Supreme Court of Ohio Clerk of Court - Filed June 30, 2015 - Case No. 2015-1093

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

FILED
COURT OF APPEALS
JUN 30 2015
MAUREEN G. KELLY
CLERK OF COURT
LAKE COUNTY, OHIO

STATE OF OHIO,	:	**OPINION**
Plaintiff-Appellee,	:	**CASE NO. 2013-L-125**
- vs -	:	
WILLIAM D. SERGENT,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 12 CR 000825.

Judgment: Affirmed in part, reversed in part, and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel,* Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Michael P. Maloney, 24441 Detroit Road, #300, Westlake, OH 44145-1543 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, William D. Sergent, appeals the judgment of the Lake County Court of Common Pleas finding him guilty of three counts of rape, following his guilty plea, and sentencing him to consecutive prison terms. At issue is whether the trial court properly made the findings mandated by R.C. 2929.14(C)(4) to support appellant's consecutive sentences and whether appellant's guilty plea was voluntary. For the reasons that follow, we affirm in part, reverse in part, and remand.

{¶2} On May 8, 2013, appellant, who was then 53 years old, pled guilty via information to three counts of rape committed against his minor biological daughter.

{¶3} During the guilty plea hearing, the prosecutor provided the court with the following factual basis for appellant's guilty plea: In November 2012, the Lake County Sheriff's Department was dispatched to The Freedom Assembly Church regarding a sex offense reported by a 14-year-old female. The responding deputies learned that B.S., appellant's daughter, was a member of the church and had recently disclosed to the pastor's wife that she had been the victim of ongoing sexual abuse by her father. B.S. told the deputies that, beginning in June 2009, when she was 10 years old, her mother left her and her father began pressuring her to have sex with him. Her father threatened to send her away if she did not submit to him. At first B.S. said no, but appellant continued to pressure her and she eventually submitted. She said appellant had vaginal intercourse with her many times over a period of more than one year during three separate time periods - between June 1, 2009 and July 31, 2009; between August 1, 2009 and September 30, 2009; and between March 1, 2010 and August 31, 2010.

{¶4} The deputies took B.S. to a sexual assault nurse examiner for an examination, which revealed physical evidence of penetration that supported B.S.' allegations.

{¶5} Appellant admitted the facts recited by the prosecutor were true. When the trial court asked appellant what he had done to his daughter, he said he was ashamed to even say it. He admitted that he had vaginal intercourse with the child on multiple occasions and that he threatened to send her away unless she had sex with him. He said he used the child's Barbie dolls to teach her about sexual conduct.

{¶6} On June 18, 2013, pursuant to the joint recommendation of counsel, the trial court sentenced appellant to three eight-year terms in prison, each to be served consecutively to the others, for a total of 24 years in prison.

{¶7} Appellant did not file a timely direct appeal. Instead, some five months after his conviction, he filed a motion for leave to file a delayed appeal. The state filed a brief in opposition. This court granted appellant's motion and appointed counsel to represent him on appeal.

{¶8} Subsequently, appellate counsel filed an appellate brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). In his brief, counsel stated that, after reviewing the record, he found no prejudicial error committed by the trial court, but raised certain arguable issues. On the same date appellant's counsel filed the *Anders* brief, counsel also filed a motion to withdraw as appellate counsel as he found the appeal wholly frivolous. In his motion to withdraw, counsel certified he sent a copy of his *Anders* brief and motion to withdraw to appellant with the instruction that he may file his own brief.

{¶9} On June 11, 2014, this court entered judgment granting leave to appellant to file a pro-se brief by July 11, 2014. In that entry, this court also ordered that the motion to withdraw filed by appellant's counsel be held in abeyance pending this court's further review and determination pursuant to *Anders*. On June 25, 2014, appellant filed a pro-se motion requesting an extension to file his brief. This court granted that motion and gave him leave to file his brief by August 11, 2014. However, appellant did not file a brief.

{¶10} On November 3, 2014, after a full examination of the record, this court entered judgment finding an arguable issue existed to support appellant's appeal

pursuant to *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177. In *Bonnell*, the Supreme Court of Ohio held that in order to impose consecutive sentences, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and to incorporate those findings in its sentencing entry. *Id.* at syllabus. In this case, the trial court included the findings required by R.C. 2929.14(C) in its sentencing entry, but did not make such findings at the sentencing hearing, as required by *Bonnell.* Thus, in this court's November 3, 2014 judgment, this court stated that appellant's sentence arguably did not comply with *Bonnell* and was potentially contrary to law.

{¶11} Pursuant to *Anders*, this court appointed new appellate counsel to pursue the appeal, and directed new counsel to prepare an appellate brief discussing the arguable issue identified by this court in its November 3, 2014 judgment entry; any arguable issues raised in the *Anders* brief previously filed on appellant's behalf; and any additional arguable issues that may be found in the record.

{¶12} Thereafter, appellant's new counsel filed an appellate brief, asserting two assignments of error, which we now address. For his first, he alleges:

{¶13} "The trial court erred in failing to make the required findings under O.R.C. 2929.14(C)(4) at appellant's sentencing hearing prior to imposing consecutive sentences of imprisonment."

{¶14} In reviewing felony sentences, we apply the standard of review set forth in R.C. 2953.08(G)(2). That section directs the appellate court "to review the record, including the findings underlying the sentence" and to modify or vacate the sentence "if it clearly and convincingly finds * * * (a) [t]hat the record does not support the sentencing court's findings under division * * * (C)(4) of section 2929.14 * * * of the Revised Code * * * [or] (b) [t]hat the sentence is otherwise contrary to law."

{¶15} R.C. 2929.14(C)(4), effective September 30, 2011, provides in pertinent part:

{¶16} 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:

{¶17} (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction * * *, or was under post-release control for a prior offense.

{¶18} (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.

{¶19} (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶20} The Supreme Court in *Bonnell, supra*, stated that a trial court's failure to incorporate the findings required by R.C. 2929.14(C) in the sentencing entry after

making those findings at the sentencing hearing does not render the sentence contrary to law. *Id.* at ¶30. Rather, such clerical mistake can be corrected via a nunc pro tunc entry. *Id.* However, the Court said that a trial court's failure to make the findings required by R.C. 2929.14(C)(4) for consecutive sentences at the sentencing hearing makes the sentence contrary to law, requiring the vacation of the sentence and a remand to the trial court for resentencing. *Id.* at ¶36-37.

{¶21} Here, appellant was sentenced to consecutive prison terms pursuant to the parties' joint sentencing recommendation. R.C. 2953.08(D) provides: "A sentence imposed upon a defendant is *not subject to review* * * * if the sentence is *authorized by law*, has been *recommended jointly* by the defendant and the prosecution in the case, and is imposed by a sentencing judge." (Emphasis added.) However, while the court included the findings required by R.C. 2929.14(C) in its sentencing entry, it did not make such findings at the sentencing hearing, as required by *Bonnell.*

{¶22} This court addressed similar facts in *State v. Bell*, 11th Dist. Portage No. 2014-P-0017, 2015-Ohio-218. In *Bell*, the defendant pled guilty to multiple offenses and the parties jointly recommended consecutive sentences, but the court did not make the statutory findings necessary for consecutive sentences. This court held: "[B]ecause 'a sentence is only authorized by law if it comports with all mandatory sentencing provisions[,]' this court and the Ohio Supreme Court have held that an agreed sentence between the state and the defendant does not relieve the trial court of its obligation to make the statutorily required findings to impose consecutive sentences." *Id.* at ¶12, quoting *State v. McFarland,* 11th Dist. Lake No. 2013-L-061, 2014-Ohio-2883, ¶13-14, quoting *State v. Underwood,* 124 Ohio St.3d 365, 2010-Ohio-1, ¶19-22. Although the

defendant's consecutive sentence in *Bell* was jointly recommended, this court vacated the sentence because the trial court failed to make the statutory findings. *Id.* at ¶16.

{¶23} Based on this court's precedent in *Bell*, we hold that appellant's first assignment of error has merit and that his sentence must be vacated.

{¶24} However, we note that *Underwood, supra* (the Supreme Court case on which this court based its holding in *Bell*), is distinguishable from *Bell* and the instant case because the issue in *Underwood* was different. The issue before the Supreme Court in *Underwood* was whether a jointly-recommended sentence is authorized by law and thus not reviewable *when the sentence was imposed for offenses that are allied offenses*. The Court in *Underwood* held that such a sentence is not authorized by law and is appealable. *Id.* at ¶1. In contrast, neither *Bell* nor the present case involved allied offenses.

{¶25} We also note that two other Ohio Appellate Districts have reached decisions that conflict with *Bell*. In *State v. Weese*, 2d Dist. Clark No. 2013-CA-61, 2014-Ohio-3267, which was decided post-*Underwood*, the defendant pled guilty to multiple offenses (not allied offenses) and agreed to a consecutive sentence, but the trial court did not make the statutory findings required by R.C. 2929.14(C) for consecutive sentences. The Second District held that in these circumstances, the trial court was not required to make the statutory findings. *Weese* at ¶4. In support, the Second District stated:

> {¶26} Ordinarily, R.C. 2929.14(C)(4) requires certain findings to be made before consecutive sentences can be imposed. However, the Ohio Supreme Court explicitly has held that "[a] sentence imposed upon a defendant is not subject to review under [R.C. 2953.08(D)] if the

> sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, ¶25. In addition, the Court [in *Porterfield*] stated that "[t]he General Assembly intended a jointly agreed-upon sentence to be protected from review precisely because the parties agreed that the sentence is appropriate. Once a defendant stipulates that a particular sentence is justified, the sentencing judge no longer needs to independently justify the sentence." *Id.* Therefore, not only were findings unnecessary, but the agreed sentence is not subject to appellate review. Any argument to the contrary lacks arguable merit and would be frivolous. *Weese, supra,* at ¶5.

{¶27} Likewise, post-*Underwood*, the Fourth District reached the same conclusion the Second District reached in *Weese*, but the opposite conclusion from that which we reached in *Bell*, in *State v. Pulliam*, 4th Dist. Scioto No. 14CA3609, 2015-Ohio-759. In *Pulliam*, the defendant pled guilty to two offenses (not allied offenses), pursuant to a plea bargain and agreed sentence. On appeal, the defendant argued that the trial court erred when it imposed consecutive sentences without making the required findings pursuant to R.C. 2929.14. The Fourth District disagreed, holding that "[b]cause [the defendant's] sentence was imposed pursuant to a negotiated plea agreement which included an agreed sentence, it [was] not subject to appellate review under R.C. 2953.08(D)." *Pulliam* at ¶2.

{¶28} The Fourth District in *Pulliam* stated that, while a failure to make the findings required by R.C. 2929.14(C)(4) renders a consecutive sentence contrary to law,

in the context of an agreed sentence, consecutive-sentence findings are unnecessary and the agreed sentence is not subject to appellate review. *Pulliam* at ¶7-8

{¶29} In addressing the effect of *Bonnell, supra,* on its holding, the Fourth District in *Pulliam, supra,* stated:

> {¶30} While *Bonnell* reaffirmed that trial courts are required to make the findings mandated by R.C. 2929.14(C)(4) prior to imposing consecutive terms of imprisonment, *Bonnell* only involved a negotiated plea agreement, not an agreed sentence. *Id.* at ¶9 (arguments were made at the sentencing hearing "but no one addressed whether the sentences should be served concurrently or consecutively[.]"). Thus, *Bonnell* is factually distinguishable and does not control the outcome of the present case. *Pulliam* at ¶10.

{¶31} We note that *Weese* and *Pulliam* are consistent with the precedent of this court and other Ohio Appellate Districts prior to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Those pre-*Foster* cases consistently held that a jointly-recommended consecutive sentence is authorized by law and not subject to appellate review where the court does not make statutory findings if the consecutive prison terms do not exceed the maximum term prescribed for each offense. *State v. Rivers*, 11th Dist. Trumbull No. 2003-T-0170, 2005-Ohio-1100, ¶9, 16; *State v. Owens*, 2d Dist. Montgomery No. 19546, 2003-Ohio-5736, ¶8; *State v. Byerly*, 3d Dist. Hancock Nos. 5-99-26, 5-99-27, 1999 Ohio App. LEXIS 5165, *5-*6 (Nov. 4, 1999).

{¶32} This court finds that the judgments entered in this case and in *Bell, supra*, are in conflict with the judgments pronounced on the same question by the Second

District Court of Appeals in *Weese, supra*, and the Fourth District Court of Appeals in *Pulliam, supra*.

{¶33} Ohio Constitution, Article IV, Section 3(B)(4) provides:

{¶34} Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

{¶35} Pursuant to the foregoing constitutional provision, we sua sponte certify a conflict on the following question to the Supreme Court for review and final determination:

{¶36} In the context of a jointly-recommended sentence, is the trial court required to make consecutive-sentence findings under R.C. 2929.14(C) in order for its sentence to be authorized by law and thus not appealable?

{¶37} The attention of counsel for both appellant and appellee is called to the Rules of Practice of the Supreme Court, Section 8, Certified-Conflict Cases, for further proceedings.

{¶38} Appellant's first assignment of error is sustained.

{¶39} For appellant's second and final assignment of error, he alleges:

{¶40} "Appellant's guilty plea was not knowingly and voluntarily entered."

{¶41} The underlying purpose of Crim.R. 11(C) is to convey certain information to a defendant so that he can make a voluntary and intelligent decision regarding whether to plead guilty. *State v. Ballard*, 66 Ohio St.2d 473, 479-480 (1981). "The standard for reviewing whether the trial court accepted a plea in compliance with

Crim.R. 11(C) is a de novo standard of review." *State v. Cardwell*, 8th Dist. Cuyahoga No. 92796, 2009-Ohio-6827, ¶26, citing *State v. Stewart*, 51 Ohio St.2d 86 (1977). This standard "requires an appellate court to review the totality of the circumstances and determine whether the plea hearing was in compliance with Crim.R. 11(C)." *Cardwell, supra.*

{¶42} Before accepting a guilty plea, the trial court must personally address the defendant and determine that the plea is being made voluntarily with an understanding of the nature of the charges and the maximum penalty (Crim.R. 11(C)(2)(a)); determine that the defendant understands the effect of the plea and that upon acceptance of the plea, the court may proceed with sentence (Crim.R. 11(C)(2)(b)); and determine that the defendant understands his constitutional rights (Crim.R. 11(C)(2)(c)).

{¶43} Appellant argues that his plea was not knowing and voluntary because, prior to pleading guilty, the trial court did not advise him that his sentence of 24 years in prison was jointly recommended by counsel.

{¶44} When determining whether the trial court has met its obligations under Crim.R. 11 in accepting a plea, appellate courts have distinguished between constitutional and non-constitutional rights. *State v. Montgomery*, 11th Dist. Ashtabula No. 2009-A-0057, 2010-Ohio-4555, ¶13. A trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of the constitutional rights set forth in that rule and the failure to do so invalidates the plea. *Id.* "Strict compliance" does not require a verbatim recitation of the rights being waived; rather, the standard requires the court to explain or refer to the rights in a manner reasonably intelligible to the defendant entering the plea. *Id.* Alternatively, while literal compliance with Crim. R. 11 with respect to the non-constitutional rights set forth in that rule is preferred, substantial compliance

with the rule will suffice. *Id.* at ¶14. A court substantially complies where the record demonstrates the defendant, under the totality of the circumstances, subjectively understood the implications of the plea and the rights waived. *Id.*

{¶45} Further, a trial court's failure to substantially comply with the non-constitutional requirements of Crim.R. 11(C) alone will not constitute a basis for an automatic reversal. *Montgomery, supra,* at ¶15. To rise to the level of reversible error, a defendant must demonstrate he or she was prejudiced by the lack of compliance. *Id.* The test for prejudice is "whether the plea would have otherwise been made." *Id.* In other words, the defendant must show that, but for the alleged error, he would not have pled guilty and instead would have insisted on going to trial.

{¶46} "'When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily.'" *State v. McKenna*, 11th Dist. Trumbull No. 2009-T-0034, 2009-Ohio-6154, ¶51, quoting *State v. Engle*, 74 Ohio St.3d 525, 527 (1996). "In order for a plea to be knowingly, intelligently, and voluntarily entered, a defendant must be 'informed in a reasonable manner at the time of entering his guilty plea of his rights to a [1.] trial by jury and to [2.] confront his accusers, and his [3.] privilege against self-incrimination, and his [4.] right of compulsory process for obtaining witnesses in his behalf.'" *McKenna, supra*, quoting *State v. Ballard*, 66 Ohio St.2d 473, 478 (1981).

{¶47} "'Generally, a guilty plea is deemed to have been entered knowingly and voluntarily if the record demonstrates that the trial court advised a defendant of (1) the nature of the charge and the maximum penalty involved, (2) the effect of entering a plea to the charge, and (3) that the defendant will be waiving certain constitutional rights by entering his plea.'" *State v. Strong*, 11th Dist. Ashtabula No. 2013-A-0003, 2013-Ohio-

5189, ¶17, quoting *State v. Madeline*, 11th Dist. Trumbull No. 2000-T-0156, 2002 Ohio App. LEXIS 1348, *11 (Mar. 22, 2002). Where the record shows the trial court complied with these three requirements, appellant's guilty plea is entered knowingly and voluntarily. *Id.*

{¶48} Here, the record reveals that, before accepting appellant's guilty plea, the trial court complied with these requirements. First, the trial court advised appellant of the nature of the charges and the maximum penalty involved. The court read to appellant each of the three counts of rape as charged in the information. The court advised him that each of the three counts of rape is a first-degree felony with a potential prison term of three to ten years; that the sentences can be imposed consecutively; that his total exposure was 30 years in prison; and that a prison term in this case was mandatory.

{¶49} Second, the court advised appellant of the effect of entering a guilty plea. To satisfy this requirement, a trial court, before accepting a guilty plea, is required to inform the defendant that a guilty plea is a complete admission of guilt and that when the plea is accepted, the court may proceed with sentencing. *State v. Giovanni*, 7th Dist. Mahoning No. 07 MA 60, 2008-Ohio-2924, ¶45. Here, the court advised appellant that his guilty plea was a complete admission of his guilt and that once his plea was accepted, he could be sentenced immediately.

{¶50} Third, the court advised appellant that by pleading guilty, he would be waiving his right to a trial by jury, his privilege against self-incrimination, his right to have the state prove the charges against him beyond a reasonable doubt, the right to confront and cross-examine the state's witnesses against him, and the right of compulsory process to obtain witnesses in his behalf. Appellant said he understood

these rights and waived them. Further, in his written guilty plea, appellant stated he understood that by pleading guilty he waives each of the foregoing rights, which were listed on the written plea.

{¶51} As a result, the record shows the trial court advised appellant of (1) the nature of the charges and the maximum penalty involved, (2) the effect of entering a guilty plea to the charges, and (3) that, by pleading guilty, appellant would be waiving the foregoing constitutional rights. For this reason alone, the record shows that appellant knowingly and voluntarily entered his guilty plea. *Strong, supra.*

{¶52} Moreover, appellant stated that he was entering his guilty plea freely and voluntarily and that it was his own decision and voluntary act to plead guilty. He said that no one had made any promises or threats to him to induce him to plead guilty. In addition, before accepting appellant's guilty plea, the trial court found on the record that appellant had been informed of all of his constitutional rights and that he made a knowing, intelligent, and voluntary waiver of those rights.

{¶53} Appellant has not cited any case law, and we have not located any, holding that in order for a guilty plea to be voluntary, the trial court must advise the defendant regarding any sentencing recommendations. In fact, Crim.R. 11 does not require a trial court to advise the defendant regarding a sentencing recommendation, joint or otherwise, prior to accepting a guilty plea. Thus, pursuant to Crim.R. 11, appellant did not have a right to be advised by the trial court that counsel jointly recommended a sentence of 24 years in prison. In any event, the trial court did reference the effect of a joint sentencing recommendation. After the trial court advised appellant of his potential sentence, but before appellant plead guilty, the trial court advised him that at sentencing, the court was "not bound by and [did] not have to follow

the recommendation of the prosecutor, [appellant's] attorney, or *even a joint recommendation as to the sentence*." (Emphasis added.) Further, the court told appellant that it did not yet know what the attorneys' sentencing recommendations were going to be, but that, "even if [the prosecutor and appellant's attorney] recommend a low sentence,' the court could sentence him to 30 years in prison. In addition, before appellant pled guilty, *the prosecutor and appellant's trial counsel advised the court in the presence of appellant that there was a joint recommendation of 24 years in prison.* Thus, appellant was fully aware of this joint recommendation before he pled guilty, and we do not accept appellant's argument that because the court did not personally advise him that counsel had jointly recommended a sentence of 24 years, appellant could have reasonably expected a combined sentence of three years in prison. Moreover, there is no evidence in the record showing that if the court had personally advised appellant that there was a joint recommendation by counsel of 24 years in prison, appellant would not have pled guilty and instead would have insisted on going to trial. Thus, even if appellant was entitled to be advised by the court of counsel's joint sentencing recommendation, there is no evidence he was prejudiced as a result of the trial court not advising him of the sentencing recommendation.

{¶54} We thus hold the trial court did not err in accepting appellant's guilty plea.

{¶55} Appellant's second assignment of error is overruled.

{¶56} In summary, the trial court did not err in accepting appellant's guilty plea and his conviction is affirmed. However, because the court did not make the necessary findings for consecutive sentences at appellant's sentencing hearing, the imposition of consecutive sentences is contrary to law. Thus, we reverse and vacate appellant's sentence and remand the matter to the trial court for resentencing.

{¶57} For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed in part and reversed in part; and this case is remanded for further proceedings consistent with the opinion.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.