

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-08-059

Appellee

Trial Court No. 2007-CR-073

v.

Timothy Thayer

DECISION AND JUDGMENT

Appellant

Decided: September 30, 2009

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and Mary Ann Baryliski,
Assistant Prosecuting Attorney, for appellee.

Dan Weiss, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas, following a guilty plea, in which the trial court found him guilty of one count of felonious assault, in violation of R.C. 2903.11(A)(2), with a firearm specification, in

violation of R.C. 2941.145, and sentenced him to serve a total of seven years in prison.

On appeal, appellant sets forth the following assignment of error:

{¶ 2} "The court erred in failing to substantially comply with the requirements of Criminal Rule 11 in accepting appellant's plea of guilty."

{¶ 3} On February 6, 2007, the Erie County Grand Jury indicted appellant on one count of having a weapon while under disability, in violation on R.C. 2923.13(A)(4) (Count 1); one count of attempted murder, in violation of R.C. 2903.02(A) (Count 2); one count of felonious assault, in violation of R.C. 2903.11(A)(2) (Count 3); and one count of abduction, in violation of R.C. 2905.02(A)(2) (Count 4). In addition, the grand jury found, as to Count 3, that appellant had a firearm on or about his person or under his control while committing the offense, in violation of R.C. 2941.141. The grand jury further found, as to Count 4, that appellant either had a firearm on his person or under his control; or displayed, brandished, indicated that he had a firearm, or used a firearm to commit the offense, in violation of R.C. 2941.145. The charges were based on allegations by appellant's girlfriend and family members that he threatened them with a firearm during a domestic dispute.

{¶ 4} On February 15, 2007, appellant entered a plea of not guilty to all counts of the indictment. On April 5, 2007, appellant filed a motion to suppress evidence or, in the alternative, to dismiss the charges against him.

{¶ 5} On May 1, 2007, at appellant's request, the trial court ordered appellant to undergo an examination at the Court Diagnostic and Treatment Center ("CDTC") to

determine whether he was both competent to stand trial and/or insane. On June 26, 2007, after reviewing reports issued by Thomas G. Sherman, MD, of the CDTC, the trial court found that, at the time of the charged offenses, appellant did not suffer from a mental disease or defect that prevented him from knowing his acts were wrongful. The trial court also found that appellant understood the charges against him and the nature of the proceedings of the court system, and he was capable of assisting counsel in his own defense.

{¶ 6} On August 22, 2007, a hearing was convened to address appellant's motion to dismiss/suppress. However, at the outset of the hearing, defense counsel stated that appellant wanted to withdraw the motion. Defense counsel further stated that, pursuant to a plea bargain, appellant agreed to change his plea to guilty of one count of felonious assault in violation of R.C. 2903.11, a second degree felony, and one count of having a weapon while under disability, in violation of R.C. 2923.13(A)(4). The prosecutor then stated that, pursuant to the plea, the state would dismiss Counts 1, 2 and 4 in exchange for appellant's guilty plea to felonious assault and the three-year gun specification set forth in R.C. 2941.145. She recommended a four-year prison term on the felony charge, to be served consecutively with the mandatory three-year sentence, for a total sentence of seven years.

{¶ 7} Defense counsel stated that he had thoroughly discussed the plea with appellant, and that appellant was "fully comprehensive" of the nature and consequences of the plea. The trial court then addressed appellant directly, during which appellant

stated that he was not under the influence of alcohol, drugs, or prescription medication. Appellant then stated that he had some questions about the plea, relating to whether the sentences could be made concurrent instead of consecutive. The trial court responded that the firearm specification carried a three-year mandatory consecutive sentence.

{¶ 8} The record also shows that, while attempting to ascertain the voluntariness of appellant's plea, the trial court and appellant had the following exchange:

{¶ 9} "The Court: This is what you want to do?

{¶ 10} "[Appellant]: Yeah, I got to now.

{¶ 11} "The Court: No, you got -- your don't got to [sic] 'til I --

{¶ 12} "[Appellant]: Stick with this one.

{¶ 13} "The Court: You don't have to * * *. You have the option to make this plea or to go to trial, one of the two.

{¶ 14} "[Appellant]: I'll stick with this one.

{¶ 15} "The Court: Okay. You've heard the --

{¶ 16} "[Appellant]: I don't think it's fair, but --

{¶ 17} "The Court: This -- this is your choice. If you don't want to enter a guilty plea, you don't have to. In this hearing here today, I have to determine, first off, are you knowingly, intelligently and voluntarily entering this guilty plea. The comments you're making to this court indicate you're not doing this voluntarily, and if you're not knowingly, intelligently and voluntarily entering this plea, then the alternative is to call a jury in and we'll try the case.

{¶ 18} "[Appellant]: No, I'll keep it on this.

{¶ 19} "The Court: Okay. You've heard the plea agreement here today. * * *

Are you in agreement with it? * * *

{¶ 20} "[Appellant]: Yes."

{¶ 21} Appellant then indicated that he needed more time to consider the nature of his plea, and to talk with defense counsel. A recess was granted, after which appellant indicated that he would proceed with the plea, and that he was satisfied with his attorney's representation. At that time, the following exchange took place between the trial court and appellant:

{¶ 22} "The Court: Do you understand the recommendation made of seven years is not binding on this Court? This Court could give less, this Court could give more. Do you understand that?"

{¶ 23} "[Appellant]: Yes

{¶ 24} "* * *

{¶ 25} "The Court: You're pleading guilty to a felony of the second degree. That carries a possible prison sentence of anywhere from two up to eight years in increments of a year and a fine up to \$15,000. That count, that offense is not mandatory prison, but there is a presumption for prison. It's presumed in the law that you must go to prison for that offense.

{¶ 26} "You're also pleading guilty to a three year gun specification, and that is mandatory. It's mandatory that the Court impose it, and it's mandatory that the Court run

it consecutive to your felony of the second degree, so at the very minimum, you're looking at five years in prison, and the most, you're looking at 11 years in prison. Do you understand that?

{¶ 27} "[Appellant]: Yes.

{¶ 28} The trial court then explained the conditions of postrelease control to appellant, as well as his limited rights on appeal. The trial court also stated that appellant's victims had the right to appear and make statements at the time of sentencing. The trial court explained appellant's constitutional rights, as follows:

{¶ 29} "The Court: Now, Mr. Thayer, you have certain Constitutional rights that you're giving up by pleading guilty here. I want to make - - I want to go over those rights. I first want to make sure you understand your right and then I want to make sure you're giving up that right. * * *"

{¶ 30} The trial court then advised appellant of his constitutional rights to a trial by a 12-member jury; to have the elements of the offenses charged proven beyond a reasonable doubt; to have a unanimous verdict; to cross-examine witnesses at trial; to subpoena his own witnesses for trial; and to not testify in his own defense. After the recital of each constitutional right, appellant indicated that he understood and wished to give up that right as part of his plea. At that point, the trial court and appellant engaged in a conversation, after which appellant indicated that he understood the issues raised in his motion to dismiss/suppress were waived when the motion was withdrawn. Appellant

then indicated that nothing had been offered to him in exchange for his plea, and that he was not forced into making the plea.

{¶ 31} After the above exchanges took place, the trial court reviewed the terms of the plea with appellant as follows:

{¶ 32} "The Court: You understand what you're doing here today? You understand you're entering your guilty plea to a felony of the second degree and a gun specification of three years, which is mandatory and must be served consecutive to the sentence for the felony of the second degree and you're agreeing on a seven year sentence, you understand that's what you're doing here today?"

{¶ 33} "[Appellant]: Yeah, but I don't understand -- why can't -- yes, I do.

{¶ 34} "The Court: You do?"

{¶ 35} "[Appellant]: Yeah.

{¶ 36} " * * *

"The Court: Going back to Count 3, in violation of 2903.11, felonious assault, a felony of the second degree, going back to the gun specification of three years, how do you plead to * * * that offense and that specification?"

{¶ 37} "[Appellant]: Guilty

{¶ 38} "The Court: You're pleading guilty to that because you are guilty, correct?"

{¶ 39} "[Appellant]: About having the gun?"

{¶ 40} "The Court: You're pleading guilty to the gun specification -- * * * and the felonious assault because you are guilty, correct?"

{¶ 41} "[Appellant]: Yeah.

{¶ 42} "The Court: Mr. Thayer, I want you [to] make sure you know what you're doing. You can go to trial on all these counts if you want.

{¶ 43} "[Appellant]: Well, going to trial, it can only get worse on this, right?"

{¶ 44} "The Court: I'm not going to give you any legal advice, but you have that right. That's what I want to make sure.

{¶ 45} "[Appellant]: Yeah, I understand."

{¶ 46} The trial court found that appellant's plea was knowingly, voluntarily, and intelligently made, and constituted a voluntary waiver of his constitutional rights pursuant to Crim.R. 11, and found him guilty of one count of felonious assault with a three-year gun specification. At appellant's request, sentencing was postponed pending the completion of a presentence investigation. While in the Erie County jail awaiting sentencing, appellant suffered life-threatening injuries when he unsuccessfully attempted to commit suicide. On October 10, 2007, appellant made a second request for a competency evaluation, based on his suicide attempt.

{¶ 47} On October 11, 2007, a sentencing hearing was held, at which appellant's defense attorney stated that appellant wanted to withdraw his earlier motion to withdraw his guilty plea, which the trial court granted. In spite of the defense attorney's representation that appellant was still recovering from his suicide attempt and was not yet able to speak, the trial court denied appellant's second request for a competency

evaluation, based on its earlier determination that appellant was mentally competent to stand trial.

{¶ 48} Victims' statements were then made by appellant's relatives, Paul and Sue Thayer. The trial court also stated that it had received victims' statements from appellant's girlfriend, Tracy Summerfield, and his nephew, Josh Thayer. The trial court then reminded appellant that a three-year sentence on the gun specification was mandatory, and advised him as to the conditions of postrelease control. Defense counsel asked the trial court to impose the minimum sentence for felonious assault, on the basis that "nobody was actually injured * * *." Appellant, who was unable to speak due to his injuries, submitted a written statement to the trial court, which said: "Seven years is too much. It was not meant to happen. Nobody was hurt."

{¶ 49} After hearing appellant's statement read in court, the trial court stated that it had reviewed appellant's prior record, which included numerous DUI and OMVI offenses, as well as convictions for theft and criminal trespass, in addition to the instant offense. The trial court noted that appellant served 180 days in jail in 2006, when his probation for an OMVI offense was revoked. The trial court then stated that it had reviewed the purposes and principles of sentencing pursuant to R.C. 2929.11, as well as the factors enumerated in R.C. 2929.12. Specifically, the trial court noted that appellant's relationship to his victims, which were his girlfriend, his brother and sister, and his 15 year-old nephew, facilitated the offense. The trial court also noted that all of appellant's victims suffered serious physical and psychological harm.

{¶ 50} The trial court stated that there were no factors indicating the less seriousness nature of the offense, and that appellant was on probation for a previous offense at the time of the incident in this case. As for recidivism factors, the trial court noted that appellant had not responded favorably to court-ordered sanctions in the past, and he showed no "general remorse" for his actions. The trial court also stated that the circumstances giving rise to the instant offense could recur in the future. Thereafter, the trial court sentenced appellant to serve four years in prison for felonious assault, to be followed by a three-year sentence on the firearm specification. A notice of appeal was filed on April 30, 2008, which was dismissed by this court as untimely on May 21, 2008. A motion for delayed appeal was filed on July 21, 2008, which this court granted on August 14, 2008.

{¶ 51} On appeal, appellant alleges that the trial court erred by not substantially complying with Crim.R. 11 before accepting his guilty plea. In support, appellant argues that the record indicates he did not understand or agree with the terms of his plea, as reflected by the record. Appellant further argues that his plea should not have been accepted because his injury while in prison rendered him unable to assist with his own defense.

{¶ 52} Crim.R. 11(C)(2), states, in pertinent part, that:

{¶ 53} "(2) 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:

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

{¶ 55} "(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.

{¶ 56} "(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. * * *

{¶ 57} When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179. The underlying purpose of Crim.R. 11 is to convey to the defendant certain information so he or she can make a voluntary and intelligent decision whether to plead guilty. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶ 18.

{¶ 58} "With respect to an explanation of constitutional rights, a trial court strictly must comply with the dictates of Crim.R. 11(C)(2)(c)." *State v. Freed*, 8th Dist. No. 90720, 2008-Ohio-5742, ¶ 37. (Other citations omitted.) The focus in such cases is whether or not the trial court explained the consequences of the plea "in a manner reasonably intelligible to that defendant." *State v. Ballard* (1981), 66 Ohio St.2d 473. In

regard to the explanation of nonconstitutional rights, such as the maximum sentence for each charge, substantial compliance with Crim.R. 11 is sufficient. *State v. Allen*, 6th Dist. No. S-09-004, 2009-Ohio-3799, ¶ 22. "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.*, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 93.

{¶ 59} As set forth above, the record shows that the trial court explained appellant's constitutional rights and, on several occasions, told appellant he had the right to rescind his plea and go to trial. Particularly, when appellant expressed concern over the length of his potential prison sentence, the trial court explained the mandatory prison term, associated with the firearm specification, and offered appellant the alternative of proceeding to a jury trial.

{¶ 60} On consideration of the entire record, we find that the trial court strictly complied with the dictates of Crim.R. 11 by informing appellant of his constitutional rights before determining that the plea was knowingly, intelligently and voluntarily made. In addition, we find that appellant's temporary inability to speak at his sentencing hearing due to his self-inflicted injuries had no bearing on his earlier ability to understand the nature and consequences of his plea. Finally, appellant's apparent belief that the length of his imminent sentence was too harsh is not a sufficient reason to allow him to withdraw his plea. *State v. McComb*, 2d Dist. Nos. 22570, 22571, 2008-Ohio-295, ¶ 9, citing *State*

v. Long (May 13, 1993), 2d Dist. No. 13285. Accordingly, appellant's sole assignment of error is not well-taken.

{¶ 61} The judgment of the Erie County Court of Common Pleas is affirmed.

Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

Richard W. Knepper, J.
CONCUR.

JUDGE

JUDGE

Judge Richard W. Knepper, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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