

[Cite as *State v. Reed*, 2010-Ohio-1096.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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| STATE OF OHIO, |) | |
| |) | CASE NO. 09 MA 53 |
| PLAINTIFF-APPELLEE, |) | |
| |) | |
| - VS - |) | OPINION |
| |) | |
| DONNIE-RAY REED, |) | |
| |) | |
| DEFENDANT-APPELLANT. |) | |

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| CHARACTER OF PROCEEDINGS: | Criminal Appeal from Common Pleas Court, Case No. 08CR531. |
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| JUDGMENT: | Affirmed. |
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APPEARANCES:
For Plaintiff-Appellee:

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Mahoning County Prosecutor
Attorney Ralph M. Rivera
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For Defendant-Appellant:

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

Dated: March 11, 2010

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this court. Appellant Donnie Ray Reed appeals the October 1, 2008 decision of the Mahoning County Court of Common Pleas that imposed a jointly recommended six year prison sentence subsequent to accepting Reed's guilty plea on one count of Reckless Homicide, a third degree felony violation of R.C. 2903.041, with a firearm specification under R.C. 2941.145(A).

{¶2} Reed argues that his plea was not knowing, voluntary and intelligent because the trial court failed to define the elements of reckless homicide, and because the trial court imposed more than a minimum sentence. Reed also argues that counsel caused Reed's guilty plea to be less than voluntary, knowing and intelligent, because counsel failed to inform Reed of the elements of reckless homicide or of the minimum possible sentence for the offense. Reed also argues that counsel was ineffective because counsel stayed silent during the sentencing hearing and did not present any argument for a shorter sentence. Upon review, Reed's assignments of error are meritless.

{¶3} The trial court was not required to define each element of reckless homicide, and the trial court's subsequent sentencing decision did not affect the knowing, voluntary, or intelligent nature of Reed's plea. Moreover, because the trial court imposed Reed's jointly recommended sentence, his argument regarding non-minimum sentencing is waived. Finally, Reed has failed to demonstrate that counsel caused his plea to be less than voluntary knowing and intelligent, or that counsel was ineffective during Reed's sentencing hearing. Accordingly, the trial court's decision is affirmed.

Facts and Procedural History

{¶4} On April 4, 2008, Reed shot Randy Davis in the head, resulting in Davis's death. There was conflicting information as to whether the shooting had been purposeful or accidental. On June 19, 2008, a grand jury indicted Reed on one count of murder, in violation of R.C. 2903.02(A)(D), a first degree felony, along with a firearm specification pursuant to R.C. 2941.145(A). Reed entered a plea of not guilty and was appointed counsel.

{¶5} Reed entered into a Crim.R. 11 plea agreement with the State on

September 25, 2008. Pursuant to the plea agreement, the State moved the trial court to dismiss the murder count, amend the indictment to include one count of reckless homicide, and retain the firearm specification. Reed agreed to change his plea to guilty. Reed and the State agreed to jointly recommend a three-year sentence for the reckless homicide charge, consecutive to the three year firearm specification, for a total of six years.

{¶6} The trial court held a plea hearing on September 25, 2008, and accepted Reed's plea subsequent to conducting a Crim.R. 11 colloquy. Reed waived pre-sentence investigation, the parties jointly recommended the sentence, and the trial court accepted their recommendation. Upon realizing that the victim's representative had not been notified of the sentencing hearing, the trial court vacated the September 25 sentencing hearing and conducted the hearing anew on September 30, 2008. After hearing the victim impact statement, Reed's personal statement, and counsel's argument that the trial court should not impose any higher a sentence than already recommended, the trial court again accepted the jointly recommended sentence. The trial court memorialized these proceedings in its October 1, 2008 judgment entry. This Court accepted Reed's delayed appeal.

Substantial Compliance with Crim.R. 11(C)(2)(a) – Elements of Offense

{¶7} In his first of two assignments of error, Reed asserts:

{¶8} "Under the totality of the circumstances, appellant's plea was not given knowingly and intelligently where the trial court failed to fully inform appellant of the elements of the amended charge of reckless homicide at the sentencing hearing and in imposed [sic] a total sentence in excess of the statutory minimum for the offense."

{¶9} Reed contends that the trial court erred in accepting his guilty plea because it was not knowing, voluntary and intelligent. Reed argues that a knowing, voluntary and intelligent plea was prevented by the trial court's failure to provide definitions of all elements of the offense, as well as the trial court's departure from the statutory minimum sentence for the offense.

{¶10} In a criminal case, a plea must be made knowingly, voluntarily and intelligently. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, at

¶7; *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179, 660 N.E.2d 450. If a plea is not knowing, voluntary and intelligent, it has been obtained in violation of due process and is void. *State v. Martinez*, 7th Dist. No. 03MA196, 2004-Ohio-6806, at ¶11, citing *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274.

{¶11} In order for a trial court to ensure that a defendant's plea is knowing, voluntary and intelligent, it must engage the defendant in a colloquy pursuant to Crim.R. 11(C). *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, at ¶25-26. During the colloquy, the trial court is to provide specific information to the defendant, including constitutional rights being waived (such as trial by jury and confrontation of witnesses) and non-constitutional information (such as nature of the charges and the maximum penalty involved) before the judge may accept the plea. Crim.R. 11(C)(2); *State v. Francis*, 104 Ohio St.3d 494, 2004-Ohio-6894, 820 N.E.2d 355.

{¶12} A trial court must strictly comply with Crim.R. 11 regarding constitutional rights, and must substantially comply regarding non-constitutional rights. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. "Substantial compliance [with Crim.R. 11] means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *Id.* See, also, *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, at ¶31.

{¶13} Reed argues that his plea was not knowing, voluntary and intelligent and that he did not have an understanding of the charge against him as required by Crim.R. 11(C)(2)(a) because the trial court did not explain the elements of reckless homicide. However, Crim.R. 11(C)(2)(a) does not require a trial court to provide a detailed explanation of the elements of the charges against a defendant. *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, at ¶57. A trial court generally does not need to explain the elements of any charge, where the defendant or counsel indicates on the record that the nature of the offense has been explained to the defendant. *Id.* at ¶57-59.

{¶14} The written plea agreement that Reed signed stated that "counsel has advised me and I fully understand the nature of the charge(s) against me and the elements contained therein." Additionally, during the trial court's colloquy with Reed, the

following exchange took place:

{¶15} "The Court: Do you understand the charge of reckless homicide and all the elements contained within it and the firearm specification and all the elements contained within it?

{¶16} "The Defendant: Yes, Your Honor."

{¶17} * * *

{¶18} "The Court: I have gone through this written plea of guilty form with you. Did you go through this form with your lawyer before you signed it?

{¶19} "The Defendant: Yes, Your Honor."

{¶20} "The Court: Do you feel that you understand everything in this form and in these proceedings?"

{¶21} "The Defendant: Yes, Your Honor."

{¶22} Given Reed's statement that he received an explanation of the elements of the charged offense, and his statement that he understood the nature of the charges against him, the totality of the circumstances indicates that Reed subjectively understood the implications of his plea and the rights he was waiving. Although Reed now argues on appeal that he in fact did not understand the elements of the reckless homicide charge, there is no information in the record to support his argument. The trial court therefore did not err in accepting Reed's guilty plea, as it was knowing, voluntary and intelligent.

{¶23} As an additional argument, Reed asserts that his plea was not knowing, voluntary and intelligent because the trial court erroneously departed from the statutory minimum sentence for Reed's offense.

{¶24} A trial court's selection of a particular sentence within the statutory range does not have an effect on the knowing, voluntary and intelligent nature of a guilty plea, as a sentencing decision is made subsequent to the entry of a plea. See *State v. Johnson* (1988), 40 Ohio St.3d 130, 133-134, 532 N.E.2d 1295 ("Crim.R. 11 applies only to the entry and acceptance of the plea. It has no relevance to the exercise of the trial court's sentencing discretion at that stage * * *."). At the pleading stage, a defendant must know the possible ramifications of his plea, not the future sentencing decision of the trial court. Reed was informed that the trial court had the discretion to select any

sentence within the statutory range for Reed's offense, and was further informed of the statutory range applicable for his offense. Thus the imposition of a non-minimum sentence did not undermine the knowing, voluntary and intelligent nature of Reed's plea.

{¶25} Moreover, the trial court's sentence followed the sentencing recommendation jointly made by the State and Reed. Pursuant to R.C. 2953.08, "[a] sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." R.C. 2953.08(D)(1); *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, at ¶25. "A sentence is 'authorized by law' and is not appealable within the meaning of R.C. 2953.08(D)(1) only if it comports with all mandatory sentencing provisions." *State v. Underwood*, --- Ohio St.3d ---, 2010-Ohio-1, --- N.E.2d ---, at paragraph two of the syllabus. An appellant continues to be barred by R.C. 2953.08 from challenging the court's discretion in selecting a sentence pursuant to statutory provisions such as R.C. 2929.11 and R.C. 2929.12. *Id.* at ¶22.

{¶26} Here, the three year sentence for reckless homicide was within the statutory range of one to five years, and the three year sentence for the firearm specification complied with the statutory mandate of three years. R.C. 2929.14(A)(3); R.C. 2929.14(D)(1)(a)(ii). There is no indication that Reed's sentence contravened any of the applicable mandatory sentencing provisions. The sentence was jointly recommended by Reed and the State, and the recommended sentence was imposed by the trial court. Therefore Reed's sentence is not subject to review on appeal. Given the foregoing, Reed's first assignment of error is meritless.

Ineffective Assistance of Counsel

{¶27} In his second assignment of error, Reed asserts:

{¶28} "The judgment entry and sentence of conviction should be vacated and overturned for the reason that defendant had ineffective assistance of counsel and was denied his Constitutional rights under the Sixth Amendment and the Ohio Constitution."

{¶29} Reed argues that he was denied the effective assistance of counsel because trial counsel did not inform Reed of the elements of reckless homicide, or of the

statutory sentencing range for the offense. Reed further argues that counsel was ineffective for failing to advocate more strenuously at Reed's sentencing hearing.

{¶30} To prevail on a claim of ineffective assistance of counsel, an appellant must satisfy the two-pronged test of *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. First, the appellant must establish that counsel's performance fell below an objective standard of reasonable representation. *Id.* Second, the appellant must demonstrate that he was prejudiced by counsel's performance. *Id.* at 690. To establish prejudice, an appellant must show there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694.

{¶31} The appellant bears the burden of proof in demonstrating ineffective assistance of counsel. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 1999-Ohio-102, 714 N.E.2d 905; *State v. Smith* (1985), 17 Ohio St.3d 98, 17 OBR 219, 477 N.E.2d 1128. When evaluating an ineffective assistance of counsel claim, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland* at 689. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373. If an appellant cannot show how counsel's errors undermined the reliability of the court's decision, there is no basis for finding that appellant's right to counsel had been violated. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, at ¶109; *Strickland*, at 693.

{¶32} In the first part of his argument, Reed claims that his attorney failed to inform him about the elements of the charge against him as well as the statutory range for the charge. Reed's argument is undermined by his statements at his plea hearing, as well as his written guilty plea, which indicate that he was aware of the elements of the reckless homicide charge, and that he was aware that the statutory sentencing range for the charge was one to five years. Thus, Reed has not demonstrated that his plea was less than voluntary, knowing and intelligent. Counsel's performance was therefore not deficient with respect to Reed's submission of a guilty plea.

{¶33} In the second part of his argument, Reed claims that his attorney was

ineffective for standing silent at Reed's sentencing hearing and failing to raise the issue of mens rea at sentencing, given that Reed maintained that the shooting was accidental. However, because the trial court accepted the jointly proposed sentence, there was little that counsel could validly raise at Reed's sentencing hearing. Counsel's failure to argue against a sentence that he himself recommended would be well within the realm of reasonable representation. Additionally, Reed's claim that counsel stood silently during the sentencing hearings is incorrect. During Reed's second sentencing hearing, counsel spoke at length about the accidental nature of Reed's offense, and asked that the trial court maintain its acceptance of the jointly recommended sentence, even in light of the compelling victim impact statement given earlier in the hearing.

{¶34} Moreover, given that the trial court imposed the sentence that Reed joined in requesting, there was not a reasonable probability that, but for his counsel's failure to object, the outcome of Reed's sentencing hearing would have been different. Thus, Reed has not satisfied either prong of the *Strickland* test, and he was not denied the effective assistance of counsel at the sentencing stage of his proceedings. Accordingly, Reed's second assignment of error is meritless.

{¶35} In conclusion, Reed's guilty plea was voluntary, knowing and intelligent, and counsel was not ineffective at Reed's sentencing hearing. Accordingly, the judgment of the trial court is affirmed.

Vukovich, P.J., concurs.

Waite, J., concurs.