

[Cite as *State v. Gary*, 2020-Ohio-4069.]

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 109074
 v. :
 :
 DOMINGO GARY, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED

RELEASED AND JOURNALIZED: August 13, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-635702-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Gregory M. Paul, Assistant Prosecuting Attorney, *for appellee*.

The Law Office of Jaye M. Schlachet and Eric M. Levy, *for appellant*.

KATHLEEN ANN KEOUGH, J.:

{¶ 1} Defendant-appellant Domingo Gary was indicted as follows: Count 1, rape in violation of R.C. 2907.02(A)(2); Count 2, sexual battery in violation of R.C. 2907.03(A)(5); and Count 3, unlawful sexual conduct with a minor in violation of

R.C. 2907.04(A). The charges related to an incident that occurred in December 2017, when Gary raped his 14-year-old stepdaughter. Pursuant to a plea agreement, he pleaded guilty to Count 1, rape, and Counts 2 and 3 were dismissed. On appeal, he argues that his plea was not knowing, voluntary, and intelligent. We affirm.

{¶ 2} In his single assignment of error, Gary contends that the trial court violated Crim.R. 11(C)(2)(a) because it did not advise him before accepting his plea that he was subject to a mandatory term of imprisonment and not eligible for community control sanctions.¹

{¶ 3} Crim.R. 11(C)(2)(a) provides that a trial court shall not accept a guilty plea in a felony case without first

[d]etermining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶ 4} “Crim.R. 11(C)(2)(a) requires a trial court to determine that the defendant has an awareness about the potential penalty before accepting a guilty plea. It does not, however, require the court to make any specific articulation as to the potential penalty.” *State v. Homolak*, 8th Dist. Cuyahoga No. 107040, 2019-Ohio-869, ¶ 4, comparing Crim.R. 11(C)(2)(a) with Crim.R. 11(C)(b)-(c) (which require the court to determine that the defendant understands and additionally specifically inform the defendant), and citing *State v. Davis*, 8th Dist. Cuyahoga No.

¹ “Rape carries a mandatory prison term under R.C. 2929.13(F)(2).” *State v. Arnett*, 88 Ohio St.3d 208, 214, 724 N.E.2d 793 (2000).

76085, 2000 Ohio App. LEXIS 4044, 12 (Sept. 7, 2000) (“Although the judge must specifically determine whether a defendant understands that he is not eligible for probation, the rule does not require him to personally inform a defendant of this fact in every circumstance. Crim.R. 11(C)(2) distinguishes between things the judge must determine from those of which he must inform a defendant regardless of whether an independent understanding is shown.”).

{¶ 5} Thus, this court has held that a court need not specifically inform a defendant that a particular conviction mandates prison or precludes a community control sanction where the record clearly indicates that the defendant so understood. *See, e.g., State v. Smith*, 8th Dist. Cuyahoga No. 83395, 2004-Ohio-1796, ¶ 11 (“The mere fact that the [trial] court did not specifically say ‘You are ineligible for probation’ or ‘This offense requires a mandatory term of prison’ will not be fatal unless the record clearly indicates that the defendant was unaware that he would be sent to prison upon a plea of guilty and he was prejudiced by that fact.”); *State v. McLaughlin*, 8th Dist. Cuyahoga No. 83149, 2004-Ohio-2334, ¶ 19 (“[T]he trial court need not specifically inform the defendant he is ‘ineligible for probation’ if the totality of the circumstances warrant the trial court in making a determination the defendant understands the offense is ‘nonprobationable.’”).

{¶ 6} As relevant to this case, where a defendant complains the trial court failed to explain a nonconstitutional right, the relevant inquiry is whether the court substantially complied with the rule. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 31. “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.” *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶ 7} At Gary’s change of plea hearing, the prosecutor put the plea agreement on the record: the state would nolle Counts 2 and 3 in exchange for Gary’s guilty plea to Count 1, rape in violation of R.C. 2907.02(A)(2). The prosecutor explained, “[t]hat felony of the first degree is punishable by three to 11 years incarceration and [a] fine of not more than \$20,000.” The trial judge asked Gary’s counsel if that was his understanding, to which he responded, “It is, your Honor.”

{¶ 8} The trial judge asked Gary questions regarding his age and education, and then asked him, “Do you understand the charges against you?” to which Gary responded affirmatively. The judge then asked Gary, “[d]o you understand the plea agreement that your attorney has reached on your behalf with the state of Ohio?” and Gary again responded affirmatively. After confirming with Gary that he understood that the court was making no promises regarding his sentence in this case, the judge then discussed Cuyahoga C.P. No. CR-17-615567, in which Gary was serving community control sanctions. The judge confirmed that Gary understood that his guilty plea of rape in this case was a violation of his community control sanctions in CR-17-615567, and that he could receive a separate sentence in that case.

{¶ 9} The trial court then reviewed the constitutional rights Gary would be waiving by pleading guilty and confirmed Gary’s understanding of those rights. The court then advised Gary:

Based upon the statements of the prosecuting attorney and your lawyer I believe it is your intention to enter a plea of guilty to Count 1, rape, in violation of 2907.02(A)(2) as charged in Count 1. This is a first-degree felony punishable from three to 11 years in prison and up to [a] \$20,000 fine.

The judge then asked counsel, “[i]s it mandatory prison?” to which the prosecutor responded affirmatively.

{¶ 10} The court then advised Gary that as part of the plea, Counts 2 and 3 would be dismissed, and Gary was ordered to have no contact with the victim, to which Gary responded “[o]kay.” The court advised Gary that he would also be required to register as a Tier III sex offender, and explained that he would be required to verify his address with in-person verification every 90 days for his lifetime.

{¶ 11} The judge then asked Gary, “[d]o you understand the offense to which you are pleading guilty?” and Gary responded affirmatively. The judge then asked him, “[d]o you understand the possible maximum penalty?” and Gary again responded affirmatively. The judge then advised Gary that “[u]pon completion of your prison term, you will be subject to postrelease control supervision for a mandatory period of five years.” (Emphasis added.)

{¶ 12} Then, after explaining the possible penalties for violating postrelease control, the judge asked Gary if he had any questions “about your rights, the charge,

the penalties or anything that we've done here today." Gary told the judge he had no questions.

{¶ 13} After confirming that both defense counsel and the prosecutor were satisfied the judge had complied with Crim.R. 11, the judge found that Gary had been informed of his constitutional rights, and that he understood the nature of the charge, the effect of the plea, and the maximum penalties that could be imposed. The court further found that Gary was making a knowing, voluntary, and intelligent plea; accepted his plea; and found him guilty of rape.

{¶ 14} Although the trial court never specifically advised Gary that prison was mandatory or that he was ineligible for community control sanctions, the record reflects that he was nevertheless subjectively aware. Based on the totality of the circumstances, we find that the trial court substantially complied with Crim.R. 11(C)(2)(a).

{¶ 15} The trial court advised Gary that the offense to which he was pleading guilty was punishable by 3 to 11 years in prison, and when the trial court asked if it was "mandatory prison," the prosecutor responded affirmatively. Gary told the court that he understood both the offense to which he was pleading guilty and the maximum penalty, and told the judge he did not have any questions about the rape charge or the associated penalties. The court advised Gary that he would be subject to postrelease control "upon completion of your prison term," and when the court asked Gary after this advisement if he had any questions, he told the court "no." The record is abundantly clear that Gary understood he would be sentenced to prison

and was not eligible for community control. Indeed, community control was never discussed as a possible sentence, and due to the nature and severity of his offense — the rape and resulting pregnancy of his 14-year-old stepdaughter — Gary had no basis upon which to conclude that he would not be sentenced to prison.

{¶ 16} Gary argues, in reliance on *State v. Morgan*, 2d Dist. Clark No. 2017-CA-29, 2018-Ohio-319, that even if the trial court advised him that prison was mandatory, there can be no finding of substantial compliance with Crim.R. 11(C)(2)(a) because the court did not also advise him of his ineligibility for community control. *Morgan* does not stand for this proposition. The *Morgan* court found that the trial court did not substantially comply with Crim.R. 11(C)(2)(a) because the defendant was *neither* advised that he was subject to a mandatory prison sentence upon his conviction for rape, *nor* that he would be ineligible for community control if he were convicted. *Id.* at ¶ 16. The *Morgan* court did not set forth a requirement that a trial court must advise the defendant of both the mandatory prison sentence and ineligibility for community control in order to substantially comply with Crim.R. 11(C)(2)(a).

{¶ 17} Our review of the record in this case indicates that Gary subjectively understood that he faced a mandatory prison sentence and was not eligible for community control. Accordingly, we find that the trial court substantially complied with Crim.R. 11(C)(2)(a), and overrule the assignment of error.

{¶ 18} “While we do not require it, the trial court might consider as a better practice to avoid this and other similar appeals, the use of written plea agreements

signed by the state and the defendant. Many other trial courts find this practice useful.” *Homolak*, 8th Dist. Cuyahoga No. 107040, 2019-Ohio-869 at ¶ 15.

{¶ 19} Judgment affirmed.

It is ordered that appellee recover from 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 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.

KATHLEEN ANN KEOUGH, JUDGE

LARRY A. JONES, SR., P.J., and
EILEEN A. GALLAGHER, J., CONCUR

