[Cite as *State v. Gilmore*, 2009-Ohio-4230.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 92106, 92107, 92108, 92109

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KEVIN J. GILMORE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeals from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-498813, CR-493778, CR-498126, CR-499150

BEFORE: Dyke, J., Gallagher, P.J., and Sweeney, J.

RELEASED: August 20, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

{¶ 1} In these consolidated appeals, defendant-appellant, Kevin J. Gilmore ("appellant"), appeals his convictions in Cuyahoga County Court of Common Pleas Case Nos. CR-493778, CR-498126, CR-498813, and CR-499150. For the reasons that follow, we affirm all his convictions.

{¶ 2} Between March and August of 2007, the Cuyahoga County Grand Jury indicted appellant in four separate cases. On March 23, 2007, appellant was indicted in Case No. CR-493778 for one count of carrying a concealed weapon, one count of having a weapon while under a disability, and one count of receiving stolen property.

{¶ 3} On July 5, 2007, the Grand Jury indicted appellant in Case No. CR-498126. In that case, appellant was charged with four counts: two counts of having a weapon while under a disability; one count of carrying a concealed weapon; and one count of failure to comply with order or signal of police officer.

{¶ 4} In the third case, Case No. CR-498813, appellant was indicted on July 30, 2007 on five counts: two counts of improperly discharging a firearm at or into habitation; one count of failure to comply with order or signal of a police officer; one count of having a weapon while under a disability; and one count of carrying a concealed weapon. The first four counts also included firearm specifications.

{¶ 5} Finally, on August 1, 2007, appellant was indicted in his fourth case, Case No. CR-499150. In that case, the Grand Jury indicted appellant for one count of coercion and one count of failure to comply with an order or signal of a police

officer with a furthermore clause for the operation of a motor vehicle causing a risk of serious physical harm.

{¶ 6} Subsequently, on May 15, 2008, Case No. CR-498813 proceeded to a bench trial after appellant waived his right to a jury. Based on the presented evidence, the trial court found appellant guilty of failure to comply with an order or signal of a police officer and having a weapon while under a disability, as well as the one-year firearm specifications attached thereto. The court, however, found appellant not guilty of the remaining three charges.

{¶ 7} In Case Nos. CR-493778 and CR-499150, appellant pled guilty to all charges on June 27, 2008. Likewise, a month later, on July 28, 2008, the court accepted appellant's guilty plea as to all counts in Case No. CR-498126 after a lengthy discussion.

{¶ 8} On August 25, 2008, the trial court sentenced appellant in all four cases. In Case No. CR-498126, appellant was sentenced to two years imprisonment, three-years in Case No. CR-498813, and two years and six months in both Case No. CR-499150 and Case No. CR-493778. The court ordered that the sentence in CR-499150 be served consecutively to the sentences in CR-493778, CR-498126 and CR-498813, for a total prison sentence of nine years.

{¶ 9} Appellant now appeals his convictions in all four cases. In the interests of convenience, we have consolidated the appeals as appellant proposed the same assignment of error in each case. Appellant's sole assignment of error reads:

{¶ 10} "The trial court erred in accepting Gilmore's plea of guilty in that Gilmore did not enter that guilty plea voluntarily."

{¶ 11} In each of these cases, appellant argues that the trial court erred in accepting his guilty pleas because he did not enter them voluntarily. For the following reasons, we find appellant's argument unpersuasive.

{¶ 12} As a procedural matter, we note that we review de novo a trial court's acceptance of a plea in compliance with Crim.R. 11(C) and the requirements of due process. *State v. Sample*, Cuyahoga App. No. 81357, 2003-Ohio-2469; *State v. Jones*, Cuyahoga App. No. 79811, 2002-Ohio-1271. In order to satisfy these requirements, the record must demonstrate that a plea of guilty was made knowingly, intelligently, and voluntarily. *State v. Younger* (1975), 46 Ohio App.2d 269, 271-272, 349 N.E.2d 322. To meet this standard, the plea must be entered with a full understanding of its consequences. *State v. Bowen* (1977), 52 Ohio St.2d 27, 28, 368 N.E.2d 843. Moreover, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. See *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. The test is whether the plea would have otherwise been made. Id.

{¶ 13} Crim.R. 11(C)(2) requires:

{¶ 14} "In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:

{¶ 15} "(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.

{¶ 16} "(b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.

{¶ 17} "(c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself."

{¶ 18} In determining whether the trial court has satisfied its duties under Crim.R. 11 in taking a plea, reviewing courts have distinguished between constitutional and non-constitutional rights. See *State v. Ballard* (1981), 66 Ohio St.2d 473, 481, 423 N.E.2d 115; *State v. Stewart* (1977), 51 Ohio St.2d 86, 93, 364 N.E.2d 1163; *State v. Higgs* (1997), 123 Ohio App.3d 400, 402, 704 N.E.2d 308. The trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights. See *Ballard*, supra at paragraph one of the syllabus; *Stewart*, supra at 88-89, 364 N.E.2d 1163. "'Strict compliance' does not require an exact recitation of the precise language of the rule; [r]ather, the focus, upon review, is whether the record shows that the trial court explained or referred to

the right in a manner reasonably intelligible to that defendant." *Ballard*, supra at 479-480.

{¶ 19} With regard to the non-constitutional rights enumerated in Crim.R. 11, only substantial compliance is required. *Stewart*, supra at 93; *Nero*, supra at 108. "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." *Nero*, supra. The Ohio Supreme Court has acknowledged that there is no easy or exact way to determine what someone subjectively understands. *State v. Carter* (1979), 60 Ohio St.2d 34, 38, 396 N.E.2d 757. Accordingly, "if the defendant receives the proper information, then we can ordinarily assume that he understands that information. [In deciding whether the defendant had the required information], we look at all the particular facts and circumstances surrounding the case." Id.

{¶ 20} On May 20, 2008, the trial court engaged in an extensive colloquy with appellant prior to accepting his guilty pleas in Case Nos. CR-493778 and CR-499150. The court adequately explained to appellant the constitutional rights he was waiving, informed him of the charges against him, the possible sentences, and post-release control. Despite appellant's assertions to the contrary, there is no indication in the record that appellant was threatened or coerced into pleading guilty to the charges in Case Nos. CR-493778 or CR-499150. When the court asked appellant whether he was threatened or coerced, appellant responded with an affirmative "No." Furthermore, a review of the transcript reveals that the dialog quoted by appellant in his brief in support of the argument that appellant was coerced does not occur during

the plea hearing on May 20, 2008 for Case Nos. CR-493778 or CR-499150. Rather, the discussion quoted concerns the plea hearing regarding Case No. CR-498126 and is contained in the transcript of those proceedings. Accordingly, in Case Nos. CR-493778 and CR-499150, only after appellant convinced the court that he understood the charges and penalties, did the court accept appellant's guilty pleas, finding he entered them knowingly, intelligently and voluntarily. Naturally, therefore, we affirm appellant's convictions for those cases.

{¶ 21} With regard to Case No. CR-498126, the trial court held a separate plea hearing on July 28, 2008. At that hearing, the court again notified appellant of the constitutional rights he was waiving, the charges against him, the possible penalties associated with those charges, and post-release control. Additionally, the court engaged in a colloquy with appellant regarding his voluntariness in pleading guilty.

{¶ 22} First, the court inquired whether he was threatened or coerced into entering the plea. After appellant initially responded that he was not, he then presented the court with the following question: "Excuse me, Judge. Am I supposed to get promised anything or not?" The court then partook in the following discussion with appellant:

{¶ 23} "THE COURT: I said - -

{¶ 24} "THE DEFENDANT: You said - -

{¶ 25} "THE COURT: Let me finish. I said did anyone threaten or coerce you to make this plea?

{¶ 26} "THE DEFENDANT: I don't know that other half. I know what threat means.

{¶ 27} "THE COURT: You don't know what coerce means?

{¶ 28} "THE DEFENDANT: Forced you.

{¶ 29} "THE DEFENDANT: I know I was promised three years.

{¶ 30} "[DEFENSE COUNSEL]: We talked about we were going to try to convince [the court] to give you three years."

{¶ 31} "DEFENDANT: That was only before.

{¶ 32} "THE COURT: Hold on, Mr. Gilmore, let me cut to the chase."

{¶ 33} Thereafter, the court spoke with appellant and stated that he was not entitled to a minimum three-year prison sentence if he pled guilty to the indictment. The court explained that because it decides the sentence, and because it did not promise appellant a minimum sentence of three years, any promise made by another that he would receive the minimum sentence was erroneous. The court stated that if appellant believed he would only get three years imprisonment by pleading guilty to the charges in this case, then the court would withdraw his guilty plea and begin the trial of the matter. The court also ordered a recess while defense counsel further explained the matter with appellant.

{¶ 34} Following the recess, defense counsel and the court continued the discussion with appellant regarding his voluntariness to plead guilty to the charges that ended in the following exchange:

{¶ 35} "[Defense counsel]: Are you asking the Judge to vacate your plea or are you ready to accept the plea?

{¶ 36} "THE DEFENDANT: I am going to accept it.

{¶ 37} "THE COURT: Okay. So the plea that - -

{¶ 38} "THE DEFENDANT: I have faith in God.

{¶ 39} "THE COURT: So the plea you just entered in court is knowingly, intelligently, voluntarily, is that correct?

{¶ 40} "THE DEFENDANT: Yes.

{¶ 41} "THE COURT: Have you been threatened or coerced to make the plea? Has anyone threatened or coerced you or strong-armed you into making this plea?

{¶ 42} "THE DEFENDANT: No.

{¶ 43} "THE COURT: Have you been promised anything?

{¶ 44} "THE DEFENDANT: After you said all that, no.

{¶ 45} "THE COURT: Okay, Even before I said anything, have you been promised anything? Did I promise you anything?

{¶ 46} "THE DEFENDANT: No.

{¶ 47} "THE COURT: Okay. Anything further?

{¶ 48} "[DEFENSE COUNSEL]: Just thank you, Judge, for your time in clarifying that confusion for us.

{¶ 49} "THE COURT: You are quite welcome. We will see you at the sentencing date."

{¶ 50} A reading of the transcript clearly demonstrates that, while appellant may have initially been confused and believed he was promised a three year sentence, both his attorney and the court adequately clarified the situation such that appellant ultimately and affirmatively acknowledged that he was not coerced into pleading guilty to the charges in the indictment and that he entered his plea knowingly, intelligently and voluntarily. Consequently, we affirm appellant's convictions in Case No. CR-498126.

{¶ 51} Finally, with regard to Case No. CR-498813, appellant did not plead guilty but rather was found guilty after a bench trial of failure to comply with order or signal of a police officer, having a weapon while under a disability, and the one-year firearm specifications. Accordingly, appellant's argument that his guilty plea in Case No. CR-498813 was not entered voluntarily is clearly inapplicable and without merit. Appellant's convictions in Case No. CR-498813 are affirmed.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for these appeals.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

ANN DYKE, JUDGE

SEAN C. GALLAGHER, P.J., and
JAMES J. SWEENEY, J., CONCUR