

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-87
 : (C.P.C. No. 07CR-05-3755)
 Kevin Fanfulik, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

D E C I S I O N

Rendered on September 17, 2009

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for
appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Kevin Fanfulik is appealing from his convictions for insurance fraud and arson following his pleas of no contest. He assigns two errors for our consideration:

ASSIGNMENT OF ERROR NUMBER ONE

THE TRIAL COURT ERRED WHEN IT ACCEPTED THE DEFENDANT'S PLEA OF NO CONTEST WHEN THE RECORD DEMONSTRATED THAT THE DEFENDANT MAINTAINED THAT HE WAS INNOCENT AND THAT THE NO CONTEST PLEA WAS COERCED BY THE TRIAL COURT'S THREAT THAT THE DEFENDANT WOULD GO TO PRISON IF HE WAS CONVICTED BUT THAT HE

WOULD RECEIVE COMMUNITY CONTROL AND GO HOME IF HE CHANGED HIS PLEA TO GUILTY OR NO CONTEST. THE PLEA WAS FURTHER COERCED WHEN THE TRIAL COURT TOLD THE DEFENDANT THAT IT WOULD ALLOW THE STATE TO USE AN UNCHARGED ACT, MADE OUTSIDE THE SCOPE OF THE ALLEGATIONS IN THE INDICTMENT AND BILL OF PARTICULARS, AS PROOF OF THE COMMISSION OF ONE OF THE ELEMENTS OF THE OFFENSE OF INSURANCE FRAUD AND INFORMED THE DEFENDANT THAT HE WOULD NOT BE ABLE TO CALL AN EXPERT WITNESS IN HIS DEFENSE TO TESTIFY ABOUT THE IMPACT A BRAIN TUMOR HAD ON THE DEFENDANT'S MEMORY.

ASSIGNMENT OF ERROR NUMBER TWO

THE TRIAL COURT ERRED WHEN IT RULED THAT THE STATE COULD USE AN UNCHARGED ACT, MADE OUTSIDE THE SCOPE OF THE ALLEGATIONS IN THE INDICTMENT AND BILL OF PARTICULARS, AS PROOF OF THE COMMISSION OF INSURANCE FRAUD AND BY FURTHER RULING THAT THE DEFENDANT COULD NOT CALL AN EXPERT WITNESS IN HIS DEFENSE TO TESTIFY ABOUT THE IMPACT A BRAIN TUMOR HAD ON THE DEFENDANT'S MEMORY.

{¶2} Following a fire involving his motor vehicle, Fanfulik made a claim for the loss with his insurance carrier. Because he had been convicted of insurance fraud previously, his claim received special attention. Following an investigation of the fire and the claim, Fanfulik was charged with arson and a new charge of insurance fraud.

{¶3} Fanfulik entered no contest pleas to the insurance fraud and arson charges after extensive negotiations between his counsel and the assistant prosecuting attorney assigned to the case. The lawyers agreed upon a joint recommendation for community control, formerly known as probation, in return for the pleas. The trial judge assigned to the case indicated in open court her willingness to accept the joint recommendation and

place Fanfulik on community control if he entered the plea. The judge also indicated that if Fanfulik went to trial and was convicted, his sentence would depend upon the facts developed at trial and Fanfulik's prior record. Since Fanfulik had previously been convicted of insurance fraud, he could reasonably believe that a plea meant community control and a trial ending in one or more convictions meant prison time. The trial court judge made these options clear by stating to Fanfulik:

* * * If you go to trial and it comes back guilty, I look at your record. If you have a record, you will go to prison. * * *

* * *

However, I will tell you this. If your counsel and prosecution agree to a sentence, I do not disrupt that. If they come to me with a joint recommendation * * * I will give the joint recommendation.

(Tr. 4- 5.)

{¶4} Initially Fanfulik continued to assert his innocence and requested a jury trial. Counsel for Fanfulik next addressed, in open court, a motion in limine previously filed on Fanfulik's behalf. The motion attempted to block the prosecution from using a deposition of Fanfulik in its case-in-chief. In the deposition, Fanfulik initially denied the existence of his prior insurance fraud conviction and then acknowledged it. The conviction occurred in 1999.

{¶5} After hearing the arguments of counsel, the trial judge indicated a willingness to allow the deposition to be admitted as evidence.

{¶6} Counsel for Fanfulik also indicated a desire for a physician to testify that Fanfulik had an undiagnosed brain tumor at the time of the deposition and that the tumor affected his ability to recall his prior conviction for insurance fraud at the time he was

deposed. The trial judge indicated an unwillingness to allow the testimony in part because Fanfulik was not yet under the doctor's care at the time of the deposition. As a result, the judge felt the doctor would be speculating about the existence of the tumor and its effects.

{¶7} After these issues were discussed in open court, Fanfulik continued to assert that "I didn't do the arson." (Tr. 21.)

{¶8} Due to a lack of available jurors, the start of the trial was then held over until the next morning. By the following morning, Fanfulik had changed his mind about going to trial and had signed a form to enter a plea of no contest to insurance fraud and arson.

{¶9} The trial court carefully reviewed the plea form with Fanfulik and carefully followed Crim.R. 11 in accepting the plea. Counsel for Fanfulik indicated an intention to pursue an appeal based upon the trial judge's rulings on the motions in limine. Those issues and the voluntariness of the pleas are now before this appellate court.

{¶10} Addressing the second assignment of error first, the indication from the trial judge that she would allow use of the deposition of Fanfulik at trial as proof of an element of the crime was a preliminary ruling. The trial judge could have changed her mind on this issue at any time before the deposition was entered as an exhibit or before testimony about the deposition was offered. Such preliminary rulings cannot be the basis for reversible error, as our prior rulings have consistently indicated. See *State v. Volpe*, 10th Dist. No. 06AP-1153, 2008-Ohio-1678, ¶22; *State v. Grubb* (1986), 28 Ohio St.3d 199, 200-02.

{¶11} Likewise, the trial judge's indication that she would not allow a licensed physician to testify about Fanfulik's medical condition at the time he was deposed was

preliminary at best. Upon further reflection or legal research, she might well have realized that a physician can testify to a reasonable medical certainty about medical conditions which existed before the physician became a treating physician for Fanfulik. See *Comer v. Federated Dept. Stores* (Feb. 21, 1985), 10th Dist. No. 84AP-822, in which a non-treating physician was permitted to testify that the plaintiff's unusual physical activity at work caused her heart attack. The judge's preliminary indication of intention cannot serve as the basis for a finding of reversible error following the no contest plea.

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

{¶13} The more challenging issue is presented by the first assignment of error. The trial judge clearly indicated on the day before the no contest pleas were entered that if Fanfulik went to trial on the insurance fraud charge and arson charge, both felonies of the fourth degree, Fanfulik would be sent to prison given his prior felony conviction. Such a statement by the trial judge in a situation involving low-grade property crimes, especially before the judge has the benefit of a pre-sentence investigation, is somewhat remarkable. The statement clearly could be construed as telling Fanfulik that he would be penalized for continuing to assert his innocence and for exercising his constitutional right to a trial. However, despite the judge's statements, Fanfulik asserted his right to a jury trial. If not for the unavailability of jurors, Fanfulik would have proceeded to trial that day.

{¶14} At the same time, Fanfulik had the rights he was giving up by entering no contest pleas explained to him in great detail in open court and presented to him in great detail in the plea form he signed before the pleas were entered in open court. The trial judge asked Fanfulik directly:

Are you waiving these rights and entering this plea knowingly, intelligently and voluntarily?

(Tr. 29.)

{¶15} Fanfulik responded "yes, ma'am." Fanfulik had a full opportunity to consult with his retained counsel before the pleas were entered. He expressed no reservations about the pleas at the time they were entered.

{¶16} Under the circumstances, we cannot find that the trial court erred in accepting the pleas.

{¶17} Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.
