[Cite as *State v. Burston*, 2010-Ohio-5120.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93645

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICO O. BURSTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-504827, CR-506032, and CR-512011

BEFORE: Gallagher, A.J., Rocco, J., and Sweeney, J.

RELEASED AND JOURNALIZED: October 21, 2010

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SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, Rico O. Burston, appeals from his convictions and sentences in three underlying criminal cases.[1] For the reasons stated herein,

[1] Cuyahoga County Court of Common Pleas Case Nos. CR-504827, CR-506032, and CR-512011.

we affirm. This appeal concerns three criminal cases in which Burston was convicted on four counts of drug trafficking and one count of drug possession, all with forfeiture specifications. The trial court sentenced Burston on or about November 10, 2008, to a cumulative prison term of six years, with three years of postrelease control.

{¶ 2} Because the initial sentencing entries did not address the forfeiture specifications, there was no final appealable order. See *State v. Byrd*, Cuyahoga App. No. 91090, 2009-Ohio-1876. As a result, Burston moved to correct the entries to comply with Crim.R. 32(C). On June 25, 2009, the trial court entered nunc pro tunc journal entries that included the forfeiture specifications.

{¶ 3} Burston timely filed this appeal from the corrected sentencing entries. He raises seven assignments of error for our review.

{¶ 4} Under his first assignment of error, Burston argues that the trial court erred by accepting his guilty plea without properly advising him of his right against self-incrimination. More specifically, Burston asserts that the trial court failed to inform him of his right not to be compelled to testify against himself.

{¶ 5} Crim.R. 11(C)(2)(c) provides that the trial court "shall not accept a plea of guilty * * * without * * * [i]nforming the defendant and determining that the defendant understands that by the plea the defendant is waiving the

rights * * * 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."

{¶ 6} Although a trial court must strictly comply with the mandates of Crim.R. 11 with respect to constitutional rights, that does not mean that the rule's exact language must be followed. *State v. Freed*, Cuyahoga App. No. 90720, 2008-Ohio-5742, ¶ 37. The Ohio Supreme Court has recognized that literal compliance with the wording of Crim.R. 11(C)(2) is not required and that the focus upon review is whether the record shows the trial court explained the right "in a manner reasonably intelligible to that defendant." *State v. Ballard* (1981), 66 Ohio St.2d 473, 480-482, 423 N.E.2d 115.

{¶ 7} In this case, the trial court asked Burston: "Do you understand that you are giving up your right in each case to remain silent and not testify[?]" Burston responded affirmatively.

{¶ 8} This court has upheld the use of similar language sufficient to comply with the mandates of Crim.R. 11(C) with regard to the privilege against self-incrimination. See *State v. Ortiz*, Cuyahoga App. No. 91626, 2009-Ohio-2877; *State v. Bassett*, Cuyahoga App. No. 90887, 2008-Ohio-5597, ¶ 20; *State v. Ip*, Cuyahoga App. No. 86243, 2006-Ohio-2303. The "right to remain silent" has been described as a "term of art synonymous with the Fifth Amendment privilege against self-incrimination." *State v. Henderson*,

Montgomery App. No. 21425, 2006-Ohio-6306. As this court stated in *Bassett*, supra, "the court's wording that appellant could choose not to testify is the equivalent of saying that the state could not compel her to testify and amounts to strict compliance under Crim.R. 11(C)(2)." Likewise, this court has recognized that advising a defendant that he is waiving his right to remain silent is sufficient to explain the privilege against compulsory self-incrimination and complies with Crim.R. 11(C). *State v. Flynn*, Cuyahoga App. No. 93588, 2010-Ohio-3191. Accordingly, Burston's first assignment of error is overruled.

{¶ 9} Under his second assignment of error, Burston contends the trial court failed to substantially comply with Crim.R. 11(C)(2) when it failed to properly inform him of postrelease control. Burston asserts that the trial court failed to adequately notify him of postrelease control as to each offense. We find no merit to his argument.

{¶ 10} During the plea hearing, the trial court explained to Burston that, upon his release from prison, he would be on three years of postrelease control and that for violating postrelease control, he could be returned to prison for up to one-half of the total sentence and subject to other consequences. Although Burston was not separately advised of postrelease control as to each offense, he was subject to a three-year mandatory postrelease control term that would run concurrent to any discretionary terms imposed. Further, at sentencing the trial court again advised Burston of postrelease control. Because a

six-year sentence was imposed, the trial court indicated that violations of postrelease control could result in his return to prison for up to three years. We find that the trial court's advisement was in conformance with former R.C. 2943.032,[2] which is applicable herein, and that Burston was fully and adequately informed of the consequences of violating postrelease control. Burston's second assignment of error is overruled.

{¶ 11} Under his third assignment of error, Burston claims his conviction on Count 4 in Case No. CR-512011 is void and must be vacated because the trial court dismissed that count. Our review of the record reflects that the trial court's reference to the dismissal of this count was a mere misstatement on the record. Burston pled guilty and was sentenced on this charge. The trial court's journal entry reflects the same and accurately reflects that only Counts 2, 3, and 5 were nolled. Accordingly, Burston's third assignment of error is overruled.

{¶ 12} Under his fourth assignment of error, Burston argues the trial court did not enter judgment in accordance with the plea agreement. Burtson

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[2] R.C. 2943.032 was amended by H.B. 130, which became effective on April 7, 2009. The new version of the statute provides that the court must inform the defendant prior to accepting a guilty plea that "if the court imposes a prison term upon the defendant for the felony, and if the offender violates the conditions of a post-release control sanction imposed by the parole board upon the completion of the stated prison term, the parole board may impose upon the offender a residential sanction that includes a new prison term of up to nine months." See R.C. 2943.032. Insofar as Burston's arguments are based on the current version of the statute, this version was not in effect at the time of Burston's plea or sentencing.

asserts that the court's dismissal of Count 4 and failure to enter a plea of guilty to Count 2 in CR-512011 were contrary to the plea agreement. We have already determined that Burston was convicted on Count 4, as discussed under the third assignment of error. Burston also claims that the court mistakenly accepted his plea of guilty to Count 1, instead of Count 2.

{¶ 13} A review of the transcript shows that at the commencement of proceedings, the prosecutor expressed his understanding of the charges to which Burston was to plead guilty. In reviewing these charges, the prosecutor referenced Count 2, drug trafficking, in CR-512011. However, Burston, who pled in accordance with the plea agreement, entered a plea of guilty on Count 1 in CR-512011, for possession of drugs.

{¶ 14} In discussing the charges to which Burston was to plead guilty, the court referenced Count 1, a felony of the second degree. Further, Count 2 was among the counts the court nolled pursuant to the state's motion to dismiss. At the time of sentencing, the court reiterated the charges to which Burston pled guilty and clarified that Count 1 in CR-512011 was a possession charge. At no time did Burston claim that his plea or conviction was not in conformity with the plea agreement. Because Burston has not established a breach of the plea agreement, we overrule Burston's fourth assignment of error.

{¶ 15} Under his fifth assignment of error, Burston claims he was deprived of effective assistance of counsel because his attorney did not ensure that the court complied with Crim.R. 11 when it accepted his plea and that the court followed the plea agreement. Burston's effective assistance of counsel argument is premised on claimed errors that we have already rejected. Because Burston has failed to demonstrate that counsel's performance was deficient, we overrule his fifth assignment of error.

{¶ 16} Under his sixth assignment of error, Burston argues the trial court erred by sentencing him to consecutive sentences without submitting findings pursuant to R.C. 2929.14(E). This court has previously considered and rejected similar arguments. "Under current Ohio law, a trial court 'now has the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently.' *State v. Elmore*, 122 Ohio St.3d 472, 480, 2009-Ohio-3478, 912 N.E.2d 582; *State v. Bates*, 118 Ohio St.3d 174, 178, 2008-Ohio-1983, 887 N.E.2d 328. Although recognized, the Ohio Supreme Court has yet 'to address fully all ramifications of [*Oregon v. Ice* (2009), ___U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517.]' In *Elmore*, the court followed its *Foster* decision, and reiterated that trial courts '"are no longer required to make findings or give their reasons for maximum, consecutive, or more than the minimum sentences."' *Elmore*, supra at 482, 912 N.E.2d 582, quoting *State v. Foster*, 109 Ohio St.3d 1,

2006-Ohio-856, 845 N.E.2d 470. Until the Ohio Supreme Court states otherwise, this court continues to follow *Foster*." *State v. Sturgill*, Cuyahoga App. No. 93158, 2010-Ohio-2090, ¶ 17. Burston's sixth assignment of error is overruled.

{¶ 17} Under his seventh assignment of error, Burston claims the trial court's failure to honor the plea agreement with regard to the sentence rendered his plea unknowing and involuntary. Burston argues that his guilty plea was based on a promise of a four-year prison term, but the trial court imposed an aggregate six-year prison sentence.

{¶ 18} A review of the record reflects that the trial court reviewed the potential prison terms for Burston's offenses, as well as the possibility for concurrent and consecutive sentences. The court advised Burston before he entered his plea that "you're going to prison for at least 2 years to a maximum of 21 years." The court also advised Burston that he was subject to three years' postrelease control. Before entering his plea, Burston expressed his understanding of the potential sentence that could be imposed and that no threats or promises had been made with regard to his plea.

{¶ 19} After Burston pled guilty to the charges, the court indicated that it would "probably" impose the four-year sentence recommended by the state, but warned Burston to show up on the sentencing date. Burston failed to

appear for the scheduled sentencing date and was arrested. Thereafter, the trial court sentenced Burston to an aggregate prison term of six years.

{¶ 20} Under Ohio law, trial courts may reject plea agreements and are not bound by a jointly recommended sentence. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 28. During the plea hearing in this case, the trial court advised Burston of the sentence that could be imposed. The court was not bound to impose the recommended sentence and clearly forewarned Burston to show up on the sentencing date. Our review reflects that Burston's plea was knowing, voluntary, and intelligent. Accordingly, Burston's seventh assignment of error is overruled.

{¶ 21} For the foregoing reasons, we overrule all of Burston's assignments of error and affirm the judgment of the trial court.

Judgment affirmed.

It is ordered that appellee recover from appellant 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. 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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

JAMES J. SWEENEY, J., CONCURS;

KENNETH A. ROCCO, J., DISSENTS
(WITH SEPARATE OPINION)

KENNETH A. ROCCO, J., DISSENTING:

{¶ 22} I disagree with the majority's determination that the trial court sufficiently advised appellant that he was waiving his privilege against self-incrimination when it asked the appellant if he understood "that you are giving up your right in each case to remain silent and not testify." In my opinion, the "right to remain silent" is an inadequate description of the constitutional right not to be compelled to incriminate oneself.

{¶ 23} The trial court must strictly comply with Crim.R. 11 when it informs criminal defendants of the constitutional rights they are waiving and ensures that they understand them. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621; *State v. Ballard* (1981), 66 Ohio St.2d 473, 478, 423 N.E.2d 115. Strict compliance does not require rote recitation of the exact language of Crim.R. 11(C)(2). *State v. Day*, Cuyahoga App. No. 88725, 2007-Ohio-4052, ¶21. The trial court must engage in meaningful dialogue with the defendant that explains the pertinent constitutional rights "in a

manner reasonably intelligible to that defendant." *Ballard*, supra, at paragraph two of the syllabus.

{¶ 24} In my opinion, to advise a defendant that he has the "right to remain silent" is not a reasonably intelligible description of the right not to be compelled to testify against oneself at trial. The United States Supreme Court in *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, formulated the now-ubiquitous phrase "the right to remain silent" to inform a suspect of his constitutional right against compelled self-incrimination before the police may conduct a custodial interrogation. This fifth amendment right is, however, primarily a *trial* right: "nor shall [any person] be compelled in any criminal case to be a witness against himself." The *Miranda* warnings were thus intended to offset the compulsion inherent in a custodial setting to ensure that any statements the suspect made were voluntary *before they could be used at trial*.

{¶ 25} The fifth amendment right not to be compelled to incriminate oneself has its origins as a protest to the inquisitorial methods used by the Star Chamber. " 'So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.' " *Miranda*, at 443, quoting *Brown v. Walker* (1896), 161 U.S. 591, 596-597, 16 S.Ct. 644, 40 L.Ed. 819.

{¶ 26} The phrase "the right to remain silent" adequately informs a defendant that he is not required to respond to custodial police interrogation, counteracting the subtle compulsion inherent in the interrogation setting. However, it does not fully inform the defendant that the state may not use its power to compel him to testify at his own trial. The essence of the right against compulsory self-incrimination is that it limits the government's power to force a defendant to testify against himself. Being informed that one has the right not to testify, without being informed that one cannot be *compelled* to exercise that right in any particular way, is inadequate.

{¶ 27} The trial court's colloquy with appellant here falls somewhere between the insufficient language used by the court in *State v. Singh* (2000), 141 Ohio App.3d 137, 750 N.E.2d 598 ("You could testify but you need not testify if you desire not to * * *") and the sufficient language used by the court in *State v. Madaris*, 156 Ohio App.3d 211, 2004-Ohio-653, 805 N.E.2d 150 ("Do you understand that by pleading you are giving up your right to a trial at which you cannot be made to testify against yourself?"). These cases demonstrate that, in informing the defendant of his right against compulsory self-incrimination, the court must make it clear that the defendant not only has the choice whether to testify, but that no force or compulsion may be used to sway the defendant's decision whether or not to testify in his own defense.

Informing the defendant only that he has the "right" not to testify is not a sufficient explanation of this important constitutional right.

{¶ 28} We have previously found that the trial court strictly complied with Crim.R. 11(C)(2)(c) when it informed the defendant of his right against compulsory self-incrimination in language similar to that used by the trial court here. See, e.g., *State v. Ip*, Cuyahoga App. No. 86243, 2006-Ohio-2303 ("you have the right to remain silent, not to testify at trial and no one can comment on the fact that you did not testify at trial"); *State v. Ortiz*, Cuyahoga App. No. 91626, 2009-Ohio-2877 ("you are guaranteed the right * * * not to testify at the time of trial; that no one may comment on your silence"). However, in neither of these cases did the appellant raise the precise issue raised here, that is, whether such language sufficiently informs the defendant of his right against *compulsory* self-incrimination. Rather, in *Ip*, the question before us was whether the trial court was obligated to inform the defendant of his right to testify, and in *Ortiz*, the issue was whether the court's recitation of rights adequately ensured that the defendant understood those rights. Therefore, I do not believe that these precedents are controlling here.

{¶ 29} I would reverse the judgment of conviction, vacate the plea entered in this case, and remand for further proceedings. Accordingly, I dissent.