[Cite as *State v. Corpening*, 2011-Ohio-6002.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NOS. 2011-A-0005 and 2011-A-0006**
ANDRE M. CORPENING,	:	
Defendant-Appellant.	:	

Criminal Appeals from the Ashtabula County Court of Common Pleas, Case Nos. 2010 CR 63, and 2010 CR 225.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Ariana E. Tarighati, Law Office of Ariana E. Tarighati, L.P.A., 34 South Chestnut Street, Suite 100, Jefferson, OH 44047-1092 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Andre Corpening appeals from his convictions of possession of cocaine and possession of marijuana in two separate cases. Mr. Corpening pled guilty to the charges after the court denied his motion to suppress, but he now claims his plea was not knowing, voluntary, and intelligent. He also claims his trial counsel provided ineffective assistance of counsel in advising him to plead guilty, because by pleading

guilty he waived search and seizure issues regarding the police's stop of his vehicle on appeal. For the following reasons, we affirm the trial court's judgment.

{¶2} **Substantive Facts and Procedural History**

{¶3} On the evening of February 11, 2010, Trooper Caraway and Trooper Balcomb set up surveillance behind an Economy Inn and Suites, located between the Speedway and Sheetz gas stations on US 20 in Ashtabula Township. This area was known for drug activities, and the officers have made recent drug related arrests there. At 2:53 a.m., Trooper Caraway saw a bronze Chevy Blazer pulling into the Speedway gas station. The driver, Mr. Corpening, left the vehicle, ran across the parking lot to one of the hotel rooms, returned quickly to his vehicle, and left without making any purchase at the Speedway. Trooper Caraway followed the vehicle, as it made its way to Fargo Drive, across from Speedway, and pulled into a residential driveway. Mr. Corpening got out of his vehicle, walked to the rear of the house, returned quickly to his vehicle, and backed out of the driveway.

{¶4} As the Chevy Blazer passed Trooper Caraway, the trooper saw that its license plate was partially obscured by snow. Based upon this technical violation of R.C. 4503.21, he initiated a traffic stop.

{¶5} Responding to Trooper Caraway's query regarding his activity at the gas station, Mr. Corpening explained that he had picked up his passenger, Jennifer Riley, at a local bar, and was giving her a ride home. He further explained he walked over to Economy Inn and Suites to "get money for taking Jennifer home from the bar." When asked why he did not purchase gas at the gas station, Mr. Corpening had no answer.

{¶6} Trooper Caraway then asked Mr. Corpening to sit in the backseat of his patrol vehicle to continue questioning. Mr. Corpening explained he needed money from

his cousin “Kizzy,” a resident at Economy Inn and Suites. Because he knew the “reputation” of the hotel, he parked his vehicle at the gas station and walked over to the hotel instead. Unbeknownst to Mr. Corpening, Trooper Caraway was aware that a “Kizzy Holley,” a resident at the hotel, had been previously arrested for possession of narcotics. Mr. Corpening further explained that he stopped at the Fargo Drive residence, which he claimed was his aunt’s house, to make sure Ms. Riley, his passenger, was not carrying any contraband in the event he was stopped by the police.

{¶7} Mr. Corpening was cooperative during the traffic stop and gave the police permission to search his vehicle. Trooper Caraway and Trooper Balcomb found marijuana seeds on the floorboard. Inside the center console, which was in plain view, they found a spoon with white residue and a burn mark on the underside of the spoon. Trooper Caraway confiscated the spoon for later testing, recognizing it as drug paraphernalia. Based on his training, he believed a drug had been placed in the spoon with a liquid, which was heated up to turn the drug into a liquid form for injection.

{¶8} Mr. Corpening and Ms. Riley were both charged with possession of drug paraphernalia. However, because the county jail was fully occupied, they were released from the scene instead of being arrested. Mr. Corpening was also given a warning for the obscured license plate.

{¶9} Trooper Caraway then returned to the Fargo Drive house for further investigation. He found a purple lighter on the driveway, and observed a fresh set of footprints in the snow leading to the rear of the house. He, along with Trooper Balcomb, then went to the Sheetz gas station to complete paper work for their shift. Shortly after the troopers arrived at the Sheetz, Mr. Corpening pulled into the gas station. Trooper Caraway asked him if he was there to purchase gas, to which he answered yes.

{¶10} The troopers then decided to return to the Fargo Drive house to set up surveillance. Within five minutes, Mr. Corpening's vehicle pulled into its driveway, but backed out in less than a minute. At that point, Trooper Balcomb, acting upon his suspicion that a crime had occurred or something was about to occur, pulled up to the house and stopped Mr. Corpening. Trooper Balcomb's suspicion was specifically aroused by Mr. Corpening's actions "going to the hotel, going to the residence, leaving the residence, coming back with seeing us at the Sheetz gas station and then going back to the residence again within five minutes."

{¶11} As Trooper Balcomb pulled behind Mr. Corpening's vehicle, he observed Mr. Corpening exiting his vehicle and swinging his feet in the snow in an attempt to cover up something, which turned out to be two large bags of cocaine.

{¶12} Trooper Caraway approached Mr. Corpening and inquired why he was at the house again. Mr. Corpening stated he stopped at the house to let his aunt know why the police were there earlier, although there were still no lights in the house, and no one emerged from the house during the entire evening. As the police learned later, Mr. Corpening was not known to the resident of the home.

{¶13} Based on the incident, the state filed an indictment, in Case No. 2010 CR 63, charging Mr. Corpening with two counts of possession of cocaine, in violation of R.C. 2925.11(A) and R.C. 2925.11(A)(C)(4)(c), respectively.

{¶14} Mr. Corpening pled not guilty and filed a motion to suppress. After a hearing, where Trooper Caraway and Trooper Balcomb testified regarding the circumstances surrounding their stops of the vehicle, the trial court denied the motion. Mr. Corpening then changed his plea to guilty on both counts.

{¶15} As to the marijuana seeds found in his vehicle, the state filed an information, in Case No. 2010 CR 225, charging him with possession of marijuana with forfeiture specification, in violation of R.C. 2925.11(A). He pled guilty to the charge.

{¶16} For his conviction of two counts of possession of cocaine, the trial court sentenced Mr. Corpening to 18 months of imprisonment on count one, and two years on count two; for possession of marijuana with forfeiture specification, the court sentenced him to one year. All three terms are to be served concurrently.

{¶17} On appeal, Mr. Corpening raises the following two assignments of error:[1]

{¶18} "[1.] Trial counsel's deficient performance during the proceedings deprived the defendant-appellant of the effective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights.

{¶19} "[2.] An appellant's plea is not knowingly, voluntarily and intelligently made when the trial court fails to advise him of all of the trial rights he is waiving by entering a plea of guilty."

{¶20} "A guilty plea represents a break in the chain of events that preceded it in the criminal process. Thus, a defendant who admits his guilt waives the right to challenge the propriety of any action taken by the court or counsel prior to that point in the proceedings unless it affected the knowing and voluntary nature of the plea." *State v. DelManzo*, 11th Dist. No. 29009-L-167, 2010-Ohio-3555, ¶35, citing *State v. Madeline* (Mar. 22, 2002), 11th Dist. No. 2000-T-0156, 2002 Ohio App. LEXIS 1348, *10-11, and *State v. Haynes* (Mar. 3, 1995), 11th Dist. No. 93-T-4911, 1995 Ohio App. LEXIS 780, *3-4. "This waiver applies to a claim of ineffective assistance of counsel,

[1] Mr. Corpening filed two separate appeals, 2011-A-0005 and 2011-A-0006, relating to 2010 CR 63 and 2010 CR 225, respectively. We have consolidated these two appeal numbers for disposition. We note, however, both assignments of error relate to Case No. 2010 CR 63 only.

unless the alleged conduct caused the plea not to be knowing and voluntary." Id. citing *Madeline* at *11.

{¶21} Thus, we will address the second assignment of error first.

{¶22} **Whether the Plea was Knowing, Voluntary, and Intelligent**

{¶23} Under his second assignment of error, Mr. Corpening argues his plea was not knowing, voluntary, and intelligent, because the trial court failed to determine whether he knowingly, voluntarily, and intelligently waived his right to testify on his own behalf.

{¶24} "In order for a trial court to ensure that a felony defendant's plea is knowing, voluntary and intelligent, it must engage the defendant in a colloquy pursuant to Crim.R. 11(C)." *State v. Mitchell*, 7th Dist. Dist. No. 10 MA 55, 2011-Ohio-2974, ¶15, citing *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶25-26.

{¶25} In *State v. Gibson*, 11th Dist. No. 2005-P-0066, 2006-Ohio-4182, this court explained the requirements of R.C. Crim. 11:

{¶26} "Crim.R. 11(C)(2)(c) specifically addresses the various constitutional rights that the trial court must discuss with the defendant prior to the acceptance of a guilty plea. These constitutional rights originated from *Boykin v. Alabama* (1969), 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 ***. In *Boykin*, the United States Supreme Court held that because a defendant's guilty plea waives several constitutional rights, the record on appeal must demonstrate that a defendant is fully informed of such waiver for his or her guilty plea to be considered voluntary and knowing. Id. at 242. Therefore, to conform with these constitutional requirements, the trial court must explain to the defendant that he or she 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 require the state to prove guilt beyond a reasonable doubt. See, generally, *Boykin* at 243. See, also, *State v. Singh* (2000), 141 Ohio App.3d 137, 750 N.E.2d 598 ***." Id. at ¶14 (citation omitted).

{¶27} Crim.R.11(C)(2)(c) lists the five constitutional rights that a trial court must personally advise a defendant he is waiving before accepting a guilty plea. Crim.R. 11(C) states:

{¶28} "(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:

{¶29} "***

{¶30} "(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."

{¶31} "Generally, a guilty plea is deemed to have been entered knowingly and voluntarily if the record demonstrates that the trial court advised a defendant of (1) the nature of the charge and the maximum penalty involved, (2) the effect of entering a plea to the charge, and (3) that the defendant will be waiving certain constitutional rights by entering his plea." *Madeline* at *11, citing *State v. Sopjack* (Dec. 15, 1995), 11th Dist. No. 93-G-1826, 1995 Ohio App. LEXIS 5572, *27-28.

{¶32} Mr. Corpening cites several United States Supreme Court cases to support his claim that the trial court should have advised him of his right to testify. See, e.g., *Faretta v. California* (1975), 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562; *Ferguson v. Georgia* (1961), 365 U.S. 570, 602, 81 S.Ct. 765, 5 L.Ed.2d 783; *Rock v. Arkansas* (1987), 483 U.S. 44, 52-53, 107 S.Ct. 2704, 97 L.Ed.2d 37. However, these cases stand only for the proposition that a criminal defendant has a constitutional right to testify at his or her trial; they do not impose a burden on the trial court to advise a defendant of such a right.

{¶33} A criminal defendant's right to testify, although a constitutional right, is not one of the rights enumerated in Crim. R. 11 that a trial court must advise a defendant of before the court can accept the defendant's guilty plea. Rather, the right to testify "is a right that is exercised *only after* a defendant, in consultation with his attorney, decides to put the prosecution to its proof at trial." (Emphasis added.) *State v. Vaughn*, 8th Dist. No. 87245, 2006-Ohio-6577, ¶33. During the plea colloquy the trial court is not required to engage a defendant regarding this right; instead, "it is the primary duty of criminal defense attorneys to ensure that their clients understand the existence of this right and the wisdom of exercising it as a matter of trial strategy when a defendant actually goes to trial." Id.

{¶34} Here, a review of the plea hearing shows that the trial court properly complied with Crim.R. 11 in advising Mr. Corpening of the rights he waived by pleading guilty. Mr. Corpening's claim that his plea was not knowing, voluntary, and intelligent because the trial court did not advise him of his right to testify at trial is not supported by any case law authority. *Vaughn*, supra. The second assignment of error is without merit.

{¶35} **Whether Counsel Provided Ineffective Assistance of Counsel in Appellant's Guilty Plea**

{¶36} Under the first assignment of error, Mr. Corpening argues his trial counsel's decision to have him enter a guilty plea, thereby waiving any suppression issue on appeal, deprived him of the effective assistance of counsel.

{¶37} To establish his claim that his counsel provided ineffective assistance, Mr. Corpening must demonstrate (1) his counsel was deficient in some aspect of his representation, and (2) there is a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶38} A threshold issue in a claim of ineffective assistance of counsel is whether there was actual error on the part of appellant's trial counsel. *State v. McCaleb*, 11th Dist. No. 2002-L-157, 2004-Ohio-5940, ¶92. In Ohio, every properly licensed attorney is presumed to be competent and therefore a defendant bears the burden of proof. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Counsel's performance will not be deemed ineffective unless and until the performance is proven to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *State v. Iacona* (2001), 93 Ohio St.3d 83, 105. Furthermore, decisions on strategy and trial tactics are generally granted wide latitude of professional judgment, and it is not the duty of a reviewing court to analyze the trial counsel's legal tactics and maneuvers. *State v. Gau*, 11th Dist. No. 2005-A-0082, 2006-Ohio-6531, ¶35, citing *Strickland* at 689. Debatable trial tactics and strategies generally do not constitute ineffective assistance of counsel. *State v. Phillips* (1995), 74 Ohio St.3d 72.

{¶39} Mr. Corpening fails to make the threshold demonstration that his trial counsel's performance was deficient in the plea proceeding. The record reflects that

the trial court conducted a hearing on Mr. Corpening's motion to suppress, where his counsel vigorously cross-examined the state's witnesses regarding the circumstances of the stop. The trial court, however, overruled the motion. It determined that the stop was lawful on both occasions: the first stop was properly based on a technical violation of the traffic law, and the second investigative stop was justified by "specific and articulable facts which, taken together with rational inferences from these facts, reasonably suggest[ed] that criminal activity was afoot." After the adverse ruling on the motion to dismiss, Mr. Corpening's counsel negotiated a plea bargain with the state, resulting in Mr. Corpening's guilty plea.

{¶40} Given this record, we discern no deficiency in counsel's performance in negotiating a plea bargain to eliminate the risk of Mr. Corpening's receiving a longer sentence after trial, in light of the uncertainty of a reversal of the trial court's denial of the motion to suppress.

{¶41} Mr. Corpening claims his counsel should have had him enter a "no contest" plea in order to preserve the suppression issue on appeal. Yet, he has offered no evidence that a "no contest" plea was ever an option in the plea negotiations, or, if it was, he would have received similar favorable terms in exchange for that plea.

{¶42} Even if counsel's performance in negotiating a plea bargain *was* deficient, Mr. Corpening cannot succeed in his ineffective assistance of counsel claim. In *Madeline*, supra, we explained what a defendant must prove to establish ineffective assistance of counsel: "In the context of a guilty plea conviction, to demonstrate ineffective assistance of trial counsel, a defendant must show: (1) counsel's performance was deficient and (2) the defendant was prejudiced by the deficient performance in that there is a reasonable probability that, but for counsel's error(s), the

defendant would not have pled guilty." Madeline at *9, citing *State v. Desellems* (Feb. 12, 1999), 11th Dist. No. 98-L-053,1999 Ohio App. LEXIS 458, *9, citing *Hill v. Lockhart* (1985), 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203. The burden of proving ineffective assistance of counsel falls upon a defendant. *Madeline* at *10.

{¶43} Mr. Corpening has not presented any evidence to show that he would not have pled guilty but for the alleged deficient performance by counsel. The first assignment of error is without merit.

{¶44} The judgment of the Ashtabula County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.