[Cite as *State v. Calvin*, 2015-Ohio-2759.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100296

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MANDELL D. CALVIN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-09-523916

BEFORE: Keough, J., Jones, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: July 9, 2015

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KATHLEEN ANN KEOUGH, J.:

{¶1} Defendant-appellant, Mandell D. Calvin, appeals his convictions following a guilty plea. For the reasons that follow, we uphold Calvin's guilty pleas, but remand to the trial court to redetermine Calvin's sentence in accordance with R.C. 1.58.

{¶2} In 2012, Calvin was named in a 42-count indictment for offenses that occurred between September 2005 through October 2009. Following discovery, Calvin entered into an agreement with the state where he agreed to plead guilty to an amended Count 2, aggravated theft in violation of R.C. 2913.02(A)(3), a fourth-degree felony ("F4") with the economic harm as $25,000 to $100,000; Counts 3 and 4, aggravated theft in violation of R.C. 2913.02(A)(3), felonies of the fifth degree ("F5") with the economic harm of $500 to $5,000; Count 5, identity fraud in violation of R.C. 2913.49(C) with an attendant furthermore clause specifying that the victim of the offense was an elderly or disabled adult, a felony of the second degree ("F2") with the economic harm as $5,000 to $100,000; an amended Count 9, identity fraud in violation of R.C. 2913.49(C), an F5 with economic harm as less than $500; Counts 13, 15, 16, and 26, identity fraud in violation of R.C. 2913.49(C), an F4 with economic harm of $500 to $5,000; and Count 42, possessing criminal tools, in violation of R.C. 2923.24, an F5.

{¶3} Calvin was sentenced to five years in prison for Count 5 (F2), 18 months for each F4, and one year for each F5. All sentences were ordered to run concurrently for a total prison sentence of five years. Calvin appeals his convictions raising two assignments of error.

I. Sentencing after H.B. 86

{¶4} In his first assignment of error, Calvin contends that the trial court erred by sentencing him under versions of R.C. 2913.02 (aggravated theft) and 2913.49 (identity fraud) that were no longer in effect. Calvin makes no argument challenging his conviction and sentence for Count 42, possessing criminal tools.

{¶5} After Calvin's offenses were committed, but prior to indictment and sentencing, the General Assembly enacted Am.Sub.H.B. No. 86 ("H.B. 86"), effective September 30, 2011, which amended several sections of the criminal code to decrease the offense classifications, thereby reducing the penalty or punishment for some offenses.

{¶6} In *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612, ¶ 1, the Ohio Supreme Court addressed the issue of "whether a defendant may benefit from the decrease in a classification and penalty of an offense enacted by the General Assembly that becomes effective after the commission of the offense but before sentencing on that offense." In *Taylor*, the defendant stole $550 worth of merchandise from a store in July 2011. At the time of the offense and indictment, theft of property with a value of $500 or more but less than $5000 was a fifth-degree felony.

{¶7} However, after the passage of H.B. 86, the classification of theft of property valued at less than $1,000 was a first-degree misdemeanor. Taylor pled no contest to the offense and was convicted and sentenced for a first-degree misdemeanor. The state appealed, contending that the trial court erred in failing to convict Taylor of a felony. The Ninth District determined that the court properly sentenced Taylor for a first-degree

misdemeanor, but held that the court should have found him guilty of a felony. The Supreme Court accepted the case on a certified conflict with the Fifth District.

{¶8} In reversing the Ninth District, the Supreme Court determined that

> R.C. 1.58(B) provides that if the penalty or punishment for an offense is reduced by amendment of a statute and if sentence has not already been imposed, then the amended reduced penalty or punishment shall be imposed. Thus, in accordance with R.C. 1.58(B) and the uncodified portion of Section 4 of H.B. 86, the determining factor on whether the provisions of H.B. 86 apply to an offender is not the date of the commission of the offense but rather whether sentence has been imposed.

Id. at ¶ 19. In so holding, the court stated that "the legislature intended to afford the benefit of a decreased theft offense classification to offenders like Taylor." *Id*. at ¶ 4.

{¶9} Calvin is an offender like Taylor — he committed the offenses under the old heightened classification levels, but was indicted and sentenced after H.B. 86, which reduced the classification levels.

{¶10} However, Calvin was indicted under the versions of R.C. 2913.02 and 2913.49 in effect at the time of his offenses. Rather than convicting and sentencing Calvin under the laws in effect at the time of sentencing as required under H.B. 86 and explained in *Taylor*, the court convicted and sentenced Calvin under the statutes in effect at the time of his offenses. This is contrary to R.C. 1.58 and *Taylor*, and thus, was error by the trial court.[1]

[1]We recognize that the trial court did not have the benefit of *Taylor* at the time Calvin pleaded guilty and was sentenced.

{¶11} However, our review of the indictment and record reveals that not all of Calvin's convictions are affected by this error. Calvin's convictions and sentence on Counts 2, 3, and 4 for aggravated theft, and Counts 5 and 9 for identity fraud, were lawful. Counts 13, 15, 16, and 26 are problematic.

{¶12} At the time Calvin committed the aggravated theft offense reflected in Count 2, the offense was an F4 if the value of the economic harm to the victim was $5,000 or more but less than $100,000. However, the changes to Ohio's sentencing laws under H.B. 86 increased the minimum threshold value for an F4 offense. R.C. 2913.02(A)(3). When Calvin pleaded guilty and was sentenced, an offense was an F4 if the value of the property was $7,500 or more but less than $150,000. R.C. 2913.02(B)(2). In this case, the value of the economic harm, as evidenced by the restitution amount stated at the plea hearing, was $47,989.21. (Tr. 12.) This amount falls with the value range under both the old version of R.C. 2913.02 and the post-H.B 86 version. Therefore, Calvin's conviction under Count 2 for aggravated theft, a fourth-degree felony, and his sentence of 18 months is not contrary to law. The court's error in applying the pre-H.B. 86 version of R.C. 2913.02 was harmless.

{¶13} At the time Calvin committed the aggravated theft offense reflected in Counts 3 and 4, the offenses were F5 offenses if the value of economic harm was $500 or more but less than $5,000. However, the changes in Ohio's sentencing laws by H.B. 86 increased the minimum threshold value for an F5 charge. When Calvin pleaded guilty and was sentenced, an aggravated theft offense pursuant to R.C. 2913.02(A)(3) was an F5

if the value of the property was $1,000 or more but less than $7,500. R.C. 2913.02(B)(2). In this case, the value of the economic harm, as evidenced by the restitution amounts stated during the plea, were $3,673.06 for Count 3 and $1,089.05 for Count 4. (Tr. 12.) These amounts fall within the value range under both the old version of R.C. 2913.02 and the post-H.B. 86 version. Therefore, Calvin's convictions under Counts 3 and 4 for aggravated theft, felonies of the fifth degree, and his sentence of one year in prison for each offense are not contrary to law. Therefore, the court's error in applying the pre-H.B. 86 version of R.C. 2913.02 was harmless.

{¶14} At the time Calvin committed the identity fraud offense containing a furthermore clause that the victim was elderly or disabled as reflected in Count 5, the offense was an F2 if the value of economic harm was $5,000 or more but less than $100,000. However, the changes in Ohio's sentencing laws under H.B. 86 increased the minimum threshold value for this offense. When Calvin pleaded guilty and was sentenced, an identity fraud offense involving an elderly victim was an F2 if the value of the property was $7,500 or more but less than $150,000. In this case, the value of the economic harm to the elderly victim was $10,070. (Tr. 34.) This amount falls within the value range under both the old version of R.C. 2913.49 and the post-H.B. 86 version. Therefore, Calvin's conviction under Count 5 for identity fraud involving an elderly victim, a second-degree felony, and his sentence of five years in prison is not contrary to law. The court's error in applying the pre-H.B. 86 version of R.C. 2913.49 was harmless.

{¶15} At the time Calvin committed the identity fraud offense reflected in Count 9, the offense was an F5 if the value of the economic harm was less than $500. R.C. 2913.49. However, the changes in Ohio's sentencing laws by H.B. 86 increased the maximum value for an F5 charge. When Calvin pleaded guilty and was sentenced, to constitute an F5 identity fraud offense, the maximum value of the property was $1,000. In this case, the record is silent as to the value of the economic harm the victim suffered. However, because the statutory change only affected the maximum value, Calvin's conviction for an F5 and one year prison term was not contrary to law. The court's error in applying the pre-H.B. 86 version of R.C. 2913.49 was harmless.

{¶16} Calvin's convictions and sentences on Counts 13, 15, 16, and 26 are more problematic. We agree with Calvin that because the record does not reveal the economic harm or "value of the credit, property, services, debt, or other legal obligation," this court cannot determine the level of offense of which Calvin should have been convicted and sentenced. The state makes no argument disputing Calvin's claims regarding these counts. We recognize that Calvin failed to object at sentencing that the trial court was sentencing him under pre-H.B. 86 laws. Nevertheless, the trial court's application of the degrees of the offenses other than as required by H.B. 86 was plain error. *See State v. Christian*, 2d Dist. Montgomery No. 25256, 2014-Ohio-2672, ¶ 149.

{¶17} Counts 13, 15, 16, and 26 all charged Calvin with fourth-degree identity fraud felonies. When Calvin committed these offenses, they were classified as an F4 if the value of the economic harm was $500 or more but less than $5,000. However, the

changes in Ohio's sentencing laws by H.B. 86 increased the minimum threshold value for an F4 identity fraud offense pursuant to R.C. 2913.49. At the time Calvin pleaded guilty and was sentenced, an identity fraud offense was an F4 if the threshold value of the property was $1,000 or more, but less than $7,500. In this case, the record is silent as to the value of the economic harm the victim suffered. Therefore, it is possible that Calvin was convicted of a higher degree felony and sentenced to a longer prison sentence for the offenses because if the value of the economic harm was less than $1,000, Calvin should have been convicted of only an F5 identity fraud offense, which carries a maximum penalty of one year. The maximum penalty for a fourth-degree felony is 18 months, which is the sentence that Calvin received on each of these four offenses. Therefore, it is possible that Calvin's convictions and sentence are contrary to law. On the record before this court, we cannot make this determination.

{¶18} Accordingly, we remand the case to the trial court to determine the value of the economic harm on Counts 13, 15, 16, and 26. If the economic harm is less than $1,000, the trial court is required to follow the mandates set forth in *Taylor* and convict Calvin of the decreased felony F5 classification and resentence him accordingly.

{¶19} Calvin's first assignment of error is sustained in part and overruled in part.

II. Plea Agreement

{¶20} In his second assignment of error, Calvin contends that the trial court erred by accepting his plea agreement because he did not understand the nature of the charges and the maximum penalty involved. Essentially, Calvin complains that because he was

convicted and sentenced under versions of R.C. 2913.02 and 2913.49 that were no longer in effect, he did not make a knowing, intelligent, and voluntary plea.

{¶21} Crim.R. 11(C)(2)(a) requires the trial court to explain to a defendant "the nature of the charge and of the maximum penalty involved." These rights are nonconstitutional rights, and thus subject to review under the totality of the circumstances to determine whether Calvin understood the implication of his plea and the rights he was waiving. *State v. Lomax*, 8th Dist. Cuyahoga No. 98125, 2012-Ohio-4167, ¶ 13, citing *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). The failure to comply with Crim.R. 11 regarding non-constitutional rights will not invalidate a plea unless the defendant suffered prejudice. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12. The test for prejudice is "whether the plea would not have otherwise been made." *Id.*, quoting *Nero* at 108.

{¶22} H.B. 86 did not alter the nature of the offenses for which Calvin was charged or to which he pled guilty; it changed only the classifications and penalty for the offenses. No elements of the offenses or specifications were removed or added. *See State v. Kaplowitz*, 100 Ohio St.3d 205, 2003-Ohio-5602, 797 N.E.2d 977, syllabus ("R.C. 1.58(B) does not apply to give a criminal defendant the benefit of a reduced sentence, if by applying it, the court alters the nature of the offense, including specifications to which the defendant pled guilty or which he was found guilty."); *State v. Limoli*, 10th Dist. Franklin No. 11AP-924, 2012-Ohio-4502, ¶ 15 (H.B. did not alter the

nature of the offense of "possession of cocaine" by removing the distinctions between crack cocaine and powered cocaine.)

{¶23} This court has consistently held that "'courts are not required to explain the elements of each offense, or to specifically ask the defendant whether he understands the charges, unless the totality of the circumstances shows that the defendant does not understand the charges.'" *State v. Whitfield*, 8th Dist. Cuyahoga No. 81247, 2003-Ohio-1504, ¶ 14, quoting *State v. Cobb*, 8th Dist. Cuyahoga No. 76950, 2001-Ohio-4132. In this case, nothing in the record indicates that Calvin did not understand the charges to which he pled guilty. The plea colloquy demonstrates that the trial court identified each charge to which Calvin was pleading guilty and explained the maximum penalty involved. The state also explained to the court the plea bargain reached by the parties, outlining each individual count.

{¶24} The trial court's advisement regarding the maximum penalties involved in this case may have been improper, but at most, the improper advisement would only have been a overstatement of the maximum penalty. It is hard to demonstrate prejudice when an overstatement of the maximum penalty was given, and Calvin still entered his guilty pleas. *See, e.g., State v. Barner*, 4th Dist. Meigs No. 10CA9, 2012-Ohio-4584, ¶ 13; *State v. Lauharn*, 2d Dist. Miami No. 2012-CA-9, 2012-Ohio-6185 ¶ 11. Calvin has failed to demonstrate that he was prejudiced in any way by his pleas, and without a showing of prejudice, his argument fails. *State v. Clay*, 8th Dist. Cuyahoga No. 89763, 2008-Ohio-1415 ¶ 15.

{¶25} Accordingly, we find that Calvin's pleas were knowing, intelligent, and voluntary; thus, the trial court did not err in accepting his pleas. The second assignment of error is overruled.

{¶26} While the guilty pleas remain intact, the case is remanded to the trial court for a determination of the value of the economic harm on Counts 13, 15, 16, and 26. If the economic harm is less than $1,000, the trial court is required to follow the mandates set forth in *Taylor*, issue a new judgment entry of conviction finding Calvin guilty of the decreased felony F5 classification, and resentence him accordingly on those counts.

{¶27} Judgment affirmed in part; case remanded.

It is ordered that the parties shall equally in 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 common pleas court 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.

KATHLEEN ANN KEOUGH, JUDGE

LARRY A. JONES, SR., P.J., and
ANITA LASTER MAYS, J., CONCUR