

[Cite as *State v. Docgrand*, 2009-Ohio-5077.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NOS. 08 MA 249
)	08 MA 250
PLAINTIFF-APPELLEE)	08 MA 251
)	
VS.)	OPINION
)	
FELICIA DOCGRAND)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio Case Nos. 07CR1599; 08CR461; 08CR857
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JUDGMENT:	Affirmed.
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APPEARANCES:

For Plaintiff-Appellee:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. James E. MacDonald Assistant Prosecuting Attorney 21 West Boardman Street, 6 th Floor Youngstown, Ohio 44503
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For Defendant-Appellant:	Atty. Edward A. Czopur The Liberty Building 42 N. Phelps Street Youngstown, Ohio 44503
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JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: September 22, 2009

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WAITE, J.

{¶1} Appellant Felicia Docgrand appeals her convictions and sentences in the Mahoning County Court of Common in three separate criminal matters, all based on guilty pleas arising from three Crim.R. 11 plea agreements. The three cases involved one count of possession of cocaine and two counts of theft. One plea hearing was held to dispose of the three guilty pleas. Appellant contends that she was entitled to have the court explain her constitutional rights to her three times in the three separate cases. The record reflects that Appellant had two attorneys representing her in the three cases, both were present at the consolidated plea hearing, and the court explained all of Appellant's constitutional rights to her at the change of plea hearing. Crim.R. 11 does not prohibit consolidated plea hearings, and Appellant has pointed to no authority establishing any error in the procedure used by the trial court. Appellant also argues that the trial court failed to ask her whether she understood that the court could immediately proceed to sentencing upon acceptance of the plea, but no prejudice was shown from the court's alleged error because the court did not sentence her until two months later. Both of Appellant's assignments of error are overruled and the judgment of the trial court is affirmed.

{¶2} Appellant was indicted on January 10, 2008, on one count of possession of cocaine, R.C. 2925.11(A), a fifth-degree felony. This was designated as Case No. 2007 CR 1599. On May 29, 2008, Appellant was indicted on one count of theft, R.C. 2913.02(A)(3), a third-degree felony. This was designated as Case No. 2008 CR 461. On August 14, 2008, Appellant was indicted on an additional count of theft, R.C. 2913.(A)(3), a fifth-degree felony. This was designated as Case No. 2008

CR 857. The victim of the theft offenses was an 82-year-old man named Darryl Kitchin.

{¶3} Attorney Mike Gollings was appointed to represent Appellant on the two theft cases, and Attorney A. Ross Douglass was appointed to represent her on the drug possession case.

{¶4} On September 25, 2008, Appellant entered into written Crim.R. 11 plea agreements in each of the three criminal cases pending against her. Appellant agreed to plead guilty to all three charges, and the more serious theft charge was amended to a fourth-degree felony. The prosecutor agreed to stand silent at sentencing regarding any sentencing recommendations. A change of plea hearing for the three cases was held on September 29, 2008. Both of Appellant's attorneys were present at the hearing. After reviewing the plea agreements with Appellant, the court informed her that the constitutional rights involved in the three cases were the same and that they would only be going over those rights once during the hearing. (9/29/08 Tr., p. 4.) Appellant agreed, and there was no objection to this procedure by either counsel.

{¶5} The court reviewed each of the indictments separately with Appellant, including the maximum potential penalties, and then proceeded to review the constitutional and statutory rights that were being waived by her guilty pleas. The court discussed the right to trial by jury, right to proof beyond a reasonable doubt, right to cross-examine witnesses, right to compel witnesses to testify in her behalf, and the right of Appellant to refuse to testify at trial. At the end of the hearing, the court informed Appellant that, upon acceptance of the guilty pleas, the court could

proceed immediately to sentencing. The court ordered a presentence investigation to be prepared and set the sentencing hearing for November 21, 2008. At the sentencing hearing, the court stated that Appellant was to receive 12 months in prison for possession of cocaine, 18 months on the first theft charge, and 12 months on the second theft charge, all to be served consecutively.

{¶6} On November 25, 2008, the court filed the judgment entries of conviction. In the written entries, the court imposed a different sentence than was stated at the sentencing hearing. The court sentenced Appellant to 12 months in prison on each of the three charges, to be served consecutively. Although this discrepancy is not an issue on appeal, Appellant's counsel appears to remain under the impression that Appellant was sentenced to an 18-month prison term in Case No. 2008 CR 461. This timely appeal followed on December 11, 2008.

ASSIGNMENT OF ERROR NO. 1

{¶7} "THE TRIAL COURT FAILED THROUGH THE PLEA COLLOQUY GIVEN TO APPELLANT AT HER PLEA HEARING TO PROTECT APPELLANT'S CONSTITUTIONAL RIGHTS PURSUANT TO CRIMINAL RULE 11(C)(2) IN THAT IT FAILED TO ENSURE THAT PLAINTIFF KNEW AND UNDERSTOOD THE RIGHTS THAT SHE WOULD BE GIVING UP IN EACH PLEA BARGAIN ACCEPTED BY THE COURT."

{¶8} Appellant argues that her plea agreements were not knowingly entered into because the court held one combined plea hearing to resolve three separate felony criminal cases against her but informed her of her constitutional rights only once, instead of three times.

{¶9} Appellant is correct that a guilty plea must be made knowingly, intelligently and voluntarily for it to be valid and enforceable. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶25. In order to ensure that a plea is made knowingly, intelligently and voluntarily, Crim.R. 11(C)(2) requires the trial judge to address the defendant personally to review the rights that are being waived and to discuss the consequences of pleading guilty. Crim.R. 11(C)(2)(c) requires the court to review five constitutional rights that are waived when entering a guilty plea: the right to a jury trial, the right to confront one's accusers, the privilege against compulsory self-incrimination, the right to compulsory process to obtain witnesses, and the right to require the state to prove guilt beyond a reasonable doubt. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶19. A trial court must strictly comply with Crim.R. 11(C)(2)(c) when advising the defendant of the constitutional rights that are being waived in entering a guilty plea. *Id.* at syllabus. A trial court's acceptance of a guilty plea will be affirmed only if the trial court engaged in meaningful dialogue with the defendant which, in substance, explained the pertinent constitutional rights, "in a manner reasonably intelligible to that defendant." *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, paragraph two of the syllabus; see also *Veney*, *supra*, at ¶27.

{¶10} Although Appellant admits that the trial court reviewed the constitutional rights she was waiving, she argues that the court should have discussed each of these rights three separate times to correspond to the three criminal cases against her.

{¶11} Crim.R. 11(C)(2) does not require or even address whether indictments may be consolidated for purposes of conducting a single change of plea hearing to review multiple plea agreements. The rule simply states that:

{¶12} “(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:

{¶13} “(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.

{¶14} “(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.

{¶15} “(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.”

{¶16} There is no question that the court addressed Appellant personally to review the rights that were being waived. There is no question that the court informed Appellant in a reasonable manner that her rights were the same in each of the three cases and that, hence, the court would need to review those rights only

once. Appellant has pointed to no caselaw or criminal rule that requires the trial court to hold separate change of plea hearings for a defendant who has signed multiple plea agreements, all of which are pending before the court at the same time. Combined plea hearings are a common occurrence in Ohio. *State v. Hartman*, 8th Dist. No. 91611, 2009-Ohio-2876 (one plea hearing for six separate indictments); *State v. Horner*, 6th District No. L-08-1125, 2009-Ohio-1815, ¶5 (one plea hearing for two defendants with separate indictments); *State v. Goyman*, 3rd Dist. Nos. 10-06-23, 10-06-24, 2007-Ohio-215, ¶4 (one plea hearing for two separate criminal cases).

{¶17} Appellant does not argue that there was some difference between the three pending cases that would require a separate or different explanation from the trial court as to the constitutional rights that were being waived. All three cases involved felony charges and the same constitutional rights were being waived in each case. Pursuant to Crim.R. 11(C)(2), the court addressed Appellant personally regarding all the constitutional rights that she was waiving by entering a guilty plea. Thus, the court strictly complied with the requirements of the criminal rule. The trial court also reviewed the details of each indictment separately, including the specific charges and potential penalties for each crime, so there was no confusion that the change of plea hearing was somehow limited to one particular indictment. Appellant was represented by two attorneys at the hearing. Neither commented on or objected to the court's decision to conduct one review of the waiver of constitutional rights.

{¶18} Appellant's argument is more in the nature of a general due process claim than an argument as to whether her plea was made knowingly and intelligently. Appellant believes that due process in her circumstances requires three separate

change of plea hearings. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires criminal prosecutions to comport with prevailing notions of fundamental fairness. *California v. Trombetta* (1984), 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413. “[T]he concept of due process is flexible and varies depending on the importance attached to the interest and the particular circumstances under which the deprivation may occur.” *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 459, 668 N.E.2d 457. To establish a violation of due process, there must also be a showing of some type of prejudice suffered by the error. *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶70. Appellant has not alleged any prejudice from the alleged error, and none is discernable from the record. The trial court explained all of Appellant’s constitutional rights in a manner completely consistent with the requirements of Crim.R. 11(C)(2). There is nothing to prevent the court from holding a single change of plea hearing for the sake of judicial economy. Appellant’s first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 2

{¶19} “THE TRIAL COURT FAILED, THROUGH THE PLEA COLLOQUY GIVEN TO APPELLANT, TO ENSURE THAT APPELLANT KNEW AND UNDERSTOOD THE EFFECT OF THE PLEA BARGAINS IN VIOLATION OF HER RIGHTS PURSUANT TO CRIMINAL RULE 11(C)(2)(b).”

{¶20} Appellant here argues that the trial court’s plea colloquy did not substantially comply with Crim.R. 11(C)(2)(b), which prohibits the trial court from accepting a guilty plea prior to taking the following action:

{¶21} “(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.”

{¶22} Appellant contends that the trial court failed to explain to her, as required by Crim.R. 11(C)(2)(b), that one of the affects of the plea was that the court could proceed immediately to judgment and sentence. This aspect of Crim.R. 11(C) raises a nonconstitutional requirement of the rule. *State v. Eckles*, 173 Ohio App.3d 606, 2007-Ohio-6220, ¶43. Appellant is correct that the trial court’s compliance with the nonconstitutional requirements of Crim.R. 11 is reviewed for substantial compliance rather than strict compliance. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶11-12. “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.” *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. Furthermore, “failure to comply with nonconstitutional rights will not invalidate a plea unless the defendant thereby suffered prejudice.” *Griggs*, supra, at ¶12. The test for prejudice is “whether the plea would have otherwise been made.” *Nero*, supra, at 108.

{¶23} In this case, the court informed Appellant that, “the court upon acceptance may immediately proceed to judgment and sentencing,” but the court failed to explicitly ask Appellant if she understood what that statement meant. (9/29/08 Tr., p. 11.) The record also clearly reflects that the court did not proceed immediately to sentencing after informing Appellant that it could do so. Instead, the court ordered a presentence investigation to be prepared and set the sentencing

hearing for November 21, 2008, approximately two months after the change of plea hearing occurred. Appellant has not alleged any prejudice as a result of the court's actions, and since the court did not immediately proceed to sentencing, the error could not have had any effect on the outcome of the plea. The court substantially complied with Crim.R. 11(C)(2)(b) and Appellant's second assignment of error is overruled.

{¶24} In conclusion, Appellant has failed to establish any precedent or rule that would prohibit a trial court from holding a single change of plea hearing for one defendant who has two or more Crim.R. 11 plea agreements pending before the court. Appellant has also failed to show how she was prejudiced when the trial judge failed to specifically ask her if she understood that the court could proceed immediately to sentencing upon its acceptance of the guilty plea. Both of Appellant's assignments of error are overruled, and the judgment of the trial court is affirmed.

Vukovich, J., concurs.

DeGenaro, P.J., concurs.