[Cite as *State v. Rasmussen*, 2010-Ohio-639.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. KURT E. RASMUSSEN Appellant	C. A. Nos. 24661 and 24662 APPEAL FROM JUDGMENT ENTERED IN THE STOW MUNICIPAL COURT COUNTY OF SUMMIT, OHIO CASE No. 2009CRB00501

DECISION AND JOURNAL ENTRY

Dated: February 24, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Kurt E. Rasmussen, appeals from his convictions in the Stow Municipal Court. This Court affirms.

I

{¶2} On February 26, 2009, Rasmussen travelled from Chicago, Illinois, to Akron, Ohio, for a business appointment. After concluding his appointment that day, he went to a local sports club and consumed several alcoholic beverages, then attempted to return to his hotel. At approximately 2:30 a.m. on February 27, 2009, Rasmussen was stopped by police based on his erratic driving. He consented to a field sobriety test and a breathalyzer test, which indicated a blood alcohol concentration ("BAC") of .144, exceeding the legal limit of .08. Throughout this process, Rasmussen failed to inform the officer at the scene that he had a concealed carry permit and was carrying a loaded .357 Magnum on his person at the time, as well as a pocket knife.

{¶3} Rasmussen was arrested at the scene and charged with the following traffic offenses: operating a vehicle while under the influence of alcohol ("O.V.I."), in violation of R.C. 4511.19(A)(1)(a); operating a vehicle with a prohibited blood alcohol level in violation of R.C. 4511.19(A)(1)(d); failure to signal while changing course, in violation of Cuyahoga Falls Codified Ordinance ("C.F.C.O.") 331.14; failure to control, in violation of C.F.C.O. 331.34, failure to wear a seat belt, in violation of C.F.C.O. 337.27. Rasmussen was later charged with using a weapon while intoxicated, in violation of R.C. 2923.15; violating the duties of licensed individual, in violation of R.C. 2923.126; and carrying a prohibited weapon, in violation of C.F.C.O. 549.10. Rasmussen was held in jail pending arraignment, which occurred at approximately 8:30 a.m. that same day. At his arraignment, he pleaded guilty to using a weapon while intoxicated and violating the duties of licensed individual, as well as the O.V.I. charge. The remaining charges were dismissed. Rasmussen was given concurrent sentences of three days in jail for each offense plus fines and costs and was ordered to surrender his weapon and his concealed carry permit.

{¶4} Rasmussen filed two separate notices of appeal and corresponding briefs; one for his O.V.I. conviction and one for his weapons-related convictions, although he asserted the identical assignment of error and argument in support thereof in both of his appellate briefs. Consequently, we have consolidated his appeals because they arise out of the same matter.

II

Assignment of Error

> "THE DEFENDANT'S PLEA OF GUILTY WAS NOT VOLUNTARILY, KNOWINGLY, OR INTELLIGENTLY MADE BECAUSE HE WAS NOT MENTALLY COMPETENT AT THE TIME HE ENTERED THE GUILTY PLEA[.]"

{¶5} In his sole assignment of error, Rasmussen argues that his plea is invalid because he remained under the influence of alcohol at the time it was made. We disagree.

{¶6} In order for a plea to be constitutionally enforceable, it must be entered knowingly, voluntarily, and intelligently. *State v. Engle* (1996), 74 Ohio St.3d 525, 527. Crim.R. 11 requires a trial judge personally inform a defendant of certain matters before accepting a guilty plea. See Crim.R. 11(C)(2). In doing so, strict compliance with Crim.R. 11 is preferred, but is not required if there was substantial compliance. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. A determination of whether a plea is knowing, intelligent, and voluntary is based upon a review of the record. *State v. Spates* (1992), 64 Ohio St.3d 269, 272. If a criminal defendant claims that his guilty plea was not knowingly, voluntarily, and intelligently made, then the appellate court must review the totality of the circumstances in order to determine whether or not the defendant's claim has merit. *Nero*, 56 Ohio St.3d at 108. "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." Id. A reviewing court "will not invalidate a plea unless the defendant thereby suffered prejudice." *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, at ¶20, quoting *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, at ¶12. This requires a showing that, but for the error, the plea would not have been made. *Sarkozy* at ¶20.

{¶7} Rasmussen's convictions constitute a "serious offense" pursuant to Crim.R. 2(C). Therefore, Crim.R. 11(D) governs the acceptance of his plea. Under that rule, before accepting a guilty plea, the trial court must "first address[] the defendant personally and inform[] the defendant of the effect of the pleas of guilty *** and determin[e] that the defendant is making the plea voluntarily." Crim.R. 11(D). Because Rasmussen was acting pro se at the time of his plea,

the court could not accept his plea until it "readvise[d] [Rasmussen] that he *** ha[d] the right to be represented by retained counsel, or *** appointed counsel, [and he again] waive[d] this right." Id.

{¶8} Rasmussen asserts that, having recorded a BAC of .144 at approximately 2:30 a.m., when he was arraigned approximately six hours later, he was still intoxicated and therefore was incompetent to make a valid plea. In addition to the short duration of time between his arrest and his plea, he points to the fact that a repeat BAC was not performed before his arraignment to determine if he was, in fact, no longer intoxicated. He also points to the judge's remarks during his arraignment that Rasmussen "seem[ed] to be acting oddly," noting that the judge specifically stated that he was "trying to figure out [] whether or not [Rasmussen was] of sound mind and not under the influence [of alcohol] now, so that [his] decisions [to plead guilty] [we]re sound ones." Rasmussen argues that these comments, the close proximity between his arrest and his arraignment, and the court's failure to retest his BAC level before his arraignment, support a conclusion that under the totality of the circumstances, his guilty plea was not entered into voluntarily, knowingly, or intelligently because he was intoxicated at the time.

{¶9} Our review of the record, however, reveals that the trial court complied with the requirements set forth in Crim.R. 11(D) in textbook fashion. The court queried Rasmussen with a separate question as to whether he understood that by pleading guilty, he was waiving: his right to a jury trial; his right to confront witnesses against him; his right to call witnesses in his defense; his right to testify on his own behalf; his right to require the prosecution prove his guilt beyond a reasonable doubt; and his right to obtain or be appointed counsel. He responded affirmatively to each question and repeated in each instance that he understood he was waiving

the right. Additionally, he executed a written waiver of rights in both the O.V.I. and the criminal weapons case.

{¶10} Though the judge did remark that Rasmussen was acting "oddly," he followed that statement by asking Rasmussen specifically, "Do you believe that you are completely sober right now?" to which Rasmussen replied "Yes, sir." The judge again asked if he understood everything that was being said and if he knew that he had the right to counsel. Rasmussen again replied "yes" to both inquiries. Moreover, the transcript reveals a lengthy dialogue between Rasmussen and the court, in which Rasmussen stated at different points that he made a "dumb, dumb mistake" and acted like "an idiot." Rasmussen also: apologized to the court for his poor judgment; apologized to the police officers for not informing them of his concealed carry; stated he should have thought more clearly before wearing a loaded gun after drinking; volunteered to permanently relinquish his gun; explained the mail-order process through which he was able to obtain his concealed carry permit; and asked for community service in lieu of jail time. It is doubtful that a defendant who was intoxicated would, at the same time, have the capacity to be remorseful, embarrassed, and ashamed about his conduct, in addition to being able to provide a detailed recollection of the process by which he obtained his concealed carry permit. See, e.g., *State v. Humphrey*, 6th Dist. No. WM-05-012, 2006-Ohio-2630, at ¶12-35 (rejecting defendant's claim on appeal that he had medication-induced intoxication at his plea hearing which rendered him incompetent, given that he expressed confusion, embarrassment, and remorse over his actions and had denied during the hearing that any medication he was taking at that time had an adverse effect upon him).

{¶11} Furthermore, the transcript of the plea colloquy did not reflect any point at which Rasmussen was asked to repeat himself, nor did it reveal that his testimony was ever inaudible as

to suggest his speech was slurred, despite his assertion that he was intoxicated at the time. Though he argues that the trial court should have retested his BAC before accepting his plea, he cites to no authority for such a requirement. App.R. 16(A)(7). In short, based on the totality of the circumstances, it is evident that Rasmussen was competent to enter his guilty plea and was properly informed of the effects of doing so. Thus, his argument that his plea was not knowingly, voluntarily, and intelligently made is without merit. Accordingly, his sole assignment of error is overruled.

III

{¶12} Rasmussen's sole assignment of error is overruled. The judgment of the Stow Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Stow Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

JOHN C. OBERHOLTZER, Attorney at Law, for Appellant.

VIRGIL E. ARRINGTON, JR., Cuyahoga Falls Law Director, and JOHN E. CHAPMAN, Assistant Cuyahoga Falls Law Director, for Appellee.