

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	John W. Wise, P.J.
	:	Julie A. Edwards, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 08 CA 75
	:	
	:	
FRANK M. CUTHBERT	:	<u>OPINION</u>
	:	
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Fairfield County Court of Common Pleas Case No. 2008 CR 00150
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	September 10, 2009
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APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Edwards, J.

{¶1} Defendant-appellant, Frank Cuthbert, appeals his conviction and sentence from the Fairfield County Court of Common Pleas on one count each of rape, gross sexual imposition and weapons under disability. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 9, 2008, the Fairfield County Grand Jury indicted appellant on one count of rape in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree, one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), a felony of the third degree, and one count of weapons under disability in violation of R.C. 2923.13(A)(2), a felony of the third degree. The victims of the rape and gross sexual imposition were appellant's step-grandchildren. At his arraignment on May 15, 2008, appellant entered a plea of not guilty to the charges.

{¶3} Thereafter, on August 15, 2008, appellant entered a plea of guilty to the charges contained in the indictment. As memorialized in a Judgment Entry filed on September 29, 2008, appellant was sentenced to an aggregate prison sentence of nineteen (19) years.

{¶4} Appellant now raises the following assignment of error on appeal:

{¶5} "THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS UNDER ARTICLE I, SECTIONS 5 AND 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS HIS PLEA WAS UNKNOWING, UNINTELLIGENT AND INVOLUNTARY."

I

{¶6} Appellant, in his sole assignment of error, argues that his guilty plea was not voluntary, knowing or intelligent, because the trial court failed to inform him of his constitutional right to a unanimous jury verdict and because the trial court failed to inform him that he was not eligible for judicial release.

{¶7} In *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, the Ohio Supreme Court reviewed a defendant's claim that the trial court did not adequately inform him of his rights. *Ketterer* cited *State v. Jells* (1990), 53 Ohio St.3d 22, 559 N.E.2d 464, wherein paragraph one of the syllabus, the court held there was no requirement for a trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial. The *Ketterer* court explained that the trial court was not required to specifically advise the defendant on the need for jury unanimity. *Ketterer*, supra at paragraph 68, citing *State v. Bays*, 87 Ohio St.3d 15, 1999-Ohio-216, 716 N.E.2d 1126, which in turn cited *United States v. Martin* (C.A.6 1983), 704 F.2d 267. In *Bays*, the Supreme Court held "a defendant need not have a complete or technical understanding of the jury trial right in order to knowingly and intelligently waive it," *Bays*, supra at 20.

{¶8} Several courts, including the Ohio Supreme Court, have held there is no requirement that a trial court inform a defendant of his right to a unanimous verdict. *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, at ¶ 44-46 (accused need not be told that jury unanimity is necessary to convict and to impose sentence); *State v. Smith*, Muskingum App. No. CT2008-0001, 2008-Ohio-3306 at ¶ 27 (there is no explicit requirement in Crim.R. 11(C)(2)(a) that a defendant be informed of

his right to a unanimous verdict); *State v. Williams*, Muskingum App. No. CT2007-0073, 2008-Ohio-3903 at ¶ 9 (the Supreme Court held an accused need not be told the jury verdict must be unanimous in order to convict); *State v. Barnett*, Hamilton App. No. C-060950, 2007-Ohio-4599, at ¶ 6 (trial court is not required to specifically inform defendant that she had right to unanimous verdict; defendant's execution of a written jury trial waiver and guilty plea form, as well as her on-the-record colloquy with the trial court about these documents, was sufficient to notify her about the jury trial right she was foregoing); *State v. Goens*, Montgomery App. No. 19585, 2003-Ohio-5402, at ¶ 19; *State v. Pons* (June 1, 1983), Montgomery App. No. 7817, 1983 WL 2450, (defendant's argument that he be told that there must be a unanimous verdict by the jury is an attempted super technical expansion of Crim.R. 11); *State v. Small* (July 22, 1981), Summit App. No. 10105, 1981 WL 4084 (Crim.R. 11 does not require the court to inform the defendant that the verdict in a jury trial must be by unanimous vote). See also our decisions in *State v. Dooley*, Muskingum App. No. CT2008-0055, 2009-Ohio-2095 and *State v. Wesaw*, Fairfield App. No. 08CA12, 2008-Ohio- 5572.

{¶9} Appellant also argues that his plea was not knowing, intelligent and voluntary because the trial court failed to inform him that he was ineligible for judicial release.

{¶10} Pursuant to the terms of R.C. 2929.20(A)(1), persons serving a mandatory prison sentence are not eligible for early release from prison. Pursuant to the terms of R.C. 2929.13(F)(2) and (3), persons who commit rape on a victim who is under thirteen years of age or who commit gross sexual imposition against a child under the age of thirteen when there is evidence other than the uncorroborated claim of the child victim

must be sentenced to prison terms. See *State v. McIntyre*, (June 16, 2000), Lucas App. No. L-99-1369, 2000 WL 770134. In the case sub judice, the indictment alleged that appellant raped a person less than thirteen years of age in violation of R.C. 2907.02(A)(1)(b) and that appellant knowingly had sexual contact with a person less than thirteen years of age in violation of R.C. 2907.05(A)(14). Appellant, in a taped statement of May 5, 2008, confessed to the rape and gross sexual imposition. Thus, there was corroboration of the charges. We find, therefore, that appellant was not entitled to judicial release because he was serving a mandatory prison term. See *McIntyre*, supra.

{¶11} Crim.R. 11(C) states, in relevant part, as follows: “(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: (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....”

{¶12} In *State v. Smith*, Muskingum App No. CT2007-0073, 2008-Ohio-3306, the appellant argued that his plea was not knowing, intelligent and voluntary because he was not informed by the trial court that he was not eligible for judicial release.

{¶13} In rejecting the appellant’s argument, this Court stated, in relevant part, as follows: “Judicial release, as with the former early release through parole, ‘is distinct

from sentencing because it operates to reduce a prison term the court has imposed.’ *State v. White*, 2nd Dist. No. 04CA120, 2005-Ohio-5906, at ¶ 22. Thus, it is not the sort of ‘effect of the plea’ of which a defendant must be informed before entering a plea. As the Ohio Supreme Court has recognized, ‘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. See, *State v. Mitchell*, 11th Dist. No.2004-T-0139, 2006-Ohio-618 at ¶ 14.” *Id* at paragraph 17. This Court, in *Smith*, further held that “[u]nless incorporated into a plea agreement, the trial court is not under an obligation to inform a defendant regarding his eligibility for judicial release. *Hill v. Lockhart* (1985), 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (‘[w]e have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant’s plea of guilty to be voluntary’).” *Id.* at paragraph 25. See also *State v. Simpson*, Franklin App. No. 07AP-929, 2008-Ohio-2460, in which the court held in paragraph 6 as follows: “Crim.R. 11(C)(2)(a) does not explicitly require a trial court to inform a defendant that he is ineligible for judicial release.”

{¶14} Appellant's sole assignment of error is, therefore, overruled.

{¶15} Accordingly, the judgment of the Fairfield County Court of Common Pleas is affirmed.

By: Edwards, J.

Wise, P.J. and

Delaney, J. concur

JUDGES

JAE/d0821

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
FRANK M. CUTHBERT	:	
	:	
Defendant-Appellant	:	CASE NO. 08 CA 75

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas is affirmed. Costs assessed to appellant.

JUDGES