

[Cite as *State v. King*, 2010-Ohio-2839.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23325
v.	:	T.C. NO. 05 CR 1842
	:	
WILLIAM KING, JR.	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 18th day of June, 2010.

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Defendant-Appellant

DONOVAN, P.J.

{¶ 1} Defendant-appellant William King, Jr., appeals his conviction and sentence for one count of rape of a child under thirteen, in violation of R.C. 2907.02(A)(1)(b), a

felony of the first degree. King filed a timely notice of appeal with this Court on March 17, 2009.

I

{¶ 2} On May 16, 2005, King was indicted for one count of rape of child under ten, in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree. At his arraignment on May 19, 2005, King stood mute, and the trial court entered a plea of not guilty on his behalf.

On June 2, 2005, King filed a motion to suppress, and a hearing was held on said motion on June 30, 2005. The trial court denied King's motion to suppress in a written decision filed on July 14, 2005.

{¶ 3} On August 23, 2005, King filed a plea of not guilty by reason of insanity, as well as a request for a competency evaluation and sanity evaluation. An entry was filed on November 1, 2005, in which the court found King competent to stand trial after the psychiatric evaluations were performed.

{¶ 4} On January 9, 2006, King entered into a plea agreement wherein he plead guilty to one count of rape of a child under thirteen in violation of R.C. 2907.02(A)(1)(b), which would result in a prison term of nine or ten years, in exchange for dismissal of the rape as originally charged in the indictment. While awaiting sentencing, King filed a motion to withdraw his plea on March 20, 2006. After negotiations with the State, King withdrew his motion to vacate his plea on April 3, 2006, and the court sentenced him to eight years in prison on April 5, 2006.

{¶ 5} On October 10, 2008, King filed a motion to withdraw his plea, a motion to appoint counsel, and a motion to inform his power of attorney. In written decision filed on

February 19, 2009, the trial court overruled all of King's motions.

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

II

{¶ 7} Initially, we note that King's appointed appellate counsel filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, in which he asserted that he could locate no arguable issues for review on appeal. Pursuant to *Anders*, we granted King sixty days from our order filed on October 5, 2009, in which to file a brief for our review. On December 3, 2009, King filed a pro se brief containing two assignments of error. The State filed its brief in opposition on March 15, 2010. King's appeal is now properly before us.

III

{¶ 8} King's first assignment of error is as follows:

{¶ 9} "TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO INVESTIGATE THE DEFENDANT'S MENTAL STATE OF MENTAL RETARDATION, HIS FAMILY HISTORY, CHILDHOOD BEHAVIORS AND ACTIVITIES BEFORE MAKING TRIAL STRATEGIES VIOLATING DEFENDANT'S FIFTH, SIXTH AND FOURTEENTH UNITED STATES CONSTITUTIONAL AMENDMENT RIGHTS. COUNSEL FURTHER FAILED TO SUFFICIENTLY PROTECT DEFENDANT'S DUE PROCESS RIGHTS BY DISPOSING OF THIS CASE THROUGH A PLEA BARGAIN. DEFENDANT DID NOT UNDERSTAND THE NATURE OF THE CHARGES AGAINST HIM AND HIS PLEA WAS NOT INTELLIGENTLY NOR VOLUNTARILY MADE."

{¶ 10} In his first assignment, King contends that his trial counsel's performance

was deficient because he failed to adequately investigate King's psychological condition prior to the plea hearing held on January 9, 2006. Specifically, King argues that he is essentially mentally retarded, and was, therefore, unable to understand the nature of the rape offense. On that basis, he asserts that his guilty plea was less than knowing and voluntary and should be vacated.

{¶ 11} A guilty plea waives the right to allege ineffective assistance of counsel, except to the extent the errors caused the plea to be less than knowing and voluntary. *State v. Spates* (1992), 64 Ohio St.3d 269, 269. Only if there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty but would have insisted on going to trial will the judgment be reversed. *Hill v. Lockhart* (1985), 474 U.S. 52, 52-53, 106 S.Ct 366, 88 L.Ed.2d 203; *State v. Xie* (1992), 62 Ohio St.3d 521, 524; *State v. Davis* (Aug. 7, 2000), Butler App. No. CA98-06-134.

{¶ 12} An appellate court reviews the record to determine if the plea was knowing, intelligent, and voluntary. *State v. McQueeney*, 148 Ohio App.3d 606, 2002-Ohio-3731, at ¶18. The court must determine if the trial court substantially complied with Crim.R. 11 in accepting the plea. *State v. Kelley* (1991), 57 Ohio St.3d 127, 128. Substantial compliance occurs when "the defendant subjectively understands the implications of his plea and the rights he is waiving." *State v. Nero* (1990), 56 Ohio St.3d 106, 108. If the rule was complied with, the plea was knowing, intelligent, and voluntary. *McQueeney*, supra at ¶24-30.

{¶ 13} 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).

{¶ 14} 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.

{¶ 15} 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); *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.

{¶ 16} A defendant who challenges his plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. *State v. Goens*, Montgomery App. No. 19585, 2003-Ohio-5402; Crim.R. 52(A). The test is whether the plea would have been otherwise made. *Id.*

{¶ 17} In reviewing the colloquy between the trial court and King, we find that the court substantially complied with the requirements set forth in Crim.R. 11(C), and that King's guilty plea was made in a knowing and voluntary fashion. An examination of the record of the plea hearing in the instant case clearly establishes that the trial court fully complied with the requirements of Crim.R. 11(C)(2) before accepting King's guilty plea. Thus, there is no arguable merit to the claim that King did not knowingly, intelligently, and voluntarily enter his pleas.

{¶ 18} Additionally, King alleges that his trial counsel failed to properly adequately investigate his mental condition and whether or not he understood the nature of the charge against him. Aside from being unsupported by the record, any non-jurisdictional defects raised by King which occurred prior to the voluntary entering of a plea of guilty or no contest are waived by said plea. *State v. Randle*, Montgomery App. No. 21931, 2007-Ohio-2967. The essential facts upon which King's allegations of ineffectiveness are based lie outside this record and thus, the issues are not properly raised in a direct appeal. *State v. Allah*, Clark App. No. 08 CA 0035, 2008-Ohio-6719, citing *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 448 N.E.2d 452.

{¶ 19} Lastly, the record contains no evidence which suggests that King was somehow unable to comprehend the nature of the crime for which he was charged. Prior to the plea hearing, a complete psychiatric evaluation was performed on King, and he was found competent to stand trial. Thus, there is no evidence in the record which supports King's argument that he was unable to understand the nature of the proceedings against him because of an alleged mental deficiency.

{¶ 20} King's first assignment of error is overruled.

IV

{¶ 21} King's second and final assignment of error is as follows:

{¶ 22} "THE TRIAL COURT ABUSED ITS DISCRETION BY NOT GRANTING AN EVIDENTIARY HEARING."

{¶ 23} In his final assignment of error, King contends that the trial court erred when it denied his motion to hold an evidentiary hearing regarding "new evidence being presented that would prove [King's] inability to understand the previous [plea] hearings which took place."

{¶ 24} "In order to prevail on a post-sentence motion to withdraw a plea, a movant must show a manifest injustice that needs to be corrected. (Internal citations omitted). The Ohio Supreme Court has defined a manifest injustice as a clear or openly unjust act. (Internal citations omitted). The standard requires a showing of some extraordinary circumstances. (Internal citations omitted). * * * [T]he good faith, credibility, and weight of a movant's assertions in support of a post-sentence motion to withdraw a plea are matters to be resolved by the trial court. (Internal citations omitted). The decision whether to grant a motion to withdraw a plea is committed to the discretion of the trial court. (Internal citation omitted). Moreover, an evidentiary hearing is not required on every post-sentence motion to withdraw a plea. The movant must establish a reasonable likelihood that withdrawal of his plea is necessary to correct a manifest injustice before a trial court must hold a hearing on his motion." (Internal citation omitted.) *State v. Stewart*, Greene App. No. 2003-CA-28, 2004-Ohio-3574.

{¶ 25} “Abuse of discretion” has been defined as an attitude that is unreasonable, arbitrary, or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 26} A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.

{¶ 27} The record simply does not support King’s new claims that he was unable to understand the proceedings in which he plead guilty to rape of child under thirteen years of age. Thus, King has failed to establish a reasonable likelihood that withdrawal of his guilty plea was necessary to correct a manifest injustice, and the trial court did not abuse its discretion by refusing to hold a hearing on his motion.

{¶ 28} King’s second assignment of error is overruled.

V

{¶ 29} In addition to reviewing the assignments raised by King in his pro se brief, we have conducted an independent review of the trial court’s proceedings and have found no error having arguable merit. Accordingly, King’s appeal is without merit, and the judgment of the trial court is affirmed.

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BROGAN, J., concurs.

GRADY, J., concurring:

{¶ 30} Defendant contends that his counsel was ineffective for failing to investigate numerous circumstances of Defendant's background before Defendant entered a guilty plea, and that his guilty plea was not intelligently or voluntarily made because Defendant did not understand the nature of the charges against him.

{¶ 31} Claims of ineffective assistance of counsel are subject to a general requirement that the defendant affirmatively prove prejudice. It is not enough to show that the alleged errors of counsel had some conceivable effect on the outcome of the proceeding. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington* (1984), 466 U.S. 668, 105 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 32} Defendant's contention that he did not understand the nature of the charges against him lacks any specific reference to what understanding Defendant lacked. The contention instead suggests that circumstances of Defendant's background, his mental and emotional difficulties, and his level of intelligence, inhibited him from having the necessary understanding. However, Defendant fails to connect any of those circumstances to the guilty pleas he entered, to show that but for counsel's failure to investigate them, Defendant would not have entered his guilty pleas. Defendant's motion therefore fails to demonstrate any nexus between counsel's alleged failures and the prejudicial result that *Strickland* requires. That omission is not available for correction through an evidentiary hearing.

{¶ 33} We may grant appellate counsel who filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 leave to withdraw, and

affirm an order adverse to a defendant, on a finding that an appeal contains no meritorious issues for our review. The record of the present case fails to reveal any meritorious issue for review. I would affirm the trial court's order overruling Defendant's Crim.R. 32.1 motion to withdraw his guilty pleas.

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Copies mailed to:

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