

TABLE OF CONTENTS

TABLE OF CONTENTS ii

EXPLANATION OF WHY THIS CASE IS A CASE IS OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION 1

STATEMENT OF CASE AND FACTS 3

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 5

 PROPOSITION OF LAW No. 1: A trial court does not commit reversible error when it fails to advise a defendant that he will not be eligible for judicial release due to the imposition of a mandatory sentence..... 5

CONCLUSION 9

CERTIFICATE OF SERVICE 9

APPENDIX

Approx. Page

Appellee’s Plea Form, Ashland County Court of Common Pleas (March 10, 2011)... 1

Judgment Entry (Sentencing) from the Ashland County Court of Common Pleas (May 3, 2011) 4

Opinion of the Fifth District Court of Appeals (Feb. 29, 2012) 8

Judgment Entry of the Fifth District Court of Appeals (April 5, 2012)..... 19

EXPLANATION OF WHY THIS CASE IS A CASE IS OF PUBLIC OR GREAT
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION

This case presents the critical issue of whether a defendant's guilty plea is knowingly and voluntarily made as required by Crim.R. 11 when the trial court does not advise a defendant he is ineligible for judicial release due to the imposition of a mandatory sentence.

The Fifth District Court of Appeals has ruled that a defendant does not enter a guilty plea knowingly and voluntarily as required by Crim.R. 11 when the trial court fails to advise a defendant that he is ineligible for judicial release due to the imposition of a mandatory sentence.

The decision of the court of appeals sets a precedent that requires a trial court to advise a defendant of countless possible consequences that could result from a plea of guilty, however uncertain the consequences may be. The decision could cause a number of imprisoned persons to challenge the sufficiency of Ohio trial courts' advisement of the consequences of a plea of guilty. Because the decision will affect criminal trial courts within Ohio and could potentially cause a host of litigation on this point, this matter is of public interest and great general interest.

Crim.R. 11 states in relevant part that, 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 determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved. Crim.R. 11(C)(2)(a).

On appeal to the Fifth District Court of Appeals, Appellee argued that she was not informed of the maximum penalty involved as required by Crim.R. 11, namely because the trial court did not advise the Appellee that any prison sentence over the mandatory minimum prison term of two years would also be considered mandatory time. In reversing the trial court, the Fifth District Court of Appeals held that the trial court's failure to advise Appellee she would not be eligible for judicial release rendered the trial court's explanation of the sentence insufficient to advise Appellee of the potential maximum consequences of her plea.

The court of appeal's decision contravenes long-standing legal precedent that addresses the adequacy of a plea colloquy between a defendant and the court. This Court has held that nonconstitutional aspects of the plea colloquy, such as information concerning the sentence, are subject to review under a standard of substantial compliance. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12. The trial court's failure to inform the Appellee of the effect of her guilty plea as required by Crim.R. 11 is presumed not to be prejudicial. *Id.* at syllabus.

In this case, the trial court properly advised the Appellee that she could serve a sentence of up to five (5) years in prison. The trial court advised Appellee there was a mandatory prison sentence. While an inmate may be eligible for an early judicial release under Ohio Revised Code §2929.20, section (D) of the statute provides that a trial court may deny the motion without a hearing. Therefore, the decision as to whether a defendant will be released from imprisonment early is within the discretion of the trial court. Given the tenuous nature of judicial release, the trial court was not required to

specifically relate this potential consequence to the Appellant in order for the Appellant's plea to be voluntary.

This case is currently remanded to the trial court, the Ashland County Court of Common Pleas. The case may be resolved prior to the possible acceptance of this appeal. However, the case is not subject to the mootness doctrine. The challenged action in this case is capable of repetition yet evades review. *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231, 2000 -Ohio- 142, 729 N.E.2d 1182 (2000). Further, "(1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.* It is likely that Appellant will be faced with this same legal issue in the future.

It is of paramount importance for this Court to resolve the issue of whether a trial court must advise a defendant of the possibility of judicial release and describe each portion of a sentence as "mandatory" or "discretionary" in order to comply with Crim.R. 11(C). Because this matter affects all trial courts throughout the State of Ohio, this court must grant jurisdiction to hear this case and review the erroneous decision of the court of appeals.

STATEMENT OF CASE AND FACTS

On March 10, 2011, the Appellee entered a plea of guilty to one count of Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs in violation of R.C. 2925.041(a), a felony of the third degree. Prior to the plea hearing, the Appellee reviewed and executed a plea form. This form listed the maximum penalty in the same manner as was reviewed orally in the trial court at the change of plea hearing.

At the plea hearing, the trial court engaged in the following colloquy with the Appellee, to comply with the mandates of Crim.R. 11.

THE COURT: Do you understand the penalty range for that charge, has that been reviewed with you?

MS. BELL: Um --

THE COURT: Well, we will go over it in a second, but I want to make sure that you have had, up to this point, reviewed that with Attorney Sullivan, you reviewed the written document with him?

MS. BELL: Yes.

THE COURT: And based on your advanced educational degrees, I assume that you were able to understand; is that correct?

MS. BELL: Yes, I understand.

THE COURT: Well, if I accept your plea, Ma'am, do understand that the maximum stated prison term that I could impose is two, three, four or five years?

MS. BELL: Yes.

THE COURT: Do you understand because of the nature of this charge, it does carry a mandatory prison term of two years?

MS. BELL: Yes.

...

THE COURT: You understand that because there is a mandatory prison term, that any prison term served would not be served with time credit?

MS. BELL: Yes.

(Tr. 16-18.)

The trial court held a sentencing hearing on April 29, 2011. (Appx. 1.) The trial court sentenced Appellee to a mandatory three (3) year term of imprisonment.

On June 16, 2011 the Appellee filed a Notice of Appeal with the Fifth District Court of Appeals. On February 29, 2012, the Fifth District Court of Appeals issued its decision. (Appx. 2.) Despite the fact that the trial court advised the Appellee that the court could impose up to five (5) years in prison, the Fifth District Court of Appeals held that the trial court had failed to advise the Appellee of the maximum penalties.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW No. 1: A trial court does not commit reversible error when it fails to advise a defendant that he will not be eligible for judicial release due to the imposition of a mandatory sentence.

In reversing the trial court, the Fifth District Court of Appeals held that the colloquy between the trial court and the Appellee was insufficient to advise Appellee of the potential maximum consequences of her plea.

When a defendant enters a plea of guilty in state criminal court, he waives his privilege granted against compulsory self-incrimination guaranteed by the Fifth Amendment and made applicable to states by the Fourteenth Amendment. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The defendant also waives the right to trial by jury and third the right to confront one's accusers. *Id.* See the Fifth Amendment; the Fourteenth Amendment.

This Court has held that a trial court must strictly comply with the provisions of Crim.R. 11(C)(2) that relate to the waiver of constitutional rights, including the right to a trial by jury, the right to confront one's accusers, the privilege against self-incrimination, and the right to compulsory process of witnesses. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, at the syllabus; *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981), at paragraph one of the syllabus.

Information concerning the sentence is considered a nonconstitutional aspect of the plea colloquy. *State v. Heisler*, Slip Copy, 3rd Dist. Nos. 4-11-14, 4-11-15, 4-11-16, 4-11-17, 2012 -Ohio- 1277, citing *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12. Substantial compliance with Crim.R. 11(C) is sufficient when waiving non-constitutional rights. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d

474, (1990). “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.” *Nero* at 108; *State v. Carter*, 60 Ohio St.2d 34, 396 N.E.2d 757 (1979). Failure to adequately inform a defendant of her nonconstitutional rights at a plea hearing will not invalidate a plea unless the defendant suffered prejudice. *Griggs* at ¶ 12, citing *Nero* at 107.

Crim.R. 11(C)(2)(a) does not explicitly require a trial court to inform a defendant that he is ineligible for judicial release. *State v. Simpson*, 10th Dist. No. 07AP-929, 2008-Ohio-2460. Several Ohio appellate courts have ruled that a trial court is not required to advise a defendant of the availability of judicial release in order for the defendant’s guilty plea to be voluntary. *State v. Cline*, 10th Dist. No. 05AP-869, 2006-Ohio-4782. See also *State v. Mitchell*, 11th App. No.2004-T-0139, 2006-Ohio-618, *cert. denied*, 109 Ohio St.3d 1508, 2006 -Ohio- 2998, 849 N.E.2d 1028 (the trial court’s and trial counsel’s erroneous misrepresentations regarding judicial release eligibility did not invalidate a guilty plea when the trial court complied with Crim.R. 11); *State v. Cvijetinovic*, 8th App. No. 81534, 2003-Ohio-563 (guilty plea upheld where the record failed to demonstrate that defendant relied upon the trial court’s misstatements about judicial release); *State v. Taylor*, 12th App. No.2003-07-025, 2004-Ohio-3171, *cert. denied*, 103 Ohio St.3d 1526, 2004 -Ohio- 5852, 817 N.E.2d 409 (guilty plea upheld where record did not reflect that the decision to plead guilty was influenced by the trial court’s erroneous information regarding his eligibility for judicial release); *State v. Blackshear*, 2nd Dist. No. 24302, 2011-Ohio-2059 (under the circumstances, trial counsel’s misrepresentations regarding eligibility for judicial release did not invalidate guilty plea).

Prior to the decision in this case, the Fifth District Court of Appeals itself has held in multiple cases that, “unless incorporated into a plea agreement, the trial court is not under an obligation to inform a defendant regarding his eligibility for judicial release.” *State v. Wallace*, 5th Dist. No. 2010-CA-00008, 2010 -Ohio- 4297. See also, *State v. Young*, 5th Dist. No. 10-CA-15., 2011 -Ohio- 532; *State v. Smith*, 5th Dist. No. CT2007-0073, 2008-Ohio-3306; *State v. Cuthbert*, 5th Dist. No. 08 CA 75, 2009-Ohio-4856.

Where a defendant is induced to enter a guilty plea by erroneous representations as to the applicable law, the plea has not been entered knowingly and intelligently. *Mitchell* at ¶15 citing *State v. Engle*, 74 Ohio St.3d 525, 528, 1996-Ohio-179, 660 N.E.2d 450.

However, Ohio courts have held that the failure to include such information in the court's colloquy does not violate a defendant's Crim.R. 11 rights. *State v. Oliver*, 6th Dist. No. S-10-040, 2011-Ohio-5305; *State v. Sherman*, 5th Dist. No.2009-CA-132, 2010-Ohio-3959. Therefore, pursuant to Ohio appellate law, the trial court followed the proper procedure in informing the Appellee of the nature of her charges as well as the maximum penalty involved. There is no information that Appellee was misled by the trial court as to the nature of her sentence.

Crim.R. 11 requires a trial court to explain the maximum penalty involved in a criminal offense, not every intricacy of felony sentencing, such as whether or not a defendant may be eligible for judicial release. In the present matter, the maximum penalty for the felony of the third degree that Appellee pled guilty to was five years in prison. Eligibility for judicial release is immaterial to the maximum penalty for an offense. The plea paperwork and record of the change of plea hearing indicate that

Appellee was advised that she could face up to a maximum of five years in prison. The trial court complied with the mandates of Crim.R. 11(C)(2)(a).

“Judicial release, as with the former availability early release through parole, ‘is distinct from sentencing because it operates to reduce a prison term the court has imposed.’” *Mitchell* at ¶14, quoting *State v. White*, 2nd Dist. No. 04CA120, 2005-Ohio-5906. Judicial release is not the sort of “effect of the plea” of which a defendant must be informed before entering a plea. *Id.* This Court has held that “a defendant who bases a plea decision on parole eligibility will often be relying on a factor beyond the prediction of defense counsel, and beyond the actual control of a defendant.” *State v. Xie* (1992), 62 Ohio St.3d 521, 524-525, 584 N.E.2d 715.

This Court has previously found that failure to inform a defendant who pleads guilty to more than one offense that the court may order him to serve any sentences imposed consecutively, rather than concurrently, is not a violation of Crim.R. 11(C)(2), and does not render the plea involuntary. *State v. Johnson*, 40 Ohio St.3d 130, 532 N.E.2d 1295 (1988), at the syllabus. Appellant requests that this Court extend this ruling to other aspects of a defendant’s sentence, namely advisement of the unavailability of judicial release when the court imposes a mandatory sentence.

The Supreme Court of the United States has addressed an analogous situation, in which a defendant was not advised of parole eligibility prior to a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The longstanding test for determining the validity of a guilty plea is “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162

(1970); see *Boykin*, 395 U.S. at 242; *Machibroda v. United States*, 368 U.S. 487, 493, 82 S.Ct. 510, 513, 7 L.Ed.2d 473 (1962). The Supreme Court of the United States held that the United States Constitution does not require the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas. See Fed.R.Crim.P. 11(c); *Hill* at 56.

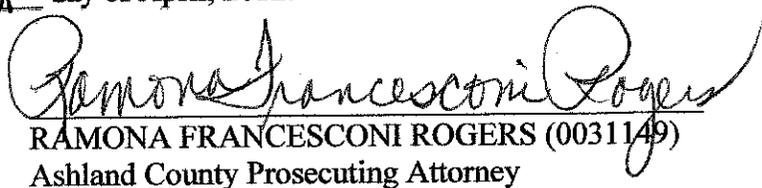
CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this court accept jurisdiction in this case so that this Court will review the important issues presented on the merits.


RAMONA FRANCESCONI ROGERS (0031149)
Ashland County Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum in Support of Jurisdiction of the Appellant - State of Ohio was served via regular U.S. Mail postage prepaid and facsimile on Attorney Erin Poplar, Counsel for Appellee, 1636 Eagle Way, Ashland, Ohio 44805, this 12th day of April, 2012.


RAMONA FRANCESCONI ROGERS (0031149)
Ashland County Prosecuting Attorney

IN

2011 MAR 10 PM 2:55

IN THE COURT OF COMMON PLEAS
ASHLAND COUNTY, OHIO

ANNETTE SHAW
CLERK OF COURTS
ASHLAND, OHIO

STATE OF OHIO,

Case No. 10-CRI-118

Plaintiff

vs.

TERRI L. BELL,

Defendant.

RECEIVED
MAR 11 2011

ASHLAND COUNTY PROSECUTOR

WAIVER OF CONSTITUTIONAL
RIGHTS AND PLEA OF GUILTY

This matter came on for a change of plea this 10th day of March, 2011. The Defendant, through her attorney, requested to withdraw her former plea of not guilty and enter a plea of guilty subject to the Court accepting the plea of guilty to the following charge(s):

COUNT ONE: ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS (Section 2925.041(A) of the Ohio Revised Code), a felony of the third degree, a lesser included charge to Count One: ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS (Section 2925.041(A) of the Ohio Revised Code), a felony of the second degree.

Maximum Penalty. The Court finds that the Defendant understands that the maximum penalty as to said count is as follows:

COUNT ONE:

Offense: ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS

Maximum Stated Prison Term: 2, 3, 4 or 5 years

Mandatory Minimum Prison Term: 2 years

Maximum Fine: \$10,000.00

Mandatory Minimum Fine: \$5,000.00

License Suspension: Not less than six months nor more than five years

Court costs, restitution and other financial sanctions including fines, day fines, and reimbursement for the cost of any sanctions may also be imposed.

The Court further finds that the Defendant understands that if she is now on felony probation, parole, under a community control sanction, or under post release control from prison, this plea may result in revocation proceedings and any new sentence could be imposed consecutively. The Defendant has been advised that any prison term stated will be served without good time credit.

RAMONA
FRANCESCO
ROGERS
ASHLAND COUNTY
PROSECUTING ATTORNEY
110 COTTAGE STREET
3rd FLOOR
ASHLAND, OHIO 44805

(419) 289-3857
FAX (419) 281-3865

Post Release Control. The Court advised the Defendant that a period of supervision by the Adult Parole Authority after release from prison is optional in this case. If the Defendant receives prison for a felony 3, 4 or 5, the Defendant may be given up to 3 years of post release control. A violation of any post release control rule or condition can result in a more restrictive sanction while the Defendant is under post release control, and increased duration of supervision or control, up to the maximum term and reimprisonment even though the Defendant may have served the entire stated prison term imposed upon her by this Court for all offenses. If the Defendant violates conditions of supervision while under post release control, the Parole Board could return her to prison for up to nine months for each violation, for a total of ½ of the originally stated prison term. If the violation is a new felony, the Defendant could receive a prison term of the greater of one year or the time remaining on post release control, in addition to any other prison term imposed for the offense.

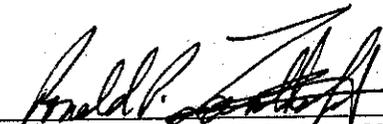
Community Control. The Court informed the Defendant that if this Court is not required by law to impose a prison sanction, it may impose community control sanctions or non-prison sanctions upon the Defendant. The Defendant understands that if she violates the terms or conditions of a community control sanction, the Court may extend the time for which the Defendant is subject to this sanction up to a maximum of 5 years, impose a more restrictive sanction, or imprison her for up to the maximum stated term allowed for the offense as set out above. R/S

The Defendant, after being fully informed by counsel and by the Court of the following:

- a) that she is presumed innocent;
- b) her right to a jury trial;
- c) the maximum penalties provided by law;
- d) the effect of her plea of guilty;
- e) that the Court, upon accepting her plea of guilty, may proceed with judgment and sentencing;
- f) that by this plea of guilty she is waiving the following Constitutional Rights:
 - 1) her right to a jury trial;
 - 2) her right to confront witnesses against her;
 - 3) her right to have compulsory process for obtaining witnesses in her favor;
 - 4) her right to require that the State of Ohio prove her guilty beyond a reasonable doubt at a trial at which she could not be compelled to testify against herself.

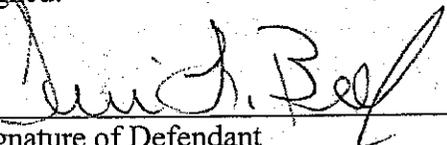
The Defendant hereby voluntarily gives up and waives all the aforementioned rights and withdraws her former plea of not guilty and enters a plea of guilty to the charge(s) set forth above.

The Defendant was advised of her right to appeal a maximum sentence, her other limited appellate rights and that any appeal must be filed within 30 days of her sentence.

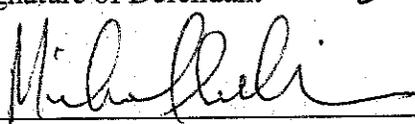


JUDGE, COURT OF COMMON PLEAS

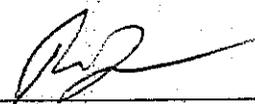
Signed:



Signature of Defendant



Attorney for Defendant



~~Prosecutor/Assistant Prosecutor~~

JOURNAL ENTRY

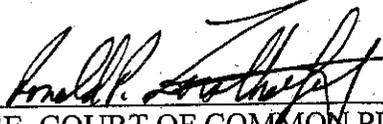
This matter came on for a change of plea this 10th day of March, 2011, the Defendant being present in open court and represented by Attorney Michael Sullivan.

Whereupon, the Defendant was advised by the Court of her rights pursuant to Rule 11(C) of the Ohio Rules of Criminal Procedure and voluntarily waived said rights before entering her plea of guilty.

Whereupon, the Defendant's plea of guilty is hereby accepted and ORDERED filed.

3/10/11

Date



JUDGE, COURT OF COMMON PLEAS

cc. Prosecutor
Defendant
Defense Counsel
Adult Parole Authority

IN THE COURT OF COMMON PLEAS
ASHLAND COUNTY, OHIO

2011 MAY -3 AM 10:07

STATE OF OHIO,

Case No. 10-CR-

ANNETTE SHAW
CLERK OF COURTS
ASHLAND, OHIO

Plaintiff,

vs.

TERRI L. BELL,

JUDGMENT ENTRY - SENTENCING

Defendant.

This matter came before the Court, on the 29th day of April, 2011 for sentencing, the Defendant having previously pled guilty to the following offense: **ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURING OF DRUGS**, in violation of Ohio Revised Code Section 2925.041(A), a felony of the third degree. The State of Ohio was represented by Assistant-Prosecuting Attorney Andrew N. Bush. The Defendant was present and she was represented by Attorney Michael P. Sullivan.

Prior to imposing sentence, the Court afforded all parties present the opportunity to be heard with regard to sentencing. The Court gave defense counsel an opportunity to speak on behalf of the Defendant, which he did. The Court addressed the Defendant personally and asked her if she wished to make a statement on her own behalf or present any information in mitigation of punishment, which she did. The State of Ohio spoke with regard to sentencing.

The Court advised the parties that the Court had received and reviewed a full complete Pre-Sentence Investigation Report from the Adult Parole Authority prior to the hearing and a clinical report by Dr. Patton.

The Court reviewed the purposes of felony sentencing as set forth in the Ohio Revised Code Section 2929.11. Specifically, the Court noted that:

- The overriding purposes of felony sentencing is to punish the offender and protect the public from future crime committed by the offender and others.
- The Court must always consider the need for incapacitation, deterrence, rehabilitation and restitution.
- The sentence should be commensurate with, and not demeaning to, the seriousness of the offender's conduct and its impact on the victim and consistent with sentences for similar crimes by similar offenders.
- The sentence must not be based on the offender's race, ethnicity, gender or religion.

In fashioning a sentence in this case, the Court has fully considered the provisions of O.R.C. Chapter 2929, the circumstances of the offense, the information contained in the pre-sentence investigation and the information furnished by the parties to this case. Based upon the facts and circumstances in evidence, and the pre-sentence investigation, the Court specifically finds that the Defendant has the future ability to be employed and to pay financial sanctions in this case.

Based upon a consideration of the purposes and principles of the felony sentencing law, the statutory sentencing factors, and weighing the above findings, this Court finds that the Defendant is NOT amenable to community control sanctions and that a prison sentence is consistent with the purposes and principles of the felony sentencing law of Ohio.

As stated in Count One of the Indictment for the offense of ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS, in violation of Ohio Revised Code Section 2925.041(A), a felony of the third degree, the Defendant is sentenced to a mandatory three (3) years under the authority of the Ohio Department of Rehabilitation and Correction for placement in an appropriate penal institution and fined Five Thousand Dollars (\$5,000.00), said fine to be divided and allocated by the Prosecutor's Office between law enforcement and the Prosecutor's Office.

The Court notified the Defendant of the possibility of the applicable periods of post-release control and the potential consequences of a violation of post-release control. Upon completion of the prison term ordered herein, the Defendant may also serve up to three (3) years post-release control as determined pursuant to Ohio Revised Code Section 2967.28. If the Defendant violates the terms of post-release control, the adult parole authority may impose a more restrictive sanction, or the parole board may return the Defendant to prison for up to nine (9) months, but not more than half of the original prison sentence. If the Defendant commits a new felony while on post-release control, she may be given a prison sanction of a minimum of one (1) year up to the time remaining on post-release control, in addition to any sentence received on the new felony offense. The Defendant acknowledged her understanding of the Court's explanation of post-release control. For purposes of post-release control, the Court FINDS that the Defendant's county of residence is Ashland County, Ohio.

The Court informed the Defendant of her right to appeal the sentence, and of her right to court-appointed counsel to represent her in the appeal, if she were indigent. The Court further advised the Defendant of the necessity that any appeal be filed in writing with the Court within thirty (30) days of the filing of the sentencing entry of the Court. The Defendant acknowledged an understanding of the Court's explanation of her appeal rights.

It is hereby ORDERED that the Defendant shall receive credit for one hundred thirteen (113) days of local jail time served in this case through April 29, 2011, and she shall receive one (1) day's credit for each day served subsequent to the date of sentencing, while awaiting transfer to the receiving institution.

The Defendant is remanded to the custody of the Ashland County Sheriff's Office to await transportation to a state penal receiving institution. The Clerk of Courts is directed to

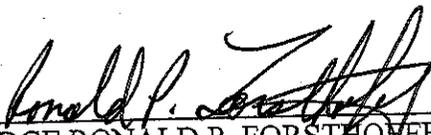
issue a warrant of conveyance to the Ashland County Sheriff directing him to deliver the Defendant to the Ohio Department of Rehabilitation and Correction, Ohio Reformatory for Women, 1479 Collins Avenue, Marysville, Ohio, for placement in an appropriate penal institution.

The Defendant's operator's license shall be SUSPENDED for a period of five (5) years from this date.

The Pre-Sentence Investigation Report shall be filed **UNDER SEAL** in this case.

The Defendant is ORDERED to pay court costs in this case, including a sum of \$30.00, taxed as costs pursuant to Ohio Revised Code Section 2949.091, a sum of \$25.00, taxed as court costs pursuant to Ohio Revised Code Section 120.36, and a sum of \$30.00, to be paid over to the Treasurer of the State of Ohio, pursuant to Ohio Revised Code Section 2743.70.

Bond is ORDERED released.



JUDGE RONALD P. FORSTHONFEL
COMMON PLEAS COURT

cc: Ashland County Prosecutor's Office
Michael P. Sullivan, Attorney for Defendant
Terri L. Bell, Defendant
Ashland County Jail
Adult Parole Authority
Investigating Agency – Ashland Police Department
Ohio Department of Rehabilitation and Correction
Bureau of Sentence Computation

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

2012 FEB 29 PM 1:26

STATE OF OHIO

Plaintiff-Appellee

-vs-

TERRI L. BELL

Defendant-Appellant

JUDGES:

Hon. Patricia A. Delaney
Hon. W. Scott Gwin, J.
Hon. William B. Hoffman, J.

ANNETTE SHAW
CLERK OF COURTS
ASHLAND, OHIO

Case No. 11-COA-019

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Ashland County Common
Pleas Court, Case No. Trial Court Number
10-CRI-118

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

RAMONA FRANCESCONI ROGERS
Ashland County Prosecutor
110 Cottage St.
Ashland, Ohio 44805

ERIN N. POPLAR
Erin Poplar Law, LLC
1636 Eagle Way
Ashland, Ohio 44805

ANDREW N. BUSH
Assistant Prosecuting Attorney
110 Cottage St.
Ashland, Ohio 44805

*rev case
A
plar
to
e
indoo*

110

Hoffman, J.

(¶1) Defendant-appellant Terri L. Bell appeals her sentence entered by the Ashland County Court of Common Pleas on one count of illegal assembly or possession of chemicals for the manufacture of drugs, in violation of R.C. 2925.041(A), a third degree felony. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE CASE

(¶2) On March 10, 2011, Appellant entered a plea of guilty to the aforementioned charge. At the change of plea hearing, the following exchange occurred on the record, prior to the trial court accepting Appellant's plea:

(¶3) "The Court: Well, if I accept your plea, Ma'am, do understand that the maximum stated prison term that I could impose is two, three, four, or five years?"

(¶4) "Ms. Bell: Yes.

(¶5) "The Court: Do you understand because of the nature of this charge, it does carry a mandatory prison term of two years?"

(¶6) "Ms. Bell: Yes.

(¶7) "The Court: It also has a maximum potential fine of \$10,000, but there is a mandatory minimum fine of \$5,000. Do you understand that?"

(¶8) "Ms. Bell: Yes, I do.

(¶9) "The Court: And because it's a drug-related offense, it carries a license suspension for six months and no more than five years. Do you understand that?"

(¶10) "Ms. Bell: Yes, sir, I do.

(¶11) "The Court: You also understand that the court can impose additional financial sanctions to the fines, day fines, court costs, or costs of any sanctions imposed?

(¶12) "Ms. Bell: Yes, sir, I do.

(¶13) "The Court: Do you understand, Ma'am, that if you are new on felony probation or parole or community control sanctions or any type of post-release control, this plea would possibly result in a revocation proceeding and a new sentence could be imposed consecutively?

(¶14) "I am not inquiring as to whether or not you are, but you need to be aware if you are, that that is a consequence?

(¶15) "Ms. Bell: Yes, I do understand.

(¶16) "The Court: You understand that because there is a mandatory prison term, that any prison term served would not be served with time credit?

(¶17) "Ms. Bell: Yes."

(¶18) Tr. at 17-18.

(¶19) The trial court then conducted a sentencing hearing on April 29, 2011, the following exchange occurred on the record at the hearing:

(¶20) "Mr. Sullivan: Your Honor, was it the Court's intention to impose the mandatory minimum?

(¶21) "The Court: The Court is imposing three years mandatory.

(¶22) "Mr. Sullivan: It's my understanding, Judge - - could we approach on this?

(¶23) "The Court: Yes, you may.

(¶24) Thereupon, a sidebar was held.

(¶25) "The Bailiff: Go off the Record?"

(¶26) "The Court: No, this needs to be on the Record."

(¶27) "Mr. Sullivan: I understand that the mandatory minimum is two years - -

(¶28) "The Court: My understanding is that [sic] mandatory minimum is two years and the Court has the option to impose whatever the appropriate sentence is for an F-3, and that sentence is mandatory. Whatever the court imposes."

(¶29) "Mr. Sullivan: It's not the Court's intention to impose the mandatory minimum?"

(¶30) "The Court: I am imposing three years mandatory. If she wants to appeal that then she can."

(¶31) "My understanding of the Sentencing statutes and I am not saying that I am an expert at three months on the bench, but my understanding is for purposes of Sentencing, when there is a mandatory sentence, the fact there is a minimum mandatory, what that means is that is a minimum sentence that the court has to impose. It's a mandatory sentence, meaning there is no credit for good time and those kinds of things. That is not meaning that a three, four, five year Sentence is not also mandatory."

(¶32) "There is a difference between mandatory time and non-mandatory time, whether it's two years, three years, four years."

(¶33) "And my understanding is that this charge carries with it a mandatory sentence, period. It's one of those F-3 Sentences, but that Sentence, whatever it is, is mandatory."

(¶34) "Again, if I am wrong, I guess you can appeal it and we all will find out, but that is what the Sentence is."

(¶35) "Let me know if you guys have a discussion at the Prosecutor's Office, let me know if I am off base about that.

(¶36) "Mr. Bush: I will (Inaudible).

(¶37) The Court: That is my understanding. Anything further, Attorney Sullivan?

(¶38) "Mr. Sullivan: No, Your Honor.

(¶39) "The Court: Anything further, Attorney Bush?

(¶40) "Mr. Bush: No, Your Honor.

(¶41) "The Court: This matter is concluded."

(¶42) Tr. at 12-15.

(¶43) Via Judgment Entry of May 3, 2011, the trial court sentenced Appellant to a mandatory three year prison sentence. Appellant was also ordered to pay a mandatory minimum fine in the amount of \$5,000, plus court costs.

(¶44) Appellant now appeals, assigning as error:

(¶45) "I. THE TRIAL COURT ERRED AND DID NOT INFORM APPELLANT OF THE MAXIMUM PENALTY INVOLVED AS REQUIRED BY OHIO CRIMINAL RULE 11(C)(2)(A) AT APPELLANT'S CHANGE OF PLEA HEARING BECAUSE THE COURT DID NOT CLEARLY INFORM APPELLANT THAT ANY PRISON SENTENCE SHE MAY RECIEVE [SIC] OVER THE MANDATORY MINIMUM PRISON TERM OF TWO YEARS WOULD ALSO BE MANDATORY TIME.

(¶46) "II. THE TRIAL COURT ERRED AND [SIC] WHEN IT IMPOSED THE MANDATORY MINIMUM FINE ON APPELLANT PURSUANT TO OHIO REVISED CODE SECTIONS 2925.041 AND 2929.18 BECAUSE SHE HAD ALREADY BEEN

FOUND TO BE INDIGENT AND HAD COMPLETED AND FILED AN AFFIDAVIT OF INDIGENCY PRIOR TO SENTENCING.

(¶147) "III. IN THE ALTERNATIVE, APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION BECAUSE HER COURT-APPOINTED COUNSEL DID NOT REQUEST THAT THE COURT REFRAIN FROM IMPOSING A MANDATORY FINE ON APPELLANT PURSUANT TO OHIO REVISED CODE SECTIONS 2925.041 AND 2929.18."

I

(¶148) Appellant entered a plea of guilty to one count of assembly or possession of chemicals for the manufacture of drugs, in violation of R.C. 2925.041, which reads, in pertinent part:

(¶149) "(A) No person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II in violation of section 2925.04 of the Revised Code.

(¶150) ****

(¶151) "(C) Whoever violates this section is guilty of illegal assembly or possession of chemicals for the manufacture of drugs. Except as otherwise provided in this division, illegal assembly or possession of chemicals for the manufacture of drugs is a felony of the third degree, and, except as otherwise provided in division (C)(1) or (2) of this section, division (C) of section 2929.13 of the Revised Code applies in determining

whether to impose a prison term on the offender. If the offense was committed in the vicinity of a juvenile or in the vicinity of a school, illegal assembly or possession of chemicals for the manufacture of drugs is a felony of the second degree, and, except as otherwise provided in division (C)(1) or (2) of this section, division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the violation of division (A) of this section is a felony of the third degree under this division and if the chemical or chemicals assembled or possessed in violation of division (A) of this section may be used to manufacture methamphetamine, there either is a presumption for a prison term for the offense or the court shall impose a mandatory prison term on the offender, determined as follows:

(¶52) "(1) Except as otherwise provided in this division, there is a presumption for a prison term for the offense. **If the offender two or more times previously has been convicted of or pleaded guilty to a felony drug abuse offense, except as otherwise provided in this division, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than two years.** If the offender two or more times previously has been convicted of or pleaded guilty to a felony drug abuse offense and if at least one of those previous convictions or guilty pleas was to a violation of division (A) of this section, a violation of division (B)(6) of section 2919.22 of the Revised Code, or a violation of division (A) of section 2925.04 of the Revised Code, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than five years. ****"

(¶53) (Emphasis added.)

(¶54) Revised Code Section 2925.01 defines "drug abuse offense" and "felony drug abuse offense" as:

(¶55) "(H) 'Drug abuse offense' means any of the following:

(¶56) "(1) A violation of division (B) of section 2913.02 that constitutes theft of drugs, or a violation of section 2925.02, 2925.03, 2925.11, 2925.12, 2925.13, 2925.22, 2925.23, 2925.31, 2925.32, 2925.36, or 2925.37 of the Revised Code;

(¶57) "(2) A violation of an existing or former law of this or any other state or of the United States that is substantially equivalent to any section listed in division (H)(1) of this section;

(¶58) "(3) An offense under an existing or former law of this or any other state, or of the United States, of which planting, cultivating, harvesting, processing, making, manufacturing, producing, shipping, transporting, delivering, acquiring, possessing, storing, distributing, dispensing, selling, inducing another to use, administering to another, using, or otherwise dealing with a controlled substance is an element;

(¶59) "(4) A conspiracy or attempt to commit, or complicity in committing or attempting to commit, any offense under division (H)(1), (2), or (3) of this section.

(¶60) "(I) 'Felony drug abuse offense' means any drug abuse offense that would constitute a felony under the laws of this state, except a violation of section 2925.11 of the Revised Code.

(¶61) The record demonstrates Appellant had previously entered a plea or been convicted of multiple felony drug abuse offenses, to wit: illegal processing of drug documents (x2), in violation of R.C. 2925.23; deception to obtain a dangerous drug, in violation of R.C. 2925.22; deception to obtain a dangerous drug (x2); aggravated

trafficking in drugs, in violation of R.C. 2925.03, and trafficking in LSD, in violation R.C. 2925.03. As a result, subsection (C)(1) requires the trial court impose as a *mandatory prison term* one of the prison terms prescribed for a felony of the third degree that is not less than two years.

(¶62) The trial court stated on the record the maximum stated prison term was two, three, four or five years. Accordingly, the statute instructs the trial court to select one of the prescribed terms for a third degree felony not less than two years, and then directs the selected term shall be mandatory. Accordingly, we find the trial court could sentence Appellant to a mandatory three years in prison, which is within the range of prescribed terms for the offense.

(¶63) Having determined the trial court properly concluded Appellant could be sentenced to a mandatory three year prison sentence, we now must determine if the trial court properly advised Appellant of the maximum penalty at the change of plea hearing.

(¶64) Appellant asserts the trial court did not clearly inform her any prison sentence imposed exceeding the mandatory minimum prison term of two years would also be mandatory time, ineligible for jail time credit or judicial release.

(¶65) Criminal Rule 11(C)(2)(A), reads:

(¶66) "(C) Pleas of guilty and no contest in felony cases

(¶67) "(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:

(¶68) "(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."

(¶69) Appellant asserts the trial court failed to inform Appellant of the maximum penalty involved as required by Criminal Rule 11(C)(2)(a). We agree.

(¶70) As set forth above in the Statement of the Case, the trial court stated at the change of plea hearing the charge carried a mandatory prison term of two years. Later, at the sentencing hearing, the trial court imposed a three year mandatory prison term. Review of the colloquy at the change of plea hearing, as quoted supra, demonstrates Appellant was not informed the trial court could elect a greater **mandatory** term other than a mandatory two year prison sentence. Appellant was not advised a selected prison term of over two years would be mandatory making Appellant ineligible for judicial release.

(¶71) As such, we find Appellant was not properly advised as required by Crim.R. 11. Appellant's first assignment of error is sustained.

II. and III.

(¶72) In light of our disposition of Appellant's first assignment of error, we find any discussion of Appellant's second and third assignments of error to be premature.

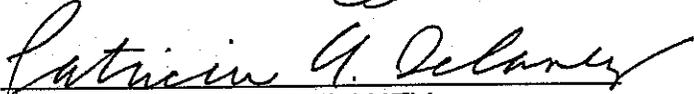
(¶73) The judgment of the Ashland County Court of Common Pleas is reversed and the matter remanded to the trial court for further proceedings in accordance with the law and this Opinion.

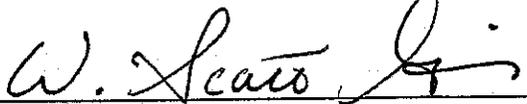
By: Hoffman, J.

Delaney, P.J. and

Gwin, J. concur


HON. WILLIAM B. HOFFMAN


HON. PATRICIA A. DELANEY


HON. W. SCOTT GWIN

FILED APPEALS COURT

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

2012 APR -5 AM 10:19

ANNETTE SHAW
CLERK OF COURTS
ASHLAND, OHIO

STATE OF OHIO

Plaintiff-Appellee

-vs-

TERRI L. BELL

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 11-COA-019

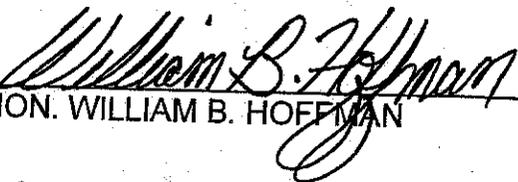
This matter came on for consideration upon the state of Ohio's application for reconsideration of this Court's February 29, 2012 Opinion and Judgment Entry, which application was filed on March 5, 2012. Appellant Terri L. Bell filed an opposition to the application on March 14, 2012.

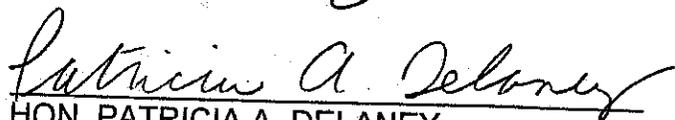
The state of Ohio further moved this Court for a stay of execution of this Court's decision pending determination of the application for reconsideration.

The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. *Columbus v. Hodge*, 37 Ohio App.3d 68, 523 N.E.2d 515, (1987) paragraph one of the syllabus. "An application for reconsideration may not be filed simply on the basis that a party disagrees with the prior appellate court decision." *Hampton v. Ahmed*, 7th Dist. No. 02 BE 66, 2005-Ohio-1766, ¶ 16, citing *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (1996).

Upon review of the State's application for reconsideration, the same does not call our attention to an obvious error in the decision or raise an issue for our consideration not previously considered.

The State's application for reconsideration is denied, and the motion for stay of execution is also denied.


HON. WILLIAM B. HOFFMAN


HON. PATRICIA A. DELANEY


HON. W. SCOTT GWIN

WBH/ag 3/29/12