

[Cite as *State v. McGrady*, 2010-Ohio-3243.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2009 CA 60
v.	:	T.C. NO. 2009CR0158
	:	
OLIVIA K. McGRADY	:	(Criminal appeal from Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

.....

**OPINION**

Rendered on the 9<sup>th</sup> day of July, 2010.

.....

ELIZABETH A. ELLIS, Atty. Reg. No. 0074332, Assistant Prosecutor, 61 Greene Street,  
Xenia, Ohio 45385  
Attorney for Plaintiff-Appellee

DAVID A. SAMS, Atty. Reg. No. 0055235, P. O. Box 40, W. Jefferson, Ohio 43162  
Attorney for Defendant-Appellant

.....

DONOVAN, P.J.

{¶ 1} Defendant-appellant Olivia K. McGrady appeals from her conviction and sentence on one count of violating a protection order, in contravention of R.C. 2919.27(A)(1), a felony of the third degree, and one count of theft, in violation of

2913.02(A)(1), a felony of the fifth degree. Olivia filed a timely notice of appeal with this Court on August 17, 2009.

## I

{¶ 2} The charges against Olivia stemmed from an incident which occurred on March 1, 2009. Prior to the date on which the offenses occurred, Olivia's mother, Laundra McGrady, sought and was granted a domestic violence temporary protection order against Olivia which restrained her from contacting Laundra or entering the residence of her mother.

On March 1, 2009, Olivia called Laundra by phone and then traveled to her mother's residence, all in contravention of the protection order. Upon arriving at the residence, Olivia gained access to the house and stole property valued between \$500.00 and \$5,000.00.

{¶ 3} On March 23, 2009, Olivia was charged by secret indictment with one count of violating a protection order, in contravention of R.C. 2919.27(A)(1), a felony of the third degree, and one count of burglary, in violation of 2911.12(A)(3), a felony of the third degree.

Olivia was arraigned on March 27, 2009, and pleaded not guilty to both of the charges in the indictment.

{¶ 4} On May 26, 2009, Olivia plead guilty to one count of violating a protection order and one count of theft. The State had agreed to reduce the burglary charge down to one count of theft. The trial court ordered a pre-sentence investigation and scheduled Olivia's sentencing hearing for July 17, 2009, at 2:30 p.m.

{¶ 5} Prior to the sentencing hearing, Olivia filed a motion to withdraw her plea and supporting affidavit on July 15, 2009. As a basis for the request, Olivia argued that her plea was not made knowingly nor voluntarily. During the subsequent hearing on July 17,

2009, Olivia also asserted that she believed that she was innocent of the charges and wanted a jury trial. Olivia's mother, Laundra, testified at the hearing on behalf of her daughter. Laundra provided testimony which was inconsistent with prior statements she made regarding Olivia's behavior. Laundra, however, did acknowledge that Olivia violated the terms of the protection order. After entertaining arguments from the State and Olivia's counsel, the trial court denied Olivia's motion to withdraw her guilty pleas and sentenced her to four years in prison for violation of the protection order and six months on the theft charge, the sentences to be served concurrently.

{¶ 6} It is from this judgment that Olivia now appeals.

## II

{¶ 7} Olivia's first assignment of error is as follows:

{¶ 8} "THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS HER PLEA WAS NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED."

{¶ 9} In her first assignment, Olivia contends that the trial court erred when it failed to inform her during the Crim. R. 11(C) colloquy, of her constitutional right to a unanimous jury. Olivia also asserts that the court erred when it failed to advise her of her right to testify on her own behalf.

{¶ 10} Crim. R. 11(C) sets forth the requisite notice to be given to a defendant at a plea hearing on a felony. To be fully informed of the effect of the plea, the court must

determine that the defendant's plea was made with an "understanding of the nature of the charges and the maximum penalty involved." Crim. R. 11(C)(2)(a).

{¶ 11} In order for a plea to be given knowingly and voluntarily, the trial court must follow the mandates of Crim. R. 11(C). If a defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and is void. *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274.

{¶ 12} A defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. *State v. Stewart* (1977), 51 Ohio St.2d 86, 93; Crim. R. 52(A). The test is whether the plea would have been otherwise made. *Id.* at 108.

{¶ 13} A trial court must strictly comply with Crim. R. 11 as it pertains to the waiver of federal constitutional rights. These include the right to trial by jury, the right of confrontation, and the privilege against self-incrimination. *Id.* at 243-44. However, substantial compliance with Crim. R. 11(C) is sufficient when waiving non-constitutional rights. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. The non-constitutional rights that a defendant must be informed of are the nature of the charges with an understanding of the law in relation to the facts, the maximum penalty, and that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence. Crim. R. 11(C)(2)(a)(b); *State v. Philpott*, Cuyahoga App. No. 74392, citing *McCarthy v. U.S.* (1969), 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418. 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*, 56 Ohio St.3d at 108.

{¶ 14} Initially, we note that the trial court expressly advised Olivia of her constitutional right to a jury trial during the plea hearing. Olivia argues that the court failed to additionally inform her of her right to a unanimous jury verdict. In *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, however, the Ohio Supreme Court recently held that a court did not need to inform a defendant of the unanimity requirement regarding a jury verdict in order for the defendant to validly waive his right to a jury trial. “\*\*\* [A] defendant need not have a complete or technical understanding of the jury-trial right in order to waive it.” *Id.* In the instant case, the trial court properly informed Olivia of her constitutional right to jury trial during the plea hearing. The fact that the court did not additionally inform of her the requirement for jury unanimity did not render her guilty pleas unknowing nor involuntary.

{¶ 15} We also find no merit to Olivia’s assertion that her plea was rendered void by the court’s failure to inform her of her right to testify on her own behalf. During the Crim. R. 11(C) colloquy, the court stated the following:

{¶ 16} “The Court: \*\*\* In addition, you would have the right to call your own witnesses to testify for you at trial, and if those witnesses were for any reason unwilling or reluctant to come in and testify, [defense counsel] could force them to come testify by virtue of what is called compulsory process or subpoena power of the Court.

{¶ 17} “You have the right to demand the State of Ohio prove each and every element of the offenses they claim you committed beyond a reasonable doubt.

{¶ 18} “Also, you have a presumption of innocence. *At your trial you have the right to remain silent. No one can force you to testify against yourself, and if you did*

*choose to remain silent, that fact could not be used in any way against you.”*

{¶ 19} While the court did not expressly advise Olivia that she could testify on her own behalf at trial, the court did state that she did not have to provide testimony against herself, or otherwise incriminate herself. It is implicit in the court’s colloquy with Olivia that she could testify at her trial if she so desired, but that no one could force her to do so. Moreover, other than pointing out alleged deficiencies in the court’s Crim. R. 11(C) colloquy, Olivia has failed to demonstrate any prejudice resulting therefrom. Thus, we hold that Olivia’s guilty pleas were made in a knowing, intelligent, and voluntarily fashion.

{¶ 20} Olivia’s first assignment of error is overruled.

### III

{¶ 21} Olivia’s second assignment of error is as follows:

{¶ 22} “THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT OVERRULED HER PRE-SENTENCE MOTION TO WITHDRAW HER PLEA BASED ON A CLAIM OF INNOCENCE AND IN THE ABSENCE OF ANY SHOWING OF PREJUDICE BY THE STATE.”

{¶ 23} In her second assignment, Olivia argues that the court erred when it denied her pre-sentence motion to withdraw her guilty pleas.

{¶ 24} A motion to withdraw a plea of guilty or no contest is governed by Crim.R. 32.1, which states:

{¶ 25} “A motion to withdraw a plea of guilty or no contest may be made only

before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.”

{¶ 26} The Ohio Supreme Court has ruled that a trial court should “freely and liberally grant” a pre-sentence motion to withdraw a guilty plea, provided that the defendant provides a reasonable and legitimate basis for the withdrawal. *State v. Xie* (1992), 62 Ohio St.3d 521, 526-27. However, “[a] defendant does not have an absolute right to withdraw a guilty plea prior to sentencing.” *Id.* at paragraph one of the syllabus. A decision to allow the withdrawal of a guilty plea before sentencing is within the sound discretion of the trial court. *Id.* at paragraph two of the syllabus.

{¶ 27} In reviewing whether the trial court abused its discretion, we apply the following factors: “(1) whether the accused was represented by highly competent counsel; (2) whether the accused was given a full Crim.R. 11 hearing before entering the plea; (3) whether a full hearing was held on the withdrawal motion; and (4) whether the trial court gave full and fair consideration to the motion.” *State v. McNeil* (2001), 146 Ohio App.3d 173, 176, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211, 214. A defendant generally is not allowed to withdraw his plea prior to sentencing just because he is made aware that a subjectively unexpected sentence is going to be imposed. *State v. Uribe* (Mar. 5, 1999), Montgomery App. No. 17044, citing *State v. Peterseim* (1980), 68 Ohio App.2d at 213.

{¶ 28} On appeal, Olivia contends that the trial court failed to give full and fair consideration to her motion, and that no evidence was adduced which demonstrated that the State would suffer any prejudice as a result of the withdrawal. Olivia also argues that a pre-sentence motion to withdraw a plea should be freely and liberally granted.

{¶ 29} We note that the trial court complied with the provisions of Crim.R. 11(C)(2) during the plea hearing. Olivia indicated that she was satisfied with the representation afforded her and she had sufficient time to discuss the matter with her lawyer. Olivia stated that she had completed approximately twelve years of school. Olivia acknowledged that she had not been threatened or promised anything other than the reduction of the burglary charge in exchange for her plea. Olivia stated she was not under the influence of drugs or alcohol. Olivia did not indicate to the court that she was under any emotional stress. Olivia indicated that her plea was voluntary and acknowledged that she understood the nature of the charges against her. The trial court explained the maximum penalties, judicial release, and post release control. The court adequately explained the rights Olivia waived by entering guilty pleas. Olivia acknowledged all of her rights, indicated that she understood them, and signed the plea form.

{¶ 30} Upon review of the record, we find no error in the trial court's ruling. Olivia was given a complete and impartial hearing regarding the withdrawal of her pleas, and she was given ample opportunity to explain her reasons for seeking withdrawal. Olivia's basis for seeking the withdrawal, however, revealed only a change of heart. The court provided Olivia a hearing on her motion to withdraw her pleas and listened to Laundra's testimony regarding her belief that Olivia had not done anything wrong and that she simply needed help for her substance abuse problems. It is apparent from the record that the court did not give any weight to Laundra's contradictory testimony regarding Olivia's criminal behavior. Laundra's testimony was internally inconsistent and primarily a mother's plea for treatment in lieu of imprisonment. The record also reflects that Olivia was represented by highly



competent counsel at the plea hearing.

{¶ 31} Simply put, there is no indication from the record that Olivia’s decision to file a motion to withdraw her pleas was anything other than a mere “change of heart,” which is not a sufficient basis upon which a defendant can rely in order to successfully withdraw her guilty pleas. Under these circumstances, the trial court did not abuse its discretion in denying Olivia’s motion to withdraw her guilty pleas.

{¶ 32} Olivia’s second assignment of error is overruled.

#### IV

{¶ 33} Olivia’s third and final assignment of error is as follows:

{¶ 34} “THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE IMPOSITION OF A PRISON TERM GREATER THAN THE MINIMUM TERM IN THE ABSENCE OF REQUIRED FINDINGS WHEN SHE HAD NEVER SERVED A PRISON TERM BEFORE.”

{¶ 35} In her final assignment, Olivia argues that the greater than minimum sentences imposed by the trial court are contrary to law and a violation of her constitutional rights. Olivia’s argument in this regard is based on her assertion that the recently decided U.S. Supreme Court case of *Oregon v. Ice* (2009), – U.S. –, 129 S.Ct. 711, 172 L.Ed.2d 517, has effectively overruled the Ohio Supreme Court’s decision in *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856.

{¶ 36} The Ohio Supreme Court has stated that “[t]he general rule is that ‘an

appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.' \* \* \* Likewise '[c]onstitutional rights may be lost as finally as any others by a failure to assert them at the proper time.' \* \* \* Accordingly, the question of the constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution, this means in the trial court." *State v. Awan* (1986), 22 Ohio St.3d 120, 122. However, the Supreme Court has cautioned that this waiver doctrine is discretionary and that "[e]ven where waiver is clear, this court reserves the right to consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it." *In re M.D.* (1988), 38 Ohio St.3d 149, syllabus.

{¶ 37} In this case, it is undisputed that neither Olivia nor her counsel raised the issue of the constitutionality of the Ohio Supreme Court's holding in *Foster* in light of the U.S. Supreme Court's holding in *Ice* before the trial court. We note that Olivia has not argued ineffective assistance of trial counsel as an assignment of error on appeal. Furthermore, *Oregon v. Ice*, upon which Olivia relies, only addressed consecutive sentencing. It is undisputed that Olivia has raised this issue for the first time on appeal. As the issue was not raised before the trial court, the issue has been waived and we decline to consider it. Olivia's final assignment of error is without merit and is overruled.

V

{¶ 38} All of Olivia's assignments of error having been overruled, the judgment of the trial court is affirmed.

.....

FAIN, J. and KLINE, J., concur.

(Hon. Roger L. Kline, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Elizabeth A. Ellis  
David A. Sams  
Hon. J. Timothy Campbell