

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

MICHAEL LUKAN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 23 CO 0017

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2022 CR 238

BEFORE:

Mark A. Hanni, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:

Affirmed.

Atty. Vito J. Abruzzino, Columbiana County Prosecutor, and *Atty. Shelley M. Pratt*, Assistant Prosecuting Attorney, Columbiana County Prosecutor's Office, for Plaintiff-Appellee and

Atty. James R. Wise, for Defendant-Appellant.

Dated: December 13, 2023

HANNI, J.

{¶1} Defendant-Appellant, Michael Lukan, appeals from a Columbiana County Common Pleas Court judgment convicting him of aggravated robbery with a firearm specification and having a weapon under disability, following his guilty plea.

{¶2} On May 11, 2022, a Columbiana County Grand Jury indicted Appellant on one count of aggravated robbery, a first-degree felony in violation of R.C. 2911.01(A)(1) with a firearm specification, and one count of having a weapon under disability, a third-degree felony in violation of R.C. 2923.13(A)(2). The charges stemmed from the November 2019 armed robbery of Buckeye Pharmacy in St. Clair Township. Appellant initially entered a not guilty plea.

{¶3} Pursuant to plea negotiations with Plaintiff-Appellee, the State of Ohio, on October 3, 2022, Appellant changed his plea to guilty to the charges set out in the indictment. In exchange, the State agreed to recommend a sentence of nine years on the aggravated robbery count and three years on the having a weapon under disability count, to run concurrently. The firearm specification carried with it a mandatory three-year sentence to run consecutively to and prior to the other sentences. The trial court advised Appellant of all the rights he was waiving by pleading guilty and Appellant acknowledged that he understood and wished to enter a guilty plea. The trial court also advised Appellant of the potential minimum and maximum sentences he faced. Notably, the court advised Appellant that on the aggravated robbery count, he faced a maximum prison sentence of 11 years. At the conclusion of the change of plea hearing, the court ordered a presentence investigation and set the matter for a later sentencing hearing.

{¶4} On January 12, 2023, the trial court began the sentencing hearing. But during the hearing, the court realized that Appellant was subject to an indefinite sentence on the aggravated robbery count, of which the court had not previously advised him. It was determined that Appellant committed the offenses in this case on November 12, 2019. Prior to that time, on March 22, 2019, the Reagan Tokes Law became effective. The Reagan Tokes Law provides that first-degree and second-degree felonies not carrying a life sentence are subject to an indefinite sentencing scheme. For Appellant, this meant that he was subject to an indefinite prison sentence on the aggravated robbery

count of 11 to 16½ years. Because Appellant had not been advised of the correct potential maximum sentence that he faced when he changed his plea, the trial court continued the sentencing hearing to allow Appellant time to discuss the matter with his counsel.

{¶5} On January 25, 2023, the trial court reconvened the sentencing hearing. The court explained to Appellant the indefinite sentence that he faced on the aggravated robbery count. It then asked him if he wanted to withdraw his guilty plea in light of this information. Appellant was unsure so the court provided Appellant additional time with his counsel. Appellant then acknowledged that he did not wish to withdraw his plea and stated that he wished to proceed to sentencing. The court signed a new, accurate, Judicial Advice to Defendant form stating that for aggravated burglary, Appellant faced a maximum prison term of 11 to 16½ years.

{¶6} The trial court sentenced Appellant to an indefinite prison term of 9 to 13½ years for aggravated robbery, three years for having a weapon under disability to be served concurrently with the aggravated robbery sentence, and three years on the firearm specification to be served consecutively to the other prison terms. Thus, Appellant will serve a minimum of 12 years and a maximum of 16½ years.

{¶7} On April 5, 2023, this Court granted Appellant's motion to file a delayed appeal. He now raises two assignments of error for our review.

{¶8} Appellant's first assignment of error states:

THE TRIAL COURT FAILED TO ACCEPT A PLEA FROM THE DEFENDANT REGARDING THE AGGRAVATED ROBBERY COUNT OF THE INDICTMENT.

{¶9} Appellant argues the trial court was required to, and failed to, accept a new guilty plea from him after it properly advised him of the correct maximum prison term he faced. Thus, he contends, his conviction should be reversed and the matter remanded for a new plea hearing.

{¶10} When determining the validity of a plea, this court must consider all of the relevant circumstances surrounding it. *State v. Trubee*, 3d Dist. Marion No. 9-0365, 2005-Ohio-552, ¶ 8, citing *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747

(1970). Pursuant to Crim.R. 11(C)(2), the trial court must 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 he understands the plea he is entering and the rights he is voluntarily waiving. Crim.R. 11(C)(2). If the plea is not knowing, intelligent, and voluntary, it has been obtained in violation of due process and is void. *State v. Martinez*, 7th Dist. Mahoning No. 03-MA-196, 2004-Ohio-6806, ¶ 11, citing *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

{¶11} A trial court must strictly comply with Crim.R. 11(C)(2) pertaining to the waiver of federal constitutional rights. *Martinez*, at ¶ 12. These rights include the right against self-incrimination, the right to a jury trial, the right to confront one's accusers, the right to compel witnesses to testify by compulsory process, and the right to proof of guilt beyond a reasonable doubt. Crim.R. 11(C)(2)(c).

{¶12} The trial court strictly complied with Crim.R. 11(C)(2) by advising Appellant of each of the constitutional rights he was waiving by entering a guilty plea. Specifically, at the change of plea hearing, the court advised Appellant that the State would have to prove him guilty beyond a reasonable doubt, that he had the right to confront the witnesses against him, that he had the right to compel witnesses on his behalf, that he had the right against self-incrimination, and that he had the right to a jury trial. (Oct. 3, 2022 Tr. 20-22). Appellant does not contest this.

{¶13} A trial court need only substantially comply with Crim.R. 11(C)(2) pertaining to non-constitutional rights such as informing the defendant of “the nature of the charges with an understanding of the law in relation to the facts, the maximum penalty, and that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence.” *Martinez*, at ¶ 12, citing Crim.R. 11(C)(2)(a)(b).

{¶14} The trial court substantially complied with Crim.R. 11(C)(2). At the change of plea hearing, the court explained the nature of the charges in relation to the facts, which Appellant indicated that he understood. (Oct. 3, 2022 Tr. 13-14). And the court explained that after Appellant entered his plea, it could proceed immediately to sentencing. (Oct. 3, 2022 Tr. 11).

{¶15} As to the maximum sentence, the trial court mistakenly informed Appellant at the change of plea hearing that he was subject to a maximum prison term of 11 years on the aggravated robbery count. (Oct. 3, 2022 Tr. 16). The court realized its error at the original sentencing hearing when it was going over the State’s recommended sentence. (Jan. 12, 2023 Tr. 8). The confusion stemmed from the effective date of the Reagan Tokes Law (March 22, 2019), which provides for indefinite sentencing for first-degree and second-degree felonies, and the date of the offense (November 19, 2019). (Jan. 12, 2023 Tr. 8-9). Apparently, the parties had believed the offense predated the enactment of the Reagan Tokes Law. (Jan. 12, 2023 Tr. 8). Given that the court had incorrectly informed Appellant of the maximum sentence he faced at the change of plea hearing, it continued the sentencing hearing to allow Appellant time to decide if he wished to change his guilty plea or to proceed with sentencing.

{¶16} At the January 25, 2023 hearing, the trial court explained the indefinite sentencing to Appellant and the possible maximum sentence he faced on the aggravated robbery count. (Jan. 25, 2023 Tr. 6-8). The court asked Appellant if this information caused him to want to withdraw his guilty plea. (Jan. 25, 2023 Tr. 8). Appellant stated that he was unsure of how he wished to proceed. (Jan. 25, 2023 Tr. 10). So the court took a recess to allow Appellant additional time to confer with his counsel. (Jan. 25, 2023 Tr. 10). After conferring with his counsel, Appellant informed the court that he wished to proceed to sentencing. (Jan. 25, 2023 Tr. 12).

{¶17} While the trial court did not take a new guilty plea from Appellant, it was not required to do so. The court substantially complied with Crim.R. 11(C)(2) with regard to Appellant’s non-constitutional rights. At the change of plea hearing, the court informed Appellant of the nature of the charges with an understanding of the law in relation to the facts and that after entering a guilty plea or a no contest plea, it could proceed to judgment and sentence. And while it provided Appellant with erroneous information regarding the maximum sentence on the aggravated robbery count, the court realized its mistake prior to sentencing. It allowed Appellant time to decide whether he wished to keep his guilty plea and proceed to sentencing or to withdraw his plea. These circumstances demonstrate substantial compliance with the Criminal Rule.

{¶18} The Second Appellate District reviewed a similar situation in *State v. Treece*, 2d Dist. Montgomery No. 29258, 2022-Ohio-1610, and found no error. In that case, Treece pleaded guilty to aggravated arson. At Treece's plea hearing, the trial court mistakenly advised him that he would be required to register with the violent offender database. But at Treece's sentencing hearing, a different judge conducted the proceedings and advised Treece that the judge at the plea hearing had been incorrect regarding the violent offender database. Instead, the new judge correctly advised Treece that he would have to register with the Ohio arson database due to the nature of his crimes. The trial court then asked Treece if he wanted to withdraw his guilty plea because he had initially been told he had to register with the violent offender database instead of the arson database. Treece stated he did not wish to withdraw his plea and elected to proceed with sentencing. The court advised Treece of the requirements to which he would be subjected when he registered with the arson database and asked Treece if he understood the requirements. Treece acknowledged that he did. On appeal, the Second District determined that because the trial court correctly advised Treece regarding his duty to register with the arson database and its requirements prior to sentencing, there was no meritorious issue on appeal. *Id.* at ¶ 18.

{¶19} As was the case in *Treece*, because the trial court correctly advised Appellant prior to sentencing and gave him the opportunity to withdraw his plea, the court was not required to hold a new change of plea hearing.

{¶20} Accordingly, Appellant's first assignment of error is without merit and is overruled.

{¶21} Appellant's second assignment of error states:

SENTENCING DEFENDANT PURSUANT TO THE REAGAN-TOKES ACT
VIOLATES THE SEPARATION OF POWERS AND DUE PROCESS.

{¶22} The trial court sentenced Appellant to an indefinite prison term of 9 to 13½ years for aggravated robbery. Thus, on this offense, Appellant will serve a minimum of nine years and has the potential to serve an additional four-and-a-half years under the Reagan Tokes Law.

{¶23} Appellant asserts that the Reagan Tokes Law is unconstitutional because it violates a defendant's right to a jury trial and the separation of powers doctrine by giving the executive branch of the government the authority to increase a defendant's sentence.

{¶24} The Reagan Tokes Law, in general, provides that first-degree and second-degree felonies not carrying a life sentence are subject to an indefinite sentencing scheme. Now, when imposing prison terms for offenders with first-degree or second-degree felony offenses, sentencing courts are to impose an indefinite sentence, meaning a stated minimum sentence as provided in R.C. 2929.14(A)(2)(a) and an accompanying maximum sentence as provided in R.C. 2929.144.

{¶25} Once an offender serves the required minimum term of incarceration, the Reagan Tokes Law provides that the offender is presumed to be released. R.C. 2967.271(B). But the Department of Rehabilitation and Corrections (DRC) may rebut the presumption of release and maintain the offender in custody for a reasonable period of time, not to exceed the maximum term of incarceration imposed by the sentencing court. R.C. 2967.271(D). The DRC may overcome the presumption of release only if it conducts a hearing and finds that one or more of the following apply:

(1)(a) During the offender's incarceration, the offender committed institutional rule infractions that involved compromising the security of a state correctional institution, compromising the safety of the staff of a state correctional institution or its inmates, or physical harm or the threat of physical harm to the staff of a state correctional institution or its inmates, or committed a violation of law that was not prosecuted, and the infractions or violations demonstrate that the offender has not been rehabilitated, [and]

(b) The offender's behavior while incarcerated, including, but not limited to the infractions and violations specified in division (C)(1)(a) of this section demonstrate that the offender continues to pose a threat to society.

(2) Regardless of the security level in which the offender is classified at the time of the hearing, the offender has been placed by the department in extended restrictive housing at any time within the year preceding the date of the hearing.

(3) At the time of the hearing, the offender is classified by the department as a security level three, four, or five, or at a higher security level.

R.C. 2967.271(C)(1), (2), and (3).

{¶26} On July 26, 2023, the Ohio Supreme Court addressed the constitutionality of the Reagan Tokes Law. *In State v. Hacker*, Slip Opinion No. 2023-Ohio-2535, the appellants argued that the portion of the Reagan Tokes Law that allows the DRC to maintain an offender's incarceration beyond the minimum prison term imposed by a trial court, violates the separation-of-powers doctrine, procedural due process, and the right to a jury trial. The Ohio Supreme Court rejected each of these claims and upheld the constitutionality of the Reagan Tokes Law. *Id.* at ¶ 25, 28, 40.

{¶27} Accordingly, Appellant's second assignment of error is without merit and is overruled.

{¶28} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

D'Apolito, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be waived.

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.