[Cite as *State v. Taylor*, 2009-Ohio-2392.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91898

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM TAYLOR

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas

Case No. CR-501814

BEFORE: Dyke, J., Rocco, P.J., and Blackmon, J.

RELEASED: MAY 21, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

David L. Doughten, Esq.
The Brownhoist Building
4403 St. Clair Avenue
Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEE

William D. Mason, Esq.
Cuyahoga County Prosecutor
By: Gregory Mussman, Esq.
Asst. County Prosecutor
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

{¶1} Defendant-appellant, William Taylor ("appellant"), appeals the trial court's acceptance of his no contest plea. For the reasons provided below, we reverse and remand.

{¶2} On October 15, 2007, the Cuyahoga County Grand Jury indicted appellant on four counts: two counts of drug trafficking in violation of R.C. 2925.03(A)(1), one count of drug trafficking in violation of R.C. 2925.03(A)(2), and one count of drug possession in violation of R.C. 2925.11(A). Two of the drug possession charges also had a schoolyard specification in violation of R.C. 2925.03(C)(2)(b). Initially, appellant pled not guilty to all charges in the indictment.

{¶3} On June 9, 2008, after informing appellant of his rights pursuant to Crim.R. 11(C), the trial court accepted appellant's pleas of no contest with the condition that the court conduct an evidentiary hearing to determine whether the state had sufficient evidence establishing the schoolyard specification. Two days later, the court conducted said hearing and heard the testimony of Thomas M. Snezek and Kevin P. Monnolly regarding the location of the drug offenses and the location of the school to determine whether the drug offenses occurred within 1000 feet of the boundaries of a school premises.

{¶4} At the summation of the state's case, appellant's counsel attempted to introduce the testimony of Brian Draper, an individual who would present measurements regarding the schoolyard specifications different than those presented by the state. The trial court refused to allow Draper's testimony, noting that when a defendant pleads no contest, he or she pleads to the facts as the state

has presented them. At that time, appellant's counsel, the court, and the state engaged in a discussion regarding the significance of the hearing and the effect of appellant's no contest plea.

{¶5} Thereafter and after hearing the state's evidence, the trial court found appellant guilty of all offenses as well as the schoolyard specifications. The court sentenced appellant to five years of community control sanctions, ordered he participate in a work release program for 270 days, complete 200 hours of community service, submit to random drug tests, and attend AA/NA meetings.

{¶6} Appellant now appeals and presents two assignments of error for our review. In the interests of convenience, we will address his second assignment of error first. This assignment of error states:

{¶7} "The trial court abused its discretion by accepting the appellant's invalid plea."

{¶8} Here, appellant argues the trial court erred in accepting his plea of no contest because he did not enter the plea knowingly, voluntarily, and intelligently. He argues that the record demonstrates that he misunderstood the effects of the no contest plea. For the following reasons, we agree with appellant.

{¶9} We review de novo the trial court's acceptance of a plea in compliance with Crim.R. 11(C) and the requirements of due process. *State v. Sample*, Cuyahoga App. No. 81357, 2003-Ohio-2756; *State v. Jones*, Cuyahoga App. No. 79811, 2002-Ohio-1271. In order to satisfy these requirements, the record must demonstrate that a plea of no contest was made knowingly, intelligently, and

voluntarily. *State v. Farley*, Lawrence App. No. 02CA32, 2003-Ohio-7338. To meet that standard, the plea must be made with a full understanding of its consequences. *State v. Bowen* (1977), 52 Ohio St.2d 27, 28, 368 N.E.2d 843. Moreover, a defendant who challenges his no contest plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. See *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. The test is whether the plea would have otherwise been made. Id.

{¶10} Crim.R. 11(C)(2) requires:

{¶11} "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:

{¶12} "(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.

{¶13} "(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.

{¶14} "(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."

{¶15} In determining whether the trial court has satisfied its duties under Crim.R. 11 in taking a plea, reviewing courts have distinguished between constitutional and non-constitutional rights. See *State v. Higgs* (1997), 123 Ohio App.3d 400, 402, 704 N.E.2d 308; *State v. Gibson* (1986), 34 Ohio App.3d 146, 147, 517 N.E.2d 990. The trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights. See *State v. Stewart* (1977), 51 Ohio St.2d 86, 88-89, 364 N.E.2d 1163; *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, paragraph one of the syllabus. "Strict compliance" does not require an exact recitation of the precise language of the rule; [r]ather, the focus, upon review, is whether the record shows that the trial court explained or referred to the right in a manner reasonably intelligible to that defendant." *Ballard*, supra at 479-480.

{¶16} With regard to the non-constitutional rights enumerated in Crim.R. 11, only substantial compliance is required. *Stewart*, supra at 93; *Nero*, supra at 108. "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." *Nero*, supra.

{¶17} The right to understand the effect of his no contest plea is a non-constitutional right. See *Nero*, supra; *Sample*, supra; *State v. Clark*, Cuyahoga App. No. 79386, 2002-Ohio-15. Accordingly, we review the record to determine whether appellant subjectively understood the implications of his no contest plea.

{¶18} To understand the effect of a no contest plea pursuant to Crim.R.

11(C)(2)(b), one must first consider Crim.R. 11(B)(2), which provides:

{¶19} "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."

{¶20} There is no exact test to determine whether a defendant subjectively understands the effect of his no contest plea. See *State v. Carter* (1979), 60 Ohio St.2d 34, 38, 396 N.E.2d 757. In order to ensure a defendant does understand the effect, a court must look to all the particular facts and circumstances surrounding the case. Id., citing *Johnson v. Zerbst* (1938), 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461, overruled in part on other grounds by *Edwards v. Arizona* (1981), 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880.

{¶21} After reviewing the transcript of the proceedings of the evidentiary hearing regarding the schoolyard specifications, which occurred only days after appellant pled no contest, it is clear that his plea was based upon an erroneous interpretation of the effect of a no contest plea, and thus, was not made knowingly, voluntarily, or intelligently.

{¶22} At the evidentiary hearing, the trial court and appellant's counsel engaged in the following discussion after appellant attempted to introduce the testimony of Brian Draper, an individual who would present different measurements regarding the schoolyard specifications:

{¶23} "THE COURT: When you plead no contest you are pleading to the

facts as the State would have presented them.

{¶24} "[DEFENSE COUNSEL]: I am just saying we have opposing facts.

{¶25} "THE COURT: Yes. But a plea of no contest is a plea to the facts as the State would present them at trial. I assume that's what we just heard here.

{¶26} "Am I correct in that statement? I believe I am.

{¶27} "[PROSECUTOR]: That's the State's position, your Honor.

{¶28} "THE COURT: All right. So you wish to make some kind of argument. This is not - - on one hand its an evidentiary hearing, but it's the duty of the State to present the evidence that would have been presented at trial. That's what you are pleading no contest to.

{¶29} "[DEFENSE COUNSEL]: Well, your Honor, again, as I indicated earlier, in the hearing or trial, I asked that it be considered at trial because there is some disagreement as to whether this is an essential element.

{¶30} "THE COURT: No. It's an enhancement. It's not an essential element. It's an enhancement. I think its quite clear from - - the statute is very clear on that. Normally, if there were no schoolyard specifications, count one would be a felony of the fourth degree. Counts two and three are felonies of the fifth degree and count four would be a felony of the what - -

{¶31} "[PROSECUTOR]: Count four is a felony of the fifth degree because there is no specification.

{¶32} "I would only indicate, your Honor, that my understanding from reading the case law is that it is an essential element.

{¶33} "Based on *State of Ohio* versus *Staples*, 88 Ohio Appellate 3rd, 359, that once any testimony is properly introduced as to distance from the location of the drug offense to the school boundaries, the issue becomes one of the factors the jury is to determine upon the weight of the evidence.

{¶34} "You are the fact finder. I think that applies.

{¶35} "THE COURT: You plead no contest. That's a jury trial. What's the difference?

{¶36} "[PROSECUTOR]: Your Honor, I would just submit that for purposes of this hearing the State's understanding is there was a no contest plea to the indictment.

{¶37} "THE COURT: With the schoolyard specification they wanted an evidentiary hearing on whether or not the State would have proved the - -

{¶38} "[PROSECUTOR]: - - schoolyard specification.

{¶39} "THE COURT: So all right. I will conclude that the hearing is now finished. That the evidence will be taken under advisement. I am going to step down. I do not believe that your statement of the law is correct in entering the no contest plea.

{¶40} "If you wanted to take – if you felt that this was an element that they could not prove, you have to take it to trial whether it be to the bench or otherwise. You plead no contest to the counts with the caveat that there would be an evidentiary hearing as to the schoolyard specification. They either had the evidence or they didn't. So all right.

{¶41} [DEFENSE COUNSEL]: Your Honor, I made a mistake in withdrawing the no contest plea as to the specifications that were in the case. My understanding was in pleading no contest to the underlying - -

{¶42} "THE COURT: That's not what you did.

{¶43} "[DEFENSE COUNSEL]: Well, would we be able to make arguments?

{¶44} "THE COURT: I am going to step off the bench here.

{¶45} "[DEFENSE COUNSEL]: Thank you, your Honor."

{¶46} Additionally, when the judge returned to the courtroom and found appellant guilty of all charges in the indictment, the following exchange occurred between the court and defense counsel:

{¶47} "[DEFENSE COUNSEL]: Your Honor, may I proffer for the record or offer any cases to proffer for the record?

{¶48} "THE COURT: No. Because you plead no contest. The plea of no contest is an admission of the facts in the case. The State has presented the facts of the case in this particular matter.

{¶49} "[DEFENSE COUNSEL]: I was not allowed to present anything in opposition.

{¶50} "THE COURT: That's right. Because you are admitting to the facts of the case. A plea of no contest is an admission of the facts of the case, not an admission of guilt. It's up to the court based on everything that it has heard to enter that ruling. * * *"

{¶51} A reading of this transcript clearly indicates that appellant's counsel did not understand the effect of a no contest plea. As previously stated, a no contest plea "is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment." Crim.R. 11(B)(2). Therefore, because appellant's legal advisor did not understand, appellant surely could not have understood the effect of the plea either. A defendant is presumed to have the same legal knowledge as his defense counsel. The trial court should have recognized this fact and sua sponte withdrew appellant's no contest plea finding he did not enter the plea knowingly, voluntarily, or intelligently.

{¶52} We acknowledge that the trial court asked appellant at the plea hearing whether he understood "that by entering your plea of no contest you are not admitting your guilty but admitting the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against you in any subsequent civil or criminal proceeding" and that appellant responded in the affirmative. However, even if it is entirely plausible that the defendant understands the effect of his no contest plea, the record must demonstrate that understanding. See *State v. Blair* (1998), 128 Ohio App.3d 435, 437-438, 715 N.E.2d 233. A mere affirmative response to the question whether he understands the effect of his no contest plea, absent more, is insufficient to support the necessary determination that he understands. See id. at 438. Accordingly, we find appellant's no contest plea was not entered knowingly, voluntarily, or intelligently.

{¶53} Given our decision regarding appellant's first assignment of error,[1] we find appellant's second assignment of error moot and decline to address it pursuant to App.R. 12(A).

{¶54} Consequently, we reverse and remand for proceedings consistent with this opinion.

Judgment reversed and remanded.

It is ordered that appellant recover from appellee his 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 Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for further proceedings.

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

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., and
PATRICIA A. BLACKMON, J., CONCUR

[1]"I. The appellant was denied the effective assistance of counsel at his plea proceeding, rendering his no contest plea void or voidable."