

[Cite as *State v. Fitzgerald*, 2010-Ohio-363.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92978

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM FITZGERALD

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-507569

BEFORE: Boyle, J., Kilbane, P.J., and McMonagle, J.

RELEASED: February 4, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Michael P. Maloney
24441 Detroit Road
Suite 300
Westlake, Ohio 44145

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Daniel A. Cleary
Assistant County Prosecutor
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, William Fitzgerald, appeals his convictions for theft and forgery. He raises only one assignment of error for our review, that is, that his “no contest plea was not knowingly and intelligently made.” Fitzgerald argues that his plea was not voluntary because the trial court advised him in such a way, that “he believed he could still be found not guilty after he executed his no contest plea.” Finding merit to his claim, we reverse his convictions and remand.

Procedural History

{¶ 2} Fitzgerald was indicted on one count of theft, in violation of R.C. 2913.02(A)(1), and two counts of forgery, in violation of R.C. 2913.31(A)(2) and (3). Fitzgerald initially pled not guilty to the charges but later withdrew his not guilty plea and entered a plea of no contest.

{¶ 3} After an evidentiary hearing on the amount of restitution Fitzgerald should pay, the trial court sentenced him to three years of community control sanctions and ordered him to pay \$13,905.53 in restitution.

The Colloquy Before the Plea Colloquy

{¶ 4} At the beginning of the change-of-plea hearing, the trial court stated, “All right. I do have before me defendant’s waiver of jury trial.” Fitzgerald’s defense attorney explained, “Your Honor, I witnessed my client’s signature; and subsequent to his signature, I affixed my signature to the document.”

{¶ 5} The court replied, “All right, thank you. Mr. Fitzgerald, I have defendant’s waiver of jury trial. I will review it with you. The purpose of this

waiver of jury trial is when an individual pleads no contest, what happens then is this Court requests from the State of Ohio that they place and spread upon the record the facts of the case and then the Court makes a determination as to whether you are guilty or not guilty.

{¶ 6} “Therefore, rather than a jury of 12 making that determination, the Court makes that determination. So you’re waiving a jury trial and, in essence, the Court, the Judge, is making that determination.”

{¶ 7} The trial court then read Fitzgerald’s written jury-trial waiver into the record and asked Fitzgerald if that was his signature. Fitzgerald replied that it was his signature. The trial court then asked him how much education he had and if he could read and write the English language. The trial court then stated, “All right. It’s your intention to waive a jury trial and plead no contest and have the Judge, myself, make that determination?” Fitzgerald replied again that it was.

{¶ 8} Defense counsel then informed the trial court that Fitzgerald had agreed to plead no contest to the indictment, but that the issue of restitution would be decided at a hearing. Defense counsel explained that Fitzgerald wished to plead no contest — despite the fact that defense counsel believed Fitzgerald “has a complete defense to these charges.” Defense counsel further stated, “I have informed my client that he can expect findings of guilt on a no contest plea.” A few seconds (or a few lines in the transcript) later defense

counsel said, "I have advised my client that, again, a no contest plea will in all likelihood result in a finding of guilty."

The Plea Colloquy

{¶ 9} At that point, the trial court addressed Fitzgerald and asked him the following questions: If any threats had been made against him, if he was satisfied with his lawyer, if he was currently on probation or postrelease control, if he held any professional license or public office, if he was a U.S. citizen, where he was born, how far he had gone in school, if he understands the English language, if he understood the indictment against him, if all his questions had been answered by counsel, if he was under the influence of any drugs or alcohol that day, if he had taken any medication that affected his judgment that day, and if he had been charged with any other crimes since the present case commenced. The trial court then informed Fitzgerald of the following:

{¶ 10} "The constitution of the United States of America and the great state of Ohio guarantee to you certain rights. Those rights are as follows.

{¶ 11} "The right to trial by jury. The right to confront and examine witnesses that the State would present against you. The right to subpoena or force the attendance at trial of any person who can offer testimony on your behalf and the Court will enforce that subpoena. The right to have the State prove you are guilty beyond a reasonable doubt to a jury of 12 or a judge if you were to waive a jury. And the right not to testify at the time of trial, that no one may comment on your silence.

{¶ 12} “In addition, the right to testify is among the rights waived when defendants plead guilty and forego trial.”

{¶ 13} The court asked Fitzgerald if he understood those rights, and then explained:

{¶ 14} “Do you understand that when you plead no contest, this Court then asks the State of Ohio to give a recitation of the facts; and then upon a recitation of the facts, the Court then makes a finding as to whether you are guilty or not guilty? Do you understand that?”

{¶ 15} The trial court then stated, “if the Court were to make a finding of guilt, do you understand that the Court may then proceed to judgment and sentence?” Finally, the court properly explained to Fitzgerald the maximum possible penalty he could receive, including all the nuances of postrelease control.

{¶ 16} With respect to all three counts, the trial court then read the indictment and asked Fitzgerald what his plea was. After Fitzgerald informed the court that he was entering a plea of no contest to each count, the court asked the prosecutor to “give a recitation of the facts,” which the prosecutor then did. After the prosecutor’s recitation of the facts, the trial court found Fitzgerald guilty of each count.

{¶ 17} Crim.R. 11(C)(2) provides that “[i]n felony cases the court may refuse to accept a plea of *** no contest, and shall not accept a plea of *** no contest without first addressing the defendant personally and doing all of the following:

{¶ 18} “(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.

{¶ 19} “(b) Informing the defendant of and determining that the defendant understands the effect of the plea of *** no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶ 20} “(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.”

{¶ 21} In *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, the Ohio Supreme Court explained the important policy reasons behind the procedures set forth in Crim.R. 11:

{¶ 22} “A criminal defendant’s choice to enter a plea of guilty or no contest is a serious decision. The benefit to a defendant of agreeing to plead guilty is the elimination of the risk of receiving a longer sentence after trial. But, by

agreeing to plead guilty, the defendant loses several constitutional rights. *Boykin v. Alabama* (1969), 395 U.S. 238, 243; *State v. Nero* (1990), 56 Ohio St.3d 106, 107, 564 N.E.2d 474. The exchange of certainty for some of the most fundamental protections in the criminal justice system will not be permitted unless the defendant is fully informed of the consequences of his or her plea. Thus, unless a plea is knowingly, intelligently, and voluntarily made, it is invalid. See *State v. Engle* (1996), 74 Ohio St.3d 525, 527, 660 N.E.2d 450.

{¶ 23} “To ensure that pleas conform to these high standards, the trial judge must engage the defendant in a colloquy before accepting his or her plea. See *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, paragraph one of the syllabus; Crim.R. 11(C), (D), and (E). It follows that, in conducting this colloquy, the trial judge must convey accurate information to the defendant so that the defendant can understand the consequences of his or her decision and enter a valid plea.” *Clark* at ¶25-26.

{¶ 24} Crim.R. 11(C)(2) involves protection of both constitutional and nonconstitutional rights. See *State v. Garcia*, 6th Dist. No. F-07-018, 2008-Ohio-4284, ¶11. The standard of review differs depending upon the rights appellant raises on appeal. *State v. Joachim*, 8th Dist. No. 90616, 2008-Ohio-4876, ¶7. With respect to constitutional rights, a trial court must strictly comply with the dictates of Crim.R. 11(C)(2). When nonconstitutional rights are involved, only substantial compliance is required. *State v. Pate*, 8th Dist. No. 90313, 2008-Ohio-5736, ¶4.

{¶ 25} Where “substantial compliance” is required, if, under the totality of the circumstances, it is apparent the defendant subjectively understood the implications of his plea and the rights he was waiving, the plea should not be disturbed on appeal. *Clark* at ¶31, citing *Nero*, 56 Ohio St.3d at 108. We note further that a defendant who challenges his plea on the basis that it was not knowingly, intelligently, and voluntarily made must show that he was prejudiced by the court’s failure to substantially comply with the rule. *Clark* at ¶32, citing *Nero* at 108; *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶12. In order to show such prejudice, the defendant must show that he would not have otherwise entered into the plea. *Id.*

{¶ 26} There is no question that regarding the constitutional rights Fitzgerald was waiving, the nature of the charges, and the maximum penalty involved, the trial court fully complied with the requirements under Crim.R. 11(C)(2). But with respect to informing Fitzgerald as to the effect of a no contest plea, we find that the trial court failed to substantially comply with Crim.R. 11(C)(2)(b).

Effect of No Contest Plea

{¶ 27} The effect of a no contest plea is set forth in Crim.R. 11(B)(2), which states: “The plea of no contest is not an admission of defendant’s guilt [as is the effect of a guilty plea], but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.”

{¶ 28} The Ohio Supreme Court explained in *State v. Bird*, 81 Ohio St.3d 582, 584, 1998-Ohio-606, 692 N.E.2d 1013:

{¶ 29} “According to Crim.R. 11(B)(2), a no contest plea is ‘not an admission of defendant’s guilt, but is an admission of the truth of the facts alleged in the indictment ***.’ Therefore, we have held that where the indictment, information, or complaint contains sufficient allegations to state a felony offense and the defendant pleads no contest, the court must find the defendant guilty of the charged offense. *State ex rel. Stern v. Mascio* (1996), 75 Ohio St.3d 422, 425.”

{¶ 30} Thus, a no contest plea is not a self-executing judgment of conviction. The trial court “possesses discretion to determine whether the facts alleged in the indictment, information, or complaint are sufficient to justify conviction of the offense charged.” *Mascio* at 423, citing *State v. Thorpe* (1983), 9 Ohio App.3d 1, 3 (Markus, J., concurring). “If the court determines that the alleged facts are insufficient to state the charged offense, it may *** dismiss the charge.” (Citations omitted.) *Id.* at 423-424. The trial court cannot find the defendant not guilty.

{¶ 31} Informing a defendant of the effect of his or her plea is a nonconstitutional right, and therefore, only substantial compliance is required. *Pate*, *supra*, at ¶4.

{¶ 32} Here, with respect to the effect of a no contest plea, the trial court incorrectly explained to Fitzgerald: “Do you understand that when you plead no contest, this Court then asks the State of Ohio to give a recitation of the facts; and then upon a recitation of the facts, the Court then makes a finding as to whether you are guilty or not guilty? Do you understand that?” After Fitzgerald replied that he did, the trial court explained, “if the Court were to make a finding of guilt, do you understand that the Court may then proceed to judgment and sentence?”

{¶ 33} We find that the trial court failed to substantially comply with Crim.R. 11 when explaining the effect of a no contest plea to Fitzgerald. The trial court could not have found Fitzgerald “not guilty” as it advised him. It could have either found him guilty as charged, guilty of a lesser-included offense, or if it found that the indictment failed to sufficiently charge him, it could have dismissed the charge entirely.

{¶ 34} Accordingly, we find that Fitzgerald could not have subjectively understood the implications of his no contest plea since the trial court did not convey accurate information to him regarding the effect of such a plea.

Prejudice

{¶ 35} Nonetheless, we must still determine whether Fitzgerald was prejudiced by the trial court’s failure to substantially comply with Crim.R. 11. After reviewing the totality of the circumstances, we find that he was. Even

before the plea colloquy began, the trial court had Fitzgerald sign a waiver of his rights to a jury trial — which is not required so long as the trial court adequately informs a defendant at the plea hearing that he is waiving his Fifth Amendment privilege against self-incrimination, the right to a trial by jury, and the right to confront one’s accusers. See *State v. Plato*, 2d Dist. No. 2003CA26, 2004-Ohio-5782 (defendant’s voluntary plea amounts to waiver of right to jury trial); see, also, *McAuley v. Maxwell* (1963), 174 Ohio St. 567, 190 N.E.2d 922.

{¶ 36} But here, even before the plea colloquy began (during the jury-trial waiver discussion), the trial court improperly explained to Fitzgerald:

{¶ 37} “The purpose of this waiver of jury trial is when an individual pleads no contest, what happens then is this Court requests from the State of Ohio that they place and spread upon the record the facts of the case and then the Court makes a determination as to whether you are guilty or not guilty.

{¶ 38} “Therefore, rather than a jury of 12 making that determination, the Court makes that determination. So you’re waiving a jury trial and, in essence, the Court, the Judge, is making that determination.”

{¶ 39} Again, the trial court cannot find a defendant not guilty when he or she pleads no contest. Thus, even when the trial court was explaining a jury waiver to Fitzgerald, it did not properly explain the effect of a no contest plea.

{¶ 40} Finally, Fitzgerald’s defense attorney informed the court that although he believed Fitzgerald had a complete defense to the charges, Fitzgerald wished to plead no contest. And then he stated to the court that he “informed my client that he can expect findings of guilt on a no contest plea,” and a few seconds later said, “I have advised my client that, again, a no contest plea will in all likelihood result in a finding of guilty.” We find this further added to Fitzgerald’s confusion as to what the effect of a no contest plea is. According to defense counsel’s statements, Fitzgerald could have believed although it was likely the trial court would find him guilty, it may still find him not guilty. Again, this was not a possibility.

{¶ 41} Thus, we find that Fitzgerald was prejudiced by the trial court’s failure to substantially comply with Crim.R. 11. Based on what was explained to him, he could have very well believed that the trial court could still find him not guilty of the charges. If he knew otherwise, he may not have entered into the plea — especially in light of the fact that his attorney stated that he believed Fitzgerald had a complete defense to the charges.

{¶ 42} Accordingly, we reverse Fitzgerald’s convictions and remand.

Judgment reversed and cause remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

**CHRISTINE T. McMONAGLE, J., CONCURS;
MARY EILEEN KILBANE, P.J., CONCURS IN JUDGMENT ONLY**