

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-P-0003
TERRY L. SAWYER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2010 CR 0148.

Judgment: Reversed and remanded.

Victor V. Viglucci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Nicholas Swyrydenko, 137 South Main Street, Suite 206, Akron, OH 44308 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This matter is before us on a reopened appeal pursuant to App.R.26(B) based on appellant, Terry Sawyer’s, claim that he was deprived of effective assistance of appellate counsel. Appellant contends that the trial court erroneously sentenced him to a mandatory prison term and that his original appellate counsel’s failure to raise such an obvious error on appeal prejudicial him. Based on that contention, appellant has requested that this court vacate the trial court’s judgment entry, and either remand to

the trial court for issuance of a new sentencing entry correcting the error, or amend the judgment on our own accord.

{¶2} By way of background, appellant was found guilty after a jury trial in the Portage County Common Pleas Court of two counts of felonious assault under R.C. 2903.11(A)(1) and(2). During the sentencing hearing, the trial court stated on the record that it was not issuing a mandatory prison term. Yet, for some reason, the trial court's judgment entry imposed a mandatory term of five years imprisonment for each offense, with those terms to run concurrent. On the initial appeal to this court in *State v. Sawyer*, 11th Dist. No. 2011-P-0003, 2011-Ohio-6098, we affirmed the decision of the trial court. Although appellant's counsel raised six assignments of error on appeal, he did not raise any issue regarding the imposition of a mandatory prison sentence. Thus, the issue was not addressed by this court in appellant's initial appeal.

{¶3} Appellant filed a timely application to reopen his appeal pursuant to App.R. 26(B) based on appellate counsel's failure to assign as error the mandatory sentence imposed in the judgment entry. This Court determined that appellant demonstrated a colorable claim of ineffective assistance under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and granted his application. We found that appellant made a threshold showing there was a "genuine issue as to whether he was deprived of effective assistance of appellate counsel" and "that appellant advances a colorable claim that he was prejudiced because he is not eligible for judicial release under his current mandatory sentence but arguably would be eligible if his sentence were not mandatory."

{¶4} Appellant asserts the following assignment of error for our review:

{¶5} “The trial court acted contrary to law and committed plain error in sentencing defendant to mandatory terms of imprisonment on two counts of felonious assault.”

{¶6} Generally, the failure to raise an issue or argument at the trial court level that is apparent at the time of trial constitutes a waiver of such issue. *State v. Awan*, 22 Ohio St.3d 120, syllabus (1984). Under Crim.R. 52(B), however, this court has the power to recognize plain error or defects involving substantial rights even if they are not brought to the attention of the trial court. *State v. Haines*, 11th Dist. No. 2003-L-035, 2005-Ohio-1692, ¶30. Plain error exists only where, but for the error, the outcome of the trial would have been different. *State v. Bennett*, 11th Dist. No. 2002-A-0020, 2005-Ohio-1567, ¶55. Therefore, to warrant reversal for plain error, this court must find that: (1) there was an error, i.e., a deviation from a legal rule; (2) the error was plain, i.e., there was an “obvious” defect in the trial proceedings; and (3) the error affected substantial rights, i.e., affected the outcome of trial. *Id.* at ¶56.

{¶7} Turning to the first and second prongs of the plain error analysis, this court agrees with appellant that the court’s error in sentencing him to a mandatory term on each count was obvious error. Pursuant to R.C. 2929.14(A)(2), subject to some enumerated exceptions, “[f]or a felony of the second degree, the prison terms shall be two, three, four, five, six, seven, or eight years.” Thus, when faced with an offender, such as appellant, found guilty of a second degree felony, the sentencing court has discretion to impose a sentence ranging from two to eight years. Additionally, appellant does not meet any of the conditions of the relevant portions of the Ohio sentencing laws regarding the imposition of mandatory prison terms, such as, *inter alia*,

where the victim was a police officer or someone the defendant knew to be pregnant, or the defendant was convicted of a gun specification or had one of several enumerated prior convictions. See *generally* R.C. 2929.13, R.C. 2929.14, and 2903.11(D)(1)(b). Accordingly, in the instant matter, the trial court's imposition of mandatory terms was expressly contrary to law, and therefore, obvious error.

{¶8} The state does not take issue with appellant's assertion that he should not have been sentenced to mandatory prison terms. However, the state argues that the judgment entry's notation of mandatory prison terms is simply a clerical error under Crim.R. 36, and that appellant's remedy is to request a *nunc pro tunc* entry from the trial court modifying his sentence rather than to ask this court to either vacate the trial court's judgment or enter our own judgment correcting the error. We disagree.

{¶9} Pursuant to Crim.R. 36, "[c]lerical mistakes in judgment, order, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time." "[N]unc pro tunc entries 'are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided or what the court intended to decide.'" *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, ¶14, quoting *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 164 (1995).

{¶10} In light of the court's statement on the record, it is probable that it did not intend to impose mandatory sentences upon appellant and that the use of the term "mandatory" in the judgment entry was, in fact, simply a mistake. However, we will not presume to know what the court *actually* intended. It is possible that the court could have changed its mind between the time of the hearing and the entry of its judgment.

Therefore, we cannot conclusively determine that the judgment entry's notation of mandatory prison terms is a clerical error.

{¶11} Finally, turning to the third prong of the plain error test, we address the question of whether the trial court's error affected appellant's substantial rights such that the outcome of his trial would have clearly been different. We agree with appellant that trial court's error in imposing mandatory sentences was prejudicial because it denied him any future eligibility to file for judicial release.

{¶12} As a result of appellant's mandatory prison sentence, he is currently denied the eligibility to file for judicial release. See R.C. 2929.20(A)(1)(a) and (B). However, had he been sentenced to a nonmandatory prison terms, he would be eligible to file a motion for judicial release "not earlier than four years after" being delivered to prison. R.C. 2929.20(C)(3). Hence, had the trial court correctly sentenced appellant to nonmandatory five years terms, the outcome of his sentence would have been different because he would be eligible for judicial release after serving four years of his sentence.

{¶13} In conclusion, we hold that appellant's assignment of error has merit. Accordingly, we reverse and remand the matter to the trial court for issuance of a new sentencing entry.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.