

[Cite as *State v. Tarleton*, 2014-Ohio-5820.]

STATE OF OHIO BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 13 BE 17
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
DAVID ALLEN TARLETON,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 12 CR 062
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JUDGMENT:	Reversed and Remanded.
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APPEARANCES:	
For Plaintiff-Appellee:	Attorney Daniel P. Fry Prosecuting Attorney Attorney Helen Yonak Assistant Prosecuting Attorney 147-A West Main Street St. Clairsville, OH 43950

For Defendant-Appellant:	Attorney Timothy Young Ohio Public Defender Attorney Terrence K. Scott Assistant State Public Defender 250 East Broad Street, Suite 1400 Columbus, OH 43215
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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: December 29, 2014

[Cite as *State v. Tarleton*, 2014-Ohio-5820.]
DeGenaro, P.J.

{¶1} Defendant-Appellant David Tarleton appeals his conviction and nine year prison sentence after pleading guilty to aggravated vehicular homicide in the Belmont County Common Pleas Court. Tarleton raises one assignment of error, arguing that his plea violated the Fourteenth Amendment of the U.S. Constitution, and Article I, Section 10 of the Ohio Constitution, as he contends it was not knowingly, intelligently, and voluntarily entered. For the reasoning provided below, Tarleton's assignment of error is meritorious. Accordingly, Tarleton's plea is vacated and the matter is reversed and remanded for further proceedings.

Facts and Procedural History

{¶2} On March 8, 2012, Defendant-Appellant David Tarleton was indicted by a Belmont County Grand Jury on one count of aggravated vehicular homicide, R.C. 2903.06, a first degree felony. The incident occurred when Tarleton's motorcycle collided with a deer, slid across the road, and caused the death of his girlfriend, Cathy Kurucz, who was a passenger. It was alleged Tarleton was driving a motorcycle with faulty brakes and under an OVI-related license suspension.

{¶3} On August 13, 2012, Tarleton entered into a plea agreement with the State, wherein he pled guilty to one count of aggravated vehicular homicide as indicted, and in exchange, the State would remain silent at sentencing. The plea agreement stated that a prison term was presumed to be necessary. Under the section entitled "Prison Term is Mandatory/Consecutive" the word "Mandatory" was circled. Underneath that section "3 years" was written. Further, the agreement indicated that the offense carried an eleven year maximum stated prison term. At the plea hearing, the trial court engaged in Crim.R. 11 colloquy with Tarleton and explained his constitutional and non-constitutional rights. It is undisputed that the word mandatory was not used at the plea hearing, the sentencing hearing or in the sentencing entry.

{¶4} On September 10, 2012, Tarleton was sentenced to nine years of imprisonment with credit for time served. At the sentencing hearing, two victim-impact statements were read and Tarleton accepted responsibility for his actions.

{¶5} Post-sentencing, Tarleton filed a pro-se motion to vacate his plea and a motion to enforce specific performance of the plea agreement. Tarleton later withdrew his request to vacate his guilty plea, which the court granted. In his April 23, 2013 motion to enforce specific performance of the plea agreement, Tarleton argued that he was promised a four year prison term by his attorney. He explained that he would not have pled guilty nor waived any of his rights had he known that he would be sentenced to more than four years. The court did not rule on this motion.

{¶6} On August 14, 2013, this Court granted Tarleton's motion for delayed appeal and appointed counsel.

Plea

{¶7} Tarleton's sole assignment of error asserts:

{¶8} "David Tarleton was deprived of his right to due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution when the trial court accepted an unknowing, unintelligent, and involuntary guilty plea."

{¶9} In order to comply with due process requirements, a defendant's guilty plea must be knowingly, voluntarily, and intelligently entered. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶7, citing *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). In accordance with Crim.R. 11(C), when a plea of guilty is made in a felony case the court must address the defendant and: 1) determine that the plea is voluntary and the defendant understands that nature of the charges and the maximum penalty applicable; 2) determine that the defendant understands the effect of the plea and that if the court accepts the plea, the court will proceed with judgment and sentencing; 3) determine that the defendant understands that he is waiving his right to a jury trial, right to confront witnesses, right to have compulsory process for obtaining witnesses in defendant's favor, and that the defendant is relieving the State of their burden to prove his guilt beyond a reasonable doubt at a trial where the defendant cannot be forced to testify against himself. Crim.R. 11(C)(2). When there is a negotiated plea in a felony case, the underlying agreement of the plea

must be stated in open court on the record. Crim.R. 11(F). When a plea of guilty is entered, the plea is an admission of guilt and the court will proceed with sentencing after accepting the plea. Crim.R. 11(B)(1), (3).

{¶10} The trial court must engage the defendant in a colloquy pursuant to Crim.R. 11(C) to determine whether the plea is knowing, voluntary, and intelligent. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶26. During the colloquy, the trial court must provide a defendant with both the constitutional and nonconstitutional rights that will be waived as a result of a guilty plea. Crim.R. 11(C)(2); *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, ¶29.

{¶11} The constitutional rights a defendant waives after a guilty plea include: the right to a jury or bench trial, the right to confront an accuser, the right to compel witnesses to testify by compulsory process, the right against self-incrimination, and the right to force the state to prove the defendant's guilt beyond a reasonable doubt. Crim.R. 11(C)(2)(c); *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶19-21. A trial court must strictly comply with the recitation of a defendant's constitutional rights. *Id.* at ¶31; *State v. Ballard*, 66 Ohio St.2d 473, 477-478, 423 N.E.2d 115 (1981). Strict compliance does not require a verbatim recitation of the rule's exact language. *Ballard*, 66 Ohio St.2d at 479-480. Rather, a reviewing court should review the record to determine whether "the trial court explained these rights in a manner reasonably intelligible to that defendant." *Id.* at paragraph two of the syllabus.

{¶12} In addition to a defendant's constitutional rights, the trial court must also advise him of the nonconstitutional rights that will be waived, which include the effect of the plea, the nature of the charges, the maximum penalty, and an advisement on post-release control. Crim.R. 11(C)(2); *Veney*, 120 Ohio St.3d 176 at ¶10-13. Further, a defendant must be notified whether he is eligible for probation or community control sanctions at the sentencing hearing. *Id.* at ¶10. Finally, the defendant must be advised that if the guilty plea is accepted by the court, the court may proceed to judgment and sentencing. *Id.* at ¶11. When advising a defendant of his nonconstitutional rights, the trial court must substantially comply with these requirements, meaning that under the

totality of the circumstances the defendant must subjectively understand the implications of the plea and the rights he is waiving. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990); *Sarkozy*, 117 Ohio St.3d 86 at ¶20.

{¶13} A defendant challenging his plea based on a trial court's failure to substantially comply with Crim.R. 11 must additionally show a prejudicial effect, meaning he would not have otherwise entered the plea. *Veney*, 120 Ohio St.3d 176 at ¶15, citing *Nero*, 56 Ohio St.3d at 108. When determining the voluntariness of a plea, a reviewing court must consider all of the relevant circumstances surrounding the plea. *State v. Johnson*, 7th Dist. No. 07 MA 8, 2008-Ohio-1065, ¶8, citing *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

{¶14} Tarleton contends the trial court failed to comply with Crim.R. 11(C) for two reasons. First, during the colloquy at the plea hearing, the judge failed to advise him that he was subject to a mandatory prison sentence. Second, the mandatory nature of his sentence was not stated in a concise manner in the written plea agreement, adding further confusion.

{¶15} Secondly, Tarleton contends that the sentencing entry suggested that he was eligible for community control and judicial release: "* * * the court finds that a community control sanction or a combination of community control sanctions will **not** adequately punish this offender and protect the public from future crimes and the imposition of said community control sanctions would demean the seriousness of this offense." Tarleton urges that this ambiguous language was further compounded by the court's failure to orally or otherwise explain to him that he was not eligible for community control or judicial release.

{¶16} The State counters that under R.C. 2929.14(A)(1) the sentencing range for a first-degree felony is three to eleven years, as such, a three-year prison sentence was mandatory and properly noted on the written plea agreement which was orally conveyed to Tarleton at the plea hearing. Additionally, the written plea agreement, which was signed by Tarleton in open court, expressly stated the trial court did not have to follow any agreed upon recommendations.

{¶17} Regarding his constitutional rights, the trial court informed Tarleton that by pleading guilty he would waive his right to a jury or bench trial, his right to force the prosecution to prove its case beyond a reasonable doubt, his right to have a compulsory process to compel witnesses to testify, his right to cross examine any testifying witnesses, and his right to remain silent at trial. Tarleton indicated an understanding of his rights and entered a guilty plea. The record demonstrates the trial court strictly complied with these Crim.R. 11 requirements.

{¶18} We turn next to whether the trial court substantially complied with Crim.R. 11 regarding Tarleton's non-constitutional rights. The trial court informed Tarleton that he was pleading guilty to a "first degree felony charge of vehicular homicide" and that the maximum stated prison term was, eleven years in prison, with a possible maximum fine of \$20,000 and a lifetime operator's license suspension. Further, the court alerted Tarleton that he would be subject to five years of post-release control after his release from prison. The trial court did not inform Tarleton that his sentence was mandatory.

{¶19} An identical issue was presented to the Fifth District in *State v. Dunham* 5th Dist. No. 2011-CA-121, 2012-Ohio-2957. In *Dunham*, the trial court did not advise the defendant of the mandatory nature of his sentence, the written plea agreement indicated that four years out of the maximum fifteen year sentence was mandatory, and the sentencing entry imposing a nine year term contained a handwritten notation that the sentence was mandatory. *Id.* at ¶16. The Fifth District held that due to the lack of notice by the trial court and the discrepancy in the plea agreement and sentencing entry, Dunham was unaware of how many years of his prison term was mandatory, and that he would be ineligible for community control sanctions and judicial release. *Id.* at ¶16–17. As a result, the Fifth District vacated Dunham's plea.

{¶20} Given the similarities between this case and *Dunham*, we likewise vacate Tarleton's plea. Here, the trial court never informed Tarleton that any part, let alone his entire sentence, was mandatory. The sentencing entry does not indicate that the nine years imposed was mandatory. Significantly, the written plea agreement only

indicates that three years was mandatory while the maximum term of incarceration was eleven years.

{¶21} The State argues that Tarleton was well aware that he was subject to a three year mandatory sentence and that the trial court had the discretion to impose additional non-mandatory time of up to 8 years, which would comport with the sentencing maximum of 11 years for a first degree felony. However the State is mistaken that the trial court could impose a hybrid sentence composed of mandatory and discretionary sub-terms. Pursuant to R.C. 2903.06, the statute governing aggravated vehicular homicide, Tarleton was subject to the imposition of a mandatory prison term; only the length was within the trial court's discretion.

{¶22} The Ohio Supreme Court recently addressed the impropriety of hybrid sentencing as suggested by the State here:

[S]uch a hybrid sentence would have been legally impossible. No sentencing statute allows a court to divide a singular "mandatory prison term" into a hybrid of mandatory and discretionary *sub-terms*. R.C. 2925.03(C)(4)(e) unambiguously requires a unitary "prison term" that is "mandatory," and R.C. 2929.13(F)(5) instructs that a court "shall not reduce" that term through judicial release. To override these legislative commands would require judicial improvisation in a legal system in which "[c]rimes are statutory, as are the penalties therefor, and the only sentence which a trial court may impose is that provided for by statute." *Colegrove v. Burns*, 175 Ohio St. 437, 438, 195 N.E.2d 811 (1964). The trial court had "no power to substitute a different sentence for that provided for by statute."

State v. Ware, -- Ohio St.3d --, 2014-Ohio-5201, -- N.E.3d --, ¶13.

{¶23} Here, the plea agreement signed by Tarleton states that 3 years are mandatory and the maximum sentence which could be imposed is 11 years. However, at the plea hearing the trial court only reiterated that a maximum sentence of 11 years could be imposed; it was silent regarding whether the entire sentence it could impose,

let alone the 3 years denoted in the plea agreement, was mandatory. The sentencing entry imposed a 9 year sentence, which suggests a discretionary term, and as a consequence would make Tarleton eligible to apply for judicial release after three years. Thus, both the plea agreement and the trial court's sentencing entry misstate the law pursuant to R.C. 2903.06 and *Ware*, supra.

{¶24} The trial court was required pursuant to Crim.R. 11(C) to inform Tarleton of the potential maximum penalty before Tarleton entered his plea, and failed to accomplish this by not informing Tarleton of the mandatory nature of the entire nine year sentence and perpetuating the possibility of judicial release after three years as written in the plea agreement. Reading R.C. 2903.06 and *Ware* together, the entire prison term was mandatory; the only discretion the trial court had when sentencing Tarleton was how many years that mandatory prison term would be. The State could not offer, and Tarleton could not knowingly and intelligently accept, a plea agreement based upon a proposed hybrid sentence that was a legal impossibility.

{¶25} Under the totality of the circumstances, Tarleton did not understand that the entire sentence imposed, regardless of the length of the prison term, was mandatory; which additionally would preclude him from seeking judicial release. Nor does it appear that Tarleton would have entered his guilty plea had the trial court advised him that the entire potential sentence, up to a maximum of 11 years, was mandatory. The trial court committed prejudicial error when it accepted his guilty plea based upon unclear information in the plea agreement which stated that only three years of a potential sentence was mandatory, and the ambiguity was perpetuated by the trial court's silence at the plea hearing regarding the mandatory nature of Tarleton's entire sentence. As such, his plea was not knowingly, voluntarily and intelligently entered. Tarleton's sole assignment of error is meritorious.

{¶26} Accordingly, because the trial court failed during the plea colloquy to advise Tarleton that he was subject to a mandatory term of incarceration which could not be separated into discretionary and mandatory time, Tarleton's plea is vacated and the matter is remanded for further proceedings.

Vukovich, J., concurs.

Waite, J., concurs.