[Cite as *State v. Petronzio*, 2021-Ohio-2041.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 109823
v.	:	
ANTHONY J. PETRONZIO,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 17, 2021

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-20-647424-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Allison M. Cupach, Assistant Prosecuting Attorney, *for appellee*.

Cullen Sweeney, Cuyahoga County Public Defender and Francis Cavallo, Assistant Public Defender, *for appellant*.

MICHELLE J. SHEEHAN, J.:

{¶ 1} Defendant-appellant Anthony J. Petronzio appeals from a judgment of the trial court that convicted him of menacing by stalking after he pleaded no contest

to the offense. On appeal, he raises the following two assignments of error for our review:

> I. Appellant did not enter into the no contest plea in a knowing, voluntary and intelligent manner, violating his right to due process under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and Article I Section 10 of the Ohio Constitution.
>
> II. Appellant was denied effective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I Section 10 of the Constitution of the State of Ohio.

{¶ 2} After a careful review of the record and applicable law, we find no merit to the appeal and affirm the judgment of the trial court.

{¶ 3} Petronzio and his adoptive sister, Cindy Smith, were involved in a long-standing family feud over certain financial matters. Between July and December 2019, he left 38 voicemails for her, threatening her and her family's life. On January 21, 2020, the grand jury returned an indictment charging him with menacing by stalking in violation of R.C. 2903.211(A)(1), a felony of the fourth degree. On June 25, 2020, the trial court held a pretrial hearing, which was conducted initially to hear Petronzio's counsel's motion to withdraw as counsel. The court hearing was conducted via video conferencing due to the Covid-19 pandemic. At the hearing, Petronzio changed his plea from not guilty to no contest. Based on the no contest plea, the court found him guilty of menacing by stalking and imposed a one-year term of community control for his offense.

No Contest Plea

{¶ 4} Under the first assignment of error, Petronzio claims his no contest plea was not knowing, intelligent, or voluntary because the trial court did not comply with the requirement of Crim.R. 11(C).

{¶ 5} To ensure that a defendant enters a plea knowingly, intelligently, and voluntarily, the trial court is required to engage a defendant in a plea colloquy pursuant to Crim.R. 11. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 25-26. The underlying purpose of Crim.R. 11 colloquy is to convey to the defendant certain information to enable him or her to make a knowing, intelligent, and voluntary decision in the plea. *State v. Ballard,* 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981).

{¶ 6} Crim.R. 11(C)(2) requires that a trial court determine from a colloquy with the defendant whether the defendant understands (1) the nature of the charge and maximum penalty, (2) the effect of the guilty plea, and (3) the constitutional rights waived by a guilty plea. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621.

{¶ 7} When reviewing a plea colloquy, our focus is not on whether the trial judge has "[incanted] the precise verbiage" of the rule. *State v. Dangler*, 162 Ohio St.3d 1, 2020-Ohio-2765, 164 N.E.3d 286, ¶ 12, quoting *State v. Stewart*, 51 Ohio St.2d 86, 92, 364 N.E.2d 1163 (1977). Rather, the focus of our review is on "whether the dialogue between the court and the defendant demonstrates that the defendant understood the consequences of his plea." *Id.*, citing *Veney*, at ¶ 15-16.

{¶ 8} Where the issue concerns a nonconstitutional requirement, we review for substantial compliance. *See State v. Jordan*, 8th Dist. Cuyahoga No. 103813, 2016-Ohio-5709, ¶ 46, citing *Veney* at ¶ 14-17. For example, the right to be informed of the effect of a plea is a nonconstitutional requirement and it is subject to review under a substantial compliance standard. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12, citing *State v. Nero*, 56 Ohio St.3d 106, 107, 564 N.E.2d 474 (1990).

{¶ 9} "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* at 108. "[I]f it appears from the record that the defendant appreciated the effect of his plea and his waiver of rights in spite of the trial court's error, there is still substantial compliance." *State v. Caplinger*, 105 Ohio App.3d 567, 572, 664 N.E.2d 959 (4th Dist.1995).

{¶ 10} Furthermore, when a nonconstitutional aspect of a plea colloquy is at issue, a defendant must show prejudice before the plea will be vacated for an error involving the court's compliance with Crim.R. 11(C). *Jordan* at ¶ 47, citing *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, at ¶ 17. *See also Dangler*, 162 Ohio St.3d 1, 2020-Ohio-2765, 164 N.E.3d 286, at ¶ 14-15 (prejudice must be demonstrated by a defendant claiming the trial court fails to comply with Crim.R. 11(C) unless the issue involves a constitutional right or unless the trial court completely fails to comply with a portion of Crim.R. 11 (C)). The test for prejudice is whether the plea would have otherwise been made. *Nero* at 108.

{¶ 11} Under the first assignment of error, Petronzio argues that his plea was not knowing because at the beginning of the hearing he informed the trial court he had not receive any discovery material. Our review of the pertinent portion of the transcript reflects the following exchanges:

> THE PROSECUTOR: * * * At this time we believe that full discovery has been exchanged. The case has been marked to the indictment. One count F-4, menacing by stalking.
>
> The State had multiple conversations with our victim in this case, and we were just continuing to negotiate whether or not we were going to plead this case. Thank you.
>
> THE COURT: Okay. [Defense Counsel], has discovery been complied with?
>
> [DEFENSE COUNSEL]: Your Honor, to the best of my knowledge, I have received discovery, and I had discussed possible resolutions with my client.
>
> THE COURT: All right. Mr. Petronzio, are you satisfied that the discovery has been completed?
>
> THE DEFENDANT: No. No, I'm not. No. I'm not because there are a lot of things —
>
> * * *
>
> THE DEFENDANT: * * * I am not happy because the documentation that they are using is false and, second of all, the documentation — she [referring to the victim] is submitting documentation that's not even hers, that it's from an attorney. Okay?
>
> * * *
>
> THE COURT: * * * You may object to their admissibility, but you're still getting documents and that's what counts. Okay?
>
> THE DEFENDANT: I haven't — I haven't seen anything. The only thing I've been told is on the phone, and the attorney told me that he

> received some cease and desist that [sic] she [referring to the victim] is using that from an e-mail that's not even hers. * * *
>
> [THE DEFENSE COUNSEL]: Your Honor, I'd ask that the Court advise Mr. Petronzio that I don't think we want to get into the facts of the case [referring to a separate federal case involving both Petronzio and the victim]. The purpose of this hearing it's to address [counsel's] motion to withdraw [as counsel] * * *.
>
> * * *
>
> THE COURT: *** but I want the record to be clear. So the discovery has been, is ongoing and, sir, * * * [h]ave you had the opportunity to discuss a resolution of this case with your lawyer?

(Tr. 4-8.)

{¶ 12} Our review of the transcript does not support Petronzio's allegation that he did not receive any discovery material. The transcript reflects that his defense represented to the court that counsel had received discovery and had discussed possible resolutions with Petronzio. Petronzio may not have received actual copies of the discovery material but his allegation that the documentation was "false" and was not the victim's own would seem to indicate that he was aware of the content of the discovery material. As we discuss more fully in the following, our review of the lengthy colloquy between the trial court and Petronzio indicates he was well informed of the charge against him.

{¶ 13} Petronzio next claims that he expressed a desire to go to trial, but, despite his wish, the trial court sua sponte conducted a plea colloquy. He points to the following exchange at the outset of the hearing to show that the trial court disregarded his wish to have the case tried:

> THE COURT: Okay. And obviously since we're having this hearing today, you're not in favor of the resolution of this case. You want to try this case, is that correct?
>
> THE DEFENDANT: Yes, sir.

(Tr. 8-9.)

{¶ 14} Our review of the hearing in its entirety does not support Petronzio's contention that the trial court disregarded his wish to go to trial and sua sponte conducted a plea hearing. The transcript reflects that, after the above exchange, the trial court advised Petronzio regarding the possibility of a delayed trial date due to the Covid-19 pandemic but explained that should he choose to go to trial, the state would carry the burden of proving his guilt beyond a reasonable doubt. The trial court also explained to him what would occur in a jury trial. After a lengthy explanation about a jury trial, the court advised Petronzio that he had two other options: to plead to the offense or waive the jury trial and have the matter tried to the bench.

{¶ 15} After these explanations, the court asked Petronzio if he understood everything the court explained so far. Petronzio answered: "Yes, sir. Yes, sir, I do." The court then repeated that he could enter a plea and conclude the case on that day, or wait for a trial to be scheduled. The court also asked if Petronzio would like to take a recess to talk to his counsel and possibly conclude the case that day. Petronzio answered "yes." The transcript reflects that, after the recess, the court began an extended Crim.R. 11 colloquy with Petronzio. Petronzio's claim that the trial court "embarked on the Plea Colloquy sua sponte" is not supported by the record.

{¶ 16} Under the first assignment of error, Petronzio also claims that his no contest plea was not knowing or intelligent because the court explained the effect of a no contest plea only after he entered the plea.

{¶ 17} To advise a defendant of the "effect of the plea" means to advise him or her of the appropriate language under Crim.R. 11(B). *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, paragraph two of the syllabus. Crim.R. 11(B)(2) sets forth the effect of a no contest pleas, stating: "The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint and such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding."

{¶ 18} Here, the transcript reflects that, after the recess, the court conducted a Crim.R. 11(C) colloquy, explaining that if Petronzio was to plead guilty or no contest, he would give up his constitutional right to have the state prove his guilt beyond a reasonable doubt, right to a jury trial, right to subpoena and cross-examine witnesses, and right not to testify against himself. The court also explained that should he plead no contest, the prosecutor must provide a statement of the facts supporting the offense. The court then asked Petronzio whether he wanted to plead guilty or no contest. Petronzio stated: "I'll plead no contest."

{¶ 19} After the prosecutor recited the facts underlying the charge against Petronzio for menacing by stalking, the court then explained to him the effects of the no contest plea as required by Crim.R. 11(B)(2) — that a no contest plea was not an

admission of the defendant's guilt, but only an admission of the truth of the facts alleged in the indictment, and that the plea shall not be used against him in any subsequent civil or criminal proceedings. The following exchange is then reflected in the transcript:

> THE COURT: Okay. I just want to make sure you understand. I want to be clear in the record you're not pleading guilty. You're pleading no contest. It cannot be used in any other proceedings. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And that's what you want to do?
>
> THE DEFENDANT: Yes, sir.

(Tr. 30.)

{¶ 20} Before proceeding to sentencing, the court asked if Petronzio understood he was pleading no contest to a fourth-degree felony, subject to a possible prison term of six to eighteen month. He answered: "Yes, sir, I do."

{¶ 21} The transcript reflects his counsel then spoke on his behalf and presented mitigating factors for the court's consideration: Petronzio, who was 56, had not had a felony conviction in decades, his last misdemeanor was nearly a decade ago, and he has been a law-abiding citizen for a significant period of time; the stalking offense stemmed from some deep-rooted issues in the family and Petronzio had made it clear he would not have future contact with the victim and her family. The trial court sentenced Petronzio to a one-year term of community control but indicated its willingness to terminate the community control in six

months if he pays the court costs and abides by the order of no contact with the victim and her family and the other conditions of his community control. The court next instructed him to contact the court-supervised release section and let it know that he had pleaded guilty. Petronzio repeated the court's instruction but corrected the court's mistake, stating: "Oh, I am going to call the probation * * * and tell them that *I pled no contest — not plead guilty but no contest* — and that I have to find a probation officer or community control, or whatever you call it." (Emphasis added.) (Tr. 46.)

{¶ 22} Pursuant to *Dangler*, our review is to assess "whether the dialogue between the court and the defendant demonstrates that the defendant understood the consequences of his plea." The transcript here reflects the trial court explained in great detail the implication of forgoing a trial and the effect of a no contest plea. The court repeatedly asked Petronzio if he understand the nature of his plea and if he was indeed pleading no contest and he answered affirmatively on each occasion. In fact, at the conclusion of the hearing, he corrected the trial court when it erroneously stated Petronzio pleaded guilty, and reaffirmed that he was pleading no contest. The lengthy dialogue between the court and Petronzio as reflected in the transcript amply demonstrates that Petronzio understood the consequences of his no contest plea and, specifically, the effect of his no contest plea. Although the colloquy was not in perfect order, the trial court substantially, if not fully, complied with Crim.R. 11(C).

{¶ 23} Because the trial court at the very least substantially complied with Crim.R. 11(C), Petronzio must demonstrate prejudice in order to have his conviction reversed. *Dangler* at ¶ 16. Although Petronzio expressed a desire to go to trial at the outset of the hearing, he pleaded no contest after a rather extensive colloquy with the trial court. Petronzio makes no demonstration that he was prejudiced by the trial court's failure to more fully explain the no contest plea, nor is any prejudice apparent in the record before us. The first assignment of error lacks merit.

Ineffective Assistance of Counsel

{¶ 24} Under the second assignment of error, Petronzio argues his counsel provided ineffective assistance of counsel. In order to establish a claim of ineffective assistance of counsel, appellant must show "(1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that but for counsel's errors, the proceeding's result would have been different." *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 200, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Ohio, every properly licensed attorney is presumed to be competent and a defendant claiming ineffective assistance of counsel bears the burden of proof. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). "Judicial scrutiny of defense counsel's performance must be highly deferential." *State v. Brown*, 8th Dist. Cuyahoga Nos. 93216 and 93217, 2010-Ohio-364, ¶ 5, citing *Strickland* at 2065.

{¶ 25} In this case, Petronzio pleaded no contest to the charge against him. In a plea case, an appellant claiming ineffective assistance of counsel must show that there is a reasonable probability that, but for counsel's errors, he would have insisted on going to trial. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 89.

{¶ 26}Petronzio contends his counsel provided ineffective assistance of counsel in that counsel failed to share discovery information with him and, "had he been fully informed, there is certainly a reasonable probability that he would not have entered a plea in this case."

{¶ 27} While Petronzio proclaimed he had not received any discovery material at one point at the hearing, other statements made by him indicated he disputed the information provided by the prosecutor. While Petronzio claims on appeal that he was deprived of information necessary for him to make an informed decision, he does not identify the information he was allegedly deprived of that caused him to plead no contest instead of opting for trial. On this issue, the transcript reflects that after Petronzio expressed his dissatisfaction over discovery material, the court called for a recess to allow a discussion between Petronzio and his counsel regarding the evidence against him and his options. After the recess, the trial court engaged in a plea colloquy without any further protest from Petronzio regarding discovery and any concerns over discovery he might have had appears to have been resolved. Having carefully reviewed the transcript, we find Petronzio fails to meet his burden of demonstrating that, but for the information his counsel

allegedly failed to share with him, he would have gone to trial instead of pleading no contest. Petronzio's claim of ineffective assistance of counsel lacks merit. The second assignment of error is overruled.

{¶ 28} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

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MICHELLE J. SHEEHAN, JUDGE

SEAN C. GALLAGHER, P.J., and
LISA B. FORBES, J., CONCUR