

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	Nos. 11AP-111
Plaintiff-Appellee,	:	and 11AP-148
	:	(C.P.C. No. 09CR-5643)
v.	:	and
	:	No. 11AP-149
	:	(C.P.C. No. 10CR-4786)
Shawn L. Buoni,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	
	:	

D E C I S I O N

Rendered on December 22, 2011

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Yavitch & Palmer Co., L.P.A., and *Nicholas Siniff*, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Shawn L. Buoni, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to guilty plea, of two counts of aggravated robbery and one count of assault of a police officer. Because (1) defendant admitted to venue in his guilty plea, and (2) the trial court did not err in

sentencing defendant or in failing to explain the reasons for imposing consecutive sentences, we affirm.

I. Facts and Procedural History

{¶2} On the night of September 9, 2009, officers from the Sunbury Police Department responded to a reported robbery at a United Dairy Farmers store in Sunbury, Ohio, located in Delaware County. Upon arrival, officers discovered the store clerk lying on the floor with a "busted lip." (Plea hearing Tr. 8.) According to the clerk, the assailant entered the store, brandishing a blue pocketknife, and threw her onto the floor. Holding a knife to her back, the robber told her to open the cash register and then to get back on the floor. The robber took \$57.75 and an envelope with store keys. After learning that the store had been robbed and the clerk assaulted, police consulted the store's surveillance video and ascertained the suspect left the scene in a "dark-colored Jeep." (Plea hearing Tr. 9.) Based upon the clerk's description and the recorded footage, police issued a general description of the suspect and his vehicle.

{¶3} At about 7:00 a.m. on the morning of September 10, a friend of defendant entered the Hilliard police station in Franklin County and informed an officer that defendant "was at home and confessed to [the friend] that he had just robbed the UDF up in Sunbury." (Plea hearing Tr. 9.) According to the friend, defendant indicated he was about to "go to his father's house to do some bodily harm to his father and then try to commit suicide by cop." (Plea hearing Tr. 9.)

{¶4} The Hilliard officer contacted the Sunbury station. While the two departments were piecing together their information, another robbery occurred, this time at a Hilliard-area Burger King in Franklin County. According to the Burger King

employees, a man entered the restaurant, grabbed a worker, put a knife to the worker's neck, and demanded money. After taking \$45.12 from the register, the man drove off in a black SUV. Hilliard police responded to the Burger King call and determined the suspect that the restaurant witnesses described fit the general description of defendant. Police also noted the parallels between the robberies, including the use of a pocketknife and the vehicle description.

{¶5} Hilliard police went to defendant's residence in Hilliard. When they arrived, they observed defendant walking from the residence and ordered him to stop. Instead of complying, defendant got into an SUV and fled the area. After a pursuit through Franklin County, defendant's car went off the roadway and struck a fire hydrant. When a Hilliard police officer approached the stalled car, defendant exited the car, pulled a knife from his pocket, and began walking away despite the officer's warnings to stop. Following a struggle, officers took defendant into custody. Witnesses at the scene identified defendant; a sweatshirt and blue-handled knife matching the descriptions the Burger King employees gave, as well as some cash, were recovered from defendant's car.

{¶6} Defendant first was indicted in Franklin County in September 2009 in case No. 09CR-5643 for the events that occurred in Franklin County. The indictment charged defendant with one count of aggravated robbery, two counts of robbery, three counts of felonious assault, one count of failure to comply, and one count of assault.

{¶7} Under a second indictment filed in Franklin County on August 16, 2010, defendant was charged in case No. 10CR-4786 with one count of aggravated robbery, two counts of robbery, and one count of kidnapping arising out of his conduct in Delaware County. The indictment stated that "Count One alleges an offense that is part of a course

of criminal conduct between September 9, 2009 and September 10, 2009." According to the indictment, "the course of conduct was part of the same chain of events or in furtherance of the same purpose or objective."

{¶8} On August 24, 2010, defendant appeared before the trial court on both cases. At that time, defendant entered a guilty plea in case No. 09CR-5643 to aggravated robbery, a first-degree felony, and assault on a police officer, a felony of the fourth degree. In case No. 10CR-4786, he pled guilty to aggravated robbery. Accepting the plea, and pursuant to the state's request, the trial court entered a nolle prosequi on the remaining charges. The trial court sentenced defendant in case No. 09CR-5643 to eight years for the aggravated robbery charge and one year on the assault, to be served concurrently. In case No. 10CR-4786, the court imposed a sentence of seven years on the aggravated robbery charge, to be served consecutively with his sentence in case No. 09CR-5643.

II. Assignments of Error

{¶9} On appeal, defendant assigns three errors:

Assignment of Error No. 1:

The trial court lacked jurisdiction to sentence Appellant as the indicted crime was alleged to have been committed in Delaware County Ohio, thereby violating Appellant's right to Due Process under the Fourteenth Amendment to the United States Constitution, and comparable provisions of the Ohio Constitution.

Assignment of Error No. 2:

The trial court abused its discretion by considering conduct of Appellant for which he had not been convicted and not relying on the statutory guidelines for sentencing, thereby violating his Due Process Rights under the Fourteenth

Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution.

Assignment of Error No. 3:

The trial court erred by not stating the specific reasons for ordering non-minimum consecutive sentences, thereby violating his Due Process Rights under the Fourteenth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution.

III. First Assignment of Error - Venue

{¶10} Defendant's first assignment of error asserts the trial court "lacked jurisdiction to sentence" him because of improper venue. Although he pled guilty to aggravated robbery in connection with case No. 10CR-4786 pertaining to the robbery in Delaware County, defendant on appeal contends no continuing course of conduct supported venue in Franklin County for the conduct arising in Delaware County.

{¶11} Preliminarily, defendant's argument appears to conflate subject matter jurisdiction and venue. In contrast with subject matter jurisdiction, which may be challenged at any time, venue is not jurisdictional. *State v. Andrews*, 148 Ohio App.3d 92, 2002-Ohio-787, ¶20 (stating venue "is neither a jurisdictional nor a material element of a criminal offense"). Although "venue is not an essential element of a charged offense," the state must prove venue beyond a reasonable doubt unless defendant waives it. *State v. Wheat*, 10th Dist No. 05AP-30, 2005-Ohio-6958, ¶10, citing *State v. Headley* (1983), 6 Ohio St.3d 475, 477. A defendant "waives the right to challenge venue when the issue is raised for the first time on appeal." *Id.*, citing *State v. Loucks* (1971), 28 Ohio App.2d 77, 78; Crim.R. 12(C)(2) (providing that "defenses or objections based on defects in the indictment" must be raised before trial).

{¶12} Not only did defendant fail to challenge venue before the Franklin County trial court and thus waive it, he admitted to venue when he pled guilty to the aggravated robbery charge stemming from the events at the United Dairy Farmers store in Delaware County, including the indictment language that asserted the Delaware County crimes were part of a continuing course of conduct ending in Franklin County. See R.C. 1901.12 (permitting offenses committed in different jurisdictions as part of a course of criminal conduct "to be tried in any jurisdiction in which one of those offenses or any element of one of those offenses occurred"); *State v. Beuke* (1988), 38 Ohio St.3d 29, 36. A guilty plea admits to committing the crime charged, as described in the indictment. *United States v. Broce* (1989), 488 U.S. 563, 569, 109 S.Ct. 757, 763. Nor does defendant suggest his guilty plea was entered into other than knowingly, intelligently, and voluntarily. Accordingly, defendant's "guilty plea precludes [him] from challenging the factual issue of venue." *State v. McCartney* (1988), 55 Ohio App.3d 170. See also *State v. Cruse*, 10th Dist. No. 01AP-1074, 2002-Ohio-3259, ¶22 (stating "[a] criminal defendant who enters a voluntary plea of guilty while represented by competent counsel waives all non-jurisdictional defects in prior stages of the proceedings"); *Austin v. Perini* (C.A.6, 1970), 32 Ohio Misc. 31 (noting "[i]t is well settled in this Circuit that a voluntary plea of guilty made by an accused while represented by competent counsel waives all non-jurisdictional defects").

{¶13} Even if, despite defendant's guilty plea, a plain error analysis were appropriate, defendant cannot demonstrate plain error. Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B), however, places three limitations

on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. Initially, an error must exist. *State v. Hill*, 92 Ohio St.3d 191, 200, 2001-Ohio-141. Second, the error must be plain. To be plain within the meaning of Crim.R. 52(B), an error must be an obvious defect in the trial proceedings. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68; *State v. Sanders* (2001), 92 Ohio St.3d 245, 257. Third, the error must have affected defendant's substantial rights, meaning that the trial court's error must have affected the outcome of the trial. See *Hill* at 205; *State v. Moreland* (1990), 50 Ohio St.3d 58, 62; *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* at paragraph three of the syllabus. See also *State v. Thompson* (1987), 33 Ohio St.3d 1, 10.

{¶14} Several factors preclude plain error here. Initially, defendant actively endeavored to "get [the] Delaware County case and [the Franklin County] case set in Franklin County for possible resolution. (Continuance Entry filed in 09CR-5643 on 3/18/10; see also Continuance Entries filed 4/12/10, 7/27/10 and 8/5/10.) Defendant is not entitled to "take advantage of an error which he himself invited or induced." *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, ¶27; see also *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶75.

{¶15} Moreover, the trial court's decision to allow defendant's Delaware-based charges to be brought in Franklin County court on the basis of a continuing course of conduct was not plainly erroneous. R.C. 2901.12(H) states that prima facie evidence of a course of criminal conduct is present if the "offenses were committed as part of the

same transaction or chain of events, or in furtherance of the same purpose or objective" or if they "involved the same or a similar modus operandi." Although defendant contends no continuing course of conduct made venue proper in Franklin County, the stated facts suggest otherwise. Defendant committed the robberies hours apart, with the same blue pocketknife, exhibited a pattern of violent behavior toward the victim stores' employees, and stole very little money. Coupled with the warnings of defendant's friend to police that defendant intended to be caught, and even commit "suicide by cop," the stated facts indicate not just robbery, but an intention to commit a chain of events beginning with the first robbery in Delaware County and ending only because defendant confronted Officer Anderson. Accordingly, plain error does not exist.

{¶16} Defendant's first assignment of error is overruled.

IV. Second Assignment of Error – Sentencing

{¶17} Defendant's second assignment of error claims the trial court abused its discretion when it considered conduct "for which he had not been convicted." (Appellant's brief, 5.) Defendant contends the trial court improperly based its sentence on such conduct when he "did not have any meaningful opportunity to defend the case." (Appellant's brief, 6.)

{¶18} The incident to which defendant refers occurred while he was out of jail on bond following his plea hearing. As defendant's counsel explained, defendant was at a lounge having drinks with his girlfriend when a fellow patron began experiencing chest pains and difficulty breathing. Defendant transported the patron to a nearby fire station in search of help. At the fire station, paramedics attended to the patron, and a police officer told defendant to leave. Apparently frustrated by what he considered to be a slow

response to the patron's medical needs, defendant became combative and was arrested for disorderly conduct. To support his contention that the trial court actually considered the incident, defendant points to the trial court's references to it at the sentencing hearing.

{¶19} In *State v. English* (1991), 77 Ohio App.3d 371, 386, this court held that the trial court, at sentencing, "may consider information which would have been inadmissible at trial, including information regarding other arrests, regardless of whether convictions resulted." (Internal citations omitted.) *Id.*, citing *State v. Burton* (1977), 52 Ohio St.2d 21, 23, quoting *United States v. Doyle* (C.A.2, 1965), 348 F.2d 715, 721, cert. denied, 382 U.S. 843, 86 S.Ct. 89 (stating "[f]ew things can be so relevant as other criminal activity of the defendant," so that to argue " 'the presumption of innocence is affronted by considering unproved criminal activity is as implausible as taking the double jeopardy clause to bar reference to past convictions' "); *Maple Heights v. Dickard* (1986), 31 Ohio App.3d 68, 71.

{¶20} In sentencing defendant, the trial court noted that "at the end of the day it becomes * * * about punishment for this case and also the safety of our community." (Sentencing hearing Tr. 13.) The court then listed factors from the aggravated robberies and assault that proved relevant to its decision, including the "trauma that the victims experienced," defendant's use of physical force and a knife in the commission of the robbery, and the police chase and "offenses against the police." (Sentencing hearing Tr. 14-15); see R.C. 2929.12.

{¶21} With those remarks, defendant contends that, whatever other factors the trial court cited, its considering his latest arrest was the impetus to the court's conclusion that defendant was a danger to the community and warranted a greater sentence. To the

contrary, the court, in mentioning defendant's risk to the community, referenced the knife defendant used against the United Dairy Farmers clerk and Burger King employees, stating that "the community is at risk for whatever may come, whatever you have in your arsenal, whether it be a knife. You know, this time it was a knife." (Sentencing hearing Tr. 5.)

{¶22} Moreover, defendant, through counsel, initiated discussion at the sentencing hearing of the most recent arrest. When the court asked if defendant wanted to "offer any type of mitigation," defense counsel discussed his client's "recent setback," acknowledged defendant "got a little emotional, let his mouth get the best of him," and stated defendant "had good intentions at heart, was trying to be a good Samaritan." Counsel concluded by asking the court "to consider these matters in imposing the sentence here today." (Sentencing hearing Tr. 4.) The trial court explicitly stated that it was taking the post-bond incident into consideration "not in terms of his guilt but just in terms of the events and his inability to control his temper and recognize when to remove himself from a situation." (Sentencing hearing Tr. 13.) The trial court's focus thus was on defendant's failure to control his behavior.

{¶23} The trial court did not abuse its discretion in considering factors relating to defendant's conduct approximately two weeks before sentencing on the immediate convictions, particularly when defense counsel's offers of mitigating circumstances included several references to the incongruity between defendant's crimes and his general progress and good behavior during the same time period. See *State v. Polick* (1995), 101 Ohio App.3d 428, 431; *State v. Yontz* (1986), 33 Ohio App.3d 342, syllabus

(noting a reviewing court will not disturb the sentence unless the trial court has abused its discretion in that regard").

{¶24} Defendant further contends the trial court abused its discretion by not relying on the statutory guidelines for sentencing. To the extent defendant contends the court failed to advise of and apply the appropriate statutory sentencing terms for the crimes committed, the record reflects defendant faced up to ten years in prison for the aggravated robbery conviction and up to 18 months in prison for the assault on a police officer conviction in case No. 09CR-5643, plus up to an additional ten years for the aggravated robbery conviction in case No. 10CR-4786, for a total of 21 and a half years, "if the court were to run those consecutive of one another." (Plea hearing Tr. 17.) Moreover, the trial court's judgment entry indicates the court considered the factors in R.C. 2929.11 through 2929.14, which satisfies the court's obligations under those statutes. *State v. Sharp*, 10th Dist. No. 05AP-809, 2006-Ohio-3448, ¶6 (noting that such a representation "supports the conclusion that the trial court considered the requisite statutory factors prior to sentencing appellant").

{¶25} Because the trial court did not abuse its discretion in sentencing defendant, the second assignment of error is overruled.

V. Third Assignment of Error – Consecutive Sentences

{¶26} Finally, defendant contends the trial court erred in imposing consecutive sentences without making the findings required by R.C. 2929.14(E)(4). Defendant argues the United States Supreme Court decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, in upholding the constitutionality of a similar statute, essentially overruled *State*

v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856, insofar as *Foster* found R.C. 2929.14(E)(4) unconstitutional and severed it from Ohio's sentencing provisions.

{¶27} The Supreme Court of Ohio recently addressed and rejected defendant's argument, concluding: "[t]he United States Supreme Court's decision in *Oregon v. Ice* * * * does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*." *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, paragraph two of the syllabus. As a result, "[t]rial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made." *Id.* at paragraph three of the syllabus.

{¶28} Defendant's third assignment of error is overruled.

VI. Disposition

{¶29} Having overruled defendant's three assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

KLATT and TYACK, JJ., concur.
