[Cite as *State v. Dunaway*, 2010-Ohio-2304.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2009-05-141 CA2009-06-164
- vs -	:	O P I N I O N
	:	5/24/2010
JESSE LEE DUNAWAY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. 2008-04-0664

Robin N. Piper III, Butler County Prosecuting Attorney, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45011-6057, for plaintiff-appellee

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YOUNG, P.J.

{¶1} Defendant-appellant, Jesse Lee Dunaway, appeals his conviction and sentence in the Butler County Court of Common Pleas following his no contest plea to 12 offenses. We affirm.

{¶2} Appellant's convictions stemmed from an ongoing course of criminal activity occurring between March 4 and March 15, 2008. On the evening of March 4,

appellant sent numerous threatening text messages to the victim, his ex-girlfriend, Roselda Bean. Ten days later, appellant chased Bean's vehicle down Route 4 and ultimately crashed his vehicle into Bean's, causing a multiple-car accident. Roughly 24 hours later, on March 15, appellant broke into Bean's house and stabbed her 11 times.

{¶3} In May 2008, appellant was indicted on one count of attempted murder, two counts of aggravated burglary, three counts of felonious assault, two counts of violating a protection order, two counts of domestic violence, and one count each of menacing by stalking and telecommunications harassment, for a total of 12 counts. Appellant's trial counsel filed a written plea of not guilty by reason of insanity and a suggestion that appellant was incompetent to stand trail. The trial court subsequently ordered appellant to submit to a competency evaluation by the Butler County Center for Forensic Psychiatry. The competency evaluation indicated that appellant was competent to stand trial, and both parties stipulated to its admission.

{¶4} On February 24, 2009, appellant withdrew his not guilty by reason of insanity plea and entered a no contest plea to all 12 charges. After completing a plea colloquy pursuant to Crim.R. 11, the trial court accepted appellant's no contest plea and entered a finding of guilty on all 12 counts. The trial court sentenced appellant to 20 years in prison and to five years of postrelease control.

{¶5} Appellant appeals, raising two assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "APPELLANT'S CONSTITUTIONAL RIGHT TO COUNSEL WAS PREJUDICED BY THE INEFFECTIVE ASSISTANCE OF HIS TRIAL COUNSEL."

{¶8} In his first assignment of error, appellant argues that his counsel was "prejudicially deficient in his representation" because he failed to: (1) request a second competency evaluation, and (2) apprise the court-appointed psychologist of appellant's "substantial mental health history." Appellant claims that these failures cumulatively deprived him of the opportunity to "make a knowing, intelligent and voluntary decision to waive his trial and to amend his plea from not guilty by reason of insanity to no-contest."

Crim.R. 11 Colloquy

{¶9} Appellant's claim that his jury waiver and no-contest plea were not "knowing, intelligent and voluntary" requires a review of the trial court's Crim.R. 11 colloquy. The procedure a trial court must adhere to before accepting a criminal defendant's felony plea is governed by Crim.R. 11(C)(2), which provides as follows:

{¶10} "(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:

{¶11} "(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.

{¶12} "(b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.

{¶13} "(c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have

compulsory process for obtaining witnesses in his favor, 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."

{¶14} With respect to the nonconstitutional notifications required by Crim.R. 11(C)(2)(a) and (b), the Ohio Supreme Court has held that a trial court's "substantial compliance" during the plea colloquy is sufficient for a valid plea. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-2500, ¶22. Under this standard, a court's slight deviation from the text of the rule is permissible, so long as the totality of the circumstances indicates that the defendant subjectively understands the implications of his plea and the rights he is waiving. *State v. Douglass*, Butler App. Nos. CA2008-07-168, CA2008-08-199, 2009-Ohio-3826, ¶10. Further, a defendant must show prejudice "before a plea will be vacated for a trial court's error involving Crim.R.11(C) procedure when nonconstitutional aspects of the colloquy are at issue." *Veney* at ¶17; *State v. Nero* (1990), 56 Ohio St.3d 106, 108 (the test for prejudice is "whether the plea would have otherwise been made").

{¶15} However, when advising a defendant of the rights enumerated in Crim.R. 11(C)(2)(c), a court must exercise "strict" compliance during the plea colloquy for the plea to be valid. *Veney* at ¶18-22. As the Supreme Court stated, "[a]lthough the trial court may vary slightly from the literal wording of the rule in the colloquy, the court cannot simply rely on other sources to convey these rights to the defendant." Id. at ¶29. Specifically, before accepting a felony plea, "a trial court must orally advise a defendant * * * that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain

witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination." Id. at ¶31.

{¶16} At the February 23, 2009 plea hearing, the following colloquy took place, in pertinent part:

{¶17} "MR. SALYERS [prosecuting attorney]: We are here in the case of State of Ohio versus [appellant], CR-08-04-0664. * * * [I have been handed] an executed jury waiver, and then three plea forms that [appellant] has executed with the assistance of his counsel in which [appellant] is pleading no contest to all 12 charges of the indictment without any agreement.

{¶18} "MR. SCHNEIDER [appellant's attorney]: Your Honor, for the record, Tim Schneider on behalf of [appellant] who is to my left, and what was stated to the Court by Mr. Salyers is accurate.

{¶19} " * * *

{¶20} "THE COURT: Is this your signature here?

{¶21} "THE DEFENDANT: It is.

{¶22} "THE COURT: You have a right to a trial. Even if you are guilty, you have a right to a trial. You have a right to have the State prove the case against you, and they have to do that by proving each and every element of the offense beyond a reasonable doubt. The burden is on them. If they don't meet their burden, there's a finding of not guilty on whatever charge that they fail to meet their burden on. Do you understand that?

{¶23} "THE DEFENDANT: Yes, ma'am.

{¶24} "THE COURT: You have a right to have the State bring their witnesses

in and make them testify from the witness stand, and you have the right to have your attorney cross-examine those witnesses after the prosecution has finished asking questions, and cross-examination simply means to ask questions. Do you understand that?

{¶25} "THE DEFENDANT: Yes, ma'am.

{¶26} "THE COURT: You have a right to have your own witnesses here. You have a right to have your own witnesses subpoenaed to make sure they are here. If you give the names and addresses of your witnesses to your attorney, this Court will subpoena them for you. A subpoena is a court order that tells somebody that they have to be here, and if they don't obey the subpoena, I will immediately issue a material witness warrant and send the police out to get them right away, and we will hold them in jail until we get them over here. Do you understand that?

{¶27} "THE DEFENDANT: Yes.

{¶28} "THE COURT: You have a right to remain silent. That means the prosecution cannot make you take the stand and testify. The only person to decide whether to take the stand to testify [is] you, yourself, based upon advice from your attorney. Do you understand that?

{¶29} "THE DEFENDANT: Yes.

{¶30} "THE COURT: And you have a right to a trial by a jury of twelve people, and they can't come back with a guilty verdict unless all twelve vote guilty. Do you understand that?

{¶31} "THE DEFENDANT: Yes.

{¶32} "THE COURT: I have here a jury waiver, did you read that?

{¶33} "THE DEFENDANT: I did.

{¶34} "THE COURT: Did you discuss that with your attorney?

{¶35} "THE DEFENDANT: I did.

{¶36} "THE COURT: And this is your signature, is that correct?

{¶37} "THE DEFENDANT: Yes.

{¶38} "THE COURT: Do you understand that means that there will be no jury trial, the jury trial will not go forward on March 3rd. Do you understand that?

{¶39} "THE DEFENDANT: Yes.

{¶40} "THE COURT: Is this what you want to do?

{¶41} "THE DEFENDANT: Yes, ma'am.

{¶42} "THE COURT: Are you sure?

{¶43} "THE DEFENDANT: Yes.

{¶44} "THE COURT: Positive?

{¶45} "THE DEFENDANT: Positive.

{¶46} " * * *

{¶47} "THE COURT: Do you understand that on a no contest plea if the prosecutor reads facts which make out the fact pattern of * * * each particular plea, that this Court is going to make a finding of guilty, do you understand that?

{¶48} "THE DEFENDANT: I do.

{¶49} "THE COURT: And this court could make these sentences consecutive. Do you understand that?

{¶50} "THE DEFENDANT: Yes.

{¶51} " * * *

{¶52} "THE COURT: [This court is] going to put you, no question about it, on post-release control for a period of five years under the supervision of a parole authority reporting to a parole officer. And that is very important to you because that subjects you to the possibility of more prison time than what is on the plea because if you violate their rules and regulations, they can send you back in increments of 30, 60, 90 days, and they can send you back for a total amount of time of one-half of whatever I sentence you to in addition to the sentence that I gave if you violate the post-release control. Do you understand that?

{¶53} "THE DEFENDANT: I do.

{¶54} " * * *

{¶55} "THE COURT: And do you understand that * * * I'm not going to go through judicial or community control because it is not my intention to do that.

{¶56} "THE DEFENDANT: Yes, Your Honor.

{¶57} "THE COURT: Do you understand that if you enter this plea, and I make a finding of guilty, that there will be no trial, do you understand that?

{¶58} "THE DEFENDANT: I do.

{¶59} "THE COURT: Okay. Do you have any questions about what you are doing that you would like to ask me before we go forward?

{¶60} "THE DEFENDANT: I do not.

{¶61} "THE COURT: Do you have any questions that you need to ask your attorney or talk to you attorney before we go forward?

{¶62} "THE DEFENDANT: No.

{¶63} "THE COURT: Have any threats or promises been made to you to get

you to plea to this?

{¶64} "THE DEFENDANT: No.

{¶65} " * * *

{¶66} "THE COURT: Do you understand that by signing that, you are entering a no contest plea on * * * those charges?

{¶67} "THE DEFENDANT: Yes, ma'am.

{¶68} "THE COURT: Is this what you want to do?

{¶69} "THE DEFENDANT: Yes, ma'am.

{¶70} "THE COURT: Are you sure?

{¶71} "THE DEFENDANT: Yes, ma'am.

{¶72} "THE COURT: Are you positive?

{¶73} "THE DEFENDANT: Yes, ma'am.

{¶74} "THE COURT: What is your plea?

{¶75} "THE DEFENDANT: No contest."

{¶76} In addition to the quoted material, the trial court explained the maximum possible penalties for each charge and asked whether appellant understood the nature of the charges to which he was pleading no contest. After careful review of the trial court's plea colloquy with appellant, we find that the court diligently complied with the nonconstitutional requirements of Crim.R. 11(C)(2)(a) and (b), and strictly complied with the constitutional requirements of Crim.R. 11(C)(2)(c) in accepting appellant's plea.

{¶77} Further, when the trial court accidentally stated that appellant was pleading "guilty" to attempted murder, appellant immediately conferred with his

attorney, who then informed the court that appellant "just wanted to clarify that he [was] pleading no contest." In sum, appellant appears to have understood the information given to him by the trial court and the consequences of his choice to plead no contest. Thus, we find that appellant's no contest plea was properly accepted by the trial court and was knowingly, intelligently, and voluntarily made.

Ineffective Assistance of Counsel

{¶78} In his first assignment of error, appellant also argues that his trial counsel was ineffective. We disagree.

{¶79} To establish ineffective assistance, appellant must first show that his counsel's actions fell below an objective standard of reasonableness, and secondly, that appellant was prejudiced as a result of counsel's actions. *Strickland v. Washington* (1984), 466 U.S. 668, 687-88, 104 S.Ct. 2052. Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 694. A strong presumption exists that licensed attorneys are competent and that the challenged action is the product of a sound trial strategy and falls within the wide range of professional assistance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143, certiorari denied (1990), 497 U.S. 1011, 110 S.Ct. 3258.

{¶80} Appellant first claims his counsel was ineffective because he failed to request a second competency evaluation after the court-appointed psychologist's evaluation concluded that appellant was competent to stand trial. Because appellant initially pled not guilty by reason of insanity, trial counsel could have requested an independent evaluation by an examiner of appellant's choice. R.C. 2945.371(B).

However, we cannot say that counsel was ineffective for failing to request a second competency evaluation simply because appellant was entitled to one by law. See *State v. Connor* (July 17, 2000), Brown App. No. CA99-08-024, at 4. "The decision not to request another evaluation may have been a tactical strategy, since a second report finding appellant competent to stand trial and not under any mental illness would bolster the state's position." Id.

{¶81} In the case at bar, even though counsel may have been aware that appellant had a history of mental illness, there is nothing in the record showing that a second evaluation would have determined appellant not competent to stand trial. In her competency evaluation, the court-appointed psychologist stated that appellant possessed no symptoms that would "significantly interfere with his understanding of the nature and objective of the legal proceedings he is likely to encounter or with his ability to assist in his defense. In fact, [appellant] demonstrated a good understanding of the charges against him and the possible penalties if convicted of these charges. He also demonstrated a good understanding of the legal proceedings he [would] likely encounter including the plea process, plea bargaining and presenting and confronting witnesses and other trial procedures."

{¶82} The record also reveals that, throughout the course of this case, appellant wrote numerous letters to his trial counsel and the court. In these letters, appellant demonstrated a keen grasp on the rules of criminal procedure and the meaning and significance of specific court proceedings.[1] Further, appellant is no

1. In a letter dated October 3, 2008, appellant ordered his attorney to file a motion to suppress evidence related to Bean's stabbing, including "all blood evidence," appellant's confession due to intoxication, and multiple witness' statements. In another letter to his attorney, appellant accurately

stranger to the judicial system, having had multiple prior convictions for aggravated assault, disorderly conduct, fleeing and alluding, hit and run, and wanton endangerment. Thus, it is clear that appellant has an adequate grasp on the inner workings of the judicial system.

{¶83} In sum, given the amount of evidence in favor of a competency finding, we cannot say that appellant's trial counsel was outside the range of professionally competent assistance when he failed to request a second competency evaluation. Furthermore, the evidence does not support a finding that a second evaluation would have resulted in a different competency finding. See *In re Stone*, Clinton App. No. CA2002-09-035, 2003-Ohio-3071, ¶18.

{¶84} Appellant next asserts that his trial counsel was ineffective for failing to apprise the court-appointed psychologist of "relevant information regarding [his] substantial mental health history." However, we fail to see how appellant's psychological history is related to his ability to understand the nature of the proceedings and to assist in his defense. Further, appellant gave the court-appointed psychologist ample background information relevant to his psychological history, including a history of his childhood, family, education, employment, relationships, mental health and substance abuse. In addition, appellant completed psychological testing that indicated appellant likely had a "borderline personality with paranoid features of suspicion, distrust and overgeneralization," but that appellant

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cited multiple sections of the Ohio Revised Code, including "2923.02 Attempt: attempt to commit aggravated murder is a max sentance [sic] to life imprisonment." In another letter, appellant defined a plea bargain as "a negotiated agreement between a prosecutor [and] criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor."

appeared "capable of managing his emotions and behavior in a courtroom and tolerating the stress of legal proceedings." Given this evidence, we find there is no reasonable probability that the result of the competency evaluation would have been different had appellant's trial counsel introduced evidence of appellant's psychological history. Therefore, appellant's ineffective assistance of counsel argument fails.

{¶85} Appellant's first assignment of error is overruled.

{¶86} Assignment of Error No. 2:

{¶87} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT SENTENCED HIM."

{¶88} Appellant argues that the trial court erred in imposing consecutive sentences without first making certain findings on the record.

{¶89} Appellant bases his argument on the recent United States Supreme Court ruling in *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711. Appellant argues that the holding in *Ice* invalidates a portion of the Ohio Supreme Court's decision in *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster,* the supreme court held that R.C. 2929.14(E)(4) and 2929.41(A), which required judicial fact-finding before the imposition of consecutive sentences, are unconstitutional under *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531; and *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348. As a result, the supreme court severed these provisions from Ohio's sentencing framework and held that trial courts "have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive,

or more than the minimum sentences." *Foster* at ¶100. See also *State v. Lewis*, Warren App. Nos. CA2009-02-012, CA2009-02-016, 2009-Ohio-4684.

{¶90} As we have already held, the "United States Supreme Court did not expressly overrule *Foster* in the *Ice* decision. Unless or until *Foster* is reversed or overruled, we are required to follow the law and decisions of the Ohio Supreme Court." *Lewis* at ¶10. While the Ohio Supreme Court has acknowledged *Ice,* it has not yet addressed the application of *Ice* to *Foster.* See *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478; *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147. Thus, we see no reason to revisit these issues and decline appellant's invitation to reconsider our position at this time. *Lewis*, 2009-Ohio-4684; *State v. Montgomery*, Clermont App. No. CA2009-01-004, 2009-Ohio-5073, ¶9.

{¶91} Appellant's second assignment of error is overruled.

{¶92} Judgment affirmed.

POWELL and HENDRICKSON, JJ., concur.