[Cite as *State v. Belden*, 2012-Ohio-6240.]

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

State of Ohio	Court of Appeals No. OT-11-033
Appellee	Trial Court No. 11-CR-047
v.	
Verlton R. Belden	**DECISION AND JUDGMENT**
Appellant	Decided: December 31, 2012

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Melissa R. Bergman, Assistant Prosecuting Attorney, for appellee.

Michael W. Sandwisch, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Ottawa County Court of Common Pleas, following a guilty plea, in which the trial court found appellant, Verlton Ray Belden, guilty of two counts of domestic violence, both violations of R.C. 2919.25, and sentenced him to serve an aggregate prison term of four years. On appeal, appellant sets forth the following three assignments of error:

1. The Court erred to the prejudice of the Defendant in failing to substantially comply with Criminal Rule (11)(C)(2)(a) by failing to advise the Defendant of mandatory post release control at the time of the Defendant's plea.

2. The Court erred to the prejudice of the Defendant in granting the Defendant's request for a Psychological and/or Psychiatric Assessment/Evaluation for Determination of Sentence Recommendation and then reversing said Decision one (1) month later for no stated reason.

3. The Court erred to the prejudice of the Defendant by imposing a Mandatory Sentence of three (3) years on Defendant's Conviction for Domestic Violence, O.R.C. Section 2919.25, a felony of the third degree, in its Sentencing Judgment Entry, when the Court advised the Defendant on the Open Court Record during the Sentencing Hearing that it would impose no more mandatory time that [sic] was required by law, when the law only requires a mandatory of six (6) months [sic] time for a felony of the third degree, Domestic Violence Offense, pursuant to O.R.C. Section 2919.25(D)(6)(d).

{¶ 2} In May 2011, appellant was indicted by an Ottawa County Grand Jury on two counts of domestic violence in violation of R.C. 2919.25(A), both third degree felonies, one count of felonious assault in violation of R.C. 2903.11, a second degree felony, and three counts of alleged endangering children in violation of R.C. 2919.22(A),

2919.22(B)(1) and 2919.22(B)(2), two second felonies and one third degree felony, respectively. The charges stemmed from an incident in which appellant allegedly injured his girlfriend's son by jamming Q-Tips into the boy's ears and punching the six year old in the stomach, and also hitting the child's mother in the face when she attempted to intervene.

{¶ 3} Initially, appellant entered a not guilty plea to all of the charges. On July 20, 2011, appellant appeared before the trial court, withdrew his former not guilty pleas, and entered pleas of guilty to the two counts of domestic violence, one of which was reduced to a fourth degree felony. Pursuant to the plea, the remaining four counts of the indictment were to be dismissed.

{¶ 4} At the change of plea hearing, the trial court, in accordance with Crim.R. 11(C)(2)(a), addressed appellant personally and ascertained that he was not under the influence of drugs or alcohol at the time of the plea, that he was not threatened, and had not received any promises in exchange for his plea. The trial court then explained to appellant that the penalty for a third degree felony was a maximum of five years in prison with a $10,000 fine, and the penalty for a fourth degree felony was a maximum of 18 months in prison and a $5,000 fine. The trial court further told appellant that the minimum mandatory prison term for each of the two offenses was six months, and that, although there was no requirement that the prisons terms be served consecutively they could, in the court's discretion, be "stacked" for a possible aggregate sentence of six and one-half years.

{¶ 5} After explaining the sentencing options to appellant, the trial court ascertained that appellant had consulted with his attorney and that all of his questions regarding the plea had been answered. Appellant then told the trial court his version of the events that led to the charges against him. During his statement, appellant stated that he was trying to clean the child's ears with Q-Tips; however, appellant admitted that he punched his girlfriend's son in frustration when the boy would not stop crying. He also admitted to punching his girlfriend when she tried to intervene to help her son.

{¶ 6} After making his statement, appellant stated that he was satisfied with defense counsel's representation. The trial court then explained the possible penalties, which included payment of court costs, restitution to appellant's victims, and a prison sentence with no reduction for good time. The trial court also told appellant that, after serving his sentence, he would be required to serve a term of postrelease control which "could be for as long as three years." The trial court further advised appellant that he would be subject to further penalties if he violated the terms of postrelease control.

{¶ 7} Following the above exchange, the trial court explained the consequences of a felony conviction and apprised appellant that, by entering a plea, he was waiving his right to a jury trial, to have the elements of the charged offenses proved beyond a reasonable doubt, to cross-examine witnesses at trial, to subpoena witnesses, and to refuse to testify on his own behalf. The trial court also explained the limited rights to appeal appellant's sentence, and stated that, although the matter could proceed to sentencing immediately after the plea was entered, the sentencing hearing would be

delayed pending the preparation of a presentence investigative report. That same day, appellant filed a request for a psychiatric assessment at state expense.

{¶ 8} At the conclusion of the hearing, the trial court found that appellant's decision to withdraw his not guilty plea and to tender a guilty plea to two counts of domestic violence was knowingly, voluntarily and intelligently made. The court further found that appellant was adequately informed of his constitutional rights, that he understood the nature of the charges, the effects of the plea, and the penalties involved. Accordingly, appellant's guilty pleas were accepted, and the trial court found appellant guilty of two counts of domestic violence pursuant to R.C. 2919.25(A).

{¶ 9} Following the hearing, appellant executed a written plea agreement, in which he agreed to plead guilty to two counts of domestic violence. As to the first violation of R.C. 2919.25(A), a third degree felony, the plea agreement stated, in relevant part:

> I understand the **MAXIMUM** sentence **COULD** be: a maximum basic prison term of **five (5) years** of which **six (6) months** is a mandatory minimum. Any prison sentence imposed will be mandatory. I understand I will not be eligible for judicial release during this time. * * * (Emphasis sic.)

{¶ 10} As to the second violation of R.C. 2919.25(A), a fourth degree felony, the plea agreement stated, in relevant part:

I understand the **MAXIMUM** sentence **COUL**D be: a maximum basic prison term of **eighteen (18) months** of which **six (6) months** is mandatory, after which I am eligible for judicial release. * * *

I understand that the Court may impose said sentences consecutively.

* * *

I know any prison term will be the term served without good time credit. After prison release, I will have up to three (3) years of post-release control. * * * (Emphasis sic.)

{¶ 11} On August 2, 2011, the trial court granted appellant's request for a psychological and/or psychiatric assessment. However, on September 2, 2011, the trial court sua sponte reconsidered and revoked its earlier decision.

{¶ 12} A sentencing hearing was held on September 15, 2011, at which appellant's defense attorney commented on the contents of appellant's PSI report. Specifically, defense counsel stated that appellant had a history of mental health issues, including bi-polar disorder, mood swings and depression. Defense counsel further stated that appellant was adopted as a child, after he and his brother were abandoned by their biological parents. The two boys lived for a while in an old car, where they ingested windshield wiper fluid and antifreeze, which killed appellant's brother and caused appellant to suffer permanent "physical abnormalities." The prosecutor then recommended that appellant be ordered to serve a three-year prison term, after which

appellant's girlfriend asked that the restraining order against appellant be dropped, so that she and her son could have contact with appellant. Appellant's attorney then asked the trial court to consider community control in lieu of prison, after which appellant stated that he wanted treatment for his psychiatric disorder.

{¶ 13} After hearing all the above statements, the trial court stated that appellant's lengthy criminal history, which includes domestic violence, assault, resisting arrest, disorderly conduct and illegally carrying a concealed weapon, is "troubling." The trial court noted that, in spite of his claims of mental illness, appellant has not been treated for a psychiatric disorder since 2004. After reviewing the statutory factors, including the overriding purpose of felony sentencing set forth in R.C. 2929.11, and the seriousness and recidivism factors set forth in R.C. 2929.12, including the need for incapacitating appellant and deterring him from future crime, as well as the seriousness of appellant's conduct and its impact on his victims, the trial court concluded that appellant is a "dangerous person" who is not fit to live with a child. After considering the factors in R.C. 2929.13, the trial court concluded that appellant is not amenable to community control.

{¶ 14} After finding appellant guilty of Counts 1 and 2 of the indictment, the trial court sentenced appellant to serve three years and 12 months in prison, respectively, and ordered the sentences to be served consecutively. When defense counsel questioned whether the entire four years would be mandatory time, the prosecutor responded: "I think the first six months is mandatory. I do not know if the second six months is

mandatory." The trial court then stated: "We will try to make that clear in our sentencing entry. There will be no more mandatory time ordered than is required, how is that?"

{¶ 15} On September 19, 2011, the trial court journalized a sentencing judgment entry in which it reiterated appellant's sentence and dismissed Counts 3 through 6 of the indictment. Thereafter, the trial court stated that appellant is "subject to a ***mandatory*** three year period of post release control." (Emphasis sic.) A timely notice of appeal was filed in this court on September 22, 2011.

{¶ 16} In his first assignment of error, appellant asserts that he should be allowed to withdraw his guilty plea and vacate his conviction because the plea was not knowingly, voluntarily and intelligently made. We agree, for the following reasons.

{¶ 17} This court has previously held that "[b]efore accepting a guilty plea, a trial court must substantially comply with the requisites of Crim.R. 11(C)(2)(a). *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990), citing *State v. Stewart*, 51 Ohio St.2d 86, 92-93, 364 N.E.2d 1163 (1977)." *State v. Lamb*, 156 Ohio App.3d 128, 804 N.E.2d 1027, 2004-Ohio-474, ¶ 14 (6th Dist.). The term "substantial compliance" means that, "'under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.'" *Id.* (Citations omitted.) Pursuant to R.C. 2929.14(F), "post release control is part of an offender's sentence." *Id.*, citing *State v. Prom*, 12th Dist. No. CA2002-01-007, 2003-Ohio-6543, ¶ 26. Accordingly, failure to accurately advise an offender of a mandatory period of postrelease control

"does not constitute substantial compliance with [the trial court's] responsibility to inform the defendant of the maximum penalty involved." *Id.*, citing *State v. Perry*, 8th Dist. No. 82085, 2003-Ohio-6344, ¶ 10.

{¶ 18} In *State v. Lamb*, *supra*, this court considered a similar case from the Ottawa County Court of Common Pleas in which the trial court neglected to inform appellant, Roy Michael Lamb, that he would be subject to postrelease control upon his release from prison. Lamb's written plea stated only that: "After prison release, I may have up to 3 years of post-release control." *Id.* at ¶ 7. At the time, Lamb was actually subject to a mandatory five-year term of postrelease control. *Id.* at ¶ 9. On appeal, we found that, by not correctly informing Lamb of the mandatory five-year term of postrelease control, the trial court failed to substantially comply with Crim.R. 11(C)(2)(a). *See also State v. Pitts*, 159 Ohio App.3d 852, 825 N.E.2d 695, 2005-Ohio-1389 (6th Dist.). (Failure to notify defendant of mandatory postrelease control at the change of plea hearing does not constitute substantial compliance with Crim.R. 11(C)(2)(a). *Id.* at ¶ 26, citing *State v. Lamb*, *supra*.)

{¶ 19} As set forth above, the trial court advised appellant that postrelease control "could be for as long as three years" at the plea change hearing and also in appellant's written plea. However, in both its plea judgment entry filed on August 2, 2011, and the sentencing judgment entry filed on September 15, 2011, the trial court imposed a mandatory three-year term of postrelease control.

{¶ 20} On consideration of the foregoing, we find that the circumstances of this case are sufficiently similar to those presented in *Lamb* and *Pitts* to justify a finding that the trial court did not substantially comply with the requirements of Crim.R.11(C)(2)(a) when it told appellant that he "may" be subject to "up to" a three-year term of the postrelease control, rather than advising him that such a term was mandatory. Accordingly, we find that appellant's plea was not knowingly, voluntarily and intelligently made, and the trial court erred by accepting the plea under those circumstances. Appellant's first assignment of error is well-taken.

{¶ 21} In his second assignment of error, appellant asserts that the trial court erred by reconsidering and revoking its decision to grant appellant's request for a psychiatric assessment/evaluation before sentencing. In support, appellant argues that, at the sentencing hearing, the trial court was made aware of his mental health issues and should have decided that a psychological evaluation was needed before sentence was imposed. Appellant further states that "the Trial Court could not possibly make a proper determination for sentencing without the Psychological and/or Psychiatric Evaluation/Assessment which it initially Ordered and then for no stated reason Reverses [sic] it's [sic] Decision and Denied the Same."

{¶ 22} Ohio courts have held that there is no statutory mandate entitling a defendant to a psychological evaluation prior to sentencing. *State v. Todd*, 10th Dist. No. 06AP-1208, 2007-Ohio-4307, ¶ 23, citing *State v. Rogers*, 8th Dist. No. 80304, 2002-Ohio-3418, ¶ 17. In fact, "a defendant has no absolute right to an independent psychiatric

evaluation." *Rogers,* citing *State v. Marshall,* 15 Ohio App.3d 105, 107, 472 N.E.2d 1139 (8th Dist.1984). Finally, R.C. 2929.12(C)(4) does "not require [ ] '* * * that any certain weight be given to potentially mitigating circumstances; instead, the trial court, in exercising its sentencing discretion, determines the weight afforded to any particular statutory factors, mitigating grounds, or other relevant circumstances.'" *State v. Andrukat,* 5th Dist. No. 2002CA00352, 2003-Ohio-2643, ¶ 39, quoting *State v. Pitt,* 3d Dist. Nos. 16-02-01, 16-02-02, 2002-Ohio-2730.

{¶ 23} As stated above, the trial court was made aware both in the PSI report and at the time of sentencing that appellant had an abusive childhood and that he suffered from mental issues and physical limitations as a result. The trial court was also fully aware of appellant's violent tendencies, his lengthy criminal history and the nature of the crimes charged in this case. Accordingly, we cannot say that the trial court erred by refusing to grant appellant's request for a psychological evaluation before sentencing. Appellant's second assignment of error is not well-taken.

{¶ 24} In his third assignment of error, appellant asserts that the trial court erred by imposing a mandatory three-year sentence on his conviction for domestic violence, when the trial court stated at the sentencing hearing that it would impose no more than the minimum amount of mandatory time, and R.C. 2929.25(D)(6)(d) limits mandatory time for a third degree felony to six months. Based on our finding that appellant's plea was not knowingly, voluntarily and intelligently made, the sentencing issue raised in appellant's third assignment of error has become moot.

{¶ 25} On consideration whereof, this court finds that appellant was prejudiced and prevented from having a fair hearing on his guilty plea. Accordingly, appellant's conviction is reversed, his sentence is vacated, and this case is remanded to the Ottawa County Court of Common Pleas for further proceedings consistent with this judgment. Costs assessed to appellee, the state of Ohio.

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

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE