and never intended to cause her

harm, and the only way he could have prevented the incident would have been to have left the relationship years earlier.

{¶29}After hearing appellant's argument, and in pronouncing sentence, the court noted appellant's two prior cases of domestic violence, two probation violations, and indictment on this case seven months after being released from prison. The court also noted the physical injuries the victim suffered, including a broken eye socket and permanent injury to a finger. The court told appellant that his case was the reason "why I never lock myself into a sentence[,]" explaining that:

{¶30}"Even though the State of Ohio feels that three years is an appropriate sentence in this case, based upon your comments in this courtroom, I do not.

{¶31}"You clearly fail to see what you did is wrong. You had every opportunity to leave this scene but you chose to stay and punish your wife in the most brutal of manners.

{¶32}"Frankly I do not understand why a man who survives what he claims to be a terrible altercation with a knife doesn't have one cut on his body from that knife. *** [Y]ou could have left the house without any injury to either you or your wife.

{¶33}"But to come in here and tell me otherwise and claim that you're the victim of your wife's bipolarism is offensive."

{¶34}Upon review, we find that appellant has failed to rebut the presumption that the trial court considered the R.C. 2929.12(C) mitigating factors. Based upon the record before us and the presumption that the trial court did consider the R.C. 2929.12 factors, we find that the trial court properly sentenced appellant.

{¶35}Accordingly, appellant's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

JAMES J. SWEENEY, P.J., and
ANTHONY O. CALABRESE, JR., J., CONCUR