[Cite as *State v. McElroy*, 2017-Ohio-1049.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 104639, 104640 and 104641

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM McELROY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART;
REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-16-602911-A, CR-16-604168-A and CR-16-605606-A

BEFORE: E.A. Gallagher, P.J., Kilbane, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 23, 2017

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EILEEN A. GALLAGHER, P.J.:

{¶1} In this consolidated appeal, defendant-appellant William McElroy appeals from his convictions and sentences following his guilty pleas to various counts in three separate cases: two counts of burglary, one count of theft and one count of misuse of credit cards in Case No. CR-16-602911 (Appeal No. 104641), one count of theft in Case No. CR-16-604168 (Appeal No. 104640) and one count of drug possession in Case No. CR-16-605606 (Appeal No. 104639). McElroy contends that the trial court did not properly advise him of his constitutional privilege against self-incrimination prior to accepting his guilty pleas. McElroy also contends that he was denied effective assistance of counsel with respect to the withdrawal of his guilty pleas and that the trial court abused its discretion in failing to hold a hearing to determine whether McElroy should be permitted to withdraw his guilty pleas. With respect to his sentences, McElroy contends that the trial court subjected him to double jeopardy and imposed a sentence that was contrary to law by sentencing him to a prison term after ordering him to serve a term in a community-based correctional facility ("CBCF") if found eligible for the CBCF. McElroy also contends that the trial court erred in imposing a prison sentence that differed from that pronounced at the sentencing hearing and in ordering an amount of restitution that differed from that agreed to as part of the plea agreement. For the reasons that follow, we affirm McElroy's convictions. However, in Case No. CR-16-602911, we vacate the trial court's June 7, 2016 nunc pro tunc entry and remand for resentencing limited to correcting the amount of restitution to be paid to J.B. to $700. In Case No. CR-16-604168, we vacate the trial court's June 7, 2016 nunc pro tunc entry and remand

the matter for resentencing limited to correcting the amount of restitution to be paid to F.W. to $37,350. In addition, in Case Nos. CR-16-604168 and CR-16-605606, we remand for the trial court to enter nunc pro tunc orders correcting its May 24, 2016 sentencing journal entries to reflect that the 12-month sentence imposed in Case No. CR-16-605606 is to be served concurrently with the sentences imposed in Case Nos. CR-16-602911 and CR-16-604168.

Factual and Procedural Background

{¶2} On February 10, 2016, a Cuyahoga County grand jury indicted McElroy on eight counts in Case No. CR-16-602911: two counts of burglary (Counts 1 and 6), two counts of theft (Counts 2 and 7), one count of receiving stolen property (Count 3), one count of telecommunications fraud (Count 4), one count of misuse of credit cards (Count 5) and one count of possessing criminal tools (Count 8). Each of the counts also carried a forfeiture specification. The charges related to McElroy's alleged use of a friend's, J.B.'s, U.S. Bank credit card to obtain approximately $1,300 in unauthorized cash withdrawals and his theft of a flat screen television and Xbox from J.B.'s residence in October 2015.

{¶3} On March 4, 2016, McElroy was indicted on one count of theft and one count of telecommunications fraud in Case No. CR-16-604168, arising out of a scheme in which McElroy allegedly impersonated a Cuyahoga County probation officer to swindle $37,350 from an elderly victim, F.W., during June 2014 through February 2016.

{¶4} On May 11, 2016, McElroy was indicted on one count of drug possession in Case No. CR-16-605606. McElroy entered not guilty pleas to all of the charges against him.

{¶5} On April 27, 2016, McElroy and the state reached a "package plea" agreement in Case Nos. CR-16-602911 and CR-16-604168. Pursuant to the plea agreement, McElroy agreed to change his pleas and plead guilty in Case No. CR-16-602911 to one of the theft counts, the misuse of credit cards count and two amended burglary counts — i.e., Count 1 was amended from a second-degree felony to a fourth-degree felony and Count 6 was amended from a second-degree felony to a third-degree felony. He also agreed to plea guilty to one count of theft, a third-degree felony, in Case No. CR-16-604168. As part of the plea agreement, McElroy further agreed to forfeit a vehicle as set forth in the forfeiture specification and to pay agreed restitution to several victims, including $700 to J.B., $1,304.95 to U.S. Bank and $37,350 to F.W.

{¶6} After conducting a plea colloquy, the trial court accepted McElroy's guilty pleas on each of these counts and indicated that it would order restitution as agreed to each of the victims, i.e., $1,304.95 to U.S. Bank, $37,350 to F.W. and $700 to J.B. In exchange for McElroy's guilty pleas, the remaining counts against him in Case Nos. CR-16-602911 and CR-16-604168 were nolled. The trial court ordered a presentence investigation report ("PSI") and scheduled the matter for a sentencing hearing on May 18, 2016. Defense counsel requested that the trial court also consider a CBCF referral and the trial court indicated it would do so. On April 29, 2016, the trial court entered a

journal entry in Case Nos. CR-16-602911 and CR-16-604168 relating to a possible CBCF referral.

{¶7} On May 18, 2016, McElroy withdrew his previously entered not guilty plea in Case No. CR-16-605606 and pled guilty to drug possession, a fifth-degree felony, as alleged in the indictment. After conducting a plea colloquy, the trial court accepted McElroy's guilty plea, then proceeded directly to sentencing in all three cases.

{¶8} Prior to sentencing, the trial court heard from the state, a detective familiar with the facts of the cases, defense counsel and McElroy. In addition, the trial court indicated that it had reviewed (1) the case files for each case, (2) the PSI and (3) "Revised Code Section R.C. 2929.11 for the principles and purposes of sentencing, Revised Code Section R.C. 2929.12 for the seriousness and recidivism factors, and Revised Code Section 2929.13 and other Revised Code Sections for felony sentencing of the 5th, 4th, and 3rd degree low tier."

{¶9} The state requested that a prison term be imposed in the three cases based on the nature of the crimes and the "specific vulnerability of the victims," as detailed by the detective. Defense counsel asserted that McElroy's crimes stemmed from a long-standing drug addiction and requested that he be committed to the CBCF.[1] McElroy stated that he was "apologetic" for his actions and requested that he be referred to a drug treatment facility.

[1]Counsel further indicated that McElroy had been "accepted into the CBCF" and that there was a bed available for McElroy "tomorrow morning" "if the Court would still allow him to go there."

{¶10} The trial court indicated that McElroy's "prior criminal history" and the fact that "he does commit crimes on a regular basis" weighed in favor of a prison sentence. It further noted that McElroy knew he had a drug problem and "could have, at any time, walked into any treatment facility and asked for help" but failed to do so.

{¶11} In Case No. CR-16-602911, Counts 1 (burglary), 2 (theft) and 5 (misuse of credit card) merged for sentencing and the state elected sentencing on Count 1. At the sentencing hearing, the trial court imposed prison sentences of 18 months on Count 1 and 24 months on Count 6 (burglary), to run concurrent to each other. In Case No. CR-16-604168, the trial court sentenced McElroy to 24 months in prison to run consecutively to his sentences in Case No. CR-16-602911. In Case No. CR-16-605606, the trial court sentenced McElroy to 12 months in prison, to be served concurrently with the sentences imposed in the other two cases, resulting in an aggregate prison term of four years. The trial court also indicated that McElroy would be required to pay $8,700 in restitution to J.B., $13,049.95 in restitution to U.S. Bank and $13,000 in restitution to F.W.

{¶12} In its May 24, 2016 sentencing journal entries, however, the trial court indicated that the 12-month sentence imposed in CR-16-605606 was to be served consecutively to the sentences imposed in Case Nos. CR-16-602911 and CR-16-604168. The trial court also ordered McElroy to pay $8,700 in restitution to J.B. and $1,304.95 in restitution to U.S. Bank in Case No. CR-16-602911 and $13,000 in restitution to F.W. in Case No. CR-16-604168.

{¶13} On June 7, 2016, the trial court issued two nunc pro tunc entries for the journal entries entered on May 24, 2016. In Case No. CR-16-602911, the trial court

issued a nunc pro tunc entry ordering McElroy to pay $870 in restitution to J.B. In Case No. CR-16-604168, the trial court issued a nunc pro tunc entry ordering McElroy to pay $37,500 in restitution to F.W.

{¶14} McElroy appealed his convictions and sentences, raising the following nine assignments of error for review:

> Assignment of Error I: The trial court erred in issuing a second judgment without jurisdiction to do so, subjecting appellant to double jeopardy after it had already ordered appellant to CBCF once found eligible.
>
> Assignment of Error II: The trial court acted contrary to law in ignoring its own journal entry and conclusion that appellant had been sentenced to CBCF and would serve a term in CBCF if found eligible.
>
> Assignment of Error III: The trial court erred in imposing consecutive sentences, such that it failed to make findings to impose consecutive sentences for each case.
>
> Assignment of Error IV: The trial court erred in imposing a term of imprisonment that does not match that stated in the sentencing hearing.
>
> Assignment of Error V: The trial court abused its discretion in imposing restitution that exceeded the amount proven or agreed to by the parties, and did not consider appellant's inability to pay.
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> Assignment of Error VI: The trial court violated Crim.R. 11 by taking appellant's plea by stating the prospect of one restitution amount, then imposing a different and higher restitution amount at sentencing.
>
> Assignment of Error VII: The trial court failed to comply with Crim.R. 11 by failing to advise appellant of his right to remain silent at trial.
>
> Assignment of Error VIII: The trial court erred in failing to hold a hearing on appellant's and counsel's comments that he be allowed to withdraw his plea.
>
> Assignment of Error IX: Defense counsel provided ineffective assistance by deferring to the court in regards to appellant's withdrawal of the plea.

{¶15} For ease of discussion we consider McElroy's arguments out of order, and together, where appropriate. We address his seventh assignment of error first.

Law and Analysis

Issues Relating to Defendant's Guilty Pleas Compliance with Crim.R. 11(C)(2)(c)

{¶16} In his seventh assignment of error, McElroy argues that his pleas and convictions in Case Nos. CR-16-602911 and CR-16-604168 should be vacated because the trial court failed to comply with Crim.R. 11(C)(2)(c) before accepting his guilty pleas.

{¶17} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996); *see also State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 7. In considering whether a plea was entered knowingly, intelligently and voluntarily, "an appellate court examines the totality of the circumstances through a de novo review of the record." *State v. Spock,* 8th Dist. Cuyahoga No. 99950, 2014-Ohio-606, ¶ 7; *see also State v. Jackson,* 8th Dist. Cuyahoga No. 99985, 2014-Ohio-706, ¶ 6. The trial court's "failure to adequately inform a defendant of his constitutional rights would invalidate a guilty plea under a presumption that it was entered involuntarily and unknowingly." *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12; *see also State v. Ballard,* 66 Ohio St.2d 473, 478, 423 N.E.2d 115 (1981) ("a guilty plea is constitutionally infirm when the defendant is not informed in a reasonable manner at the time of entering

his guilty plea of his rights to a trial by jury and to confront his accusers, and his privilege against self-incrimination, and his right of compulsory process for obtaining witnesses in his behalf").

{¶18} Before accepting a guilty plea in a felony case, the trial court must "inform" the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c) and "determin[e] that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself." Crim.R. 11(C)(2)(c). Thus, Crim.R. 11(C)(2)(c) requires that the trial court conduct an oral dialogue with the defendant to ensure that the defendant understands, among other things, that if the defendant chooses to go to trial, he or she "cannot be compelled to testify against himself or herself." *Engle* at 527; *State v. Hinton*, 8th Dist. Cuyahoga No. 102710, 2015-Ohio-4907, ¶ 21. With respect to this duty, strict compliance is required or a defendant's plea is invalid. *Veney* at syllabus.

{¶19} This does not mean, however, that the trial court must use the precise language contained in Crim.R. 11(C)(2)(c) in order to comply with the rule. Although "the preferred method of informing a criminal defendant of his or her constitutional rights during the plea colloquy is to use the language contained in Crim.R. 11(C)," literal compliance with Crim.R. 11(C)(2)(c) is not mandatory. *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826, ¶ 14; *see also State v. Marks*, 8th Dist. Cuyahoga No. 92548, 2009-Ohio-6306, ¶ 15 ("There is no requirement in the law that the trial court

use specific language when informing a defendant of a constitutional right for purposes of Crim.R. 11(C), only that the defendant be sufficiently appraised of the enumerated rights."). "[A] rote recitation of Crim.R. 11(C) is not required, and failure to use the exact language of the rule is not fatal to the plea. Rather, the focus, upon review, is whether the record shows that the trial court explained or referred to the right in a manner reasonably intelligent to that defendant." *Ballard* at 480; *see also Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, at ¶ 27. Thus, the "test for strict compliance" under Crim.R. 11(C)(2)(c) is whether "'the record shows that the judge explained these rights in a manner reasonably intelligible to the defendant.'" *State v. Gaines*, 8th Dist. Cuyahoga No. 102024, 2015-Ohio-2397, ¶ 6, quoting *Ballard* at 480.

{¶20} At the plea hearing in Case Nos. CR-16-602911 and CR-16-604168, the trial court advised McElroy regarding his constitutional privilege against self-incrimination as follows:

> THE COURT: Do you understand you have the right not to testify at the time of the trial in your case and that you are giving up that right?
>
> DEFENDANT PIERSON: Yes.
>
> DEFENDANT McELROY: Yes.[2]

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[2]In his brief, McElroy challenges only the trial court's advisement of his waiver of the privilege against self-incrimination in Case Nos. CR-16-602911 and CR-16-604168 and does not argue that the trial court's similar advisement during the plea hearing in Case No. CR-16-605606 was deficient. At the plea hearing for McElroy's plea in Case No. CR-16-605606, the trial court advised McElroy regarding his constitutional privilege against self-incrimination as follows:

> THE COURT: Do each of you understand that you have the right not to testify at the time of the trial of your case, which no one may use against you, and you are giving

{¶21} Citing this court's decision in *Gaines*, *supra*, and the Tenth District's decision in *State v. Truitt*, 10th Dist. Franklin No. 10AP-795, 2011-Ohio-2271, McElroy contends that the trial court's colloquy was deficient because the trial court did not "elaborate" upon his right not to testify and further inform McElroy (1) that he "could remain silent through trial," (2) "that the State could not force him to testify" and (3) that his "silence could not be commented on at trial." He argues that by failing to "inform [McElroy] of the nuances" of his constitutional privilege against self-incrimination, the trial court "failed to confirm" that McElroy entered his pleas knowingly, intelligently and voluntarily. We disagree.

{¶22} This case is clearly distinguishable from *Gaines*. In *Gaines*, the trial court informed the defendant he had the constitutional right "to remain silent and not to testify and [that] no one could comment on the fact that [he] did not testify at trial." *Gaines*, 2015-Ohio-2397, at ¶ 7. The defendant then asked, "[w]hat that mean, I don't have to testify at trial?" *Id.* In response to his question, the trial court stated:

> If we had proceeded to trial, the State of Ohio would have the burden of proof. That means that the jury would be impaneled, and the State of Ohio would have the burden of presenting to the jury information and testimony beyond a reasonable doubt that you committed these offenses, but you would not have any burden at all. Do you understand?
>
> The Defendant: Yes.

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up that right?

DEFENDANT PEARSALL: Yes, sir.

DEFENDANT McELROY: Yes.

Id.

{¶23} On appeal, this court concluded that although the trial court "did advise the defendant of his right against compulsory self-incrimination in accordance with Crim.R. 11(C)(2)(c)," it did not strictly comply with the rule because "strict compliance with the constitutional mandates under this section requires that the defendant also understand the rights he is waiving." *Id.* at ¶ 8. Because the trial court's response did not answer the defendant's question regarding his constitutional right not to testify at trial, there was "no clear manifestation" that the defendant understood his right not to testify. *Id.* Accordingly, this court held that the defendant's guilty plea was not entered knowingly, intelligently and voluntarily and vacated his plea. *Id.* at ¶ 12.

{¶24} In *Gaines*, the defendant specifically asked the trial court about his right not to testify and received no answer to his question from the trial court. In this case, McElroy did not ask any questions regarding his waiver of the privilege against self-incrimination or otherwise give any indication that he did not understand his constitutional right not to testify at trial.

{¶25} In *Truitt, supra*, with respect to waiver of the constitutional privilege against self-incrimination, the trial court advised the defendant only that he had the "right to remain silent." *Truitt,* 2011-Ohio-2271, at ¶ 12. On appeal, the defendant argued that this was insufficient because it did not "did not adequately explain" to the defendant that "he could not be compelled by the state to testify on his own behalf." *Id.* at ¶15. The Tenth District disagreed, stating:

> Here * * * the trial court advised appellant of his "right to remain silent." * * * The plain meaning of the trial court's words suggest that appellant had the right to say absolutely nothing at trial, if he so desired. Intuitively, if a person remains silent at trial, they opt to engage the privilege against self-incrimination and do not testify against themselves. In addition, as previously stated, the trial court inquired whether appellant had any questions regarding the colloquy, and appellant answered "no, sir." * * * Therefore, pursuant to *Ballard*, we find that the trial court explained waiver of the privilege against self-incrimination in a reasonably intelligible manner and in strict compliance with Crim.R. 11(C)(2)(c).

Id. at ¶ 21.

{¶26} Although the *Truitt* court held that the trial court's advisement that the defendant had the "right to remain silent" was sufficient for purposes of the self-incrimination privilege advisement required under Crim.R. 11(C)(2)(c), it did not hold that a trial court must specifically advise a defendant that he or she has "the right to remain silent" in order to strictly comply with Crim.R. 11(C)(2)(c). *See also State v. Hayes*, 11th Dist. Portage No. 2014-P-0044, 2016-Ohio-2794, ¶ 19 (trial court's advisement to defendant that he could not be required to testify against himself "clearly imports that he had an absolute right to remain silent" and "was a sufficient advisement to comply with *Ballard*").

{¶27} Under Crim.R. 11(C)(2)(c), the trial court was required to explain, in a manner reasonably intelligent to McElroy, that he could not be compelled to testify against himself. When a defendant is instructed that he has the "right to not to testify at trial," it follows that he has a right to remain silent at trial and cannot be compelled to testify against himself. *See Hayes*, 2016-Ohio-2794, at ¶ 19. This court and others have indicated that language similar to that used by the trial court in this case is sufficient to

strictly comply with the requirements of Crim.R. 11(C)(2)(c) relating to the privilege against self-incrimination. *See, e.g., State v. Huang*, 8th Dist. Cuyahoga No. 99945, 2014-Ohio-1511, ¶ 24 (noting that "[t]his court has held that the right not to testify is the same as stating that a defendant cannot be compelled to testify"); *State v. Burston*, 8th Dist. Cuyahoga No. 93645, 2010-Ohio-5120, ¶ 4-8 ("'the court's wording that appellant could choose not to testify is the equivalent of saying that the state could not compel her to testify and amounts to strict compliance under Crim.R. 11(C)(2)'"), quoting *State v. Bassett*, 8th Dist. Cuyahoga No. 90887, 2008-Ohio-5597, ¶ 20; *see also Hayes* at ¶ 9-12, 19 (trial court's advisement to defendant "you're not required to testify against yourself" was sufficient to comply with Crim.R. 11(C)(2)(c)). Contrary to McElroy's contention, Crim.R. 11(C)(2)(c) does not require that the trial court further inform a defendant that he or she could "remain silent through trial" or that his or her "silence could not be commented on at trial." *See, e.g., State v. Jones*, 8th Dist. Cuyahoga No. 104189, 2016-Ohio-5712, ¶ 10-12 (concluding that trial court "properly advised [defendant] that he did not have to testify against himself" and rejecting defendant's argument that his plea should be vacated because the trial court failed to advise him of "the right that the State could not comment on his exercise of the right to silence [and the] right to have the jury advised that any failure to testify may not be used against him") (emphasis omitted); *State v. Williams*, 10th Dist. Franklin No. 13AP-723, 2014-Ohio-846, ¶ 1, 10-12 (rejecting defendant's claim that trial court failed to strictly comply with Crim.R. 11(C)(2)(c) when it did not inform defendant that no one could comment on his silence at trial and that the jury would be instructed not to hold his silence against him); *State v. Eckles*, 173 Ohio App.3d

606, 2007-Ohio-6220, 879 N.E.2d 829, ¶ 39 (7th Dist.) (Crim.R. 11(C)(2)(c) "contains no requirement that one must be advised that the decision not to testify cannot be used against him or commented on").

{¶28} Having thoroughly reviewed the record, we conclude that the trial court did not violate Crim.R. 11(C)(2)(c) in accepting McElroy's plea and that McElroy entered his plea knowingly, intelligently and voluntarily. We find that the trial court explained waiver of the privilege against self-incrimination in a manner reasonably intelligent to McElroy in strict compliance with Crim.R. 11(C)(2)(c). The trial court specifically advised McElroy that he had "the right to not testify at the time of trial" and McElroy indicated that he understood that he was waiving that right. McElroy did not ask any questions and there is nothing else in the record to suggest that McElroy did not, in fact, fully understand that he was waiving his privilege against self-incrimination. The dialogue between the trial court and McElroy was sufficient to satisfy the requirement under Crim.R. 11(C)(2)(c) that a defendant be informed of, and understand, that he or she cannot be compelled to testify against himself or herself. McElroy's seventh assignment of error is overruled.

Withdrawal of Guilty Pleas

{¶29} McElroy's eighth and ninth assignments of error relate to McElroy's request to withdraw of his guilty pleas. In his eighth assignment of error, McElroy argues that the trial court erred in failing to hold a hearing to determine whether, based on certain remarks McElroy and defense counsel made following sentencing, McElroy should be permitted to withdraw his guilty pleas. In his ninth assignment of error, he contends that

defense counsel provided ineffective assistance with respect to McElroy's "withdrawal of the plea." These assignments of error are based on the following exchange between McElroy, the court and defense counsel, which occurred after his sentences were imposed:

> DEFENDANT McELROY: May I ask you a question?
>
> THE COURT: Sure.
>
> DEFENDANT McELROY: * * * To be more clear, obviously, I'm going to go to treatment for myself not because of what you are saying. Because of like — it's already done. And I need to say something.
>
> With the situation, with the [F.W.] situation, his son was doing it first. I did do it. It was wrong. I stole $7500. I did steal that and do that for my drug problem. *I was told flat out what to cop out to. I never even explained my case to this person.*
>
> The crime was on my best friend. I want help, so I'm going to do what you're saying. That's the truth. *This man right here, (indicating), did not represent me at all.*
>
> MR. SHAUGHNESSY: *Judge, you know what? Let him withdraw his plea.*
>
> DEFENDANT McELROY: *I didn't get to explain my case to you.*
>
> THE COURT: Mr. McElroy, you did explain this case to me. The fact of the matter is, he put you in the best possible light. The fact of the matter is, your actions and your conduct, over the past several months, has been horrendous. Horrendous.
>
> I have an obligation to protect the public. That is my first obligation, to protect the public. I get criticized left and right for trying to help guys like you who have drug problems, stuff like that. I get criticized left and right.
>
> When I put somebody in prison, it's because I think they deserve to go to prison. It's not for my numbers, or to make me feel good, or to face the cops, or press, or anybody else. It's because I think it is the right thing to do under the circumstances.

> And your attorney can talk 'til he's blue in the face. He could have tried these cases. And if you were convicted, you would have been convicted of more counts than you pled to. Potential charges would have been greater. Potential penalties would be greater.
>
> What you have is an opportunity. Don't kick it away by being bitter, or think that you got the short end of the stick. You have been giving that to everybody left and right here for the last several years. Do you want me to read your criminal history in front of everybody?
>
> DEFENDANT McELROY: No.

(Emphasis added.)

{¶30} A defendant who enters a guilty plea has no right to withdraw it. Crim.R. 32.1 provides that a trial court may grant a defendant's postsentence motion to withdraw a guilty plea only "to correct manifest injustice." Accordingly, a defendant who seeks to withdraw a guilty plea after sentencing bears the burden of demonstrating "manifest injustice." Manifest injustice has been described as a "clear or openly unjust act," *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998), that is evidenced by "an extraordinary and fundamental flaw in the plea proceeding," *State v. Hamilton*, 8th Dist. Cuyahoga No. 90141, 2008-Ohio-455, ¶ 8; *see also State v. Vinson*, 8th Dist. Cuyahoga No. 103329, 2016-Ohio-7604, ¶ 41. Thus, a postsentence withdrawal of a guilty plea is permitted "only in extraordinary cases." *State v. Rodriguez*, 8th Dist. Cuyahoga No. 103640, 2016-Ohio-5239, ¶ 22.

Hearing on Withdrawal of Guilty Pleas

{¶31} A trial court is not automatically required to hold a hearing on a postsentence motion to withdraw a guilty plea. *State v. Chandler*, 10th Dist. Franklin No. 13AP-452, 2013-Ohio-4671, ¶ 7. A hearing is required only if the facts alleged by the defendant,

accepted as true, would require that the defendant be allowed to withdraw the plea. *Id.; Rodriguez* at ¶ 23. An evidentiary hearing on a postsentence motion to withdraw a guilty plea is generally not required if "the record indicates that the movant is not entitled to relief and the movant has failed to submit evidentiary documents sufficient to demonstrate a manifest injustice." *State v. Russ*, 8th Dist. Cuyahoga No. 81580, 2003-Ohio-1001, ¶ 12. The trial court's decision whether to hold a hearing on a postsentence motion to withdraw a guilty plea is reviewed for abuse of discretion. *See, e.g., State v. Rice*, 2d Dist. Montgomery No. 27045, 2017-Ohio-122, ¶ 10; *State v. Bruce*, 10th Dist. Franklin No. 2016-Ohio-7132, ¶ 7-8; *see also State v. Congress*, 8th Dist. Cuyahoga No. 102867, 2015-Ohio-5264, ¶ 11 (indicating that "[g]enerally, the trial court's decision to deny a postsentence motion to withdraw a plea without a hearing is granted deference, particularly when the court conducted the original plea hearing" because "the trial court is in the best position to assess the credibility of the defendant's assertions"). An abuse of discretion occurs where the trial court's decision is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶32} We find no abuse of discretion by the trial court in failing to hold a hearing to determine whether McElroy should be permitted to withdraw his guilty pleas. First, it is important to note that McElroy did not move to withdraw his guilty pleas prior to filing his appeals. Even if we were to interpret McElroy's postsentencing comments as a request to withdraw his guilty pleas, McElroy did not identify any specific facts that would support the conclusion that withdrawal of his guilty pleas was necessary to correct manifest

injustice. Indeed, other than his bare assertions that trial counsel "did not represent me at all" and that he "never even explained [his] case" to his defense counsel, McElroy offered nothing to substantiate his claim that counsel failed to provide adequate representation. McElroy admitted, both as part of his guilty pleas and again at the sentencing hearing that he committed the acts giving rise to the offenses in Case Nos. CR-16-602911 and CR-16-604168. Furthermore, his postsentence criticisms of defense counsel contradicted his earlier statements to the trial court, during the plea hearing, that he was "satisfied with the services of [his] lawyer" and that no threats or promises had made to him to induce him to change his pleas. McElroy's eighth assignment of error is overruled.

Ineffective Assistance of Counsel

{¶33} McElroy also contends his guilty pleas should be vacated because defense counsel provided ineffective assistance by "stepping aside" and "deferring to the court" with respect to McElroy's "withdrawal of the plea."

{¶34} To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate: (1) deficient performance by counsel, i.e., that counsel's performance fell below an objective standard of reasonable representation, and (2) that counsel's errors prejudiced the defendant, i.e., a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. "Reasonable

probability" is "probability sufficient to undermine confidence in the outcome." *Strickland* at 694.

{¶35} It is not entirely clear from McElroy's argument what he contends defense counsel should have done but failed to do. A claim of ineffective assistance of counsel is waived by a guilty plea, except to the extent that the ineffective assistance of counsel caused the defendant's plea to be less than knowing, intelligent and voluntary. *See, e.g.*, *Vinson*, 2016-Ohio-7604, at ¶ 30; *State v. Williams*, 8th Dist. Cuyahoga No. 100459, 2014-Ohio-3415, ¶ 11, citing *State v. Spates*, 64 Ohio St.3d 269, 272, 595 N.E.2d 351 (1992), citing *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). Furthermore, although McElroy claims he "would have withdrawn his plea had he been properly advised on doing so," as detailed above, he has identified no factual or legal basis for the postsentence withdrawal of his guilty pleas. Accordingly, it cannot be said that McElroy was prejudiced by any alleged ineffective assistance of counsel with respect to McElroy's "withdrawal of the plea." McElroy's ninth assignment of error is overruled.

Sentencing Issues

{¶36} McElroy's remaining assignments of error relate to the sentences imposed by the trial court.

Journal Entry Relating to the CBCF

{¶37} In his first and second assignments of error, McElroy argues that he was subjected to multiple punishments for the same offense in violation of the Fifth Amendment's prohibition against double jeopardy when the trial court, at the May 18,

2016 sentencing hearing, sentenced him to prison despite its entry of a prior order directing him "to successfully complete the entire CBCF program" "[i]f found eligible" for the CBCF. McElroy claims that because he was, in fact, ultimately "found eligible" for the CBCF program, the trial court was compelled to refer him to the CBCF and, based on the prohibition against double jeopardy, could not "change" his sentence "after the [April 29, 2016] entry was made." McElroy further argues that the trial court acted "contrary to law" in imposing a prison sentence "at sentencing" after "at one point finding that prison was not appropriate" for him and that his prison sentences should, therefore, be vacated under R.C. 2953.08(G)(2). McElroy's arguments are meritless.

{¶38} These assignments of errors are based on a poorly worded journal entry the trial court entered on April 29, 2016 in Case Nos. CR-16-602911 and CR-16-604168 after the April 27, 2016 plea hearing:

> DEFENDANT REMANDED TO JAIL FOR PLACEMENT INTO A RESIDENTIAL FACILITY FOR UP TO SIX MONTHS. THE DEFENDANT IS TO BE SCREENED FOR PLACEMENT INTO A COMMUNITY BASED CORRECTIONAL FACILITY (CBCF). THE COURT AUTHORIZES A COPY OF THE PSI REPORT TO BE GIVEN TO THE CBCF FOR THE PURPOSE OF SCREENING, EVALUATION AND CASE PLANNING. IF FOUND ELIGIBLE, THE DEFENDANT IS TO SUCCESSFULLY COMPLETE THE ENTIRE CBCF PROGRAM AND FOLLOW ALL PROGRAM RECOMMENDATIONS. THE CUYAHOGA COUNTY SHERIFF DEPARTMENT IS ORDERED TO

TRANSPORT DEFENDANT. IT IS FURTHER ORDERED THAT IF THE DEFENDANT FAILS TO FOLLOW PROGRAM RULES AND REGULATIONS OF THE C.B.C.F. PROGRAM, SAID DEFENDANT SHALL BE TAKEN INTO CUSTODY AND RETURNED TO THE CUYAHOGA COUNTY JAIL AND HELD WITHOUT BOND UNTIL FURTHER ORDER OF THIS COURT. DEFENDANT ORDERED TO BE SCREENED FOR ELIGIBILITY BY CBCF PERSONNEL TO BE PLACED IN THE JUDGE NANCY R. MCDONNELL COMMUNITY BASED CORRECTIONAL FACILITY. COURT AUTHORIZES A COPY OF THE PSI REPORT BE GIVEN TO CBCF FOR PURPOSES OF SCREENING, EVALUATION, AND CASE PLANNING. SHERIFF ORDERED TO TRANSPORT DEFENDANT WILLIAM MCELROY * * * GENDER: MALE, RACE: WHITE. 04/27/2016 CPEDB 04/27/2016 15:12:54

{¶39} The journal entry followed a brief discussion between the trial court and defense counsel at the plea hearing regarding the possibility of a CBCF referral:

> [DEFENSE COUNSEL]: Your Honor, would the Court consider also CBCF referral?
>
> THE COURT: Yes. They should do that anyhow. We'll mark that. * * *
>
> [DEFENSE COUNSEL]: Thank you very much, your Honor.

Nothing further was stated at the plea hearing regarding the CBCF.

{¶40} When considered in context, it appears that the April 29, 2016 journal entry was intended by the trial court as a referral for McElroy to be screened to determine whether he was eligible for placement into the CBCF. However, we acknowledge that this is not all the entry, in fact, purports to do.

{¶41} The Fifth Amendment's Double Jeopardy Clause "protects against the imposition of multiple criminal punishments for the same offense in successive proceedings." *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684, ¶ 24, citing *Hudson v. United States*, 522 U.S. 93, 99, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997); *United States v. Husein*, 478 F.3d 318, 338 (6th Cir.2007). "'If a defendant has a legitimate expectation of finality, then an increase in that sentence is prohibited by the double jeopardy clause.'" *Raber* at ¶ 24, quoting *United States v. Fogel*, 829 F.2d 77, 87 (D.C.Cir.1987). However, "when a defendant is or should be aware at sentencing that the sentence may be increased, there is no legitimate expectation of finality to invoke a double-jeopardy concern." *In re D.S.*, 146 Ohio St.3d 182, 2016-Ohio-1027, 54 N.E.3d 1184, ¶ 23, citing *Husein* at 338, and *Fogel* at 87.

{¶42} McElroy argues that his prison sentences should be vacated because a trial court has "no authority to reconsider valid, final judgments in criminal cases" and double jeopardy "prohibit[s] a trial court from modifying a sentence once it has commenced."

{¶43} In this case, the April 29, 2016 journal entry did not constitute a "valid, final judgment" sentencing McElroy to the CBCF. As of April 29, 2016, the scheduled sentencing hearing had not yet been held, the PSI had not yet been prepared and the trial court had not yet considered the principles and purposes of felony sentencing under R.C.

2929.11 or the seriousness and recidivism factors under R.C. 2929.12. The defendant and defense counsel had not been given an opportunity to make a statement on the defendant's behalf or to present any information in mitigation of punishment and neither the prosecuting attorney nor any of McElroy's victims had been given an opportunity to speak. Crim.R. 32(A). The purported "sentence" to the CBCF was not imposed in defendant's presence as required under Crim.R. 43(A), and the April 29, 2016 journal entry did not meet the requirements of Crim.R. 32(C). In addition, McElroy never "commenced" a sentence at the CBCF. He was never transported to, or placed in, the CBCF with respect to the offenses at issue here. As such, McElroy could have had no legitimate expectation of finality in the April 29, 2016 journal entry as "sentencing" him to the CBCF, and neither the prohibition against double jeopardy nor R.C. 2953.08(G)(2) precluded the trial court from sentencing McElroy to a prison term at the sentencing hearing on May 18, 2016.

{¶44} Further, the record reflects that McElroy did not, in fact, have an expectation that he had been sentenced to the CBCF based on the April 29, 2016 journal entry. It is clear from the transcript of the sentencing hearing that the parties believed it remained to be decided whether McElroy would be sentenced to the CBCF. McElroy did not object, at the sentencing hearing, to the trial court's imposition of a prison sentence on double jeopardy grounds or otherwise contend that the trial court was bound by its April 29, 2016 journal entry to sentence him to the CBCF. To the contrary, both McElroy and defense counsel argued extensively at the sentencing hearing that he be committed to the CBCF. McElroy's first and second assignments of error are overruled.

Imposition of Term of Imprisonment that Did Not Match that Stated at Sentencing Hearing

{¶45} In his third and fourth assignments of error, McElroy contends that the trial court erred in imposing a prison sentence that differed from that pronounced at the sentencing hearing and that the trial court failed to make the requisite findings to support the imposition of consecutive sentences in Case No. CR-16-605606.[3]

{¶46} At the sentencing hearing, in Case No. CR-16-602911, the trial court imposed sentences of 18 months on Count 1 and 24 months on Count 6, to run concurrent to each other. In Case No. CR-16-604168, the trial court sentenced McElroy to 24 months to run consecutively to the sentences in Case No. CR-16-602911, and in Case No. CR-16-605606, the trial court sentenced McElroy to 12 months, to be served *concurrently* with the sentences imposed in the other two cases, resulting in an aggregate prison term of four years. Later in the sentencing hearing, the trial court reiterated that McElroy had received an aggregate four-year sentence: "I'm giving you 48, with a possibility if you get your act together, that you have a possibility of judicial release."

{¶47} In its May 24, 2016 sentencing journal entries, however, the trial court indicated that the 12-month sentence imposed in CR-16-605606 was to be served *consecutively* to the sentences imposed in Case Nos. CR-16-602911 and CR-16-604168, resulting in an aggregate five-year prison sentence.

[3]McElroy does not dispute that the trial court made the requisite findings to support the imposition of consecutive sentences in Case Nos. CR-16-602911 and CR-16-604168.

{¶48} The state concedes that, based on its statements at the sentencing hearing, the trial court "clearly intended" that the 12-month sentence imposed in CR-16-605606 be served concurrently with the sentences imposed in Case Nos. CR-16-602911 and CR-16-604168. McElroy's fourth assignment of error is sustained. In Case Nos. CR-16-604168 and CR-16-605606, we remand for the trial court to enter nunc pro tunc orders correcting its May 24, 2016 sentencing journal entries to reflect that the 12-month sentence imposed in Case No. CR-16-605606 is to be served concurrently with the sentences imposed in Case Nos. CR-16-602911 and CR-16-604168. *See* Crim.R. 36 ("[c]lerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time"); *see also State ex rel. DeWine v. Burge*, 128 Ohio St.3d 236, 2011-Ohio-235, 943 N.E.2d 535, ¶ 17 ("'[C]ourts possess inherent authority to correct clerical errors in judgment entries so that the record speaks the truth.'"), quoting *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19; *State v. Spears*, 8th Dist. Cuyahoga No. 94089, 2010-Ohio-2229, ¶ 10 (nunc pro tunc order may be properly used "to memorializ[e] what the trial court actually did at an earlier point in time, such as correcting a previously issued order that fails to reflect the trial court's true action * * * [;][t]herefore, a nunc pro nunc entry may be used to correct a sentencing entry to reflect the sentence the trial court imposed upon a defendant at a sentencing hearing"); *State v. Hampton*, 8th Dist. Cuyahoga No. 103992, 2016-Ohio-5419, ¶ 4 ("'Although a court speaks through its journal entries, clerical errors may be corrected at any time in order to conform to the transcript of the proceedings."'), quoting *State v. Steinke*, 8th Dist. Cuyahoga No. 81785,

2003-Ohio-3527, ¶ 47 (remanding case to the trial court to correct error in sentencing judgment entry to make the judgment entry conform to the transcript of the sentencing hearing).

{¶49} Based on our resolution of McElroy's fourth assignment of error, his third assignment of error is moot.

Restitution

{¶50} McElroy's fifth and sixth assignments of error relate to the trial court's restitution order. In his fifth assignment of error, McElroy contends that the trial court abused its discretion and committed plain error in imposing restitution that exceeded the amount of restitution McElroy agreed to pay as part of the plea agreement and failing to consider his inability to pay. In his sixth assignment of error, McElroy argues that the trial court violated Crim.R. 11(C)(2)(b) by "promising" one restitution amount prior to McElroy's plea and imposing another restitution amount at sentencing.

{¶51} The record reflects that, as part of the plea agreement, McElroy agreed to pay $700 in restitution to J.B. The record further reflects that the trial court stated at the plea hearing that he would order McElroy to pay restitution of $700 to J.B. However, at the sentencing hearing and in its May 26, 2016 judgment entry, the trial court ordered McElroy to pay $8,700 in restitution to J.B. In its June 7, 2016 nunc pro tunc order, the trial court incorrectly modified the amount of restitution to be paid to J.B. to $870.

{¶52} The state concedes the trial court's error and acknowledges that the correct amount of restitution to be paid to J.B. is $700.

{¶53} With respect to McElroy's claim that the trial court erred in imposing restitution without considering his ability to pay, the record reflects that McElroy expressly agreed to pay the restitution $700 in restitution to J.B. as part of his plea agreement. "'When the agreement to pay restitution to the victim is part and parcel of a plea agreement, there is no reversible error in imposing a financial sanction, without first determining the defendant's ability to pay.'" *State v. McMullen*, 1st Dist. Hamilton No. C-140562, 2015-Ohio-3741, ¶ 5, quoting *State v. Coburn*, 6th Dist. Sandusky No. S-09-006, 2010-Ohio-692, ¶ 22; *State v. St. Martin*, 8th Dist. Cuyahoga No. 96834, 2012-Ohio-1633, ¶ 8 ("when the [s]tate and the defense enter into a stipulation as to the amount of restitution, the stipulation is sufficient to support the trial court's order and precludes the defendant from complaining about it on appeal"); *State v. Allen*, 8th Dist. Cuyahoga No. 96952, 2012-Ohio-1193, ¶ 9-10 ("if the parties stipulate to the restitution amount, the defendant is precluded from raising the court's failure to determine his ability to pay as an assigned error").

{¶54} We also note, sua sponte, that although the record reflects that McElroy agreed, as part of the plea agreement, to pay $37,350 in restitution to F.W. and that the trial court stated at the plea hearing that it would order McElroy to pay restitution of $37,350 to F.W., at the sentencing hearing and in its May 26, 2016 judgment entry, the trial court ordered McElroy to pay $13,000 in restitution to F.W. In its June 7, 2016 nunc pro tunc order, the trial court incorrectly modified the amount of restitution to be paid to F.W. to $37,500.

{¶55} McElroy's fifth assignment of error is sustained in part and overruled in part. In Case No. CR-16-602911, we vacate the trial court's June 7, 2016 nunc pro tunc entry and remand the matter for resentencing limited to correcting the amount of restitution to be paid to J.B. to $700. In Case No. CR-16-604168, we vacate the trial court's June 7, 2016 nunc pro tunc entry and remand the matter for resentencing limited to correcting the amount of restitution to be paid to F.W. to $37,350.

{¶56} Based on our resolution of McElroy's fifth assignment of error, his sixth assignment of error is moot.

{¶57} Judgment affirmed in part; reversed in part; remanded. In Case No. CR-16-602911,the trial court's June 7, 2016 nunc pro tunc entry is vacated and the case remanded for resentencing limited to correcting the amount of restitution to be paid to J.B. to $700. In Case No. CR-16-604168, we vacate the trial court's June 7, 2016 nunc pro tunc entry and remand the matter for resentencing limited to correcting the amount of restitution to be paid to F.W. to $37,350. In addition, in Case Nos. CR-16-604168 and CR-16-605606, we remand for the trial court to enter nunc pro tunc orders correcting its May 24, 2016 sentencing journal entries to reflect that the 12-month sentence imposed in Case No. CR-16-605606 is to be served concurrently with the sentences imposed in Case Nos. CR-16-602911 and CR-16-604168.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

_____
EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
SEAN C. GALLAGHER, J., CONCUR