

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-117
Cleophas J. Alexander,	:	(C.P.C. No. 11CR-09-4791)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on November 13, 2012

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Yeura Venters, Public Defender, and *Timothy E. Pierce*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Cleophas J. Alexander ("defendant"), appeals from the judgment of the Franklin County Court of Common Pleas sentencing him to a five year prison term for aggravated robbery following his guilty plea. We affirm that judgment.

{¶ 2} On September 8, 2011, the Franklin County Grand Jury indicted defendant on one count of aggravated robbery, in violation of R.C. 2911.01, a felony of the first degree, and robbery, in violation of R.C. 2911.02, a felony of the second degree. Both counts arose from a single incident. On August 31, 2011, the victim, Sewit Tesfamichael, was sitting in her car in the parking lot of a bar at Cleveland Avenue and Morse Road, in Columbus, Ohio. Defendant approached her car, tapped on her window, and asked for a light. (Tr. 18.) When she rolled down the window, defendant pulled out a lock-blade

knife and demanded money. (Tr. 18.) Ms. Tesfamichael gave him the money she had and defendant ran away. (Tr. 18.) Ms. Tesfamichael drove her car to the bar's security guard and told him what happened. The guard and a bar patron chased defendant and apprehended him. (Tr. 19.) Columbus police officers arrived and recovered Ms. Tesfamichael's money and the lock-blade knife. Ms. Tesfamichael positively identified defendant as the man who robbed her. (Tr. 19.)

{¶ 3} Defendant filed an affidavit of indigency and was appointed counsel. On September 15, 2011, counsel for defendant filed a demand for discovery. That same day, counsel also filed a demand for a bill of particulars.

{¶ 4} On October 3, 2011, plaintiff-appellee, the State of Ohio ("the State"), filed a bill of particulars and provided discovery.

{¶ 5} Following defendant's plea of not guilty by reason of insanity ("NGRI"), the court ordered an evaluation of defendant.

{¶ 6} On December 5, 2011, the assessment from Netcare was filed with the common pleas court. The psychologist concluded:

It is my opinion, with a reasonable degree of psychological certainty, that Cleophas Alexander was experiencing a severe mental disease – and was also under the voluntary influence of substances – but not a severe mental defect at the time of the alleged offense. Further, it is my opinion that he knew the wrongfulness of his acts at the time of the offense charged.

(R. 38.)

{¶ 7} Defendant's case was set for trial on December 12, 2011. On December 6, 2011, the State provided supplemental discovery to defendant. On December 12, 2011, defendant appeared in court with counsel. At that time, defendant expressed concern because he saw his discovery for the first time that morning. (Tr. 2.) Defendant also indicated that he had some witnesses whom he wanted to call on his behalf and that his attorney was not prepared for trial. (Tr. 3.) Defendant asked the court to allow him to secure other counsel within 30 days. (Tr. 3-4.) With regard to potential witnesses, the following exchange took place between the court, defendant, and defendant's counsel:

[DEFENSE COUNSEL]: For the record, Your Honor, just so it is clear, Your Honor, the witnesses that are being referred to are witnesses that go to the issue of the NGRI, which he has

been found not to be. So I explained to him that that is part of the problem, is that in a case where he has been found to be not NGRI, those witnesses would not necessarily have relevant testimony.

THE COURT: What witnesses are you talking about?

THE DEFENDANT: Sir, one of - -

THE COURT: No, no, no. I am talking to [defense counsel].

[DEFENSE COUNSEL]: They are witnesses through the Veterans Administration that have some knowledge of what is contained in the - -

THE COURT: Are you talking about Mr. Zeyen's witnesses?

[DEFENSE COUNSEL]: No, no, the witnesses - - because he indicated there were witnesses that he wanted, that he wanted subpoenaed.

THE COURT: Oh, your client?

[DEFENSE COUNSEL]: Right, right. And just for the record, the witnesses that he is referring to are witnesses that would go to the issue of NGRI, but he has been found to be not NGRI.

THE COURT: That is already over with, so we are not going to go over those witnesses again.

THE DEFENDANT: Your Honor, please, sir. One of the witnesses is the one that I have the paperwork here from the VA where I do, I am suffering from PTSD from the military.

THE COURT: Post traumatic stress?

THE DEFENDANT: Yes, sir.

THE COURT: I had that four or five times. I am a Vietnam veteran. I was in combat. I know what that is. Everybody has got that nowadays. That is very common.

THE DEFENDANT: This was different. It is called military sexual trauma on PTSD that I have been found to have.

THE COURT: We have already had you evaluated and we are done with that, so we are not going to plow that ground again. Have a seat.

(Tr. 5-7.)

{¶ 8} After a brief recess, defendant's counsel presented the court with a signed guilty plea form. As the court was questioning defendant about his rights, defendant again indicated that he felt he was being forced to proceed with the trial when he wanted to secure new counsel. The trial court informed defendant that, three months ago he had indicated that he was indigent and wanted a court appointed attorney. The court asked him again if he wanted to proceed with a jury trial instead of pleading guilty, and defendant ultimately indicated that he would proceed with the guilty plea. During the course of the plea colloquy, the trial court explained to defendant the rights that he was waiving by entering a plea of guilty. When the court asked defendant if he understood his rights, the following exchange took place regarding defendant's witnesses:

THE DEFENDANT: You said I can have rights to witnesses, right, if I chose a jury trial?

THE COURT: What is that?

THE DEFENDANT: You say I would have a right to witnesses if I - - that you just read that said I just have a right to witnesses if I had a jury trial?

THE COURT: Yes.

THE DEFENDANT: That is what I prefer, sir.

[DEFENSE COUNSEL]: Well, Your Honor, again, just so the record is clear as far as witnesses go, and I explained this to Mr. Alexander, that witnesses that do not have relevant testimony I am not likely to put on the stand.

THE COURT: I am not likely to listen to them either.

What witnesses do you have that have something to say about this robbery?

THE DEFENDANT: One witness has verified where I was at at the time of the robbery. Another witness who at the time of

this supposed robbery, I am robbing somebody one day before payday.

THE COURT: One day what?

THE DEFENDANT: I was - - this incident happened one day before my payday.

THE COURT: Which proves absolutely nothing. You are just saying that you have a witness who will testify that this happened one day before your payday?

THE DEFENDANT: Yes. No, I already know that. I got that part. I am saying if, if my witnesses were to testify that I was there with him at the time of this robbery.

THE COURT: Oh. Who is that witness?

THE DEFENDANT: His name is Jimbo.

THE COURT: Have you told your attorney about that witness?

THE DEFENDANT: We have not - - my attorney haven't discussed anything about me trying to represent this case at all except for Netcare and you ordered that - -

THE COURT: Oh, you think I ordered that on my own?

THE DEFENDANT: No.

THE COURT: I didn't.

[DEFENSE COUNSEL]: In all fairness, Your Honor, we know where he was at the time of the robbery because he was - - we know that because he was apprehended simultaneously with the alleged incident. So I have not heard anything about an alibi at this point.

THE COURT: How could you be someplace else if the police arrested you on the scene, Mr. Alexander? Mr. Alexander?

THE DEFENDANT: Sir.

THE COURT: I just asked you a question.

THE DEFENDANT: Yes, sir.

THE COURT: Now what is it? I don't know.

THE DEFENDANT: Your Honor, this is - - I have very ineffective - - he has tried to send me to prison instead of trying to defend me.

THE COURT: He has what?

THE DEFENDANT: He is attempting to send me to prison as opposed to try to defend me.

THE COURT: I am asking you about your witness.

THE DEFENDANT: Your Honor, do what you want with me.

THE COURT: No, I am not doing what I want to do. Sit down.

(Tr. 13-15.)

{¶ 9} Following another short recess, defendant and his counsel again appeared before the court. The court continued advising defendant about the rights he was waiving and also explained the charge to which he was pleading guilty, as well as the maximum fine and penalties. Defendant entered a guilty plea to the aggravated robbery charge. The trial court asked defendant if he had any additional questions and the defendant responded "[e]verything is okay." (Tr. 18.)

{¶ 10} After the statement of facts was read, defendant waived his right to a presentence investigation and the trial court sentenced him to the jointly recommended sentence of five years incarceration.

{¶ 11} Defendant was asked again if he had anything additional to say and defendant responded as follows:

Your Honor, I never robbed nobody in my life and sorry if I did what they say I did. I wish the person who I supposedly robbed was standing here so I can apologize. I am too old, I am 58, I can't remember the date. And I don't know if I could do five years, but I am going to try.

If I am wrong, I - - if I am wrong, I deserve to pay for something I did because if it would have happened to one of my family members, I would be wanting some kind of justice as well. So I am sorry, Your Honor, for taking you through all

of this rigmarole I took today, but I am not fully understanding everything as I supposed to, but I guess I am trying to do what is right for me and satisfy the justice system at the same time. That is all, Your Honor. Thank you.

(Tr. 21.)

{¶ 12} Defendant appeals and assigns the following assignment of error:

The trial court erred in accepting Appellant's guilty plea in violation of Crim. R. 11 and due process guarantees under the state and federal Constitutions.

{¶ 13} It is well-established that a guilty plea is a waiver of a defendant's constitutional rights and that a waiver of such rights must be knowingly and intelligently made to meet the constitutional standards. *Boykin v. Alabama*, 395 U.S. 238 (1969). Accordingly, Crim.R. 11(C)(2) prohibits a trial court from accepting a guilty plea 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.

{¶ 14} In the present case, the trial court questioned defendant at length. Defendant acknowledged the court's questions and repeatedly insisted that he was innocent and wanted a jury trial. Defendant complained that his attorney was focused on the NGRI plea and had failed to properly prepare for trial by investigating witnesses and

exploring other defenses. The trial court denied defendant's request for newly appointed counsel or for an opportunity to hire one.

{¶ 15} Defendant asserts that he was pressured into pleading guilty when the trial court refused to acknowledge that his trial counsel had not properly represented him. In response, the State concedes that defense counsel is required to investigate all apparently substantial defenses available to a defendant and must assert them in a proper and timely manner. However, the State contends that, in the present case, defense counsel properly represented defendant despite defendant's protestations during the plea hearing. The State argues that the trial court complied with the requirements of the law.

{¶ 16} On defendant's behalf, defense counsel requested a bill of particulars and made a demand for discovery on September 15, 2011. On October 3, 2011, the State provided the bill of particulars and discovery. On November 1, 2011, defense counsel informed the trial court that defendant was pleading NGRI and asked that defendant be evaluated. On December 6, 2011, a Netcare assessment was filed indicating that, while defendant was experiencing severe mental disease and was under the influence of substances, he did not have a severe mental defect at the time of the alleged offense and he knew the wrongfulness of his acts. Thereafter, defendant and defense counsel appeared before the trial court on December 12, 2011, at which time defendant entered a guilty plea.

{¶ 17} As indicated above, defense counsel took an active role in preparing defendant's defense. Faced with the evidence of the defendant's guilt and assertion that he suffered from a form of post traumatic stress disorder, defense counsel filed an NGRI plea and asked that defendant be evaluated. Following the evaluation, whereby the examiner found defendant was not NGRI, defense counsel discussed a plea with defendant.

{¶ 18} As noted previously, defense counsel explained to the trial court that the testimony of the witnesses to whom defendant referred would have been relevant to the NGRI plea, but those witnesses did not have testimony that would contradict the evidence that defendant actually robbed the victim. The record reflects that defendant was apprehended at the scene of the alleged crime, was identified by the victim as the man who had robbed her, and both the victim's money and the lock-blade knife were recovered

from defendant's person. As such, to the extent that defendant argues that he had witnesses who would testify that he was not present at the time and scene of the alleged crime, the evidence clearly established that he was.

{¶ 19} To the extent that defendant argues that the trial court erred by accepting his plea where it was clear that counsel had not explored possible defenses or prepared for trial, this court finds that the record establishes otherwise. The fact that defendant continued to maintain his innocence in the face of the evidence of his guilt, does not establish that defense counsel did not zealously represent him and does not contradict the record demonstrating that the trial court complied with the requirements of Crim.R. 11(C)(2).

{¶ 20} Furthermore, the record demonstrates the trial court engaged in a meaningful colloquy with defendant prior to accepting his guilty plea. During the plea hearing, the trial court discussed the plea form with defendant and addressed his rights pursuant to Crim.R. 11. Among other things, the court informed defendant that, by entering a plea of guilty, he was waiving his right to: (1) a trial by jury; (2) confront or cross-examine witnesses against him; (3) subpoena witnesses who would testify in his favor and compel those witnesses to appear; (4) remain silent and require the State to prove his guilt beyond a reasonable doubt; and (5) appeal to a higher court if mistakes were made during trial. The trial court also addressed the charge to which defendant was pleading guilty, along with the maximum fine and penalties, and the implications of a prison sentence, which would also include a mandatory period of post-release control.

{¶ 21} After reviewing the record, this court finds that the trial court did comply with the requirements of Crim.R. 11(C)(2) and that defendant has not established that his guilty plea was not knowingly, intelligently, and voluntarily made. As such, defendant's sole assignment of error is overruled.

{¶ 22} Having found that defendant has not demonstrated the trial court failed to comply with Crim.R. 11(C)(2), defendant's sole assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN, P.J., and DORRIAN, J., concur.
