

[Cite as *State v. Triplett*, 2009-Ohio-2571.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91807

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMAR TRIPLETT

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510459

BEFORE: Jones, J., Cooney, A.J., and Celebrezze, J.

RELEASED: June 4, 2009

JOURNALIZED:

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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).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Jamar Triplett (“Triplett”), appeals the trial court’s denial of his motion to withdraw his guilty plea. Finding no merit to the appeal, we affirm.

{¶ 2} In 2007, Triplett was charged with two counts of aggravated robbery, three counts of felonious assault, two counts of kidnapping, and one count of attempted murder. Each count was accompanied by one- and three-year firearm specifications. The matter proceeded to a jury trial, but after the jury heard opening statements, Triplett decided to plead guilty to the indictment, partly based on the State’s recommendation that he receive a prison sentence of seven years. The court accepted Triplett’s plea and found him guilty of all charges.

{¶ 3} At the sentencing hearing, Triplett orally requested to withdraw his guilty plea and stated that he wanted a new attorney. The court granted Triplett a continuance and held a hearing on his oral motion. The trial court denied Triplett’s motion to withdraw his guilty plea and sentenced him to seven years in prison.

{¶ 4} Triplett appeals, raising three assignments of error for our review.

Crim.R. 11

{¶ 5} In the first assignment of error, Triplett argues that the trial court did not fully comply with Crim.R. 11 in accepting his plea.

{¶ 6} Crim.R. 11(C)(2) mandates that a trial court shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

“(a) Determining 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.

“(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty ***, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

“(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant’s favor, and to require the state to prove the defendant’s guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.”

{¶ 7} Ohio courts have divided Crim.R. 11 requirements into two categories: constitutional and nonconstitutional rights. See *State v. Parks*, Cuyahoga App. No. 86312, 2006-Ohio-1352, citing *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. We review a trial court’s errors of constitutional rights for strict compliance and errors of nonconstitutional rights for substantial compliance.

{¶ 8} Here, Triplett argues that the court failed to inform him of the maximum penalty for each charge and failed to inform him that the court could

immediately proceed to judgment and sentencing. Triplett is alleging a violation of his nonconstitutional rights; therefore, we review his claims to see if the trial court substantially complied with Crim.R. 11.

{¶ 9} Substantial compliance has been defined as whether “under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.” *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474; see, also, *State v. Veney*, 120 Ohio St.3d 176, 179-180, 2008-Ohio-5200. In other words, when reviewing the totality of the circumstances, a court must determine whether the defendant understood the consequences of waiver. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51.

{¶ 10} A defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. *Nero*. To demonstrate prejudice in the context of this case, Triplett must show that his guilty plea would otherwise not have been entered if the trial court had not erred. *Id*.

{¶ 11} Triplett argues that the trial court failed to inform him of the maximum penalty he faced when entering his guilty pleas because the court did not inform him of the possible range of a sentence for a second-degree felony.¹

¹Second-degree felonies carry a possible sentence of two to eight years in prison, in yearly increments. R.C. 2929.14(A)(2).

The court informed him that he faced a maximum ten years for a first-degree felony. Ohio does require the court to satisfy itself that the defendant knows the maximum penalty applicable to the offense involved. *State v. Wilson* (1978), 55 Ohio App.2d 64, 65-66, 379 N.E.2d 273, 274. But Crim.R. 11(C)(2) does not require the court to discuss the possibility of consecutive sentences. *State v. Gooch*, 162 Ohio App.3d 105, 108-109, 2005-Ohio-3476, 832 N.E.2d 821. Although Triplett argues that the trial court erred when it did not inform him of the range of sentence for a second-degree felony, we find that Triplett has failed to show how he was prejudiced by the court's omission. Moreover, the record suggests that Triplett was not prejudiced since his sentences were ordered to run concurrent and he did not receive the maximum sentence for even one first-degree felony. See *State v. Johnson* (1988), 40 Ohio St.3d 130, 532 N.E.2d 1295.

{¶ 12} We find that, under the totality of the circumstances, the trial court adequately informed Triplett of his potential maximum sentence. During the plea colloquy, the trial court advised Triplett that a first-degree felony carries a prison sentence of three to ten years. The court also advised Triplett that he must serve the firearm specifications prior to and consecutive with the underlying felonies and that he would be subject to five years of postrelease control. Since Triplett pled guilty only to first- and second-degree felonies, we find that he subjectively understood what his maximum sentence could be. That being said, we once again urge trial courts to strictly comply with the mandates

of Crim.R. 11 by orally setting forth the range of penalties for each charge to which the defendant is pleading guilty or no contest.

{¶ 13} Crim.R. 11 also requires a trial court to inform the defendant that the court may choose to immediately proceed to sentencing. Although the trial court in this case erred in not informing the defendant that it could immediately proceed to sentencing, Triplett has failed to show how this omission prejudiced him. See *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163.

{¶ 14} We find that the trial court substantially complied with the mandates of Crim.R. 11. The first assignment of error is overruled.

Presentence Motion to Withdraw Guilty Plea

{¶ 15} In the second assignment of error, Triplett argues that the court erred in denying his motion to withdraw his guilty plea. Crim.R. 32.1 provides that a defendant may move to withdraw his guilty plea prior to sentencing. A motion to withdraw a plea filed prior to sentencing should be freely allowed. See *State v. Peterseim* (1980), 68 Ohio App.2d 211, 428 N.E.2d 863. A defendant who so moves, however, does not have an absolute right to have his guilty plea withdrawn. A mere change of heart is insufficient justification. *State v. Drake* (1991), 73 Ohio App.3d 640, 645, 598 N.E.2d 115.

{¶ 16} The trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for withdrawal of the plea. *State v. Xie* (1992), 62 Ohio St.3d 521, 527, 584 N.E.2d 715. The good faith, credibility and weight of

the movant's assertions are matters to be resolved by the trial court. *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324. Therefore, the decision to grant or deny the motion is within the trial court's discretion and will not be disturbed absent a finding of an abuse of discretion. *Id.*

{¶ 17} In considering a motion to set aside a plea, the trial court should consider:

“(1) prejudice to the prosecution; (2) whether the accused is represented by highly competent counsel; (3) whether a full Crim.R. 11 hearing took place; (4) whether a full hearing on the motion took place; (5) whether the court gave full and fair consideration to the motion; (6) whether the motion was made in a reasonable time; (7) whether the motion states specific reasons for withdrawal; (8) whether the accused understood the nature of the charges and the possible penalties; and (9) whether the accused was perhaps not guilty or had a complete defense.”

State v. Fish (1995), 104 Ohio App.3d 236, 661 N.E.2d 788, citing *Peterseim*, at 213-214; see, also, *State v. See*, Cuyahoga App. No. 89256, 2007-Ohio-6203.

{¶ 18} Triplett argues that the trial court failed to consider whether he got along with his attorney, whether he was innocent of the offenses for which he was charged, and whether the trial court complied with Crim.R. 11. At the hearing on the motion to withdraw his plea, Triplett argued that he did not understand why it took so long for him to go to trial, and he thought that his speedy trial rights were violated.²

²At the initial sentencing hearing, Triplett gave the court a motion to withdraw his guilty plea that stated that his speedy trial rights were violated.

{¶ 19} The record reflects that Triplett was represented by competent counsel who was involved in extensive plea negotiations with the State regarding the length of the prison sentence the State would request at sentencing. Before he entered his plea, the court had impaneled a jury and the State was preparing to call the victim to testify. The record also shows that Triplett participated in the plea colloquy and discussed his plea with the court. The court allowed Triplett the opportunity to be heard on his motion to withdraw, and the record reflects that the court gave full and fair consideration to Triplett's motion. Moreover, as we found under the first assignment of error, the trial court substantially complied with Crim.R. 11.

{¶ 20} Therefore, we find that the trial court did not abuse its discretion in denying Triplett's motion to withdraw his guilty plea. The second assignment of error is overruled.

Ineffective Assistance of Trial Counsel

{¶ 21} In the third assignment of error, Triplett argues that he did not receive effective assistance of counsel. In a claim of ineffective assistance of counsel, the burden is on the defendant to establish that counsel's performance fell below an objective standard of reasonable representation and prejudiced the defense. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To determine whether counsel was ineffective, Triplett

must show that: (1) counsel's performance was deficient, in that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, and (2) counsel's deficient performance prejudiced the defense in that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*.

{¶ 22} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301, 209 N.E.2d 164. In evaluating whether a petitioner has been denied the effective assistance of counsel, the Ohio Supreme Court held that the test is "whether the accused, under all the circumstances, *** had a fair trial and substantial justice was done." *State v. Hester* (1976), 45 Ohio St.2d 71, 341 N.E.2d 304, paragraph four of the syllabus.

{¶ 23} When making that evaluation, a court must determine whether there has been a substantial violation of any of defense counsel's essential duties to his client and whether the defense was prejudiced by counsel's ineffectiveness. *State v. Lytle* (1976), 48 Ohio St.2d 391, 358 N.E.2d, 623; *State v. Calhoun*, 86 Ohio St.3d 279, 289, 1999-Ohio-102, 714 N.E.2d 905. To show that a defendant has been prejudiced, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Bradley*, at paragraph three of the syllabus; *Strickland*.

{¶ 24} Within this assignment of error, Triplett argues that he did not get along with his attorney. He fails, however, to show how he was prejudiced by his

counsel's alleged ineffectiveness. A review of the record reveals that Triplett never expressed his displeasure with counsel before trial or at the plea hearing. Furthermore, defense counsel negotiated a recommended prison sentence of seven years when Triplett faced a possible maximum sentence of over 75 years in prison.

{¶ 25} We find that Triplett received effective assistance of trial counsel. The third assignment of error is overruled.

{¶ 26} Accordingly, judgment is affirmed.

It is ordered that appellee recover of 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.

LARRY A. JONES, JUDGE

COLLEEN CONWAY COONEY, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

