

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOHN JOHNSON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0128

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case Nos. 16-CR-1133, 19-CR-499

BEFORE:

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

JUDGMENT:

Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Edward A. Czopur, DeGenova & Yarwood, Ltd. 42 North Phelps St., Youngstown, Ohio 44503 for Defendant-Appellant.

Dated: September 29, 2020

Robb, J.

{¶1} Defendant-Appellant John Johnson appeals from his pleas and convictions entered in Mahoning County Common Pleas Court. The issue in this case is whether the plea was entered into knowingly, intelligently, and voluntarily. For the reasons expressed below, we hold that it was and affirm the convictions.

Statement of the Case

{¶2} Appellant was indicted for having a weapon while under disability in violation of R.C. 2923.13(A)(3)(B), a third-degree felony; improperly handling a firearm in a motor vehicle in violation of R.C.2923.16(B)(I)(2), a fourth-degree felony; receiving stolen property in violation of R.C. 2913.51(A)(C), a fourth-degree felony; and illegal use or possession of drug paraphernalia in violation of R.C. 2925.14(C)(1)(F), a fourth-degree misdemeanor. 10/27/16 16-CR-1133 Indictment. The above offenses were alleged to have occurred on September 26, 2016. The indictment additionally contained a forfeiture specification for the \$1,821.00 Appellant had in his possession. 10/27/16 16-CR-1133 Indictment.

{¶3} Counsel for Appellant filed a motion to suppress evidence of the automobile stop and search. 2/15/17 16-CR-1133 Motion. The basis for the stop was erratic driving; however, the dashcam video did not show Appellant crossing the centerline. The parties agreed the issue could be decided by the trial court solely viewing the dashcam video. 9/15/17 16-CR-1133 J.E. The trial court overruled the motion to suppress stating the video showed Appellant continually drifting left in his lane and touching the centerline on several occasions. 9/15/17 16-CR-1133 J.E. The trial court found this amounted to erratic driving and formed a sufficient basis for an articulable and reasonable justification for the investigatory stop. 9/15/17 16-CR-1133 J.E.

{¶4} After numerous pre-trials, discovery, and the decision on the motion to suppress, defense counsel moved to withdraw and asked the court to permit Appellant to proceed pro se. 3/26/18 16-CR-1133 Motion. The trial court granted the motion and appointed stand-by counsel. 3/27/18 16-CR-1133 J.E.

{¶15} Appellant then filed a pro se motion to dismiss asserting the trial court did not have jurisdiction. 10/1/18 16-CR-1133 Motion. The trial court overruled the motion. 10/5/18 16-CR-1133 J.E.

{¶16} In June 2019, Appellant was indicted again. 6/27/19 19-CR-499 Indictment. This time he was indicted for having a weapon while under disability in violation of R.C. 2923.13(A)(3), a third-degree felony; improperly handling firearms in a motor vehicle in violation of R.C. 2923.16(B), a fourth-degree felony; and obstructing official business in violation of R.C. 2921.31(A), a fifth-degree felony. 6/17/19 19-CR-499 Indictment. The above offenses were alleged to have occurred on April 14, 2019. 6/17/19 19-CR-499 Indictment. Appellant waived his right to counsel and moved to proceed pro se. 7/18/19 19-CR-499 Motion. The trial court granted this request and appointed the same stand-by counsel it appointed for the earlier case. 7/18/19 19-CR-499 J.E.

{¶17} The state moved to join the trials of the two indictments. 7/10/19 16-CR-1133 Motion; 7/10/19 19-CR-499 Motion. The trial court granted the motion. 8/13/19 16-CR-1133 J.E.; 8/13/19 19-CR-499 J.E.

{¶18} Appellant filed motions in July and August to dismiss in each of the cases asserting the trial court lacked jurisdiction because the Ohio Revised Code was not properly enacted and thus, the laws he was alleged to have violated were not valid. 7/17/19 16-CR-1133 and 19-CR-499 Motions to Dismiss for Lack of Subject Matter Jurisdiction; 8/2/19 16-CR-1133 Motion to Dismiss for Lack of Subject Matter Jurisdiction. The trial court overruled the July motions. 7/23/19 16-CR-1133 J.E.; 7/23/19 19-CR-499 J.E.

{¶19} A plea agreement was reached between the parties in September 2019. As to the 2016 indictment, Appellant entered a guilty plea to having a weapon while under disability, receiving stolen property, illegal use or possession of drug paraphernalia and the forfeiture specification. 9/11/19 16-CR-1133 Plea Agreement; 9/11/19 16-CR-1133 J.E. The state dismissed the improperly handling a firearm in a motor vehicle charge. 9/11/19 16-CR-1133 J.E.; 9/11/19 16-CR-1133 Plea Agreement. As to the 2019 indictment, Appellant pled guilty to having weapons while under disability and the state dismissed the improperly handling a firearm in a motor vehicle and obstructing official business charges. 9/10/19 19-CR-499 J.E. Prior to accepting the guilty pleas, the trial

court overruled Appellant's August motion to dismiss based on lack of subject matter jurisdiction. 9/10/19 16-CR-1133; 9/9/19 Tr. 4-7. The parties agreed to jointly recommend an aggregate three-year sentence and the state agreed to not oppose judicial release to CCA after Appellant completed two years of the three-year sentence. 9/10/19 19-CR-499 Plea Agreement; 9/11/19 16-CR-1133 Plea Agreement.

{¶10} In executing the plea agreement, Appellant signed his name and wrote "all rights reserved" under it. Tr. 8. The trial court indicated that it could not accept his signature with that reservation and explained that the guilty plea would preserve his right to appeal the ruling on the motion to dismiss. Tr. 9-12.

{¶11} Following a plea colloquy, the trial court accepted the plea and followed the plea recommendation. 9/10/19 19-CR-499 J.E.; 9/11/19 16-CR-1133 J.E. It entered an aggregate three-year sentence for guilty pleas to the 2016 indictment and a three-year term for the guilty plea to the 2019 indictment. 9/10/19 19-CR-499 J.E.; 9/11/19 16-CR-1133 J.E. The trial court ordered the sentences in the two cases to be served concurrent. 9/10/19 19-CR-499 J.E.

{¶12} Appellant filed a delayed appeal, which we granted. During the appellate process, Appellant asked his appointed counsel to withdraw and to be permitted to proceed pro se. 11/30/19 Motion. We denied the request. 2/18/20 J.E. Following counsel's filing of an appellate brief, Appellant filed an additional appellate brief. Counsel asked for the pro se brief to be considered as a supplemental brief. 5/22/20 Motion. We denied the request indicating that hybrid representation is not permitted. 6/10/20 J.E. Accordingly, only counsel's April 29, 2020 brief will be considered in this appeal.

Assignment of Error

"Appellant's plea was not entered knowingly, intelligently, and voluntarily as the trial court improperly instructed Appellant as to what rights he would have on appeal."

{¶13} Appellant argues his plea was not knowingly, intelligently, and/or voluntarily entered because the trial court advised him that his guilty plea preserved all his rights. He contends this was not an accurate statement because the guilty plea denied him of his right to appeal the suppression ruling. The state counters asserting the trial court complied with Crim.R. 11 and the plea was knowingly, voluntarily, and intelligently entered.

{¶14} Pursuant to Crim.R. 11(C)(2), the trial court must follow a certain procedure 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 the judge has “[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 knowing, intelligent, and voluntary, then it has been obtained in violation of due process and is void. *State v. Martinez*, 7th Dist. Mahoning No. 03-MA-196, 2004-Ohio-6806, ¶ 11, citing *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709 (1969).

{¶15} Recently, the Ohio Supreme Court has clarified the tests to be utilized in reviewing a plea. *Dangler*, 2020-Ohio-2765 at ¶ 13-17. The *Dangler* Court reiterated the traditional rule that when 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 that it has made limited exceptions to the prejudice component of the traditional rule in the criminal plea context. *Dangler* at ¶ 14.

{¶16} 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.

{¶17} 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. *Id.*, 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.

{¶18} 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.*

{¶19} 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.

{¶20} Here, the trial court complied with Crim.R. 11(C) and explained all of the constitutional rights. The trial court advised 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. Tr. 13-17.

{¶21} 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. Tr. 14-16, 18-21. Appellant contends the plea was not knowing, intelligent, or voluntary

because he was advised that by pleading guilty he was preserving all his rights and thus, he was not properly advised of the affect of his plea.

{¶22} If Appellant was advised that his guilty plea was preserving all his appellate rights, then despite the proper advisements, his plea possibly would not be knowing, intelligent, and/or voluntary if he could show prejudice. The rule is clear that a guilty plea does not preserve the right to appeal a suppression issue. *State v. Beasley*, 152 Ohio St.3d 470, 2018-Ohio-16, 97 N.E.3d 474, ¶ 15 (“A valid guilty plea by a counseled defendant, however, generally waives the right to appeal all prior nonjurisdictional defects, including the denial of a motion to suppress.”). As stated above, Appellant did file a motion to suppress, which was denied by the trial court. Thus, his guilty plea did not preserve the right to appeal that ruling.

{¶23} Appellant, however, is not completely accurate in his description of the advisement the trial court gave to him regarding his guilty plea and the preservation of his right to appeal certain rulings. The trial court did not directly state that all rights were preserved by pleading guilty. Rather, the questions and issues Appellant had regarding preserving his right to appeal was in regard to his motions to dismiss, which were overruled. As aforementioned, in the motion to dismiss, Appellant argued the Ohio Revised Code was not properly enacted, and as such, he could not be charged or found guilty of violating provisions from an improperly enacted code. The four-page discussion of preserving his right to appeal concerned the ruling on the motion to dismiss. Tr. 8-12. As the trial court correctly noted in that discussion, the issue Appellant was raising in that motion was subject matter jurisdiction. Tr. 9-12. “Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time.” *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11. Thus, a guilty plea does not waive subject matter jurisdiction.

{¶24} Furthermore, it is obvious Appellant was not concerned about appealing the suppression issue, had no desire to appeal that decision, and was advised that the guilty plea would not preserve the suppression ruling for appeal. In the discussion concerning whether the guilty plea would preserve Appellant’s right to appeal the ruling on the motion to dismiss, suppression was discussed. In agreeing that the motion to dismiss raised subject matter jurisdiction issues, the trial court stated, “This is not a ruling on the motion

to suppress that would have to be preserved by virtue of a no contest plea.” Tr. 9. Therefore, given the statements it can be concluded Appellant understood what appellate rights he was waiving and what appellate rights he was preserving by entering the guilty plea. *Dangler*, 2020-Ohio-2765 at ¶ 12 (stating the focus in reviewing a plea is whether the dialogue between the court and the defendant demonstrates that the defendant understood the consequences of his plea.).

{¶25} We disagree with appellate counsel’s characterization of Appellant being confused about numerous facets of the plea process. Appellant did ask questions during the plea process. Specifically, he wanted to know about preserving his right to appeal the motion to dismiss ruling, he wanted to know about the elements of the forfeiture specification, he had questions about who would be the witnesses against him if he went to trial, and he wanted to make sure he would get credit for the time he served while awaiting trial. Tr. 8-12, 14-16, 17-18, 19-20. Appellant chose to represent himself, and the questions he asked did not demonstrate substantial confusion. His statements and questions demonstrated an understanding of the process. The trial court at the end of the hearing noted that Appellant was bright, well-spoken, and articulate. Tr. 25. A thorough reading of the transcript supports this characterization of Appellant and indicates that he was neither confused, nor lacked an understanding of the plea process.

{¶26} In conclusion, the sole assignment of error is overruled. The convictions are affirmed.

Donofrio, J., concurs.

D’Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning 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.