[Cite as *State v. Harp*, 2024-Ohio-2120.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 23CA1170
	:	
v.	:	
	:	DECISION AND
MARK A. HARP,	:	JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	

APPEARANCES:

Brian T. Goldberg, Cincinnati, Ohio, for Appellant.

Aaron E. Haslam, Adams County Prosecutor, West Union, Ohio, for Appellee.

Smith, P.J.

{¶1} Mark A. Harp, Appellant, appeals from the judgment of the Adams County Court of Common Pleas convicting him of one count of domestic violence, a third-degree felony in violation of R.C. 2919.25(A), and sentencing him to a prison term of 30 months. On appeal, Harp raises a single assignment of error, contending that his plea was not entered into knowingly, intelligently, and voluntarily. However, after considering the totality of the circumstances, we cannot conclude that Harp's guilty plea was not knowing, intelligent, or voluntary or that the trial court erred in its acceptance of the plea or in imposing sentence.

Thus, we find no merit to Harp's arguments. Accordingly, Harp's sole assignment of error is overruled and the judgment of the trial court is affirmed.

FACTS

{¶2} On September 13, 2022, Harp was indicted on four felony counts as follows:

Count One:	Kidnapping in violation of R.C. 2905.01(B)(2), a first-degree felony;
Count Two:	Abduction in violation of R.C. 2905.02(A)(2), a third-degree felony;
Count Three:	Attempted felonious assault in violation of R.C. 2923.02(A), a third-degree felony; and
Count Four:	Domestic violence in violation of R.C. 2919.25(A), a third-degree felony.

The charges stemmed from an incident that occurred between Harp and Brandy Goldie, Harp's girlfriend of approximately one year, who he lived with on and off. Harp initially entered a plea of not guilty to the charges and the matter proceeded towards trial.

{¶3} Harp thereafter entered into plea negotiations with the State which resulted in Harp agreeing to plead guilty to count four, domestic violence, in exchange for the dismissal of counts one, two, and three. Additionally, the plea agreement included an agreement between Harp and State for a jointly-recommended sentence that included a prison term of 9 months, with credit for 269

days served. After applying credit for time served, Harp would have only had one day of time left to serve.

{¶4} A change of plea hearing was held on May 26, 2023. The trial court engaged in a plea colloquy with Harp that, in addition to providing him with the required constitutional and nonconstitutional advisements required by Crim.R. 11, also informed to him multiple times that although it intended to impose the jointly-recommended, or "stipulated," sentence of 9 months, there were conditions attached and that sentencing ultimately remained in the court's sole discretion. The trial court accepted Harp's guilty plea, released him on bond, ordered a pre-sentence investigation, and set the matter for sentencing on a later date.

{¶5} A sentencing hearing was held on June 20, 2023. Because Harp tested positive for methamphetamine in the interval between the change of plea and sentencing hearings, the trial court elected not to impose the jointly-recommended sentence and instead sentenced Harp to a prison term of 30 months, which was within the statutorily-permitted range for a third-degree felony. Harp thereafter filed his timely appeal, setting forth a single assignment of error for our review.

ASSIGNMENT OF ERROR

I. MR. HARP'S PLEA WAS NOT ENTERED INTO KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY.

ASSIGNMENT OF ERROR I

{¶6} In his sole assignment of error, Harp contends that his plea was not made knowingly, intelligently, and voluntarily. More specifically, Harp argues 1) that a "plea is not made knowingly when the trial court accepts a jointly recommended sentence and tells the defendant he intends to impose that sentence, but at sentencing imposes a lengthier sentence;" and 2) that a "plea is not made knowingly when the trial court fails to advise him at the time of the plea that he is facing a mandatory term of incarceration and will not be eligible for community control." Harp argues that his plea and sentence should be vacated and that the matter be remanded to the trial court for the court to either impose the jointly-recommended sentence, or give him an opportunity to withdraw his guilty plea.

{¶7} With respect to Harp's first argument, the State responds by directing our attention to the fact that Harp had a positive drug screen and that the trial court "unambiguously required the defendant to obey the law and any deviation, regardless of how minor, voids the agreement." The State contends that the positive drug screen breached the plea agreement and released the court from any obligation it had to impose the agreed upon sentence. With respect to Harp's second argument, the State contends that because "[t]he record is absent of any allegations that the victim in this case was pregnant" at the time of the offense,

Harp was correctly informed that he was not facing mandatory prison time and that he would be eligible for community control.

Standard of Review

{¶8} Crim.R. 11(C)(2) governs the acceptance of guilty pleas by the trial court in felony cases and provides that a trial court should not accept a guilty plea without first addressing the defendant personally and:

> (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.
>
> (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
>
> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶9} "Thus, prior to accepting a guilty plea, a 'court must inform the defendant that he is waiving his privilege against compulsory self-incrimination, his right to jury trial, his right to confront his accusers, and his right of compulsory process of witnesses.' " *State v. Tolle*, 2022-Ohio-2839, 194 N.E.3d 410, ¶ 9 (4th Dist.), quoting *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115, paragraph one

of the syllabus (1981). *See also* Crim.R. 11(C)(2)(c). " 'In addition to these constitutional rights, the trial court must determine that the defendant understands the nature of the charge, the maximum penalty involved, and the effect of the plea.' " *Tolle* at ¶ 9, quoting *State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶ 41.

{¶10} When reviewing a defendant's constitutional rights (right to a jury trial, right to call witnesses, etc.), a trial court must strictly comply with Crim.R. 11(C)(2)(c). *Tolle, supra*, at ¶ 10; *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 18. In contrast, when reviewing a defendant's non-constitutional rights (maximum penalty involved, understanding effect of plea, etc.), a trial court must substantially comply with Crim.R. 11(C)(2)(a) and (b). *Tolle* at ¶ 11; *State v. Veney, supra*, ¶ 18. " '[S]ubstantial compliance' means that 'under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.' " *State v. Morrison*, 4th Dist. Adams No. 07CA854, 2008-Ohio-4913, ¶ 9, quoting *State v. Puckett*, 4th Dist. Scioto No. 03CA2920, 2005-Ohio-1640, ¶ 10, citing *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977); *State v. Carter*, 60 Ohio St.2d 34, 396 N.E.2d 757 (1979).

{¶11} As this Court observed in *Tolle*, *supra*, the *Veney* Court held as follows regarding the acceptance of guilty pleas:

> " 'When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution.' " *Veney, supra*, at ¶ 7, quoting *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996); *State v. Montgomery, supra*, at ¶ 40; *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826, ¶ 9.

See Tolle, at ¶ 12.

" 'It is the trial court's duty, therefore, to ensure that a defendant "has a full understanding of what the plea connotes and of its consequence." ' " *Tolle*, at ¶ 13; quoting *Montgomery* at ¶ 40, in turn quoting *Boykin v. Alabama*, 395 U.S. 238, 244, 89 S.Ct. 1709 (1969); *State v. Conley*, 4th Dist. Adams No. 19CA1091, 2019-Ohio-4172, ¶ 34.

{¶12} When an appellate court evaluates whether a defendant knowingly, intelligently, and voluntarily entered a guilty plea, the court must independently review the record to ensure that the trial court complied with the Crim.R. 11 constitutional and procedural safeguards. *See Tolle*, at ¶ 14; *State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014-Ohio-5601, ¶ 36; *State v. Eckler*, 4th Dist. Adams No. 09CA878, 2009-Ohio-7064, ¶ 48; *Veney, supra*, at ¶ 13 ("Before accepting a guilty or no-contest plea, the court must make the determinations and give the warnings required by Crim.R. 11(C)(2)(a) and (b) and notify the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c)"); *State v. Kelley*, 57 Ohio St.3d 127, 128, 566 N.E.2d 658 (1991) ("When a trial court or appellate court is

reviewing a plea submitted by a defendant, its focus should be on whether the dictates of Crim.R. 11 have been followed"); *See also State v. Shifflet*, 2015-Ohio-4250, 44 N.E.3d 966 (4th Dist.), ¶ 13, citing *State v. Smith*, 4th Dist. Washington No. 12CA11, 2013-Ohio-232, ¶ 10.

{¶13} "The purpose of Crim.R. 11(C) is 'to convey to the defendant certain information so that he can make a voluntary and intelligent decision whether to plead guilty.' " *Tolle* at ¶ 15, quoting *Ballard*, *supra*, at 479-480. As set forth above, although literal compliance with Crim.R. 11(C) is preferred, it is not required. *See State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 29, citing *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 19. Therefore, an appellate court will ordinarily affirm a trial court's acceptance of a guilty plea if the record reveals that the trial court engaged in a meaningful dialogue with the defendant and explained "in a manner reasonably intelligible to that defendant" the consequences of pleading guilty. *Ballard* at paragraph two of the syllabus; *Barker* at ¶ 14; *Veney* at ¶ 27; *Conley* at ¶ 37.

{¶14} Additionally, it has been held that a defendant who seeks to invalidate a plea on the basis that the trial court partially, but not fully, informed the defendant of his or her non-constitutional rights must demonstrate a prejudicial effect. *See Tolle* at ¶ 16; *Veney* at ¶ 17; *Clark* at ¶ 31. To demonstrate that a defendant suffered prejudice due to the failure to fully inform the defendant of his

or her non-constitutional rights, the defendant must establish that, but for the trial court's failure, a guilty plea would not have been entered. *See Clark* at ¶ 32, citing *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990) (stating that "[t]he test is 'whether the plea would have otherwise been made' "). However, when a trial court completely fails to inform a defendant of his or her non-constitutional rights, the plea must be vacated, and no analysis of prejudice is required. *See Clark* at ¶ 32, citing *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 22.

Legal Analysis

{¶15} As set forth above, the present case involves a trial court's imposition of a sentence that exceeded the sentence that was jointly recommended by the parties. We initially note that generally, "a 'trial court is not bound by a [sentencing] recommendation.' " *State v. Howard*, 2017-Ohio-9392, 103 N.E.3d 108, ¶ 58 (4th Dist.), quoting *State v. Bailey*, 5th Dist. Knox No. 05-CA-13, 2005-Ohio-5329, ¶ 15. We explained in *Howard* that " ' "[a] trial court does not err by imposing a sentence greater than 'that forming the inducement for the defendant to plead guilty when the trial court forewarns the defendant of the applicable penalties, including the possibility of imposing a greater sentence than that recommended by the prosecutor.' " ' " *Howard* at ¶ 58, quoting *State ex rel. Duran v. Kelsey*, 106 Ohio St.3d 58, 2005-Ohio-3674, 831 N.E.2d 430, ¶ 6,

quoting *State v. Buchanan*, 154 Ohio App.3d 250, 2003-Ohio-4772, 796 N.E.2d 1003, ¶ 13 (5th Dist.), in turn quoting *State v. Pettiford*, 12th Dist. Fayette No. CA2001-08-014, 2002 WL 652371, *3 (Apr. 22, 2002).

{¶16} With respect to Harp's first argument, the record indicates that the plea agreement Harp entered into with the State included a jointly-recommended 9-month prison term, with credit for 269 days served. Harp argues that his "plea of guilty was not made knowingly, intelligently, and voluntarily, when the trial court refused to impose the jointly recommended sentence." There is no indication from the record that the trial court was involved in the plea negotiations. Further, Harp concedes that although the trial court stated on the record during the change of plea hearing that it intended to follow the agreement, the court also laid out several conditions that must be satisfied for the jointly recommended sentence to be imposed.

{¶17} Harp argues, however, that the trial court was "very vague at the plea hearing with what would cause it to not follow the stipulated sentence." Harp further argues that "[t]he only thing he did was test positive for methamphetamine one time[,]" and that "[w]hile this behavior is wrong, it is not something the trial court told Mr. Harp would void the proposed sentence." Harp contends that although the trial court warned him that "he could not continue his criminal behavior or pick up any infractions of the law[,] [t]hat leaves open for

interpretation whether testing positive for methamphetamine is a continuation of criminal behavior that would warrant not following the agreed sentence." Thus, he essentially argues that because none of the charges he was facing directly involved the use of drugs, testing positive for methamphetamine did not constitute a "continuation" of his criminal behavior.

{¶18} A review of the change-of-plea hearing transcript reveals that the trial court provided several warnings to Harp related to the conditions tied to the imposition of the jointly-recommended sentence. For instance, the following statements occurred on the record prior to the acceptance of Harp's guilty plea:

Court:	* * * Would you like to also recite what you believe the, uh, results of the plea negotiations are that were conducted pursuant to Crim.R. 11?
Prosecutor Blanton:	* * * The parties would stipulate to a term of incarceration of nine months, understanding that credit for time served would be applied * * *.
* * *	
Court:	Mr. Harp, if you do enter a plea of guilt at the time of sentencing, you're facing a maximum penalty of three years in prison and a maximum fine of $10,000. Do you understand that?
Mark Harp:	Yes, Your Honor.
* * *	

Court:	So, Mr. Harp, we talked about, um, first let me say this, uh, counsel met with me, and I intend to follow their agreement so it's on record, okay? But I wanna explain a few things to you. Um, there'll be another sentencing date, okay? If you go out prior to that sentencing date and continue your criminal behavior. I won't follow this agreement, sir. So, I wanna make sure you understand you're exposed to three years, but I'm telling you on the record, I intend to file this agreement as long as there's no further infractions of the law, and I don't care how minor they are. Do you understand that?
Mark Harp:	Yes, sir.
* * *	
Court:	* * * Now, this is a stipulated agreement, uh, plea agreement, meaning that, uh, the State of Ohio, as well as you have evaluated all the evidence, uh, have determined that an appropriate sentence would be nine months. Um do you understand that?
Mark Harp:	Yes, Your Honor.
Court:	And I've told you at least twice, and I'll make it a third time, I intend to file that agreement unless you have a violation of law between now and the time of the sentencing hearing. Do you understand?
Mark Harp:	Yes, Your Honor.

Court:	I still must advise you of this, that the court is not bound to follow the stipulated plea agreement that the court, the sentence that will be imposed is in the court's sound discretion, so long as it is in compliance with the law. Do you understand?
Mark Harp:	Yes, Your Honor.
Court:	And again, I renew, I intend to follow the agreement.

The trial court thereafter completed the plea colloquy and accepted Harp's guilty plea.

{¶19} Harp relies on several cases in support of his argument that the trial court accepted the jointly-recommended sentence and was therefore bound to impose the agreed sentence. For instance, Harp cites to *State v. Ohler*, which involved an appellate court affirmance of a trial court's decision to vary from an otherwise stipulated sentence. *State v. Ohler*, 3d. Dist. Crawford No. 3-22-23, 2022-Ohio-4066. Harp acknowledges that in *Ohler*, the court "made much of the fact that the trial judge was specific on the record that if [Ohler] tested positive for drugs or violated the terms of her bond, the agreement would likely not be followed." Harp claims that the facts in *Ohler* are very different from the facts sub judice, in that he was only warned "that he could not continue his criminal behavior or pick up any infractions of the law." Harp argues that a positive drug

screen does not constitute an infraction of the law. As noted above, he also seems to argue that because the offense he committed was domestic violence, using drugs was not a "continuation" of his criminal behavior.

{¶20} Harp also directs our attention to our prior decision in *State v. Willey*, 4th Dist. Washington No. 01CA37, 2002-Ohio-2849, ¶ 13, asserting that in *Willey*, this Court "supported the position that if a judge does not impose a specific sentence promised by the trial court, the defendant must be given the opportunity to withdraw his plea of guilty." Our review of *Willey*, however, reveals that when it became apparent that the trial court was going to vary from the agreed-upon sentence, Willey objected. *Id.* at ¶ 9. It was in response to Willey's objection that the trial court "offered to permit" Willey to withdraw his guilty plea. There was no such objection lodged here. Instead, the record before us here reveals that Harp acknowledged that he had made a mistake by using methamphetamine while out on bond. As such, we find *Willey* to be factually distinguishable from this case and we cannot conclude that the trial court was required to sua sponte offer Harp an opportunity to withdraw his plea.

{¶21} Instead, we find the recent reasoning set forth in *State v. Bakos*, 2023-Ohio-2827, 223 N.E.3d 516 (11th Dist.) to be helpful in analyzing the questions before us. In *Bakos*, the court of appeals held that the trial court violated Bakos' due process by accepting the parties' stipulated sentencing

recommendation and then imposing a harsher penalty than agreed. *Id.* However, in *Bakos*, it was specifically determined that the trial court "accepted the stipulated sentencing recommendation." *Id.* at ¶ 33. The trial court further stated in its sentencing entry that the "sentence is a stipulated sentence pursuant to R.C. 2953.08." Based upon those facts, the *Bakos* court held that the trial court was bound to impose the agreed, or stipulated, sentence. *Id.* at ¶ 40. In reaching its decision, the *Bakos* court explained as follows:

> Due process concerns are implicated in "whether the accused was put on notice that the trial court might deviate from the recommended sentence or other terms of the agreement before the accused entered his plea and whether the accused was given an opportunity to change or to withdraw his plea when he received this notice." [*City of Warren v. Cromley*, 11th Dist. Trumbull No. 97-T-0213, 1999 WL 76756, *3], citing Katz & Giannelli, Criminal Law, Section 44.8, at 154-155, (1996).
>
> *There is no due process violation where the defendant is forewarned of the possibility that the trial court may impose a greater penalty than the one forming the inducement for the plea. State ex rel. Duran v. Kelsey*, 106 Ohio St.3d 58, 2005-Ohio-3674, 831 N.E.2d 430, ¶ 6.
>
> "[T]he touchstone for determining constitutional fairness in plea submissions is notice." [*State v. Elliott*, 1st Dist., 2021-Ohio-424, 168 N.E.3d 33], ¶ 18. Where the trial court does not provide adequate notice that it will not accept a stipulated plea, "the remedy is to resentence the defendant in accordance with the recommendation or allow the defendant to withdraw his plea." *Id.* at ¶ 19; *See* [*State v. Allgood*, 9th Dist. Lorain Nos. 90CA004903, 90CA004905 and 90CA004907, 1991 WL 116269, *3 (June 19, 1991)].

Bakos at ¶ 28-30. (Emphasis added).

{¶22} Likewise, in *State v. Bonnell*, the court determined that the trial court's promise not to sentence Bonnell to prison was "definite and certain[,]" and that "the trial court did not give [Bonnell] any notice that it intended to deviate from the terms of the plea bargain." *State v. Bonnell*, 12th Dist. Clermont No. CA2001-12-094, 2002-Ohio-5882, ¶ 19-20. Based upon those findings, the court found reversible error "because the trial court explicitly promised appellant it would not sentence him to prison, then failed to follow through on its promise at the sentencing hearing without stating its intention and without giving appellant the opportunity to withdraw his plea." *Id.* at ¶ 22. In reaching its decision, the *Bonnell* court reasoned as follows:

> *The facts of this case differ from cases in which a trial court states that it is inclined to sentence a defendant in a particular way and states that inclination in conditional terms. See State v. Burton* (1977), 52 Ohio St.2d 21, 368 N.E.2d 297 (defendant cautioned by trial court that he would not receive consideration in sentencing if arrested before hearing). The facts also differ from those cases in which the state recommends a sentence and the trial court is not directly involved in plea negotiations. *State v. Gastaldo* (Sept. 21, 1998), Tuscarawas App. No. 98AP010006 (trial court informed defendant that it was not bound by recommended sentence); *State v. Skrip*, Greene App. No.2001-CA-74, 2002-Ohio-538930 (trial court stated that it did not promise anything with regard to plea agreement and that the underlying agreement was between the defendant and the state, not the court).

Bonnell at ¶ 19. (Emphasis added).

{¶23} The *Bonnell* Court further reasoned as follows:

> The analysis in cases such as this one centers on whether the defendant was put on notice that the trial court might deviate from the terms of the plea agreement and whether the defendant was given an opportunity to withdraw his plea after receiving notice. *See Warren v. Cromley* (Jan. 29, 1999), Trumbull Co. App. No. 97-T-0213.

Id. at ¶ 21.

Because the *Bonnell* court determined that the trial court did not clearly warn Bonnell that it might deviate from the plea agreement, it held that the case had to be remanded and one of two remedies must be offered. *Id.* at ¶ 23. "Either the trial court must sentence appellant in accordance with the plea agreement or if it determines such a sentence is no longer appropriate, it must allow appellant the opportunity to withdraw his guilty plea." *Id.*

{¶24} Thus, we read the above cases together to mean that if it is determined that a trial court accepted a jointly recommended sentence and unequivocally agreed to impose it, and then imposes a harsher sentence than that agreed upon without warning a defendant that it might vary from the agreement if certain conditions are not met, then reversible error occurs which necessitates either remand for resentencing in accordance with the terms of the original plea agreement, or to allow the defendant to withdraw his guilty plea. However, no reversible error occurs when it is determined that a trial court sufficiently warned a defendant that a harsher sentence may be imposed than the one agreed upon if

certain conditions are not met, or if certain conduct occurs, between the plea and sentencing hearings.

{¶25} Here, a review of the record and, in particular, the change-of-plea hearing transcript indicates that the trial court substantially complied with Crim.R. 11(C) in accepting Harp's guilty pleas. This was not a situation where the trial court accepted a jointly-recommended sentence and unequivocally agreed to impose that sentence. Instead, the record demonstrates that the trial court warned Harp multiple times in multiple different ways that the imposition of the agreed-upon nine-month prison term was contingent on Harp obeying the law and that any infraction, no matter how small, would void the agreement. Using methamphetamine is illegal, regardless of whether or not criminal charges are filed. Additionally, the use of illegal drugs was a violation of Harp's terms of release.

{¶26} Further, we find Harp's argument that because he was charged with domestic violence, the use of illegal drugs did not constitute a "continuation" of his particular criminal behavior to be disingenuous. Moreover, and importantly, the trial court advised Harp that the sentence that would ultimately be imposed remained in the sole discretion of the court, and when Harp was asked if he understood that before entering his guilty plea, Harp advised that he did. Thus, we find no error in the trial court's imposition of a sentence that exceeded the one

agreed upon between Harp and the State, nor can we conclude that the trial court's refusal to impose the jointly-recommended sentence invalidated Harp's guilty plea.

{¶27} Additionally, we find no merit to Harp's claim that the trial court was required, but failed, to inform him that he was facing a mandatory sentence and that he was not eligible for community control. Harp's second argument raised under his sole assignment of error contends that his guilty plea was not entered knowingly, voluntarily, and intelligently in light of the trial court's failure to notify him that he was facing a mandatory term of incarceration, and that he was not eligible for community control. Harp argues that because he was convicted of domestic violence, a third-degree felony in violation of R.C. 2919.25(A), and that because he had two prior convictions for domestic violence, R.C. 2919.25(D)(6)(d) was implicated. He argues that R.C. 2919.25(D)(6)(d) applied to render him ineligible for community control, and also required a mandatory prison term of at least 6 months, or an appropriate sentence for a felony of the third degree, ranging from 9 to 36 months. Harp claims that the trial court's failure to advise him that community control was not possible and that he was facing a mandatory prison term of incarceration rendered his plea involuntary. The State responds, however, by pointing out that R.C. 2919.25(D)(6)(d) only applies when the victim at issue is pregnant at the time of the offense, and that because there is no evidence in the

record indicating the victim here was pregnant, R.C. 2919.25(D)(6)(d) "was not in play." For the following reasons, we agree with the State.

{¶28} R.C. 2919.25 provides, in pertinent part, as follows:

> (A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.
>
> * * *
>
> (4) If the offender previously has pleaded guilty to or been convicted of *two or more offenses of domestic violence* or two or more violations or offenses of the type described in division (D)(3) of this section involving a person who was a family or household member at the time of the violations or offenses, *a violation of division (A) or (B) of this section is a felony of the third degree*, *and*, if the offender knew that the victim of the violation was pregnant at the time of the violation, the court shall impose a mandatory prison term on the offender pursuant to division (D)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the first degree.
>
> * * *
>
> (6) If division (D)(3), (4), or (5) of this section requires the court that sentences an offender for a violation of division (A) or (B) of this section to impose a mandatory prison term on the offender pursuant to this division, the court shall impose the mandatory prison term as follows:
>
> * * *
>
> (d) If the violation of division (A) or (B) of this section is a felony of the third degree, except as otherwise provided in division (D)(6)(e) of this section and notwithstanding the range of definite prison terms prescribed in division (A)(3) of section 2929.14 of the Revised Code for a felony of the third degree, the court shall impose a mandatory prison term on the offender of either a definite term of six months or one of the prison terms prescribed

> in division (A)(3)(b) of section 2929.14 of the Revised Code for felonies of the third degree. (Emphasis added).

{¶29} Harp was charged with a violation of R.C. 2919.25(A), which is typically a fourth-degree misdemeanor per R.C. 2919.25(D)(2); however, in this case the degree of the offense was elevated to a third-degree felony per R.C. 2919.25(D)(4) by virtue of the fact that Harp had two prior convictions for domestic violence. However, the plain language of R.C. 2919.25(D)(4) only requires that a mandatory prison term be imposed in accordance with R.C. 2919.25(D)(6)(d) if the offender knows that the victim is pregnant at the time of the offense. As pointed out by the State, there is no evidence in the trial court record indicating that the victim here was pregnant at the time of the offense. Thus, the portion of R.C. 2919.25(D)(4) that requires a mandatory prison term and renders an offender ineligible for community control under R.C. 2919.25(D)(6)(d) is inapplicable to the present case. As such, we find no merit to this portion of Harp's sole assignment of error.

{¶30} Therefore, after considering the totality of the circumstances, we cannot conclude that Harp's guilty plea was not knowing, intelligent, or voluntary or that the trial court erred in its acceptance of the plea or imposition of sentence. Accordingly, we find no merit to Harp's sole assignment of error and the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hess, J. and Wilkin, J., concur in Judgment and Opinion.

For the Court,

_____

Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.