

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94790

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RAYMOND MILLER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-496154

BEFORE: Blackmon, J., Kilbane, A.J., and Sweeney, J.

RELEASED AND JOURNALIZED: March 3, 2011

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Raymond Miller appeals the trial court's acceptance of his guilty plea and assigns the following errors for our review:

“I. The trial court erred and violated the defendant's constitutional right to a speedy trial when the defendant raised a speedy trial objection during the plea hearing so that his plea was not knowingly, intelligently, and voluntarily made under Criminal Rule 11.”

“II. The defendant was denied the effective assistance of counsel.”

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court’s decision. The apposite facts follow.

{¶ 3} On May 15, 2007, the Cuyahoga County Grand Jury indicted Miller on one count each of theft and robbery. On May 30, 2007, Miller pleaded guilty at his arraignment, and several pretrials followed. While out on bond, Miller was picked up by the Adult Parole Authority and subsequently released to the custody of the U.S. Marshals. On February 25, 2009, the U.S. Marshals released Miller to the state correctional institution.

{¶ 4} On January 25, 2010, Miller pleaded guilty to an amended charge of attempted robbery. On February 18, 2010, the trial court sentenced Miller to a prison term of 18 months.

Criminal Rule 11

{¶ 5} In the first assigned error, Miller argues his guilty plea was not knowingly, intelligently, and voluntarily made.

{¶ 6} 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*, Cuyahoga App. 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.*

{¶ 7} 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:

“(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 or no contest, 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.”

{¶ 8} 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.

{¶ 9} 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.

{¶ 10} 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.

{¶ 11} In the instant case, at the plea hearing, the state set forth the charge, maximum penalty, and plea discussions on the record. The trial court engaged Miller in a Crim.R. 11 colloquy. During the colloquy, Miller affirmatively expressed that he understood his rights, and that he understood he was giving up those rights by entering a guilty plea. Miller also affirmatively expressed that he understood the nature of the charge and the maximum penalty the court could impose, in this case, six to 18 months for attempted robbery.

{¶ 12} In addition, Miller indicated he was not under the influence of drugs, alcohol, or medication that affected his judgment. Further, Miller stated that no threats or promises had been made to induce his plea and that he was satisfied with his representation. Finally, Miller admitted that he was in fact guilty of the charge as amended.

{¶ 13} The trial court determined that Miller's plea was knowingly, intelligently, and voluntarily made, and accepted Miller's plea. Miller, through counsel asked the trial court to order a presentence investigation report. The trial court consented and scheduled the sentencing hearing for February 16, 2010.

{¶ 14} However, immediately after the trial court accepted Miller's plea, the following exchange took place:

"Mr. Smith: Also, one more thing, too, your Honor. If you could, your Honor, could we address the issue of speedy trial? I know we talked about it, but I just wanted to make sure that you could address it.

"The Court: Well, I mean, Mr. Miller, you understand that you're waiving that right to make that argument by pleading guilty, right?

"The Defendant: Well, from what I understand, any constitutional defects you don't waive, and speedy trial is a constitutional issue.

"The Court: It's a constitutional issue and also a statutory issue. There are two standards. * * * The statutory has certain language I'm sure you're familiar with, 270 days —.

"The Defendant: Yes, your Honor.

"The Court: — and based on 3 to 1 because you have been incarcerated pending this case. I know part of the time you weren't incarcerated or you weren't held on this case, we released you, and then you went and took care of the federal case.

"The Defendant: Yes, your Honor." Tr. 11-13.

"* * *

"The Defendant: Should we address the fines and stuff at sentencing?

"The Court: Yeah. I'll do that definitely at sentencing, but what I wanted to let you know, speedy trial rights, there's a lot of case law and there's certain things that our courts have said toll the

time. It stops the clock from ticking. When motions are filed, until they're answered, especially motions to dismiss, so when you filed your motion to dismiss based on speedy trial time, until there's a ruling on that, it stops the time from running. Continuances at the defendant's request toll the time, any action that you take that delays the case would toll the time as well. I didn't go through and look at all the days. When your attorney tells me you're willing to accept responsibility, that tells me that those motions are no longer before the court, that they're moot, that I don't have to make a ruling on them. I wouldn't normally make a ruling because now you're giving up, you're waiving your right to a trial, to those things. If you're telling me, you know, you don't want to waive those rights, then we should proceed with the trial and I can make a ruling on those motions after the state responds and then decide whether or not it has any merit." Tr. 14-15.

{¶ 15} Initially, we note that Miller waited until after he had pleaded guilty; thus, after he admitted the factual basis for the plea, and after the trial court accepted the plea to raise the issue of a possible speedy trial violation. "A plea of guilty waives a defendant's right to challenge his or her conviction on statutory speedy trial grounds pursuant to R.C. 2945.71(B)(2)." *State v. Goodwin*, Cuyahoga App. No. 93249, 2010-Ohio-1210, quoting *State v. Kelley* (1991), 57 Ohio St.3d 127, 566 N.E.2d 658, paragraph one of the syllabus.

{¶ 16} A guilty plea also waives claims of ineffective assistance of counsel based upon statutory speedy trial issues. *State v. Johnson* (Mar. 4, 1993), Cuyahoga App. No. 61904; *State v. Mayle*, 5th Dist. No. CA 07-3, 2008-Ohio-286, at ¶39, citing *State v. Barnett* (1991), 73 Ohio App.3d 244, 596 N.E.2d 1101. “[I]t is clear that a plea of guilty waives the right to claim that the accused was prejudiced by constitutionally ineffective counsel, except to the extent the defects complained of caused the plea to be less than knowing and voluntary.” *Barnett*, 73 Ohio App.3d at 249.

{¶ 17} We also note that the trial court gave Miller the opportunity to essentially withdraw the guilty plea, proceed to trial, and allow the trial court to rule on the motion. However, the record indicates Miller failed to motion the court to withdraw his plea and pursue the speedy trial motion. Instead, Miller, who was already serving a federal prison sentence, asked the trial court to fashion a sentence that would allow him to stay in Ohio for the longest possible time in order that he could give his ailing wife moral support.

Specifically, Miller asked the trial court to impose the maximum sentence of 18 months, with no concurrent time, and with no credit for time served. Tr. 22.

{¶ 18} In addition, even if Miller had not waived his statutory right to a speedy trial, the record demonstrates that the case was extensively pre-tried between the time of Miller’s bindover and the time he pleaded guilty.

Further allowing for the more than 11 continuances and other delays initiated by Miller, combined with the federal case, which he was currently serving a lengthy prison sentence, there was no speedy trial violation.

{¶ 19} We conclude, the trial court strictly complied with the requirements of Crim.R. 11(C) in accepting Miller's guilty plea. Miller knowingly, intelligently, and voluntarily entered his guilty plea and thus waived his right to challenge his conviction on statutory speedy trial grounds.

We further conclude that the record indicates that Miller has suffered no prejudice, and may have actually benefitted from the maximum sentence of 18 months. Accordingly, we overrule Miller's first assigned error.

Ineffective Assistance of Counsel

{¶ 20} In the second assigned error, Miller argues he was denied the effective assistance of counsel.

{¶ 21} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the deficient performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph one of the syllabus.

{¶ 22} To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different. *Id.* at paragraph two of the syllabus. Judicial scrutiny of a lawyer's performance must be highly deferential. *State v. Moon*, Cuyahoga App. No. 93673, 2010-Ohio-4483, citing *State v. Sallie*, 81 Ohio St.3d 673, 1998-Ohio-343, 693 N.E.2d 267.

{¶ 23} In the instant case, Miller argues he was denied the effective assistance of counsel because trial counsel failed to address issues relating to his right to a speedy trial. As discussed in the first assigned error, Miller did not raise the issue of a possible speedy trial violation until after he had pleaded guilty, and thus, waived his right to challenge his conviction on appeal.

{¶ 24} Further, as previously stated, a defendant who pleads guilty is precluded from claiming ineffective assistance of counsel, based upon statutory speedy trial issues, except to the extent that the defects complained of caused the plea to be less than knowing, intelligent, and voluntary. *State v. Cordell*, 2d Dist. No. 2009 CA 57, 2010-Ohio-5277, citing *Barnett* supra. See, also, *State v. Benne*, 12th Dist. No. CA 2005-09-090, 2006-Ohio-3628, ¶26.

{¶ 25} In the first assigned error, we concluded that Miller's guilty plea was knowingly, intelligently, and voluntarily made. Thus, with respect to

this assertion, Miller cannot demonstrate that counsel's performance fell below an objective standard of reasonable representation. As such, Miller was not denied the effective assistance of counsel. Accordingly, we overrule the second assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, A.J., and
JAMES J. SWEENEY, J., CONCUR