

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93878

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL GIBSON

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-519610

BEFORE: Blackmon, J., Rocco, P.J., and Dyke, J.

RELEASED AND JOURNALIZED: July 29, 2010

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Michael Gibson appeals his conviction for possession of drugs and assigns the following two errors for our review:

“I. Appellant’s continued detention following the officer’s discovery that he was not the owner of the vehicle violated the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 14, of the Ohio Constitution.”

“II. Appellant’s no contest plea may be void in that the record supports the conclusion that he thought he was receiving a non-jury trial.”

{¶ 2} Having reviewed the record and the relevant law, we reverse Gibson’s conviction and remand for further proceedings consistent with this opinion. The apposite facts follow.

Facts

{¶ 3} The Cuyahoga County Grand Jury indicted Gibson for one count of possession of drugs. Gibson filed a motion to suppress the physical evidence.

{¶ 4} At the suppression hearing, Officer Nan testified that he and his partner, Officer Roshetsky were running random checks of license plates. The license plate on the vehicle being driving by Gibson indicated that the owner was a female with a suspended driver’s license. The officers could not determine whether the driver was a female or male because they were driving behind the vehicle; therefore, they pulled over the vehicle. Upon seeing Gibson, who was the driver of the vehicle, the officers realized the owner was not operating the car. However, they noticed Gibson did not have his seat belt on, which was a traffic violation.

{¶ 5} The officers asked for Gibson’s driver’s license and upon checking it in the computer, discovered that his license was suspended. Gibson was arrested for driving under suspension and cited for not wearing a seatbelt.

The officers asked Gibson if he had anything in the vehicle that they should know about; he told them he had some marijuana in the glove box. Because the car was going to be towed, the officers conducted an inventory search of the vehicle and recovered the marijuana. They also observed a plastic baggie protruding from the roof area above the driver's seat. The bag was removed and was found to contain crack cocaine.

{¶ 6} The trial court denied Gibson's motion to suppress and issued a four page opinion in support of its decision. Subsequently, Gibson entered a no contest plea to drug possession. The trial court sentenced him to seven months in prison.

Motion to Suppress

{¶ 7} In his first assigned error, Gibson argues the trial court erred by denying his motion to suppress. He contends that once the officers discovered he was not the owner of the vehicle, they had no right to further detain him.

{¶ 8} At a hearing on a motion to suppress, the trial court functions as the trier of fact. Accordingly, the trial court is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. On review, an appellate court must accept the trial court's findings of fact if those findings are supported by competent, credible evidence. *State v.*

Retherford (1994), 93 Ohio App.3d 586, 592, 639 N.E.2d 498. After accepting such factual findings as true, the reviewing court must then independently determine, as a matter of law, whether or not the applicable legal standard has been met. *Id.*

{¶ 9} An investigatory stop is permissible if a law enforcement officer has a reasonable suspicion, based on specific and articulable facts, that the individual to be stopped may be involved in criminal activity. When determining whether or not an investigative traffic stop is supported by a reasonable, articulable suspicion of criminal activity, the stop must be viewed in light of the totality of circumstances surrounding the stop. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph one of the syllabus, cert. denied (1988), 488 U.S. 910, 109 S.Ct. 264, 102 L.Ed.2d 252.

{¶ 10} We conclude the officers' stop of Gibson's vehicle was legal. The officers were randomly running license plates; the computer indicated the plate of the car Gibson was driving was a vehicle owned by a driver with a suspended license. This provided the officers with reasonable suspicion that a crime was being committed.

{¶ 11} Upon stopping the car, the officers were able to determine, simply by looking at Gibson, that he was not the owner because the owner was a female. However, Gibson was not wearing a seatbelt, which entitled the officer to ask for Gibson's license. While Officer Nan stated that he routinely

checks the licenses of all drivers of stopped cars in order to determine if the licenses are valid, the fact that Gibson admittedly was not wearing his seatbelt, gave the officer the authority to procure the license. Therefore, we conclude the officers' stop of the vehicle was legal as was their further investigation by running Gibson's driver's license through the car computer. Accordingly, Gibson's first assigned error is overruled.

No Contest Plea

{¶ 12} In his second assigned error, Gibson contends his no contest plea was not knowingly entered because he believed he was going to have a bench trial.

{¶ 13} In determining whether to accept a no contest or guilty plea, the trial court must determine whether the defendant has knowingly, intelligently, and voluntarily entered the plea. Crim.R. 11(C); *State v. Johnson* (1988), 40 Ohio St.3d 130, 532 N.E.2d 1295. A trial court must strictly comply with Crim.R. 11 as it pertains to the waiver of constitutional rights, which include the right to trial by jury, the right of confrontation, and the privilege against self-incrimination. *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274. However, substantial compliance with Crim.R. 11(C) is sufficient when waiving non-constitutional rights. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474.

{¶ 14} The non-constitutional rights that a defendant must be informed of are the nature of the charges with an understanding of the law in relation to the facts, the maximum penalty, and that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence. Crim.R. 11(C)(2)(a) and (b); *McCarthy v. U.S.* (1969), 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418. 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*, 56 Ohio St.3d at 108.

{¶ 15} Where “substantial compliance” is required, if under the totality of the circumstances, it is apparent the defendant subjectively understood the implications of his plea and the rights he was waiving, the plea should not be disturbed on appeal. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462. Additionally, a defendant who challenges his plea on the basis that it was not knowingly, intelligently, and voluntarily made must show that he was prejudiced by the court’s failure to substantially comply with the rule. *Id.* at ¶32.

{¶ 16} In the instant case, it is undisputed that the court fully complied with Crim.R. 11(C) regarding explaining the constitutional rights that Gibson was waiving. However, the court failed to substantially comply with Crim.R. 11(C)(2)(b) in informing Gibson as to the effect of his no contest plea.

{¶ 17} Prior to explaining the rights Gibson waived by pleading no contest, the trial court had Gibson sign a jury waiver form. The court then stated as follows:

“Mr. Gibson, as your counsel, Mr. Wade, had stated, what you’re doing by signing this waiver of jury trial and pleading no contest is that you, in essence, are waiving the right to have the 12 jurors make a determination of whether you are guilty or not guilty. Then you’re intending to plead no contest, which means then I will make the decision based upon the facts presented whether or not you’re guilty or not.” Tr. 68.

{¶ 18} Then during the plea colloquy, the court advised as follows:

“All right. And then with regard to Mr. Gibson, understand you’re pleading no contest, so there will be a recitation of the facts by the State of Ohio with regard to a factual basis for the plea. The court will then make a determination as to whether you’re guilty or not and then proceed forward. Do you understand?” Tr. 88.

{¶ 19} These were incorrect advisements as the court cannot find a defendant not guilty based on the facts when he or she enters a no contest plea. By pleading no contest, the defendant is admitting to the truth of the facts alleged in the indictment. Crim.R. 11(B)(2). As the Ohio Supreme Court explained in *State v. Bird*, 81 Ohio St.3d 582, 1998-Ohio-606, 692 N.E.2d 1013:

“According to Crim.R. 11(B)(2), a no contest plea is ‘not an admission of defendant’s guilt, but is an admission of the truth of the facts alleged in the indictment * * *.’

Therefore, we have held that where the indictment, information, or complaint contains sufficient allegations to state a felony offense and the defendant pleads no contest, the court *must* find the defendant guilty of the charged offense. *State ex rel. Stern v. Mascio* (1996), 75 Ohio St.3d 422, 425, 662 N.E.2d 370.” (Emphasis added.)

{¶ 20} Thus, contrary to what the court advised Gibson, the court does not have the discretion to determine Gibson’s guilt based on the facts of the case. If the indictment contains sufficient allegations of a felony offense, the court must find Gibson guilty.

{¶ 21} Recently, this court in *State v. Fitzgerald*, Cuyahoga App. No. 92978, 2010-Ohio-363, addressed the exact same situation. In that case, the same lower court judge as the instant case, made the same advisements to the defendant. We concluded the advisements were prejudicial because it led the defendant to believe the court could possibly find him not guilty based on the facts of the case.

{¶ 22} As in the instant case, the defense counsel in *Fitzgerald* also exacerbated the error. In *Fitzgerald*, defense counsel informed the defendant that the no contest plea would in “all likelihood result in a finding of guilty.” We concluded that this explanation in conjunction with the court’s incorrect

advisements led the defendant to believe there was a possibility he could be found not guilty. In the instant case, defense counsel told Gibson,

“I have also explained to him his right to a jury trial in this particular case and the fact by entering a plea of no contest, he will be, in effect waiving that right to have this case decided by a jury of 12. He will be admitting to the facts as alleged but will not be entering a guilty plea. This court will make that finding.” Tr. 67.

{¶ 23} We conclude this explanation added to the confusion regarding the jury waiver and its relationship to the no contest plea. Thus, we agree with Gibson that the court’s explanation was confusing and did create the expectation that he would be receiving a bench trial. Thus, his no contest plea was not knowingly entered. Accordingly, Gibson’s second assigned error has merit.

{¶ 24} Judgment reversed and remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., and
ANNE DYKE, J., CONCUR