[Cite as *State v. Brooks*, 2016-Ohio-8250.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. John W. Wise, P.J.
Plaintiff - Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
CALVIN L. BROOKS, SR.,	:	Case No. 16CA36
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 2015 CR 0848 R
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	December 15, 2016

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
BAMBI COUCH PAGE Prosecuting Attorney	JOHN A. BOYD 1 Marion Avenue, Suite 215 Mansfield, Ohio 44903
By: DANIEL M. ROGERS Assistant Prosecuting Attorney Richland County Prosecutor's Office 38 S. Park Street Mansfield, Ohio 44902	

Baldwin, J.

{¶1} Defendant-appellant Calvin L. Brooks, Sr. appeals from the May 5, 2016 Order overruling his Motion to Dismiss and the May 5, 2016 Sentencing Entry. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On October 15, 2015, the Richland County Grand Jury indicted appellant on one count of aggravated burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree, one count of aggravated burglary in violation of R.C. 2911.11(A)(2), a felony of the first degree, one count of burglary in violation of R.C. 2911.12(A)(1), a felony of the second degree, and one count of burglary in violation of R.C. 2911.12(A)(3), a felony of the third degree. Appellant also was indicted on one count of criminal damaging in violation of 2906.06(A)(1), a misdemeanor of the second degree, and one count of menacing in violation of R.C. 2903.22(A), a misdemeanor of the fourth degree. At his arraignment on October 27, 2015, appellant entered a plea of not guilty to the charges.

{¶3} Appellant, on May 4, 2016, filed a Motion to Dismiss due to Violation of Right to Speedy Trial. Appellee filed a response to the same on May 4, 2016.

{¶4} On May 5, 2016, appellant withdrew his former not guilty plea and pleaded guilty to all of the charges. As memorialized in a Sentencing Entry filed on May 5, 2016, appellant was sentenced to eight years in prison. Pursuant to an Order also filed on May 5, 2016, the trial court overruled appellant's Motion to Dismiss.

{¶5} Subsequently, on May 13, 2016, appellant filed a pro se Motion to Withdraw Plea. The trial court never ruled on the motion.

{¶6} On June 3, 2016, appellant filed a Notice of Appeal from the trial court's May 5, 2016 Order overruling his Motion to Dismiss and the May 5, 2016 Sentencing Entry.

{¶7} Appellant raises the following assignments of error on appeal:

{¶8} I. MR. BROOK'S GUILTY PLEA IN THIS CASE WAS NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY GIVEN BECAUSE THE STATE RECOMMENDED A FOUR YEAR SENTENCE AS CONSIDERATION FOR A WRITTEN GUILTY PLEA, BUT THE CRIM. R. 11(C) COLLOQUY BETWEEN THE COURT AND MR. BROOKS MADE NO MENTION OF THE FOUR YEAR SENTENCE RECOMMENDATION, NOR WHETHER THE TRIAL COURT WOULD FOLLOW AN UNWRITTEN POLICY TO VOID THE SENTENCE RECOMMENDATION(.) THE RECORD DEMONSTRATES THAT THE DEFENDANT REASONABLY AND SUBJECTIVELY EXPECTED TO RECEIVE A FOUR YEAR SENTENCE IF HE PLED GUILTY, AND HE WAS CONSEQUENTLY PREJUDICED BY HIS REASONABLE AND SUBJECTIVE EXPECTATIONS WHEN HE RECEIVED AN EIGHT YEAR SENTENCE.

{¶9} II. THE TRIAL COURT ERRED BY ACCEPTING MR. BROOK'S NEGOTIATED GUILTY PLEA WHEN AT THE TIME OF THE PLEA, THE FACTS KNOWN TO THE COURT WERE SUCH THAT A MATERIAL TERM OF THE PLEA AGREEMENT WAS VOID PURSUANT TO THE COURT'S OWN UNWRITTEN POLICY, OF WHICH MR. BROOKS WAS NOT SUFFICIENTLY PLACED ON NOTICE, WHERE THAT TERM INDUCED MR. BROOKS INTO PLEADING GUILTY, AND WHERE MR. BROOKS THEN RECEIVED A SENTENCE GREATER THAN THAT FOR WHICH HE WAS AWARE THAT THE COURT COULD IMPOSE UNDER THE TERMS OF THE

NEGOTIATED GUILTY PLEA, IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE US. CONSTITUTION.

I, II

{¶10} Appellant, in his two assignments of error, argues that the trial court erred in accepting his guilty plea. Appellant contends that the trial court's decision to sentence him to eight years rather than the four years recommended by the State renders his plea unknowingly, unintelligent and involuntary. We disagree.

{¶11} Crim.R. 11(C)(2) states as follows:

{¶12} (2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶13} (a) Determining 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.

{¶14} (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶15} (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and 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.

{¶16} Crim. R. 11 requires guilty pleas to be made knowingly, intelligently and voluntarily. Although literal compliance with Crim. R. 11 is preferred, the trial court need only "substantially comply" with the rule when dealing with the non-constitutional elements of Crim.R. 11(C). *State v. Dunham,* 5th Dist. No. 2011–CA–121, 2012–Ohio–2957, ¶ 11 citing *State v. Ballard,* 66 Ohio St.2d 473, 475, 423 N.E.2d 115 (1981), citing *State v. Stewart,* 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977). In *State v. Griggs,* 103 Ohio St.3d 85, 2004–Ohio–4415, 814 N.E.2d 51, ¶ 12, the Ohio Supreme Court noted the following test for determining substantial compliance with Crim.R. 11:

> Though failure to adequately inform a defendant of his constitutional rights would invalidate a guilty plea under a presumption that it was entered involuntarily and unknowingly, failure to comply with non constitutional rights will not invalidate a plea unless the defendant thereby suffered prejudice. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. The test for prejudice is 'whether the plea would have otherwise been made.' *Id.* Under the substantial-compliance standard, we review the totality of circumstances surrounding [the defendant's] plea and determine whether he subjectively understood that a guilty plea is a compete admission of guilt.

{¶17} In determining whether the trial court has satisfied its duties under Crim.R. 11 in taking a plea, reviewing courts have distinguished between constitutional and non-constitutional rights. *State v. Clark,* 119 Ohio St.3d 239, 2008–Ohio–3748, 893 N.E.2d

462 at ¶ 32; *State v. Aleshire,* 5th Dist. Licking No.2007–CA–1, 2008–Ohio–5688, ¶ 10. The trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights. *State v. Clark,* 119 Ohio St.3d at 244, 893 N.E.2d at 499, 2008–Ohio–3748, ¶ 31.

{¶18} In the case sub judice, the trial court complied with Crim.R. 11(C)(2). The trial court described all of the counts against appellant and explained the maximum penalties associated with the counts. The trial court also advised appellant of his trial rights and that, if he pleaded guilty, he would be giving up those rights.

{¶19} Appellant specifically argues that his plea was not knowing, intelligent and voluntary because he did not receive a four year sentence. Appellant initially contends that the trial court, at the final pretrial on December 7, 2015, told appellant that "if you were to plea without a PSI a four year sentence would be appropriate." Transcript at 17. However, there is no evidence that the trial court agreed to such sentence and the trial court, on May 5, 2016, stated that its "notes very clearly say the PSI would dictate." Transcript at 18. Appellant, when asked by the trial court during the plea hearing, stated that no one had promised him anything in exchange for his plea.

{¶20} Appellant argues that the written plea agreement "made no representation regarding the force of a recommended sentence" and that, therefore, his plea was not knowing, intelligent and voluntary. However, the Admission of Guilt/Judgment Entry signed by appellant on May 5, 2016 stated that "State rec 4 years ODRC." At the plea hearing, appellant was advised by the trial court that the maximum sentence that he faced was eleven years. Appellant indicated to the trial court that he understood the maximum sentence that he could face. The trial court's failure to follow the sentence recommended

by the State does not make the sentence invalid. It is well-established a trial court is not bound by a prosecutor's recommendations at sentencing. *State v. Ybarra*, 5th Dist. Licking No. 14-CA-8, 2014-Ohio-3485 citing *State v. Rink,* 6th Dist. No. L–02–1307, 2003–Ohio–4097, at ¶ 5. When a trial court imposes a greater sentence than recommended in the plea agreement, and when the defendant is forewarned of the applicable maximum penalties, there is no error on behalf of the trial court if it imposes a more severe sentence than was recommended by the prosecutor. *State v. Darmour* (1987), 38 Ohio App.3d 160, 160–161, 529 N.E.2d 208.

{¶21} Finally, appellant argues that the trial court sentenced appellant to eight years rather than the recommended four years because appellant's plea occurred after the last plea date. Appellant contends that the trial court informed him on December 7, 2015 that the trial court would not accept negotiated pleas after December 14, 2015. There is nothing in the record supporting appellant's assertion that the trial court, in essence, punished him for a negotiated plea after the last plea date.

{¶22} Based on the foregoing, we find that appellant's plea was intelligent, knowing and voluntary and that the trial court did not err in accepting the same.

{¶23} Appellant's two assignments of error are, therefore, overruled.

{¶24} Accordingly, the judgment of the Richland County Court of Common Pleas is affirmed.

By: Baldwin, J.

Wise, P.J. and

Delaney, J. concur.