

[Cite as *State v. Cardwell*, 2009-Ohio-6827.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92796

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CORY CARDWELL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512701

BEFORE: Sweeney, J., Cooney, A.J., and Boyle, J.

RELEASED: December 24, 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).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Cory Cardwell (“defendant”), appeals the trial court’s denial of his motion to withdraw his guilty plea and the concurrent sentences imposed upon him for his aggravated robbery and rape convictions with three-year gun specifications, which he was ordered to serve consecutively to his sentence in another case. For the reasons that follow, we affirm.

{¶ 2} This case was initiated by a match of rape kit evidence to defendant’s DNA in the Combined DNA Index System (“CODIS”). Defendant was already serving a prison sentence when he was indicted in this case in 2008.

He was charged with committing numerous felonies on September 18, 1997 involving a female victim, who was raped and impregnated by defendant. Defendant faced one count of aggravated robbery with gun specifications, three counts of kidnapping, two counts of rape with gun specifications, and felonious assault with gun specifications.

{¶ 3} The matter proceeded to a jury trial that began on December 3, 2008. After the State presented the testimony of three witnesses, on December 4, 2008 and in the midst of trial, defendant pled guilty to aggravated robbery with a three-year gun specification, and one count of rape with a three-year gun specification. All other charges were nolle. As a condition of the plea agreement, defendant was required, and agreed, to give a truthful statement to police about the intimidation of the victim. The trial court engaged in a detailed discussion with defendant about his various constitutional rights and whether he

understood them, as well as the terms and consequences of his guilty plea. The prosecutor and defense counsel were satisfied that the trial court had complied with Crim.R. 11. Defendant was referred to probation for a presentence investigation report. Sentencing was set for January 8, 2009.

{¶ 4} On December 24, 2008, defendant filed a pro se motion to withdraw his guilty plea and request for new counsel. The trial court held a hearing on this motion. At the hearing on the motion, defendant asserted that his attorney did not subpoena a witness and that he had tape recordings of the victim. Defendant admitted he had not reviewed the alleged tape recordings that he claimed were in his mother's possession.

{¶ 5} The prosecutor indicated that the State had attempted to contact the witness in question and that the individual was not a fact witness. In addition, the State had dismissed the count that involved this person. It was also established at the hearing that defendant's mother had not been present during his trial,¹ nor had she provided anyone with any tapes.² The prosecutor indicated he had spoken with defendant's mother several months before and was never informed of any exculpatory evidence, nor was he aware of any such evidence. The prosecutor said he had provided his contact information to

¹According to the record, no one from defendant's family had attended his trial.

²Later, defense counsel stated on the record that defendant's mother told him there were tapes involved in this case, but despite his numerous phone conversations with defendant's mother and brother prior to trial, he never received any tapes. Although defendant's mother was present at the hearing and sentencing, she did not bring any tapes with her.

defendant's family, but was never contacted by them about any exculpatory evidence they allegedly obtained from the victim. The prosecutor also pointed out that defendant pled guilty in the midst of trial and after he had heard testimony of three witnesses against him. According to the State, defendant spoke to a police detective after he had pled guilty and confessed to committing the rape.

{¶ 6} The trial court considered the evidence and arguments and denied defendant's pro se motion and proceeded to sentence the defendant, who was represented by his court-appointed counsel. Defendant indicated he was presently serving a prison sentence of "25 to life," which he wanted the court to take into consideration. Also, he apologized to the victim for "any inconvenience [he] may have caused her" and that he was sorry "for anything that took place." The victim addressed the court as well as the State. According to the State, someone had contacted the victim prior to trial about her testimony in this case. The State was informed that defendant indicated to police that he was not ready to get out of jail. Defendant's mother also addressed the court. She indicated that defendant has grown up while in jail, having been incarcerated since 18 or 19 years of age. She expressed a desire to bond with the victim's daughter, who she believed to be her grandchild.

{¶ 7} The trial court imposed sentence as follows: concurrent ten-year prison terms on Counts 1 and 6, to be served consecutive to a three-year term on the gun specifications and also consecutive to defendant's existing prison term in

CR-354196. The trial court stated the following reasons for the sentence it imposed:

{¶ 8} “[H]e gave the most half-hearted apology I have ever heard, the most insincere apology I have ever heard.

{¶ 9} “As the testimony revealed, this woman was kidnapped at gunpoint, driven around, raped, let go somewhere in the neighborhood of Case Western Reserve University, shoeless, without her coat, so any attempt to say that this was consensual is the most ridiculous and preposterous thing I’ve ever heard. People who have consensual sex with one another generally do not drop them off in a street in the middle of the night without their shoes or coat.

{¶ 10} “So because you have taken no responsibility in front of me, and your apology was so pathetic and so insincere, I feel that you have not been rehabilitated in any way. You would be of no assistance to anybody, and you are a menace to society.”

{¶ 11} The court advised defendant of postrelease control and of his Tier III sex offender classification. Defendant now appeals, asserting three assignments of error for our review.

{¶ 12} “I. The trial court abused its discretion in denying appellant’s presentence motion to withdraw his plea of guilty without being afforded standard due process.”

{¶ 13} A motion to withdraw a guilty plea is governed by the standards set forth in Crim.R. 32.1, which state:

{¶ 14} “A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.”

{¶ 15} The general rule is that motions to withdraw guilty pleas before sentencing are to be freely allowed and treated with liberality. *State v. Peterseim* (1979), 68 Ohio App.2d 211, 214, 428 N.E.2d 863, citing *Barker v. United States* (C.A. 10, 1978), 579 F.2d 1219, 1223. However, a defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715.

{¶ 16} In ruling on a presentence withdrawal motion, the court must conduct a hearing and decide whether there is a reasonable and legitimate basis for the withdrawal of the plea. *Id.* at 527, 584 N.E.2d 715. The decision to grant or deny such a motion is within the sound discretion of the trial court. *Id.*

{¶ 17} “It is not an abuse of discretion to deny a presentence motion to withdraw a guilty plea when a defendant: (1) is represented by competent counsel; (2) is given a full Crim.R. 11 hearing before entering a plea; and (3) is given a hearing on the motion to withdraw that plea during which the court considers the defendant’s arguments in support of the motion.” *State v. Bridges*, Cuyahoga App. No. 87633, 2006-Ohio-6280, ¶5, citations omitted; see, also, *State v. Peterseim*, at 214, 428 N.E.2d 863.

{¶ 18} Having reviewed the record and considered all the relevant factors and applicable law, we do not find that the trial court abused its discretion when it denied defendant's presentence motion to withdraw. In this matter, defendant was represented by highly competent counsel, was given a full Crim.R. 11 hearing before entering his plea and, contrary to defendant's assertions, he was given a hearing on his motion to withdraw the plea during which the court considered his arguments.

{¶ 19} Defendant's assertion that the trial court did not afford him appropriate due process at his hearing for the reason that he was unclear that the trial court would hear his motion on that day is unavailing. On December 4, 2008, defendant was advised that his sentencing hearing was scheduled for January 8, 2009. He knew of this hearing date when he filed his motion to withdraw his guilty plea. There is no justifiable reason why defendant would have been unprepared to address it at the January 8, 2009 hearing date. Also, his mother, who allegedly had the exculpatory evidence, was present at the January 8, 2009 hearing but did have any such evidence with her. Accordingly, Assignment of Error I is overruled.

{¶ 20} "II. The trial court failed to determine that the appellant's plea was made voluntarily in violation of the United States Constitution and Ohio Constitution."

{¶ 21} Crim.R. 11(C) provides in pertinent part:

{¶ 22} “(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;

{¶ 23} “(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.

{¶ 24} “(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.

{¶ 25} “(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.”

{¶ 26} The standard for reviewing whether the trial court accepted a plea in compliance with Crim.R. 11(C) is a de novo standard of review. *State v. Stewart* (1977), 51 Ohio St.2d 86. It requires an appellate court to review the totality of the circumstances and determine whether the plea hearing was in compliance with Crim.R. 11(C). *Id.* at 92-93. Compliance with Crim.R. 11(C) requires the trial court to engage the defendant on the record in a reasonably intelligible dialogue. *State v. Ballard* (1981), 66 Ohio St.2d 473.

{¶ 27} Defendant claims his plea was not voluntary because the trial court did not specifically ask him if his plea was voluntary or undertaken of his own free will. As set forth, Crim.R. 11(C)(2)(a) does not require the court to ask these questions but rather to “determine,” among other things, that the defendant is entering a plea voluntarily.

{¶ 28} To the extent defendant failed to raise this issue in his motion to withdraw his guilty plea in the trial court, he has waived it. See *State v. Nathan* (1995), 99 Ohio App.3d 722, 725. Additionally, his arguments lack merit.

{¶ 29} The record establishes that the trial court strictly complied with Crim.R. 11. Defendant entered his plea in the midst of trial and after hearing the testimony of three witnesses. He specifically denied being threatened or promised anything to induce his plea. The court allowed defendant time to confer with his counsel before entering his plea. The trial court also specifically asked defendant whether he had “any questions about his rights, the charges, the penalties, or anything that [was] being done [in court that day].” To which defendant responded that he did not. The record demonstrates that defendant entered his plea voluntarily. Accordingly, Assignment of Error II is without merit and is overruled.

{¶ 30} “III. The imposition of a consecutive sentence is contrary to law.”

{¶ 31} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court, in a plurality decision, addressed the standard for

reviewing felony sentencing. See, also, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Appellate courts must apply the following two-step approach: “First, they must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court’s decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard.” *Kalish* at ¶26, 896 N.E.2d 124.

{¶ 32} In this case, defendant maintains that the trial court erred by imposing consecutive sentences because he asserts the trial court was required to make findings under R.C. 2929.14(E)(4).³ In *Foster*, the Ohio Supreme Court held, in relevant part, “that R.C. 2929.14(E)(4) and 2929.41(A) are capable of being severed. After the severance, judicial fact-finding is not required before imposition of consecutive prison terms.” *Foster*, 2006-Ohio-856, ¶99. Defendant maintains, however, that a recent decision by the United States Supreme Court “reinstated the Ohio statutory sentencing requirements,” which were excised by *Foster*. See *Oregon v. Ice* (2009), ____ U.S. ____, 129 S.Ct. 711, 172 L.Ed.2d 517. In either case, we find that the sentence imposed upon defendant was not contrary to law.

³We have assumed for purposes of addressing this assignment of error that defendant’s sentence was “consecutive.” In actuality, the trial court imposed concurrent sentences in this case but ordered defendant to serve them consecutive to the sentence he was already serving in another case.

{¶ 33} In addition to determining the length of a prison sentence for each conviction, courts have the discretion to determine whether prison sentences are to be served consecutively or concurrently. See *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328. In *Ice*, the United States Supreme Court addressed the court's authority to impose consecutive sentences. The court in *Ice* held that Oregon statutes requiring judicial fact-finding before imposing consecutive sentences do not violate the Sixth Amendment guarantee of a jury trial. *Id.* at 714. However, the effect *Ice* may have on Ohio's post-*Foster* sentencing scheme has not been fully addressed by the Ohio Supreme Court; thus, we continue to follow *Kalish* and *Foster* when reviewing felony sentencing issues. See *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379, at ¶29 (concluding that, in regard to *Ice*, "we decline to depart from the pronouncements in *Foster*, until the Ohio Supreme Court orders otherwise"). See, also, *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582 (acknowledging the *Ice* decision and holding that "*Foster* did not prevent the trial court from imposing consecutive sentences; it merely took away a judge's duty to make findings before doing so. The trial court thus had authority to impose consecutive sentences on Elmore").

{¶ 34} In this case, the trial court's imposition of a 13-year sentence, consecutive to the sentence defendant had begun to serve, is supported by the record and was not an abuse of discretion. Accordingly, Assignment of Error III is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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. 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.

JAMES J. SWEENEY, JUDGE

COLLEEN CONWAY COONEY, A.J., and
MARY J. BOYLE, J., CONCUR