

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-P-0077
GWYNN D. GRIFFEY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2006 CR 0739.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Patricia J. Smith, 114 Barrington Town Square, #188, Aurora, OH 44202 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Gwynn D. Griffey, appeals the judgment of the Portage County Court of Common Pleas denying his motion to withdraw his guilty plea to nonsupport of dependants. At issue is whether the trial court abused its discretion in denying appellant’s motion. For the reasons that follow, we affirm.

{¶2} On December 26, 2006, the grand jury returned a one-count indictment against appellant charging him with nonsupport of dependants, in violation of R.C. 2919.21(A)(2)(B), a felony of the fifth degree. The indictment alleged that appellant had

failed to provide support for his son pursuant to an order established by the Portage County Domestic Relations Court for 26 out of 104 consecutive weeks between January 1, 2000 and December 31, 2001. Appellant pled not guilty to the charge.

{¶3} Thereafter, at a pretrial held on July 24, 2009, appellant's counsel advised the court that after several lengthy discussions with appellant, he had decided to plead guilty to the indictment. At the change-of-plea hearing that followed, the court asked appellant if his attorney had advised him and if he understood the nature of the charge to which he would be pleading guilty, which the court said was "Non-support of Dependents, a felony of the fifth degree," and appellant said yes. The court also advised appellant and he said he understood the potential sentence; post-release control; the effect and consequences of his guilty plea; and that upon acceptance of his plea, the court could immediately proceed with judgment and sentencing.

{¶4} The court also advised appellant and he said he understood and waived his right to a jury trial at which the state would be required to prove his guilt beyond a reasonable doubt, the right to confront and cross-examine the state's witnesses, the right to subpoena witnesses, and the privilege against self-incrimination.

{¶5} Appellant said he was entering his plea voluntarily and of his own free will; that he had not been promised, coerced, or threatened into entering a plea; and that he did not want the court to set the case for trial.

{¶6} Appellant told the court that he had thoroughly reviewed with his attorney the written plea of guilty, which the prosecutor had prepared, and that he had voluntarily signed it. The written guilty plea provided: "I have been informed by my Attorney and by the Judge, and I understand the nature of the charge[] to which I am pleading guilty,

to wit: nonsupport of dependents, a felony of the fifth degree O.R.C. 2919.21(A)(2)(B) ***.” The written guilty plea also listed all of appellant’s rights under Crim.R. 11. It provided that appellant had been advised of each of these rights and that he understood and waived them.

{¶7} The court found that appellant understood and waived his rights before entering his guilty plea; that he understood the effects of his plea; and that he entered his plea knowingly and voluntarily. The court then accepted appellant’s guilty plea, and referred the matter to the probation department for a presentence report.

{¶8} Thereafter, on September 4, 2009, appellant filed a motion to withdraw his guilty plea. On September 21, 2009, the court held a hearing on the motion. Appellant testified that several years ago he was injured in a traffic accident that resulted in his being in a coma for 30 days. He said that for the past few months he has been under the care of a neurologist for shaking, which, he has been told, may “possibly” be caused by Parkinson’s Disease. In explaining why he believed his guilty plea was not voluntary, appellant testified: “*** [W]hen I came into this Courtroom – I was in a total state of shock. I didn’t understand what was coming at me. They were talking about felony, I didn’t understand what a felony was, even though I’m an educated adult ***.” In explaining why he believed he had a defense to the charge, appellant testified: “*** I understand a felony of this type is willful non-payment. *** And I didn’t do willful non-payment.”

{¶9} On cross-examination, appellant conceded he never told the court that he did not understand the nature of the charge. In fact, he testified that on the day he pled guilty, he told the court he understood the nature of the charge to which he was

pleading guilty; the effect and consequences of his guilty plea; and that upon accepting his plea, the court could immediately proceed with judgment and sentencing. He also testified that he had been advised by his attorney and the judge that by pleading guilty, he would be waiving each of the constitutional rights the judge had explained to him and that he understood and waived each of these rights in open court. He conceded that the judge had gone over each of his rights as set forth in his written guilty plea slowly and carefully and that afterwards, she asked him if he was guilty of nonsupport of dependants and he said he was guilty.

{¶10} At the conclusion of the testimony, the court denied appellant's motion to withdraw his guilty plea, finding:

{¶11} "This matter has been pending since January 23 of 2009.

{¶12} "****

{¶13} "I fully went over the plea sheet ***[.] I go over the plea sheet very thoroughly, I make sure that the individual understands his right[s], and I remember this particular case because I went over it slowly and methodically, the Defendant thoroughly knew what his rights were, knew that any time he could say let's go to trial, and instead he entered a plea of guilty."

{¶14} On October 30, 2009, the trial court sentenced appellant to 60 months of community control. Appellant was also ordered to pay arrearages in the amount of \$39,900 to the Child Support Enforcement Agency within 60 months. Appellant appealed, asserting the following for his sole assignment of error:

{¶15} “The trial court abused its discretion and erred when it failed to vacate the guilty plea of the appellant when a timely motion to Withdraw the Plea [sic] was made prior to sentencing.”

{¶16} We review a trial court’s denial of a motion to withdraw a guilty plea pursuant to the abuse of discretion standard. *State v. Kimble*, 11th Dist. No. 2005-T-0085, 2006-Ohio-6096, at ¶5, citing *State v. Xie* (1992), 62 Ohio St.3d 521, 526. This court has stated that the term “abuse of discretion” is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, at ¶30, citing *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. The Second Appellate District has also recently adopted this definition of the abuse of discretion standard in *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶65, citing Black’s Law Dictionary (4 Ed.Rev.1968) 25 (“A discretion exercised to an end or purpose not justified by and clearly against reason and evidence”).

{¶17} A motion to withdraw a guilty plea filed before sentencing should be freely and liberally granted. *Xie*, supra, at 526. However, there is no absolute right to withdraw a guilty plea. *Id.* Courts are required to conduct a hearing at which the defendant is required to articulate a reasonable and legitimate basis for the withdrawal of the plea. *Id.* Although a motion to withdraw a guilty plea before sentencing is to be freely allowed, the decision whether to grant such motion is still within the sound discretion of the trial court. *Id.*, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211, 213.

{¶18} A trial court does not abuse its discretion in denying a pre-sentence motion to withdraw a guilty plea when the following occur: “(1) the trial court made certain, pursuant to Crim.R. 11, that the defendant fully understood the nature and consequences of the original plea and that the plea was entered into voluntarily; (2) the accused was represented by highly competent counsel; (3) the defendant was given an adequate hearing on his motion to withdraw his plea and was afforded the opportunity to make all arguments in support of his motion; and (4) the lower court gave the necessary consideration to defendant’s motion.” *State v. Curd*, 11th Dist. No. 2003-L-030, 2004-Ohio-7222, at ¶107, reversed on other grounds at 109 Ohio St.3d 313, 2006-Ohio-2109, citing *Peterseim*, supra, at 214.

{¶19} Appellant argues the trial court abused its discretion in not allowing him to withdraw his guilty plea because, he claims, the trial court failed to determine whether he understood the nature of the charge. He therefore challenges only the first requirement under the *Peterseim* test.

{¶20} Crim.R. 11(C)(2) provides:

{¶21} “*** In felony cases the court may refuse to accept a plea of guilty ***, and shall not accept a plea of guilty *** without first addressing the defendant personally and doing all of the following:

{¶22} “(a) *Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and the maximum penalty involved ***.*

{¶23} “(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty ***, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶24} “(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the right 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.” (Emphasis added.)

{¶25} When determining whether the trial court has met its obligations under Crim.R. 11 in accepting a guilty plea, appellate courts have distinguished between constitutional and non-constitutional rights. With respect to the constitutional rights, a trial court must advise a defendant that, by pleading guilty, he or she is waiving: “(1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination.” *State v. Veney*, 120 Ohio St.3d 176, at syllabus, 2008-Ohio-5200 (Crim.R. 11(C)(2)(c) applied); see, also *State v. Porterfield*, 11th Dist. No. 2002-T-0045, 2004-Ohio-520, at ¶23. A trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of the constitutional rights and the failure to do so invalidates the plea. *Veney*, supra; see, also, *State v. Lavender*, 11th Dist. No. 2000-L-049, 2001-Ohio-8790, 2001 Ohio App. LEXIS 5858, *11. “Strict compliance” does not require a verbatim recitation of the rights being waived. *State v. Ballard* (1981), 66 Ohio St.2d 473, 480. Rather, the standard requires the court to explain or refer to the rights in a manner reasonably intelligible to the defendant entering the guilty plea. *Id.*

{¶26} In contrast, the remaining, so-called non-constitutional rights set forth under Crim.R. 11 require the court to: (1) *determine the defendant understands the nature of the charge(s)* and possesses an understanding of the legal and practical effect(s) of the plea; (2) determine the defendant understands the maximum penalty that could be imposed; and (3) determine that the defendant is aware that, after entering a guilty plea, the court may proceed to judgment and sentence. See Crim.R. 11(C)(2)(a) and (b). *State v. Nero* (1990), 56 Ohio St.3d 106, 107-108. Although literal compliance with Crim. R. 11 with respect to the non-constitutional rights is preferred, an advisement that substantially complies with the rule will suffice. *Nero, supra*. A court substantially complies where the record demonstrates the defendant, under the totality of the circumstances, understood the implications of the plea and the rights waived. *Id.*

{¶27} It is necessary to point out, however, that if a trial court fails to inform a defendant in any manner of one of the non-constitutional rights listed in Crim.R. 11(C), such failure will not result in an automatic reversal. *Porterfield, supra*, at ¶25. To rise to the level of reversible error, a defendant must demonstrate that he or she was *prejudiced* by the lack of compliance. *State v. Johnson* (1988), 40 Ohio St.3d 130, 134; see, also, Crim.R. 52(A); Crim.R. 33. To establish prejudice, the defendant must demonstrate he would not have pled guilty but for the trial court's alleged failure to inform him of one of the nonconstitutional rights. *Nero, supra*.

{¶28} In *State v. Higgs* (1997), 123 Ohio App.3d 400, this court held that, absent an indication by the defendant of confusion concerning the elements of the crime, the trial court is not required to recite or explain the elements to him. *Id.* at 404. The court's determination that the defendant understands the nature of the charge can be based on

the totality of the circumstances, including reference to discussions between the defendant and his attorney. Id.

{¶29} In *State v. Lelux* (Mar. 4, 1997), 10th Dist. No. 96APA08-1018, 1997 Ohio App. LEXIS 785 the trial court asked the defendant if he was voluntarily pleading guilty to “aggravated trafficking, a felony in the first degree.” The court did not, however, explain the nature of the charge to the defendant or personally ask him if he understood the nature of the charge. The Tenth District held that even if the trial court should have personally addressed and inquired of the defendant whether he understood the nature of the charge, the defendant was not prejudiced because neither the defendant nor his attorney requested further elaboration from the court. Id. at *6.

{¶30} In *State v. Thomas*, 10th Dist. No. 04AP-866, 2005-Ohio-2389, the defendant argued the trial court failed to determine that he understood the nature of the charge against him before accepting his guilty plea. At the plea hearing, the trial court did not explain the elements of the charge of murder, nor did the trial court ask him if he understood the nature of the charge. The Tenth District held: “*it is not always necessary for a trial court to advise the defendant of the elements of the charge or to ask him if he understands the charge, so long as the totality of the circumstances demonstrate that the defendant understood the charge.*” (Emphasis added.) Id. at ¶11. The appellate court held the following circumstances indicated that the defendant understood the nature of the charge to which he pled guilty: (1) the charge, murder, was a lesser included offense of the charge for which he was originally indicted, aggravated murder; (2) the guilty plea form that appellant signed identified the charge and stated that he reviewed the facts and law of his case with counsel; (3) the

defendant did not voice any concerns about his understanding of the nature of the charge and his attorney did not express any concern regarding his client's understanding of the nature of the charge. *Id.* at ¶12.

{¶31} As noted above, appellant argues the trial court failed to determine whether he understood the nature of the charge. We do not agree. The record reveals the following circumstances: (1) appellant had lengthy discussions concerning the case with his attorney, following which he decided to plead guilty; (2) the trial court personally addressed appellant and asked him if he had been informed by his attorney and if he understood the nature of the charge to which he was pleading guilty, and appellant said yes; (3) in his written guilty plea, appellant stated that he had been informed by his attorney and by the Judge and that he understood the nature of the charge to which he was pleading guilty; (4) appellant never said he did not understand the nature of the charge; (5) his attorney did not express any concern about appellant's understanding of the nature of the charge; (6) appellant pled guilty to the crime charged in the indictment, which listed all the elements of the crime; (7) appellant acknowledged receipt of a copy of his indictment at his arraignment on January 23, 2009; and (8) the written guilty plea form appellant signed identified the crime to which appellant pled guilty and the statute violated.

{¶32} Based on the totality of the circumstances, the record demonstrates that appellant understood the nature of the charge to which he pled guilty.

{¶33} Appellant also argues that the court abused its discretion in not allowing him to vacate his guilty plea because, he claims, "he had an affirmative defense of inability to pay due to medical and financial issues." However, appellant does not

reference the record in support of this argument. For this reason alone, his argument is not well taken. App.R. 16(A)(7).

{¶34} In any event, contrary to appellant's argument, he never testified that he did not make his child support payments because he could not afford to make them or because medical reasons prevented him from making them. An appellate court in determining the existence of error is limited to a review of the record. *State v. Sheldon* (Dec. 31, 1986), 11th Dist. No. 3695, 1986 Ohio App. LEXIS 9608, *2; *Schick v. Cincinnati* (1927), 116 Ohio St. 16, at paragraph three of the syllabus. Without any evidence in support of appellant's argument, there is nothing for us to consider. On appeal it is the appellant's responsibility to support his argument by evidence in the record that supports his or her assigned errors. *Columbus v. Hodge* (1987), 37 Ohio App.3d 68. Where a defendant attempting to withdraw a guilty plea fails to present evidence in support of an alleged defense, the trial court does not abuse its discretion in denying the motion. *State v. Bass*, 3d Dist. No. 1-99-63, 1999-Ohio-923, 1999 Ohio App. LEXIS 5202, *4-*5.

{¶35} Appellant's reliance on *State v. Tull*, 168 Ohio App.3d 54, 2006-Ohio-3365, is misplaced because, unlike the defendant there, appellant did not testify that he was financially unable to make his child support payments. In any event, even if appellant had testified he was unable to pay child support, the affirmative defense under R.C. 2919.21(D) would still not have been available to him because he failed to present any evidence, as required by this statute, that he provided such support to his child as was within his ability and means to pay. *Id.* at 58.

{¶36} Appellant's reasons for withdrawing his guilty plea were thus unsubstantiated. His claim of innocence was therefore nothing more than a mere change of heart, which we have repeatedly held is an insufficient basis for withdrawing a guilty plea. *Kimble*, supra, at ¶16, citing *Curd*, supra, at ¶14.

{¶37} Further, appellant argues his guilty plea was invalid because the trial court failed to explain to him his potential affirmative defense of financial inability to pay. However, "Crim.R. 11 does not require a trial judge to *** inform a criminal defendant of possible affirmative defenses." *State v. Kramer*, 7th Dist. No. 01-C.A.-107, 2002-Ohio-4176, at ¶24. The Supreme Court of Ohio has held: "Where a criminal defendant [is] represented by counsel ***, the trial court is not required, pursuant to Crim.R. 11(C), to apprise him of [] affirmative defenses *** prior to accepting his plea of guilty ***." *State v. Reynolds* (1988), 40 Ohio St.3d 334, syllabus.

{¶38} Moreover, even if the trial court had not asked appellant if he understood the nature of the charge, he would still not have been entitled to a reversal because there is no evidence of prejudice. *Johnson*, supra; *Nero*, supra. First, neither appellant nor his attorney ever requested elaboration from the court concerning the nature of the charge. *Lelux*, supra. Moreover, appellant did not testify that if he understood the nature of the charge, he would not have pled guilty. *Nero*, supra.

{¶39} Finally, appellant did not state in his motion to withdraw or argue at the hearing on the motion that he could not afford to make his payments or that his medical condition prevented him from paying child support. The argument concerning his purported defense is therefore waived on appeal. *State v. Awan* (1986), 22 Ohio St.3d 120, 122.

{¶40} We therefore hold the trial court did not abuse its discretion in denying appellant’s motion to withdraw his guilty plea.

{¶41} For the reasons stated in the Opinion of this court, the assignment of error is not well taken. It is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs,

COLLEEN MARY O’TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O’TOOLE, J., dissents with Dissenting Opinion.

{¶42} As I would reverse, and remand this matter for trial, I respectfully dissent.

{¶43} Crim.R. 32.1 provides: “A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.”

{¶44} Crim.R. 32.1 “gives no guidelines for a trial court to use when ruling on a presentence motion to withdraw a guilty plea.” *Xie*, supra, at 526. However, there is a presumption at law that such motions should be “freely allowed.” *Peterseim*, supra, at paragraph one of the syllabus. As the *Peterseim* court explained:

{¶45} “Neither party has cited, and this court has not found, any Ohio case discussing the standard for evaluating *pre*-sentence guilty plea withdrawal under Crim.R. 32.1. However, the language of that rule is nearly identical *** to that of

Fed.R.Crim.P. 32(d), and we, consequently, can refer to the federal cases for direction in this case.

{¶46} “The rule states that post-sentence plea withdrawal will be permitted only ‘to correct manifest injustice,’ but makes no such limitation on pre-sentence plea withdrawal. Consequently, it can be seen that the standards for permitting pre-sentence plea withdrawal are different than those for permitting withdrawal after sentencing has occurred. *** In *Kadwell v. United States* (C.A. 9, 1963), 315 F.2d 667, the court distinguished between pre-sentence and post-sentence plea withdrawal, holding that the rule required free allowance of leave to withdraw in the pre-sentence situation. The court based this holding on practical considerations:

{¶47} “(***) Before sentencing, the inconvenience to court and prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the right of the accused to trial by jury. But if a plea of guilty could be retracted with ease *after* sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe. (***)’ (Emphasis *sic* and footnote omitted.) *Id.*, at 670. Accord, *Barker v. United States* (C.A. 10, 1978), 579 F.2d 1219, 1223; *United States v. Roberts* (C.A.D.C., 1977), 570 F.2d 999, 1008; *United States v. Read* (C.A. 9, 1976), 534 F.2d 858, 859.” (Emphasis *sic*.) (Footnotes omitted.)

{¶48} Unlike the majority, I believe Mr. Griffey presented sufficient evidence at the hearing on his motion to withdraw of a valid affirmative defense pursuant to R.C. 2919.21(D), making the public interest in a determination of this matter by trial paramount. That division provides:

{¶49} “It is an affirmative defense to a charge of failure to provide adequate support under division (A) of this section or a charge of failure to provide support established by a court order under division (B) of this section that the accused was unable to provide adequate support or the established support but did provide the support that was within the accused’s ability and means.”

{¶50} Mr. Griffey testified that he suffered major trauma due to a car accident in the past, and was in a coma for thirty days, at that time. He testified he is under the care of a neurologist, for a potential case of Parkinson’s Disease. He testified that his wife is principally responsible for advising him on and handling his affairs, including his financial affairs. He testified he was in a state of “shock” at the time he entered his plea of guilty, and had only arrived in Ohio, from his present home in Florida, the night before entering that plea.

{¶51} The majority is correct that none of this amounts to direct evidence that Mr. Griffey is unable to provide support. But it is evidence that he suffers considerable medical problems, and must rely on others to help him handle his affairs. In the context of a motion to withdraw a plea, I think it was sufficient to raise issues regarding whether he understood the nature of his plea at the time he entered it, and whether he might have a valid affirmative defense to the charge against him.

{¶52} For the foregoing reasons, I respectfully dissent.