

[Cite as *State v. Dosch*, 2009-Ohio-6534.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 08 MA 63
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
ROBERTA DOSCH)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the County Court
No. 2 of Mahoning County, Ohio
Case Nos. 03 CR 1500; 03 TRA 2866

JUDGMENT: Reversed and Remanded.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant: Atty. Damian A. Billak
100 Federal Plaza East, Suite 101
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JUDGES:

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

Dated: December 8, 2009

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WAITE, J.

{¶1} Appellant Roberta Dosch argues that her no contest plea was invalid because the trial court failed to inform her that she was waiving her right to have the state establish her guilt by proof beyond a reasonable doubt, and because the court did not explain the effect of pleading no contest. The state agrees with Appellant's argument. Thus, the judgment of the Mahoning County Court No. 2 is reversed.

{¶2} This case began in the Mahoning County Court No. 2 after Appellant was arrested for operating a vehicle under the influence of alcohol ("OVI") in 2003. Her criminal record indicated that she had more than three previous OVI convictions in the past three years and that her OVI charge should be a felony rather than a misdemeanor. The case was remanded to the Mahoning County Grand Jury, and Appellant was indicted on December 30, 2003, on two counts of OVI, R.C. 4511.19(A)(1) and (5). Both are fourth degree felonies. The case was transferred to the Mahoning County Court of Common Pleas.

{¶3} The case underwent extensive litigation throughout the next four years, including a number of attempts at reaching a plea agreement. On July 23, 2007, the parties reached an agreement whereby Appellant would plead no contest to one count of first degree misdemeanor OVI, and the second OVI charge would be dismissed. They also agreed that the case would be remanded to Mahoning County Court No. 2 for sentencing. A change of plea hearing was held the same day. The trial court reviewed a number of constitutional rights that were being waived by entering the plea, but did not discuss or mention the phrase "proof beyond a

reasonable doubt.” The court did not explain to Appellant the effect of entering a no contest plea as set forth in Crim.R. 11(B) and (C).

{¶14} The case was remanded to the county court and Appellant was sentenced on September 13, 2007. The court sentenced her to 30 days in jail, 110 days of electronically monitored house arrest, and \$550 in fines.

{¶15} Appellant filed this appeal on April 7, 2008, along with a motion for delayed appeal. We granted the delayed appeal on April 18, 2008.

ASSIGNMENTS OF ERROR

{¶16} “(I) Ms. Dosch’s Plea is Invalid for the Court’s Failure to Comply with the Substantial-Rights Portions of the Crim.R. 11 Colloquy in violation of U.S. Const. Amends V, VI, and XIV and Oh.Const. Art. 1, sec. 10.”

{¶17} “(II) Ms. Dosch’s Sentence is Void for Lack of Subject Matter Jurisdiction.”

{¶18} Appellant argues that the trial court failed to comply with Crim.R. 11 regarding the court’s acceptance of a no contest plea in a felony case. More specifically, Appellant contends that the court failed to tell her that she was waiving the right to have the state prove all the elements of the crime beyond a reasonable doubt, and that the court failed to inform her of the effect of her no contest plea. The state has confessed error in this appeal.

{¶19} Crim.R. 11 sets forth the requirements for a court to accept pleas of guilty and no contest in both felony and misdemeanor cases. This case involves both felony and misdemeanor rights because Appellant was charged with and prosecuted

on two felony counts of OVI, but was attempting to plead guilty to one misdemeanor count of OVI. A plea of guilty or no contest must be made knowingly, intelligently and voluntarily for it to be a valid and enforceable plea. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶25. In order to ensure that a plea in a felony case is being 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 the plea.

{¶10} Crim.R. 11(C)(2)(c) requires the court to review five constitutional rights that are waived when entering a guilty or no contest plea in a felony case: 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 waived in entering a felony plea. *Id.* at syllabus. Prejudice is presumed if the court fails to inform the defendant of the constitutional rights contained in Crim.R. 11(C)(2)(c). *Id.* at ¶29. A trial court's acceptance of a guilty or no contest 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.

{¶11} The requirement in Crim.R. 11(C)(2)(b) and 11(E) that the court must explain the effect of a no contest plea is a nonconstitutional requirement and is subject to review 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.

{¶12} The court is required to convey the three points of information contained in Crim.R. 11(B) regarding a plea of no contest: (1) that it is not an admission of guilt; (2) that it is an admission of the truth of the facts alleged in the indictment, information, or complaint; and (3) that the plea shall not be used against the defendant in any subsequent civil or criminal proceeding. The court in this case did not relay any of that information to Appellant.

{¶13} The state has confessed error and admits that the court did not discuss at least one of the constitutional rights Appellant was waiving; the right to have the state prove all the elements of the case beyond a reasonable doubt. The state concedes that this error is reviewed for strict compliance and that prejudice is presumed. Therefore, the trial court committed reversible error and Appellant’s first assignment of error is sustained. The state does not confess error as to the trial

court's failure to discuss the effect of pleading no contest. Appellee is correct that this second error is reviewed for substantial compliance and that the record must show that the defendant was prejudiced by the error. No prejudice is shown in the record, and none is alleged by Appellant. The court's error in failing to discuss the effect of a no contest plea does not constitute reversible error. Nevertheless, because a reversible error is supported by the record, the judgment of the trial court is vacated, the plea is permitted to be withdrawn, and the case is remanded to the trial court for further proceedings. Appellant's second assignment of error relates to an alleged sentencing error and is moot because the conviction and sentence are both hereby vacated.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.