

[Cite as *State v. Scruggs*, 2010-Ohio-5604.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94518

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RAMON SCRUGGS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-520896

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

RELEASED AND JOURNALIZED: November 18, 2010

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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Ramon Scruggs appeals his convictions and assigns the following errors for our review:

“I. Defendant was denied due process of law when the court did not recuse itself after it had recused itself on the co-defendant.”

“II. Defendant was denied due process of law when he was convicted of offenses occurring in California.”

“III. Defendant was denied due process of law when he was convicted of offenses barred by the statute of limitations.”

“IV. Defendant was denied due process of law when the court accepted defendant’s pleas of guilty without determining that he understood the nature of the offenses.”

“V. Defendant was denied due process of law when the court sentenced defendant to more than a minimum sentence.”

{¶ 2} Having reviewed the record and pertinent law, we affirm Scruggs’s convictions. The apposite facts follow.

{¶ 3} On February 11, 2009, a Cuyahoga County Grand Jury indicted Scruggs on ten counts of drug trafficking. The ten counts against Scruggs, formerly a medical doctor and licensed in California, were part of a 22-count indictment charging him with prescribing anabolic steroids to several individuals in Ohio, including codefendants Anthony Tuleta and Craig Romey.

{¶ 4} On March 6, 2009, Scruggs pleaded not guilty at his arraignment and, thereafter, several pretrials were conducted. On October 5, 2009, pursuant to a plea agreement with the state, Scruggs pleaded guilty to five counts of drug trafficking, and the state dismissed the remaining charges. The trial court ordered a presentence investigation report and scheduled a sentencing hearing for December 7, 2009.

{¶ 5} On December 14, 2009, the trial court sentenced Scruggs to concurrent prison terms of three years for each count.

Trial Court's Recusal

{¶ 6} In the first assigned error, Scruggs argues he was denied due process when the trial judge failed to recuse herself from his case in light of her recusal from his codefendant's case.

{¶ 7} R.C. 2701.03 provides in pertinent part as follows:

“(A) If a judge of the court of common pleas allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the supreme court in accordance with division (B) of this section.

“(B) An affidavit of disqualification filed under section 2101.39 or 2501.13 of the Revised Code or division (A) of this section shall be filed with the clerk of the supreme court not less than seven calendar days before the day on which the next hearing in the proceeding is scheduled and shall include all of the following:

“(1) The specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the facts to support each of those allegations or, in relation to an affidavit filed against a judge of a court of appeals, a specific allegation that the judge presided in the lower court in the same proceeding and the facts to support that allegation;

“(2) The jurat of a notary public or another person authorized to administer oaths or affirmations;

“(3) A certificate indicating that a copy of the affidavit has been served on the probate judge, judge of a court of appeals, or judge of a court of common pleas against whom the affidavit is filed and on all other parties or their counsel;

“(4) The date of the next scheduled hearing in the proceeding or, if there is no hearing scheduled, a statement that there is no hearing scheduled.”

{¶ 8} R.C. 2701.03 provides the exclusive means by which a litigant can assert that a common pleas judge is biased or prejudiced. *Peterman v. Stewart*, 5th Dist. No. 07 CAE 10 0054, 2008-Ohio-2164, citing *Adkins v. Adkins* (1988), 43 Ohio App.3d 95, 539 N.E.2d 686. Thus, an appellate court clearly lacks any authority to pass upon the disqualification of a common pleas court judge or to void the judgment of a trial court on that basis. *State v. Ramos* (1993), 88 Ohio App.3d 394, 623 N.E.2d 1336.

{¶ 9} By failing to properly file an affidavit of disqualification with the Supreme Court pursuant to R.C. 2701.03, a party waives any error relating to the trial judge’s denial of a motion to recuse. *State v. Fannin*, Cuyahoga App. No. 80014, 2002-Ohio-4180. In the instant case, Scruggs never raised the issue of bias or prejudice with the trial court and failed to abide by the mandatory requirements of R.C. 2701.03; therefore, he has waived any argument with regard to disqualification.

{¶ 10} Moreover, the record indicates that the trial court, upon learning the brother of one of Scruggs’s codefendants had been a contractor on her home many years ago, on her own accord, recused herself from the codefendant’s case. There is no indication in the record that Scruggs had a connection with the brother, who was the contractor on the trial judge’s home. Accordingly, we overrule the first assigned error.

Territorial Jurisdiction

{¶ 11} In the second assigned error, Scruggs argues he was denied due process because he was convicted of offenses that occurred in California.

{¶ 12} R.C. 2901.11 grants jurisdiction to Ohio courts over criminal offenses that occur in Ohio. See *State v. Ahmed*, Cuyahoga App. No. 84220, 2005-Ohio-2999. The statute provides that “[a] person is subject to criminal prosecution and punishment in this state if * * * [t]he person commits an offense under the laws of this state, any element of which takes place in the state.” R.C. 2901.11(A)(1).

{¶ 13} In the instant case, as previously noted, a grand jury indicted Scruggs on ten counts of drug trafficking in violation of R.C. 2925.03(A)(1), that states “(A) No person shall knowingly do any of the following: (1) Sell or offer to sell a controlled substance[.]” Specifically, the record indicates that

Scruggs, while a physician and licensed to practice in the state of California, unlawfully sold anabolic steroids over the internet to two Ohio residents.

{¶ 14} Because the anabolic steroids were delivered to users in Ohio, Ohio has jurisdiction over the criminal acts of the sender; consequently, it placed an element of the crime within the state's jurisdiction. Scruggs was subject to criminal prosecution and punishment in Ohio. Accordingly, we overrule the second assigned error.

Statute of Limitation

{¶ 15} In the third assigned error, Scruggs argues he was convicted of an offense that was barred by the statute of limitations.

{¶ 16} The statute of limitations for a felony is six years. R.C. 2901.13(A)(1)(a). See, also, *State v. Caver*, Cuyahoga App. No. 91443, 2009-Ohio-1272. In the instant case, Scruggs contends that count one of the indictment was barred by the statute of limitation because it alleged that the offense occurred on January 9, 2003, but he was not indicted until February 11, 2009.

{¶ 17} The statute of limitations can be tolled by R.C. 2901.13(D), which provides:

“An offense is committed when every element of the offense occurs. In the case of an offense of which an element is a continuing course of conduct, the

period of limitation does not begin to run until such course of conduct or the accused's accountability for it terminates, whichever occurs first.”

{¶ 18} Here, contrary to Scruggs's assertions, the record indicates that the date of offense for count one of the indictment is January 9, 2003 through December 1, 2003. Pursuant to R.C. 2901.13(D), the course of conduct for count one of the indictment ended on December 1, 2003, well within the six-year statute of limitation pursuant to R.C. 2901.13(A)(1)(a). Thus, Scruggs could properly be prosecuted and convicted for the disputed count. Accordingly, we overrule the third assigned error.

Involuntary Plea

{¶ 19} In the fourth assigned error, Scruggs argues that he did not knowingly plead guilty to the instant charges.

{¶ 20} Both the Ohio and the United States Constitutions require that a defendant entering a guilty plea must do so knowingly, intelligently, and voluntarily. *State v. Fisher*, Cuyahoga App. No. 93683, 2010-Ohio-3876, citing *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179, 660 N.E.2d 450.

Crim.R. 11(C)(2) requires that the trial court engage in oral dialogue with the defendant to determine that the plea is voluntary, that the defendant understands the nature of the charges and the maximum penalty involved,

and to personally inform the defendant of the constitutional guarantees he waives by entering a guilty plea. *Id.*

{¶ 21} Crim.R. 11(C)(2) states:

“In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

“(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

“(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

“(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant’s favor, and to require the state to prove the defendant’s guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.”

{¶ 22} 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. Conner*, Cuyahoga App. No. 93953, 2010-Ohio-4353, citing *State v. Higgs* (1997), 123

Ohio App.3d 400, 704 N.E.2d 308; *State v. Gibson* (1986), 34 Ohio App.3d 146, 517 N.E.2d 990. The trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights. See *State v. Stewart* (1977), 51 Ohio St.2d 86, 88-89, 364 N.E.2d 1163; *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, paragraph one of the syllabus. “Strict compliance” does not require an exact recitation of the precise language of the rule, but instead focuses on whether the trial court explained or referred to the right in a manner reasonably intelligible to that defendant. *Id.*

{¶ 23} For non-constitutional rights, scrupulous adherence to Crim.R. 11(C) is not required; the trial court must substantially comply. *Stewart*. “Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implication of his plea and the rights he is waiving.” *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474.

{¶ 24} 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. *State v. Moulton*, Cuyahoga App. No. 93726, 2010-Ohio-4484. The test for prejudice is whether the plea would have otherwise been made. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621.

{¶ 25} In the instant case, Scruggs did not have a full understanding of the elements of the offense. However, the transcript belies Scruggs's present assertions. The following discussions took place at the plea hearing:

“The Court: Is this your understanding of the plea?”

“Mr. Buckley: Yes, it is.”

“The Court: Have you had an opportunity to discuss this and the discovery with the State with your client?”

“Mr. Buckley: I have, your Honor.”

“* * *”

“The Court: Is it your client's intention to enter a plea today?”

“Mr. Buckley: Yes, Judge.”

“The Court: Mr. Scruggs, do you understand everything we've said today?”

“The Defendant: Not quite.”

“The Court: Tell me what you don't understand.”

“The Defendant: I don't understand the sentencing.”

“The Court: I'm going to go through those with you but, basically on a felony of the third degree in the State of Ohio, * * *. Does that answer your initial question?”

“The Defendant: No, your Honor. I'm wondering what is going to be placed in the plea bargain. Or that hasn't been determined yet?”

“The Court: There is no sentencing recommendation being made to the Court. You’re going to be referred for a presentence report. You’re going to come back here on December 7th. Mr. Buckley has asked me to postpone this until after federal sentencing. I told him my experience with the federal court is rarely if ever do I see them go on a date they say they’re going to go; hopefully your case will be an exception and I will see you on December 7th.

**** * ***

“The Court: Any other questions?

“The Defendant: Does the sentencing in the federal case have a bearing on your sentence?

“The Court: It could. It might not. It may or it may not. I will certainly listen to Mr. Buckley discuss it, but what impact it will have have on me, I can’t tell you because I don’t have any other sentencing information in front of me today about you.

“The Defendant: I see.

**** * ***

“The Court: Okay? So let’s go back. Do you understand now everything we’ve said so far today?

“The Defendant: Yes, your Honor.” Tr. 4-6.

{¶ 26} Initially, we note Scruggs’s counsel told the court that he and Scruggs had discussed the terms of the plea agreement and discovery. The court’s determination that the defendant understands the charge can be based

on the surrounding circumstances, such as recitations of discussions between the defendant and his attorney. *State v. Swift* (1993), 86 Ohio App.3d 407, 412, 621 N.E.2d 513.

{¶ 27} We also note that the above excerpt, and elsewhere in the record, indicates that the trial court ascertained that Scruggs knowingly, intelligently, and voluntarily entered the pleas. As the excerpt reveals, Scruggs, a former medical doctor, had questions about the sentencing. The record indicates that the trial court painstakingly explained the possible sentence for the instant charges. The trial court also explained to Scruggs, who was awaiting sentence in federal court for prescribing steroids to baseball players, that she did not know what effect, if any, the federal sentence would have on her decision.

{¶ 28} There is no indication in the record that Scruggs did not understand the nature of the offense. We conclude that Scruggs's active role at the plea hearing, his professional expertise as a former licensed physician, and the statement by counsel establish sufficient circumstances for the court to determine Scruggs understood his charges. Accordingly, we overrule the fourth assigned error.

Nonminimum Sentence

{¶ 29} In the fifth assigned error, Scruggs argues the trial court erred in sentencing him to more than a minimum sentence.

{¶ 30} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Ohio Supreme Court held that statutes requiring judicial findings prior to imposition of maximum, nonminimum, or consecutive sentences violated the Sixth Amendment. *Id.* at paragraph one of the syllabus. The *Foster* court found R.C. 2929.14(B) and (C), R.C. 2929.14(E)(4), R.C. 2929.19(B)(2), and R.C. 2929.41(A) unconstitutional, and as a remedy, excised those statutes. *Id.* at paragraphs one, two, three, and four of the syllabus.

{¶ 31} As a result, after *Foster*, “[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” *Id.* at paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, at paragraph three of the syllabus. Thus, post-*Foster*, we now apply an abuse of discretion standard in reviewing a sentence that is within the statutory range. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. See, also, *State v. Lindsay*, 5th Dist. No. 06CA0057, 2007-Ohio-2211; *State v. Parish*, 6th Dist. No. OT-07-049, 2008-Ohio-5036;

State v. Bunch, 9th Dist. No. 06 MA 106, 2007-Ohio-7211; and, *State v. Haney*, 11th Dist. No.2006-L-253, 2007-Ohio-3712.

{¶ 32} An abuse of discretion is more than an error in judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *State v. Murray*, 11th Dist No. 2007-L-098, 2007-Ohio-6733, citing *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122, 614 N.E.2d 748.

{¶ 33} In *Foster*, the Ohio Supreme Court held that R.C. 2929.11 must still be followed by trial courts when sentencing offenders. The Ohio Supreme Court held that R.C. 2929.11 does not mandate judicial fact-finding; rather, the trial court is merely to “consider” the statutory factors set forth in this section prior to sentencing. *Id.*

{¶ 34} R.C. 2929.11(A) provides that a trial court that sentences an offender for a felony conviction must be guided by the “overriding purposes of felony sentencing.” *State v. McCarroll*, Cuyahoga App. No. 89280, 2007-Ohio-6322. Those purposes are “to protect the public from future crimes by the offender and others and to punish the offender.” *Id.* R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the

purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders. *Id.*

{¶ 35} Our review of the record shows that the trial court sentenced Scruggs within the statutory range provided by R.C. 2929.14 for the respective offense. Scruggs pled guilty to five counts of drug trafficking, felonies of the third degree. By pleading guilty to the indictment as amended, Scruggs admitted to committing the offense as charged. *State v. Phillips*, Cuyahoga App. No. 92560, 2009-Ohio-5564. The trial court could have sentenced Scruggs to up to five years in prison on each count, but chose to impose concurrent three-year terms. Thus, Scruggs's sentences were within the statutory range for the offenses to which he pled guilty.

{¶ 36} Prior to sentencing, the trial court stated that she had received and reviewed the presentence investigation report. The trial court also heard from the state regarding the facts of the instant case and heard in mitigation from Scruggs's counsel, who entreated the trial court to impose community control sanctions.

{¶ 37} We conclude, in light of the information presented at the sentencing hearing, the trial court considered the overriding purposes of

felony sentencing, although it did not specifically state that on the record. We have found that where the record is silent, an appellate court may presume that the trial court considered the statutory factors when imposing a sentence.

State v. Dargon, Cuyahoga App. No. 82918, 2003-Ohio-5826, citing *State v. Tucker* (Oct. 28, 1999), Cuyahoga App. No. 74950.

{¶ 38} Since the trial court sentenced Scruggs within the statutory range for the instant offenses and properly considered the purposes of felony sentencing as outlined in R.C. 2929.11, we conclude the trial court did not abuse its discretion when sentencing Scruggs. Accordingly, we overrule the fifth assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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. The defendant's conviction 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.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

ANN DYKE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR