[Cite as *State v. Burdette*, 2009-Ohio-5633.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-A-0021**
- vs -	:	
THEODORE BURDETTE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 07 CR 184.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Ariana E. Tarighati, 34 South Chestnut Street, #100, Jefferson, OH 44047-1092 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Theodore Burdette, appeals from the March 13, 2009 judgment entry of the Ashtabula County Court of Common Pleas, in which he was sentenced for aggravated assault.

{¶2} On July 27, 2007, appellant was indicted by the Ashtabula County Grand Jury on two counts of felonious assault, felonies of the second degree, in violation of R.C. 2903.11. On August 6, 2007, appellant filed a waiver of the right to be present at his arraignment and the trial court entered a not guilty plea on his behalf.

{¶3} A change of plea hearing was held on December 15, 2008. Appellant withdrew his former not guilty plea and entered an oral and written plea of guilty to the offense of aggravated assault, a felony of the fourth degree, in violation of R.C. 2903.12, a lesser included offense under count one of the indictment. On December 16, 2008, the trial court accepted appellant's guilty plea to the lesser offense, and dismissed count two pursuant to negotiated plea terms.

{¶4} Pursuant to its March 13, 2009 judgment entry, the trial court sentenced appellant to fifteen months in prison, with sixty-eight days of credit for time served. It is from that judgment that appellant filed a timely notice of appeal, asserting the following three assignments of error for our review:

{¶5} "[1.] THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY ACCEPTING HIS GUILTY PLEA, WHERE SUCH PLEA WAS NOT MADE KNOWINGLY, VOLUNTARILY, OR INTELLIGENTLY.

{¶6} "[2.] AN APPELLANT'S PLEA IS NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY MADE WHEN THE TRIAL COURT FAILS TO ADVISE HIM OF ALL OF THE TRIAL RIGHTS HE IS WAIVING BY ENTERING A PLEA OF GUILTY.

{¶7} "[3.] APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, WHERE COUNSEL'S DEFICIENT PERFORMANCE RENDERED APPELLANT'S PLEA INVOLUNTARY."

{¶8} In his first assignment of error, appellant argues that the trial court erred by accepting his guilty plea because it was not made knowingly, voluntarily, or intelligently.

{¶9} Crim.R. 11(C)(2) addresses the requirements for guilty pleas and provides: "[i]n felony cases the court may refuse to accept a plea of guilty or a plea of 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:

{¶10} "(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.

{¶11} "(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.

{¶12} "(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."

{¶13} "*** [A] defendant, who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made, must demonstrate a prejudicial effect of which the test is whether the plea would have otherwise been made." *State v. Scarnati* (Feb. 22, 2002), 11th Dist. No. 2001-P-0063, 2002 Ohio App. LEXIS 776, at 12, citing *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

{¶14} The Supreme Court of Ohio, in *State v. Griggs*, 103 Ohio St.3d 85, 2004-

Ohio-4415, syllabus, stated: "[a] defendant who has entered a guilty plea without asserting actual innocence is presumed to understand that he has completely admitted his guilt. In such circumstances, a court's failure to inform the defendant of the effect of his guilty plea as required by Crim.R. 11 is presumed not to be prejudicial."

{¶15} In the instant matter, appellant's written plea of guilty, signed by him and his counsel, shows that he was advised of his rights and that he agreed to waive them. It specifically provides, in pertinent part:

{¶16} "I understand the nature of these charges and the possible defenses I might have. I am satisfied with my attorney's advice[,] counsel and competence. I am not now under the influence of drugs or alcohol. No threats have been made to me. No promises have been made except as part of the stated plea agreement. I understand that the Court is not bound by any agreements of the parties.

{¶17} "I understand by pleading guilty I give up my right to a jury trial or court trial, where I could see and have my attorney question witnesses against me, and where I could use the power of the court to call witnesses to testify for me. I know at trial I would not have to take the witness stand and could not be forced to testify against myself and that no one could comment if I chose not to testify. I understand I waive my right to have the prosecutor prove my guilt beyond a reasonable doubt.

{¶18} "By pleading guilty I admit committing the offense and will tell the Court the facts and circumstances of my guilt. *** I enter this plea voluntarily."

{¶19} In addition, at the change of plea hearing, appellant stated that his counsel had gone over the charges with him, and indicated that he understood the plea. A review of the transcript from the plea hearing shows that the trial court engaged in the

requisite Crim.R. 11 colloquy, and that appellant understood the nature of the charges.

{¶20} The following exchange occurred between the trial judge and appellant:

{¶21} "THE COURT: *** Under Count One of the Indictment, read as follows as it was filed by the Grand Jury. It says, on or about the 30th day of April, 2007, in the City of Ashtabula, County of Ashtabula, and State of Ohio, one Theodore Burdette did knowingly cause serious physical harm to Phil Cook.

{¶22} "***

{¶23} "So do you understand what you're pleading guilty to under Aggravated Assault?

{¶24} "MR. BURDETTE: Yes, sir."

{¶25} The trial judge explained the maximum penalty to appellant, and asked him if he understood what the maximum penalties could be. Appellant replied, "Yes, sir." The trial court proceeded to tell appellant that if the court imposed a prison term upon him, he would have to serve the prison term that was imposed. After a lengthy explanation, the following colloquy took place:

{¶26} "THE COURT: *** Now, let me ask, do you have any questions about your eligibility for the prison term, possible post-release controls and your eligibility for community control?

{¶27} "MR. BURDETTE: No, sir.

{¶28} "THE COURT: All right. This is pretty complicated. If you're not sure, you probably ought to tell me.

{¶29} "MR. BURDETTE: Yeah.

{¶30} "THE COURT: Do you think you understand?

{¶31} “MR. BURDETTE: Yes. I understand, sir.

{¶32} “THE COURT: All right. Also I want to explain the effect of the plea of guilty. If I accept your plea of guilty, that constitutes a complete admission of guilt. *** So if I accept your plea of guilty, that pretty much closes the book on whether you're guilty or not. And you do waive some appellate rights then by pleading guilty. Do you understand that?

{¶33} “MR. BURDETTE: Yes, sir.

{¶34} “THE COURT: Any questions you want to ask me about anything we've gone over here so far?

{¶35} “MR. BURDETTE: No, sir.

{¶36} “THE COURT: Do you understand what I've said to you so far?

{¶37} “MR. BURDETTE: Yes, sir.

{¶38} “THE COURT: Okay. All right. You have some additional rights. Next I want to explain you have a right to a trial by jury. [The trial judge went into a lengthy explanation of jury selection, the requirement of a unanimous verdict, burden of proof, and compulsory process.] *** Now Mr. Burdette, do you have any questions about anything that I've gone over here?

{¶39} “MR. BURDETTE: No, sir.

{¶40} “THE COURT: Is there anything you're not sure of, anything you want me to repeat?

{¶41} “MR. BURDETTE: No, sir.

{¶42} “THE COURT: Do you understand what I've said to you so far?

{¶43} “MR. BURDETTE: Yes, sir.

{¶44} "THE COURT: *** All right. Let me ask, are you in court this afternoon [on] your own free will in entering a plea of guilty to the lesser included offense of Aggravated Assault, a felony of the fourth degree under Count One of the Indictment?

{¶45} "MR. BURDETTE: Yes, sir.

{¶46} "***

{¶47} "THE COURT: All right. Do you understand if I accept your plea of guilty, there isn't going to be any trial in this case?

{¶48} "MR. BURDETTE: Yes, sir."

{¶49} After appellant indicated to the trial judge a factual background of what had happened, appellant's counsel interjected, stating:

{¶50} "MS. LANE: Your Honor, just for the record, based upon the discovery, and I did discuss this with Mr. Burdette, that I recommended that he take the Aggravated Assault plea. I do not believe he has a viable self-defense claim due to the excessive use of the force. And I did recommend that he take – we did discuss self-defense as – and I don't believe that we can – we could meet our burden of proof.

{¶51} "THE COURT: Do you want me to accept your plea?

{¶52} "MR. BURDETTE: Yes, sir."

{¶53} The trial court's dialogue with appellant was thorough and, by all indications, appellant, who was represented by counsel, understood the implications of his plea and the rights he was waiving. The trial court complied with the provisions of Crim.R. 11(C). Before accepting appellant's guilty plea, the trial court determined that appellant made his guilty plea voluntarily, and that he understood the nature of the charges against him and of the maximum penalty involved. Crim.R. 11(C)(2)(a). The

trial court informed appellant of and determined that he understood the effect of his guilty plea, and that it could proceed with judgment and sentence. Crim.R. 11(C)(2)(b). Also, the trial court informed appellant and determined that he understood that by pleading guilty he was waiving his constitutional rights. Crim.R. 11(C)(2)(c).

{¶54} Nothing before this court leads us to conclude that appellant's plea was not knowing, voluntary, or intelligent. As such, the trial court did not err by accepting appellant's guilty plea.

{¶55} Appellant's first assignment of error is without merit.

{¶56} In his second assignment of error, appellant contends that his guilty plea was not knowingly, voluntarily, and intelligently made because the trial court failed to advise him of all of the trial rights he was waiving by entering a plea of guilty. Specifically, appellant maintains that his guilty plea is invalid because the trial court did not inquire if he understood his right to testify on his own behalf.

{¶57} "The matters subject of Crim.R. 11(C)(2)(c) are constitutional, and strict compliance by the trial court with the rule is required in presenting them to a defendant. *State v. Woodliff,* 11th Dist. No. 2004-P-0006, 2005-Ohio-2257, at ¶51. However, the requirements of Crim.R. 11(C)(2)(a) and (b) are not constitutional. Thus, substantial compliance by the trial court in presenting the matters subject of these portions of the rule is sufficient. Id. '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* [supra,] 108 ***." *State v. Gibson*, 11th Dist. No. 2007-G-2755, 2007-Ohio-6254, at ¶11. (Parallel citation omitted.)

{¶58} "To comply with the constitutional requirements, the court must explain to the defendant that he 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* [supra,] *** citing *Boykin v. Alabama* (1969), 395 U.S. 238 ***; *State v. Ballard* (1981), 66 Ohio St.2d 473, 478 ***; *State v. Higgs* (1997), 123 Ohio App.3d 400, 407 ***." *State v. Lavender* (Dec. 21, 2001), 11th Dist. No. 2000-L-049, 2001 Ohio App. LEXIS 5858, at 10-11. (Parallel citations omitted.)

{¶59} "There is no case law indicating that one must be informed that the decision to not testify cannot be used against the defendant. Furthermore, Crim.R. 11 contains no such requirement." *State v. Eckles*, 173 Ohio App.3d 606, 2007-Ohio-6220, at ¶41.

{¶60} In the case at bar, the record shows that the trial court strictly complied with the constitutional provisions of Crim.R. 11(C)(2)(c). The plea colloquy, as previously addressed in appellant's first assignment of error, establishes that the trial court complied with the mandates of Crim.R. 11 and it was not required to inform appellant that he was waiving his right to testify. See *Eckles*, supra, at ¶41.

{¶61} Appellant's second assignment of error is without merit.

{¶62} In his third assignment of error, appellant alleges that he was denied the effective assistance of counsel, in violation of his rights under the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, where counsel's deficient performance rendered his plea involuntary. He stresses that he was not advised of his right to testify and did not understand the nature of the charges against him.

{¶63} *Strickland v. Washington* (1984), 466 U.S. 668, 687, states:

{¶64} "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction *** has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction *** resulted from a breakdown in the adversary process that renders the result unreliable."

{¶65} "*** When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, quoting *Strickland*, supra, at 694, states: "[t]o warrant reversal, '(t)he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"

{¶66} In order to prevail on a claim of ineffective assistance of counsel, the defendant has the burden to establish two things: (1) that counsel's performance was deficient, and (2) that counsel's deficiency prejudiced the defense. *State v. Reynolds* (1998), 80 Ohio St.3d 670, 674, citing *Strickland*, supra, at 687. The defendant must

produce evidence that counsel acted unreasonably by substantially violating essential duties owed to the client. *State v. Sallie* (1998), 81 Ohio St.3d 673, 674.

{¶67} A criminal defense attorney owes a duty of care to his client. A "duty" is defined as "[a] legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right." Black's Law Dictionary (8 Ed.2004) 543.

{¶68} Under *Strickland* as interpreted by Ohio courts, attorneys are presumed competent, reviewing courts must refrain from second-guessing strategic, tactical decisions and strongly assume that counsel's performance falls within a wide range of reasonable legal assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558. See, also, *State v. Burley* (Aug. 11, 1998), 7th Dist. No. 93-CA-204, 1998 Ohio App. LEXIS 3895, at 9 (a defendant is not guaranteed the right to the best or most brilliant counsel).

{¶69} Upon demonstrating counsel's deficient performance, the defendant then has the burden to establish prejudice to the defense as a result of counsel's deficiency. *Reynolds*, supra, at 674. The reviewing court looks at the totality of the evidence and decides if there exists a reasonable probability that, were it not for serious errors made, the outcome of the trial would have been different. *Strickland*, supra, at 695-696. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

{¶70} "Criminal defense is an art, not a science. Criminal defense attorneys adopt different approaches to their craft, based partly upon the demands of the particular case, and partly upon their own personal characteristics. Ordinarily, defense counsel's particular style of defense is not a basis for a claim of ineffective assistance of

counsel." *State v. Benton* (Jan. 20, 1993), 2d Dist. No. 91 CA 71, 1993 Ohio App. LEXIS 172, at 7. "A lawyer shall act with *reasonable* diligence and promptness in representing a client." Ohio Prof. Cond. Rule 1.3. (Emphasis sic.)

{¶71} In the case sub judice, we disagree with appellant that his counsel was ineffective based on the record before us. As previously addressed in his foregoing two assignments of error, the plea colloquy establishes that appellant was advised of his rights and that he understood the nature of the charges against him.

{¶72} Pursuant to *Strickland*, supra, appellant fails to show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. Even assuming arguendo that appellant's counsel's performance was deficient, appellant cannot show that the deficient performance prejudiced the defense. Thus, he cannot show that but for his counsel's unprofessional errors, the result of the proceeding would have been different.

{¶73} Appellant's third assignment of error is without merit.

{¶74} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Ashtabula County Court of Common Pleas is affirmed. The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDELL, J.,

concur.