

[Cite as *State v. Hudson-Bey*, 2016-Ohio-7722.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104245

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEON HUDSON-BEY

DEFENDANT-APPELLANT

**JUDGMENT:
DISMISSED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-599544-A

BEFORE: Jones, A.J., E.T. Gallagher, J., and Blackmon, J.

RELEASED AND JOURNALIZED: November 10, 2016

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LARRY A. JONES, SR., A.J.:

{¶1} In October 2015, defendant-appellant Deon Hudson-Bey was indicted on one count each of burglary, petty theft, and criminal damaging or endangering. In December 2015, Hudson-Bey pleaded guilty to burglary in exchange for the remaining two counts being dismissed. The trial court sentenced Hudson-Bey to a six-year prison term. Hudson-Bey, pro se, filed an appeal and a motion for appellate counsel. Counsel was appointed, and has filed a motion to withdraw and a brief in support of his request to withdraw as required by *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

{¶2} In *Anders*, the United States Supreme Court held that if appointed counsel, after a conscientious review of the case, determines the appeal to be wholly frivolous, he or she should advise the court of that fact and request permission to withdraw. *Id.* at 744. Counsel's request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* Further, counsel must also furnish the client with a copy of the brief and allow the client sufficient time to file his or her own brief. *Id.* Appointed counsel here fully complied with the requirements of *Anders*.

{¶3} Once appellate counsel satisfies these requirements, this court must fully examine the proceedings below to determine if any arguably meritorious issues exist. *Id.*; Loc.App.R. 16(C). If we determine that the appeal is wholly frivolous, we may

grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements, or we may proceed to a decision on the merits if state law so requires. *Anders* at *id.*; Loc.App.R. 16(C).

{¶4} In July 2016, this court ordered appointed counsel's motion to withdraw be held in abeyance pending our independent review of the case. This court also notified Hudson-Bey that he had until August 22, 2016, to file his own brief. Hudson-Bey filed a motion requesting a copy of the docket, copies of the transcripts for the plea and sentencing hearings, and an extension of time to file his brief. This court instructed Hudson-Bey to contact the clerk of courts for a copy of the docket. This court further ordered the clerk of courts to send the plea and sentencing transcripts to Hudson-Bey in prison, under the warden's supervision. It was directed that the transcripts be returned to this court by October 3, 2016, which was the same date this court extended the time to for the filing of Hudson-Bey's brief. Hudson-Bey did not file a brief.

{¶5} In appointed counsel's brief, he states that after his careful review of the record, he has concluded that there are no "errors by the trial court prejudicial to the rights of appellant upon which an assignment of error may be predicated." Nonetheless, as required by *Anders*, counsel has submitted the following as a potential assignment of error: "Whether appellant entered his guilty plea knowingly, intelligently and voluntarily."

{¶6} After conducting an independent review of Hudson-Bey's case, for the reasons that follow we dismiss his appeal and grant appointed counsel's motion to

withdraw.

{¶7} The underlying purpose of Crim.R. 11(C) is to convey certain information to a defendant so that he or she can 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). “The standard for reviewing whether the trial court accepted a plea in compliance with Crim.R. 11(C) is a de novo standard of review.” *State v. Cardwell*, 8th Dist. Cuyahoga No. 92796, 2009-Ohio-6827, ¶ 26, citing *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977). “It requires an appellate court to review the totality of the circumstances and determine whether the plea hearing was in compliance with Crim.R. 11(C).” *Cardwell at id.*

{¶8} Crim.R. 11(C)(2) provides in relevant part that in felony cases the court may refuse to accept and shall not accept a plea of guilty 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.

{¶9} Strict compliance by the trial court is required for the waiver of the constitutional rights set forth under Crim.R. 11(C)(2)(c). *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 18. Under the more stringent standard for constitutionally protected rights, a trial court's acceptance of a guilty plea will be affirmed only if the trial court engaged in meaningful dialogue with the defendant, which, in substance, explained the relevant constitutional rights "in a manner reasonably intelligible to that defendant." *Ballard* at paragraph two of the syllabus.

{¶10} With regard to the nonconstitutional rights set forth in Crim.R. 11(C)(2)(a) and (b), reviewing courts consider whether there was substantial compliance with the rule. *Veney* at ¶ 14-17. "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). Further, if the record demonstrates that, even in spite of any error on the trial court's part, the defendant appreciated the effect of his or her plea and waiver of rights, there is still substantial compliance. *State v. Caplinger*, 105 Ohio App.3d 567, 572, 664 N.E.2d 959 (4th Dist.1995).

{¶11} Moreover, a defendant must show prejudice before a plea will be vacated for a trial court's error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the colloquy are at issue. *Veney* at ¶ 17. The test for prejudice is whether the plea would have otherwise been made. *Id.*

{¶12} In regard to advising Hudson-Bey of the constitutional rights he was waiving, the trial court strictly complied with the requirements under Crim.R. 11(C)(2)(c). Specifically, the court advised him that he was waiving his rights to (1) a jury trial (tr. 6); (2) confront witnesses against him (*id.* at 7); (3) have compulsory process for obtaining witnesses in his favor (*id.*); (4) require the state to prove his guilt beyond a reasonable doubt (*id.*); and (5) his right to remain silent and not testify, without comment on the fact that he did not testify. (*Id.*) Hudson-Bey indicated that he understood. (*Id.* at 6-7.)

{¶13} Further, the court's advisement in regard to the nonconstitutional rights Hudson-Bey was waiving more than substantially complied with the requirements under Crim.R. 11(C)(2)(a) and (b). Specifically, the court addressed Hudson-Bey personally and determined that he was entering into the plea voluntarily, with an understanding of the nature of the charges and the maximum penalty involved. (Tr. 7-10.) The court specifically reviewed the crime to which Hudson-Bey was pleading, burglary, a second-degree felony, and that it was punishable by a two-to-eight-year prison sentence and a fine up to \$15,000. (*Id.* at 8.)

{¶14} The court also reviewed the following with Hudson-Bey: (1) the possibility of the imposition of community control sanctions and the consequences for violating the sanctions; (2) the possibility of being sentenced on another case for which he was on postrelease control at the time this offense was committed; (3) the mandatory period of postrelease control for this case if sentenced to prison and the consequences of violating

it; and (4) the possibility of restitution. Hudson-Bey indicated that he understood all of the trial court's advisements. (*Id.* at 8-9.) Hudson-Bey stated that no threats or promises had been made to him to induce his plea (*id.* at 9), that he was "very" satisfied with his counsel's representation (*id.* at 6), and when asked if he had any questions, responded, "no, not at all."

{¶15} Having independently reviewed the record as required by *Anders*, we find no error. We therefore conclude that this appeal is wholly frivolous and grant appointed counsel's motion to withdraw.

{¶16} Case dismissed.

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

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.

LARRY A. JONES, SR., ADMINISTRATIVE JUDGE

EILEEN T. GALLAGHER, J., and
PATRICIA ANN BLACKMON, J., CONCUR