

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2000-L-080
FREDERICK C. GALLOWAY, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 97 CR 000250

Judgment: Affirmed in part; reversed in part and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Amy E. Cheatham*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH, 44077. (For Plaintiff-Appellee).

Paul J. Mooney, 107 Water Street, Chardon, OH, 44024. (For Defendant-Appellant).

ROBERT A. NADER, J.

{¶1} On July 14, 1997, appellant, Frederick C. Galloway, Jr., was indicted, in case number 97-CR-000250, on seven counts: (1) grand theft of a motor vehicle, in violation of R.C. 2913.02; (2) theft, in violation of R.C.2913.02; (3) possession of criminal tools, in violation of R.C.2923.24; (4) breaking and entering, in violation of R.C. 2911.13; (5) theft, in violation of R.C. 2913.02; (6) vandalism, in violation of R.C. 2909.05; and (7) breaking and entering, in violation of R.C. 2911.13. Appellant waived his right to be present at arraignment and entered a plea of not guilty.

{¶2} Appellant was later charged, in case number 97-CR-000328, with three counts: (1) grand theft of a motor vehicle, in violation of R.C. 2913.02; (2) breaking and entering, in violation of R.C. 2911.13; and (3) receiving stolen property, in violation of R.C. 2913.51. Appellant also entered a plea of not guilty to these charges.

{¶3} On September 29, 1997, the court held a hearing in which appellant withdrew his pleas of not guilty, and pleaded guilty to reduced charges in both cases. Immediately after the change of plea hearing, appellant was sentenced, pursuant to a joint sentencing recommendation. The court sentenced appellant to a prison term of twelve months in case number 97-CR-000250, and a prison term of eighteen months in case number 97-CR-000328, to be served concurrently with each other and consecutive to a prison term appellant was serving at the time of the sentence.

{¶4} On May 19, 2000, appellant filed a motion for leave to file a delayed appeal of case number 97-CR-000250, and a motion for appointed counsel. We granted both motions. Any issues resulting from case number 97-CR-000328 are not before this court. The instant appeal followed.

{¶5} Appellant raises the following assignments of error:

{¶6} “[1.] Defendant-appellant was denied due process of law in violation of Ohio Crim.R. 11, the Fourteenth Amendment to the United States Constitution, and Article I Section X of the Ohio Constitution where the trial court failed to comply with Ohio Crim.R. 11(C).

{¶7} “[2.] Defendant-appellant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth amendments to the U.S. Constitution and Article I, Section X of the Ohio Constitution.”

{¶8} In his first assignment of error, appellant argues that his right to due process, as provided in Crim.R. 11, was violated because the court accepted a guilty plea that was not knowingly and voluntarily made. Appellant contends that the trial court failed to strictly comply with the mandates of Crim.R. 11(C) by failing to inform appellant of his constitutional rights in a separate colloquy for each case.

{¶9} Crim.R. 11(C)(2) provides:

{¶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 a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶11} “(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.

{¶12} “(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.

{¶13} “(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.”

{¶14} Crim.R. 11(C)(2) creates two sets of requirements for a court to accept a

guilty plea in a felony case. The first set addresses constitutional rights and the second set does not. To comply with the constitutional requirements, the court must explain to the defendant that he is waiving: (1) the Fifth Amendment privilege against self-incrimination, (2) the right to a trial by jury, (3) the right to confront one's accusers, (4) the right to compulsory process of witnesses, and (5) the right to be proven guilty beyond a reasonable doubt. *State v. Nero* (1990), 56 Ohio St.3d 106, citing *Boykin v. Alabama* (1969), 395 U.S. 238, 242-243, *State v. Ballard* (1981), 66 Ohio St.2d 473; *State v. Higgs* (1997), 123 Ohio App.3d 400, 407. The court must strictly comply with these requirements, and the failure to strictly comply invalidates a guilty plea. *Higgs*, supra, at 403.

{¶15} There is no dispute that the court informed appellant of each of his constitutional rights before accepting pleas of guilty. Appellant argues that, because the court only read them to appellant once during the hearing, appellant could not have understood that these constitutional rights applied to both cases. Appellant argues that his age of eighteen at the time of the hearing, his lack of education, and his use of Ritalin and Prozac at some point in the past show that he could not have understood his rights to apply to both cases.

{¶16} The record of the guilty plea colloquy shows that the court did comport with the requirements of Crim.R. 11. The court first asked appellant whether he wanted to have his rights read to him twice:

{¶17} "THE COURT: *** Will you accept the Court reading these rights at one time? During the pleas I am going to ask if you are satisfied, do you require that I read them twice?"

{¶18} “THE DEFENDANT: Yes, your honor.

{¶19} “THE COURT: Do you want me to read them” twice?

{¶20} “THE DEFENDANTO [sic]: No, no sir.”

{¶21} The court then proceeded to read appellant all the charges against him, from both cases, and asked whether appellant had read the indictments and whether he understood the nature of the charges against him. Appellant responded in the affirmative.

{¶22} The court then informed appellant of his constitutional rights, as required by Crim.R. 11(C). After informing appellant of his rights, the court asked:

{¶23} “THE COURT: Do you give up these rights, in both these cases, to a trial by Jury, and elect to have the Court accept your plea of guilty to these charges?

{¶24} “THE DEFENDANT: Yes.”

{¶25} It is clear from the record that the trial court strictly complied with the constitutional requirements of Crim.R. 11(C) by informing appellant of his constitutional rights and ascertaining that he understood that he was giving up these rights in both cases by entering a plea of guilty.

{¶26} Appellant argues in his brief that he could not have fully understood the proceedings because of his age of eighteen years, his limited education, and the fact that he had, in the past, taken prescriptions for Ritalin and Prozac. Appellant, however, had received a GED, was able to read, write, and understand English, and was not under the influence of Ritalin, Prozac, or any other drugs, at the time of the hearing. These arguments are not well taken. Appellant’s first assignment of error is without merit.

{¶27} In his second assignment of error, appellant argues that he was denied effective assistance of counsel. Appellant argues that his counsel was ineffective because he failed to request that the court order a presentence investigation report. Because the court did not order a presentence investigation report, appellant argues, the court was unable to give him community control sanctions at the time of the sentence, and he would be prohibited from receiving community control after serving a portion of the sentences.

{¶28} A guilty plea waives the right to appeal issues of ineffective assistance of counsel, unless the ineffective assistance caused the guilty plea to be involuntary. *State v. Lewis* (Aug. 19, 1994), 11th Dist. No. 92-T-4687, 1994 Ohio App. LEXIS, at *10, citing *State v. Barnett* (1991), 73 Ohio App.3d 244. Appellant claims that he would not have entered a guilty plea unless his counsel had been ineffective. Thus, although his assignment of error does not make this clear, appellant is alleging that his counsel's conduct caused his guilty plea to be involuntary.

{¶29} "Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus, citing *Strickland v. Washington* (1984), 466 U.S. 668. A licensed attorney is presumed to have rendered effective assistance in representing a criminal defendant; thus, appellant bears the burden of proving ineffective assistance. *State v. Kerns* (July 14, 2000), 11th Dist. No. 99-T-0106, 2000 Ohio App. LEXIS 3202, at *7.

{¶30} In order to demonstrate ineffective assistance of counsel in the context of

a guilty plea conviction, the defendant must demonstrate that the trial counsel's performance was deficient and that the defendant was prejudiced by the deficient performance in that it precluded the defendant from entering the plea knowingly and voluntarily. *Kerns*, supra, at *8, citing *State v. Sopjack* (Dec. 15, 1995), 11th Dist. No. 93-G-1826, 1995 Ohio App. LEXIS 5572.

{¶31} In the instant case, appellant cannot show that his counsel's performance was deficient or that he was prejudiced by his counsel's failure to request that a presentence investigation report be completed. Appellant was sentenced to twelve months in prison pursuant to a joint sentencing recommendation. While this recommendation is not binding on the court, it indicates that appellant was aware of the proposed sentence and, in fact, did plead guilty knowing that he would not receive community control at the time of sentencing.

{¶32} Crim.R. 32.2 requires that a presentence investigation report be ordered prior to the court imposing community control sanctions for a felony offense. A presentence investigation report was not necessary, however, for the court to impose the jointly recommended sentence of twelve months in prison. Appellant's counsel was not deficient for failing to request a superfluous presentence investigation report. Indeed, the report, if completed, could have contained information about appellant that could have dissuaded the court from imposing the jointly recommended sentence.

{¶33} Furthermore, the fact that the court did not order a presentence investigation report prior to sentencing appellant did not preclude him from receiving early judicial release. The rule requiring the court to obtain a presentence investigation report before imposing community control sanctions for a felony offense does not

require that the presentence investigation report actually be completed prior to sentencing. *State v. Digrino* (1995), 107 Ohio App.3d 336, 339. Thus, a presentence investigation report could have been completed after appellant's sentence, but prior to any early judicial release hearing. *Id.* at 341. Appellant cannot show that he was prejudiced by his counsel's decision not to ask the court for a presentence investigation report prior to sentencing. Appellant's second assignment of error is without merit.

{¶34} Although appellant does not assign it as error, the trial court's judgment entry includes "bad time" language. In *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, syllabus, 2000-Ohio-116, the Supreme Court of Ohio declared the "bad time" statute, R.C. 2967.11, was unconstitutional on the grounds that it violates the doctrine of separation of powers.

{¶35} For the above reasons, we affirm the judgment in all respects except as to the "bad time" language; that portion of the judgment is reversed and remanded for the trial court to enter a judgment that does not include any references to bad time.

WILLIAM M. O'NEILL, P.J.,

JUDITH A. CHRISTLEY, J.,

concur.