[Cite as *State v. Galberth*, 2020-Ohio-7021.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

RUDOLPH RICHARD GALBERTH, JR.,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 BE 0020

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 18 CR 133

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Daniel P. Fry, Prosecutor, *Atty Kevin Flanagan, Chief Assistant Prosecutor,* Courthouse Annex I, 147-A West Main Street, St. Clairsville, Ohio 43950 for Plaintiff-Appellee and

Atty. Rhys B. Cartwright-Jones, 47 N. Phelps Street, Youngstown, Ohio 44503 for Defendant-Appellant.

Dated: December 24, 2020

Robb, J.

{¶1} Defendant-Appellant Rudolph Galberth appeals from his convictions for aggravated murder and weapons while under disability entered in Belmont County Common Pleas Court. The issues raised in this appeal are whether Appellant was denied effective representation and whether the plea was entered into knowingly, intelligently, and voluntarily. For the reasons expressed below, the convictions are affirmed.

Statement of the Case and Facts

{¶2} On June 14, 2020 Amy Butler was shot and killed. Appellant was indicted for aggravated murder in violation of R.C. 2903.01(A), an unspecified felony, and having a weapon while under disability in violation of R.C. 2923.13(A)(3), a third-degree felony. The aggravated murder charge had an attendant firearm specification in violation of R.C. 2941.145.

{¶3} Throughout the proceedings, Appellant was represented by three different counsel. The first set of attorneys working as a team were from the Belmont County Public Defender's Officer, Attorney Frank Pierce and Attorney Tom Ryncarz. They represented Appellant for four months. During that time, he was arraigned, there was a request for discovery filed, pretrials were held, and a motion to suppress any statements made by Appellant was filed. 7/19/18 Arraignment; 7/23/18 Defendant Request for Discovery; 8/7/18 Pretrial; 8/21/18 Request for a continuance; 10/16/18 Defendant's Motion to Suppress.

{¶4} On October 18, 2018, the trial court received a handwritten letter from Appellant requesting new counsel be appointed. A hearing on the letter was held on October 23, 2018. The hearing indicated there was a breakdown in the attorney client relationship, and the trial court permitted Attorneys Pierce and Ryncarz to withdraw and appointed new counsel.

{¶5} New counsel was Attorney William Mooney from the State Public Defenders' Office. He filed a motion for funds for an investigator, a demand for discovery, a motion to dismiss based on a speedy trial violation, two motions to suppress any

statements made by Appellant, and a motion for continuance because they received more discovery. 10/29/19 Demand for Discovery; 11/9/18 Funds for Investigation Expert; 11/19/18 Motion to Dismiss based on Speedy Trial; 1/22/19 Motion to Suppress; 2/1/19 Motion to Suppress; 2/26/19 Motion for Continuance.

{¶6} After watching the recordings of the interrogation, the trial court denied the motions to suppress. 3/22/19 J.E.

{¶7} Attorney Mooney negotiated a plea agreement and an agreed upon sentence. Appellant pled guilty to aggravated murder in violation of R.C. 2903.01(A), the attendant gun specification in violation of R.C. 2941.145, and having a weapon while under disability in violation of R.C. 2923.13(A)(3). 4/11/19 Guilty Plea. Given the murder charge, Appellant faced life without the possibility of parole. However, the state agreed to jointly recommend a life sentence with the possibility of parole after 20 years, three years for the gun specification, and three years for the weapons while under disability conviction. 4/11/19 Guilty Plea. The recommendation was for the life sentence to run concurrent to the three-year sentence for the charge of having a weapon while under disability, but the three-year sentence for the gun specification would run consecutive. 4/11/19 Guilty Plea.

{¶8} After a plea colloquy, the trial court immediately proceeded to sentencing and sentenced Appellant in accordance with the jointly recommended sentence. Appellant received an aggregate sentence of life with the possibility of parole after 23 years. Appellant filed a delayed appeal, which we granted. Appellant raises two assignments of error.

First Assignment of Error

"Appellant was denied the effective assistance of counsel, therefore voiding his guilty plea."

{¶9} Appellant argues his trial counsel was ineffective and this ineffectiveness voided his guilty plea. He asserts he wrote to the trial court numerous times complaining of the legal representation he was receiving, but ultimately he was forced to enter a plea that he never would have entered had he received effective assistance of counsel.

{¶10} We have previously explained that a voluntary guilty plea waives the right to allege ineffective assistance of counsel except to the extent Appellant asserts that the

plea was not knowing and voluntary. *State v. Kelly*, 7th Dist. Columbiana No. 08CO23, 2009-Ohio-1509, ¶ 11. "[I]n Ohio, a properly licensed attorney is presumed competent." *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62. Where a defendant has entered a guilty plea, the defendant can prevail on an ineffective assistance of counsel claim only by demonstrating that there is a reasonable probability that, but for counsel's deficient performance, he would not have pled guilty to the offenses at issue and would have insisted on going to trial. *State v. Cologie*, 7th Dist. Belmont No. 17 BE 0009, 2017-Ohio-9217, ¶ 29. "Reasonable probability" is "probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984).

{¶11} Here, the first set of counsel represented Appellant for four months, met with him approximately six times, requested discovery, and filed a motion to suppress. 10/23/18 Tr. 6. Appellant wrote a letter to the court requesting new counsel. The trial court held a hearing on October 23, 2018. During the hearing, the trial court asked Appellant questions and his two attorneys spoke. The conversation indicated that there was a break down in the attorney client relationship. During the hearing, the trial court indicated the transcript of the hearing would be sealed. Appellant generally expressed distrust of certain attorneys.

{¶12} The trial court then appointed new counsel, who was from the State Public Defender's Office. New counsel represented Appellant for seven months. New counsel filed a motion for funds for an investigator, a demand for discovery, a motion to dismiss based on a speedy trial violation, two motions to suppress any statements made by Appellant, and a motion for continuance because they received more discovery. 10/29/18 Demand for Discovery; 11/9/18 Funds for Investigation Expert; 11/19/18 Motion to Dismiss based on Speedy Trial; 1/22/19 Motion to Suppress; 2/1/19 Motion to Suppress; 2/26/19 Motion for Continuance.

{¶13} New counsel also negotiated the plea agreement and a jointly recommended sentence. That jointly recommended sentence was an aggregate sentence of life with the possibility of parole after 23 years. Prior to the negotiation, Appellant faced life without the possibility of parole. It is noted that counsel attempted to have Appellant's statements made during questioning suppressed; however, the trial

court denied that motion. Consequently, given that his statements would be admissible, counsel's performance was not deficient; the negotiated plea indicates competent representation considering the record.

{¶14} Furthermore, during the plea colloquy, Appellant stated his attorneys had explained everything to him, gone over all the possible evidence, and answered his questions. 4/11/19 Tr. 8. He expressed he was satisfied with their advice and competence. 4/11/19 Tr. 8. He further indicated that he was entering the plea of his own free will, that it was voluntary, and that he was not promised anything, threatened by anyone, or coerced in any manner to enter the plea. 4/11/19 Tr. 7. Therefore, it is difficult to conclude Appellant would not have entered the plea given this conversation.

{¶15} For those reasons, this assignment of error is meritless.

Second Assignment of Error

"The trial court erred when it accepted Defendant-Appellant's plea because it was not knowingly, voluntarily, and intelligently entered."

{¶16} Appellant asserts his plea was not entered into knowingly, intelligently, and voluntarily. He asserts that he consistently indicated he wanted to bring his case to trial and prove his innocence. He contends his counsel was unwilling to present a case for his innocence. He asserts he stated off the record that he only entered the plea because trial counsel did not believe him and told him he would only get new counsel if he pled guilty.

{¶17} The state asserts the plea colloquy indicates the plea was entered into knowingly, intelligently, and voluntarily. All the requirements of Crim.R. 11(C) were met.

{¶18} The trial court must follow certain procedures for accepting guilty pleas in felony cases. Prior to accepting a guilty plea to a felony charge, the trial court must conduct a colloquy with the defendant to determine that he understands the plea he is entering and the rights, constitutional and nonconstitutional, he is voluntarily waiving. Crim.R. 11(C)(2). The focus in reviewing pleas is not whether they have "[incanted] the precise verbiage" of the rule, but whether the dialogue between the court and the defendant demonstrates that the defendant understood the consequences of his plea. *State v. Dangler*, ___ Ohio St.3d ___, 2020-Ohio-2765, ___ N.E.3d ____, ¶ 12. "If the

plea is not knowingly, intelligent, and voluntary, enforcement of that plea is unconstitutional." *Id.* at ¶ 10.

{¶19} Recently, the Ohio Supreme Court has clarified the tests to be utilized in reviewing a plea. *Id*. at ¶ 13-17. The *Dangler* Court reiterated the traditional rule that when a defendant seeks to have his conviction reversed on appeal, he must establish an error in the trial court proceedings and that he was prejudiced by that error. *Id*. at ¶ 13, citing *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 14-15. The Ohio Supreme Court then explained it has made limited exceptions to the prejudice component of the traditional rule in the criminal plea context. *Dangler* at ¶ 14.

{¶20} One exception is when the trial court fails to explain the constitutional rights a defendant waives by pleading guilty or no contest. *Id*. In that instance, no showing of prejudice is required; rather it is presumed the plea was entered involuntarily and unknowingly. *Id*. citing *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, at ¶ 31 and *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, syllabus. The constitutional rights are those set forth in Crim.R. 11(C)(2)(c): the right to a jury trial, the right to confront one's accusers, the privilege against self-incrimination, the right to compulsory process to obtain witnesses, and the right to require the state to prove guilt beyond a reasonable doubt. *Dangler* at ¶ 14.

{¶21} The other created exception to the prejudice requirement is when a trial court completely fails to comply with a portion of Crim.R. 11(C); the complete failure to comply with a portion of Crim.R. 11(C) eliminates the defendant's burden to show prejudice. *Id*. at ¶ 15, citing *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 22. The *Dangler* court gave the *Sarkozy* decision as an example. *Dangler* at ¶ 15. In *Sarkozy*, the Court found that the trial court had completely failed to comply with Crim.R. 11(C)(2)(a)'s requirement to explain the maximum penalty when the court made no mention of postrelease control in the plea colloquy, despite the fact the defendant was subject to a mandatory five years of postrelease control. *Dangler, citing Sarkozy.* However, when a trial court fails to fully cover other "nonconstitutional" aspects of the plea colloquy, a defendant must affirmatively show prejudice to invalidate a plea. *Dangler* at ¶ 14.

{¶22} Aside from those two exceptions, "the traditional rule continues to apply: a defendant is not entitled to have his plea vacated unless he demonstrates he was prejudiced by a failure of the trial court to comply with the provisions of Crim.R. 11(C)." *Dangler* at ¶ 16. The test for prejudice is "whether the plea would have otherwise been made." *Id.*

{¶23} In simple terms, the *Dangler* Court explained that questions to be answered in the Crim.R. 11 context are: "(1) has the trial court complied with the relevant provision of the rule? (2) if the court has not complied fully with the rule, is the purported failure of a type that excuses a defendant from the burden of demonstrating prejudice? and (3) if a showing of prejudice is required, has the defendant met that burden?" *Dangler*, 2020-Ohio-2765, ¶ 17.

{¶24} Here, the trial court fully complied with Crim.R. 11(C). The trial court advised Appellant that by entering a guilty plea he was waiving his right to a jury trial, the right to have the state prove the elements of the offenses by proof beyond a reasonable doubt, the right to confront witnesses against him, the right to compel witnesses to testify by the compulsory process, and the right against self-incrimination. 4/11/19 Tr. 9-11. As to the nonconstitutional rights enumerated in Crim.R. 11, Appellant was advised of the nature of the charges; the possible maximum penalty, including postrelease control; and that the trial court could proceed immediately to sentencing. 4/11/19 Tr. 5-9.

{¶25} Furthermore, the trial court asked Appellant if his attorneys had explained everything to him, gone over all the possible evidence and answered his questions. 4/11/19 Tr. 8. Appellant responded that they had. 4/11/19 Tr. 8. He was then asked if he was satisfied with their advice and competence, and he indicated he was. 4/11/19 Tr. 8. He was additionally asked if he was entering the plea of his own free will, if he was entering the plea voluntarily, and if he was promised anything, threatened by anyone, or coerced in any way to enter the plea. 4/11/19 Tr. 7. He indicated that he was not coerced and he was entering the plea freely. 4/11/19 Tr. 7.

{¶26} Accordingly, given the record there is nothing to suggest the plea was not entered into knowingly, intelligently, and voluntarily. We cannot consider Appellant's alleged off the record statement in determining whether the plea was voluntary; we can only review the record.

{¶27} For the above stated reasons, this assignment of error lacks merit.

Conclusion

{¶28} For the reasons expressed above, both assignments of error lack merit. The convictions are affirmed.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.