

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DAVID JOSEPH ALLEN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 BE 0051

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 17 CR 245.

BEFORE:

Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:

Reversed and Remanded;
Plea Vacated.

Atty. Dan Fry, Belmont County Prosecuting Attorney and *Atty. Kevin Flanigan*, Assistant Prosecuting Attorney, 147-A West Main Street, St. Clairsville, Ohio 43950, for Plaintiff-Appellee, No Brief Filed.

Atty. Gary L. Van Brocklin, P.O. Box 3537, Youngstown, Ohio 44513-3537, for Defendant-Appellant.

Dated: March 2, 2020

WAITE, P.J.

{¶1} Appellant David J. Allen appeals his December 5, 2017 Belmont County Common Pleas Court conviction for aggravated possession of a controlled substance. Appellant argues that the trial court failed to notify him at the plea hearing of the maximum possible penalty he faced, that his sentence was mandatory, or that he was ineligible for probation or community control sanctions. For the reasons provided, Appellant's argument regarding his plea has merit. His remaining sentencing argument is moot. Accordingly, Appellant's plea is vacated and the matter is remanded to the trial court for further proceedings consistent with this Opinion.

Factual and Procedural History

{¶2} On August 24, 2017, Appellant was charged with one count of aggravated possession of a controlled substance (Methamphetamine), a felony of the second degree in violation of R.C. 2925.11(C)(1)(c), and three counts of the sale or offer to sell a controlled substance (Methamphetamine), felonies of the third degree in violation of R.C. 2925.02(A)(1), (C)(1), each with a specification that the offense was committed within 1,000 feet of a school.

{¶3} On November 13, 2017, Appellant pleaded guilty to aggravated possession of a controlled substance. The remaining charges and specifications were dismissed. On December 5, 2017, the trial court sentenced Appellant to the maximum sentence of eight years of incarceration. As part of the sentence, the trial court also imposed

postrelease control, ordered restitution of drug money, and suspended his driver's license for one year. It is from this entry that Appellant timely appeals.

{¶4} On March 16, 2018, Appellant's appointed counsel filed a no merit brief in accordance with *State v. Toney*, 23 Ohio App.2d 203, 262 N.E.2d 419 (7th Dist.1970). As we no longer accept no merit briefs, we appointed new counsel who filed a brief on Appellant's behalf. See *State v. Cruz-Ramos*, 2018-Ohio-1583, 125 N.E.3d 193 (7th Dist.).

ASSIGNMENT OF ERROR NO. 1

THE COURT ERRED WHEN IT FAILED TO INFORM APPELLANT OF THE MAXIMUM PENALTY INVOLVED THAT THE PENALTY WAS MANDATORY AND THAT THE APPELLANT WAS NOT ELIGIBLE FOR PROBATION OR FOR THE IMPOSITION OF COMMUNITY CONTROL SANCTIONS AT THE PLEA HEARING.

{¶5} Appellant argues that the trial court failed to advise him at his plea hearing of his maximum possible penalty, that a prison term was mandatory, and that he was ineligible for community control. Appellant claims that the trial court's sole reference to the maximum possible penalty was: "[d]o you understand what the maximum penalty could be?" (11/13/17 Plea Hrg. Tr., p. 5.) Because the court made only a limited reference to the maximum possible penalty without any explanation, made no reference to the mandatory nature of the prison term, and made no reference to his ineligibility for community control sanctions, Appellant urges that the trial court wholly failed to comply with Crim.R. 11 and he need not claim prejudice.

{¶6} Guilty pleas are governed by Crim.R. 11. Pursuant to Crim.R. 11(C)(2), the trial judge must enter into a colloquy with a defendant to review the rights that the defendant is waiving as a result of the guilty plea, and the consequences of such plea. “The underlying purpose, from the defendant's perspective, of Crim.R. 11(C) is to convey to the defendant certain information so that he can make a voluntary and intelligent decision whether to plead guilty.” *State v. Rowbotham*, 173 Ohio App.3d 642, 2007-Ohio-6227, 879 N.E.2d 856, ¶ 17 (7th Dist.), citing *State v. Ballard*, 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981). A defendant who lacks the ability to understand the nature and object of the proceedings is unable to enter into a knowing, intelligent, and voluntary plea. *State v. Doak*, 7th Dist. Columbiana Nos. 03 CO 15, 03 CO 31, 2004-Ohio-1548, ¶ 15.

{¶7} As part of the colloquy, the trial court is required to advise a defendant of certain constitutional and nonconstitutional rights. The constitutional rights are outlined within Crim.R. 11(C)(2) and include: the right to a jury trial, to confront witnesses against him, have a compulsory process for obtaining witnesses in his favor, and require the state to prove all elements beyond a reasonable doubt at a trial where the defendant cannot be compelled to testify against himself. *State v. Bell*, 7th Dist. Mahoning No. 14 MA 0017, 2016-Ohio-1440, ¶ 9, citing *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 19-21; *Ballard, supra*, at 477. The trial court must strictly comply with informing the defendant of these requirements; if it fails to strictly comply, the defendant's plea is invalid. *Bell* at ¶ 9, citing *Veney* at ¶ 31; *Ballard* at 477.

{¶8} The trial court must also advise a defendant of his nonconstitutional rights: the nature of the charges; the maximum penalty the defendant is subject to, including

postrelease control, if applicable; whether the defendant is eligible for probation or community control sanctions; and that a trial court may immediately proceed to sentencing after the plea is accepted. *Bell* at ¶ 10. Unlike the information required regarding constitutional rights, a trial court need only substantially comply with these requirements. *Id.* “Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.” *Bell* at ¶ 10, citing *Veney* at ¶ 15. If the trial court does not substantially comply with the advisement of a defendant’s nonconstitutional rights, the defendant must demonstrate a prejudicial effect in order to invalidate the plea. *Id.*

{¶9} Here, the limited issue before us is whether the trial court’s failure to advise Appellant of the maximum possible penalty, the mandatory nature of his sentence, and that he was ineligible for community control renders his plea involuntary. “[W]here a defendant faces a mandatory prison sentence as a result of a guilty or no contest plea, the trial court must determine, prior to accepting a plea, that the defendant understands that he or she is subject to a mandatory prison sentence and that as a result of the mandatory prison sentence, he or she is not eligible for probation or community control sanctions.” *State v. Tutt*, 2015-Ohio-5145, 54 N.E.3d 619, ¶ 19 (8th Dist.), citing *State v. Balidbid*, 2d Dist. Montgomery No. 24511, 2012-Ohio-1406, ¶ 10; *State v. Brigner*, 4th Dist. Athens No. 14CA19, 2015-Ohio-2526, ¶ 14; *State v. Hendrix*, 12th Dist. Butler No. CA2012-12-265, 2013-Ohio-4978, ¶ 6; *State v. Dawson*, 8th Dist. Cuyahoga No. 61828, 1993 WL 12286, *2 (Jan. 21, 1993).

{¶10} Again, this advisement falls within Crim.R. 11(C)(2)(a), a nonconstitutional right. In order to comply with Crim.R. 11(C)(2)(a), a trial court can either expressly inform

the defendant that he is subject to a mandatory prison sentence and is consequently ineligible for probation or community control sanctions, or using the “totality of the circumstances,” the trial court may determine that the defendant understands he is subject to a mandatory prison sentence. *Tutt* at ¶ 20, citing *State v. Smith*, 8th Dist. Cuyahoga No. 83395, 2004-Ohio-1796, ¶ 11.

{¶11} In *Tutt*, the trial court advised the defendant of the maximum possible penalty he faced but failed to inform him that his sentence was mandatory and that he was ineligible for community control. *Id.* at ¶ 26. On appeal, the court contrasted the facts of the case from those in *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990), where the Court held that, based on the totality of the circumstances, it was apparent Mr. Nero understood he faced a mandatory sentence and was ineligible for community control sanctions because he acknowledged that he would face a prison sentence and asked for time to “straighten out [his] affairs.” *Nero* at 108. In *Tutt*, the record was devoid of evidence that the appellant understood the mandatory nature of his prison sentence or that he was ineligible for community control sanctions. *Id.* at ¶ 26.

{¶12} In addition, the *Tutt* court considered the nature of the offense. The appellant pleaded guilty to a serious drug offense but not a “heinous crime* * * for which a defendant would have no reason to expect the imposition of community control sanctions.” *Id.* at ¶ 27. The appellate court noted that this was not a case where the trial court merely misstated the advisement. While the trial court did inform the defendant of the maximum possible penalty, there was no mention that any part of the sentence was mandatory, thus making him ineligible for community control sanctions. *Id.* at ¶ 30. As

such, the trial court's failure to provide the applicable notifications rendered the defendant's plea involuntary.

{¶13} We similarly reviewed a case where the trial court neglected to inform the defendant that he faced a mandatory prison sentence and, therefore, was ineligible for community control sanctions. *State v. Tarleton*, 7th Dist. Belmont No. 13 BE 17, 2014-Ohio-5820, ¶ 20. In *Tarleton*, however, the trial court gave conflicting information at the plea hearing and within its sentencing entry.

{¶14} The instant case is akin to *Tutt*. In both cases, the defendant faced a mandatory prison sentence and was ineligible for a community control sanction. The trial court in both cases completely neglected to so advise the defendants. Like *Tutt*, the instant record is devoid of any evidence that would allow us to find that, under the totality of the circumstances, Appellant understood that he faced a mandatory prison sentence. Unlike *Nero*, Appellant did not concede at any point that he faced a prison sentence nor did he ask for time to get his affairs in order. Like *Tutt*, Appellant faced a serious offense but not a particularly heinous offense (aggravated possession of Methamphetamine). Importantly, in the instant matter the trial court completely failed to inform Appellant of the maximum possible penalties that he faced. As such, this record clearly establishes the trial court failed in total to inform Appellant of a nonconstitutional right.

{¶15} As previously discussed, generally the failure to adequately advise a defendant of a nonconstitutional right requires a prejudice analysis. However, where the trial court wholly fails to inform a defendant of a nonconstitutional right, a defendant need not prove he was prejudiced. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 22. Instead, the plea is vacated. *Id.* Here, the trial court completely failed

to advise Appellant that he faced a mandatory sentence and was ineligible for community control. The court also failed to advise Appellant of the maximum possible penalty that he faced. Thus, a prejudice analysis is not required. Appellant’s first assignment of error has merit and is sustained.

ASSIGNMENT OF ERROR NO. 2

THE COURT ERRED WHEN IT SENTENCED APPELLANT TO THE MAXIMUM MANDATORY SENTENCE AND MADE FACTUAL FINDINGS CONTRARY TO THE PRESENTENCE INVESTIGATION.

{¶16} Appellant argues that the trial court abused its discretion in his sentencing. Appellant argues that the trial court’s comments, which characterized his record as “serious,” demonstrates the court’s animosity towards him.

{¶17} Due to the resolution of Appellant’s first assignment of error, his second assignment of error is moot.

Conclusion

{¶18} Appellant argues that the trial court failed to notify him at the plea hearing of the maximum possible penalty that he faced, that his sentence was mandatory, or that he was ineligible for probation or community control sanctions. For the reasons provided, Appellant’s argument as to his plea has merit. His issue as to sentencing is consequently moot. Accordingly, Appellant’s plea is vacated and the matter is remanded to the trial court for further proceedings consistent with this Opinion.

Robb, J., concurs.

D’Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first assignment of error is sustained and his second assignment is moot. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is reversed and Appellant's plea is vacated. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.