[Cite as *State v. Wells*, 2009-Ohio-6803.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 09 BE 12
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
GREGORY WELLS,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Juvenile Division, Case No. 09JK322.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 10, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Gregory Wells appeals from the judgment entered in the Belmont County Juvenile Court after he pled no contest to two counts of contributing to the unruliness or delinquency of a minor. First, he contends that the court did not engage in a meaningful dialogue in order to ensure that he knowingly, intelligently, and voluntarily waived his right to counsel. Second, he alleges that the court failed to fully advise him of the effect of his no contest plea. For the following reasons, appellant's plea is upheld, and the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} On April 7, 2009, police responded to a call that vehicles at the Ohio Valley Mall in Belmont County were being broken into by the occupants of a red Blazer. Two fourteen-year-old females, who were discovered in the Blazer and who had been reported as run-aways, revealed that they had been transported to the mall by three adult males, including nineteen-year-old Gregory Wells, the appellant herein. A shotgun could be seen protruding from the backseat of the vehicle. Upon a search of the vehicle, police confiscated another shotgun, a .22 caliber handgun, and five pocket knives.

¶{3} The three adult males were apprehended that night. Appellant admitted that he had sexual intercourse with one of the girls two to three times. His friend admitted to having sexual intercourse with the other girl and also admitted that they had transported the children to Maryland.

¶{4} All three males were charged with two counts of contributing to the unruliness or delinquency of a minor, a first degree misdemeanor in violation of R.C. 2919.24(A)(1). This statute provides that no person shall aid, abet, induce, cause, encourage, or contribute to a child or a ward of the juvenile court becoming an unruly child, as defined in R.C. 2151.022, or a delinquent child, as defined in R.C. 2152.02. An unruly child includes one who does not submit to the reasonable control of her parents or guardians, one who is habitually truant, one who behaves in a manner as to injure or endanger the child's own health or morals or the health or morals of others, or one who violates a law. R.C. 2151.022(A)-(D).

¶{5} At his April 10, 2009 arraignment, the court advised appellant of various rights he possessed and determined that appellant understood those rights. The court

ascertained that appellant was indigent and ordered that counsel be appointed to represent him. Appellant decided that he did not want to consult with counsel as he wished to plead no contest to both counts that day. The court accepted the plea and found appellant guilty, reading the police report into the record.

¶{6} On April 14, 2009, appellant returned for sentencing and indicated that he still wished to proceed without counsel. The court sentenced appellant to six months in jail on each count to run consecutively but suspended the sentence on count two on the condition that he refrain from contacting the minors and from violating any Ohio laws for two years. Appellant filed the within timely appeal.

ASSIGNMENT OF ERROR NUMBER ONE

¶{7} Appellant sets forth two assignments of error, the first of which provides:

¶{8} "THE TRIAL COURT VIOLATED MR. WELLS' RIGHT TO COUNSEL IN FAILING TO PROPERLY ADVISE HIM UNDER CRIM.R. 44(B). [Citations omitted]."

¶{9} At the April 8, 2009 bond hearing, the court noted that appellant had the right to be represented by a lawyer and that if he could not afford one, the court would appoint a public defender. (Tr. 2). At the April 10, 2009 arraignment, the court again advised appellant of his right to an attorney and his right to court-appointed counsel if he could not afford counsel. (Tr. 5). The court ascertained that appellant did not have counsel and that he could not afford counsel. (Tr. 5-6). Thus, the court entered a plea of not guilty on appellant's behalf and ordered that counsel be appointed. (Tr. 6). However, the following colloquy then took place:

¶{10} "MR. WELLS: I don't know if a plea to any of that right now, I want to think about that for a second.

¶{11} "THE COURT: I'm doing it for you. I'm just keeping the proceedings open against you so you can have time to talk to your lawyer.

¶{12} "MR. WELLS: I just want, I don't know, I just, I'll … I don't even know.

¶{13} "THE COURT: You said earlier that you would like to talk to a lawyer. That's fine. I have no object to that at all. That's appropriate to do that.

¶{14} "MR. WELLS: I don't even know if I want to talk to a lawyer because I'm not even from around here. That's … I just want to get this stuff over with so I can go to Moundsville and go and do my time over there. Cause I have a holder over there."

¶{15} "THE COURT: Well, first of all the Court is not going to do something just because it's convenient or quick.

¶{16} "MR WELLS: I'm just saying if I had time to think about this. I can plea no contest right? [At which point the trial court explained a no contest plea, which is the issue in the next assignment of error] * * *

¶{17} "THE COURT: * * * Okay, so let's get back to the attorney, you don't have a lawyer, would you like to speak to a lawyer or consult with a lawyer before we go any further?

¶{18} "MR. WELLS: No." (Tr. 6-7).

¶{19} Appellant then pled no contest, which he stated he was doing freely and voluntarily. He again reiterated that he did not wish to consult a lawyer. (Tr. 7). The court then had appellant sign a written waiver of counsel. Before accepting the plea, the court again advised appellant that he had the right to court-appointed counsel. (Tr. 8). Appellant then heard the court make similar statements to his two codefendants concerning the right to court-appointed counsel. Before sentencing on April 14, 2009, the court ascertained that appellant still wished to proceed without an attorney. (Tr. 16).

¶{20} Appellant now contends that the trial court violated Crim.R. 44(B) by failing to engage in a meaningful dialogue which would have ensured that he knowingly, intelligently, and voluntarily waived his right to counsel. Specifically, appellant states that the required dialogue is incomplete where the court fails to advise a defendant of the risks inherent in self-representation. Crim.R. 44 provides in pertinent part:

¶{21} "(B) Where a defendant charged with a petty offense is unable to obtain counsel, the court may assign counsel to represent him. When a defendant charged with a petty offense is unable to obtain counsel, no sentence of confinement may be imposed upon him, unless after being fully advised by the court, he knowingly, intelligently, and voluntarily waives assignment of counsel.

¶{22} "(C) Waiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22. * * *."

¶{23} "In order to establish an effective waiver of the right to counsel, the court must make sufficient inquiry to determine whether defendant fully understands and intelligently relinquishes that right." *State v. Gibson* (1976), 45 Ohio St.2d 366, ¶2 of syllabus. In other words, the record must show that the defendant understandingly and intelligently rejected the offer of counsel. *State v. Brooke*, 113 Ohio St.3d 199,

2007-Ohio-1533, ¶25, citing *State v. Wellman* (1974), 37 Ohio St.2d 162, ¶2 of syllabus.

¶{24} It has been stated that the trial court "should" inform a defendant electing to represent himself of the dangers and disadvantages of self-representation so the record demonstrates that he is aware of what he is waiving. *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶100, quoting *Faretta v. California* (1975), 422 U.S. 806, 835. Based upon aspirational statements such as this, various courts have reversed pleas upon finding the dialogue insufficient where the trial court did not specify the effect of the waiver or the hazards of self-representation but merely ascertained that the defendant knew he had a right to counsel which he wished to waive. See, e.g., State v. *Dobrovich*, 7th Dist. No. 04BE56, 2005-Ohio-4688, ¶2.

¶{25} However, the Supreme Court in *Johnson* used the word "should" rather than "must" or "shall". And, the Court specifically recognized that extensive warnings are not required. *Johnson*, 112 Ohio St.3d 210 at ¶91. Rather, the Court held that the defendant's understanding should be evaluated on a case-specific basis with consideration of the following non-exhaustive list of items: the defendant's understanding of the nature of the charges; the punishments; possible defenses; the existence of lesser included offenses; whether the charges are complex or simple; the stage of the proceeding; and, the defendant's sophistication, education or experience. Id. (noting the plurality nature of *Von Moltke v. Gillies* (1948), 332 U.S. 708, 724, a case often erroneously cited as law for the proposition that knowledge of the right to court-appointed counsel and voluntary waiver of that right are insufficient), ¶101-102 (upholding waiver where the trial court advised a capital defendant that he would be subject to same rules as would a lawyer upon mid-trial switch to self-representation). Moreover, the Supreme Court has also recently decided *Brooke*.

¶{26} In *Brooke*, the Ohio Supreme Court found a waiver of counsel valid even though the trial court did not advise the pleading defendant of the dangers inherent in self-representation. *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, ¶27-39. During one of the waivers found to be valid in *Brooke*, the trial court had merely advised the defendant of the right to counsel and ensured the waiver was voluntary. Id. In another waiver found to be valid, the trial court had advised the defendant of the nature of the charges, the right to counsel, the right to a continuance to consult with counsel, the right to court-appointed counsel if he could not afford to hire counsel; after

the defendant advised that he understood all of these things, the trial court found that he did and that he wished to waive his right to counsel. Id. at ¶41-47. Although the trial court did not mention the dangers inherent in self-representation in either of those pleas, the Supreme Court upheld the waivers as knowing, intelligent, and voluntary. Id. at ¶39, 47. As such, it is *Brooke* that guides our decision in this case.

¶{27} Here, the court advised appellant of his right to consult with and to be represented by court-appointed counsel at all stages. In fact, the court reviewed the right to free representation numerous times. See *Brooke*, 113 Ohio St.3d 199 at ¶27-39. The court also reviewed the right to a continuance. See id. at ¶41-47. The court even ordered appointment of counsel and started to continue the case so that appellant could consult with counsel. However, appellant reasoned that he just wanted to get this over with and to plead no contest so he could return to West Virginia to "do my time over there." (Tr. 6).

¶{28} The court ascertained that appellant was entering the plea without counsel freely and voluntarily. (Tr. 7). The court also had appellant sign a written waiver, even though this was not required for petty offenses, and the court incorporated the written waiver of various rights into the oral record, including his right to counsel and a continuance to consult with such counsel. See id. at ¶36-39.

¶{29} Appellant was advised of the nature of the charges. See *Johnson*, 112 Ohio St.3d 210 at ¶91. The charges and the evidence in support thereof did not involve matters of complexity. See id. Both charges, contributing to the unruliness or delinquency of a minor, entailed the same offense, just with different victims. Furthermore, no lesser included offenses have been suggested here. See id.

¶{30} Appellant had been advised that he could receive up to six months in jail on each charge and that he could be fined as much $1,000 on each charge. See id. His sophistication and education are not apparent, but he did imply experience with the criminal justice system when he voiced that he had a holder in West Virginia. See id.

¶{31} Moreover, the stage of the proceedings was a plea, as opposed to a full trial, which could have potentially required more experience and sophistication or a better explanation of what would be expected of him. See id. The court read the preliminary evidence against appellant. Appellant even admitted that he had sex two

or three times with one of the fourteen-year-old run-aways, who had been left at the mall in the weapon-filled Blazer.

¶{32} Applying the *Johnson* and *Brooke* holdings, we find that the record establishes a knowing, voluntary, and intelligent waiver under the totality of circumstances of this particular case. As such, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

¶{33} Appellant's second assignment of error provides:

¶{34} "THE TRIAL COURT ERRED IN FAILING TO PROPERLY ADVISE MR. WELLS OF THE EFFECT OF HIS PLEA. [Citations omitted]."

¶{35} Initially, we must address appellant's contention that we should apply Crim.R. 11(D),[1] which refers to "misdemeanor cases involving serious offenses", rather than Crim.R. 11(E), which refers to "misdemeanor cases involving petty offenses". A serious offense means any felony and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months. Crim.R. 2(C). A petty offense means a misdemeanor other than a serious offense. Crim.R. 2(D). Appellant was charged with two first degree misdemeanors, each with a maximum penalty of one hundred eighty days in jail. See R.C. 2919.24(A)(1) (defining contributing to delinquency or unruliness) 2929.24(A)(1) (misdemeanor penalty statute).

¶{36} Each offense is a petty offense. The fact that consecutive sentences for multiple offenses could result in a defendant spending more than six months in jail does not convert each individual offense into a serious offense. The plain language of Crim.R 11(E) supports this conclusion as it states "misdemeanor cases involving petty offenses [plural]", meaning that it contemplates application where there are multiple petty offenses.

¶{37} In fact, the United States Supreme Court has stated that if the legislature defines a petty offense as one with no more than six months incarceration, then the

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[1]Crim.R. 11(D) provides in pertinent part: "In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily."

Although this is somewhat stricter than Crim.R 11(E), appellant does not actually make arguments regarding the portions that are stricter. That is, appellant does not contend that the court failed to address the defendant personally here or failed to determine that he was making the plea voluntarily.

fact that the defendant was charged with two petty offenses does not revise the legislative judgment as to the gravity of a particular offense or transform the petty offenses into serious offenses. *Lewis v. United States* (1996), 518 U.S. 322, 327-328 (stating in a jury right case, "we do not look to the potential prison term faced by a particular defendant who is charged with more than one such petty offense"). The most recent case law out of this court also holds that Crim.R. 11(E) applies if each offense is petty, regardless of the total sentence that would be available if the court were to impose consecutive sentences for multiple offenses. *State v. Thompson*, 7th Dist. No. 03MA247, 2005-Ohio-6448, ¶14. Other districts hold likewise. *State v. Perkins*, 10th Dist. No. 07AP924, 2008-Ohio-5060, ¶43; *City of North Ridgeville v. Roth*, 9th Dist. No. 03CA008396, 2004-Ohio-4447, ¶17; *State v. Van Winkle* (Dec. 22, 1993), 2nd Dist. No. 13940. As such, the applicable provision is Crim.R. 11(E), which provides:

¶{38} "In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty."

¶{39} The Supreme Court has held that this provision requires the trial court to inform the defendant only of the effect of the type of plea to which he is pleading, rather than explain the effect of all available types of pleas. *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, ¶17, 20, 25. The effect of a no contest is defined as follows:

¶{40} "The plea of no contest is not an admission of defendant's guilt, <u>but is an admission of the truth of the facts alleged in the indictment, information, or complaint</u>, and the plea or admission shall not be used against the defendant in any subsequent civil or <u>criminal</u> proceeding." (Emphasis added to portions not recited by the trial court in this case). Crim.R. 11(B)(2).

¶{41} Here, the trial court advised the defendant that there were three types of pleas: not guilty, guilty, and no contest. The court stated that if he pled not guilty, the court would continue the case for trial and for appointment of counsel. The court advised that if he pled guilty, the court would proceed to sentencing. As to a no contest plea, the court explained:

¶{42} "If you plead no contest it does not admit you're guilty but you would give up the right to have a trial. A plea of no contest cannot be used against you at any civil proceedings that may arise out of this incident." (Tr. 7).

¶{43} As appellant points out, the court only partially defined a no contest plea under Crim.R. 11(B)(2). Specifically, the court failed to advise that a no contest plea is "an admission of the truth of the facts alleged" in the complaint. In addition, when advising that the no contest plea could not be used against the defendant in any subsequent proceeding, the trial court stated "civil proceeding" rather than "civil or criminal proceeding".

¶{44} Still, the Supreme Court requires a showing of prejudice in order to invalidate a plea on this basis. *Jones*, 116 Ohio St.3d 211 at ¶52. Thus, the defendant must establish that the plea would not otherwise have been made. Id. The reviewing court is to view the totality of the circumstances. Id. at ¶55.

¶{45} As for the fact that the no contest plea cannot be used in either a civil or criminal proceeding, this omission only works to appellant's benefit. In other words, the omission of "or criminal proceeding" from an advisement does not prejudice a defendant pleading no contest because it is merely one more reason to plead no contest.

¶{46} The court's failure to state that a no contest plea is an admission of the truth of the facts alleged is more problematic. However, it is not fatal to the plea. In *Jones*, the Supreme Court focused on the fact that the defendant presented no evidence that he claimed innocence before the trial court, and thus the Court presumed that the defendant knew that a plea of guilty is a complete admission of guilt. Id. at ¶54 (also noting that the defendant explained why he was pleading).

¶{47} Here, appellant also explained why he wanted to plead: to get this over with so he could go to West Virginia to serve time. See id. Appellant never asserted that the facts of the complaint were untrue at the time of the no contest plea. See id. Moreover, after being found guilty, he never asserted that the facts of the complaint were untrue at sentencing or in the four days prior to sentencing. He also had nothing to say regarding the charges or the contents of the police reports that were read into the record. Appellant knew he was giving up his right to trial, and he knew that the court was going to find him guilty and sentence him accordingly. He also knew that he

was waiving other rights that were explained to him on the record and which he also waived in writing.

¶{48} Thus, it seems the totality of the circumstances establish that appellant was not prejudiced by the trial court's failure to inform him of every Crim.R. 11(B)(2) aspect of a no contest plea. See *City of Youngstown v. Cohen*, 7th Dist. No. 07MA16, 2008-Ohio-1191 (finding no prejudice where the trial court failed to define no contest plea in accordance with Crim.R. 11(B)(2)); *State v. McGilton*, 7th Dist. No. 07BE9, 2008-Ohio-1185, ¶28 (finding no indication in the record that the facts of the case were in dispute or that appellant would have changed his plea if he knew that "no contest" meant admitting to the truth of the facts in the complaint). This assignment of error is overruled.

¶{49} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
Waite, J., concurs.