

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 107801
	:	
v.	:	
	:	
BRENT J. FRISCONI,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: May 9, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-629597-A

Appearances:

Vincent Esquire, Ltd., Paul W. Vincent and Adam James
Vincent, *for appellant.*

Michael C. O'Malley, Prosecuting Attorney, and
Joanna N. Lopez, Assistant Prosecuting Attorney, *for
appellee.*

KATHLEEN ANN KEOUGH, J.:

{¶ 1} This appeal is before the court on the accelerated docket pursuant to
App.R. 11.1 and Loc.App.R. 11.1. The purpose of an accelerated appeal is to allow

this court to render a brief and conclusory opinion. *State v. Priest*, 8th Dist. Cuyahoga No. 100614, 2014-Ohio-1735, ¶ 1; App.R. 11.1(E).

{¶ 2} Defendant-appellant, Brent J. Friscone, appeals from the trial court's judgment, rendered after his guilty plea, finding him guilty of attempted domestic violence and endangering children. Finding no merit to the appeal, we affirm.

I. Background

{¶ 3} In June 2018, a Cuyahoga County Grand Jury indicted Friscone on one count of domestic violence in violation of R.C. 2919.25(A), with a furthermore clause that Friscone had previously been convicted of domestic violence; one count of disrupting public services in violation of R.C. 2909.04(A)(1); and one count of endangering children in violation of R.C. 2919.22(A).

{¶ 4} On August 16, 2018, pursuant to a plea agreement, Friscone pleaded guilty to one count of attempted domestic violence and one count of endangering children. The remaining charge was nolle.

{¶ 5} Friscone appeared with counsel at the plea hearing. The prosecutor explained the proposed plea agreement, and defense counsel affirmed that the prosecutor's recitation of the proposed agreement was correct. Upon questioning, Friscone told the court that he understood the plea bargain he was being offered.

{¶ 6} The court then asked Friscone questions relating to his age, education, citizenship, and use of medication, and whether he understood that he would be admitting to the crimes by pleading guilty, and that the court would sentence him as a "guilty individual." Friscone stated that he understood.

{¶ 7} The trial court then explained the constitutional rights Friscone would be waiving by pleading guilty. Friscone affirmed that he understood these rights and his waiver of them. The judge then explained the counts Friscone would be pleading guilty to, and the potential penalties for each count. After each count and its possible penalties were explained to Friscone, the judge asked him if he understood, and Friscone responded affirmatively. The judge then asked Friscone if he had any questions “about any of this,” and Friscone responded that he had no questions.

{¶ 8} Upon questioning by the court, Friscone stated that he was not threatened to plead guilty, and was not promised anything in exchange for his guilty plea other than that Count 1 would be reduced to attempted domestic violence, and Count 2 would be nolle. The trial court then accepted Friscone’s guilty pleas as intelligently, knowingly, and voluntarily made, and found him guilty of attempted domestic violence and endangering children.

{¶ 9} The trial court then asked if defense counsel would like a presentence investigation report (“PSI”); counsel responded affirmatively, and the matter was set for sentencing.

{¶ 10} The PSI was completed on September 6, 2018. As relevant to this appeal, it noted that Friscone had tested positive for cocaine on August 8, 2018.

{¶ 11} On September 14, 2018, Friscone appeared at the sentencing hearing with counsel. Upon questioning by the court, both the prosecutor and defense counsel affirmed that they had reviewed the PSI; the court stated that it had also

reviewed the report. The court then reviewed the facts that led to the charges, as summarized in the PSI.

{¶ 12} The court also reviewed Friscone's criminal history as set forth in the PSI. The court noted that Friscone's "history is one fraught with violent crime." The court reviewed Friscone's convictions from 2001 through 2014 for driving under the influence, assault, felony drug possession, disorderly conduct and fighting, and felonious assault, noting that he was "sent to prison in 2014 [for felonious assault], and here we are back again, less than four years later, with the next violent crime."

{¶ 13} Then, in an apparent reference to the PSI, the court noted that Friscone "is still taking cocaine. He tested positive for it in August," (tr. 7) and that he was also using alcohol and marijuana. The court then found that Friscone had scored at the moderate-risk level for future crime, but noted that the recidivism risk was not determinative of whether he would be sentenced to prison, but merely a gauge of how closely he would be supervised if he were not sentenced to prison.

{¶ 14} The prosecutor then advised the court that the state disagreed with Friscone's risk recidivism classification as moderate because, although Friscone denied any drug use, the PSI demonstrated that he was still using cocaine. The state then suggested that a prison sentence would be appropriate.

{¶ 15} Defense counsel requested that the trial court sentence Friscone to probation, although he acknowledged that Friscone had made "a huge mistake here" regarding the offenses to which he had pleaded guilty, and that the record demonstrated "he had a moment of weakness back in August." (Tr. 25.)

{¶ 16} After hearing from Friscone, the trial court sentenced him to a one-year risk-reduction prison sentence on the domestic violence conviction, concurrent with six months in jail on the endangering children conviction.

{¶ 17} This appeal followed.

II. Law and Analysis

A. The Guilty Plea

{¶ 18} A guilty plea that is not knowing, intelligent, and voluntary violates the Ohio and United States Constitutions. *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). It is the trial court's duty, therefore, to ensure that a defendant has a full understanding of what the plea connotes and of its consequences. *State v. Clarke*, 8th Dist. Cuyahoga No. 105047, 2017-Ohio-8226, ¶ 19.

{¶ 19} To effectuate this constitutional mandate, a trial court shall not accept a guilty plea in a felony case without first addressing the defendant personally and (1) determining that the defendant is making the plea voluntarily, and understands the nature of the charges and the maximum penalty involved, (2) informing the defendant of and determining that the defendant understands the effects of the plea, and that upon acceptance of the plea, the court may proceed with judgment and sentence, and (3) informing the defendant and determining that the defendant understands that by pleading guilty, he is waiving his rights to a jury trial, to call and confront witnesses, and to require the state to prove his guilt beyond a reasonable doubt. Crim.R. 11(C).

{¶ 20} In his first assignment of error, Friscone contends that his guilty plea was not made knowingly because, at the time of his plea, he did not know of his August 8, 2018 positive test for cocaine use, and that this alleged violation of his community control sanctions “would be highlighted and weighed at sentencing.” Friscone contends that the alleged community control violation was never disclosed to him or his counsel prior to the plea hearing, and that had he known about it, “it would have changed his decision-making concerning the plea deal.” Accordingly, he contends that his plea should be vacated. Friscone’s argument is without merit.

{¶ 21} First, there is nothing in the record demonstrating that Friscone was subject to community control sanctions when he tested positive for cocaine on August 8, 2018. In fact, at the plea hearing, upon questioning by the court, Friscone told the court that he was not under the supervision of any court or prison authority for any other crime of which he had been convicted. (Tr. 6.) Thus, despite Friscone’s argument, the positive drug test was not a community control violation.

{¶ 22} Furthermore, Friscone did not raise any objection in the trial court regarding the court’s consideration of his positive drug test. He did not move to withdraw his plea before sentencing, even though counsel admitted that he had reviewed the PSI prior to sentencing and discovered Friscone’s positive test for cocaine use. At sentencing, rather than raising any objection to the drug test, defense counsel simply characterized Friscone’s cocaine use as “a moment of weakness back in August” and asked that he be sentenced to probation. Even after

sentencing, Friscone never moved to withdraw his plea in light of the positive drug test.

{¶ 23} It is well-settled that failure to object waives all but plain error on appeal. *State v. St. Martin*, 8th Dist. Cuyahoga No. 96834, 2012-Ohio-1633, ¶ 7. We find no plain error because Friscone's plea was made knowingly, voluntarily, and intelligently. The record reflects that the trial court conducted an extensive colloquy with Friscone at the plea hearing and complied with every aspect of Crim.R. 11(C). The judge repeatedly confirmed that Friscone understood the charges to which he would be pleading guilty and the penalties he faced, the constitutional rights he would waive by pleading guilty, and that upon accepting the plea, the court could proceed to judgment and sentencing. The record also reflects that the court repeatedly asked Friscone if he had any questions about the charges, the possible penalties, and the plea hearing procedure.

{¶ 24} Friscone's assertion that his plea should be vacated because he did not know before pleading guilty that his positive drug test would be "highlighted and weighed" at sentencing is meritless. The court told Friscone prior to his guilty plea that he could be sentenced to up to 12 months in prison for the attempted domestic violence conviction, and he told the court that he understood the penalties he faced by pleading guilty. He was ultimately sentenced to one year in prison, a sentence the court had told him was possible.

{¶ 25} Likewise, there is also no support in the record for Friscone's assertion that the state violated its agreement that it would defer to the court for

purposes of sentencing. Friscone specifically told the court at the plea hearing that he had not been promised anything in exchange for his plea other than that Count 1 would be amended to attempted domestic violence, and Count 2 would be nolle. Moreover, Friscone never argued in the trial court that the state's request for a prison sentence was a violation of their plea agreement.

{¶ 26} In light of this record, it is apparent that Friscone's guilty plea was entered knowingly, voluntarily, and intelligently. The first assignment of error is therefore overruled.

B. Crim.R. 16

{¶ 27} Under Crim.R. 16(B)(5), the state is required to disclose '[a]ny evidence favorable to the defendant and material to guilt or punishment.' Additionally, Crim.R. 16(A) states that "[o]nce discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures."

{¶ 28} In his second assignment of error, Friscone contends that the state violated its duty under Crim.R. 16(A) to supplement its discovery responses because it did not disclose his positive drug test to him prior to the plea hearing. Accordingly, he contends that his plea should be vacated. Friscone's argument is specious.

{¶ 29} Friscone tested positive for cocaine use on August 8, 2018, eight days before the plea hearing. Friscone obviously had knowledge before the August 16, 2018, plea hearing that his drug test would likely return a positive result because he was the individual who had used cocaine.

{¶ 30} Furthermore, the PSI containing the positive drug test result was not prepared until September 6, 2018, after the plea hearing. We cannot conclude that the state had a duty to disclose the positive test result to Friscone before the August 16, 2018, plea hearing when the state did not yet have that result. The record reflects that defense counsel had access to and reviewed the PSI after it was prepared. On these facts, we find no violation by the state of its duty to disclose material to Friscone.

{¶ 31} The second assignment of error is overruled.

C. The Trial Court's Consideration of the PSI

{¶ 32} In his third assignment of error, Friscone contends that the trial court violated his due process rights at sentencing by considering the August 8, 2018, positive drug test noted on the PSI.

{¶ 33} As noted earlier, Friscone raised no argument at sentencing regarding the trial court's use of the positive drug test in determining his sentence. Accordingly, he waived all but plain error for purposes of appeal. *St. Martin*, 8th Dist. Cuyahoga No. 96834, 2012-Ohio-1633, at ¶ 7.

{¶ 34} Citing the due process requirements for a parole revocation hearing, Friscone contends that he was never given written notice of the alleged violation, "let alone any of the other five requirements." But Friscone was not on parole, and the trial court was not revoking his parole. Nor was the court determining whether Friscone had violated any community control sanctions.

{¶ 35} R.C. 2951.03, regarding presentencing investigation reports in a felony case, provides that the report shall contain information regarding the circumstances of the offense, and the offender's criminal record, social history, and present condition. It further provides that the investigation may include a drug test of the offender. R.C. 2951.03(B)(2) provides that a defendant is entitled at sentencing to comment on any negative information contained in the PSI and seek to introduce contrary evidence. Friscione did not do so. Accordingly, the trial court did not err in using the information in the PSI to aid it in determining the appropriate sentence for Friscione's offenses.

{¶ 36} Friscione also contends that the trial court should have sentenced him to probation because his recidivism risk was determined to be moderate. But the trial court made clear at sentencing that an offender's recidivism risk factor is not relevant to whether an offender is sentenced to prison; it is simply a gauge of how closely an offender would need to be supervised if he were not sentenced to prison.

{¶ 37} The trial court did not improperly use information contained in the PSI when it sentenced Friscione to a one-year risk-reduction prison sentence, nor did it violate his due process rights. The third assignment of error is therefore overruled.

{¶ 38} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE

MARY J. BOYLE, P.J., and
RAYMOND C. HEADEN, J., CONCUR

