

[Cite as *State v. Deal*, 2010-Ohio-4490.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93969

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RODERICK R. DEAL

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART
AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-524047

BEFORE: Rocco, P.J., McMonagle J., and Stewart, J.

RELEASED AND JOURNALIZED: September 23, 2010

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KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Roderick R. Deal appeals from his convictions and the sentence imposed after he entered guilty pleas to three charges, viz., failure to comply with the signal or order of a police officer, aggravated vehicular homicide with a notice of prior conviction, and driving under the influence of alcohol.

{¶ 2} Deal presents eight assignments of error. He asserts: 1) the trial court violated Crim.R. 11(C)(2) by failing to inform him prior to accepting his plea that he was subject to a mandatory prison term and his driver's license would be permanently suspended; 2) the notice of prior conviction was improper; 3) his indictment was defective; 4) the trial court improperly encouraged him to accept

the state's offer of a plea agreement; 5) the trial court failed to assess in a proper manner his desire to represent himself; 6) the trial court did not comply with statutory requirements in pronouncing sentence; 7) the sentence imposed for the notice of prior conviction was improper; and, 8) the notice of prior conviction was an unconstitutional "bill of attainder."

{¶ 3} Upon a review of the record, this court finds the trial court did not err in accepting Deal's plea. However, since the notice of prior conviction attached to Count 3 of Deal's indictment was inappropriate, that part of Deal's conviction on Count 3, and the sentence that was based upon it, must be vacated. Deal's convictions and sentences are affirmed in part and vacated in part, and this case is remanded to the trial court to correct the journal entry accordingly.

{¶ 4} According to the record, the Cuyahoga County Grand Jury indicted Deal on May 14, 2009. The indictment charged him with six counts as follows: 1) R.C. 2921.331(B), failure to comply, with a furthermore clause that Deal's driving caused a substantial risk of harm; 2) R.C. 4549.02(A), failure to stop after an accident; 3) R.C. 2903.06(A)(1)(a), aggravated vehicular homicide committed while driving under the influence of alcohol; 4) R.C. 2903.06(A)(2)(a), aggravated vehicular homicide committed while driving recklessly; 5) R.C. 4549.02(A), failure to stop after an accident that resulted in death; and, 6) R.C. 4511.19(A)(1)(a), driving while under the influence of alcohol. Counts 3 and 4 each contained a

furthermore clause that Deal's driver's license was suspended, and, also, a "notice of prior conviction" for the crime of rape.

{¶ 5} Deal pleaded not guilty to the charges at his arraignment on May 19, 2009, and was assigned counsel to represent him. Less than a week later, Deal retained an attorney. On June 4, 2009, the lower court issued a journal entry setting the case for trial on August 24, 2009.

{¶ 6} On August 24, 2009, the case was called for trial. The parties informed the court that they were ready to proceed, but Deal's attorney wanted the record to reflect that Deal was rejecting counsel's advice to accept the state's offer of a plea bargain.

{¶ 7} The trial court inquired about the proposed offer. The prosecutor outlined the charges against Deal before stating that, in exchange for Deal's guilty pleas to Counts 1, 3, and 6, the other counts would be dismissed. The court asked defense counsel to comment; counsel responded that he remained "of the opinion that this matter should plead," but that Deal indicated he wanted a new attorney.

{¶ 8} The court addressed Deal to apprise him that, since the matter had been called for trial, he could not obtain a continuance. Deal asked to represent himself. The court told him to talk to his attorney and to decide his "plan of action," then took a short recess.

{¶ 9} When court reconvened, Deal maintained he wished to represent himself. The trial court engaged in a lengthy colloquy with Deal regarding his ability to do so, told him to review a “waiver of counsel” form provided to him, and took another short recess. After considering the matter, the court denied Deal’s request to represent himself by deciding it was untimely. The court informed Deal that the case would proceed to a jury trial the following morning.

{¶ 10} At that point, Deal indicated he would consider the state’s plea offer. The court ordered one more recess for the parties to discuss the issue.

{¶ 11} Thereafter, the prosecutor outlined the charges to which Deal would be entering a guilty plea, indicated the potential prison sentences and fines entailed, and stated Counts 2, 4, and 5 would be dismissed. Defense counsel concurred in this recitation.

{¶ 12} The trial court then conducted a Crim.R. 11(C)(2) colloquy with Deal. In detailing the penalties, however, the effect of the pleas on Deal’s driving privileges was not mentioned. Deal pleaded guilty to the three counts, and the trial court accepted his pleas. The court proceeded to sentencing.

{¶ 13} After the victim’s family members spoke, the prosecutor outlined the facts of the incident that led to the charges against Deal. On the night of April 25, 2009, Shaker Heights police officers stopped Deal’s vehicle on suspicion of driving under the influence of alcohol and driving under a suspended license. Rather than accept being cited, Deal sped away, crossed into Cleveland, and

collided with another vehicle. Deal continued on before striking a motorcycle; the driver of that vehicle was killed. Deal finally attempted to flee from the scene on foot, but witnesses captured him.

{¶ 14} The trial court ultimately imposed prison sentences that totaled twenty years. Deal received a term of five years on Count 1, to be served consecutively with ten years on Count 3 and another five years for the “notice of prior conviction” on that count, and a concurrent jail sentence of six months on Count 6. The trial court further informed him that his driver’s license was suspended “for a lifetime.”

{¶ 15} Deal now appeals from his convictions and the sentence imposed. He presents the following assignments of error.

{¶ 16} “I. Defendant was denied due process of law when the court failed to inform the defendant of all the applicable penalties.

{¶ 17} “II. Defendant was denied due process of law when the court imposed a sentence for the notice of prior conviction allegation in the indictment.

{¶ 18} “III. Defendant was denied due process of law when he was convicted of the offense of aggravated vehicular homicide on an indictment which failed to allege a culpable mental state.

{¶ 19} “IV. Defendant was denied due process of law when the trial court unduly participated in plea bargaining proceedings.

{¶ 20} **“V. Defendant was denied his Sixth Amendment right of self-representation when the court did not adequately inquire concerning defendant’s desire to represent himself.**

{¶ 21} **“VI. Defendant was denied due process of law when the court imposed a maximum sentence for failure to comply without considering the statutory criteria.**

{¶ 22} **“VII. Defendant was unconstitutionally subjected to multiple punishments when he was given an additional sentence on a notice of prior conviction.**

{¶ 23} **“VIII. Defendant was unconstitutionally sentenced and given an additional term of imprisonment on a notice of prior conviction in which the specification constituted a bill of attainder.”**

{¶ 24} Deal first argues that the trial court erred in accepting his plea because he was not adequately informed of the maximum penalties involved, thus, his plea could not have been knowingly, intelligently, and voluntarily made. Specifically, he contends he was not informed either that the sentence to be imposed for aggravated vehicular homicide was “mandatory,” or that his plea to that count would cause a lifetime suspension of his driver’s license.

{¶ 25} Prior to accepting a guilty plea, Crim.R. 11(C)(2) requires the trial court to “personally address” a defendant to ensure that “the defendant is making

the plea with an understanding of the maximum penalty involved.” *Id.*, ¶6. This particular requirement is met by “substantial compliance,” which means that, under the totality of the circumstances, the defendant “subjectively understands the implications of his plea* * *.” *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474.

{¶ 26} Furthermore, an appellant who challenges his guilty plea on the basis that it was not knowingly, voluntarily, and intelligently made must demonstrate “a prejudicial effect.” *Id.* The test is whether, but for the omission, the plea would not otherwise have been made. *Id.*

{¶ 27} In this case, Deal fails to make the required demonstration. The record reveals that during the proceeding, the prosecutor twice placed on the record the fact that the potential prison sentence on Count 3 involved a “mandatory” term. Therefore, Deal possessed this information. *State v. Benjamin* (Sept. 3, 1998), Cuyahoga App. No. 73017.

{¶ 28} It is clear that no one, including the trial court, mentioned the lifetime driver’s license suspension for an aggravated vehicular homicide conviction. Nevertheless, this court cannot conclude that this omission was a “deal-breaker.” *State v. Jones*, Warren App. No. CA2002-1--113, 2003-Ohio-2926.

{¶ 29} In accepting the state’s offer, Deal obtained the dismissal of three other counts. The prosecutor’s recitation of the facts, in conjunction with Deal’s own comments, indicate the state was prepared to produce substantial evidence

to prove those counts. Based upon the record, this court concludes that, “even if the trial court did not substantially comply with Crim.R. 11(C) by its failure to notify appellant of the * * * lifetime license suspension, appellant has failed to demonstrate that he would not have entered his plea but for the trial court’s failure to advise him. [Citations omitted.]” *Id.*, ¶14.

{¶ 30} Deal’s first assignment of error, accordingly, is overruled.

{¶ 31} Deal’s second, seventh, and eighth assignments of error are related; thus, they will be addressed together. Simply put, he argues that the “notice of prior conviction” attached to Count 3 was not permitted by R.C. 2903.06(B); therefore, the trial court acted improperly in both convicting him and sentencing him on this “specification.”

{¶ 32} The state concedes that the “notice of prior conviction” set forth in the indictment against Deal was improper. Consequently, Deal’s second assignment of error is sustained. This renders his seventh and eighth assignments of error moot. App.R. 12(A)(1)(c).

{¶ 33} In his third assignment of error, Deal argues that the indictment against him was defective. His argument is answered by the following:

{¶ 34} “This court has consistently recognized that by entering a plea of guilty to the offenses, a defendant waives any alleged errors in the indictment, including the failure to allege a culpable mental state. *State v. Griffin*, Cuyahoga App. No. 92728, 2010-Ohio-437; *State v. Hawkins*, Cuyahoga App. No. 91930,

2009-Ohio-4368; *State v. Gaston*, Cuyahoga App. No. 92242, 2009-Ohio-3080. Notwithstanding waiver, there was no error in the indictment because * * * strict liability applies for the acts that are prohibited. *State v. Turner*, Montgomery App. No. 22777, 2008-Ohio-6836.” *State v. Cooper*, Cuyahoga App. No. 93308, 2010-Ohio-1983, ¶11.

{¶ 35} Consequently, Deal’s third assignment of error is overruled.

{¶ 36} Deal argues in his fourth assignment of error that the trial court unreasonably “participated” in the plea bargaining process, thereby influencing him to enter his guilty pleas. This argument cannot be addressed without considering Deal’s fifth assignment of error, in which he argues that the trial court did not thoroughly inquire into his ability to represent himself. Neither argument is persuasive, because the record belies them.

{¶ 37} It cannot be ignored that this case had been called for a jury trial. At the outset of the proceeding, the prosecutor and defense counsel both indicated the parties had engaged in negotiations, but Deal refused the state’s offer. Deal informed the court that he wanted to “fire” defense counsel and proceed pro se.

{¶ 38} The trial court conducted a lengthy discussion with Deal when he expressed this inclination to represent himself. The record reflects the court’s focus was not to encourage Deal to enter a guilty plea, but, instead, to determine whether Deal was making his decision to proceed pro se knowingly and

intelligently. *Benjamin*; cf., *State v. Byrd* (1980), 63 Ohio St.2d 288, 407 N.E.2d 1384.

{¶ 39} The trial court sought to make Deal realize his limitations in his ability to present his case without either preparation or a broad understanding of the applicable law. *State v. Gibson* (1976), 45 Ohio St.2d 366, 345 N.E.2d 399. Ultimately, the trial court decided Deal had waited too long to pursue this endeavor. *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶38.

{¶ 40} Since the trial court acted appropriately in this case with respect to both the plea bargaining process and Deal's expressed desire to represent himself, Deal's fourth and fifth assignments of error also are overruled.

{¶ 41} In his sixth assignment of error, Deal argues that, because the trial court failed specifically to mention the criteria set forth in R.C. 2921.331(C)(5)(b) in pronouncing sentence on Count 1, it failed to consider them. This argument also is unpersuasive.

{¶ 42} R.C. 2921.331(C)(5)(b) provides in relevant part as follows:

{¶ 43} “(b) * * * [T]he sentencing court, in determining the seriousness of an offender's conduct for purposes of sentencing the offender for a violation of division (B) of this section, shall consider, along with the factors set forth in sections 2929.12 and 2929.13 of the Revised Code that are required to be considered, all of the following:

{¶ 44} “(i) The duration of the pursuit;

{¶ 45} “(ii) The distance of the pursuit;

{¶ 46} “(iii) The rate of speed at which the offender operated the motor vehicle during the pursuit;

{¶ 47} “(iv) Whether the offender failed to stop for traffic lights or stop signs during the pursuit;

{¶ 48} “(v) The number of traffic lights or stop signs for which the offender failed to stop during the pursuit;

{¶ 49} “(vi) Whether the offender operated the motor vehicle during the pursuit without lighted lights during a time when lighted lights are required;

{¶ 50} “(vii) Whether the offender committed a moving violation during the pursuit;

{¶ 51} “(viii) The number of moving violations the offender committed during the pursuit;

{¶ 52} “(ix) Any other relevant factors indicating that the offender’s conduct is more serious than conduct normally constituting the offense.”

{¶ 53} As recited by the state in this case, the facts afforded the trial court the opportunity to assess the seriousness of Deal’s conduct under the foregoing factors. *State v. Anderson*, Cuyahoga App. No. 83285, 2004-Ohio-2858. While operating his vehicle without a valid driver’s license and under the influence of alcohol, Deal fled from Shaker Heights police officers into Cleveland, struck one

victim's vehicle, and then struck another victim's motorcycle; the impact killed the second victim.

{¶ 54} The trial court found Deal guilty of the three counts based upon the facts as presented by the state. Under these circumstances, the court necessarily considered those that fell within R.C. 2921.331(C)(5)(b)(i)-(ix). "The court is not required by statute or otherwise to state its consideration of those statutory factors on the record nor to make any specific finding in relation thereto." *Anderson*, ¶22.

{¶ 55} Therefore, Deal's sixth assignment of error also is overruled.

{¶ 56} Deal's convictions and sentences on Counts 1 and 6 are affirmed.

{¶ 57} Based upon this court's disposition of his second assignment of error, Deal's conviction and sentence on Count 3 is affirmed in part and modified in part. His conviction on Count 3 is modified to delete the "notice of prior conviction," and that portion of his sentence is vacated. This case is remanded to the trial court for correction of the journal entry of conviction and sentence accordingly.

It is ordered that appellee 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. Case remanded to the trial court for execution of sentence.

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

KENNETH A. ROCCO, PRESIDING JUDGE

MELODY J. STEWART, J., CONCURS
CHRISTINE T. McMONAGLE, J., CONCURS
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