

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio

Court of Appeals No. S-09-004

Appellee

Trial Court No. 08CR1182

v.

John D. Allen

DECISION AND JUDGMENT

Appellant

Decided: July 31, 2009

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney, and
Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Christian R. Moore, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, John Allen, appeals a judgment of conviction for burglary and theft entered on a guilty plea in Sandusky County Court of Common Pleas. For the following reasons, we remand this case to the trial court for resentencing.

{¶ 2} On October 6, 2008, appellant broke into a Sandusky County home and stole several video game consoles and a wallet which contained several credit cards. Later that day, police were notified that one of the victim's credit cards had been used at a local Burger King. Police viewed video surveillance showing an older, dark red SUV at the window when the stolen credit card was used.

{¶ 3} Shortly thereafter, police observed a vehicle similar to the vehicle caught on the surveillance tape. When the vehicle stopped at a local grocery store police spoke with its occupants, two females. The occupants confirmed that two men, one of them appellant, were in the vehicle when they went to Burger King. The occupants advised police that they took the men to a video game store to exchange games for money. They also advised police that appellant used a credit card at a gas station and Burger King.

{¶ 4} Both appellant and the other man were detained. Police advised appellant that he was a suspect in a burglary. Appellant initially denied the allegations, but shortly thereafter admitted to the burglary.

{¶ 5} Appellant was charged with one count of burglary, a felony of the second degree, and two counts of theft, felonies of the fifth degree.

{¶ 6} On December 22, 2008, appellant pled guilty to all counts.

{¶ 7} During the plea hearing, appellant requested that he be admitted to a community drug treatment center. The court responded that upon consideration of a presentence investigation report, the court would determine if it would refer appellant to treatment.

{¶ 8} The court accepted appellant's guilty plea.

{¶ 9} On February 2, 2009, the court, after reviewing the presentence investigation report, and having been notified of appellant's denial of admittance into the treatment program, sentenced appellant to serve five years for the burglary count. The court also imposed one year for each theft count, concurrent to each other, but consecutive to the burglary, for a total of six years imprisonment. From this judgment appellant now makes this appeal.

{¶ 10} Appellant sets for the following two assignments of error.

{¶ 11} "I. The trial court abused its discretion by imposing a sentence in an unreasonable and arbitrary manner in contradiction to the stated purpose of R.C. 2929.11.

{¶ 12} "II. The trial court erred by accepting defendant-appellant's involuntary plea of guilty plea in violation of criminal rule 11."

{¶ 13} We will address the second assignment of error first.

{¶ 14} Appellant contends that his plea was involuntary because the trial court violated Crim.R. 11. When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. *State v. Engle*, 74 Ohio St.3d 525, 1996-Ohio-179. The underlying purpose of Crim.R. 11 is to convey to the defendant certain information so they can make a voluntary and intelligent decision whether to plead guilty. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶ 18.

{¶ 15} Before accepting a guilty plea in a felony case, a "trial court must inform the defendant that he is waiving his privilege against compulsory self-incrimination, his right to jury trial, his right to confront his accusers, and his right of compulsory process of witnesses." *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, ¶ 12; Citing *State v. Ballard* (1981), 66 Ohio St.2d 473. In addition to these constitutional rights, the trial court is required to determine that the defendant understands the nature of the charge, the maximum penalty involved, and the effect of the plea. Crim.R. 11(C)(2)(a-b); *Jones*, 116 Ohio St.3d at 214.

{¶ 16} First, appellant contends that his plea was induced by the trial court's alleged promise to send him to a treatment program. A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. *State v. Bowen* (1977), 52 Ohio St.2d 27, 28.

{¶ 17} Appellant draws our attention to *State v. Bonnell*, 12th Dist. No. CA2001-12-094, 2002-Ohio-5882, ¶ 18; citing *State v. Triplett* (Feb. 13, 1997), 8th Dist. No. 69237. Appellant focuses on the court's conclusion that, "When a trial court promises a certain sentence, the promise becomes an inducement to enter a plea, and unless that sentence is given, the plea is not voluntary." *Bonnell*, at ¶ 18.

{¶ 18} In *Bonnell*, the trial court promised appellant that it would not sentence him to prison. *Bonnell*, at ¶ 19. The *Bonnell* court distinguished their case from others, concluding that, "the facts of this case [*State v. Bonnell*] differ from cases in which a trial

court states that it is inclined to sentence a defendant in a particular way and states that inclination in conditional terms." Id.

{¶ 19} The present case falls into the category of cases the *Bonnell* court distinguished. Nothing in the record suggests that the trial court took part in setting any parameter of the plea agreement or promised a particular sentence. Rather, the court was inclined to refer appellant to a drug treatment facility. That inclination, however, was conditioned upon the presentence investigation report.

{¶ 20} Consequently, the trial court's statements regarding the possibility of referral to the drug treatment facility are not the types of statements that would render a plea involuntary.

{¶ 21} Second, appellant contends that his plea was involuntary due to the court's misstatement of the maximum sentence. Before a court accepts a defendant's guilty plea it must inform the defendant of the maximum sentence for each charge. Crim.R. 11(C)(2)(a). Informing the defendant of the maximum sentence(s) is not a constitutional right. *Jones*, 116 Ohio St.3d at 214.

{¶ 22} With respect to the nonconstitutional notifications required by Crim.R. 11(C)(2)(a-b), substantial compliance is sufficient. *Veney*, 120 Ohio St.3d at 179, citing *State v. Stewart* (1977), 51 Ohio St.2d 86. 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. *Stewart*, at 93; *State v. Carter* (1979), 60 Ohio St.2d 34, 38, certiorari denied (1980), 445 U.S. 953.

{¶ 23} Furthermore, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. *Stewart*, supra, at 93; Crim.R. 52(A). The test is whether the plea would have otherwise been made. *Id.*

{¶ 24} Appellant contends that the court's statement that, "the maximum penalty for the offense is eight months [sic] in prison * * *," was a factor which induced an involuntary plea. While the trial court at one point misstated the maximum sentence, it correctly stated the maximum sentence at the opening of the plea hearing. Thus, appellant was apprised of the maximum sentence.

{¶ 25} In addition, appellant read and signed the guilty plea which set forth the maximum sentences of each charge. At no point during the plea hearing, after first being notified of the correct maximum sentences, did appellant object to the court's misstatement. Neither did appellant object to signing the plea agreement which clearly stated the correct maximum sentence for each charge.

{¶ 26} After reviewing the totality of circumstances we conclude that the appellant subjectively understood the maximum sentences. We further conclude that the trial court did not violate Crim.R. 11, or make any promises to appellant. Thus, his guilty plea was made knowingly, intelligently, and voluntarily.

{¶ 27} Appellant's second assignment of error is not well-taken.

{¶ 28} Appellant, in his first assignment of error, contends that the trial court erred when imposing sentence upon him. When determining whether the trial court improperly

imposed a sentence we must apply a two-step approach. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4. First, we must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. *Id.* Second, if the first prong is satisfied, the trial court's decision shall be reviewed under an abuse of discretion standard. *Id.* An abuse of discretion is "more than an error of law or judgment; it implies that the court's decision was unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 29} A sentence is not contrary to law if it properly considers the purposes and principals of R.C. 2929.11, as well as factors considered in R.C. 2929.12. *Kalish*, 120 Ohio St.3d.at 26-27. Appellant concedes that the sentence fell within the statutorily mandated range, that the defendant was made aware of postrelease controls and their consequences, and that the trial court properly considered the sentencing statutes.

{¶ 30} The prison sentence is not clearly or convincingly contrary to law. Therefore, we must determine if the trial court abused its discretion.

{¶ 31} Appellant contends that the court did not refer to any discovery in the pre-sentence investigation report that would justify the court's imposition of the six year sentence. Trial courts, however, "*have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.*" (Emphasis added.) *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 100. The sentences are in

the statutory range. Thus, following our conclusions above, nothing in the record demonstrates that the court's decision was unreasonable, arbitrary, or unconscionable.

{¶ 32} While we conclude the prison sentences are proper, appellant makes an ancillary claim under his first assignment of error. Appellant contends that he was improperly advised of the potential duration of his postrelease control. Appellee agrees with this contention. Appellant was advised that he was eligible for a period of five years postrelease control. Postrelease control should have been three years pursuant to R.C. 2967.28(B)(2). The remedy for this error is to remand the matter to the trial court for resentencing pursuant to R.C. 2929.191(C). See *State v. Bloomer*, Slip Opinion, 2009-Ohio-2462.

{¶ 33} Accordingly, to the extent that appellant asserts that he was improperly advised of the expectation of being subject to postrelease control, his first assignment of error is well-taken.

{¶ 34} On consideration whereof, the sentencing judgment of the Sandusky County Court of Common Pleas is vacated. This matter is remanded to said court for resentencing pursuant to R.C. 2929.191(C). It is ordered that appellee pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT VACATED

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Richard W. Knepper, J.
CONCUR.

JUDGE

Judge Richard W. Knepper, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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