

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	Case No. 17CA3620
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
JAMES A. WARD,	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellant.	:	RELEASED: 06/20/2018

APPEARANCES:

Chase B. Bunstine, Chillicothe, Ohio, for appellant.

Matthew S. Schmidt, Ross County Prosecuting Attorney, and Pamela C. Wells, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for appellee.

Harsha, J.

{¶1} After James Ward pleaded no contest to a felony, the Ross County Court of Common Pleas sentenced him to prison and a mandatory term of post-release control. Ward asserts that the trial court abused its discretion when it denied his request for a trial continuance.

{¶2} Ward sought a continuance the day before his trial was to begin. Ward contended that he had given his attorney additional facts the day before his trial date and he wanted more time for his attorney to investigate a possible defense. The trial court denied the request on the ground that Ward had a number of previous opportunities to share this information with his counsel and his request for a continuance was a contrived effort to delay. In weighing the factors, we find that the trial court did not abuse its discretion. Ward sought an indefinite and unspecified delay, he contributed to the circumstances which gave rise to the request by failing to convey the

additional facts months earlier when he had the opportunity, multiple witnesses would have been inconvenienced, and the court found that the requested delay was contrived.

{¶3} Ward also asserts that he did not knowingly, intelligently, and voluntarily enter his no contest plea because the trial court misinformed or misled him about the effect of the no contest plea; i.e. the court informed him both that the prison sentence was mandatory and not mandatory. However, the trial court substantially complied with Crim.R. 11(C) when it informed him that the maximum penalty was an eight-year prison term, the term was not mandatory, and it must be served consecutive to his current sentence.

{¶4} Even if Ward was subjectively confused, he is entitled to have his guilty plea vacated only if he demonstrates a prejudicial effect, i.e., that he would not have made the plea if he had known otherwise. He does not claim any prejudicial effect and we see no evidence of any prejudicial effect in the record.

{¶5} We overrule his assignments of error and affirm his conviction.

I. FACTS

{¶6} The Ross County Grand Jury returned an indictment charging James Ward with one count of possession of a deadly weapon while under detention in violation of R.C. 2923.131, a second degree felony. The state alleged that Ward had a “homemade shank” (a knife) in his possession while he was in prison for rape, aggravated burglary, and kidnapping. Ward entered a plea of not guilty at his arraignment. The court initially set a pretrial hearing for June 2017, but Ward had ingested a large quantity of pills and was unresponsive so the court continued the

pretrial until August 2017. The continuance order stated that Ward's "mental state made his participation at this proceeding impossible."

{¶7} At the August pretrial the court set a final pretrial date of October 18, 2017 and a trial date of October 19, 2017. Approximately one month before trial the state issued subpoenas for eight witnesses to testify at trial; all were various law enforcement officials. At the final pretrial conference Ward asked for a trial continuance explaining that he had shared additional information with his trial counsel that morning and wanted counsel to have more time to investigate a possible defense. Counsel stated that it is his normal practice to meet with clients in prison, but because Ward had been transferred to the Toledo Correctional Facility, he had not done so.

{¶8} The state objected to a continuance on the ground that Ward had met with his counsel on three prior occasions and could have shared this information but failed to do so. The trial court noted that Ward had communicated through written letters from prison directly to the court and asked Ward's counsel whether Ward had also communicated to him by written letter. Ward's counsel stated that although he had written a lengthy letter to Ward, Ward had not responded and had not written any letters to him.

{¶9} The trial court denied Ward's request for a trial continuance. Ward waived his right to a jury trial, pleaded no contest, and proposed a jointly recommended two-year prison sentence.

{¶10} The trial court conducted a hearing on Ward's change of plea and engaged in a colloquy that advised Ward of his constitutional and nonconstitutional

rights prior to accepting Ward's no contest plea. The court explained that it was not bound to accept the jointly recommended sentence:

Court: Alright, do you understand that while you can recommend a sentence, the state can recommend a sentence, I'm not bound to accept anybody's recommendations?

Ward: I didn't know that the....

Court: Yeah, I can sentence you to anything at all in the legal range of sentences and * * * when cases like this, I don't know much about you * * * so what I typically do on cases like this, if both parties come to me with a recommended sentence is I generally approve the recommended sentence.

So I guess what I'm saying right now is is that typically yes, two years is about right. I don't know anything about you, I'll accept that recommendation. If I knew more about you, I suppose in theory it could be more. It can't be less because you're being offered the minimum sentence it has by law, it's a mandatory, it has to be consecutive to your sentence do you understand?

Ward: So we've –

Court: Suppose if you had less than five years left I could you [sic] on community control, but . . .

Ward: I mean so, so you're saying like it runs against what I'm already doing, or?

Cornely: It'll run after.

Court: It has to run after. It has to be consecutive.

Ward: Oh, it has, oh.

{¶11} The trial court asked Ward if he had read the plea agreement. Ward responded that he had not, but his attorney had explained some of it. The court ordered a brief recess and instructed Ward to read the entire plea agreement. His written plea agreement stated the maximum penalty and that a prison term was not mandatory:

Basic Prison Term: 2-8 years. I understand the MAXIMUM penalty COULD be: a maximum prison term of 8 years of, which 0 is mandatory,

during which I am NOT eligible for judicial release or community control.

{¶12} The court resumed session and gave this notice about the sentence:

Court: It's a second degree felony which means it's punishable by a term of imprisonment between two and eight years, and a fine of up to fifteen thousand dollars. Do you understand the possible penalties?

Ward: Yes sir.

* * *

Court: Alright, do you understand that this isn't a mandatory sentence, so in theory you could be placed on community control? Do you understand that?

Ward: Yes sir.

Court: Do you understand though that if there is a sentence, a prison sentence that's stated it has to be consecutive to what you're presently serving?

Ward: Yes sir.

{¶13} The trial court accepted Ward's plea after concluding that he had made a knowing, intelligent, and voluntary waiver of his constitutional and nonconstitutional rights under Crim.R. 11, found him guilty of possession of a deadly weapon while under detention, and sentenced him to a two-year prison term to run consecutive to the sentence he was currently serving.

II. ASSIGNMENTS OF ERROR

{¶14} Ward assigns the following errors for our review:

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO CONTINUE THE TRIAL.

II. THE TRIAL COURT ACCEPTED A PLEA IN VIOLATION OF 11(C)(2)(a) OF THE OHIO RULES OF CRIMINAL PROCEDURE.

III. LAW AND ANALYSIS

A. Denial of Motion for Trial Continuance

{¶15} Ward contends that the trial court abused its discretion in overruling his motion for a continuance. He argues that only five and one-half months had expired between his arraignment and the final pretrial. During a portion of that time he had been transferred from the Chillicothe Correctional Institute to the Toledo Correctional Institute so it was more difficult to have face-to-face meetings with counsel. Ward contends that he gave a legitimate reason for seeking a continuance: there were additional facts and circumstances that could have been a possible defense that he had not discussed with his counsel. Also, he contends for the first time on appeal that he needed a continuance because he did not understand the nature of the charges and the possible penalties provided to him in the plea form because his attorney's statements about it conflicted with the court's.

{¶16} “An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion.” *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (1981), citing *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964) and *State v. Bayless*, 48 Ohio St.2d 73, 101, 357 N.E.2d 1035 (1976); *State v. Neal*, 4th Dist. Lawrence Nos. 14CA31, 14CA32, 2015-Ohio-5452, ¶75. Abuse of discretion is an unreasonable, arbitrary, or unconscionable use of discretion, or a view or action that no conscientious judge could honestly have taken. *Id.* citing *State v. Kirkland*, 140 Ohio St.3d 73, 2014–Ohio–1966, 15 N.E.3d 818, ¶ 67. “A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of

countervailing reasoning processes that would support a contrary result.” *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶17} “ ‘There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.’ ” *Unger* at 67, quoting *Ungar*, 376 U.S. at 589. “Weighed against any potential prejudice to a defendant are concerns such as a court’s right to control its own docket and the public’s interest in the prompt and efficient dispatch of justice.” *Id.* In evaluating a motion for a continuance, a court should consider (1) the length of the delay requested; (2) whether other continuances have been requested and received; (3) the inconvenience to litigants, witnesses, opposing counsel and the court; (4) whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; (5) whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and (6) other relevant factors, depending on the unique facts of each case. *Id.*

{¶18} We find nothing unreasonable, arbitrary, or capricious about the trial court’s decision to deny Ward’s motion for a continuance. As to the length of the delay requested, Ward did not seek a specific time period – it was an indefinite, unspecified delay. Ward’s counsel explained that he went over possible defenses with Ward, but Ward was “not comfortable going to trial and wished that I had more time to investigate those, so we would be asking for a continuance.” Although Ward had not requested a prior continuance, the court had to continue a prior pretrial hearing because Ward had

ingested a large number of pills that altered his mental faculties and prevented his meaningful participation. Witnesses would be inconvenienced because the state had subpoenaed at least eight witnesses to attend trial the following day.

{¶19} The court stated that it believed the requested delay was contrived:

The court will note that this matter has been pending since April, and furthermore, this jury trial was set * * * more than a month ago * * * [on] August 2, and the day before the trial the defendant then provides new information that might amount to some kind of a defense. I'm sorry, it just appears to be contrived. He's had numerous opportunities that he could have put this forward. His previous behavior at pre-trials makes me think that he's just continuing to delay, as such I'll overrule the motion to continue.

{¶20} Finally, Ward contributed to the circumstance by: (1) ingesting pills that altered his mental faculties and deprived him of the opportunity to discuss his case with his attorney at an earlier stage; (2) failing to provide information to his attorney until the day before trial even though he had meet with him two months earlier; and (3) failing to write to his attorney or respond to his attorney's letter to him.

{¶21} We reject Ward's contention – first made on appeal – that he needed a continuance because he was confused by conflicting statements between his attorney and the court over his plea form. Confusion is not the reason he gave the trial court and it is not supported by the chronology in the record. His request for a continuance was made *before* he presented his change of plea, *before* his attorney or the court made any statements about the plea, and thus *before* any confusion arising from such statements could have existed in Ward's mind.

{¶22} We find that the trial court did not abuse its discretion in refusing to grant Ward a continuance. We overrule Ward's first assignment of error.

B. Compliance with Crim. R. 11(C)(2)(a)

{¶23} “ ‘When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution.’ ” *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 7, quoting *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). “ ‘An appellate court determining whether a guilty plea was entered knowingly, intelligently, and voluntarily conducts a de novo review of the record to ensure that the trial court complied with the constitutional and procedural safeguards.’ ” *State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014-Ohio-5601, ¶ 36, quoting *State v. Moore*, 4th Dist. Adams No. 13CA965, 2014-Ohio-3024, ¶ 13.

{¶24} Ward claims that his no contest plea is invalid because he did not knowingly, intelligently, and voluntarily enter it due to confusion over whether the charge carried a mandatory sentence. He contends that the trial court misinformed him by stating that a prison sentence was mandatory, but then later stating that it was not mandatory. He claims that as a result he was misinformed or misled about whether: (1) he was eligible for community control; (2) his charge carried a mandatory sentence; and (3) his sentence would run concurrent or consecutively to his current sentence.

{¶25} “Crim.R. 11(C) governs the process that a trial court must use before accepting a felony plea of guilty or no contest.” *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, at ¶ 8. Before accepting a no contest plea in a felony case a trial court must address the defendant personally and determine 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.” Crim.R. 11(C)(2)(a). The court must also inform the defendant of other matters under Crim.R. 11(C)(2)(b) and (c).

{¶26} Ward’s contentions involve the trial court’s notification of nonconstitutional rights under Crim.R. 11(C)(2)(a), specifically the maximum penalty involved. Because this notification is not constitutionally based, substantial compliance is sufficient; this means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. *Veney* at ¶ 15, citing *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶27} A defendant who challenges his guilty or no contest plea on the basis that it was not knowingly, intelligently, and voluntarily made must generally prove prejudice, which in this context means that he would not have entered the plea had he known otherwise. *Veney* at ¶ 15. An exception to the prejudice requirement occurs if the trial court completely failed to comply with the rule:

When the trial judge does not *substantially* comply with Crim .R. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court *partially* complied or *failed* to comply with the rule. If the trial judge partially complied, e.g., by mentioning mandatory postrelease control without explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect. See *Nero*, 56 Ohio St.3d at 108, 564 N.E.2d 474, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 93, 5 O.O.3d 52, 364 N.E.2d 1163, and Crim.R. 52(A); see also *Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 23. The test for prejudice is “whether the plea would have otherwise been made.” *Nero* at 108, 564 N.E.2d 474, citing *Stewart*, *id.* If the trial judge completely failed to comply with the rule, e.g., by not informing the defendant of a mandatory period of postrelease control, the plea must be vacated. See *Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d. 1224, paragraph two of the syllabus. “A complete failure to comply with the rule does not implicate an analysis of prejudice.” *Id.* at ¶ 22.

State v. Clark, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 32 (emphasis sic).

{¶28} Ward argues that the “Plea of No Contest” form stated that a prison sentence was not mandatory by indicting that “zero” years were mandatory. But the trial court notified him that the sentence was both mandatory and not mandatory. However, he does not claim that he was prejudiced in any way – he does not contend that he would not have entered the no contest plea had he understood the non-mandatory nature of the prison term.

{¶29} Ward contends that the trial court incorrectly informed him that a prison sentence was mandatory during the portion of the hearing where the court explained that it was not bound to accept the jointly recommended sentence.

Court: Yeah, I can sentence you to anything at all in the legal range of sentences and * * * when cases like this, I don't know much about you * * * so what I typically do on cases like this, if both parties come to me with a recommended sentence is I generally approve the recommended sentence.

So I guess what I'm saying right now is is that typically yes, two years is about right. I don't know anything about you, I'll accept that recommendation. If I knew more about you, I suppose in theory it could be more. It can't be less because you're being offered the minimum sentence it has by law, it's a mandatory, it has to be consecutive to your sentence do you understand?

Ward: So we've –

Court: Suppose if you had less than five years left I could you [sic] on community control, but . . .

Ward: I mean so, so you're saying like it runs against what I'm already doing, or?

Cornely: It'll run after.

Court: It has to run after. It has to be consecutive.

Ward: Oh, it has, oh.

In this context the trial court statement “it’s a mandatory” ostensibly refers to the minimum two-year sentence or the requirement that the sentence run consecutive. In its next statements the court both explained that community control was an option by stating, “I could you [sic] on community control” and also emphasized that the “consecutive running” of the sentence was mandatory by immediately reiterating this: “It has to run after. It has to be consecutive.”

{¶30} Nevertheless, any possible confusion over whether the sentence was mandatory was removed when the court ordered a brief recess, directed Ward to read the entire plea agreement, and reconvened. The plea agreement stated the maximum prison term of eight years and that none of the prison term was mandatory. “I understand the MAXIMUM penalty COULD be: a maximum prison term of 8 years of, which 0 is mandatory, during which I am not eligible for judicial release or community control.” After reconvening, the court notified Ward of the maximum sentence, that the sentence was not mandatory, and that it must be served consecutively:

Court: It’s a second degree felony which means it’s punishable by a term of imprisonment between two and eight years, and a fine of up to fifteen thousand dollars. Do you understand the possible penalties?

Ward: Yes sir.

* * *

Court: Alright, do you understand that this isn’t a mandatory sentence, so in theory you could be placed on community control? Do you understand that?

Ward: Yes sir.

Court: Do you understand though that if there is a sentence, a prison sentence that’s stated it has to be consecutive to what you’re presently serving?

Ward: Yes sir. (10/18/17 Tr. 11-12)

Therefore, the trial court substantially complied with Crim.R. 11 when explaining the maximum penalty and, under the totality of the circumstances, we find Ward subjectively understood the maximum penalty involved.

{¶31} Even if Ward was subjectively confused, he is entitled to have his guilty plea vacated only if he demonstrates a prejudicial effect, i.e., that he would not have made the plea if he had known otherwise. He does not claim any prejudicial effect and we see no evidence of any prejudicial effect in the record.

{¶32} We overrule his second assignment of error.

IV. CONCLUSION

{¶33} The trial court did not abuse its discretion when it denied Ward's motion for a trial continuance. The trial court substantially complied with Crim.R 11 by informing Ward of his nonconstitutional rights (the maximum penalty involved) before accepting his no contest plea. The trial court thus correctly determined that Ward knowingly, intelligently, and voluntarily entered his no contest plea.

{¶34} Having overruled Ward's assignments of error, we affirm his conviction and sentence.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, J., and McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.