

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
BRITTANY HUNTER	:	Case No. 16-CA-40
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 16CR126

JUDGMENT: Affirmed

DATE OF JUDGMENT: January 9, 2017

APPEARANCES:

For Plaintiff-Appellee

PAULA M. SAWYERS
20 South Second Street
Fourth Floor
Newark, OH 43055

For Defendant-Appellant

KEVIN J. GALL
73 North Sixth Street
Newark, OH 43055

Farmer, P.J.

{¶ 1} On March 10, 2016, the Licking County Grand Jury indicted appellant, Brittany Hunter, on one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), a felony of the third degree. Said charge arose from an incident involving appellant and her three month old son.

{¶ 2} On May 31, 2016, appellant pled guilty to the charge. By judgment entry filed same date, the trial court sentenced appellant to three years of community control, and classified her as a Tier II sex offender.

{¶ 3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶ 4} "THE DEFENDANT'S PLEA IS UNCONSTITUTIONAL UNDER BOTH THE UNITED STATES AND OHIO CONSTITUTIONS AS IT WAS NOT KNOWINGLY AND INTELLIGENTLY MADE."

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{¶ 5} Appellant claims her plea was not knowingly and intelligently given as she did not understand the nature of the charge filed against her. We disagree.

{¶ 6} Crim.R. 11 governs pleas. Subsections (C)(2)(a) and (b) govern the non-constitutional rights that a defendant must be informed of and state the following:

(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:

(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.

{¶ 7} For these non-constitutional rights, the trial court must substantially comply with the statute. *State v. Nero*, 56 Ohio St.3d 106. "Substantial compliance" means "under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *Id.* at 108. In *State v. Stewart*, 51 Ohio St.2d 86, 93 (1977), the Supreme Court of Ohio explained the following:

Finally, although it can validly be argued that the trial court should adhere scrupulously to the provisions of Crim.R. 11(C)(2) (*State v. Caudill* (1976), 48 Ohio St.2d 342, 358 N.E.2d 601), there must be some showing of prejudicial effect before a guilty plea may be vacated. See Crim.R. 52(A). This court is of the opinion that the appellant has not demonstrated

that he was in any way prejudiced by the oversight of the trial court. See *Kelleher v. Henderson* (C.A. 2, 1976), 531 F.2d 78, where it was held that knowledge of maximum and minimum sentences is not constitutionally required; the test is whether the plea would otherwise have been made. See, also, *Bell v. Estelle* (C.A. 5, 1975), 525 F.2d 656. In the instant case, the factual circumstances indicated a guilty plea to a lesser offense was the wiser course to follow, and the absence of a ritualistic incantation of an admonishment which is not constitutionally guaranteed does not establish grounds for vacating the plea.

{¶ 8} Appellant was charged with gross sexual imposition, a felony of the third degree, in violation of R.C. 2907.05(A)(4) which states:

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

{¶ 9} " 'Sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a

female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

{¶ 10} During the plea hearing held on May 31, 2016, the trial court questioned appellant under oath and asked her if she understood the nature of the charge and whether she discussed it with her attorney. T. at 4, 6. Appellant responded in the affirmative. T. at 6. Appellant admitted to signing the plea form "freely and voluntarily." T. at 6-7. After the trial court and appellant engaged in the standard Crim.R. 11 colloquy (T. at 7-9), the prosecutor presented the facts of the case as follows (T. at 9-10):

MS. SAWYERS: Yes, Your Honor. Between the dates of February 1st, 2016 and February 29th, 2016, Brittany N. Hunter, hereinafter the Defendant, rubbed A.H.'s penis with her hand while she was changing his diaper. A.H., date of birth 11/26/15, is the Defendant's infant son.

The Defendant admitted that she did this for sexual gratification. The Defendant first admitted this to A.H.'s father and made the same admission to the police dispatcher. When interviewed by Detective Steven Vanoy with the Newark Police Department the Defendant made the same admission.

{¶ 11} Appellant acknowledged that she agreed with the facts as presented by the prosecutor, discussed the facts and possible defenses with her attorney, was satisfied with her attorney, and was making her plea freely and voluntarily. T. at 11-12. The trial court advised appellant of the possible sentence and appellant acknowledged that

she understood. T. at 12-14. After accepting her plea, the trial court asked appellant if she had anything to say to whereupon the following exchange occurred (T. at 17-18):

DEFENDANT: Yes, sir. I am very sorry of what I did. He is my son and I love him to death. At the time I did do what I said I did, but - - I'm sorry. I wasn't - - I wasn't sexually aroused. I said that because I thought that would help things. I was - - at the time my boyfriend had me all like confused and stuff because he was really mad, whatever, and he had me worked up so I was willing to say whatever. But, that's the honest truth.

THE COURT: Thank you.

DEFENDANT: But I did do what I said I did.

THE COURT: Well, you understand it doesn't matter if you did what you said. It's the purpose for sexual gratification that makes an offense. Without that, it's not a crime.

DEFENDANT: Yes, I admit to it. I did it, but I didn't have the thought that - - but I didn't - - I wasn't aroused. I had said that because I thought it would help.

{¶ 12} After this exchange, the trial took a recess. T. at 18. When court was reconvened, the trial court once again asked appellant if she wanted to proceed with her plea and appellant stated "[y]es, sir." T. at 22. The trial court then asked appellant if she had anything to say before sentence was imposed whereupon she stated the following: "I'm honestly sorry. I was confused of what you were asking, but I did touch my

son's penis for sexual gratification, but afterwards I didn't receive that sexual gratification." *Id.*

{¶ 13} Upon review, we find the trial court made every effort to ensure appellant understood the nature of the charge. By her own admissions, appellant conceded the touching was for sexual gratification, but none was manifested. We find the plea colloquy and appellant's statements establish she understood the nature of the charge.

{¶ 14} The sole assignment of error is denied.

{¶ 15} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By Farmer, P.J.

Gwin, J. and

Baldwin, J. concur.

SGF/sg 1209