

[Cite as *State v. Young*, 2018-Ohio-4892.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106843

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEVIN M. YOUNG

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-15-598171-A, CR-17-616885-A, CR-17-618294-A, and CR-17-622501-A

BEFORE: McCormack, P.J., Stewart, J., and Blackmon, J.

RELEASED AND JOURNALIZED: December 6, 2018

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TIM McCORMACK, P.J.:

{¶1} Defendant-appellant Devin Young (“Young”) appeals his conviction and sentence.

For the reasons that follow, we affirm.

Procedural and Substantive History

{¶2} This appeal stems from four separate criminal cases. On August 18, 2015, Young was indicted in Cuyahoga C.P. No. CR-15-598171 on one count of having weapons while under disability, one count of carrying a concealed weapon, and one count of improperly handling firearms in a motor vehicle. All three counts carried forfeiture specifications. On November 9, 2015, Young pleaded guilty to having weapons while under disability with a

forfeiture specification and the remaining counts were nolle. Young subsequently failed to appear for sentencing, and a capias was issued in the case.

{¶3} On June 6, 2017, Young was indicted in Cuyahoga C.P. No. CR-17-616885 on one count of identity fraud and three counts of tampering with records. On August 15, 2017, Young was indicted in Cuyahoga C.P. No. CR-17-618294 on one count of trafficking (a felony of the third degree) with two forfeiture specifications, one count of drug possession with two forfeiture specifications, one count of trafficking (a felony of the fifth degree) with two forfeiture specifications, one count of possessing criminal tools, and one count of identity fraud. On November 3, 2017, Young was indicted in Cuyahoga C.P. No. CR-17-622501 on one count of trafficking with a schoolyard specification, one count of drug possession (a felony of the third degree) with a schoolyard specification, two counts of drug possession (felonies of the fifth degree) with schoolyard specifications, one count of tampering with evidence, one count of possessing criminal tools with a forfeiture specification, and one count of falsification.

{¶4} On January 24, 2018, the trial court held a group plea hearing with two other defendants in unrelated cases. The court conducted a Crim.R. 11 colloquy with the defendants. Young pleaded guilty to one count of identity fraud and one count of tampering with records, and the remaining counts in CR-17-616885 were nolle. In CR-17-618294, Young pleaded guilty to an amended count of trafficking (a felony of the fourth degree) with two forfeiture specifications, one count of trafficking (a felony of the fifth degree) with two forfeiture specifications, and one count of identity fraud; the remaining counts were nolle. In CR-17-622501, Young pleaded guilty to an amended count of trafficking (a felony of the fifth degree) and one count of possessing criminal tools with a forfeiture specification.

{¶5} On February 15, 2018, the trial court held a sentencing hearing. The court heard from Young's counsel, Young, and the prosecutor. Following these statements, the following dialogue between the court and Young occurred:

THE COURT: Thank you. Mr. Young, since you are in an honest and heartfelt mood today, tell me where you buy your heroin and the fentanyl. Give me the names and phone numbers of who you buy it from. The heroin and fentanyl? Tell me your dealer.

YOUNG: Excuse me?

DEFENSE
COUNSEL: The judge —

THE COURT: Tell me who you buy your heroin and your fentanyl from. Don't want to be that honest today, do you?

YOUNG: I'm sorry, Your Honor, but I'm taking full responsibility for the cases.

THE COURT: But you didn't make the heroin and you don't make the fentanyl, tell me where you bought it. Who gave it to you? People are dying every day in this community from that combination of drugs. I want to know where you bought it.

At that point, Young conferred with his counsel and reiterated that he was taking full responsibility for his crimes. The court proceeded to sentence Young as follows: in CR-15-598171, 36 months for having weapons while under disability; in CR-17-616885, 12 months for identity fraud and 24 months for tampering with records, to run consecutively; in CR-17-618294, 18 months for trafficking, 12 months for the other trafficking count, and 12 months for identity fraud, to run concurrently; in CR-17-622501, 12 months on trafficking and 12 months on possessing criminal tools, to run concurrently. The sentences in each case were ordered to run consecutively to each other, for a total sentence of eight and one-half years. A corresponding journal entry was issued on February 15, 2018. On February 27, 2018, the trial

court issued a nunc pro tunc entry correcting the sentencing journal entry to include the consecutive sentence findings made during the sentencing hearing.

{¶6} Young now appeals, presenting four assignments of error for our review.

Law and Analysis

{¶7} In Young's first assignment of error, he argues that the trial court erred when it failed to fully advise him of his constitutional and statutory rights prior to accepting his guilty pleas.

{¶8} In Young's second assignment of error, he argues that the trial court erred when it violated his right to silence at the sentencing hearing and punished him for exercising his right to silence.

{¶9} In Young's third assignment of error, he argues that the trial court erred when it imposed an aggregate prison term of 8.5 years. In his fourth and final assignment of error, he argues that the trial court erred when it imposed consecutive sentences without making the required findings.

Guilty Plea

{¶10} In his first assignment of error, Young argues that the trial court erred by failing to fully advise him of his constitutional and statutory rights prior to accepting his guilty plea. Specifically, Young notes that while the court advised him of his right to silence at trial, it failed to advise him that his silence could not be used against him nor commented upon. He also notes that while the trial court accurately explained the potential penalties for his offenses at one point in the hearing, it subsequently misstated the penalties for a fifth-degree felony.

{¶11} The underlying purpose of Crim.R. 11(C) is to convey certain information to a defendant so that he or she can make a voluntary and intelligent decision regarding whether to

plead guilty. *State v. Ballard*, 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981). In order to ensure that a defendant enters a plea knowingly, voluntarily, and intelligently, a trial court must engage in an oral dialogue with the defendant in accordance with Crim.R. 11(C). *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). Crim.R. 11(C) outlines the trial court's duties in accepting guilty pleas, including the duty to determine that the defendant is pleading guilty with an understanding of the maximum penalty involved and the constitutional rights he is waiving. Strict compliance with Crim.R. 11 is required with respect to constitutional rights, which means that the court must inform the defendant of the rights he is waiving and make sure the defendant understands them. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 18. With respect to nonconstitutional rights, such as the right to be informed of the nature of the charges, we review for substantial compliance. *Id.* at ¶ 14. Substantial compliance means that under the totality of the circumstances the defendant understands the implications of his plea. *State v. Carter*, 60 Ohio St.2d 34, 38, 396 N.E.2d 757 (1979).

{¶12} After a thorough review of the plea hearing, we conclude that the trial court fully complied with Crim.R. 11 in ensuring that Young's plea was knowing, intelligent, and voluntary.

{¶13} With respect to the defendant's right to silence, Crim.R. 11(C)(2)(c) sets forth the requirement for the plea colloquy, stating that the trial court must:

[inform] the defendant and [determine] that the defendant understands that by the plea the defendant is waiving the [right] to * * * require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶14} Although constitutional rights, including the privilege against compulsory self-incrimination, require strict compliance, courts are not required to use the exact language in Crim.R. 11 "as long as the record shows that the trial court explained the rights in a manner

reasonably intelligible to the defendant.” *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, at ¶ 27. Here, the court went through the consequences of Mr. Young’s guilty plea, including the rights that he would be waiving by pleading guilty. This included “the right to require the State of Ohio to prove your guilt beyond a reasonable doubt at a trial at which [Young] could not be forced to testify against [himself.]” This statement largely tracked the language of Crim.R. 11 and was a reasonably intelligible explanation of this right. Further, upon being advised of this right, Young affirmatively indicated that he understood he would be waiving it. Therefore, the court’s colloquy allowed Young to make a voluntary and intelligent decision whether to plead guilty.

{¶15} Young also argues that the trial court misstated the penalties for a fifth-degree felony resulting in a confusing atmosphere. It was acknowledged that the trial court misspoke when explaining the potential penalties for third-degree felonies, stating they these were the penalties for fifth-degree felonies rather than third-degree felonies. We note, however, that viewing the transcript in its entirety, it can be reasonably inferred that the trial court was referring to third-degree felonies. Further, “[i]n the absence of evidence to the contrary or anything in the record that indicates confusion, it is typically presumed that the defendant actually understood the nature of the charges against him.” *State v. Vialva*, 8th Dist. Cuyahoga No. 104199, 2017-Ohio-1279, ¶ 9, citing *State v. Martin*, 8th Dist. Cuyahoga Nos. 92600 and 92601, 2010-Ohio-244, ¶ 13. Nothing in the record indicates that the defendant was confused at any point during the plea hearing. Neither Young nor his defense counsel indicated that he did not understand the penalties he faced. Young affirmatively indicated that he understood the potential penalties for all of his offenses, and repeatedly indicated that he understood the

proceedings and the rights he was waiving when the trial court inquired. In light of Young's knowing, intelligent, and voluntary guilty plea, his first assignment of error is overruled.

Sentencing Statements

{¶16} In Young's second assignment of error, he argues that the trial court erred when it violated his right to silence at the sentencing hearing and punished him for exercising this right. He relies on the principle that a criminal defendant retains the right to remain silent through sentencing. *Mitchell v. United States*, 526 U.S. 314, 316, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999). We acknowledge the right confirmed in *Mitchell*. We are, though, unpersuaded by Young's arguments here.

{¶17} First, we note that Young did not in fact exercise his right to remain silent at sentencing. Instead, when the trial court asked for information about Young's drug suppliers, he repeatedly responded that he was taking full responsibility for his crimes. Therefore, Young's assertion that he was punished for exercising his right to silence is based on a premise that is different than what occurred at his sentencing hearing.

{¶18} A criminal defendant is afforded the right to address the court at his or her sentencing; Crim.R. 32 requires a sentencing court to "address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment." While the trial court's questioning of Young at issue here took place after the court had informed Young of his right to allocution, we find that the exchange was permissible. The subject of the trial court's questions were directly related to his offenses in this case. The record does not show that the trial court in any way coerced the defendant to answer the questions. Neither Young nor his counsel attempted to invoke his right to remain silent at

any point during the sentencing hearing. For these reasons, we do not find error in the trial court's questioning of Young and overrule his second assignment of error.

Sentence

{¶19} Because Young's third and fourth assignments of error both concern his sentence, we will address them together. Young argues that the trial court failed to consider the relevant factors under R.C. 2929.11 and 2929.12 and that the imposition of consecutive sentences was not supported by the record.

{¶20} Pursuant to R.C. 2953.08(G)(2), a reviewing court may increase, reduce, or otherwise modify a felony sentence if it clearly and convincingly finds that either (a) the record does not support certain required statutory findings or (b) the sentence is otherwise contrary to law. A sentence is contrary to law if the court fails to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12. Specifically with respect to consecutive sentences, an appellate court may overturn the imposition of consecutive sentences where "upon its review, [it] clearly and convincingly finds that 'the record does not support the sentencing court's findings' under R.C. 2929.14(C)(4), or the sentence is 'otherwise contrary to law.'" *State v. Lunder*, 8th Dist. Cuyahoga No. 101223, 2014-Ohio-5341, ¶ 10, citing R.C. 2953.08(G)(2)(a)-(b).

{¶21} R.C. 2929.11(A) establishes that the overriding purposes of felony sentencing are to protect the public from future crime by the offender and to punish the offender using the minimum sanctions that the court determines will accomplish those purposes. While sentencing courts have discretion to determine how best to comply with these purposes, R.C. 2929.12 provides a list of factors that courts must consider in felony sentencing. Courts must carefully consider these purposes and factors, but "it is not necessary for the trial court to articulate its

consideration of each individual factor as long as it is evident from the record that the principles of sentencing were considered.” *State v. Gonzalez*, 8th Dist. Cuyahoga No. 102579, 2015-Ohio-4765, ¶ 6, citing *State v. Roberts*, 8th Dist. Cuyahoga No. 89236, 2008-Ohio-1942, ¶ 10.

{¶22} A review of the record in this case shows that the trial court considered the relevant factors in R.C. 2929.11 and 2929.12. Therefore, Young’s sentence was not contrary to law. First, the sentencing journal entries both indicate that the court “considered all required factors of the law” and that the court found “that prison is consistent with the purpose of R.C. 2929.11.” Indeed, at the sentencing hearing, the court discussed Young’s significant criminal history, noting that his previous prison time had not adequately deterred him. The court also discussed the danger that Young’s offenses posed to the community. Based on the foregoing, it is clear from the record that the trial court considered the sentencing principles.

{¶23} R.C. 2929.14(C)(4) states:

If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender’s conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

A trial court is required to make the findings described above at the sentencing hearing and incorporate its findings into its sentencing journal entry. *State v. Hendricks*, 8th Dist. Cuyahoga No. 101864, 2015-Ohio-2268, ¶ 12, citing *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 1.

{¶24} While the trial court must make the requisite findings at sentencing, Ohio courts have consistently held that courts are not required to engage in a recitation of “magic words” in order to validly impose consecutive sentences. *State v. Gus*, 8th Dist. Cuyahoga No. 85591, 2005-Ohio-6717, ¶ 30, citing *State v. White*, 135 Ohio App.3d 481, 486, 734 N.E.2d 848 (8th Dist.1999) and *State v. Moore*, 8th Dist. Cuyahoga No. 84911, 2005-Ohio-4164, ¶ 7. Therefore, when it is clear from the record that the trial court engaged in the “appropriate analysis,” a reviewing court can conclude that the sentence complied with R.C. 2929.14(C)(4). *State v. Pavlina*, 8th Dist. Cuyahoga No. 99207, 2013-Ohio-3620, ¶ 10, citing *State v. Murrin*, 8th Dist. Cuyahoga No. 83714, 2004-Ohio-3962, ¶ 12.

{¶25} A thorough review of the record in this case shows that the trial court made the requisite findings at the sentencing hearing. The trial court discussed the danger to the community from both the drugs that Young pleaded guilty to possessing and trafficking and the weapons that he carried while committing various offenses. The court also engaged in a thorough discussion of Young's criminal history, noting that while he had served multiple prison terms for similar offenses, these prior sentences had clearly not deterred him from committing the offenses at issue here. Although this discussion does not include the exact statutory language found in R.C. 2929.14(C)(4)(c), it is clear from the record that the trial court found that

Young's criminal history necessitated consecutive sentences. For these reasons, we overrule Young's third and fourth assignments of error.

{¶26} Based on the foregoing, the judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIM McCORMACK, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., CONCURS;
MELODY J. STEWART, J., CONCURS IN JUDGMENT ONLY