[Cite as *State v. McKinley*, 2015-Ohio-2436.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P. J.
Plaintiff - Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
WILLIAM MCKINLEY	:	Case No. 14 CAA 08 0045
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Case No. 13 CRI 050253
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	June 18, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
CAROL HAMILTON O'BRIEN Delaware County Prosecutor	BRIAN G. JONES ELIZABETH E. OSORIO The Law Office of Brian Jones
By: DOUGLAS N. DUMOLT Assistant Prosecuting Attorney 140 N. Sandusky Street, 3rd Floor Delaware, OH 43015	2211 U.S. Highway 23 North Delaware, OH 43015

Baldwin, J.

{¶1} Defendant-appellant William McKinley appeals his conviction and sentence from the Delaware County Court of Common Pleas on one count of rape and one count of gross sexual imposition. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 31, 2013, the Delaware County Grand Jury indicted appellant on one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), a felony of the third degree, eight counts of rape in violation of R.C. 2907.02(A)(1)(b), felonies of the first degree, and four counts of kidnapping in violation of R.C. 2905.01(A)(4), felonies of the second degree. The indictment alleged that the victim was under the age of thirteen during each of the incidents. At his arraignment on July 11, 2013, appellant entered a plea of not guilty to the charges.

{¶3} Thereafter, on May 22, 2014, appellant withdrew his former not guilty plea and pleaded guilty, pursuant to *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160 (1970), to an amended count of gross sexual imposition and an amended count of rape. The remaining counts were dismissed. On the same date, appellant signed a Crim.R. 11(F) agreement and a formal journalized plea of guilty with an acknowledgment of the *Alford* plea.

{¶4} Pursuant to a Judgment Entry filed on July 8, 2014, appellant was sentenced to an indefinite prison term of life with parole eligibility after ten years on the count of rape and to 42 months in prison on the count of gross sexual imposition. The trial court ordered that the sentences be served consecutively.

{¶5} Appellant now raises the following assignments of error on appeal:

{¶6} I. THE TRIAL COURT ERRED IN FINDING THE DEFENDANT-APPELLANT GUILTY PURSUANT TO A *NORTH CAROLINA V. ALFORD. 400 U.S. 25, 91 S.Ct. 160 (1970),* PLEA WHERE THE FACTUAL BASIS FOR THE CONVICTION WAS LEGALLY INSUFFICIENT IN LIGHT OF THE DEFENDANT'S PROTESTATION OF INNOCENCE AND FURTHER THE PROSECUTOR'S STATEMENT OF FACTS NEGATED AN ESSENTIAL ELEMENT OF THE CRIME IN VIOLATION OF THE DUE PROCESS GUARANTEES OF THE FIFTH AMENDMENT AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I. SECTION 16 OF THE OHIO CONSTITUTION.

{¶7} II. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL DID NOT OBJECT TO THE SUFFICIENCY OF THE FACTUAL BASIS FOR THE PLEA AND FAILED TO AFFIRMATIVELY ASSERT THE DEFENDANT'S PROTESTATION OF INNOCENCE PURSUANT TO *NORTH CAROLINA V. ALFORD 400 U.S. 25. 91 S.Ct. 160 (1970).* DURING THE CHANGE OF PLEA HEARING IN VIOLATION OF THE RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I. SECTION 10 OF THE OHIO CONSTITUTION AND THE DUE PROCESS GUARANTEES OF THE FIFTH AMENDMENT AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I. SECTION 16 OF THE OHIO CONSTITUTION .

{¶8} III. THE DEFENDANT-APPELLANT'S GUILTY PLEA PURSUANT TO *NORTH CAROLINA V. ALFORD. 400 U.S. 25. 91 S.Ct. 160 (1970).* WAS NOT ENTERED KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY.

I, III

{¶9} Appellant, in his first assignment of error, argues that the trial court erred in finding him guilty pursuant to an *Alford* plea where the factual basis for the conviction was legally insufficient. In his third assignment of error, appellant argues that his plea was not entered knowingly, intelligently and voluntarily.

{¶10} Crim.R. 11 governs pleas. Subsection (C)(2) states the following:

{¶11} (2) 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:

{¶12} (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.

{¶13} (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.

{¶14} (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.

{¶15} In entering an *Alford* plea, a defendant maintains innocence, but consents to punishment: "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *North Carolina v. Alford,* 400 U.S. 25, 37, 91 S.Ct. 160 (1970). As explained by our brethren from the Second District in *State v. Padgett,* 67 Ohio App.3d 332, 338–339 (2nd Dist.1990):

> Because an *Alford* plea involves a rational calculation that is significantly different from the calculation made by a defendant who admits he is guilty, the obligation of the trial judge with respect to the taking of an *Alford* plea is correspondingly different. The trial judge must ascertain that notwithstanding the defendant's protestations of innocence, he has made a rational calculation that it is in his best interest to accept the plea bargain offered by the prosecutor.
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> Where the defendant interjects protestations of innocence into the plea proceedings, and fails to recant those protestations of innocence, the trial court must determine that the defendant has made a rational calculation to plead guilty notwithstanding his belief that he is innocent. This requires, at a minimum, inquiry of the defendant

> concerning his reasons for deciding to plead guilty notwithstanding his protestations of innocence; it may require, in addition, inquiry concerning the state's evidence in order to determine that the likelihood of the defendant's being convicted of offenses of equal or greater magnitude than the offenses to which he is pleading guilty is great enough to warrant an intelligent decision to plead guilty.

{¶16} When there is a written affirmative assertion of an *Alford* notation on the plea form and some affirmation to the trial court of an *Alford* plea, a more detailed Crim.R. 11 colloquy is required to inquire into the reasoning for the *Alford* plea. *State v. Hayes,* 101 Ohio App.3d 73, 654 N.E.2d 1348 (3rd Dist.1998).

{¶17} In the context of an *Alford* plea, the Ohio Supreme Court has held:

> Where the record affirmatively discloses that: (1) defendant's guilty plea was not the result of coercion, deception or intimidation; (2) counsel was present at the time of the plea; (3) counsel's advice was competent in light of the circumstances surrounding the indictment; (4) the plea was made with the understanding of the nature of the charges; and, (5) defendant was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial, or both, the guilty plea has been voluntarily and intelligently made.

{¶18} *State v. Piacella,* 27 Ohio St.2d 92, 271 N.E.2d 852 (1971), syllabus.

{¶19} As noted by the court in *State v. Scott,* 3rd Dist. Seneca No. 13-2000-34, 2001-Ohio-2098*,* "[t]he record also must contain strong evidence of guilt before an *Alford* plea may be accepted. Therefore, the plea should not be made without the presentation of some basic facts surrounding the offenses charged." Id at 2.

{¶20} At the plea hearing in this case, the trial court engaged in an extensive colloquy with appellant. Appellant stated that he wanted to enter an *Alford* plea to avoid a potential sentence of 183 to 207 years and indicated that he had signed the Crim.R. 11(F) agreement of his own free will. Appellant agreed that he was "making an educated, knowledgeable decision to avoid the risk of much greater incarceration" and that it was in his best interest to plead guilty. Transcript of May 22, 2014 hearing at 23. In addition, the trial court explained to appellant all of the rights that he would be giving up by pleading guilty. We find that the trial court complied with the requirements of Crim.R. 11 and, as noted by appellee, the requirements for accepting an *Alford* plea set forth in *Piacella*, supra.

{¶21} Appellant further asserts that his plea was not knowing, intelligent and voluntary because appellee's statement of the facts negated an essential element of the crime of rape pursuant to R.C. 2907.02. Appellant specifically contends that the statement of facts negated the essential element of sexual conduct as required under R.C. 2907.02(A)(1)(b). R.C. 2907.02(A)(1)(b) prohibits a person from engaging in "sexual conduct" with a person who is less than thirteen years of age. R.C. 2907.01(A) states as follows: "(A) "Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or

any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse".

{¶22} At the change of plea hearing, the following exchange occurred on the record:

{¶23} THE COURT: OKAY, MS. BEAN-DEFLUMER, TELL US WHAT FACTS YOU HAVE AS TO COUNTS ONE AND TWO AS AMENDED.

{¶24} MS. BEAN-DEFLUMER: THANK YOU, YOUR HONOR.

{¶25} THE STATE WOULD ANTICIPATE THE VICTIM TESTIFYING THAT FROM JULY 17TH, 2005, THROUGH JANUARY 1ST, 2007, AT 6286 WEST MOHICAN DRIVE IN DELAWARE COUNTY, THE DEFENDANT, WILLIAM MCKINLEY, WHO WAS A FRIEND OF THE FAMILY, PLACED HIS HAND ON HER VAGINA, RUBBED HIS PENIS ON HER VAGINA AND PLACED HIS MOUTH ON HER VAGINA, A VARIETY OF TIMES THROUGH THOSE YEARS. THE STATE WOULD PLAN ON BRINGING OUT THE DEFENDANT'S STATEMENTS TO LAW ENFORCEMENT WHERE HE CORROBORATED SOME OF THE INCIDENTS THE VICTIM RECALLED.

{¶26} THE COURT: HOW OLD IS THE VICTIM AND WHAT IS HER DATE OF BIRTH?

{¶27} MS. BEAN-DEFLUMER: THE VICTIM'S DATE OF BIRTH IS JULY 17TH, 1996.

{¶28} THE COURT: 1996?

{¶29} MS. BEAN-DEFLUMER: YES.

{¶30} THE COURT: THAT'S WHERE THE DATE CAME ON THE AMENDED? HOW OLD IS SHE TODAY?

{¶31} MS. BEAN-DEFLUMER: I BELIEVE SHE IS 16.

{¶32} THE COURT: WHERE IS MOHICAN IN DELAWARE COUNTY?

{¶33} MS. BEAN-DEFLUMER: IT IS IN POWELL.

{¶34} THE COURT: HOW DID THE DEFENDANT GET ACCESS TO THE VICTIM?

{¶35} MS. BEAN-DEFLUMER: THEY ARE FAMILY FRIENDS AND THE DEFENDANT REGULARLY WATCHED THE VICTIM ON WEEKENDS. SHE WOULD STAY AT HIS HOUSE.

{¶36} THE COURT: MS. KENDRICK, DOES THE DEFENDANT CONTEST ANY OF THE FACTS RECITED BY THE STATE?

{¶37} MS. KENDRICK: NO, YOUR HONOR.

{¶38} THE COURT: IS THAT TRUE, MR. MCKINLEY, YOU DO NOT CONTEST THE FACTS?

{¶39} THE DEFENDANT: YES.

{¶40} Transcript of May 22, 2014 hearing at 21-22.

{¶41} Appellant argues that "the State provided a statement that negates any element of conduct rather than mere contact, as in, 'mouth on vagina' in no way encompasses 'a sex act committed with the mouth and the female sexual organ'". However, as noted by this Court in *State v. Dillon*, 5th Dist. Musk No. 2008-CA-37. 2009 -Ohio- 3134 at paragraph 95: "Penetration is not required to commit cunnilingus. Rather, the placing of one's mouth on the female's genitals completes the act of cunnilingus. See *State v. Ramirez* (1994), 98 Ohio App.3d 388, 393, 648 N.E.2d 845; *State v. Bailey* (1992), 78 Ohio App.3d 394, 395, 604 N.E.2d 1366." Thus, appellee's

statement of the facts did not negate an essential element of the crime of rape pursuant to R.C. 2907.02.

{¶42} Appellant's first and third assignments of error are, therefore, overruled.

II

{¶43} Appellant, in his second assignment of error, argues that he received ineffective assistance of counsel.

{¶44} The standard this issue must be measured against is set out in *State v. Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. Appellant must establish the following:

{¶45} 2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶46} 3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

{¶47} Appellant specifically argues that his counsel was ineffective in failing to raise the sufficiency of the evidence with respect to the rape count or affirmatively assert appellant's protestation of innocence during the change of plea hearing. As is stated above, we find that appellee's statement of facts did not negate an element of the offense of rape. We further note that at the change of plea hearing, appellant stated that

an *Alford* plea "is not admitting guilt but with the evidence supplied to the court, I don't believe that I will have a chance to fight any of these indictments." Transcript of May 22, 2014 hearing at 10. Later, when asked by the court whether, even though he was professing his innocence, he wanted the court to accept his plea and find him guilty, appellant responded the he did. The trial court specifically found that appellant had professed his innocence. We agree with appellee that appellant has not cited to any authority mandating that appellant's counsel, rather than appellant, place on the record appellant's protestation of innocence.

{¶48} Based on the foregoing, appellant's second assignment of error is overruled.

{¶49} Accordingly, the judgment of the Delaware County Court of Common Pleas is affirmed.

By: Baldwin, J.

Gwin, P.J. and

Hoffman, J. concur.