[Cite as *State v. Neeley*, 2009-Ohio-2337.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-08-034
	:	O P I N I O N
- vs -		5/18/2009
	:	
GAVIN NEELEY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CRI2008-5049

Richard W. Moyer, Clinton County Prosecuting Attorney, Andrew McCoy, Brian Shidaker, 103 East Main Street, Wilmington, OH 45177, for plaintiff-appellee

Joseph H. Dennis, Clinton County Public Defender, 32 East Sugartree Street, Wilmington, OH 45177, for defendant-appellant

POWELL, J.

{¶1} Defendant-appellant, Gavin Neeley, challenges on appeal the denial of his motion to withdraw his guilty plea and the effectiveness of his trial counsel. We affirm the judgment for the reasons outlined below.

{¶2} Appellant, represented by retained counsel, entered pleas of guilty in the Clinton County Court of Common Pleas to the offenses of attempted murder and kidnapping,

and the state withdrew two rape counts and a specification attached to the kidnapping charge. The trial court sentenced appellant to seven years in prison on the kidnapping count and eight years in prison on the attempted murder count, with the sentences to run consecutively to each other.

{¶3} Appellant, pro se, filed a motion to withdraw his plea after the sentencing hearing was held, but before a sentencing entry was journalized. Appellant was represented by appointed counsel at the hearing on his motion. The trial court denied the motion and appellant filed this appeal, presenting two assignments of error for our review.

{¶4} Appellant avers under his first assignment of error that the trial court erred in denying his motion to withdraw his guilty plea prior to his sentence being imposed.

{¶5} We disagree with appellant's assertion that we should review his motion to withdraw his plea under the standard imposed for presentence motions. We note that appellant's counsel at the motion hearing did not object when the trial court observed that appellant's motion claimed a manifest injustice and indicated that the trial court would require appellant to show a manifest injustice to withdraw his plea. See Crim. R. 32.1; see *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph three of the syllabus (defendant seeking to withdraw his guilty plea after sentence has the burden of establishing the existence of manifest injustice); see *State v. Xie* (1992), 62 Ohio St.3d 521, syllabus (defendant does not have an absolute right to withdraw a guilty plea prior to sentencing; trial court must conduct a hearing to determine whether there is a "reasonable and legitimate basis for the withdrawal of the plea").

{¶6} Appellant's request to withdraw his plea came after pronouncement of sentence, that is, after a sentencing hearing was held and appellant learned what the sentence would be, and, therefore, the appropriate standard is withdrawal only to correct a manifest injustice. *State v. Surface*, Stark App. No. 2008 CA 00184, 2009-Ohio-950; *State v.*

Hall, Franklin App. No. 03AP-433, 2003-Ohio-6939; see *State v. McComb*, Montgomery App. Nos. 22579, 22571, 2008-Ohio-295; see *State v. Boswell*, Slip Opinion No. 2009-Ohio-1577 (manifest injustice standard for postsentence motion under Crim.R. 32.1 is designed to discourage defendant from testing sentence and asking to withdraw plea if sentence is unexpectedly severe).

{¶7} The decision to grant or deny a postsentence motion to withdraw a guilty plea is within the trial court's discretion, and this court reviews this determination under an abuse of discretion standard. *McComb* at ¶10; see, also, *State v. Franks*, Franklin App. No. 04AP-362, 2005-Ohio-462, ¶6 (manifest injustice is a clear and openly unjust act or relates to some fundamental flaw in the proceedings that results in a miscarriage of justice or is inconsistent with the demands of due process).

{¶8} In his motion, appellant alleged that his trial counsel misrepresented his potential sentence and failed to communicate with him about the case. Appellant testified at the hearing that his trial counsel promised him at a pre-trial that counsel "could probably" get concurrent sentences for him. He also testified that his trial counsel never visited him in jail to discuss the case.

{¶9} The transcript of the plea hearing indicates that the judge taking the plea informed appellant of the maximum possible sentence and the state's recommendation of a consecutive sentence of 15 years, and received affirmative answers from appellant about his understanding of the proceedings and his satisfaction with his trial counsel.

{¶10} After hearing appellant's testimony and reviewing the plea transcript, the trial court determined that appellant failed to show a manifest injustice on the issues argued therein. We find no abuse of discretion with that decision. *McComb* at ¶9 (not a manifest injustice when defendant holds mistaken belief that sentence would be significantly lighter, nor when attorney says a particular sentence probably will result); cf. *Pruitt v. Wilson*

(N.D.Ohio 2008), No. 1:06CV3048 (transcript of plea hearing makes clear trial court disabused defendant of any misunderstanding he may have had about the sentence he could receive).

{¶11} Appellant argues for the first time on appeal that his plea was not knowingly, intelligently, and voluntarily given because his defective indictment did not inform him of the elements of the attempted murder charge and, similarly, he was not informed of what constituted the offense of attempted murder at the plea hearing.

{¶12} A defendant who pleads guilty is not merely admitting that he did the acts described in the indictment, he is admitting guilt of a substantive crime. *State v. Sadowsky,* Cuyahoga App. Nos. 90696, 91796, 2009-Ohio-341, ¶23. A defendant who pleads guilty is limited on appeal to attacks on the voluntary, knowing, and intelligent nature of the plea and may not raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the plea. *State v. Morgan*, Hamilton App. No. C-080011, 2009-Ohio-1370, ¶22-28, 34; see *State v. Spates*, 64 Ohio St.3d 269, 1992-Ohio-130; *Sadowsky* at ¶23 (not persuaded that the Ohio Supreme Court in "*Colon I*" [*State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624] was overruling the longstanding waiver rules with regard to guilty pleas).

{¶13} We find appellant's argument related to the indictment for "attempted murder" not well taken when the name, statute number, felony level and elements of the offense of "attempt" were included in the indictment with the name and statutory designation for the offense of murder. Cf. *State v. Warren*, Mahoning App. No. 05 MA 91, 2006-Ohio-1281, ¶54-56 (conviction for an attempt is a conviction in its own right, and carries its own penalty as defined by the attempt statute); cf. *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, syllabus (indictment tracking language of the charged offense and identifying a predicate offense by reference to the statute number need not also include each element of predicate

offense in the indictment); cf. *State v. Childs*, 88 Ohio St.3d 558, 565, 2000-Ohio-425 (where charged offense is a conspiracy, it is well established that it is the elements of the conspiracy that must be provided as conspiring to commit a crime is an offense wholly separate from the crime that is the object of the conspiracy; court has consistently held that conspiracy charge need not include the elements of the substantive offense defendant may have conspired to commit); see R.C. 2941.14.

{¶14} While an indictment containing all of the pertinent elements of "attempt" and of the offense of murder could have eliminated these issues, we can find no obvious defect in the indictment that would have adversely affected the nature of appellant's plea. See *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, ¶8 ("*Colon II*") (most defective indictment cases where the error is not raised below, the appellate court analyzes the error pursuant to a claim of plain error under Crim.R. 52[B]); *State v. Payne,* 114 Ohio St.3d 502, 2007-Ohio-4642, ¶16 (courts are to take notice of plain error "only to prevent a manifest miscarriage of justice").

{¶15} Appellant also argues that his plea was not knowingly and intelligently made because he was not adequately informed at the plea hearing about the attempted murder charge either by the trial court or through the written plea form. It appears that appellant is asserting that the trial court did not determine that he had an understanding of the nature of the charge, which is a requirement under Crim.R. 11(C)(2)(a).

{¶16} The trial court need only substantially comply with the non-constitutional provisions of Crim.R. 11(C), and this case involves such a provision from Crim.R. 11(C)(2)(a). See *State v. Veney,* 120 Ohio St.3d 176, 2008-Ohio-5200, ¶14-17 (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).

{¶17} For a trial court to determine whether a defendant is making a plea with an

understanding of the nature of the charge, it is not always necessary that the court advise the defendant of the elements of the crime, or to specifically ask the defendant if he understands the charge, so long as the totality of the circumstances are such that the trial court is warranted in making a determination that the defendant understands the charge. *State v. Enyart*, Franklin App. Nos. 08AP-184, 08AP-318, 2008-Ohio-6418, ¶17.

{¶18} The record demonstrates that similarly to the indictment, the elements of the offense of "attempt" were provided, but the elements of R.C. 2903.02(B), the specific murder statute and subdivision, were not.

{¶19} We find this omission to be concerning. However, the record indicates that an extensive statement of facts was read into the record regarding the violent acts appellant perpetrated on the victim. Appellant acknowledged that he read the facts contained in the written plea form and admitted to the facts read into the record before he offered his plea. The statement included detailed acts that would constitute the offenses charged, including the attempted murder charge to which appellant ultimately admitted guilt.

{¶20} The state could have alleviated these issues by specifically assigning the detailed facts to each offense and count to which they gave rise. See *Enyart*, 2008-Ohio-6418, at ¶22. Nevertheless, we find from the totality of the circumstances the trial court substantially complied with the Crim.R. 11(C)(2)(a) provision and appellant understood the nature of the charges when taking into account the plea colloquy, appellant's participation therein and lack of objection, and considering the extensive statement of facts offered at the plea hearing.

{¶21} If we were to find that the trial court did not substantially comply with the rule, but partially complied, the plea would be vacated only if appellant demonstrated a prejudicial effect, and in this context, appellant must show that the plea would otherwise not have been entered. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶32.

{¶22} Appellant argues both here and in his second assignment of error that he was prejudiced because he had no notice of what he was accused of doing under the attempted murder charge, and that he received no benefit from his counsel and the plea agreement.

{¶23} We cannot agree with appellant's contention. Appellant was charged with four first-degree felonies for separate conduct that spanned several days. We previously discussed the admission of an extensive statement of facts that conveyed to appellant the conduct constituting the two charges to which appellant admitted guilt. Cf. *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787 (alternative means vs. multiple acts).

{¶24} Appellant was originally eligible to receive a maximum term of ten years for each of the four counts. The specification on the kidnapping charge, which alleged that the offense was committed with a sexual motivation and, thus, a sexually oriented offense under the sexual offender classification Chapter R.C. 2950, was dismissed. The two rape counts were dismissed. Appellant acknowledged to the trial court that he did not want to plead to the rape charges because he wanted to avoid sexual offender classification requirements.

{¶25} Based on the facts presented on the record, appellant failed to show that the plea would otherwise not have been entered. Appellant's arguments are not well taken.

{¶26} Appellant's final argument under this assignment of error claims the trial court's statement during the plea colloquy regarding his right to compulsory process for obtaining witnesses in his favor did not strictly comply with the constitutional Crim.R. 11 requirements.

{¶27} The right to compulsory process is constitutionally protected and a trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights. *Veney,* 2008-Ohio-5200, at ¶18-19.

{¶28} Although a trial court may vary slightly from the literal wording of the criminal rule in its colloquy, the trial court cannot simply rely on other sources to convey those rights to the defendant. Id. at ¶29; see *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph two

of the syllabus (focus on review is whether the record indicates that the judge explained these rights in a manner reasonably intelligible to the defendant).

{¶29} Although a trial court need not specifically use the term, "compulsory process," it must nonetheless inform a defendant that it has the power to force, compel, subpoena, or otherwise cause a witness to appear and testify on the defendant's behalf. *State v. Day*, Cuyahoga App. No. 88725, 2007-Ohio-4052, ¶22-23.

{¶30} The judge taking appellant's plea in the case at bar informed appellant that he was giving up the right to "use the power of the court to call witnesses to testify for you." While the language employed by the trial court was not verbatim from the language of Crim.R. 11(C)(2)(c), we find the trial court strictly complied with the provision by informing appellant that he was giving up the right to use the compulsory power of the court to obtain witnesses in his favor. See *State v. Thomas*, Franklin App. No. 04AP-866, 2005-Ohio-2389, ¶8-9 (trial court's explanation reasonably informed defendant that he could employ power of the court to compel witnesses to appear and give testimony). Appellant's first assignment of error is overruled.

{¶31} Under his second assignment of error, appellant alleges that his trial counsel was ineffective for failing to raise the issues set forth under his first assignment of error.

{¶32} To determine whether counsel's performance constitutes ineffective assistance, we must find that counsel's actions fell below an objective standard of reasonableness and that appellant was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 687-88, 104 S.Ct. 2052.

{¶33} It is well-established that a guilty plea waives the right to claim the defendant was prejudiced by the ineffective assistance of counsel, except to the extent that the defects complained of caused the plea to be less than knowing and voluntary. *State v. Caldwell* (Aug. 13, 2001), Butler App. No. CA99-08-144, citing *Spates,* 1992-Ohio-130.

{¶34} To prove a claim of ineffective assistance of counsel with a guilty plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart* (1985), 474 U.S. 52, 58-59, 106 S.Ct. 366; *Caldwell.*

{¶35} Appellant reiterates the arguments under his first assignment of error for the alleged errors of his trial counsel for this assignment of error, namely, trial counsel's lack of communication with appellant, and the failure to raise objections to the language of the indictment and the plea colloquy in reference to the attempted murder charge. Appellant further maintains that he received "no benefit of counsel, no plea agreement * * *."

{¶36} Relying upon our previous discussion of the indictment, we find no deficiency in the indictment with which to find fault with appellant's trial counsel for failing to raise an error. Further, appellant assured the trial court at his plea hearing that he was satisfied with his trial counsel's assistance and understood the proceedings and therefore, appellant has failed to show any deficiency by his counsel in that regard.

{¶37} We previously found the trial court substantially complied with the plea colloquy in reference to the nature of the charges, and there was no showing of prejudice. We previously found that the trial court strictly complied with instructions on compulsory process. We fail to find trial counsel's representation fell below the applicable standards.

{¶38} Even if we were to find that the representation by appellant's trial counsel was deficient, appellant was not prejudiced. Appellant has not claimed or offered evidence that, but for his trial counsel's actions, he would have insisted on going to trial instead of entering the guilty plea. *State v. Smith*, Franklin App. Nos. 08AP-420, 08AP-500, 2008-Ohio-6520, ¶17.

{¶39} Moreover, we disagree with appellant's allegations that he realized no benefits from either his trial counsel's efforts or the plea agreement because the state on its own

volition dismissed the two rape charges, which appellant argued was "[p]robably for good reason, as the defendant and alleged victim lived together."

{¶40} We are perplexed by appellant's implication that the rape charges were problematic to the state and their dismissal not a benefit to him for the reason that appellant and the victim lived together. Appellant's two rape charges alleged that the offender compelled the other to submit by force or threat of force, and cohabitation or marriage is not a defense to a rape charge alleging sexual conduct when the offender compels the other to submit by force or threat of force. See R.C. 2907.02(A)(2); R.C. 2907.02(G).

{¶41} As we previously observed, appellant faced a maximum term of ten years in prison for each of the four counts filed against him and the imposition of consecutive terms for any two of the felony offenses could have resulted in a prison term similar to or more than the consecutive term he received after he pled guilty. Based on our discussion under both assignments of error, we find no evidence that appellant would have insisted on going to trial instead of entering a plea and, therefore, no prejudice is shown. Appellant's second assignment of error is overruled.

{¶42} Judgment affirmed.

BRESSLER, P.J., and WALSH, J., concur.

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