[Cite as *State v. Reinthaler*, 2017-Ohio-9374.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 16 MA 0170
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
JOSEPH J. REINTHALER, JR.	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 2015 CR 1000

JUDGMENT: Affirmed in part. Remanded in part.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Nicholas A. Brevetta
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant:

Atty. Edward A. Czopur
DeGenova & Yarwood, Ltd.
42 North Phelps Street
Youngstown, Ohio 44503

JUDGES:

Hon. Cheryl L. Waite
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: December 22, 2017

[Cite as *State v. Reinthaler*, 2017-Ohio-9374.]
WAITE, J.

{¶1} Appellant Joseph J. Reinthaler, Jr. appeals his conviction and sentence entered by the Mahoning County Court of Common Pleas following his plea of guilty to one count of tampering with records, one count of forgery, one count of engaging in a pattern of corrupt activity, and sixty-seven counts of tampering with records. Appellant contends his plea was not made knowingly, intelligently and voluntarily, and should be vacated. Appellant also asserts his sentence was clearly and convincingly contrary to law because the trial court failed to make the requisite findings regarding consecutive sentencing. Based on the following, we find Appellant's guilty plea was knowingly, voluntarily and intelligently entered as the trial court strictly complied with Crim.R. 11 and Appellant's first assignment of error is overruled. Regarding Appellant's second assignment of error, the record reveals the trial court clearly engaged in the required analysis when imposing consecutive sentences at the sentencing hearing. Accordingly, the judgment of the trial court is affirmed in this respect. However, as the trial court quoted directly from R.C. 2929.14(C)(4) in the sentencing entry and did not incorporate the findings already made on the record at the sentencing hearing, a limited remand is ordered for the trial court to enter a *nunc pro tunc* entry, properly addressing the consecutive sentencing findings.

Factual and Procedural History

{¶2} Appellant operated an automobile dealership. According to evidence introduced by the state, Appellant took in cars as trade-ins at the dealership, assuring the seller that Appellant would pay off the existing liens on the car. Appellant

subsequently forged signatures and altered documents so it would appear the liens had been paid. Appellant then sold the subject cars to other, unsuspecting buyers.

{¶3} In an indictment and superseding indictment, Appellant was charged with one count of tampering with records in violation of R.C. 2913.42(A)(2), (B)(1)(4), a felony of the third degree; one count of forgery in violation of R.C. 2913.31(A)(3), (C), a felony of the fifth degree; one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(3), (B)(1), a felony of the first degree; and sixty-seven counts of tampering with records in violation of R.C. 2913.42(A)(2), (B)(1)(4), felonies of the third degree. On August 3, 2016, Appellant pleaded guilty to all charges. There was no sentencing recommendation by the state.

{¶4} On November 3, 2016, a sentencing hearing was held. Appellant was sentenced to two years of incarceration for tampering with records; twelve months for forgery; ten years for engaging in a pattern of corrupt activity; and twelve months for the sixty-seven counts of tampering with records. The trial court ordered counts one, two, three and four to run consecutive to each other, with the remaining counts to be served concurrently, for a total prison time of fourteen years.

{¶5} Appellant filed this timely appeal.

ASSIGNMENT OF ERROR NO. 1

APPELLANT'S PLEA WAS NOT MADE KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY AS THE TRIAL COURT COMPLETELY FAILED TO ADVISE APPELLANT OF THE EFFECT OF HIS PLEA AND/OR THAT UPON ACCEPTANCE OF HIS PLEA

> THAT THE COURT COULD PROCEED IMMEDIATELY TO JUDGMENT AND SENTENCE THEREBY INVALIDATING THE PLEA AS A WHOLE.

{¶6} Appellant alleges that he did not enter his plea knowingly, intelligently and voluntarily because he was not informed of the effect of his plea or that the matter could immediately proceed to judgment and sentencing.

{¶7} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle,* 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). Crim.R. 11 requires the trial court to follow a certain procedure for accepting guilty pleas in felony cases. Before the court can accept a guilty plea to a felony charge, it must conduct a colloquy with the defendant to determine that they understand the plea they are entering and the rights being voluntarily waived. Crim.R. 11(C)(2).

{¶8} Crim.R. 11(C)(2)(c) sets forth the constitutional rights that the defendant waives by entering the guilty plea.

> A trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the

> privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid. (Crim.R. 11(C)(2)(c), applied.)

State v. Veney, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, syllabus.

{¶9} Crim.R. 11(C) also sets forth the nonconstitutional rights that a defendant must be informed of prior to the trial court accepting the plea. These rights include that the defendant: (1) be informed of the nature of the charges; (2) be informed of the maximum penalty involved; (3) be informed, if applicable, that he is not eligible for probation or the imposition of community control sanctions, and (4) be informed that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence. Crim.R. 11(C)(2)(a)(b); *State v. Philpott*, 8th Dist. No. 74392 (Dec. 14, 2000), citing *McCarthy v. U.S.*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). As regards nonconstitutional rights, the trial court must substantially comply with informing a defendant of the effect of his plea. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). Substantial compliance is attained when, looking at the totality of the circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving. *Id.* Moreover, when nonconstitutional aspects of the Crim.R. 11 plea colloquy are at issue, the defendant must show he was prejudiced by the trial court's error before a plea will be vacated. *Veney* at ¶ 17. "To demonstrate prejudice in this context, the defendant must show that the plea would otherwise not have been entered." *Id*. at ¶ 15, citing *Nero* at 108.

{¶10} Appellant contends that his guilty plea was not knowing, voluntary or intelligent and, thus, it must be vacated. Appellant argues that because the trial court failed to inform him of the effect of his plea and that the matter could proceed immediately to judgment and sentence, he did not enter a knowing, intelligent and voluntary plea.

{¶11} The trial court must inform a defendant either orally or in writing of the effect of his plea and to comply with the requirements of Crim.R. 11(B). See *State v. Jones,* 116 Ohio St.3d 211, 217, 2007-Ohio-6093, 877 N.E.2d 677. A review of the transcript from Appellant's plea hearing reveals the trial court fully complied with Crim.R. 11(C)(2)(c) and fully advised Appellant of the constitutional rights he was waiving by entering a plea of guilty. At the sentencing hearing, the trial court substantially complied when advising Appellant regarding the nonconstitutional aspects of the Crim.R. 11 colloquy. Appellant was orally advised "that the court upon acceptance may proceed to judgment and sentence." (8/3/16 Plea Hrg. Tr., p. 10.) Moreover, even if Appellant raised some deficiency on the part of the trial court, he must still prove that he was prejudiced by this error. In other words, Appellant must show that, but for the alleged error by the trial court, he would have not otherwise entered a guilty plea. *Veney* at ¶ 17. Appellant made no such showing here. Appellant's responses to the trial court judge reflected that he understood the proceedings. Appellant did not assert his innocence at the colloquy and is presumed to understand the effect of his plea. *Jones* at 219-220. Therefore, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> THE SENTENCE IMPOSED AGAINST APPELLANT WAS IN VIOLATION OF 2929.14(C)(4) AND CONTRARY TO LAW AS THE TRIAL COURT DID NOT MAKE THE NECESSARY FINDINGS ORALLY AT THE SENTENCING HEARING AND/OR DID NOT INCLUDE ANY SUCH FINDINGS IN THE SENTENCING ORDER.

{¶12} It should be noted that in reviewing a felony sentence, "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *State v. Marcum,* 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1.

{¶13} Appellant contends the trial court erred in imposing consecutive sentences without making the requisite findings. As the trial court sentenced Appellant to consecutive sentences, it was required to make the required R.C. 2929.14(C)(4) findings at the sentencing hearing, and those findings must also be incorporated into the judgment entry of sentence. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 654, ¶ 29. R.C. 2929.14(C)(4) provides:

> 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.

{¶14} At the sentencing hearing the trial court ordered a portion of Appellant's sentence to run consecutively and made the following findings:

The court finds that consecutive sentences are necessary to protect the public from future crimes and to punish the defendant. The court further finds that these are done in a pattern of -- these crimes were -- offenses were committed in a pattern or a course of conduct, and that a

> substantial number of people were injured and remain injured by his conduct.

(11/3/16 Sentencing Hrg. Tr., p. 15.)

{¶15} Consequently, the trial court found R.C. 2929.12(C)(4)(b) was applicable, rendering consecutive sentences necessary. The trial court's findings at the sentencing hearing complied with R.C. 2929.14(C)(4) and the *Bonnell* mandates.

{¶16} However, it is apparent that the trial court did not appropriately incorporate those findings in the judgment entry. The trial court stated in the entry:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require offender to serve 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 offenders [sic] conduct and to the danger the offender poses to the public, and if the court finds 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 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 offenders [sic] 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. (Emphasis deleted.)

(11/18/16 J.E., p. 4.)

{¶17} Appellant contends this statement is not a valid finding as it is a "cut and paste" of verbatim statutory language. As we have noted previously, "magic" or "talismanic" words in the judgment entry of sentence are not required. However, the entry must contain at least an indication that the trial court made the necessary findings. *State v. Bellard,* 7th Dist.No. 12-MA-97, 2013-Ohio-2956, ¶ 17. The trial court need not give reasons for its findings, but must actually make the findings. At the sentencing hearing on this matter, the court engaged in the requisite analysis pursuant to R.C. 2929.14(C)(4). However, the court's judgment entry contains only a recitation of the language of the statute. There is no indication that the trial court engaged in any analysis while utilizing the language of the statute as a guide. As we have held previously on more than one occasion, this is not sufficient to satisfy the requirements of *Bonnell. State v. Williams,* 7th Dist. No. 16 MA 0041, 2017-Ohio-856, ¶ 20.

{¶18} The Court noted in *Bonnell*:

> A trial court's inadvertent failure to incorporate the statutory findings in the sentencing entry after properly making those findings at the sentencing hearing does not render the sentence contrary to law; rather, such a clerical mistake may be corrected by the court through a nunc pro tunc entry to reflect what actually occurred in open court.

Id. at ¶ 30.

{¶19} The record reflects that the trial court's findings, given orally at the sentencing hearing, demonstrate the court engaged in the required analysis prior to imposing consecutive sentences. In accordance with *Bonnell* and its progeny, the trial court's failure to incorporate those findings into the written sentencing entry amounts to a clerical error necessitating a *nunc pro tunc* entry to correctly align the language of the entry with the findings made at the sentencing hearing.

{¶20} Based on the foregoing, Appellant has not demonstrated that his guilty plea was not entered in a knowing, intelligent and voluntary fashion. Moreover, Appellant's sentence is not clearly and convincingly contrary to law as the trial court made the correct findings at the sentencing hearing to impose consecutive sentences. However, the matter is remanded. The sole reason for remand is to allow the trial court to enter a *nunc pro tunc* entry setting forth the applicable consecutive sentencing findings made at the sentencing hearing. Appellant's first assignment of error is without merit and is overruled and his second assignment is sustained in part. The judgment of the trial court is affirmed in part but remanded for

the limited purpose of entering a *nunc pro tunc* entry addressing the consecutive sentencing findings made at the sentencing hearing, according to law.

DeGenaro, J., concurs.

Robb, P.J., concurs.