

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ANTHONY JOHNSON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY **Case No. 19 MA 0103**

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 18 CR 25

BEFORE:

Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:

Reversed and Remanded.
Plea Vacated.

Atty. Paul J. Gains, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Lynn Maro, 7081 West Boulevard, Boardman, Ohio 44512, for Defendant-Appellant.

Dated: June 30, 2020

WAITE, P.J.

{¶1} Appellant Anthony Johnson appeals a September 6, 2019 judgment entry convicting him of several offenses stemming from two robberies. Appellant entered into a plea agreement in this matter, and now argues that the trial court failed to advise him of the state’s burden to prove all elements beyond a reasonable doubt during his Crim.R. 11 plea colloquy. Thus, he contends that he did not intelligently, knowingly, and voluntarily enter his guilty plea. He also argues the court abused its discretion when it sentenced him to a prison term that is more than double the term jointly recommended by the parties and is one year longer than his codefendant’s sentence. For the following reasons, Appellant’s argument regarding his plea has merit, rendering his sentencing argument moot. Accordingly, Appellant’s plea is vacated and the judgment of the trial court is reversed and remanded for purposes consistent with this Opinion.

Factual and Procedural History

{¶2} On December 28, 2017, Appellant’s codefendant, Robert Sellers, entered a Subway restaurant located in Youngstown. He brandished a gun and demanded money from the cash register. The employees complied and Sellers exited the Subway and entered a sports utility vehicle (“SUV”) driven by Appellant.

{¶3} On January 1, 2018, Sellers entered a Family Dollar store in Youngstown, this time wearing dark clothing and a ski mask. He again brandished a gun and demanded money from the cash register. The employees complied. Sellers also took a pack of cigarettes before he left the store. He entered what was described by a witness

as a white Tahoe SUV that was driven by Appellant. Based on the information given to police by the witness, officers put a “be on the lookout” or “BOLO” alert on the vehicle. Approximately twenty minutes later, police located the vehicle. Inside, they found clothing consistent with the clothing worn by the robber.

{¶4} On February 2, 2018, Appellant and Sellers were indicted on two counts of aggravated robbery, felonies of the first degree in violation of R.C. 2911.01(A)(1); two counts of robbery, felonies of the second degree in violation of R.C. 2911.02(A)(2); and one count of having a weapon while under a disability, a felony of the third degree in violation of R.C. 2923.13(A)(2), (B). Each of the aggravated robbery and robbery counts included an attendant firearm specification pursuant to R.C. 2941.145 and a violent offender specification in accordance with R.C. 2941.149.

{¶5} On October 2, 2018, Appellant filed a motion to sever his case from his codefendant’s, which the trial court granted. The state elected to proceed against Sellers first. On June 24, 2019, Sellers pleaded guilty and was sentenced to an aggregate nine-year prison term. On the same date, Appellant pleaded guilty to two counts of robbery and one count of having a weapon while under a disability, each with attendant firearm specifications pursuant to R.C. 2941.141. The aggravated robbery charges and violent offender specifications were dismissed. The parties jointly recommended a four-year prison sentence. At the plea hearing, the court indicated that it would likely accept that recommendation.

{¶6} The trial court scheduled a sentencing hearing on August 8, 2019. However, Appellant failed to appear at the hearing and the court issued a bench warrant

for his arrest. Appellant was subsequently arrested and his sentencing hearing was rescheduled for September 3, 2019.

{¶7} At the sentencing hearing, the judge discussed the fact that Appellant had a more significant criminal record than Sellers and that Sellers appeared to be more remorseful. As such, the court opined that Appellant should receive a lengthier sentence than his codefendant. The court also stated that Appellant should be punished for his failure to appear at the first sentencing hearing. Hence, the court decided it would no longer accept the jointly recommended sentence and, instead, sentenced Appellant to an aggregate term of ten years of incarceration with credit for 266 days of jail time served. It is from this entry that Appellant timely appeals.

ASSIGNMENT OF ERROR NO. 1

Johnson's plea was not knowingly, intelligently and voluntarily entered because the trial court failed to advise Johnson of the Constitutional rights being relinquished, rendering his plea invalid in violation of the Fifth and Fourteenth Amendment to the United States Constitution.

{¶8} Appellant argues that the trial court failed to inform him that by pleading guilty, he would forfeit his right to require the state to prove each element of the charged offenses beyond a reasonable doubt. As this notification involves a constitutional right, Appellant asserts that he need not establish prejudice in order to prevail. The state has confessed judgment.

{¶9} Guilty pleas are governed by Crim.R. 11. Pursuant to Crim.R. 11(C)(2), the trial judge must enter into a colloquy with a defendant to review the rights the defendant

is waiving as a result of the guilty plea, and the consequences of such plea. “The underlying purpose, from the defendant's perspective, 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.” *State v. Rowbotham*, 173 Ohio App.3d 642, 2007-Ohio-6227, 879 N.E.2d 856, ¶ 17 (7th Dist.), citing *State v. Ballard*, 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981). A defendant who lacks the ability to understand the nature and object of the proceedings is unable to enter into a knowing, intelligent, and voluntary plea. *State v. Doak*, 7th Dist. Columbiana Nos. 03 CO 15, 03 CO 31, 2004-Ohio-1548, ¶ 15.

{¶10} As part of the colloquy, the trial court is required to advise a defendant of certain constitutional and nonconstitutional rights. A defendant's constitutional rights are outlined within Crim.R. 11(C)(2) and include the right to a jury trial, to confront witnesses presented against him or her, to compulsory process for obtaining favorable witnesses, and to require that the state prove all elements beyond a reasonable doubt at a trial where the defendant cannot be compelled to testify. *State v. Bell*, 7th Dist. Mahoning No. 14 MA 0017, 2016-Ohio-1440, ¶ 9, citing *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 19-21; *Ballard*, *supra*, at 477. A trial court must strictly comply with the requirement to inform the defendant of these rights. If the court does not, the plea is invalid. *Bell* at ¶ 9, citing *Veney* at ¶ 31; *Ballard* at 477.

{¶11} The trial court must also advise a defendant of his or her nonconstitutional rights: the nature of the charges; the maximum penalty to which the defendant is subject, including postrelease control, if applicable; whether the defendant is eligible for probation or community control sanctions; and that the court may immediately proceed to sentencing after a plea is accepted. *Bell* at ¶ 10. Unlike the information required

regarding constitutional rights, a trial court need only substantially comply with informing a defendant of his nonconstitutional rights. *Id.* “Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.” *Bell* at ¶ 10, citing *Veney* at ¶ 15. If the trial court does not substantially comply, the defendant must demonstrate some prejudice in order to invalidate the plea. *Id.*

{¶12} The parties in this matter agree that the trial court failed to advise Appellant he was waiving his right to require the state to prove each element of each offense beyond a reasonable doubt, a constitutional right. A review of the record confirms the court failed to provide this advisement at Appellant’s plea hearing. As established in *Veney*, the notification regards a constitutional right, thus Appellant need not demonstrate prejudice in order to prevail. Accordingly, Appellant’s first assignment of error has merit and is sustained and his plea is hereby vacated.

ASSIGNMENT OF ERROR NO. 2

The trial court abused its discretion in sentencing Johnson to more than double the agreed upon sentence.

{¶13} Appellant argues that the trial court abused its discretion when it imposed a ten-year prison sentence. Appellant contends that this sentence is more than double the parties’ jointly-recommended sentence and that he is less culpable than Sellers. He claims he was merely the getaway driver while his codefendant entered the businesses and brandished a gun, yet he received a longer sentence.

{¶14} Because it is apparent Appellant's first assignment of error has merit and his plea must be vacated, this assignment of error is moot due to the resolution of Appellant's first assignment of error.

Conclusion

{¶15} Appellant argues that he did not intelligently, knowingly, and voluntarily enter his guilty plea because the trial court failed to advise him of all of his constitutional rights prior to accepting his plea. He also argues that the trial court abused its discretion in sentencing. For the reasons provided, Appellant's argument regarding his plea has merit, rendering his sentencing argument moot. Accordingly, Appellant's plea is hereby vacated, the judgment of the trial court is reversed and this matter is remanded for proceedings consistent with this Opinion.

Donofrio, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first assignment of error is sustained and his second assignment is moot. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is reversed. Appellant's plea is vacated and we hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.