

[Cite as *State v. Tribble*, 2017-Ohio-4425.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 16 MA 0009
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
JAMES TRIBBLE)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio
Case No. 15 CR 549

JUDGMENT: Affirmed in part.
Reversed in part. Remanded.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
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For Defendant-Appellant: Atty. Derek Cek
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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 14, 2017

[Cite as *State v. Tribble*, 2017-Ohio-4425.]
WAITE, J.

{¶1} Appellant James Tribble appeals the judgment and sentencing of the Mahoning County Common Pleas Court. Appellant contends he did not enter his guilty plea knowingly, voluntarily and intelligently because the trial court failed to comply with Crim.R. 11. However, this record shows that the trial court did meet all requirements relative to Appellant's plea. Appellant also asserts the trial court's imposition of a twelve-month sentence was contrary to law. The trial court was not required to impose a nonprison sentence. The record reveals the trial court imposed a sentence within the statutory range; thus there was no error. Appellant further contends the trial court erred in imposing a non-definite term of probation for his domestic violence conviction. As R.C. 2929.25 and R.C. 2929.27 require a definite term of probation be imposed, the trial court's sentence in this regard is in error. Appellant's third assignment of error is sustained. Finally, Appellant asserts the trial court erred in failing to properly advise him of the consequences should he violate postrelease control, pursuant to R.C. 2967.28. A review of the transcript reveals that the trial court did fail to advise Appellant. Appellant's fourth assignment of error also has merit and is sustained. In summary, Appellant's first and second assignments of error are meritless and are overruled. Appellant's third and fourth assignments of error have merit and are sustained. The sentencing of the trial court is reversed in part and the matter is remanded as to these issues.

Factual and Procedural History

{¶2} On June 25, 2015, Appellant was indicted on four charges: OVI, a felony of the fourth degree in violation of R.C. 4511.19(A)(1); assault on a police

officer, a felony of the fourth degree in violation of R.C. 2903.13; domestic violence, a misdemeanor of the fourth degree in violation of R.C. 2919.25(C); and resisting arrest, a misdemeanor of the second degree in violation of R.C. 2921.33.

{¶13} On December 3, 2015, Appellant pleaded guilty to the following: count one, physical control while under the influence in violation of R.C. 4511.194(B)(D), a misdemeanor of the first degree; count two, assault, a violation of R.C. 2903.13(A), (C)(5), a felony of the fourth degree; and count three, domestic violence in violation of R.C. 2919.25(C), (D), a misdemeanor of the fourth degree.

{¶14} A sentencing hearing was held on January 13, 2016. Appellant was sentenced to thirty days of incarceration on count one, twelve months on count two, and was sentenced to probation for count three. The sentences for all three counts were to be served concurrently. Appellant filed this timely appeal.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT COMMITTED PLAIN ERROR AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW IN ACCEPTING APPELLANT'S GUILTY PLEAS WITHOUT ADEQUATELY ADVISING HIM OF ONE OF HIS CONSTITUTIONAL RIGHTS AND OTHER NONCONSTITUTIONAL RIGHTS.

{¶15} In his first assignment of error, Appellant contends that his guilty plea was not knowingly, voluntarily and intelligently entered because the trial court failed to adequately advise him of his constitutional right to compulsory process and failed

to advise him on the nonconstitutional issue of the maximum fines to which he was subject under count three.

{¶16} “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). Crim.R. 11 requires the trial court to follow a certain procedure for accepting guilty pleas in felony cases. Before the court can accept a guilty plea to a felony charge, it must conduct a colloquy with the defendant to determine that they understand the plea they are entering and the rights being voluntarily waived. Crim.R. 11(C)(2).

{¶17} Crim.R. 11(C)(2)(c) sets forth the constitutional rights that the defendant waives by entering the guilty plea.

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. When a trial court fails to strictly comply with this duty, the defendant’s plea is invalid. (Crim.R. 11(C)(2)(c), applied.)

State v. Veney, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, syllabus.

{¶18} Crim.R. 11(C) also sets forth the nonconstitutional rights that a defendant must be informed of prior to the trial court accepting the plea. A defendant must be informed: (1) of the nature of the charges; (2) of the maximum penalty involved; (3) if applicable, that he is not eligible for probation or the imposition of community control sanctions, and (4) that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence. Crim.R. 11(C)(2)(a)(b); *State v. Philpott*, 8th Dist. No. 74392 (Dec. 14, 2000), citing *McCarthy v. U.S.*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). For these nonconstitutional rights, the trial court must substantially comply with its mandates. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). Substantial compliance is met when under the totality of the circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving. *Id.* Moreover, when nonconstitutional aspects of the Crim.R. 11 plea colloquy are at issue, the defendant must show prejudice before a plea will be vacated. *Veney* at ¶ 17. “To demonstrate prejudice in this context, the defendant must show that the plea would otherwise not have been entered.” *Id.* at ¶ 15, citing *Nero* at 108.

{¶19} In the instant case, the trial court strictly complied with the Crim.R. 11 requirement concerning waiver of the enumerated constitutional rights. At the plea hearing on December 3, 2015, the court advised:

Now do you understand by entering into this plea agreement, you’re giving up certain substantial statutory and constitutional rights, such as your right to trial by jury, your right to have the state prove beyond a

reasonable doubt each element of each offense, your right to confront any witness that would testify against you, your right to compel witnesses to testify on your own behalf, and your right not to testify at trial or any other proceeding if you so desire?

(12/3/15, Tr., p. 5.)

{¶10} Appellant responded, “[y]es, I understand everything.” (12/3/15, Tr., p. 5.) We have previously held that the language “the right to compel witnesses to testify on his behalf” strictly complies with the requirements of Crim.R. 11(C)(2)(c). *State v. Powers*, 7th Dist. No. 10 MA 161, 2011-Ohio-6541, ¶ 18. Thus, in utilizing this language, the trial court did not err when advising Appellant of each and every constitutional right that he was waiving as a result of his guilty plea.

{¶11} Appellant’s written Crim.R. 11 plea agreement also stated the fines to which Appellant was subject, however, it listed the maximum fine in a higher amount than that allowed by statute. At hearing, the trial court did not address the issue of fines. While the language of the written agreement was erroneous, in order to prevail here Appellant must establish prejudice, because the matter involves a nonconstitutional issue. *Veney*, at ¶ 17. Moreover, substantial compliance requires only that, under the totality of the circumstances, the defendant subjectively understands the implications of their plea and the rights being waived. *Nero, supra*.

{¶12} Appellant cannot establish prejudice because no fines were actually imposed for any of his offenses. Moreover, the fine to which he was potentially subject was lower, not higher, than the amount contained in the written agreement.

Appellant was represented by counsel, acknowledged counsel discussed the plea agreement with him, and stated that he understood “everything” that was presented to him during the colloquy. (12/3/15 Tr., pp. 9-11.) Based on the totality of these circumstances, it was apparent that Appellant suffered no prejudice.

{¶13} Appellant’s first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT’S SENTENCE IS CONTRARY TO LAW BY
FAILING TO COMPLY WITH THE PURPOSES AND PRINCIPLES OF
SENTENCING AND IMPOSING A PRISON SENTENCE.

{¶14} In his second assignment of error, Appellant alleges the trial court erred in sentencing him to twelve months of imprisonment and that this sentence is contrary to law.

{¶15} The Ohio Supreme Court in *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, ¶ 10, held that “appellate courts may not apply the abuse-of-discretion standard in sentencing-term challenges.” Instead, “appellate courts must adhere to the plain language of R.C. 2953.08(G)(2).” *Id.* at ¶ 7. Accordingly, “an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court’s findings under relevant statutes or that the sentence is otherwise contrary to law.” *Id.* at ¶ 1.

{¶16} Appellant contends his sentence is contrary to law because the trial court failed to properly apply the sentencing guidelines contained in R.C. 2929.11

and .12. He also claims that a prison term was not necessary to protect the public where his attack on the police officer was not a severe one and a prison term would place an unnecessary burden on government.

{¶17} The state contends that, although the trial court did not make findings regarding the purposes and principles of sentencing or place the seriousness and recidivism factors on the record, these were not required, and this record supports Appellant's sentence.

{¶18} We have consistently held that a trial court is not required to discuss seriousness and recidivism factors on the record so long as that record "allows the reviewing court to determine that the proper consideration occurred." *State v. Pyles*, 7th Dist. No. 13 BE 11, 2014-Ohio-4146, ¶ 6.

{¶19} R.C. 2953.08(G)(2) does, at times, require the trial court to make explicit findings, such as when dealing with consecutive sentencing pursuant to R.C. 2929.14(C)(4):

The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

R.C. 2953.08(G)(2). Appellant's convictions do not fall within the strictures of this statute.

{¶20} Appellant pleaded guilty to assault in violation of R.C. 2903.13(A),(C)(5), a felony of the fourth degree. R.C. 2929.14(A)(4) applies, here. Our review shows that Appellant's sentence falls within the applicable statutory range and trial courts have full discretion to impose a sentence within the statutory range. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus. Moreover, the weight to be given to the sentencing factors is purely within the discretion of the trial court. *State v. Jones*, 8th Dist. No. 104152, 2016-Ohio-8145, ¶ 14.

{¶21} Although the trial court must consider the purposes of felony sentencing pursuant to R.C. 2929.11 and the sentencing factors in R.C. 2929.12 when sentencing a defendant on a felony, the trial court is not required to discuss the factors on the record. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31. Moreover, there is a presumption that the trial court considered the appropriate factors unless an appellant affirmatively demonstrates otherwise. *State v. Stevens*, 1st Dist. No. C-130278, 2013-Ohio-5218, ¶ 12.

{¶22} In regard to Appellant's twelve month sentence for a fourth degree felony, the record shows that the trial court engaged in the correct analysis, made the appropriate findings on this issue and these findings are supported by the record. It is also apparent that the length of Appellant's sentence was not clearly and

convincingly contrary to law. Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT'S SENTENCE IS CONTRARY TO LAW
BECAUSE IT FAILS TO STATE A DEFINITE TERM OF PROBATION.

{¶23} In his third assignment of error, Appellant contends the trial court erred in issuing a nondefinite term of probation for his domestic violence conviction.

{¶24} An appellate court reviews misdemeanor sentences under an abuse of discretion standard. *State v. Marcum*, 2013-Ohio-2447, 994 N.E.2d 1 at ¶ 22. A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary. *State v. Keenan*, 143 Ohio St.3d 397, 2015-Ohio-2484, 38 N.E.3d 870, ¶ 7. A trial court generally has broad discretion when imposing sentences for misdemeanors. *Cleveland v. Peoples*, 8th Dist. No. 100955, 2015-Ohio-674, ¶ 14. However, both R.C. 2929.27 and R.C. 2929.25 set out certain guidelines for trial courts when imposing a misdemeanor sentence.

{¶25} R.C. 2929.27 provides that when there is no mandatory jail term required by law, the trial court may sentence an offender to a term of probation.

{¶26} R.C. 2929.25(A)(3) governs misdemeanor community control sanctions. It reads, in pertinent part:

At sentencing, if a court directly imposes a community control sanction or combination of community control sanctions pursuant to division (A)(1)(a) or (B) of this section, the court shall state the duration of the

community control sanctions imposed and shall notify the offender that if any of the conditions of the community control sanctions are violated the court may do any of the following:

(a) Impose a longer time under the same community control sanction if the total time under all of the offender's community control sanctions does not exceed the five-year limit specified in division (A)(2) of this section;

(b) Impose a more restrictive community control sanction under section 2929.26, 2929.27, or 2929.28 of the Revised Code, but the court is not required to impose any particular sanction or sanctions;

(c) Impose a definite jail term from the range of jail terms authorized for the offense under section 2929.24 of the Revised Code.

{¶27} In the instant matter, Appellant was sentenced to probation for his domestic violence conviction in violation of R.C. 2919.25(C), (D), a misdemeanor of the fourth degree. At the sentencing hearing, the trial court did not specify the length of his term of probation, nor is this specified in the judgment entry dated January 22, 2016, which states only “probation term.”

{¶28} This record shows the trial court failed to specify the length of Appellant's term of probation at either the sentencing hearing or in the final judgment of sentence contrary to the statutory requirements. Therefore, Appellant's third assignment of error is sustained.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT ERRED BY IMPROPERLY NOTIFYING THE APPELLANT AT THE SENTENCING HEARING OF POST RELEASE CONTROL.

{¶29} In his fourth assignment of error, Appellant contends the trial court erred in failing to properly advise Appellant of the consequences of violating postrelease control.

{¶30} At the sentencing hearing on this matter, the trial court imposed three years of postrelease control, which is permissible for a fourth degree felony. However, the trial court failed to comply with R.C. 2929.19(B)(2)(e). Pursuant to this statute, if the court determines at the sentencing hearing that a prison term is necessary or required, the court must notify the offender that if that offender violates postrelease control, the parole board may impose a prison term of up to one-half of the stated prison term to which the offender was originally sentenced.

{¶31} The trial court must include this notification at the sentencing hearing as well as in the judgment entry of sentence. *State v. Mikolaj*, 7th Dist. No. 13 MA 152, 2014-Ohio-4007, ¶ 12.

{¶32} When the sentencing court fails to properly notify the offender at the sentencing hearing of the consequences of a violation, the remedy is different than where the court gave proper notification at the hearing but then clerically failed to restate that notice in its entry. *Id.* at ¶ 21 (*nunc pro tunc* entry can be used to reflect what actually took place where notification was properly given at sentencing hearing).

To correct errors in postrelease control notification in the sentencing hearing, the trial court is to conduct a limited postrelease control hearing under R.C. 2919.191(C) and must properly impose postrelease control at that hearing. *Id.* at ¶ 13.

{¶33} In the instant case, as the trial court did not properly advise Appellant of postrelease control at either the sentencing hearing or in the judgment entry of sentence, the imposition of postrelease control must be reversed and the matter remanded for hearing on imposition of postrelease control. Appellant's fourth assignment of error also has merit and is sustained.

{¶34} Based on the foregoing, Appellant's first and second assignments of error are without merit. However, Appellant's sentence contains two errors. First, the trial court failed to state a definite term of probation for his conviction of domestic violence as Appellant argues in his third assignment of error. Secondly, the trial court failed to notify Appellant concerning the consequences of a violation of his postrelease control as argued in his fourth assignment of error. Because of these two sentencing errors, the sentence of the trial court is partially reversed and the matter is remanded for resentencing of his domestic violence conviction and as regards postrelease control.

Donofrio, J., concurs.

DeGenaro, J., concurs.