

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94788

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EDDIE THOMAS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-529178

BEFORE: Boyle, J., Stewart, P.J., and Gallagher, J.

RELEASED AND JOURNALIZED: January 20, 2011

ATTORNEY FOR APPELLANT

John H. Lawson
Brownhoist Building
4403 St. Clair Avenue
Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Daniel A. Cleary
Assistant County Prosecutor
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Eddie Thomas, appeals his convictions and the agreed eight-year sentence imposed after he pleaded guilty to an eight-count indictment as charged: two counts of aggravated burglary, one count of attempted murder, two counts of felonious assault, two counts of kidnapping, and one count of improperly discharging a firearm into

habitation. All counts also carried one- and three-year firearm specifications.

He raises four assignments of error for our review:

{¶ 2} “[1.] The trial court erred in failing to determine that the defendant made his plea voluntarily in violation of [Crim.R.] 11(C)(2)(a) and the United States and Ohio Constitutions.

{¶ 3} “[2.] The trial court erred in failing to determine that the defendant understood that he was not eligible for probation without conducting a presentence report in violation of [Crim.R.] 11(C)(2)(a) and the United States and Ohio Constitutions.

{¶ 4} “[3.] The trial court erred in failing to determine that appellant understood the effect of his plea of guilty and plea agreement regarding sentence in violation of [Crim.R.] 11(C)(2)(a) and the United States and Ohio Constitutions, to wit: that [R.C.] 2953.08(D)(1) makes such a plea agreement not subject to appellate review.

{¶ 5} “[4.] The trial court erred by failing to comply with [Crim.R.] 32 by not notifying appellant of his various appeal rights.”

{¶ 6} Finding no merit to his appeal, we affirm.

Crim.R. 11

{¶ 7} The underlying purpose of Crim.R. 11(C) is to convey certain information to a defendant so that he or she can make a voluntary and

intelligent decision regarding whether to plead guilty. *State v. Ballard* (1981), 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115. “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. Cardwell*, 8th Dist. No. 92796, 2009-Ohio-6827, ¶26, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163. “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.*

{¶ 8} Crim.R. 11(C)(2) provides in pertinent part that in felony cases the court may refuse to accept and shall not accept a plea of guilty without first addressing the defendant personally and doing all of the following:

{¶ 9} “(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.

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

{¶ 11} “(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.”

{¶ 12} A trial court must strictly comply with the Crim.R. 11(C)(2)(c) requirements that relate to the waiver of constitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶18. Under the more stringent standard for constitutionally protected rights, a trial court’s acceptance of a guilty plea will be affirmed only if the trial court engaged in meaningful dialogue with the defendant which, in substance, explained the pertinent constitutional rights “in a manner reasonably intelligible to that defendant.” *Ballard*, paragraph two of the syllabus.

{¶ 13} With respect to the nonconstitutional requirements of Crim.R. 11, set forth in Crim.R. 11(C)(2)(a) and (b), reviewing courts consider whether there was substantial compliance with the rule. *Veney* at ¶14-17. “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.” *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d

474; *Stewart*, 51 Ohio St.2d 86. “[I]f it appears from the record that the defendant appreciated the effect of his plea and his waiver of rights in spite of the trial court’s error, there is still substantial compliance.” *State v. Caplinger* (1995), 105 Ohio App.3d 567, 572, 664 N.E.2d 959.

{¶ 14} Further, a defendant must show prejudice before a plea will be vacated for a trial court’s error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the colloquy are at issue. *Veney*, 120 Ohio St.3d at ¶17. The test for prejudice is whether the plea would have otherwise been made. *Id.*; see, also, *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462.

{¶ 15} We note at the outset that Thomas does not contend that the trial court failed to advise him or ensure that he understood the constitutional rights he was waiving by entering into the plea agreement. Further, we find it significant that in relation to the nonconstitutional issues Thomas raises, he does not contend that he was prejudiced in any way, let alone establish that he was. Nor does this court find any prejudicial effect in the record on appeal.

Crim.R. 11(C)(2)(a)

{¶ 16} Thomas first argues that the trial court failed to adequately determine whether his plea was voluntary under Crim.R. 11(C)(2)(a). Again,

this provision requires that the trial court determine that “the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved[.]”

{¶ 17} Specifically, Thomas asserts only that the trial court’s question to him, “[h]as anybody made any threats or promises to you in order to get you to change your plea today[.]” does not really ask if his plea was voluntary. He claims this question did not determine whether the plea was entered into “of his own free will.” We disagree.

{¶ 18} This court addressed this exact issue in *Cardwell*, supra. In that case, the appellant argued that the trial court failed to specifically “ask him if his plea was voluntary or undertaken of his own free will.” *Id.* at ¶27. We explained that “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.” *Id.*

{¶ 19} In *Cardwell*, we found the defendant did enter into his plea voluntarily because the defendant specifically denied being threatened or promised anything to induce his plea, the defendant conferred with his counsel before entering his plea, and 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.” Id. at ¶29.

{¶ 20} Here, as in *Cardwell*, Thomas told the trial court that no one threatened him or promised him anything in exchange for his pleading guilty. And there is no evidence in the record of coercion that even remotely suggests that his guilty plea was the product of anything other than his own free will. Thomas told the trial court that he understood everything his counsel and the prosecutor stated and that he did not have any questions regarding anything he heard during the proceeding.

{¶ 21} Further, the trial court fully complied with Crim.R. 11(C)(2)(a) in ensuring that Thomas understood the nature of the charges against him and the maximum penalty involved.

{¶ 22} Thomas’s first assignment of error is overruled.

Maximum Penalty

{¶ 23} Thomas next contends that the trial court failed to ascertain that he “knew and understood the mandatory prison issue.” He argues that the trial court failed to tell him that he “was not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.” He argues this despite the fact that he admits “the plea and sentence were a package which included a plea to the indictment and agreed-upon sentencing.”

He maintains that “[t]he court accepted [his] plea and went straight to sentencing,” rather than discuss with Thomas during the plea colloquy “that he would have to be sentenced to prison.” We find no merit to his argument.

{¶ 24} The prosecutor outlined each charge at the beginning of the plea hearing, including whether the charge was a first- or second-degree felony. After ensuring that Thomas understood the constitutional rights he was waiving, the court stated: “You heard the prosecutor outline the offenses that you are agreeing to plead guilty to.” The trial court then informed Thomas that felonies of the first degree were punishable by three to ten years in prison, and further informed him that second-degree felonies were subject to two to eight years in prison. The trial court also outlined the mandatory sentence for the firearm specifications, including the fact that he would have to “complete 3 years” in prison for the firearm specifications before he began “serving day one of any sentence on the underlying offense.” The trial court also properly notified Thomas of all of the nuances of postrelease control and then asked Thomas if he understood everything that was just explained to him, to which Thomas replied that he did.

{¶ 25} Thus, we find that although the trial court did not specifically tell Thomas that he was not eligible for probation, it substantially complied with

Crim.R. 11(C)(2)(a), informing Thomas of the maximum penalty that he could receive, including prison.

{¶ 26} Further, as Thomas admits in his brief, his plea bargain with the state included his serving eight years in prison. The trial court noted for the record that he was approached by the prosecutor and defense counsel about the agreed sentence.¹ The trial court indicated that it agreed to accept the proposed sentence because the victim consented to the sentence and Thomas had no prior felony convictions. Indeed, the trial court stated at the close of the plea hearing and prior to sentencing, “[t]hat’s why we are proceeding without a presentence investigation report at this time.”

{¶ 27} Accordingly, we find no merit to Thomas’s argument that he did not understand that he would be sentenced to prison.

{¶ 28} Thomas’s second assignment of error is overruled.

Waiving Appeal Rights

{¶ 29} In his third assignment of error, Thomas maintains that the trial court erred in accepting his plea because it did not determine that he understood the effect of his plea “regarding sentence ***, to wit: that [R.C.]

¹The trial court did not state this until after it accepted Thomas’s guilty pleas to each offense. Further, neither the prosecutor nor defense counsel stated on the record during the plea hearing that an agreed sentence was part of the plea bargain. Nonetheless, Thomas does not raise any issues with the agreed sentence, nor does he contend that it was not part of the bargain. Indeed, as we indicated, he admits that it was part of the deal.

2953.08(D)(1) makes such plea agreement not subject to appellate review.” Essentially, he claims that because the trial court failed to notify him that he would not be able to “appeal the agreed package plea/sentencing,” pursuant to R.C. 2953.08(D)(1), that his plea was invalid. We disagree.

{¶ 30} R.C. 2953.08(D)(1) states that “[a] sentence imposed upon a defendant is not subject to review under this section [1] if the sentence is authorized by law, [2] has been recommended jointly by the defendant and the prosecution in the case, and [3] is imposed by a sentencing judge.”

{¶ 31} Crim.R. 11(C)(2)(b) requires a trial court to inform a defendant of the effect of a guilty plea and determine the defendant understands the effect as well. The “effect of a guilty plea” is set forth in Crim.R. 11(B), which provides that the effect of a guilty plea “is a complete admission of the defendant’s guilt.” But Crim.R. 11(C)(2) does not require the trial court to inform a defendant that by pleading guilty, he or she is waiving his or her right to appeal a jointly-agreed sentence under R.C. 2953.08(D)(1).

{¶ 32} Although not raised by Thomas, the record does reveal that the trial court did not ask Thomas if he understood that his plea was a complete admission of his guilt. Thus, the trial court did not comply with Crim.R. 11(C)(2)(b) on this matter. Nonetheless, the Ohio Supreme Court has held that unless a defendant asserts “actual innocence,” he is “presumed to

understand that he has completely admitted his guilt,” and “a court’s failure to inform the defendant of the effect of his guilty plea as required by Crim.R. 11 is presumed not be prejudicial.” *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, syllabus. Thomas did not assert “actual innocence” in this case. Nor does he even contend that he was prejudiced in any way by the trial court’s failure to determine if he understood the effect of his plea.

{¶ 33} But we agree with the Ohio Supreme Court’s repeated advisement to trial courts: “We urge trial courts to avoid committing error and to literally comply with Crim.R. 11. ‘Literal compliance with Crim.R. 11, in all respects, remains preferable to inexact plea hearing recitations.’ *Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶19, fn. 2, citing *State v. Nero*, 56 Ohio St.3d at 108, 564 N.E.2d 474. The best way to ensure that pleas are entered knowingly and voluntarily is to simply follow the requirements of Crim.R. 11 when deciding whether to accept a plea agreement.” *Clark*, 119 Ohio St.3d at ¶29.

{¶ 34} Thomas’s third assignment of error is overruled.

Crim.R. 32

{¶ 35} In his final assignment of error, Thomas contends that the trial court did not comply with Crim.R. 32(B)(2) at the sentencing hearing because

it failed to apprise him of his right to appeal. Thomas admits that under R.C. 2953.08(D)(1), he did not have the right to appeal his sentence. He nonetheless maintains the trial court erred because he had the right to appeal the voluntariness of his plea. He argues that *State v. Hunter*, 8th Dist. No. 92626, 2010-Ohio-657, applies.

{¶ 36} In *Hunter* at ¶20, this court held:

{¶ 37} “In Ohio, ‘[a] convicted defendant has a constitutional right to counsel on direct appeal to the Court of Appeals from his judgment of conviction.’ *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, citing *State v. Catlino* (1967), 10 Ohio St.2d 183, 226 N.E.2d 109; Crim.R. 44(A). In order to be properly informed under Crim.R. 32, a defendant must be told of his right to appeal, apprised of procedures and time limits involved in proceeding with that appeal, and the right to have assistance of appointed counsel for that appeal. Crim.R. 32(B); see, e.g., *Wolfe v. Randle* (S.D. Ohio 2003), 267 F.Supp.2d 743.”

{¶ 38} Although the trial court in this case failed to advise Thomas of his appellate rights under Crim.R. 32, we find *Hunter* to be distinguishable and the error here to be harmless. In *Hunter*, the defendant was not given appointed counsel and filed his appeal pro se. Here, this court granted Thomas’s motion for delayed appeal, and subsequently appointed appellate

counsel to represent him in the appeal. Accordingly, we conclude that any argument relative to the omission is moot. See *State v. Duncan*, 3d Dist. No. 7-02-10, 2003-Ohio-3879, ¶12.

{¶ 39} Accordingly, we overrule Thomas's fourth assignment of error.

Judgment 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.

MARY J. BOYLE, JUDGE

MELODY J. STEWART, P.J., and
SEAN C. GALLAGHER, J., CONCUR