[Cite as *State v. Dobbs*, 2010-Ohio-3649.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2009 CA 70
v.	:	T.C. NO. 09 CR 417
GARY W. DOBBS, JR.	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 6th day of August, 2010.

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FROELICH, J.

{¶ 1} Gary W. Dobbs, Jr. pled no contest to nine counts of rape and two counts of unlawful sexual conduct with a minor after the Greene County Court of Common Pleas overruled his motion to suppress evidence. The court found him guilty and sentenced him to an aggregate term of ten years to life. Dobbs was designated a Tier III sex offender.

{¶ 2} Dobbs appeals from the denial of his motion to suppress, arguing that his statements to a police detective were involuntary. Dobbs further claims that the trial court erred in finding him guilty, because there was no statement at the plea hearing of the elements of the charges or the facts supporting the charges against him. For the following reasons, we reject Dobbs's arguments, and the trial court's judgment will be affirmed.

I

{¶ 3} On July 10, 2009, Dobbs was indicted for nine counts of rape, in violation of R.C. 2907.02(A)(1)(b), and two counts of unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A). Dobbs entered initial pleas of not guilty.

{¶ 4} Dobbs subsequently moved to suppress statements that he made to the police when he was interrogated at the Xenia Police Department. He claimed that the police "made implied and improper representations to Defendant that if Defendant would admit certain crimes, police would obtain leniency (probation and treatment) for him." The trial court held a hearing on the motion on September 14, 2009, during which Detective Clay testified for the State and Dobbs testified on his own behalf. A copy of the pre-interview *Miranda* rights form and a DVD of the interview were admitted as evidence. The court took the matter under advisement.

{¶ 5} On September 21, 2009, the morning of Dobbs's scheduled jury trial, the trial court orally overruled the motion to suppress. The court found that Dobbs had knowingly, intelligently, and voluntarily waived his *Miranda* rights and that the detective's statements to Dobbs about her informing the court of Dobbs's cooperation and remorse or lack thereof fell "in the category of admonishing the Defendant to tell the truth, which case law upholds as a valid

statement made to someone who is involved in an interview and is not an attempt to improperly make promises or threats or coerce an individual into making statements."[1]

{¶ 6} After the trial court's oral ruling, Dobbs informed the court that he wished to arrange a plea with the State "in order to save the victim the embarrassment of testifying." After a short recess, Dobbs entered a plea of no contest to the nine counts of rape and the two counts of unlawful sexual conduct with a minor. As part of an extensive plea colloquy, the court discussed the charges with Dobbs, as follows:

{¶ 7} "THE COURT: Have you and your Counsel discussed together the nature of the charges that you are facing in this case?

{¶ 8} "THE DEFENDANT: Yes.

{¶ 9} "THE COURT: Do you understand what each of these offenses accuse you of doing?

{¶ 10} "THE DEFENDANT: Yes.

{¶ 11} "THE COURT: Have you reviewed the evidence the State has provided in discovery in this case that sets forth the facts, the basis of each of these charges?

{¶ 12} "THE DEFENDANT: Yes.

{¶ 13} "THE COURT: Have you and your Counsel discussed the possibility of legal defenses, if any, in this case?

{¶ 14} "THE DEFENDANT: Yes.

{¶ 15} "***

{¶ 16} "THE COURT: Okay. And do you understand that a no contest plea is

[1]A written entry overruling the motion to suppress was filed on October 2, 2009, after the notice of appeal was filed.

not one in which you are making any admissions. However, you should expect the Court will make a finding of guilty as a result of this plea, but also recognize that it preserves your right to appeal. Certainly the decision the Court has made regarding the Motion to Suppress, you have that right preserved, and, also, the no contest plea cannot be used against you in any future civil or criminal proceeding. Do you understand all that?

{¶ 17} "THE DEFENDANT: Yes, sir.

{¶ 18} "THE COURT: Okay. Now, I have a Rule 11 Notification and Waiver form. It appears to have your signature. Is that your signature on here?

{¶ 19} "THE DEFENDANT: Yes.

{¶ 20} "THE COURT: Have you gone over this with Mr. Wilmes?

{¶ 21} "THE DEFENDANT: Yes.

{¶ 22} "THE COURT: And you understand everything on here?

{¶ 23} "THE DEFENDANT: Yes.

{¶ 24} "THE COURT: Now, this indicates you will be entering a no contest plea to nine counts of Rape, a felony of the first degree, and two counts of Unlawful Sexual Conduct With a Minor, both felonies of the third degree. Is that your understanding?

{¶ 25} "THE DEFENDANT: Yes.

{¶ 26} "***

{¶ 27} "THE COURT: *** Is the State satisfied with the record regarding the plea at this point?

{¶ 28} "MRS. BURKE: Yes.

{¶ 29} "THE COURT: Counsel?

{¶ 30} "MR. WILMES: Yes.

{¶ 31} "THE COURT: Mr. Dobbs, as to the charges we've previously discussed how do you wish to plead at this time?

{¶ 32} "THE DEFENDANT: No contest."

{¶ 33} The court found that Dobbs's plea was entered knowingly, intelligently, and voluntarily, and that it had complied with Crim.R. 11. The court accepted Dobbs's pleas and found him guilty of each of the eleven counts. After another brief recess, the court sentenced Dobbs to ten years to life for each count of rape and to five years for each count of unlawful sexual conduct with a minor, all to be served concurrently. Dobbs was designated a Tier III sex offender.

{¶ 34} Dobbs appeals from the judgment, raising two assignments of error.

II

{¶ 35} Dobbs's first assignment of error states:

{¶ 36} "THE APPELLANT SHOULD BE ACQUITTED BECAUSE THE APPELLEE FAILED TO PROVIDE AN EXPLANATION OF THE CIRCUMSTANCE SUPPORTING THE CHARGES HE PLED NO CONTEST TO."

{¶ 37} In his first assignment of error, Dobbs claims that the trial court erred in finding him guilty on his no contest plea without an explanation of the facts and circumstances involved. Citing *Chagrin Falls v. Katelanos* (1988), 54 Ohio App.3d 157, and *Cuyahoga Falls v. Bowers* (1984), 9 Ohio St.3d 148, Dobbs asserts that, where the State's statement of facts fails to establish all of the elements of the offense, a defendant who pleads no contest must be acquitted of the offense.

{¶ 38} Dobbs did not raise this argument at the plea hearing. Accordingly, we review Dobbs's assignment for plain error. *State v. Peoples*, Miami App. No. 2005 CA 20, 2006-Ohio-4162, ¶11. "To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings." *State v. Landgraf*, Montgomery App. No. 21141, 2006-Ohio-838, ¶24, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68.

{¶ 39} The requirements for a no contest plea in felony cases differ from those for a no contest plea in misdemeanor cases. Pursuant to R.C. 2937.07, the trial court in a misdemeanor case is required to hear an explanation of the circumstances surrounding the offense and then determine whether the facts are sufficient to convict on the misdemeanor offense. See *State v. Adams*, Montgomery App. No. 22493, 2009-Ohio-2056, ¶14. The Supreme Court of Ohio has held that "the provision in R.C. 2937.07 requiring an explanation of circumstances following a plea of no contest [in a misdemeanor case] has not been superseded by the enactment of Crim.R. 11 because the statutory provision confers a substantive right." *Bowers*, 9 Ohio St.3d at 151. *Katelanos*, following *Bowers*, reversed a conviction for a first-degree misdemeanor when the trial court failed to call for the required explanation of circumstances and there was no showing that the court considered that information before convicting the defendant.

{¶ 40} R.C. 2937.06(A)(1) does not authorize a no contest plea in felony cases. See *Landgraf* at ¶20, n.1 (commenting that there appears to be no statutory provision in Ohio for no contest pleas in felony cases). However, Crim.R. 11 "permits a plea of no contest to a criminal charge, and does not require an explanation of the circumstances.

Instead, the rule permits the court to enter judgment only based upon the facts as alleged in the indictment." *Adams* at ¶14. "Where an indictment, information, or complaint contains sufficient allegations to state a felony offense and the defendant pleads no contest, the court must find the defendant guilty of the charged offense." *State v. Bird*, 81 Ohio St.3d 582, 1998-Ohio-606.

{¶ 41} Dobbs was convicted of nine first-degree felonies and two third-degree felonies. Neither R.C. 2937.07 nor the cases cited by Dobbs are applicable. Accordingly, the trial court was not required to hear an explanation of the circumstances surrounding the offense. Instead, the court was required to ensure that Dobbs's plea was knowing, intelligent, and voluntary, in accordance with the requirements of Crim.R.11(C).

{¶ 42} "Crim.R. 11(C)(2) requires the court to (a) determine that the defendant is making the plea voluntarily, with an understanding of the nature of the charges and the maximum penalty, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions; (b) inform the defendant of and determine that the defendant understands the effect of the plea of guilty and that the court, upon acceptance of the plea, may proceed with judgment and sentencing; and (c) inform the defendant and determine that he understands that, by entering the plea, the defendant is waiving the rights to a jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself." *State v. Brown*, Montgomery App. No. 21896, 2007-Ohio-6675, ¶3. See, also, *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶27.

{¶ 43} The Supreme Court of Ohio has urged trial courts to literally comply with Crim.R. 11. *Clark* at ¶29. However, because Crim.R.11(C)(2)(a) and (b) involve non-constitutional rights, the trial court need only substantially comply with those requirements. E.g., *State v. Nero* (1990), 56 Ohio St.3d 106, 108; *Greene* at ¶9. The trial court must strictly comply with Crim.R. 11(C)(2)(c), as it pertains to the waiver of federal constitutional rights. *Clark* at ¶31.

{¶ 44} We have reviewed the transcript of the plea hearing and find nothing to support a contention that Dobbs's pleas were not made knowingly, intelligently, and voluntarily. The court asked Dobbs if he had reviewed the nature of the charges with his attorney, whether he understood the charges, whether he had reviewed the State's discovery, and whether he had discussed any potential legal defenses with his attorney; Dobbs responded affirmatively to each question. The court orally identified the charges to which Dobbs would be pleading and confirmed that Dobbs had signed a plea form. That form indicated, among other things, that Dobbs was pleading no contest to Counts One through Nine, which charged rape in violation of R.C. 2907.02(A)(1)(b), a first degree felony, and to Counts Ten and Eleven, which charged unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A), a third degree felony. The form acknowledged that Dobbs understood the nature of the charges, the effect of his plea, the maximum sentences, and that he would be classified a Tier III sex offender.

{¶ 45} The trial court further explained to Dobbs the effect of a no contest plea, including the fact that he retained the right to appeal the denial of his motion to suppress and the fact that his pleas did not constitute admissions of guilt. The court

thoroughly reviewed the maximum punishments and fines, the mandatory nature of those punishments, Dobbs's ineligibility for community control on the rape charges, the requirements of parole and post-release control, and the fact that Dobbs would be classified as a Tier III sex offender. Dobbs's constitutional rights were reviewed, and Dobbs expressed that he was willing to waive those rights for purposes of entering pleas in the case. The court inquired whether Dobbs's plea was the product of promises or duress. The court informed Dobbs that it intended to impose sentence that day and to impose the sentence of ten years to life.

{¶ 46} The trial court concluded that it had complied with Crim.R 11(C) and that Dobbs had knowingly, intelligently, and voluntarily entered his pleas of no contest. We agree.

{¶ 47} Although it is the better practice, nothing in Crim.R. 11(C) required the trial court to read the indictment during the plea hearing, and the record establishes Dobbs understood the nature of the charges against him. The indictment tracked the language of the statutes and contained allegations sufficient to allege the nine counts of rape and the two counts of unlawful sexual conduct with a minor to which Dobbs pled; Dobbs does not contend otherwise. And, by entering a plea of no contest, Dobbs admitted the truth of the facts alleged in the indictment. Crim.R. 11(B)(2). Because the indictment contained allegations sufficient to allege the felony offenses to which Dobbs pled and Dobbs knowingly, intelligently, and voluntarily chose not to contest the charges, the trial court did not err when it found Dobbs guilty of committing the crimes charged.

{¶ 48} The first assignment of error is overruled.

III

{¶ 49} Dobbs's second assignment of error states:

{¶ 50} "THE TRIAL COURT ERRED IN NOT GRANTING THE MOTION TO SUPPRESS THE APPELLANT'S CONFESSION."

{¶ 51} In his second assignment of error, Dobbs claims that his confession was involuntary, because Detective Clay implied that she would speak to the trial court on his behalf if he confessed.

{¶ 52} The State's evidence at the suppression hearing established the following facts:

{¶ 53} On July 1, 2009, Detectives Clay and Meadows of the Xenia Police Department arrested Dobbs at his place of employment upon an arrest warrant. The detectives transported Dobbs to the police station and placed him in an interview room in the Detective's Section of the station. The interview, which was digitally recorded (both video and audio), began shortly before 2:30 p.m. and was conducted by Detective Clay. During the interview, Dobbs appeared to be healthy, and he did not appear to be under the influence of medicine, illegal drugs or alcohol. Detective Clay wore her firearm throughout the conversation.

{¶ 54} At the beginning of the interview, Detective Clay presented a "Constitutional Rights Pre-Interview Form" to Dobbs, which informed him of his *Miranda* rights. Dobbs wrote his name, his address, his years of schooling, and the date, time and place of the interview on the form. The detective read each of the rights aloud, asked Dobbs to mark "yes" or "no" with his initials where it asked "Do you understand?"

and told Dobbs to let her know if he had any questions. Dobbs marked that he understood each of his rights. He orally indicated that he agreed to talk with Clay and, at the bottom of the form, he signed and dated below the sentence reading: "With full knowledge of these rights, I knowingly waive these rights and voluntarily agree to answer questions and/or give a statement with out a lawyer present." Detective Clay signed the form as a witness and indicated that the interview would be digitally recorded. The form was admitted as State's Exhibit 1.

{¶ 55} At the suppression hearing, Detective Clay testified that Dobbs did not ever ask to stop the interview or for a lawyer. She denied promising anything to Dobbs or threatening him. Detective Clay indicated that she mentioned cooperation to Dobbs, but she always informs suspects that sentencing is beyond her control. Detective Clay indicated that her exact words would be reflected on the DVD of the interview, which was admitted as State's Exhibit 2.

{¶ 56} The DVD reflects that, after Dobbs waived his *Miranda* rights, Detective Clay encouraged Dobbs to cooperate. She told him that the "truth is the best way to go" and that, when he goes before a judge, the judge will want to know if Dobbs had been cooperative, remorseful, and if there was a possibility of getting him help. Detective Clay told Dobbs that she could not tell him what he "can get out of this," but it would be best for him to "work with" her. Detective Clay emphasized the importance of cooperation and stated that before she could give a good report to a court about him, she would need information and details from him. Throughout the interview, Detective Clay encouraged Dobbs to tell the truth.

{¶ 57} Dobbs testified that Detective Clay twice told him before presenting the

pre-interview form to him, "You and I can have a good relationship here. If you cooperate with me then I can speak with the Judge on your behalf." Dobbs stated that Detective Clay then said, "You don't want to actually go to trial, do you, because that would be terrible on her." Dobbs stated that he thought that, if he were honest with the detective, "it would be easier on my part if I'd cooperate." Dobbs did not know if Detective Clay's comments were on the video recording, because he was not aware that he was being recorded. Dobbs indicated that Detective Clay did not threaten him if he did not make an admission.

{¶ 58} As stated above, after hearing the testimony and reviewing the State's exhibits, the trial court orally overruled the motion to suppress. The court found that Dobbs had knowingly, intelligently, and voluntarily waived his *Miranda* rights and that Detective Clay's statements did not constitute unlawful inducements so as to render his statements involuntary.

{¶ 59} On appeal, Dobbs does not challenge the trial court's conclusion that he knowingly, intelligently, and voluntarily waived his *Miranda* rights. He claims only that his statements were made involuntarily due to unlawful inducements by Detective Clay.

{¶ 60} In ruling on a motion to suppress, the trial court assumes the role of the trier of fact; the court must determine the credibility of the witnesses and weigh the evidence presented at the suppression hearing. *State v. Morgan*, Montgomery App. No. 18985, 2002-Ohio-268, citing *State v. Curry* (1994), 95 Ohio App.3d 93, 96. In reviewing the trial court's ruling, this Court must accept the findings of fact made by the trial court if they are supported by competent, credible evidence. Id. However, "the reviewing court must independently determine, as a matter of law, whether the facts

meet the appropriate legal standard." Id.

{¶ 61} A defendant's statement to police is voluntary absent evidence that his will was overborne and his capacity for self-determination was critically impaired due to coercive police conduct. *Colorado v. Spring* (1987), 479 U.S. 564, 574, 107 S.Ct. 851, 93 L.Ed.2d 954; *State v. Otte*, 74 Ohio St.3d 555, 562, 1996-Ohio-108. "In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards* (1976), 49 Ohio St.2d 31, at paragraph two of the syllabus, overruled on other grounds, (1978), 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155. See, also, *State v. Brewer* (1990), 48 Ohio St.3d 50, 58; *State v. Marks*, Montgomery App. No. 19629, 2003-Ohio-4205. The State has the burden to show by a preponderance of the evidence that a defendant's confession was voluntarily given. *State v. Melchior* (1978), 56 Ohio St.2d 15.

{¶ 62} "Admonitions to tell the truth are considered to be neither threats nor promises and are permissible." *State v. Loza* (1994), 71 Ohio St.3d 61, 67, overruled on other grounds. A police officer's "[p]romises that a defendant's cooperation would be considered in the disposition of the case, or that a confession would be helpful, does not invalidate an otherwise legal confession." Id., citing *Edwards*, 49 Ohio St.2d at 40-41.

{¶ 63} Detective Clay's statements to Dobbs were not unlawful promises of leniency. Although Detective Clay repeatedly encouraged Dobbs to cooperate and to

tell the truth and she stated that she could inform the judge of his cooperation and remorse, the detective did not promise Dobbs that he would receive a more lenient sentence. To the contrary, Detective Clay told Dobbs that she had no control over his sentence. Detective Clay's statements to Dobbs did not render his confession involuntary.

{¶ 64} Dobbs has not argued that his statements to Detective Clay were involuntary due to other coercive police conduct, and we find no basis to conclude that any coercive police conduct occurred.

{¶ 65} The second assignment of error is overruled.

IV

{¶ 66} The trial court's judgment will be affirmed.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

Stephanie R. Hayden
William O. Cass, Jr.
Hon. Stephen A. Wolaver