

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

STATE OF OHIO, :
 :
Plaintiff-Appellee, : CASE NO. 20CA26, 20CA27,
 : 20CA28, & 20CA29
vs. :
DEVIN L. LINDSEY, : DECISION AND JUDGMENT ENTRY
 :
Defendant-Appellant. :

APPEARANCES:

Steven H. Eckstein, Washington Court House, Ohio for appellant.¹

Nicole Tipton Coil, Washington County Prosecuting Attorney, and Joseph P. Derkin, Assistant Prosecuting Attorney, Marietta, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 7-20-21
ABELE, J.

{11} This is an appeal from a Washington County Common Pleas Court judgment of conviction and sentence. Devin Lindsey, defendant below and appellant herein, pleaded guilty to various charges, including rape, receiving stolen property, unlawful sexual conduct with a minor and tampering with evidence.

{12} Appellant now assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

¹ Different counsel represented appellant during the trial

"DEFENDANT-APPELLANT'S GUILTY PLEA WAS OBTAINED IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND CRIM.R. 11(C)."

SECOND ASSIGNMENT OF ERROR:

"DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO."

{13} On October 2, 2019, in Case Number 20CA27 (Trial Court Case Number (TC) 19CR332), a Washington County Grand Jury returned an indictment that charged appellant with (1) one count of receiving stolen property, in violation of R.C. 2913.51(A)&(C)), a fifth-degree felony that also included three forfeiture specifications, and (2) one count of tampering with evidence, in violation of R.C. 2921.12(A)(1)&(B), a third-degree felony. Appellant pleaded not guilty on October 17, 2019.

{14} On November 6, 2019, in Case Number 20CA26 (TC 19CR456), a Washington County Grand Jury returned an indictment that charged appellant with one count of rape, in violation of R.C. 2907.02(A)(1)(b)&(B), a first-degree felony that also included a forfeiture specification. Appellant pleaded not guilty on November 8, 2019.

{15} On November 21, 2019, in Case Number 20CA28 (TC 19CR475),

court proceedings.

a Washington County Grand Jury returned an indictment that charged appellant with (1) two counts of unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A)&(B)(3), both third-degree felonies, (2) two counts of complicity to unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A)&(B)(3) and R.C. 2923.03(A)(2), both third-degree felonies, (3) one count of attempted failure to register in violation of R.C. 2950.05(A)&(F)(1) and R.C. 2950.99(A)(1)(b)(ii), a first-degree misdemeanor, (4) two counts of pandering obscenity involving a minor in violation of R.C. 2907.321(A)(3)&(C), both second-degree felonies, (5) two counts of pandering obscenity involving a minor in violation of R.C. 2907.321(A)(5)&(C), both fifth-degree felonies, (6) one count of endangering children in violation of R.C. 2919.22(A)&(E)(2)(a), a first-degree misdemeanor, and (7) one count of complicity to failure to register in violation of R.C. 2950.05(A)&(F)(1) and 2950.99(A)(1)(b)(ii) and 2923.03(A)(2), a first-degree misdemeanor. Appellant pleaded not guilty on November 25, 2019.

{¶6} On January 22, 2020, in Case Number 20CA29 (TC 20CR45), a Washington County Grand Jury returned an indictment that charged appellant with tampering with evidence in violation of R.C. 2921.12(A)(1)&(B), a third-degree felony. On January 24, 2020, appellant pleaded not guilty to the charge.

{¶7} On February 28, 2020, with the assistance of counsel, appellant withdrew his not guilty pleas and pleaded guilty to: (1) first-degree felony rape (Case No. 20CA26), (2) third-degree felony unlawful sexual conduct with a minor (Case NO. 20CA28), (3) third-degree felony tampering with evidence (Case No. 20CA29), and (4) fifth-degree felony receiving stolen property (Case No. 20CA27). The trial court sentenced appellant to serve concurrent prison terms of (1) life with the possibility of parole after 10 years for rape, (2) 36 months for unlawful sexual conduct with a minor, (3) 24 months for tampering with evidence, and (4) 6 months for receiving stolen property. The court dismissed all other counts. The court further ordered appellant to (1) serve five years of mandatory post-release control, (2) pay restitution, (3) forfeit specific items, and (4) register as a Tier III sex offender.

{¶8} Subsequently, this court granted appellant's motion for delayed appeal.

I.

{¶9} In his first assignment of error, appellant asserts that his guilty pleas should be invalidated because the trial court did not strictly comply with Crim.R. 11(C).

{¶10} ``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); accord *State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶ 40; *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826, ¶ 9. “It is the trial court’s duty, therefore, to ensure that a defendant ‘has a full understanding of what the plea connotes and of its consequence.’ ” *Montgomery* at ¶ 40, quoting *Boykin v. Alabama*, 395 U.S. 238, 244, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *State v. Conley*, 4th Dist. Adams No. 19CA1091, 2019-Ohio-4172, ¶ 34.

{¶11} When appellate courts evaluate whether a defendant knowingly, intelligently, and voluntarily entered a guilty plea, a court must independently review the record to ensure that the trial court complied with the Crim.R. 11 constitutional and procedural safeguards. *State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014-Ohio-5601, ¶ 36; *State v. Eckler*, 4th Dist. Adams No. 09CA878, 2009-Ohio-7064, ¶ 48; accord *Veney* at ¶ 13 (“Before accepting a guilty or no-contest plea, the court must make the determinations and give the warnings required by Crim.R. 11(C)(2)(a) and (b) and

notify the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c)."); *State v. Kelley*, 57 Ohio St.3d 127, 128, 566 N.E.2d 658 (1991) ("When a trial court or appellate court is reviewing a plea submitted by a defendant, its focus should be on whether the dictates of Crim.R. 11 have been followed."); *State v. Shifflet*, 2015-Ohio-4250, 44 N.E.3d 966 (4th Dist.), ¶ 13, citing *State v. Smith*, 4th Dist. Washington No. 12CA11, 2013-Ohio-232, ¶ 10.

{¶12} Pursuant to Crim.R. 11(C)(2), a trial court should not accept a guilty plea without first addressing the defendant personally and:

(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.

Therefore, before a court accepts a guilty plea, a "court must

inform the defendant that he is waiving his privilege against compulsory self-incrimination, his right to jury trial, his right to confront his accusers, and his right of compulsory process of witnesses." *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981), paragraph one of the syllabus; see also Crim.R.

11(C)(2)(c). "In addition to these constitutional rights, the trial court must determine that the defendant understands the nature of the charge, the maximum penalty involved, and the effect of the plea." *Montgomery* at ¶ 41.

{¶13} The purpose of Crim.R. 11(C) is "to convey to the defendant certain information so that he can make a voluntary and intelligent decision whether to plead guilty." *Ballard*, 66 Ohio at 479-480. Although literal compliance with Crim.R. 11(C) is preferred, it is not required. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 29, citing *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 19. Therefore, an appellate court will ordinarily affirm a trial court's acceptance of a guilty plea if the record reveals that the trial court engaged in a meaningful dialogue with the defendant and explained, "in a manner reasonably intelligible to that defendant," the consequences of pleading guilty. *Ballard* at paragraph two of the syllabus; accord *Barker* at ¶ 14; *Veney* at ¶ 27; *Conley* at ¶ 37.

{¶14} Additionally, a defendant who seeks to invalidate a plea

on the basis that the trial court partially, but not fully, informed the defendant of his or her non-constitutional rights must demonstrate a prejudicial effect. *Veney* at ¶ 17; *Clark* at ¶ 31. To demonstrate that a defendant suffered prejudice due to the failure to fully inform the defendant of his or her non-constitutional rights, the defendant must establish that, but for the trial court's failure, a guilty plea would not have been entered. *Clark* at ¶ 32, quoting *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990) (stating that "[t]he test is 'whether the plea would have otherwise been made' "). However, when a trial court completely fails to inform a defendant of his or her non-constitutional rights, the plea must be vacated, and no analysis of prejudice is required. *Clark*, citing *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 22.

{¶15} In the case sub judice, appellant asserts that the trial court failed to fully comply with Crim.R. 11(C). We begin with a review of the hearing transcript:

THE COURT: I have in front of me a written plea of guilty that deals with all four cases with an agreed resolution, an agreed disposition. It's our intention to go through the plea and the sentencing and the sex offender registration form today.

Attorney Blakeslee, did you - - and I'm going to include Attorney Fowler with you - - did the two of you go through the written plea of guilty with Mr. Lindsey before he signed it?

MR. BLAKESLEE: Yes, Your Honor.

THE COURT: Did you answer all of his questions and concerns as they relate to all four of the cases and the ultimate disposition of all four cases?

MR. BLAKESLEE: We did.

THE COURT: Did you consider during your representation whether it would be appropriate to file a motion to suppress in any of the cases and so advise your client?

MR. BLAKESLEE: Yes.

THE COURT: Attorney Fowler, without going back through them, do you concur that, at least in the case that you represented him, you went through the plea with him, you advised him and answered questions, considered whether a motion to suppress would be appropriate, and - - and addressed all that with your client?

MR. FOWLER: Yes, I did, Your Honor.

THE COURT: Mr. Lindsey, can you read and write?

THE DEFENDANT: Yes, sir.

THE COURT: You heard the attorneys say that they'd gone through this plea with you before you * * * signed it. Did they do that?

THE DEFENDANT: Yes, sir.

THE COURT: Did they answer your questions?

THE DEFENDANT: Yes, sir.

THE COURT: And you understand what we're doing here today. Is - - is there anything about the plea or the proceeding that you don't understand?

THE DEFENDANT: No, sir. I understand everything.

{¶16} We believe that the foregoing exchange reveals that, consistent with Crim.R. 11, the trial court personally advised

appellant of the relevant procedural safeguards and his constitutional rights. Appellant responded affirmatively that he understood his rights and that his guilty pleas would result in a waiver of his rights. Additionally, appellant acknowledged that he understood the nature of the charges, the effect of his plea, and the maximum penalty. Appellant further acknowledged that the trial court could proceed to sentencing immediately after his plea. Moreover, it appears that appellant also had the benefit of representation from two attorneys on his four cases.

{¶17} After our review, and based on the totality of the circumstances, we believe that the trial court sufficiently complied with the Crim.R. 11 requirements during the plea colloquy. The court engaged in a meaningful dialogue with appellant and explained in detail the consequences of appellant's guilty pleas. Therefore, we conclude appellant entered his plea knowingly, intelligently, and voluntarily.

{¶18} Accordingly, based upon the foregoing reasons we overrule appellant's first assignment of error.

II.

{¶19} In his second assignment of error, appellant asserts that

he received ineffective assistance of counsel during the trial court proceedings. In particular, appellant contends that trial counsel failed to inform him that a DNA test in Case No. 20CA26 "only had a probability of 82% to 92%, far less than the usual 99%, the knowledge of which would have changed Defendant-Appellant's mind about pleading guilty."²

{¶20} To prevail on a claim of ineffective assistance of counsel, an appellant must establish that (1) counsel rendered a deficient performance that fell below an objective standard of reasonable representation, and (2) counsel's deficient performance resulted in prejudice, or, in other words, a reasonable probability exists that but for counsel's errors, the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 62; *State v. Day*,

² We point out, as we did in *Day*, that "[t]o the extent [appellant] is relying on evidence outside the record to support [his] claim, postconviction relief - not direct appeal - is the appropriate method to seek relief based on a claim of ineffective assistance. *Day* at ¶ 29, see also *State v. Williams*, 4th Dist. Jackson No. 15CA3, 2016-Ohio-733, ¶ 37 (defendant based his ineffective assistance claim on speculation that evidence outside the record would establish a reasonable probability that if trial counsel had sought a continuance and submitted undetermined additional evidence, the trial court would have imposed a more lenient sentence; however direct appeal is not the proper vehicle to raise an ineffective-assistance claim premised on evidence outside the record.), citing *State v. Hampton*, 4th Dist. Lawrence No. 15CA1, 2015-Ohio-4171, ¶ 28 (petition for postconviction relief is the proper vehicle to raise a claim of ineffective assistance of

2019-Ohio-4816, 149 N.E.3d 122, ¶ 27 (4th Dist.). “When considering whether trial counsel’s representation amounts to deficient performance, ‘a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’ ” *State v. Walters*, 4th Dist. Washington Nos. 13CA33 & 13CA36, 2014-Ohio-4966, ¶ 23, quoting *Strickland* at 689. “Thus, ‘the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.’ ” *Id.*, quoting *Strickland* at 689. “ ‘ A properly licensed attorney is presumed to execute his duties in an ethical and competent manner.’ ” *Id.*, quoting *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10. “Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel’s errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment.” *Id.*

{¶21} Appellee first observes that in view of the fact that appellant pleaded guilty, appellee did not need to submit evidence or otherwise prove its case. Therefore, appellee reasons, even if we assume, for purposes of argument, that counsel rendered a deficient performance, appellant nevertheless cannot show prejudice or, in other words, no reasonable probability exists that but for counsel’s errors the outcome of the proceeding would have been

counsel that relies upon evidence outside the record).

different. See *Day*, 2019-Ohio-4816, 149 N.E.3d 122, ¶ 28 (4th Dist.). Moreover, “an attorney’s advice to take a plea deal is not ineffective assistance of counsel.” *State v. Howard*, 2017-Ohio-9392, 103 N.E.3d 108, ¶ 30 (4th Dist.) (internal quotations omitted); *State v. Robinson*, 12th Dist. Butler No. CA213-05-085, 2013-Ohio-5672, ¶ 23.

{¶22} In the case sub judice, the prosecution and appellant’s attorneys negotiated a plea agreement. Pursuant to that agreement (1) appellant received concurrent sentences less than the maximum sentences, and (2) appellee dismissed multiple (11) other counts of the indictments. Thus, it appears that appellant’s counsel strongly advocated on his behalf with the resulting plea agreement. See *Collins*, 4th Dist. Lawrence No. 18CA11, 2019-Ohio-3428, at ¶ 20. Moreover, appellant’s guilty plea represents his acknowledgment of guilt. Appellant’s concern that DNA identification evidence, in the range of 82 to 92 percent, while ignoring other evidence including, inter alia, video evidence, victim identifications, cell phone material and social media information, does not arguably undermine the strength of the evidence that the prosecution amassed during the preparation phase of this proceeding, and does not undermine trial counsels’ representation of appellant.

{¶23} Therefore, because appellant cannot establish prejudice, we overrule appellant’s second assignment of error and affirm the

trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed. Appellee shall recover of appellant the costs herein taxed.

The Court finds reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court 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 60 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 the proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60 day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-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 60 days, the stay will terminate as of the date of such dismissal.

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

Smith, P.J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, 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. tance.