[Cite as *State v. Moulton*, 2010-Ohio-4484.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93726

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANGELA MOULTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART;
REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-519027

BEFORE: Jones, J., McMonagle, P.J., and Dyke, J.

RELEASED AND JOURNALIZED: September 23, 2010

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Angela Moulton ("Moulton") appeals her conviction. Finding some merit to her appeal, we affirm in part and reverse in part.

{¶ 2} In 2008, Moulton was charged in an 80-count indictment with one count of engaging in a pattern of corrupt activity, 49 counts of forgery, four counts of identity fraud, ten counts of receiving stolen property, seven counts of theft, and

nine counts of tampering with government records. The state alleged that Moulton stole the mail of multiple people, applied for credit cards in their name, and charged over $14,000 of luxury items on the fraudulent credit cards.

{¶ 3} Moulton entered pleas of no contest to all 80 charges and the trial court sentenced her to an aggregate sentence of ten years in prison.

{¶ 4} Moulton now appeals, raising the following three assignments of error for our review:

> "I. The trial court erred when it did not advise Angela Moulton she was waiving certain constitutionally guaranteed trial rights by pleading guilty in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I Section 10 of the Ohio Constitution and Crim.R. 11.
>
> "II. The court erred in finding Ms. Moulton guilty and sentencing her under offense[s] for which she was not under indictment.
>
> "III. The offenses of tampering with records are allied offenses of similar import with the offense of engaging in a pattern of corrupt activity and thus should have been merged into a single count of conviction."

No Contest Plea

{¶ 5} In the first assignment of error, Moulton argues the trial court did not properly advise her of the constitutional rights she was waiving by pleading no contest.

{¶ 6} Crim.R. 11(C) governs the process that a trial court must use before accepting a felony plea of guilty or no contest and provides in pertinent part:

> "(2) In felony cases the court may refuse to accept a plea of guilty or 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."

{¶ 7} The duties of the trial court pursuant to Crim.R. 11 have been placed into two distinct categories: constitutional and nonconstitutional rights. See *State v. Parks*, Cuyahoga App. No. 86312, 2006-Ohio-1352, citing *State v. Higgs* (1997), 123 Ohio App.3d 400, 402, 704 N.E.2d 308; *State v. Gibson* (1986), 34 Ohio App.3d 146, 147, 517 N.E.2d 990.

{¶ 8} To comply with the duties on Crim.R. 11 regarding constitutional rights, the court must explain to the defendant that she is waiving: (1) the Fifth Amendment privilege against self-incrimination, (2) the right to a trial by jury, (3) the right to confront one's accusers, (4) the right to compulsory process of witnesses, and (5) the right to be proven guilty beyond a reasonable doubt. *State v. Nero* (1990), 56 Ohio St.3d 106, 107-108, 564 N.E.2d 474, citing *Boykin v. Alabama* (1969), 395 U.S. 238, 242-243, 89 S.Ct. 1709, 23 L.Ed.2d 274. Failure

to strictly comply with these constitutional requirements invalidates a guilty plea. See *Higgs*; *State v. Stewart* (1977), 51 Ohio St.2d 86, 88-89, 364 N.E.2d 1163; *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, paragraph one of the syllabus. But "strict compliance" does not require a rote recitation of the exact language of the rule; rather, we focus on whether the "record shows that the judge explained these rights in a manner reasonably intelligible to the defendant." *Ballard*, at paragraph two of the syllabus.

{¶ 9} In the instant case, the trial court informed Moulton of her rights to counsel and a jury trial, and that the state had to prove her guilt beyond a reasonable doubt at a trial at which she could not be compelled to testify against herself. The court also determined that she had not been induced, forced, or threatened to plead no contest.

{¶ 10} Moulton's specific complaint is that the trial court did not adequately inform her of her constitutional rights to confront witnesses against her and to have compulsory process for obtaining witnesses in her favor.

{¶ 11} In *State v. Cummings*, Cuyahoga App. No. 83759, 2004-Ohio-4470, we stated that "[a]lthough a trial court need not specifically tell a defendant that he has the right to 'compulsory process,' it must nonetheless 'inform a defendant that it has the power to force, compel, subpoena, or otherwise cause a witness to appear and testify on the defendant's behalf.'" Id. quoting *State v. Wilson*, Cuyahoga App. No. 82770, 2004-Ohio-499, at ¶16, appeal not allowed, 102 Ohio St.3d 1484, 2004-Ohio-3069, 810 N.E.2d 968.

{¶ 12} In this case, the trial court told Moulton that she had a right to "subpoena and call witnesses." We have previously held that the use of the word "subpoena" adequately informs the defendant of his right to compulsory process. *State v. Parks*, Cuyahoga App. No. 86312, 2006-Ohio-1352, appeal not allowed by 110 Ohio St.3d 1443, 2006-Ohio-3862, 852 N.E.2d 190; *State v. Senich*, Cuyahoga App. No. 82581, 2003-Ohio-5082; *State v. Gurley* (June 5, 1997), Cuyahoga App. No. 70586. Therefore, by stating Moulton had a right to subpoena witnesses, the trial court clearly informed her at the time of her plea of her right to compulsory process.

{¶ 13} We find that the trial court strictly complied with the requirements of Crim.R. 11(C) in accepting Moulton's waiver of her constitutional rights. The first assignment of error is overruled.

Theft Convictions

{¶ 14} In the second assignment of error, Moulton argues that the trial court incorrectly convicted her of two felony theft counts that, as indicted, were first-degree misdemeanors. The state concedes this assignment of error, but argues that any error was harmless because her sentences for these charges were suspended.

{¶ 15} Although not stated as such in her brief, Moulton is alleging a violation of her nonconstitutional rights. Ohio courts have determined that although literal compliance with Crim.R. 11(C)(2)(a) is preferred, substantial compliance is sufficient in regard to nonconstitutional rights. *State v. Caplinger*

(1995), 105 Ohio App.3d 567, 572, 664 N.E.2d 959, citing *State v. Johnson* (1988), 40 Ohio St.3d 130, 532 N.E.2d 1295; *State v. Nero* (1990), 56 Ohio St.3d 106, 564 N.E.2d 474. Therefore, we review Moulton's claim to see if the trial court substantially complied with Crim.R. 11 by convicting her of two felony theft counts.

{¶ 16} Substantial compliance has been defined as whether "under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *Nero*; see, also, *State v. Veney*, 120 Ohio St.3d 176, 179-180, 2008-Ohio-5200, 897 N.E.2d 621. In other words, when reviewing the totality of the circumstances, a court must determine whether the defendant understood the consequences of waiver. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51.

{¶ 17} A defendant who challenges her guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. *Nero*. To demonstrate prejudice in the context of this case, Moulton must show that her guilty plea would otherwise not have been entered if the trial court had not erred. Id.

{¶ 18} Ohio requires the court to satisfy itself that the defendant knows the maximum penalty applicable to the offense involved. *State v. Wilson* (1978), 55 Ohio App.2d 64, 65-66, 379 N.E.2d 273. Although the trial court erred when it did not inform Moulton of the range of sentence for a first-degree misdemeanor, we find that Moulton has failed to show that she was prejudiced by the court's

omission. See *State v. Triplett*, Cuyahoga App. No. 91807, 2009-Ohio-2571. The record suggests that Moulton was not prejudiced since the court stayed her sentence on those two counts. Moreover, since Moulton was willing to enter her pleas to numerous felony counts, undoubtedly she would have pled to the first-degree misdemeanor (with the lesser punishment) had the trial court properly presented her with that alternative. See *State v. Burden* (Oct. 20, 1998), Cuyahoga App. No. 54491. Thus, we hold Moulton's plea was made voluntarily and knowingly, and the error made by the trial court on the degree of the offense and penalty will inure to her benefit when those counts are remanded for resentencing.

{¶ 19} In counts 25 and 35 of the indictment, Moulton was charged with theft, in violation of R.C. 2903.02(A)(3), with the amount of the theft being less than $500. Therefore, as indicted, those crimes were first-degree misdemeanors. We find the trial court erred in entering a conviction for fifth-degree felonies on those two counts and remand the case for the trial court to correct the journal entry so that it reflects a conviction for a first-degree misdemeanor on counts 25 and 35. The trial court must also resentence Moulton on those counts.

{¶ 20} The second assignment of error is sustained.

Allied Offenses

{¶ 21} In the third assignment of error, Moulton argues that tampering with records and engaging in a pattern of corrupt activity are allied offenses of similar import. For the following reasons, we disagree.

{¶ 22} The Ohio legislature has set forth its statement of when punishments for multiple offenses arising from the same conduct may be imposed in R.C. 2941.25. R.C. 2941.25 provides:

> "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 23} In 1999, the Ohio Supreme Court issued its opinion in *State v. Rance*, 85 Ohio St.3d 632, 634, 1999-Ohio-291, 710 N.E.2d 699, forming a two-part test to determine whether crimes are allied offenses of similar import and holding that offenses were of similar import if the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." The first part of the test is to compare the elements of the two crimes to determine if the offenses are allied offenses of similar import under R.C. 2941.25(A). The second prong is to determine whether the offenses were committed with the same animus.

{¶ 24} Within the last few years, the Ohio Supreme Court has issued multiple opinions to clarify its holding in *Rance*. See *State v. Cabrales*, 118 Ohio

St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, and *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154.

{¶ 25} In *Cabrales*, the Court clarified that "courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import." Id. at paragraph one of the syllabus.

{¶ 26} In *Brown*, the Court addressed the additional factor of "societal interests," i.e., "'whether the legislature manifested an intention to serve two different interests in enacting the two statutes.'" *Brown* at ¶35, quoting *Whalen v. United States* (1980), 445 U.S. 684, 709-711, 100 S.Ct. 1432, 63 L.Ed.2d 715.

{¶ 27} By way of example, the *Brown* court noted that statutes prescribing the offenses of theft and aggravated burglary served different purposes. While the theft statute is intended to prevent the non-consensual taking of another's property; aggravated burglary, with its focus on a trespass in an occupied structure, is intended to prevent harm to persons. *State v. White*, Cuyahoga App. No. 92972, 2010-Ohio-2342, citing *Brown* at ¶36. Because aggravated burglary and theft served different societal purposes, they could be punished separately. Id.

{¶ 28} The *Brown* court then concluded that the subdivisions of the aggravated assault statute set forth two different forms of the same offense, in each of which the legislature manifested its intent to serve the same interest, i.e., preventing physical harm to persons, and they were therefore allied offenses. Id. at ¶39.

{¶ 29} In *Winn*, the Ohio Supreme Court found aggravated robbery and kidnapping to be allied offenses of similar import under the *Cabrales* test, but the Court did not consider the "societal interests" underlying the statutes to determine legislative intent as it had in *Brown*. See *State v. Minifee*, Cuyahoga App. No. 91017, 2009-Ohio-3089, appeal not allowed by 123 Ohio St.3d 1426, 2009-Ohio-5340, 914 N.E.2d 1065.

{¶ 30} In considering whether the crimes of domestic violence and kidnapping are allied offenses, we relied on *Brown* in *State v. Mosley*, 178 Ohio App.3d 631, 2008-Ohio-5483, 899 N.E.2d 1021, appeal not allowed by 121 Ohio St.3d 1427, 2009-Ohio-1296, 903 N.E.2d 326. We stated that the *Brown* court "illuminated that the [*Rance*] two-tiered test is merely a tool, not a requirement, used to determine the legislature's intentions regarding whether to permit cumulative sentencing." Id. "By asking whether two separate statutes each include an element the other does not, a court is really asking whether the legislature manifested an intention to serve two different interests in enacting the two statutes." *Mosley* quoting *Brown* at ¶35, quoting *Whalen v. United States*

(1980), 445 U.S. 684, 713, 100 S.Ct. 1432, 63 L.Ed.2d 715 (Rehnquist, J., dissenting).

{¶ 31} We now turn to the case at bar. Moulton argues that the offenses of tampering with records and engaging in a pattern of corrupt activity are allied because the predicate offense of tampering with records is subsumed into the pattern of corrupt activity violation. This is so, Moulton claims, because one cannot be convicted of the pattern of corrupt activity violation if one did not commit the underlying offense of tampering with records.

{¶ 32} The state claims that the underlying offense of tampering with records should not be considered an allied offense because a violation of Ohio's RICO statute depends on the existence of a "pattern of criminal activity" that is independent from the predicate offenses.

{¶ 33} We find the Ohio Supreme Court's holding in *Brown* instructive and now turn to determine whether the Ohio legislature manifested an intention to permit separate punishments for the commission of the pattern of corrupt activity crime and the predicate crimes. As in *Brown* and *Mosley*, we compare the societal interests protected by the relevant statues and conclude that the societal interests the statutes intend to protect are different.

{¶ 34} Tampering with records, in violation of R.C. 2913.42, criminalizes tampering with all private as well as public records for fraudulent purposes. The societal interest is to protect the integrity of written and electronic private and public records by making it a criminal violation to tamper with such records.

{¶ 35} Ohio's RICO statute, on the other hand, criminalizes a pattern of corrupt activity and imposes liability for a criminal enterprise. In *State v. Schlosser*, 79 Ohio St.3d 329, 1998-Ohio-716, 681 N.E.2d 911, the Ohio Supreme Court noted that Ohio's RICO statute was based on the federal RICO statute, Section 1962, Title 18, U.S.Code. Id. Congress, in enacting the Organized Crime Control Act of 1970, stated:

> "It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 Stat. 922, reprinted in 1970 U.S.Code Cong. & Adm. News at 1073.

{¶ 36} In *State v. Dudas*, Lake App. Nos. 2008-L-109 and 2008-L-110, 2009-Ohio-1001, the Eleventh District court discussed the very issue of whether a violation of Ohio's RICO statute and a violation of the predicate act were allied offenses and found that "[a] violation of R.C. 2923.32 requires more than just the commission of multiple designated acts of corrupt activity. R.C. 2923.32 requires employment or association with an enterprise and participation in the affairs of the enterprise through a pattern of corrupt activity. Such pattern must include both a relationship and continuous activity, as well as proof of the existence of an enterprise. Thus, the conduct required to commit a RICO violation is independent of the conduct required to commit designated acts of corrupt activity."

{¶ 37} We agree with the *Dudas* court that Ohio's RICO statute was enacted to criminalize the pattern of criminal activity and is not similar to the underlying

predicate acts. We find that the Ohio legislature manifested an intention to permit separate punishments for the commission of a pattern of corrupt activity and its predicate crimes.

{¶ 38} Moreover, we note that state and federal courts around the country have uniformly found that a RICO violation is a discrete offense that can be prosecuted and punished separately from its underlying predicate offenses.[1]

{¶ 39} The third assignment of error is overruled.

{¶ 40} Accordingly, the convictions for theft in counts 25 and 35 are reversed and the case is remanded for proceedings consistent with this opinion.

It is ordered that appellant and appellant share the 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.

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[1] See *United States v. Greenleaf* (C.A. 1, 1982), 692 F.2d 182; *U.S. v. Boylan*, (C.A. 2, 1980) 620 F.2d 359 cert. denied (1980), 449 U.S. 883; *U.S. v. Truglio* (C.A. 4, 1984), 731 F.2d 1123, 1128-30, cert. denied (1984), 469 U.S. 862, 105 S.Ct. 197, 83 L.Ed.2d 130; *U.S. v. Hawkins* (C.A. 5, 1981), 658 F.2d 279; *U.S. v. Licavoli* (C.A. 6, 1984), 725 F.2d 1040, 1050; *U.S. v. Morgano* (C.A. 7, 1994), 39 F.3d 1358; *U.S. v. Kragness* (C.A. 8, 1987), 830 F.2d 842; *United States v. Rone*, 598 F.2d 564 (C.A. 9,1979); *U.S. v. Beale*, 921 F.2d 1412 (C.A. 11,1991); *U.S. v. Grayson* (C.A.3, 1986), 795 F.2d 278, 283; *People v. Hoover* (Colo. App. 2006), 165 P.3d 784; *Carroll v. State* (Fla.App.1984), 459 So.2d 368, 369; *Chavez v. State* (Ind.App.2000), 722 N.E.2d 885, 894-94; *Dudas*, supra.

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

LARRY A. JONES, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
ANN DYKE, J., CONCUR