

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
MADISON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-06-010
- vs -	:	<u>OPINION</u>
	:	6/11/2012
KEVIN C. MOXLEY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. CR 20100040

Stephen J. Pronai, Madison County Prosecuting Attorney, Eamon P. Costello, 59 North Main Street, London, Ohio 43140, for plaintiff-appellee

William F. Oswald, Jr., 810 Sycamore Street, 6th Floor, Cincinnati, Ohio 45202, for defendant-appellant

POWELL, P.J.

{¶ 1} A defendant seeks to vacate his guilty plea, arguing he was never informed that pleading guilty would waive some of his appellate rights. We affirm the conviction, finding the defendant's guilty plea was knowingly, voluntarily, and intelligently given, the trial court's discovery determinations were waived by his guilty plea, there was no showing of ineffective assistance of counsel, and he was sufficiently notified about the consequences should he

violate postrelease control (PRC).

{¶ 2} Kevin C. Moxley was indicted in Madison County Common Pleas Court on four counts of pandering obscenity involving a minor, a felony of the second degree, and four counts of the illegal use of a minor in nudity-oriented material or performance, a fifth-degree felony. The charges stemmed from the discovery of alleged child pornography on Moxley's computer, on a file-sharing program on Moxley's computer, and on a portable data storage device.

{¶ 3} Both parties acknowledge that Moxley's pretrial discovery motions asked for copies of the alleged pornography in the state's possession, and the trial court denied the request for copies. Moxley pled guilty to one count of pandering obscenity involving a minor and one count of the illegal use of a minor in nudity-oriented material. As part of the plea agreement, the remaining six felony counts were dismissed. Although Moxley's trial counsel advocated for community control, the trial court imposed a two-year prison term.

{¶ 4} Moxley filed this appeal, raising five assignments of error for our review. For ease of discussion, we will address some of the assignments of error out of order.

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE TRIAL COURT ERRED WHEN IT ACCEPTED APPELLANT'S PLEA THAT WAS NOT MADE KNOWINGLY, INTELLIGENTLY, OR VOLUNTARILY.

{¶ 7} Moxley asserts that he was not informed that pleading guilty waived his right to appeal pretrial rulings. Moxley cites to the transcript of the sentencing hearing, wherein his trial counsel answered in the affirmative when the trial court, after imposing the sentence, said, "Counsel, there was a pre-trial motion. I guess my question is, do you intend to appeal the sentencing based on that pre-trial motion?" Moxley argues that, given the comments cited above, it was understood he wanted to appeal pretrial rulings, and, therefore, his guilty plea was not knowingly, voluntarily, and intelligently given.

{¶ 8} The record indicates Moxley moved to withdraw his plea after sentencing. The motion, which was filed by different counsel, was based on Moxley's affidavit that criticized his retained trial counsel's handling of the case. The trial court denied the motion, finding the plea colloquy sufficient and concluding that Moxley failed to show a manifest injustice to justify withdrawing the plea. See Crim.R. 32.1.

{¶ 9} Moxley's assignment of error, however, does not challenge the trial court's denial of his motion to withdraw his plea. Rather, Moxley asks this court to vacate his guilty plea by finding that it was not knowingly, voluntarily, and intelligently given.

{¶ 10} In order for a guilty plea to be entered knowingly and voluntarily, a defendant must be informed that he is waiving critical constitutional rights. *State v. Bonnet*, 12th Dist. No. CA96-07-059, 1997 WL 89161 (Mar. 3, 1997), citing *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969). Crim.R. 11 was enacted to facilitate a more accurate determination that a defendant entering a plea of guilty does so knowingly, intelligently, and voluntarily. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200.

{¶ 11} Before accepting a guilty or no-contest plea, the trial court must make the determinations of and give the warnings required by Crim.R. 11(C)(2)(a) and (b) and notify the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c). *Veney* at ¶ 13.

{¶ 12} A trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. *Id.* at syllabus. The trial court need only substantially comply with the remaining -- or nonconstitutional -- provisions of the rule, which involve an understanding of the nature of the charges, the maximum penalty involved, and the effect of the plea. *State v. Enyart*, 10th Dist. Nos. 08AP-184, 08AP-318, 2008-Ohio-

6418, ¶ 15; Crim.R. 11(C)(2)(a) and (b).

{¶ 13} The fact that a guilty plea waives the defendant's right to contest various pretrial motions is not one of the specifically enumerated rights the trial court is required to provide in the Crim.R. 11 colloquy. *State v. Kidd*, 12th Dist. No. CA2001-11-021, 2002-Ohio-6394, ¶ 29; *State v. Jones*, 1st Dist. No. C-050833, 2006-Ohio-4284, ¶ 7-8. Where a trial court fully complies with Crim.R. 11(C), a criminal defendant does not suffer any prejudice because the court failed to inform the defendant of the effect of his plea on pretrial motions. *Bonnet*, 12th Dist. No. CA96-07-059, 1997 WL 89161.

{¶ 14} A review of the record indicates the trial court strictly complied with the constitutional aspects of Crim.R. 11(C) and substantially complied with the other Crim.R. 11(C) requirements. The record also indicates Moxley told the trial court he understood the rights and requirements the trial court read to him. Therefore, we find Moxley's plea was knowingly, voluntarily, and intelligently given. Moxley's first assignment of error is not well-taken and is overruled.

{¶ 15} Assignment of Error No. 4:

{¶ 16} THE DEFENDANT-APPELLANT SUFFERED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO NOTIFY DEFENDANT-APPELLANT OF THE EFFECT OF A GUILTY PLEA ON HIS APPELLATE RIGHTS.

{¶ 17} Moxley argues that his trial counsel's assistance was ineffective when he failed to inform him that pleading guilty would waive appellate consideration of the pretrial discovery issue.

{¶ 18} A defendant who pleads guilty also waives the right to claim ineffective assistance of counsel, except to the extent that counsel's deficient performance caused the plea to be less than knowing and voluntary, which is the argument raised by Moxley. See *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130.

{¶ 19} To prevail on a claim for ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. *State v. Nelms*, 12th Dist. No. CA2011-06-046, 2012-Ohio-52, ¶ 11; *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052 (1984).

{¶ 20} When applied in the context of a guilty plea, a defendant must also demonstrate that there is a reasonable probability that, but for his counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart* 474 U.S. 52, 58-59, 106 S.Ct. 366 (1985); *State v. Jacobson*, 4th Dist. No. 01CA730, 2003-Ohio-1201. In this case, Moxley does not allege that he would have insisted on going to trial, but argues that he would have pled no contest and appealed the trial court's discovery determination.

{¶ 21} First, we note that Moxley's plea was the result of a plea agreement wherein the six remaining felony counts were dismissed if he pled guilty to two felony counts. There is no indication in the record that the state would have afforded Moxley the opportunity to plead no contest. *Kidd*, 12th Dist. No. CA2001-11-021, 2002-Ohio-6394; see *State v. Jenkins*, 3rd Dist. No. 6-08-10, 2008-Ohio-5190.

{¶ 22} Secondly, we observe that Moxley supports his arguments with a reference to the affidavit he attached to his motion to withdraw his plea. As we previously noted, the affidavit criticized trial counsel's statements and efforts or lack thereof. However, any allegations of ineffectiveness based on facts not appearing in the record should be reviewed through the postconviction remedies of R.C. 2953.21. *Jones*, 1st Dist. No. C-050833, 2006-Ohio-4284 at ¶ 3-5; see *State v. Gilbert*, 8th Dist. No. 88806, 2008-Ohio-48, ¶ 21.

{¶ 23} And, finally, we address this assignment of error by reviewing the discovery issue Moxley argues he wanted to appeal and claims he was unable to do so because his trial counsel's representation was deficient.

{¶ 24} The record indicates Moxley's trial counsel made pretrial requests for copies of

the alleged pornography, presumably for an expert to analyze. The trial court, citing *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, observed that courts could place restrictions on access to evidence, particularly when that evidence consists of alleged contraband.

{¶ 25} The trial court found the state freely provided the defense and any defense expert with access to the materials at the prosecutor's office. The trial court refused to "extend that discovery and access to images beyond what has been provided."

{¶ 26} Based on the record, we are not persuaded the trial court erred in its decision about the discovery issue, and therefore, the loss of the ability to appeal the discovery determination through the guilty plea is not outcome determinative. Moxley was not prejudiced by his trial counsel's performance. See *State v. Hamblin*, 37 Ohio St.3d 153, 155-56 (1988). Accordingly, we find Moxley's fourth assignment of error not well-taken and overrule it.

{¶ 27} Assignment of Error No. 2:

{¶ 28} THE FINDING OF THE TRIAL COURT THAT THE ADAM WALSH ACT RESTRICTS A CRIMINAL DEFENDANT'S ACCESS TO EVIDENCE RELEVANT TO THIS DEFENSE IN CHILD PORNOGRAPHY PROSECUTIONS VIOLATED THE CONFRONTATION CLAUSE AND COMPULSORY PROCESS CLAUSE; VIOLATED DEFENDANT-APPELLANT'S DUE PROCESS RIGHTS; AND, VIOLATED DEFENDANT-APPELLANT'S FIFTH AND SIXTH AMENDMENT RIGHT OF THE UNITED STATES AND OHIO CONSTITUTIONS. [sic]

{¶ 29} Assignment of Error No. 3:

{¶ 30} THE ADAM WALSH ACT RESTRICTS A CRIMINAL DEFENDANT'S ACCESS TO EVIDENCE RELEVANT TO THIS DEFENSE IN CHILD PORNOGRAPHY PROSECUTIONS IN VIOLATION OF THE UNITED STATES AND OHIO CONSTITUTIONS, AND IS THEREFORE UNCONSTITUTIONAL. [sic]

{¶ 31} Moxley's second and third assignments of error raise challenges to pretrial discovery issues and the trial court's determination on those issues. A defendant's guilty plea waives his right to contest the adverse rulings that occurred before he entered his plea. See *State v. Kelley*, 57 Ohio St.3d 127 (1991).

{¶ 32} With the exception of the constitutionality of the plea itself, a defendant who enters a plea of guilty waives the right to appeal all nonjurisdictional issues arising at prior stages of the proceedings. *Bonnet*, 12th Dist. No.CA96-07-059, 1997 WL 89161; *State v. Bach*, 12th Dist. No. CA2005-05-057, 2006-Ohio-501, ¶ 5.

{¶ 33} In other words, a guilty plea waives any and all constitutional infirmities that occurred prior to the plea, including any error associated with discovery violations. See *State v. Minkner*, 2nd Dist. No. 2006CA32, 2007-Ohio-5574, ¶ 15. When a defendant pleads guilty, he waives any claimed flaw in the discovery procedure. *State v. Carswell*, 9th Dist. No. 23119, 2006-Ohio-5210, ¶ 24.

{¶ 34} Moxley's guilty plea waived these pretrial issues; and based on our findings under previous assigned errors, his second and third assignments of error are overruled.

{¶ 35} Assignment of Error No. 5:

{¶ 36} THE TRIAL COURT ERRED WHEN IT FAILED TO PROPERLY PROVIDE NOTICE TO DEFENDANT-APPELLANT OF HIS POST-RELEASE CONTROL. [sic]

{¶ 37} Moxley asserts under this assignment of error that the trial court failed to adequately inform him at the sentencing hearing of postrelease control. Specifically, Moxley argues that the trial court stated the proper term of PRC, but only indicated that a "violation of postrelease control will result in a potential reincarceration or reimprisonment of one-half the sentence I have imposed or one year." Moxley cited additional language he believed was necessary to constitute adequate notice of the consequences of a PRC violation.

{¶ 38} The applicable version of R.C. 2929.19(B) mandates that a court, when

imposing sentence, must notify the offender at the hearing that he will be supervised pursuant to R.C. 2967.28 and that upon violating supervision or a condition of postrelease control, the parole board may impose a prison term of up to one-half of the prison term originally imposed upon the offender. *See also* R.C. 2967.28; *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶ 2; *State v. Stewart*, 12th Dist. No. CA2010-08-215, 2011-Ohio-2211, ¶ 15.

{¶ 39} The Sixth Appellate District encountered a similar situation in which a defendant alleged that he did not receive adequate notification of the consequences should he violate PRC when he was only told at the sentencing hearing that he could be remanded to prison for a period of up to one-half of his original sentence. *State v. Rodriguez*, 6th Dist. No. WD-10-016, 2010-Ohio-5513.

{¶ 40} In overruling the defendant's assignment of error, the *Rodriguez* court found the trial court complied with R.C. 2929.19(B) at the sentencing hearing and there was no "mandate in R.C. 2967.28 or any other section of the sentencing statute that require[d] a trial court to inform a defendant, at a sentencing hearing, of the penalties that could be imposed by the parole board for a violation of the conditions of parole set by the board." *Id.* at ¶ 12.

{¶ 41} While the trial court could have given the same detail at the sentencing hearing that it provided in the sentencing entry, we agree with the *Rodriguez* court that the PRC notification provided at the hearing was sufficient and did not constitute error. Moxley's fifth assignment is overruled.

{¶ 42} Judgment affirmed.

RINGLAND and PIPER, JJ., concur.