[Cite as *N. Randall v. Withrow*, 2011-Ohio-1675.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94574

VILLAGE OF NORTH RANDALL

PLAINTIFF-APPELLEE

vs.

DENNIS WITHROW

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Bedford Municipal Court
Case No. 09CRB01856-A

BEFORE: S. Gallagher, J., Stewart, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: April 7, 2011

ATTORNEYS FOR APPELLANT

Robert Tobik
Chief Public Defender

BY: David M. King
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

Leonard A. Spremulli
29325 Chagrin Blvd.
Suite 305
Pepper Pike, OH 44122

SEAN C. GALLAGHER, J.:

{¶ 1} Appellant Dennis Withrow appeals his plea and sentencing by the Bedford Municipal Court. For the reasons set forth herein, we reverse and remand.

{¶ 2} On October 1, 2009, appellee village of North Randall ("North Randall") charged Withrow with assault, in violation of R.C. 2903.13(A), a

first degree misdemeanor. He originally pleaded not guilty and waived his right to a speedy trial.

{¶ 3} After several continuances at Withrow's request, a pretrial was scheduled before a magistrate on November 3, 2009. On that date, with counsel present, Withrow either entered a no contest plea to the charge of assault, or at a minimum, worked out an agreement to plead no contest at a later date before the trial judge. We are uncertain about what exactly took place at the November 3 pretrial because no transcript was ever made of this proceeding.[1]

{¶ 4} At the time of the November 3 hearing, a document captioned "pretrial agreement form" was created that memorialized the terms of a plea in writing. The form was signed by Withrow, his attorney, and the magistrate. It contained a check mark by Withrow in a place provided indicating the plea was accepted. The form referenced the charge of assault under R.C. 2903.13(A), as well as the elements of "knowingly causing or attempting to cause harm," as well as the degree of the offense and that the plea was a plea of no contest with a finding of guilt. Also on the form were terms indicating that Withrow would be on probation for six months with

[1] At the oral argument for this case, North Randall acknowledged that the Bedford Municipal Court does not record proceedings before magistrates.

various conditions until such time as Withrow completed anger management. A $500 fine and a 30-day jail sentence were suspended.

{¶ 5} There was no reference on this form that Withrow's plea was knowingly, intelligently, and voluntarily made, nor was there any reference advising Withrow of the effect of his plea. Further, there was no reference to the maximum sentence or the range of potential penalties. Following this hearing, the docket reflects a subsequent court date was set for December 3, 2009, before one of the judges of the court.

{¶ 6} On November 20, 2009, the record shows a motion[2] by Withrow requesting a continuance of the December 3 court date. In his motion, Withrow acknowledged that he had already pleaded no contest in his case and was prepared to pay court costs. The court rescheduled the hearing before a trial judge for December 17, 2009.

{¶ 7} On December 17, Withrow appeared before the trial judge for what the docket characterizes as a "change of plea" hearing. There is no explanation in the record for why this was called a change of plea hearing where the record shows Withrow had already pleaded and been sentenced. In any event, the following exchange constitutes the entirety of the hearing with the trial court:

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[2] Withrow's motion is in the form of a typed letter addressed to the judge and faxed to the Bedford Municipal Court.

"Court: All right. We're here for a change of plea today. How do you wish to plead to the charge of assault.

Defense counsel: You're [sic] honor, Mr. Withrow will enter a plea of no contest. We will stipulate and consent to a finding of guilt and we'll waive reading.

Court: Thank you.

Defense counsel: You're welcome.

Court: On his plea, finding is guilty: 500 and cost, 30 days in jail. Jail and fine are suspended providing he is to be on six months active probation and no criminal offenses charged, to complete a course of anger management, to comply with all standard conditions of probation.

All right, sir. Go with the Bailiffs, fill in the forms for probation. They will tell you what to do.

Defense counsel: Thank you, your honor."

{¶ 8} The record reflects that Withrow paid all outstanding court costs.

{¶ 9} Withrow filed a notice of appeal, raising one assignment of error for our review. It provides, "The trial court erred when it did not advise Dennis Withrow as to the affect [sic] of his plea in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Ohio Constitution and Ohio Crim.R.11."

{¶ 10} Withrow contends that the trial court failed to comply with the mandates of Crim.R. 11 because it failed to engage him in any colloquy at the December 17 hearing. North Randall contends that because Crim.R. 19 allows a magistrate to accept pleas in misdemeanor cases, any Crim.R. 11

violation would necessarily occur at the November 3 pretrial, not at the December 17 hearing. For the reasons outlined below, we find Withrow has demonstrated that the collective proceedings on November 3 and on December 17 failed to comply with Crim.R. 11. Further, while not grounds for reversal, these proceedings seem to be inconsistent with the practices outlined under Crim.R. 19.

{¶ 11} This case requires us to review what is required for a viable plea in misdemeanor criminal offenses taken in the municipal courts.

{¶ 12} Withrow was charged with first degree misdemeanor assault under R.C. 2903.13(A), which is punishable by a maximum sentence of six months in jail and a $1,000 fine. As charged, misdemeanor assault is a "petty" offense. A petty offense is defined under Crim.R. 2(D) as "a misdemeanor other than serious offense." A "serious offense" is defined in Crim.R. 2(C) as "any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months." Since assault under R.C. 2903.13(A) is punishable by a maximum sentence of six months, assault under R.C. 2903.13(A) is a "petty" offense.

{¶ 13} Pleas in petty offense cases are governed by Crim.R. 11(E). The rule states: "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."

{¶ 14} Crim.R. 11(B)(2) governs the effect of a no contest plea: "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." See, also, *State v. Jones,* 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, at ¶ 25 ("to satisfy the requirement of informing a defendant of the effect of a plea, a trial court must inform the defendant of the appropriate language under Crim.R. 11(B)"); *Strongsville v. Starek,* Cuyahoga App. No. 92603, 2009-Ohio-4568.

{¶ 15} Withrow cites to Crim.R. 11(E), which provides: "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." Failure to comply with these mandates regarding constitutional rights renders a plea unenforceable. See *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224. Although Withrow argues that he was not advised of the level of the offense, or of the penalties and consequences for a first degree misdemeanor conviction, his brief addresses the hearing held

with the trial court on December 17 and not the hearing before the magistrate on November 3.

{¶ 16} We agree with North Randall that our initial review should be directed at whether the magistrate complied with Crim.R. 11 when he purportedly accepted Withrow's no contest plea on November 3. Normally, a reviewing court looks to the transcript to determine compliance with Crim.R. 11. Because this was a "petty offense," there was no requirement of a transcript. Under Crim.R. 22, a petty offense case need not be recorded unless such is requested by a party to the proceeding. *State v. Gaetano* (1974), 44 Ohio App.2d 233, 337 N.E.2d 664. Further, because Withrow was represented, there was no concern about creating a formal record for counsel under Crim.R. 44(B).

{¶ 17} Crim.R. 19 authorizes magistrates to accept and enter no contest pleas in misdemeanor cases, provided the requirements of Crim.R. 11 are met.[3] In such instances, any subsequent action by the trial court on Withrow's plea is not subject to Crim.R. 11 scrutiny. The practice of a trial court repeating at a subsequent hearing what has already occurred before the

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[3] Crim.R. 19(C)(1)(c) provides that magistrates are authorized to "[r]eceive pleas, in accordance with Crim.R. 11, only as follows: * * * (ii) In misdemeanor cases, accept and enter guilty and no contest pleas, determine guilt or innocence, receive statements in explanation and in mitigation of sentence, and recommend a penalty to be imposed. If imprisonment is a possible penalty for the offense charged, the matter may be referred only with the unanimous consent of the parties, in writing or on the record in open court."

magistrate appears to undermine the purpose of Crim.R. 19.[4] In essence, the flexibility that Crim.R. 19 affords trial courts is effectively lost. In any event, our initial review is to determine if the magistrate complied with the requirements of Crim.R. 11(E) and 11(B)(2). Since no transcript of the proceedings exists, we look to the "plea agreement form" signed by Withrow, his counsel, and the magistrate to determine if he was advised of the consequences of the plea.

{¶ 18} The form itself contains no Crim.R. 11 advisements. There is no explanation of a no contest plea or any other information related to the requirements of Crim.R. 11(E) or 11(B)(2). For this reason, we must conclude that the "plea agreement form" at issue here cannot establish that Withrow was advised of the effect of his plea as mandated by Crim.R. 11.

{¶ 19} In many instances we have presumed regularity in a trial court's actions in the absence of a transcript for review. "An appellant has the responsibility of providing the reviewing court with a record of the facts, testimony, and evidentiary matters that are necessary to support the appellant's assignments of error. In the absence of a complete record, an appellate court must presume regularity in the trial court's proceedings." (Internal citations omitted.) *State v. Smith,* Cuyahoga App. No. 94063,

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[4] Crim.R. 19(E) outlines the requirements for a trial court in adopting the decision of a magistrate. It does not require a separate hearing with defendant's presence. See *State v. Romans*,

2010-Ohio-3512, ¶ 11. In this instance, however, Withrow's failure to provide a transcript was not due to Withrow's or his counsel's failure to provide it. It simply did not exist. Thus, we cannot presume regularity where the court failed to create a record capable of review and then blame that failure on the appellant. We find that the only record of the November 3 hearing was the pretrial agreement form, and that form was not in compliance with Crim.R. 11.

{¶ 20} Further we are not convinced that an App.R. 9(C) statement would have provided clarity.[5] It would not have contained evidence of an explanation of circumstances in light of the assigned error in this case.

{¶ 21} We next look to the transcript of the hearing conducted before the trial judge on December 17 to determine if it contained an "explanation of the circumstances" for a no contest plea. As evidenced by the dialogue outlined earlier, this hearing failed to comply with the requirements of Crim.R. 11.

{¶ 22} In the absence of evidence to the contrary, we find that the court failed to provide Withrow with an explanation of the circumstances of his no contest plea as mandated by Crim.R. 11.

Medina App. No. 06CA0058-M, 2007-Ohio-1215.

[5] App.R. 9(C) provides in relevant part: "If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection * * *."

{¶ 23} For this reason the case is reversed and remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee 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 municipal court 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.

SEAN C. GALLAGHER, JUDGE

MELODY J. STEWART, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR