[Cite as *State v. Brown*, 2010-Ohio-3387.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 25103
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JAMES C. BROWN	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 09 07 2282

DECISION AND JOURNAL ENTRY

Dated: July 21, 2010

BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant James Brown appeals his conviction from the Summit County Court of Common Pleas for one count of domestic violence, a felony of the fourth degree. This Court vacates the judgment of the trial court.

I.

{¶2} On August 3, 2009, Mr. Brown was indicted on one count of domestic violence in violation of R.C. 2919.25(A), a felony of the third degree. Mr. Brown was charged with a third-degree felony due to the belief that he had three prior convictions, enhancing the level of the offense. On August 20, 2009, Mr. Brown filed a motion to dismiss alleging that two of the prior convictions belonged to a different James Brown and the third prior conviction was the result of an uncounseled plea. The court held a hearing on Mr. Brown's motion on October 7, 2009, at which time the State conceded that two of the prior convictions did not belong to Mr. Brown. The State amended the charge of domestic violence from a felony of the third degree to a felony

of the fourth degree. The trial court denied the motion to dismiss, finding that the remaining prior conviction was the result of a counseled plea and could be used to enhance the level of the offense. Mr. Brown pled guilty to the indictment.

{¶3} Mr. Brown timely appealed his sentence and conviction, and has raised two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRONEOUSLY LED MR. BROWN TO BELIEVE THAT HIS PRETRIAL MOTION WAS PRESERVED FOR APPELLATE REVIEW DESPITE PLEADING GUILTY TO THE CHARGES."

{¶4} In his first assignment of error, Mr. Brown contends that the trial court erroneously led him to believe that his pretrial motion was preserved for appellate review despite pleading guilty to the charges. We agree.

{¶5} At Mr. Brown's plea hearing, his lawyer told the court that, "There was some discussion about appealing the Court's decision last week[]" with regard to Mr. Brown's motion to dismiss. The judge addressed Mr. Brown stating, "Correct. You understand, Mr. Brown, that there is an option to appeal that order or that ruling, but you have 30 days, not from today's date, but from the date of the ruling, which was last week, wasn't it?" Mr. Brown replied, "Right, the 7th." After further discussion of appealing the October 7, 2009 decision, the court concluded by informing Mr. Brown that, "The notice of appeal has to be filed within 30 days. So if you want to go home and think about it for a few days, come in next week and decide you want us to appoint you a lawyer, you make sure you do that. All right?"

{¶6} There is no dispute that Mr. Brown entered a guilty plea and that the effect of a guilty plea is to waive all but a very limited right of appeal. *State v. Genda* (Mar. 3, 1982), 9th

Dist. No. 10362, at *1. Notwithstanding this well-established legal principle, upon entering his guilty plea, Mr. Brown was misinformed that he could appeal the trial court's denial of his motion to dismiss. The State contends that, notwithstanding this error, this case is not governed by *State v. Engle* (1996), 74 Ohio St.3d 525, and other similar cases decided by this Court invalidating pleas entered on the mistaken impression that pretrial issues would be preserved for appeal. The State argues that this case differs because Mr. Brown entered a guilty plea whereas the defendants in our previous cases entered no contest pleas. It correctly points out that, unlike a guilty plea, a plea of no contest is not an admission of guilt and therefore reserves certain issues for appeal that are not available to a defendant who has pled guilty. Nonetheless, we conclude that *Engle* and our subsequent cases akin to *Engle* control the result in the instant case.

{¶7} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." Id. at 527. Mr. Brown contends that his plea was not entered knowingly or intelligently because it was based on the erroneous belief that he was reserving his right to appeal.

{¶8} In *Engle*, the Supreme Court of Ohio considered the validity of a no contest plea that was entered on the mistaken impression that an issue the trial court had decided in limine was preserved for appeal. Id. at 526. The Supreme Court found that the plea was not made knowingly or intelligently because all the parties, including the judge and the prosecutor, shared the impression that the defendant could appeal the trial court's rulings. Id. at 528. Since the decision in *Engle*, this Court has consistently held that a plea is not entered knowingly and intelligently where it is predicated on an erroneous belief that the trial court's rulings are appealable.

{¶9} In *State v. Palm*, 9th Dist. No. 22298, 2005-Ohio-1637, at ¶¶4-5, Ms. Palm entered a no contest plea to obstructing justice, a felony of the fifth degree. Her plea was expressly conditioned on the preservation of an issue for appeal. Id. at ¶14. This Court determined:

> "Thus, Ms. Palm was left with the understanding and assumption that the issue could be decided on appeal. However, such an assumption was erroneous in this case, and we find that the trial court committed error in accepting Ms. Palm's plea on such a basis. Thus, the trial court's determination that Ms. Palm entered her plea knowingly, intelligently, and voluntarily appears suspect as well." Id.

Ms. Palm's plea was vacated and the case was remanded to the trial court. Id. at ¶16.

{¶10} In *State v. Smith*, 9th Dist. No. 08CA009338, 2008-Ohio-6942, at ¶4, Mr. Smith entered a no contest plea in order to appeal an evidentiary ruling that the trial court had made mid-trial. This Court reversed the trial court's judgment, finding that the defense counsel, the prosecutor, and the trial court judge all gave Mr. Smith the mistaken impression that he could appeal the trial court's ruling. Id. at ¶¶1, 4. This Court noted that "the parties operated under the assumption that the defendant could appeal and the trial court judge covered that point during the plea hearing, making sure the defendant understood he could appeal the trial court's decisions." Id. at ¶10.

{¶11} In *State v. Echard*, 9th Dist. No. 24643, 2009-Ohio-6616, at ¶1, Mr. Echard entered a no contest plea in order to appeal the trial court's decision on a pre-trial motion. This Court found that, "Although Mr. Echard forfeited his enhancement argument by pleading no contest, the record shows that the parties and court mistakenly thought he could raise the issue on appeal." Id. at ¶8. Mr. Echard's plea was vacated and this Court was "'compelled to reach such a result because of what appears to be a grave misunderstanding of the law on the part of the trial

court, the prosecutor, and the defense attorney.'" Id. at ¶12, quoting *Engle*, 74 Ohio St.3d at 528 (Resnick, J., concurring).

{¶12} As in our previous cases, Mr. Brown entered his plea with the belief that he could appeal the trial court's ruling on his motion to dismiss. The record indicates that his defense attorney and the trial judge counseled him that he would be able to appeal despite having pled guilty. A review of the record also shows that the prosecutor made no objection and all parties shared the impression that Mr. Brown could appeal. In *Engle*, *Palm*, *Smith*, and *Echard*, as in this case, the attorneys and the trial court judge "were in the position to explain [Mr. Brown's] rights to [him] and, unfortunately, they did not meet the high burden placed on them by the Ohio and United States Constitutions to ensure that [Mr. Brown] made a knowing, voluntary, and intelligent decision." *Smith* at ¶11.

{¶13} We do not deem the State's argument that this case is not governed by *Engle* to be well taken. Whether Mr. Brown was misinformed as to the effect of a no contest plea or a guilty plea, while a factual distinction, is not determinative of the outcome. Mr. Brown could not have entered his plea knowingly and intelligently if he was counseled that he would be able to appeal the denial of his pretrial motion. Accordingly, Mr. Brown's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT FAILED TO ADHERE TO THE REQUIREMENTS OF THE CRIM.R. 11 COLLOQUY RENDERING [MR. BROWN'S] PLEA INVALID."

{¶14} In his second assignment of error, Mr. Brown contends that the trial court failed to adhere to the requirements of the Crim.R. 11 colloquy, rendering his plea invalid. Our decision

regarding Mr. Brown's first assignment of error renders his second assignment of error moot. App.R. 12(A)(1)(c).

III.

{¶15} Mr. Brown's first assignment of error is sustained. His second assignment of error is rendered moot. The judgment of the Summit County Court of Common Pleas is vacated, and the cause is remanded to the trial court for further proceedings consistent with this opinion.

Judgment vacated,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶16} I respectfully dissent. Unlike the circumstances in *State v. Engle* (1996), 74 Ohio St.3d 525, the trial court here specifically informed Brown at his plea hearing that he would be giving up his right to appeal. As Brown agreed, I would affirm.

APPEARANCES:

MARTHA HOM, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.