

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 113373
 v. :
 :
 JUSTIN LOPEZ, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 19, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-23-682096-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Stephen Rocco Vernia, Assistant Prosecuting Attorney, *for appellee*.

Law Office of Kimberly Kendall Corral, Kimberly Kendall Corral, and Gabrielle Ploplis, *for appellant*.

KATHLEEN ANN KEOUGH, A.J.:

{¶ 1} In this delayed appeal, defendant-appellant, Justin Lopez, appeals his convictions following a guilty plea. For the reasons that follow, we affirm, finding no merit to the appeal.

I. Procedural History

{¶ 2} In June 2023, the State named Lopez in a seven-count indictment in Cuyahoga C.P. No. CR-23-682096-A, charging him with attempted murder, in violation of R.C. 2923.02/2903.02(A), a felony of the first degree (Count 1); discharge of a firearm on or near prohibited premises, in violation of R.C. 2923.162(A)(3), a felony of the first degree (Count 2); felonious assault, in violation of R.C. 2903.11(A)(1) and (2), second-degree felonies (Counts 3 and 4); having weapons while under disability, in violation of R.C. 2923.13(A)(2) and (3), third-degree felonies (Counts 5 and 6); and improperly handling firearms in a motor vehicle, in violation of R.C. 2923.16(B), a felony of the fourth degree (Count 7). Counts 1 through 4 contained one-year, three-year, and 54-month firearm specifications. The charges stemmed from an incident in May 2022 when Lopez shot from the roadway at the victim, who was a stranger to Lopez, striking the victim in the back. At the time of the shooting, Lopez was on community control in two different cases — Cuyahoga C.P. Nos. CR-17-620990-A and CR-17-621697-A.

{¶ 3} At the plea hearing on July 18, 2023, Lopez entered into a plea agreement with the State that also involved entering a plea in Cuyahoga C.P. No. CR-23-673828-A, which charged him with failure to comply with an order or signal of a police officer in violation of R.C. 2921.331 (Count 1) and endangering children, in violation of R.C. 2919.22 (Count 2).

{¶ 4} In case No. 682096, the State agreed to amend Count 3, felonious assault, by deleting both the one-year and 54-month firearm specifications. In

exchange, Lopez agreed to plead guilty to amended Count 3, including the three-year firearm specification, and Count 5, having weapons while under disability, as charged. The State agreed to nolle all remaining charges in that case. The State noted that the plea agreement also required (1) Lopez to have no contact with the victim, (2) that the offenses would not be allied, and (2) a mandatory prison sentence. (Tr. 5.)

{¶ 5} The State noted that the plea agreement was packaged with case No. 673828, in which it agreed to amend Count 1, failure to comply, by removing the furthermore clause, but adding that the offense was committed after a felony or fleeing after a felony. In exchange, Lopez agreed to plead guilty to amended Count 1, and to Count 2 as charged. The State noted that any sentence in Count 1 had to be served consecutively to any other prison sentence and the offense required a mandatory driver's license suspension and six points on Lopez's driver's license.

{¶ 6} Lopez's counsel agreed that the State had accurately set forth the plea agreement, that Lopez understood his rights, and that Lopez wished to plead guilty to the offenses. The trial court engaged in the requisite Crim.R. 11 plea colloquy with Lopez and accepted his guilty pleas to Count 3, as amended, and Count 5 as charged in case No. 682096, and Count 1, as amended, and Count 2 as charged in case No. 673828. Lopez further acknowledged during the plea colloquy that he would be in violation of community control in case Nos. 620990 and 621697 by pleading guilty in these cases.

{¶ 7} Lopez appeared for sentencing. Regarding amended Count 3 in case No. 682096, the trial court ordered a mandatory prison term of three years on the firearm specification, to be served prior and consecutive to a stated minimum prison term of 6 years with a maximum term of 9 years, for a total prison term of 9 to 12 years. Regarding Count 5, the trial court ordered Lopez to serve 24 months. The court noted in the journal entry that the sentence was consecutive to “CR 673828 because of the failure to comply.” In case No. 673828, on amended Count 1, the trial court imposed a prison sentence of 15 months and, on Count 2, the court sentenced Lopez to 180 days. The court ordered Lopez to serve amended Count 1 “mandatory consecutive to CR 682096 by law.” This appeal followed.

{¶ 8} At the outset, this court notes that Lopez did not appeal from the trial court’s final judgment entries in case Nos. 673828, 620990, and 621697. Accordingly, this court lacks jurisdiction to consider any argument pertaining to Lopez’s convictions in case No. 673828, or the trial court’s sentence in case Nos. 620990 and CR 621697. *See* App.R. 4 and 5; *see also State v. Lopez*, 2005-Ohio-3711, ¶ 15 (8th Dist.), citing *State v. Thompson*, 2003-Ohio-4405 (8th Dist.) (“Without a timely notice of appeal from the order challenged, this court lacks jurisdiction to consider it.”). As such, we will not consider any argument pertaining to those cases.

II. Plea Hearing

{¶ 9} In his first assignment of error, Lopez contends that he did not enter a knowing, intelligent, and voluntary plea because the trial court failed to explain

that his sentences would be mandatory and thus make him ineligible for community control or judicial release.

{¶ 10} Because a “guilty plea involves a waiver of constitutional rights, a defendant’s decision to enter a plea must be knowing, intelligent, and voluntary.” *State v. Dangler*, 2020-Ohio-2765, ¶ 10, citing *Parke v. Raley*, 506 U.S. 20, 28-29, (1992); *State v. Clark*, 2008-Ohio-3748, ¶ 25. “If the plea was not made knowingly, intelligently, and voluntarily, enforcement of that plea is unconstitutional.” *Id.* Crim.R. 11 outlines the procedures that trial courts are to follow when accepting pleas; its purpose is to convey certain information to a defendant so they can make a voluntary and intelligent decision regarding whether to plead guilty. *State v. Ballard*, 66 Ohio St.2d 473, 479-480 (1981). The Ohio Supreme Court has stated:

[O]ur focus in reviewing pleas has not been on whether the trial judge has “[incanted] the precise verbiage” of the rule, *State v. Stewart*, 51 Ohio St.2d 86, 92, 364 N.E.2d 1163 (1977), but on whether the dialogue between the court and the defendant demonstrates that the defendant understood the consequences of his plea, *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 15-16; *Clark* at ¶ 26; *State v. Miller*, 159 Ohio St.3d 447, 2020-Ohio-1420, 151 N.E.3d 617, ¶ 19.

Dangler at ¶ 12.

{¶ 11} Lopez contends that he did not understand the consequences of his plea because the trial court misled him into believing that he could be placed on community control despite being subject to a mandatory prison term. In support, he directs this court to certain statements made by the trial court during the plea

hearing wherein it referenced the possibility of community control or insinuated that prison was discretionary. *See* tr. 15, 17-19.

{¶ 12} Our review of the record reveals that the trial court's statements were not misleading. Lopez pleaded guilty to felonious assault, in violation of R.C. 2903.11(A)(1), a felony of the second degree, and having weapons while under disability, a third-degree felony, in violation of R.C. 2923.13(A)(2). Neither of these offenses require a mandatory prison sentence.

{¶ 13} Pursuant to R.C. 2929.14(A)(2), if a prison term is not mandatory, the trial court has discretion to sentence an offender for a conviction of felonious assault to community control or to a term of imprisonment ranging from two to eight years. Additionally, pursuant to R.C. 2929.14(A)(3)(b), the trial court has discretion to sentence an offender for a conviction of having weapons while under disability to community control sanctions or a to a term of imprisonment from nine, 12, 18, 24, 30, or 36 months. Accordingly, the trial court could have chosen to impose community control sanctions and not sentence Lopez to a prison sentence on those base offenses. Thus, the trial court's statements regarding the possibility of community control were proper.

{¶ 14} The only mandatory prison sentence in this case pertained to the three-year firearm specification attendant to Count 3. *See* R.C. 2929.14(B)(1)(a)(ii). And the record reveals that the trial court accurately, unambiguously, and repeatedly advised Lopez of the mandatory nature of the sentence, which Lopez and his counsel both stated they understood. When discussing the ramifications of the

Reagan Tokes Law regarding Count 3, felonious assault, the court stated, “Now, any mandatory term for all specifications, that’s the three-year firearm specification, starts prior to the start of the minimum term. So it’s three-year firearm specification, and you start your two-to-eight years.” (Tr. 14-15.) Additionally, when addressing any time-served credit, the trial court explained that any earned credit would not “relate to the three-year firearm specification that’s a mandatory term, and that term is not eligible for earned days credit.” (Tr. 18-19.) Finally, the trial court advised that if community control sanctions were imposed, “[t]he three-year firearm specification is mandatory and must be served in prison, so it’s not eligible for community control either, all right? Understand?” (Tr. 19.) Lopez responded, “Yes, sir.” (Tr. 20.) Lopez then pleaded guilty to amended Count 3, which included a three-year firearm specification and then separately pleaded guilty to the three-year firearm specification. (Tr. 22-23.)

{¶ 15} Based on the foregoing, nothing in the record suggests that Lopez was misled into believing that he would only receive community control sanctions. The trial court accurately and thoroughly advised Lopez of the minimum and maximum penalties he faced, including that he was subject to a mandatory prison sentence of three years for the firearm specification. Accordingly, we find that Lopez entered a knowing, intelligent, and voluntary plea; his first assignment of error is overruled.

III. Effective Assistance of Counsel

{¶ 16} In his second assignment of error, Lopez contends that the trial court erred in accepting his guilty plea because his counsel failed to properly inform him

of the elements of each offense prior to entering his guilty plea and that the trial court did not ensure that he understood the elements of the offenses. Accordingly, he contends that he received ineffective assistance of counsel, causing his plea to be involuntary.

{¶ 17} A claim for ineffective assistance of counsel is waived by a guilty plea unless the ineffective assistance caused the guilty plea to be involuntary. *State v. Hudson*, 2011-Ohio-6272, ¶ 24 (8th Dist.). To prove a claim of ineffective assistance of counsel after having pleaded guilty, a defendant must demonstrate there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *State v. Szakacs*, 2009-Ohio-5480, ¶ 15 (8th Dist.).

{¶ 18} Crim.R. 11(C) does not require the trial court to explain the elements of the offense before accepting a plea. The Supreme Court of Ohio has observed that trial courts need not engage in a detailed recitation of the elements of a charge before accepting a plea. *State v. Fitzpatrick*, 2004-Ohio-3167, ¶ 57. *See also State v. Vialva*, 2017-Ohio-1279, ¶ 9 (8th Dist.) (courts are not required to explain the elements of each offense). A defendant's understanding of the nature of the offenses is satisfied when the record sufficiently demonstrates that a representation was made by counsel that the defendant understood the nature of the offenses. *Fitzpatrick at id.*, citing *Henderson v. Morgan*, 426 U.S. 637, 647 (1976).

{¶ 19} The record sufficiently demonstrates that Lopez was apprised of the nature of the offenses against him. Defense counsel advised the court that Lopez

wished to withdraw his plea and enter guilty pleas and that he understood his rights. (Tr. 6-7.) The record is devoid of any indication that Lopez was reluctant to plead guilty, wished to proceed to trial, or had any questions regarding the nature of the offenses, the elements of the offenses, or the consequences of entering his guilty pleas. The record is replete with Lopez's assurances that he understood the nature of the proceedings, the plea offer, the maximum penalties involved, and his Crim.R. 11 trial rights. Additionally, he stated that he was satisfied with his counsel's representation and that he did not have any questions for the trial court prior to entering his guilty pleas. Finally, after both the State and defense counsel agreed that the trial court had complied with Crim.R. 11, the court made the finding, without objection, that "the court is satisfied that Mr. Lopez . . . understands the nature of the charges . . . [and] finds that Mr. Lopez's plea will be made knowingly, intelligently, and voluntarily." (Tr. 21.) We find that nothing in the record suggests otherwise. Accordingly, Lopez has failed to demonstrate that he entered an invalid plea and wished to proceed to trial.

{¶ 20} Lopez's second assignment of error is overruled.

IV. Consecutive Sentences

{¶ 21} At the sentencing hearing, the trial court sentenced Lopez on four matters — the felonious assault case (case No. 682096), the failure-to-comply case (case No. 673828), and two probation cases (case Nos. 620990 and 621697). Regarding the felonious assault case, the trial court imposed a total stated prison term of 9 to 12 years but noted in the journal entry, "Case consecutive to CR 673828

because of the failure to comply.” In the failure-to-comply case, the trial court imposed a total prison term of 15 months, noting in the journal entry, “Mandatory consecutive to CR 682096 by law.” Regarding the probation cases, the court terminated community control and ordered Lopez to serve 24 months on each case, concurrent, “but consecutive to CR 682096 and CR 673828.” The trial court did not make any statutory findings prior to imposing consecutive sentences but stated that consecutive sentences were required by law.

{¶ 22} In Lopez’s third assignment of error, he contends that the trial court erred in imposing consecutive sentences in these cases and failed to make the proper findings under R.C. 2929.14(C)(4).

{¶ 23} As we have previously explained, Lopez did not appeal from the judgment entries of conviction in the failure-to-comply case or the probation cases. Accordingly, we lack jurisdiction to consider the propriety of the trial court’s sentences in those cases. Nevertheless, in the judgment entry from which Lopez appealed, the trial court ordered Lopez’s sentence “consecutive to CR 673828 because of the failure to comply.”¹ Accordingly, this court will address Lopez’s argument as it pertains to the propriety of the court’s decision to order his sentence in his felonious assault case consecutive to the failure-to-comply sentence in case No. 673828.

¹ The judgment entry did not reference the sentences imposed regarding the community control violations.

{¶ 24} Lopez pleaded guilty to an amended count of failure to comply. As originally indicted, he was charged with failure to comply with an order or signal of a police officer, in violation of R.C. 2921.331(B). The charge contained a furthermore clause that Lopez’s operation of the motor vehicle caused a substantial risk of serious physical harm to persons or property. The furthermore clause enhanced the offense from a first-degree misdemeanor to a third-degree felony. *See* R.C. 2921.331(C)(5)(a)(ii). As part of the plea agreement, the State amended the charge by deleting the furthermore clause, but adding the language “in committing the offense, the offender was fleeing immediately after the commission of a felony.” (Tr. 5-6.) The amendments reduced the charge from a felony of the third degree to a fourth-degree felony. *See* R.C. 2921.331(C)(4).

{¶ 25} As originally charged or as amended, R.C. 2921.331(D) requires that “[i]f an offender is sentenced pursuant to division (C)(4) or (5) of this section for a violation of division (B) of this section, and if the offender is sentenced to a prison term for that violation, the offender *shall* serve the prison term consecutively to any other prison term or mandatory prison term imposed upon the offender.” (Emphasis added.) *See also* R.C. 2929.14(C)(3) (“If a prison term is imposed for . . . a felony violation of division (B) of section 2921.331 of the Revised Code, the offender *shall* serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.” (Emphasis added.).

{¶ 26} Although R.C. 2929.14(C)(4) provides trial courts with discretion to impose consecutive sentences under certain circumstances and requires trial courts to make specific findings before exercising that discretion, R.C. 2921.331(D) and 2929.14(C)(3) remove that discretion and require the trial court to order any prison sentence consecutive to any other prison sentence. Accordingly, the trial court did not need to make findings under R.C. 2929.14(C)(4) before ordering the 15-month sentence for the failure-to-comply offense to be served consecutive to any other prison offense because the consecutive nature of the sentence arose by operation of law. *State v. Foster*, 2013-Ohio-2199, ¶ 6 (8th Dist.); *see also State v. Harper*, 2017-Ohio-8963, ¶ 16 (1st Dist.). (“The consecutive-sentencing provisions of R.C. 2929.14(C)(4) are inapposite when the trial court is required to impose consecutive sentences by operation of law under R.C. 2921.331(B).”).

{¶ 27} Lopez’s third assignment of error is overruled.

V. Reagan Tokes Law

{¶ 28} Lopez contends in his fourth assignment of error that the trial court erred when it sentenced him to an indefinite sentence under S.B. 201, commonly referred to as the Reagan Tokes Law, because the law violates due process and thus is unconstitutional under the United States and Ohio constitutions. Lopez acknowledges that the Ohio Supreme Court rejected this argument in *State v. Hacker*, 2023-Ohio-2535; however, in anticipation of further litigation of this issue, he seeks to preserve this challenge to his sentence.

{¶ 29} In *Hacker*, the Court held that the Reagan Tokes Law is not facially vague nor unconstitutional because it provides that offenders receive a hearing before the Department of Rehabilitation and Correction (“DRC”) may extend their prison sentence beyond the minimum but within the maximum term imposed by the trial court. *Id.* at ¶ 25. Accordingly, based on the authority of *Hacker*, this court summarily overrules Lopez’s challenge to the Reagan Tokes Law and his fourth assignment of error.

{¶ 30} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant’s convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE

EILEEN T. GALLAGHER, J., and
ANITA LASTER MAYS, J., CONCUR