[Cite as *State v. Montgomery*, 2010-Ohio-4555.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-A-0057**
- vs -	:	
DOUGLAS L. MONTGOMERY, III,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2009 CR 172.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

John D. Lewis, Law Office of John D. Lewis, L.L.C., 34 South Chestnut Street, #200 Jefferson, OH 44047 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} In the instant appeal, submitted on the briefs of the parties, appellant, Douglas L. Montgomery, III, challenges the validity of the guilty plea he entered by way of *North Carolina v. Alford* (1970), 400 U.S. 25, as well as the sentence the trial court imposed subsequent to accepting the plea. For the reasons discussed below, we affirm.

{¶2} On July 10, 2009, the Ashtabula County Grand Jury returned an indictment charging appellant with one count of domestic violence, in violation of R.C. 2919.25(A), a felony of the fourth degree; and one count of disrupting public services, in violation of R.C. 2909.04(A)(1), a felony of the fourth degree. Appellant pleaded not guilty to the charges.

{¶3} The state offered appellant a plea deal the terms of which required appellant to plead guilty to one count of domestic violence in exchange for a dismissal of the other charge. A hearing was conducted during which the court conducted the requisite Crim.R. 11 colloquy; prior to the court accepting the plea, however, appellant changed his mind and withdrew his plea of guilty. At appellant's request, the matter was set for jury trial on December 15, 2009.

{¶4} On the date of trial, after the jury was impaneled, however, appellant again changed his mind. Appellant withdrew his plea of not guilty and entered a plea of guilty, pursuant to *Alford*, supra, to both counts in the indictment. The trial court did not order a presentence investigation report, but deferred sentencing to correctly calculate appellant's jail time credit. Appellant was later sentenced to 18 months imprisonment on each count to be served concurrently with each other and consecutively to a separate sentence he was already serving for crimes of which he was previously convicted. Appellant subsequently attempted to withdraw his plea of guilty, which the trial court overruled.

{¶5} Appellant now appeals assigning three errors for our review. His first assignment of error alleges:

{¶6} "The trial court erred to the prejudice of appellant by accepting his guilty plea, where such plea was not made knowingly, voluntarily, or intelligently."

{¶7} Under this assignment of error, appellant claims the trial court erred by accepting his plea without first ensuring he understood the effect of his plea and the nature of the charges. We disagree.

{¶8} Crim.R. 11(C)(2) provides:

{¶9} "*** 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:

{¶10} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and 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.

{¶11} "(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.

{¶12} "(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the right 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."

{¶13} When determining whether the trial court has met its obligations under Crim.R. 11 in accepting a plea, appellate courts have distinguished between constitutional and non-constitutional rights. With respect to the constitutional rights, a trial court must advise a defendant that, by pleading guilty, he or she is waiving: "(1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination." *State v. Veney*, 120 Ohio St.3d 176, at syllabus, 2008-Ohio-5200 (Crim.R. 11(C)(2)(c) applied); see, also *State v. Porterfield*, 11th Dist. No. 2002-T-0045, 2004-Ohio-520, at ¶23. A trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights and the failure to do so invalidates the plea. *Veney*, supra; see, also, *State v. Lavender*, 11th Dist. No. 2000-L-049, 2001-Ohio-8790, 2001 Ohio App. LEXIS 5858, *11. "Strict compliance" does not require a verbatim recitation of the rights being waived. *State v. Ballard* (1981), 66 Ohio St.2d 473, 480. Rather, the standard requires the court to explain or refer to the rights in a manner reasonably intelligible to the defendant entering the plea. Id.

{¶14} Alternatively, the remaining, so-called non-constitutional rights set forth under Crim.R. 11 require the court to: (1) determine the defendant understands the nature of the charge(s) and possesses an understanding of the legal and practical effect(s) of the plea; (2) determine the defendant understands the maximum penalty that could be imposed; and (3) determine that the defendant is aware that, after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence. See Crim.R. 11(C)(2)(a) and (b). *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

Although literal compliance with Crim. R. 11 vis-à-vis the non-constitutional rights is preferred, an advisement that substantially complies with the letter of the rule will legally suffice. *Nero,* supra. A court substantially complies where the record demonstrates the defendant, under the totality of the circumstances, subjectively understood the implications of the plea and the rights waived. Id.

{¶15} It is necessary to point out, however, that a trial court's failure to substantially comply with the non-constitutional requirements of Crim.R. 11(C) alone will not constitute a basis for an automatic reversal. See, e.g., *Porterfield,* supra, at ¶25. To rise to the level of reversible error, a defendant must demonstrate he or she was prejudiced by the lack of compliance. *State v. Johnson* (1988), 40 Ohio St.3d 130, 134; see, also, Crim.R. 52(A); Crim.R. 33. The test for prejudice is "whether the plea would have otherwise been made." *Nero,* supra.

{¶16} Before reaching the merits of appellant's argument, we first point out that the instant matter followed a convoluted procedural course in the trial court. Appellant first pleaded not-guilty; he then changed his plea to guilty after the state offered to dismiss the disrupting public service count. After a near-complete plea hearing which involved the trial court addressing appellant pursuant to Crim.R. 11(C)(2), appellant again changed his mind, advising the court that he could "beat the charge." Accordingly, a trial date was set. On the day of trial, however, after the jury had been selected, appellant resolved to plead to the indictment. The trial court conducted a plea hearing and accepted appellant's plea.

{¶17} During the hearing at which the trial court accepted appellant's plea of guilty, the court specifically and literally advised appellant of each constitutional and

non-constitutional right. Moreover, the court expressly asked appellant if he understood his rights, the nature of what he was waiving, and the ultimate effect of the guilty plea he was entering. It is therefore clear from the record that the trial court met its obligations under Crim.R. 11(C).

{¶18} Notwithstanding the evidence, however, appellant argues the trial court did not ensure he understood the effect of the plea he entered. In support, appellant points out the trial court never apprised him of the impact of entering an *Alford* plea and therefore, he maintains, the record fails to show he had knowledge of the legal effect of his plea. We disagree.

{¶19} A plea entered pursuant to *Alford* is a plea that permits a defendant to plead legal guilt, yet maintain his or her factual innocence. *State v. Anderson*, 11th Dist. No. 2005-L-178, 2006-Ohio-5167, at ¶8. Once the trial court accepts the plea, however, the defendant stands convicted as if he or she were found guilty by a jury. Id., citing *State v. Hughes*, 12th Dist. No. CA2002-11-124, 2003-Ohio-3449, at ¶9. As a matter of law, therefore, "[a]n *Alford*-type guilty plea is a guilty plea in all material respects." *United States v. Tunning* (C.A.6 1995), 69 F.3d 107, 111. Here, the trial court explained the legal effects of pleading guilty and appellant indicated he understood. With respect to appellant's *Alford* argument, we hold the trial court met its obligations under the law.

{¶20} Appellant next points to his indecision at pleading guilty as a foundation for his argument that the trial judge failed to ensure he understood the effects of the plea. Appellant asserts "it is evident that [he] did not understand the effect of the plea offers, as he waffled back and forth with regard to changing his pleas." Regardless of his "waffling," however, appellant fails to elucidate how his previous irresolution at

accepting the state's plea offer indicates he failed to understand or appreciate the rights he was waiving by ultimately pleading guilty.

{¶21} Although appellant stated on record his belief that he could "beat the case" at an earlier proceeding, the transcript of the later hearing, demonstrates appellant unequivocally wanted to enter the plea. During the colloquy with the judge, he specifically acknowledged that he understood his plea operated as a complete admission of guilt and that by accepting the plea he was waiving his right to trial by jury as well as any defense he may have to the charges. At the close of the hearing, appellant stated he wanted to enter the plea because he did not "want to try my baby's mother through this and [he did not] want to waste taxpayer's dollars." In light of this statement, the court explained that the jury was prepared to hear the case and appellant was entitled to go to trial; appellant, however, again declined to pursue a trial and pleaded guilty to the indictment. There is nothing in the record indicating appellant did not understand the impact of his plea of guilty. To the contrary, the record of the final plea hearing reveals appellant knowingly, voluntarily, and intelligently entered his plea following a precise and thorough Crim.R. 11 colloquy with the trial court.

{¶22} Finally, appellant acknowledges that the court advised him that he was waiving any defense or excuse to the charge by pleading; he further acknowledges he stated on record he understood the practical and legal effects of his plea. Appellant nevertheless argues the trial court failed to make sure appellant understood the implications of his guilty plea because, prior to being sentenced, appellant asserted he acted in self-defense when he struck the victim. Again, we disagree.

{¶23} Simply because appellant asserted he acted in self-defense at the sentencing hearing does not imply he failed to understand he had waived that defense by pleading. Appellant's statement regarding self-defense occurred when he chose to exercise his right to allocution. The record therefore indicates appellant's statement was not an attempt to defend or legally exculpate himself from the charges to which he pleaded, but merely an attempt to potentially mitigate the severity of his actions in the eyes of the court. In any case, we hold his statement had no bearing on whether he understood the effect of his plea and therefore had no bearing on the validity of the plea itself.

{¶24} Appellant's first assignment of error is overruled.

{¶25} For his second assignment of error, appellant asserts the following:

{¶26} "Mr. Montgomery was denied the effective assistance of counsel, in violation of his rights under the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, and counsel's deficient performance rendered Mr. Montgomery's plea involuntary."

{¶27} An appellant who has pleaded guilty and challenges the effectiveness of his counsel must show (1) counsel's performance was deficient; and (2) but for counsel's error, there is a reasonable probability the appealing party would not have pleaded guilty. See, e.g., *State v. Madeline*, 11th Dist. No. 2000-T-0156, 2002-Ohio-1332, 2002 Ohio App. LEXIS 1348, *9. With respect to this standard, this court has observed:

{¶28} "The mere fact that, if not for the alleged ineffective assistance of counsel, the defendant would not have entered a guilty plea is *not* sufficient to establish the

requisite connection between the guilty plea and the ineffective assistance. *** Rather, ineffective assistance of trial counsel is found to have affected the validity of a guilty plea when it precluded a defendant from entering his plea knowingly and voluntarily." Id. (Emphasis sic.)

{¶29} Appellant first asserts his counsel's assistance was ineffective because he alleges she failed to fully inform him of the potential success of defending his case utilizing the defense of self-defense. We cannot agree.

{¶30} First of all, despite appellant's claim to the contrary, there is no evidence in the record that would indicate appellant's trial counsel *did not* explain the potential advantages of defending the case based on a self-defense theory. Given this deficiency, appellant has failed to meet the first prong of the ineffectiveness test.

{¶31} Furthermore, even assuming counsel did not so inform appellant, there is no evidence in the record that a self-defense theory would have been a sensible strategic defense. We acknowledge that, at the sentencing hearing, appellant claimed the victim attacked him with a knife; in response, however, the prosecutor pointed out there was no evidence in the police report or any statement that the victim had a knife. As a result, even if counsel did not discuss the utility of a self-defense theory, the record suggests such a decision would have been strategic in nature. Because tactical decisions fall squarely within the gamut of professionally reasonable judgment, counsel's performance cannot be deemed deficient. See, e.g., *Strickland v. Washington* (1984), 466 U.S. 668, 699.

{¶32} Regardless of the above conclusion, appellant cannot demonstrate his plea was involuntary and, accordingly, cannot meet the second prong of the

ineffectiveness test. As discussed above, the trial court engaged in a thorough Crim.R. 11 colloquy, explaining the nature of the charges and the maximum penalties involved, the effect of entering a plea to the charges, and that appellant would be waiving certain constitutional rights by entering his plea. Appellant stated on record that he understood the trial court's advisements and, as a result, we hold he entered his plea knowingly and voluntarily. *State v. Dudas*, 11th Dist. Nos. 2008-L-081 and 2008-L-082, 2008-Ohio-7043, at ¶30; see, also, *Madeline*, supra, at *11; *State v. Sopjack* (Dec. 15, 1995), 11th Dist. No. 93-G-1826, 1995 Ohio App. LEXIS 5572, at *27-*28.

{¶33} Next, appellant argues his counsel's assistance was ineffective because she failed to request a presentence investigation report (PSI). We disagree.

{¶34} Crim.R. 32.2 requires a PSI only as a prerequisite to granting probation, and not as a prerequisite to all sentencing proceedings. In this case, the state recommended an aggregate six-month term of imprisonment to be served consecutively to a term he was currently serving; the defense asked the court to order a six-month aggregate term of imprisonment to be served concurrently with the term he was currently serving. The court ultimately disregarded the parties' respective positions and sentenced appellant to an aggregate term of 18 months, to be served concurrently with the term he was already serving. As there is no indication the court was considering probation, a PSI was not warranted and counsel's representation was not deficient for failing to request such a report.

{¶35} Moreover, at his plea hearing, appellant asserted he did not wish to go to trial because he did not want to put the victim through it and did not want to "waste" taxpayer money. Given appellant's justification for entering his plea, it is unclear how

the lack of a presentence investigation report rendered his *Alford* plea involuntary. We therefore hold the absence of a PSI did not affect the knowing and voluntary nature of his plea. Accordingly, counsel's failure to request a PSI prior to appellant entering his plea of guilty did not constitute ineffective representation.

{¶36} Appellant finally asserts that had his counsel ordered a PSI, the court would have had a true record of his criminal history upon which it could rely in rendering its sentence. Instead, the court merely heard the prosecutor's recitation of his criminal history; a recitation which appellant strongly contested during the sentencing hearing. Because counsel failed to request the PSI, he therefore asserts her representation was ineffective. We disagree.

{¶37} The prosecutor based her statement of appellant's record upon appellant's computerized criminal history (CCH). Although the CCH was not made part of the record, it is an alternative, credible means of surveying a defendant's past criminal behavior. Moreover, even if the prosecutor's reading of the CCH was flawed, as appellant argued at sentencing, he suffered no prejudice. The trial judge sentenced appellant within the statutory range for felonies of the fourth degree and therefore acted within his legal discretion. Accordingly, even if defense counsel should have moved to continue sentencing for purposes of obtaining a PSI (an act, under these circumstances, we do not hold she was obligated to do), appellant suffered no prejudice from counsel's failure to do so.

{¶38} Appellant's second assignment of error is therefore overruled.

{¶39} Appellant's final assignment of error provides:

{¶40} "The trial court abused its discretion when it sentenced Mr. Montgomery to the maximum terms of imprisonment."

{¶41} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio held that trial courts have discretion to impose a sentence within the statutory range without the need for findings of fact with respect to maximum sentences, consecutive sentences, or sentences greater than the minimum. Id. at paragraph seven of the syllabus and ¶99.

{¶42} Since *Foster*, the Supreme Court has established a two-step analysis for an appellate court reviewing a felony sentence. See *State v. Kalish*, 120 Ohio St.3d 23, 28, 2008-Ohio-4912. In the first step, we consider whether the trial court "adhered to all applicable rules and statutes in imposing the sentence." Id. at 25. "As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." Id. Next, we consider, with reference to the general principles of felony sentencing and the seriousness and recidivism factors set forth in Sections 2929.11 and 2929.12, whether the trial court abused its discretion in selecting the defendant's sentence. See id. at 27.

{¶43} Here, appellant does not claim his sentence was imposed contrary to law, but, rather, that the court abused its discretion in failing to properly consider the factors set forth under R.C. 2929.11 and R.C. 2929.12. We disagree.

{¶44} In *Kalish*, the Supreme Court noted:

{¶45} "*** where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration

to those statutes." *Kalish*, supra, at ¶18, fn. 4, citing *State v. Adams* (1988), 37 Ohio St.3d 295, at paragraph three of the syllabus.

{¶46} As discussed under appellant's second assignment of error, the trial court's sentence was within the statutory range for felonies of the fourth degree. Although it made no specific mention of its consideration of the statutory factors at the sentencing hearing, the current state of felony sentencing in Ohio requires this court to uphold appellant's sentence. Accordingly, we hold the trial court acted within its discretion when it imposed the maximum term of imprisonment.

{¶47} Appellant's final assignment of error is without merit.

{¶48} For the reasons discussed in this opinion, the judgment of the Ashtabula County Court of Common Pleas is hereby affirmed.

COLLEEN MARY O'TOOLE, J.,

TIMOTHY P. CANNON, J.,

concur.