

[Cite as *State v. Phelps*, 2016-Ohio-4673.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-150204
	:	C-150205
Plaintiff-Appellee,	:	TRIAL NOS. B-1404958
	:	B-1300895
vs.	:	
CRAIG PHELPS,	:	<i>OPINION.</i>
Defendant-Appellant.	:	

Criminal Appeals From: Hamilton County Court of Common Pleas

Judgments Appealed From Are: Affirmed in Part, Sentences Vacated in Part, and Cause Remanded

Date of Judgment Entry on Appeal: February 26, 2016

***Joseph T. Deters*, Hamilton County Prosecuting Attorney, and *Judith Anton Lapp*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,**

***Rubenstein & Thurman, L.P.A.*, and *Scott A. Rubenstein*, for Defendant-Appellant.**

Please note: this case has been removed from the accelerated calendar.

STAUTBERG, Judge.

{¶1} Defendant-appellant Craig Phelps pleaded guilty to and was convicted of violating the terms of his community control in the case numbered B-1300895, and aggravated robbery and felonious assault in the case numbered B-1404958. The trial court dismissed a separate robbery charge in the case numbered B-1404958. Phelps was sentenced to a total of nine years' imprisonment. Phelps now appeals, asserting three assignments of error related to his guilty pleas and his sentences.

Facts and Procedural Posture

{¶2} In September 2013, Phelps was terminated from the drug court intervention in lieu of conviction program and was placed on community control for his previous conviction of possession of cocaine in violation of R.C. 2925.11(A), a fifth-degree felony. Phelps subsequently violated the terms of his community control. A warrant for his arrest was issued in November 2013, but he was not arrested at that time.

{¶3} In August 2014, Phelps confronted an 86-year-old man and demanded his wallet. Phelps proceeded to beat and severely injure the man in order to obtain the wallet. The police arrested Phelps soon thereafter.

{¶4} Phelps was charged with aggravated robbery in violation of R.C. 2911.01(A)(3), felonious assault in violation of R.C. 2903.11(A)(1), and robbery in violation of R.C. 2911.02(A)(2). Phelps entered guilty pleas to the aggravated robbery and felonious assault charges, as well as the violation of community control.

{¶5} During the recitation of the facts, the prosecutor stated that Phelps had confronted the victim for his wallet, and when the victim had refused to produce

his wallet, a struggle had ensued, resulting in the severe beating of the victim. The trial court accepted Phelps's guilty pleas and found him guilty of aggravated robbery, felonious assault, and a community control violation.

{¶6} At Phelps's sentencing hearing, the trial court stated, "I do find that [the aggravated robbery and felonious assault] are the same offenses, and by law I don't believe I can make them consecutive." Thereafter, the trial court sentenced Phelps to eight years' imprisonment for aggravated robbery and eight years' imprisonment for felonious assault, to be served concurrently. The trial court also sentenced Phelps to one year of imprisonment for the community control violation, to be served consecutively to the aggravated robbery and felonious assault sentences. Phelps timely appealed.

Assignments of Error

{¶7} Phelps asserts three assignments of error relating to his guilty pleas and his sentencing. We will address his assignments of error out of order.

I. Guilty Pleas

{¶8} In his third assignment of error, Phelps contends that his pleas were not made knowingly, intelligently, and voluntarily because the trial court did not comply with Crim.R. 11. We disagree.

{¶9} "Prior to accepting a guilty plea from a criminal defendant, the trial court must inform the defendant that he is waiving his privilege against compulsory self-incrimination, his right to jury trial, his right to confront his accusers, and his right of compulsory process of witnesses." *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981), paragraph one of the syllabus, following *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); see Crim.R. 11(C). "A plea may be involuntary either because the accused does not understand the nature of the

constitutional protections he is waiving * * * or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt.” *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 56, quoting *Henderson v. Morgan*, 426 U.S. 637, 645, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976), fn. 13. A court should examine the totality of the circumstances in determining whether a defendant understood the charge. *Fitzpatrick* at ¶ 56.

{¶10} At the beginning of Phelps’s plea hearing, the trial court, through a series of direct questions to Phelps, established that Phelps was sober, could read and write, finished the 11th grade in school, and was satisfied with his counsel. Phelps confirmed to the trial court that he was pleading guilty to aggravated robbery and felonious assault. Phelps then identified and confirmed his signatures on the written guilty pleas and the waiver of jury trial.

{¶11} The trial court engaged in a complete Crim.R. 11 colloquy with Phelps. Several times throughout the Crim.R. 11 colloquy, the trial court asked Phelps whether he understood each right being waived, to which Phelps responded affirmatively. At the end of the colloquy, Phelps indicated that he did not have any questions, understood his rights, and wanted to plead guilty to aggravated robbery and felonious assault. The trial court then specifically asked Phelps’s defense counsel whether Phelps was proceeding knowingly, intelligently, and voluntarily, to which defense counsel responded affirmatively. Reviewing the totality of the circumstances, we find that Phelps entered into the guilty pleas for aggravated robbery and felonious assault knowingly, intelligently, and voluntarily.

{¶12} It is unclear whether Phelps is also challenging his guilty plea to his community control violation on the same grounds. Nevertheless, the Crim.R. 11 colloquy requirements do not apply to pleas to community control violations. *See*

State v. McAfee, 1st Dist. Hamilton No. C-130567, 2014-Ohio-1639, ¶ 10; *State v. Durgan*, 1st Dist. Hamilton Nos. C-75288 and C-75503, 1976 Ohio App. LEXIS 8542, *8 (May 10, 1976). After a review of the record, we also find that the trial court complied with the procedural safeguards afforded to Phelps under Crim.R. 32.3 and the Due Process Clause of the Fourteenth Amendment to the United States Constitution with respect to the guilty plea for the community control violation. See *McAfee* at ¶ 6-9. We overrule Phelps’s third assignment of error.

II. Allied Offenses

{¶13} In his first assignment of error, Phelps argues that the trial court erred when it failed to merge the aggravated robbery and felonious assault counts under R.C. 2941.25, Ohio’s multiple-count statute. The state concedes this error and agrees that the offenses should have been merged.

{¶14} Phelps pleaded guilty to aggravated robbery in violation of R.C. 2911.01(A)(3), which states that “[n]o person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall * * * [i]nfllict, or attempt to inflict, serious physical harm on another.” He also pleaded guilty to felonious assault in violation of R.C. 2903.11(A)(1), which provides that “[n]o person shall knowingly * * * [c]ause serious physical harm to another * * * .”

{¶15} Because Phelps failed to raise an allied offenses objection at sentencing, he has forfeited all but plain error. See *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3. “A forfeited error is not reversible error unless it affected the outcome of the proceedings and reversal is necessary to correct a manifest miscarriage of justice.” *Id.* Pursuant to Crim.R. 52(B), “[p]lain errors or

defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”

{¶16} “Under R.C. 2941.25, offenses merge when the defendant’s conduct can be construed to constitute two or more allied offenses of similar import, and the conduct establishes that the offenses were not committed separately or with a separate animus.” *State v. Dalmida*, 1st Dist. Hamilton No. C-140517, 2015-Ohio-4995, ¶ 24. To determine whether a defendant can be convicted of multiple offenses under R.C. 2941.25, we apply the three part *Ruff* test: “(1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions.” *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 31.

{¶17} During the plea hearing, the prosecutor stated, “Phelps had wanted [the victim’s] wallet * * * [which the victim] did not want to give up * * *, and there was * * * a pretty protracted struggle over the wallet, where [the victim] had his hand clumping his wallet * * * Phelps was proceeding to remove that, and during the course of that struggle is when [the victim] was beat and seriously injured.” The victim testified at sentencing that Phelps had jumped him and had started beating him, and had stopped only after he questioned Phelps about hitting an old man and expressed that he did not have any money.

{¶18} The record demonstrates that the aggravated robbery and the felonious assault were committed at the same time against one victim. The state did not provide any other information nor was there other information provided at sentencing to establish a separate animus or further harm that resulted from the beating. Therefore, as the state concedes, the crimes in this instance are allied

offenses of similar import that were not committed separately or with a separate animus, and the court should have merged the two offenses pursuant to R.C. 2941.25. *See Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, at ¶ 3-4; compare *State v. Bailey*, 1st Dist. Hamilton No. C-140129, 2015-Ohio-2997, ¶ 85-88.

{¶19} The record shows that the trial court apparently also believed that the offenses were allied, but ran the sentences concurrently instead of merging the offenses. “[P]lain error occurs when a trial court imposes concurrent sentences and the record shows that those offenses should have merged.” *State v. Murph*, 1st Dist. Hamilton No. C-150263, 2015-Ohio-5076, ¶ 8.

{¶20} Therefore, we sustain Phelps’s first assignment of error. We vacate the sentences imposed for the aggravated robbery and felonious assault counts and remand for resentencing on one of those counts of the state’s choice. *See State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, paragraph two of the syllabus.

III. Sentencing Findings

{¶21} In his second assignment of error, Phelps contends that the trial court erred by imposing sentences that are not supported by the findings in the record. As we have vacated the sentences for the aggravated robbery and felonious assault counts, we only review Phelps’s sentence for his community control violation.

{¶22} Under R.C. 2953.08(G)(2), we may modify or vacate a sentence if we clearly and convincingly find that either the record does not support the sentencing court’s findings or if the sentence is otherwise contrary to law. *See State v. White*, 2013-Ohio-4225, 997 N.E.2d 629, ¶ 11 (1st Dist.). R.C. 2929.15(B) permits the trial court to impose a prison term upon the defendant for a community control violation as long as the prison term is “within the range of prison terms available for

the offense for which the sanction that was violated was imposed and [does] not exceed the prison term specified in the notice provided to the offender at the sentencing hearing * * *.” R.C. 2929.15(B)(2); *see State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, paragraph two of the syllabus. The statutory range for a fifth-degree felony is between six and 12 months. R.C. 2929.14(A)(5).

{¶23} We note that the record does not contain a transcript of the sentencing hearing for Phelps’s original conviction of possession of cocaine, so we presume regularity in the hearing. *See State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684, ¶ 19. The trial court, in its 2013 sentencing entry, placed Phelps on notice that if he violated the terms of his community control, the trial court would impose a 12-month prison term. Here, the trial court sentenced Phelps to one year of imprisonment, in compliance with R.C. 2929.15(B). Additionally, the trial court complied with the requirements of R.C. 2929.14(C)(4) when it ordered Phelps’s sentence for his community control violation to run consecutively to his sentences for his aggravated robbery and felonious assault convictions. Because the trial court complied with the requirements of R.C. 2929.15(B) and 2929.14(C)(4), we cannot find that the sentence is clearly and convincingly contrary to law. Phelps’s second assignment of error is overruled.

Conclusion

{¶24} We vacate the sentences in the case numbered B-1404958, and remand for resentencing on either the aggravated robbery or felonious assault count at the state’s election. We affirm the trial court’s judgments in all other respects.

Judgments affirmed in part, sentences vacated in part, and cause remanded.

HENDON, P.J., and MOCK, J., concur.

Please note:

This court has recorded its own entry this date.