

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals Nos. WD-09-051
WD-09-076

Appellee

Trial Court No. 03 CR 327

v.

Thomas Kern

DECISION AND JUDGMENT

Appellant

Decided: November 12, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Gwen
Howe-Gebers and Jacqueline M. Kirian, Assistant Prosecuting
Attorneys, for appellee.

Thomas P. Kurt and Marshall D. Wisniewski, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the June 8, 2009 judgment of the Wood County Court of Common Pleas, which imposed an identical sentence as that imposed upon appellant, Thomas Kern, on March 29, 2004, after he was convicted following the entry of a no

contest plea to charges of violating R.C. 2903.08(A)(2), vehicular assault. The subsequent judgment was entered in order to correct the sentencing judgment pursuant to *State v. Baker* (2008), 119 Ohio St.3d 197, and provide appellant with a judgment that was a final, appealable order. Upon consideration of the assignments of error, we reverse the decision of the lower court and vacate appellant's no contest plea. Appellant asserts the following assignments of error on appeal:

{¶ 2} "I. The trial court erred in finding appellant guilty, pursuant to appellant's plea of no contest, of the offense of Vehicular Assault, a third degree felony, in violation of Ohio Revised Code Sec. 2903.08(A)(2), because the indictment as orally amended was not sufficient to establish that offense.

{¶ 3} "II. The trial court erred in accepting the plea agreement between the defendant and the State of Ohio, since the agreement included a promise by the State of Ohio to recommend that the trial court not impose a prison term, whereas a conviction for violation of Ohio Revised Code Sec. 2903.08(A)(2) carries a mandatory prison term if either of the two specifications for a third degree felony Vehicular Assault are present, thus rendering the plea agreement unknowing and involuntary.

{¶ 4} "III. Appellant's Sixth Amendment right under the United States Constitution, and Ohio Constitution, art. [sic] I, Sec. 10, to effective assistance of counsel, was violated by his attorney's failure to advise him that the sentence recommended by the State of Ohio pursuant to the plea agreement was a legal impossibility.

{¶ 5} "IV. The trial court clearly erred in the Amended Judgment Entry of June 8, 2009 by stating that appellant entered a plea of guilty, whereas the record clearly demonstrates that appellant entered a plea of no contest."

{¶ 6} On August 21, 2003, appellant was indicted in a single-count indictment alleging a violation of R.C. 2903.08(A)(1), aggravated vehicular assault, a felony of the third degree. On September 19, 2003, appellant entered a plea of not guilty. In February 2004, appellant entered into a plea agreement with the state of Ohio. The agreement erroneously stated that appellant agreed to withdraw his former plea of "guilty" and correctly stated that he would enter a plea of no contest. Appellant entered the no contest plea to the offense of "aggravated assault," in violation of R.C. 2903.08(A)(2), a felony of the third degree. (However, R.C. 2903.08(A)(2) is vehicular assault, not aggravated assault, and is a third degree felony only if one of two conditions exist.) The prosecutor agreed not to recommend imprisonment as a sentence. Appellant was informed by the written agreement that the maximum prison term was five years and that there was no mandatory prison term. Therefore, appellant believed the court could impose non-prison sanctions. Appellant indicated at the hearing that it was very important to him not to have to serve a prison term because he needed to support his family. The state of Ohio moved to amend the indictment to charge appellant with "aggravated" vehicular assault in violation of R.C. 2903.08(A)(2).

{¶ 7} At the plea hearing, the prosecution presented the facts supporting the violation of R.C. 2903.08(A)(2). However, the prosecution did not present any evidence

to support a finding that appellant did the acts necessary to elevate the crime from a felony of the fourth degree to a felony of the third degree. R.C. 2903.08(C)(2).

However, it was made clear at the beginning of the plea hearing that the plea was entered to the crime as a felony of the third degree. The court found appellant guilty of the crime to which appellant pled.

{¶ 8} Appellant was sentenced on March 31, 2004, to four years of imprisonment. On November 29, 2004, the court granted appellant's motion for judicial release pursuant to R.C. 2929.20, subject to five years of community control. Appellant violated the terms of his community control twice, first resulting in the addition of 120 days of house arrest, including drug and alcohol abuse evaluation and treatment, and secondly reimposition of the original sentence because the court found that appellant was not able to comply with the terms of the community control sanction.

{¶ 9} On March 31, 2008, appellant moved to modify his verdict and sentence pursuant to Civ.R. 33(A)(4). Appellant asserted that he had pled no contest to a violation of R.C. 2903.08(A)(2), a felony of the third degree and sentenced accordingly. However, this offense is a felony of the third degree only if, at the time of the offense, appellant was driving while under a suspension or had been previously convicted of or pled guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense. Appellant asserts that none of these conditions existed at the time of his offense. On July 25, 2008, the court denied appellant's motion finding that he had agreed to plead to the violation as a third degree felony in exchange for not proceeding to trial on the

original charges. Therefore, appellant cannot later seek to modify the plea agreement. Appellant sought an appeal to this court from this judgment. On March 31, 2009, this court affirmed the trial court's judgment on the grounds of res judicata finding that appellant could have asserted this claim on direct appeal. Appellant then sought an appeal to the Ohio Supreme Court.

{¶ 10} Meanwhile, appellant filed a motion in the trial court to correct the judgment of his conviction pursuant to Crim.R. 32(C) and *State v. Baker* (2008), 119 Ohio St.3d 197, ¶ 19, because it did not include the plea, means of conviction, and the sentence in one judgment. Therefore, on June 8, 2009, the trial court issued an amended judgment finding that appellant had pled guilty to a violation of R.C. 2903.08(A)(2) as a third degree felony and was found guilty. The court then imposed the same sentence of four years of imprisonment. Appellant sought a timely appeal from this judgment.

{¶ 11} Appellant also moved in the trial court to vacate the allegedly void sentence. The trial court denied the motion on September 30, 2009, and appellant appealed from that sentence as well. Both appeals have been consolidated for our review.

{¶ 12} Appellee first asserts that all of appellant's assignments of error are barred under R.C. 2953.23(A) because the appeal is really an untimely postconviction relief petition and under the doctrine of res judicata. First, we find that this is a direct appeal from the corrected sentencing judgment and, therefore, R.C. 2953.23(A) is not applicable. Second, appellee's res judicata arguments are meritless. The issues raised in this appeal were found to be res judicata in appellant's postconviction relief proceedings

because they could have been raised on direct appeal, but were not. Since an error in the original sentencing judgment rendered it void and the res judicata findings of the trial court in the postconviction relief proceeding are premised upon a void judgment, those findings are void as well. Therefore, we turn to appellant's assignments of error.

{¶ 13} In his second assignment of error, appellant argues that the trial court erred by accepting the plea agreement when it was based upon a promise by the prosecution to recommend that no prison term be imposed when a violation of R.C. 2903.08(A)(2) carries a mandatory prison term if it qualifies as a third degree felony. Appellant contends that the plea was, therefore, unknowing and involuntary.

{¶ 14} Because of appellant's conviction of R.C. 2903.08(A)(2) as a third degree felony, the penalty enhancement provisions of R.C. 2903.08(D)(2) mandated that the court impose a mandatory prison term. Where the statute does not indicate the length of the mandatory prison term, the court has the discretion to select any length of time within the statutory range allowed for the crime. Former R.C. 2929.01(Y)(1). However, the plea agreement clearly indicated that there was no mandatory prison term and the court did not impose a mandatory term even after the sentencing judgment was reissued to make it a final, appealable order many years later.

{¶ 15} Because the defendant gives up significant constitutional rights by entering a guilty or no contest plea, compliance with Crim.R. 11(C), (D), and (E) is required to ensure that the plea is knowingly, intelligently, and voluntarily made. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶ 25-26. The court must strictly comply with Crim.R.

11(C)(2) regarding federal constitutional rights, but need only substantially comply with the rule regarding nonconstitutional rights. *Id.* at ¶ 31-32. Furthermore, even if the trial court failed to substantially comply with Crim.R. 11(C), the plea will not be set aside unless appellant demonstrates that he was prejudiced by the court's failure to substantially comply with the rule. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶ 12.

{¶ 16} Crim.R. 11(C)(2) requires that:

{¶ 17} "In felony cases the court * * * shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
(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."

{¶ 18} This requirement has been determined to involve nonconstitutional rights. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. Therefore, the trial court need only have substantially complied with the rule in order to uphold the plea. But, substantial compliance cannot be found when a trial court totally fails to inform the defendant of a mandatory term of imprisonment and such total failure eliminates any need to demonstrate prejudice. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, ¶ 22 (trial court failed to inform the defendant of a mandatory term of postrelease control) and *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶ 40. Cf. *State v. Lane*, 3d Dist. No.

1-10-10, 2010-Ohio-4819, ¶ 17, appeal not allowed (2002), 94 Ohio St.3d 1486, Table, No. 01-2149, and *State v. Garrett*, 9th Dist. No. 24377, 2009-Ohio-2559, ¶ 17-19 (both cases distinguished *State v. Sarkozy*, supra, on the ground that the trial court only failed to mention that there was a mandatory five-year period of postrelief control, not a failure to mention postrelease control altogether); and *State v. Abuhashish*, 6th Dist. No. WD-07-048, 2008-Ohio-3849, ¶ 35 (This court made an exception where the record indicates that the defendant had actual notice of the fact that the offense carried a mandatory prison term.)

{¶ 19} In the case before us, none of the parties or the judge realized that appellant should have been sentenced to a mandatory prison term. The trial court clearly did not comply with Civ.R. 11(C)(2) and inform appellant of the maximum penalty involved and appellant was not aware of the potential imprisonment sentence he faced. It was clear from the plea hearing transcript that appellant was only pleading no contest in hopes of avoiding a prison term. Therefore, appellant could not have entered a knowing, voluntary, and intelligent no contest plea. Under such a situation, we need not consider whether appellant was prejudiced by the trial court's total failure to comply with Crim.R. 11(C). Appellant's second assignment of error is found well-taken. Consequently, appellant's remaining assignments of error are rendered moot.

{¶ 20} Having found that the trial court did commit error prejudicial to appellant and that substantial justice has not been done, the judgment of the Wood County Court of Common Pleas is reversed. We hereby vacate appellant's no contest plea and remand this

case to the trial court for further proceedings. Appellee is hereby ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.