

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

State of Ohio

Court of Appeals No. WD-11-030

Appellee

Trial Court No. 07CR389

v.

Timothy Rinehart

DECISION AND JUDGMENT

Appellant

Decided: August 2, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
Heather M. Baker and Jacqueline M. Kirian, Assistant
Prosecuting Attorneys, for appellee.

Andrew R. Schuman, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment entered by the Wood County Court of Common Pleas after defendant-appellant, Timothy Rinehart, entered a plea of guilty to one count of unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A), a

felony of the third degree, and one count of pandering sexually oriented matter involving a minor, in violation of R.C. 2907.322(A)(1), a felony of the second degree. The court found him guilty of those offenses and sentenced him to consecutive terms of three years incarceration on the unlawful sexual conduct with a minor charge and four years incarceration on the pandering charge. Appellant now challenges that judgment through the following assignments of error:

1. The bill of information fails to comport with the constitutional requirements of notice under the Ohio and United States Constitution.
2. The trial court abused its discretion in failing to hold a hearing on appellant's presentence motion to withdraw his plea.
3. Appellant's plea was not made knowingly, intelligently and voluntarily.
4. Appellant was denied effective assistance of trial counsel pursuant to the Ohio and United States Constitutions, because trial counsel failed to request discovery prior to the entry of appellant's guilty pleas.

{¶ 2} The relevant facts of this case are as follows. On October 18, 2007, appellant was charged by a bill of information with the two offenses stated above and the additional charge of importuning, in violation of R.C. 2907.07(B). On October 30, 2007, the case proceeded to a hearing at which appellant signed a waiver of his right to be prosecuted by indictment, signed a waiver of his right to be tried by a judge or jury, and pled guilty to all three offenses. The court accepted the pleas, found appellant guilty and

continued the case to January 15, 2008, for a sexual offender classification hearing and sentencing. Prior to that hearing, however, appellant filed a motion to withdraw his guilty pleas. On January 31, 2008, without conducting a hearing, the trial court denied that motion. On February 20, 2008, appellant was sentenced to three years incarceration on the count of unlawful sexual conduct, four years on the pandering count, and one year on the importuning count, with the terms to be served consecutively.

{¶ 3} Appellant appealed that conviction and sentence to this court. *See State v. Rinehart*, 6th Dist. Wood No. WD-08-015, 2010-Ohio-2259 (“*Rinehart I*”). Although appellant raised several assignments of error, we found his challenge to the trial court’s denial of his presentence motion to withdraw his guilty pleas dispositive of the case because the court had denied that motion without conducting a hearing on the matter. We therefore remanded the case to the trial court for that court to conduct a hearing on appellant’s motion.

{¶ 4} Upon remand, the case proceeded to a hearing on October 5, 2010. At that time, however, the parties informed the court that they had reached an agreement on the motion to withdraw. Appellant’s counsel stated that appellant wanted to withdraw his guilty plea only as to Count 3, the importuning charge, and was prepared to proceed to resentencing on the other two charges. The state agreed to that withdrawal and further asked the court to dismiss that charge. The court then asked appellant’s counsel if appellant had any objection to proceeding to sentencing on the remaining two charges, to which appellant’s counsel responded, “No objection.” The court then granted appellant’s

motion to withdraw his guilty plea as to the importuning charge and dismissed that charge. The court then sentenced appellant to three years incarceration on the unlawful sexual conduct charge, four years on the pandering charge, ordered that those terms be served consecutively, and determined that appellant was a Tier II sexual offender.

{¶ 5} We will first address appellant's second assignment of error in which he asserts that the lower court erred in again failing to hold a hearing on his presentence motion to withdraw his guilty pleas. Appellant contends that this court mandated such a hearing in *Rinehart I* and that the lower court abused its discretion in failing to abide by that mandate.

{¶ 6} In *Rinehart I*, we reversed the judgment of the trial court and remanded the case back to that court "to conduct a hearing on appellant's motion and to proceed with the case thereafter." That was our mandate. App.R. 27.

An appellate mandate works in two ways: it vests the lower court on remand with jurisdiction and it gives the lower court on remand the authority to render judgment consistent with the appellate court's judgment. Under the "mandate rule," a lower court must "carry the mandate of the upper court into execution and not consider the questions which the mandate laid to rest." *Sprague v. Ticonic Natl. Bank* (1939), 307 U.S. 161, 168, 59 S.Ct. 777, 83 L.Ed. 1184; see, also, *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633, at ¶ 32

* * *. The lower court may, however, rule on issues left open by the

mandate. *Id.* But when the mandate leaves nothing left to decide, the lower court is bound to execute it. *Id.* *State v. Carlisle*, 8th Dist. Cuyahoga No. 93266, 2010-Ohio-3407, ¶ 16.

{¶ 7} A trial court, however, may deviate from an appellate court mandate “when external circumstances have rendered that mandate void or moot.” *Id.* at ¶ 23.

{¶ 8} The record in this case is clear. Following our remand, appellant withdrew his motion to withdraw his guilty plea as to Counts 1 and 2, and only sought to withdraw his guilty plea as to Count 3, the importuning charge. The court then *granted* that motion. Under these circumstances, we cannot find that the lower court erred in failing to hold a hearing on appellant’s Crim.R. 32.1 motion. The second assignment of error is not well-taken.

{¶ 9} In his first assignment of error, appellant contends that his convictions must be reversed because the bill of information was defective. Specifically, appellant asserts that the bill of information was silent as to the mens rea of the crimes charged and, therefore, was fatally defective. Appellant cites *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 (“*Colon I*”), in support. *Colon I*, however, was overruled by *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26. In *Horner*, the Supreme Court of Ohio held at paragraphs one and three of the syllabus:

1. An indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state.

* * *

3. By failing to timely object to a defect in an indictment, a defendant waives all but plain error on appeal.

{¶ 10} We first note that appellant did not timely object to the claimed defect in the bill of information and therefore has waived all but plain error on appeal. Regardless, the bill of information in the present case charged appellant with unlawful sexual conduct with a minor in violation of R.C. 2907.04(A) and pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(1) by tracking the language of those statutes. Accordingly, it was not defective, and appellant's first assignment of error is not well-taken.

{¶ 11} Appellant's third and fourth assignments of error are related and will be discussed together. Appellant asserts that his guilty pleas entered below were not knowing, intelligent and voluntary. He claims that his initial trial counsel was ineffective in failing to request discovery or conduct an investigation into the facts of the case and therefore could not adequately counsel appellant regarding whether or not to plead guilty. Appellant further contends that because the lower court did not inquire of him whether he was satisfied with the services of his trial counsel or whether his trial counsel had advised him of the facts and all of the defenses regarding the case against him, his plea was involuntary.

{¶ 12} The standard for determining whether a trial attorney was ineffective requires appellant to show: (1) that the trial attorney made errors so egregious that the

trial attorney was not functioning as the “counsel” guaranteed appellant under the Sixth Amendment, and (2) that the deficient performance prejudiced appellant’s defense. *Strickland v. Washington*, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Furthermore, a court must be “highly deferential” and “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance” in reviewing a claim of ineffective assistance of counsel. *Id.* at 689. A properly licensed attorney in Ohio is presumed to execute his duties in an ethical and competent manner. *State v. Hamblin*, 37 Ohio St.3d 153, 155-156, 524 N.E.2d 476 (1988).

{¶ 13} A claim for ineffective assistance of counsel is waived by a guilty plea, unless the ineffective assistance caused the guilty plea to be involuntary. *State v. Bennett*, 6th Dist. Wood No. WD-08-005, 2008-Ohio-5812, ¶ 5. “In ineffective-assistance claims in guilty-plea cases, ‘the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’” *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 89, quoting *Hill v. Lockart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

{¶ 14} The record reveals that appellant’s original trial counsel did not request discovery prior to appellant’s entering his guilty plea. Upon remand from this court, however, his new counsel did request discovery. On September 22, 2010, counsel filed with the trial court a receipt acknowledging that he had received from the state discovery

totaling 69 pages, three CD-Rs, one DVD-R, and eight counsel-only pages. When the case came before the court for the scheduled hearing on appellant's motion to withdraw his guilty pleas, as discussed above, appellant notified the court that he was only seeking to withdraw his guilty plea as to Count 3 and that he wished to proceed to sentencing on Counts 1 and 2. That is, in light of the discovery, appellant chose to stick by his earlier pleas of guilty to Counts 1 and 2. Accordingly, we cannot say that there is a reasonable probability that but for his original counsel's review of the discovery, appellant would not have pleaded guilty and would have insisted on going to trial. The fourth assignment of error is not well-taken.

{¶ 15} Finally, in his third assignment of error, appellant asserts that his guilty pleas were not knowing, intelligent and voluntary because the lower court did not ascertain whether appellant's original counsel had advised him of the facts of the case and the defenses available or whether appellant was satisfied with the services of his counsel. Appellant cites the ABA Standards for Criminal Justice in support of his argument. Whether a defendant's guilty plea is knowing, intelligent and voluntary, however, turns on the trial court's compliance with Crim.R 11.

{¶ 16} Before accepting a guilty plea, Crim.R. 11(C) requires that the trial court inform a defendant of the constitutional rights he is waiving by entering the plea. The rule provides:

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest

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.

{¶ 17} The underlying purpose of Crim.R. 11(C) is to insure that certain information is conveyed to the defendant which would allow him or her to make a voluntary and intelligent decision regarding whether to plead guilty. *State v. Ballard*, 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981). With respect to constitutional rights, a trial court must strictly comply with the dictates of Crim.R. 11(C). *State v. Colbert*, 71

Ohio App.3d 734, 737, 595 N.E.2d 401 (11th Dist.1991). However, a trial court need not use the exact language found in that rule when informing a defendant of his constitutional rights. *Ballard, supra*, paragraph two of the syllabus. Rather, a trial court must explain those rights in a manner reasonably intelligible to the defendant. *Id.*

{¶ 18} For nonconstitutional rights, scrupulous adherence to Crim.R. 11(C) is not required; the trial court must substantially comply, provided no prejudicial effect occurs before a guilty plea is accepted. *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977). “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*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶ 19} We have carefully reviewed the transcript from the plea hearing below and conclude that the court strictly complied with the constitutional aspects of Crim.R. 11(C) and substantially complied with the nonconstitutional aspects of that rule in accepting appellant’s guilty pleas to Counts 1 and 2. The court personally addressed appellant, clearly identified the charges he was facing and stated the maximum penalties involved. The court further strictly complied with all of the constitutional aspects of Crim.R. 11(C). In addition, through the state’s detailed recitation of the facts supporting the charges, appellant was made well aware of the nature of the charges against him. Following the court’s colloquy with appellant, it is clear that appellant understood the effect of his guilty pleas. Indeed, before accepting appellant’s pleas, the court expressly found that

appellant's pleas of guilty, waiver of trial by jury and waiver of indictment were all voluntarily, intelligently and knowingly entered into.

{¶ 20} Because the lower court strictly complied with the constitutional aspects of Crim.R. 11(C) and substantially complied with the nonconstitutional aspects of that rule, we conclude that appellant's guilty pleas were knowing, intelligent and voluntary. The third assignment of error is not well-taken.

{¶ 21} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Wood 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

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

<p>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: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
