

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-1061
v.	:	(C.P.C. No. 09CR-4350)
	:	
Eric A. McIver,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 10, 2010

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Eric A. McIver ("appellant"), appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas pursuant to appellant's plea of guilty to one count of attempted escape.

{¶2} On July 22, 2009, the Franklin County Grand Jury indicted appellant on one count of escape, a third-degree felony in violation of R.C. 2921.34. The indictment alleged appellant failed to return to detention at the Franklin County Community Based Correctional Facility ("CBCF"), after being granted temporary leave for a specific purpose

or limited period. Plaintiff-appellee, State of Ohio ("the state"), alleged that on May 23, 2009, appellant left the CBCF facility where he was incarcerated on a third-degree felony charge of violating a protection order and did not return on his scheduled itinerary.

{¶3} On October 20, 2009, appellant entered a plea of guilty to the stipulated lesser-included offense of attempted escape, a felony of the fifth degree, in violation of R.C. 2923.02 as it relates to R.C. 2921.34. During the course of the plea hearing, the trial court engaged in a full and thorough recitation of the rights appellant was waiving by pleading guilty, including his right against self-incrimination, the right to trial by jury, the right to confront witnesses against him, the right to compulsory appearance of witnesses, and the right to place the burden upon the state of proving his guilt beyond a reasonable doubt. The court further informed appellant of the nature of the charges against him and the potential sentence, including the fact that his guilty plea could result in a sentence of up to 12 months in prison and a fine up to \$2,500.

{¶4} Also at the plea hearing, the prosecutor indicated that any prison sentence must be served consecutively to the underlying revocation case and that there was a joint recommendation providing that appellant's six-month sentence would be consecutive to the sentence on his revocation. The entry of guilty plea signed by appellant indicates that appellant understood the maximum prison term to be "12 months, any prison sentence must be consecutive," and that there was a jointly recommended sentence providing the same. (Entry of Guilty Plea at 1.) The trial court then sentenced appellant to the jointly recommended sentence, to wit: a six-month term of incarceration to be served consecutively to case. No. 08CR-7257. No fines or court costs were imposed, and 101 days of jail-time credit were awarded.

{¶5} This appeal followed, and appellant brings the following single assignment of error for our review:

The trial court erred in accepting Appellant's guilty plea in violation of Crim.R. 11 and due process guarantees under the state and federal Constitutions.

{¶6} The waiver of a defendant's constitutional right to a trial must be knowing, intelligent, and voluntary. *State v. Turner*, 10th Dist. No. 08AP-978, 2009-Ohio-2403. See also *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179 (A plea in a criminal case must be made knowingly, intelligently, and voluntarily. Failure to meet all three renders the plea unconstitutional under both the United States and Ohio Constitutions.).

{¶7} Crim.R. 11 governs the process of accepting a plea. Crim.R. 11(C)(2) provides as follows:

(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.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a

trial at which the defendant cannot be compelled to testify against himself or herself.

{¶8} A trial court must strictly comply with Crim.R. 11 as it pertains to the waiver of federal constitutional rights. *Boykin v. Alabama* (1969), 395 U.S. 238, 243-44, 89 S.Ct. 1709, 1712-13. These constitutional rights include the right to trial by jury, the right of confrontation, and the privilege against self-incrimination. *Id.* 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. "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. *Id.*

{¶9} Appellant submits the trial court did not conduct a full inquiry into appellant's understanding of the nature of the charges and the possible consequences of the plea. Additionally, appellant submits he was coerced into entering the plea and that potential defenses to the charge were not explored.

{¶10} As mentioned previously, the record reflects the trial court fully complied with Crim.R. 11(C), and appellant indicated on the record that he understood what rights he was voluntarily relinquishing, that he was pleading guilty to a reduced charge of attempted escape, and the potential penalties associated with said plea. Throughout that exchange, and in response to the trial court's questions as to whether or not appellant

understood each of those rights he was waiving, appellant responded in the affirmative. (Tr. 3-4.) This information was also contained in the signed entry of guilty plea form.

{¶11} The record supports a finding that appellant understood the nature of the charge to which he was pleading guilty and the potential consequences of the same. Appellant was present when, prior to the trial court's accepting appellant's guilty plea, the prosecution recited the charges and the factual basis for the offense to which appellant entered a plea of guilty. The trial court also asked appellant if he was voluntarily pleading guilty to attempted escape, and appellant responded that he was.

{¶12} Also at the plea hearing, the prosecutor indicated that "[a]ny prison sentence must be served consecutively to the underlying revocation case in this instance." (Tr. 3.) Additionally, the prosecutor stated, "[t]here's a joint recommendation on this case that provided the Defendant is revoked for the full five-year sentence on his revocation, this case will be six months consecutive to that." (Tr. 3.) The entry of guilty plea form signed by appellant indicates that appellant understood the maximum prison term to be "12 months, any prison sentence must be consecutive." The entry also provided that appellant understood that there was a jointly recommended sentence "[p]rovided the Defendant is revoked for the full 5 year sentence on his revocation, 6 months consecutive."

{¶13} Based on the totality of the circumstances, we find the record establishes appellant was advised of and understood the nature of the charge and the potential consequences of his plea.

{¶14} Appellant also contends his plea was not voluntary because the trial court failed to inform him that he would not be eligible for judicial release on a five and one-half

year term until he served at least five years. However, as this court stated in *State v. Simpson*, 10th Dist. No. 07AP-929, 2008-Ohio-2460, Crim.R. 11(C)(2)(a) does not explicitly require a trial court to inform a defendant that he is ineligible for judicial release. *Id.* at ¶6. Thus, we find no merit to appellant's argument pertaining to judicial release.

{¶15} Appellant additionally suggests that his plea was not voluntary because potential defenses were not explored. The Supreme Court of Ohio has held that affirmative defenses are not elements of the charge and that the trial court is not required to inform a defendant of available affirmative defenses. *State v. Reynolds* (1988), 40 Ohio St.3d 334. See *State v. Frye* (Nov. 10, 1997), 10th Dist. No. 97APA01-106 (Crim.R. 11 does not require the court to inform the accused of the availability of affirmative defenses.). Thus, defendant's argument regarding his understanding of statutory defenses is unpersuasive.

{¶16} Upon our review of the record, we conclude that the trial court complied with the requirements of Crim.R. 11(C) and due process in accepting defendant's guilty plea that was knowingly, intelligently, and voluntarily entered. Therefore, defendant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK, P.J., and CONNOR, J., concur.
