[Cite as *State v. Griffin*, 2020-Ohio-6830.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

CHARLES GRIFFIN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0111

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 18 CR 131A

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

JUDGMENT:
Affirmed.

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

Atty. Richard J. Hura, P.O. Box 9742, Boardman, Ohio 44513 for Defendant-Appellant.

Dated: December 9, 2020

Robb, J.

{¶1} Defendant-Appellant Charles Griffin appeals from his conviction entered in the Mahoning County Common Pleas Court upon his guilty plea to attempted rape. He contends the plea should be vacated because the trial court did not specifically inform him of the lifetime duration for Tier III sex offender registration, which automatically applied to the offense. Appellant argues he is not required to show prejudice in order to have his plea vacated because the failure to fully advise him of his sex offender registration obligation constituted a complete failure to comply with the maximum penalty provision in Crim.R. 11(C)(2)(a). We find the trial court's statements that he would be required to register as a Tier III sex offender and give notice of residency changes did not constitute a complete failure to comply, and we do not find Appellant would have rejected the plea and proceeded to trial on the original charges if the court had specified the lifetime duration of his obligation. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On February 9, 2018, Appellant was indicted for rape in violation of R.C. 2907.02(A)(1)(c) for engaging in sexual conduct knowing or with reasonable cause to believe the victim's ability to consent or resist was substantially impaired due to a mental or physical condition, a felony of the first degree. He was also indicted for sexual battery in violation of R.C. 2907.03(A)(3) for engaging in sexual conduct knowing the victim submitted because she was unaware of the act being committed, a felony of the third degree.

{¶3} Appellant's co-defendant, Morris D. Fleetion Jr., was jointly indicted for two counts each of rape and sexual battery. It was alleged that in November of 2017, they had sexual intercourse with a 17-year-old female while she was unconscious after watching her get intoxicated. The acts were apparently caught on an interior surveillance video maintained by the father of a 14-year-old female who allowed the men into her house with alcohol and marijuana while her father was away. (Plea Tr. 13-15); (9/4/19

Sent.Tr. 2-4). Counsel was appointed for Appellant in February of 2018, and various pretrials with ongoing plea negotiations occurred throughout 2018.

{¶4} On July 15, 2019, Appellant pled guilty to an amended charge of attempted rape, which is a felony of the second degree, and the state dismissed the sexual battery count. The state agreed to recommend a sentence of seven years in prison. At the plea hearing, the state said the defendant would be required to register as a Tier III sex offender. (Plea Tr. 5). Defense counsel agreed that the prosecutor correctly recited the agreement. (Plea Tr. 6). In recapping the plea agreement, the trial court said it contained "Tier III sex offender registration notification." (Plea Tr. 19). The written plea agreement mentioned Tier III sex offender registration without mentioning a duration.

{¶5} Before accepting the plea, the court informed Appellant that the maximum sentence was eight years with a $15,000 fine and explained post-release control. The court also said Appellant (and his co-defendant): "would both be required to register as Tier III sex offenders. Now, that will be explained to you in more detail with a registration notice and form that you will either sign or I will go over with you in court at your sentencing. It will have laid out for you the requirements that you will be under once you have pled guilty and once you are in our community for registration and for notification of residency changes." (Plea Tr. 11-12).

{¶6} The court then advised Appellant of the constitutional rights he would be waiving and explained Appellant was admitting his actions and allowing the court to impose the available penalties by pleading guilty. (Tr. 12, 15-17, 20-21). The court ordered a presentence investigation and granted funds for a forensic expert to prepare for sentencing mitigation arguments.

{¶7} At the September 4, 2019 sentencing hearing, the court ordered Appellant to serve seven years in prison with five years of mandatory post-release control and advised Appellant that he will have to register as a Tier III sex offender. Appellant kept interjecting by saying he was sorry, scared, and had kids; earlier, he spoke of nine children. (9/4/19 Sent.Tr. 13, 20-22). Then, the court reviewed the sex offender obligations, including registration with in-person verification every 90 days for life, notice for residency changes, and consequences of failure to register. The court asked if Appellant understood; Appellant said he did not, at which point the court started

explaining the registration duties again. (9/4/19 Sent.Tr. 22-24). After the court repeated the instruction that he had to register every 90 days for his lifetime, Appellant said, "Lifetime?" He then spoke about having to take his children to school and engaged in some unknown behavior that caused a deputy to order that Appellant be removed from the courtroom. (9/4/19 Sent.Tr. 25). As a result, the court continued the sentencing hearing to finish notification of the sex offender registration obligations.

{¶8} The sentencing hearing resumed on September 9, 2019. During the explanation of his sex offender obligations, Appellant asked why he had to report a change of telephone number and why the obligations lasted for life, and the court responded that this was the law applicable to Tier III sex offenders. (9/9/19 Sent.Tr. 10-11). Appellant reiterated his concern about transporting his children from school after he served his seven-year sentence. (9/9/19 Sent.Tr. 14). Appellant filed a timely notice of appeal from the September 18, 2019 sentencing entry.

ASSIGNMENT OF ERROR

{¶9} Appellant's sole assignment of error provides:

"The Defendant did not knowingly, intelligently, and voluntarily enter his plea when the Court failed to instruct the defendant about and inquire his understanding of the notification and reporting requirements of his sex offense plea pursuant to the requirement Crim.R. 11(C)(2)(a)."

{¶10} A defendant who pleads guilty to rape in violation of R.C. 2907.02 or an attempt to commit this offense is classified as a Tier III sex offender. R.C. 2950.01(G)(1)(a),(i) (sexual battery or attempted sexual battery falls under Tier III as well). The Tier III sex offender label is the most serious category and requires registration with in-person verification every 90 days for life and comes with community notification requirements and residency restrictions. R.C. 2950.06(B)(3) (every 90 days); R.C. 2950.07(B)(1) (until death); R.C. 2950.11(A),(F)(1)(a) (community notice); R.C. 2950.034(A) (residency restriction, enforceable through injunction).

{¶11} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily." *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). Crim.R. 11 was adopted in order to ensure a record exists for a reviewing court to assess whether the plea has these qualities. *See State v. Nero*, 56

Ohio St.3d 106, 107, 564 N.E.2d 474 (1990). Pursuant to Crim.R. 11, the trial court cannot accept a guilty plea in a felony case "without first addressing the defendant personally and * * * Determining that the defendant is making the plea voluntarily, with understanding of * * * the maximum penalty involved * * *." Crim.R. 11(C)(2)(a) (and any ineligibility for probation or community control).

{¶12} This reference to "maximum penalty" does not merely require an understanding of the maximum prison term. For instance, the trial court must advise on post-release control at the plea hearing. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 26. If there is a "complete failure" to advise on a penalty, the plea is vacated without requiring a showing of prejudice. *Id.* In *Sarkozy*, the Court found a complete failure where the trial court "failed to mention post-release control at all during the plea colloquy" but distinguished the case from a plea hearing where the court misadvises on the duration or mandatory nature of the supervision. *Id.* at ¶ 22.

{¶13} Similarly, in advising on the maximum penalty, the trial court has a duty to provide some advice on sex offender registration, if applicable, at the plea hearing. *See State v. Dangler*, __ Ohio St.3d __, 2020-Ohio-2765, __ N.E.3d__. This recent case "encourage[d] trial courts to be thorough in reviewing consequences of a defendant's decision to enter a plea, including those stemming from classification as a sex offender: the duty to register and provide in-person verification, the community-notification provisions, and the residency restrictions." *Id.* at ¶ 25. However, it is the statutory sex offender scheme *as a whole* which is considered punitive, and each separate aspect of the scheme is not a discrete criminal "penalty" for purposes of Crim.R. 11(C)(2)(a). *Id.* at ¶ 18-22. In accordance, a trial court does not "completely fail" to comply with its duty on this type of maximum penalty by failing to individually review each sex offender obligation. *Id.* at ¶ 21-22 (and thus, prejudice is required before a plea can be vacated). The *Dangler* case will be reviewed further infra.

{¶14} Appellant acknowledges the trial court was not required to review each statutory restriction in Chapter 2950 during the plea colloquy in order to comply with Crim.R. 11(C)(2)(a). *Citing, e.g.*, *State v. Butcher*, 12th Dist. Butler No. CA2012-10-206, 2013-Ohio-3081, ¶ 11 (substantial compliance where the court said the defendant would be designated a Tier III sex offender and would report every 90 days to the sheriff of the

county of his residence for the rest of his life; the appellant pointed to the failure to say he would also be required to register in the county where he works or attends school). Appellant claims his plea must be vacated because, before accepting his plea, the trial court did not inform him and ensure he understood that the registration requirement for a Tier III sex offender involved *a lifetime* obligation. He concludes the trial court's failure to mention the duration constituted a "complete failure" to advise of a maximum penalty and thus relieved him of an obligation to show prejudice (i.e., that he would not have pled guilty but for the failure).

{¶15} Appellant believes his situation is similar to *Wallace*, a case where the trial court did not even mention the sex offender label at the plea hearing. *See State v. Wallace*, 2019-Ohio-1005, 132 N.E.3d 1317 (10th Dist.) (nor did the written plea mention the sex offender label). The Tenth District vacated the plea due to the complete failure to ensure the defendant understood that, as a part of the maximum penalty, he would be subject to sex offender registration. *Id.* at ¶ 18. The court found the defendant was not required to show prejudice due to the complete failure of the trial court. *Id.* at ¶ 19. Clearly, *Wallace* is distinguishable as the trial court in the case at bar informed Appellant that he would be labeled a Tier III sex offender, would have registration requirements, and would have to give notice of residency changes.

{¶16} Appellant also relies on the Eighth District's *Baker* case where the trial court informed the defendant before accepting the plea that the rape count was "a Tier III sex offense," and then, a*fter accepting the guilty plea*, the court mentioned that the label of Tier III sex offender entailed registration (which would be explained at future sentencing). *State v. Baker*, 8th Dist. Cuyahoga No. 108301, 2020-Ohio-107, ¶ 5, ¶ 7-8. The Eighth District vacated the plea without requiring a showing of prejudice after finding this was a "complete failure" to comply with the obligation Crim.R. 11(C)(2)(a). *Id.* at ¶ 23, 25. Appellant says his plea advice was similarly lacking.

{¶17} In the case at bar, however, the trial court did not merely call *the charge* a Tier III sex *offense* before the plea but told Appellant he would be *required to register* as a Tier III sex *offender*. This occurred *before* the court reviewed his rights and accepted his guilty plea, whereas in *Baker* the court mentioned the obligation to register after accepting the plea. In addition to stating that Appellant would be required to *register* as

a Tier III sex offender, the trial court mentioned, before accepting the plea, that there would be other requirements when he was released into the community that would be explained at sentencing. And, the court referred to Appellant's obligation to give notice when he moves.

{¶18} More recently, the Ohio Supreme Court issued the aforementioned *Dangler* opinion. In *Dangler*, the Court evaluated the adequacy of the following statement by the trial court at the plea hearing: "You would also be obligated to register as a Tier III sex offender which means you would have an obligation to register for your lifetime." *Dangler*, __ Ohio St.3d __, 2020-Ohio-2765 at ¶ 4. The defendant argued his plea was not voluntary, knowing, or intelligent because the court failed to advise him of residency restrictions, community notification, and in-person verification every 90 days where he lived, worked, or went to school. *Id.* at ¶ 6. The state argued there was substantial compliance and the defendant failed to show prejudice. *Id.* at ¶ 7.

{¶19} The Sixth District vacated the plea without requiring a showing of prejudice on the grounds that the trial court completely failed to comply with Crim.R. 11(C)(2)(a) by failing to review each separate "penalty" associated with the Tier III sex offender label. *Id.* at ¶ 8, 21. The Supreme Court reversed and upheld the plea. *Id.* at ¶ 24, 26 (remanding only for consideration of a sentencing issue).

{¶20} First, the Court said the traditional rule requiring prejudice for reversal of a plea had two exceptions: (1) the failure to explain the constitutional rights being waived upon a plea; and (2) the complete failure to comply with a non-constitutional part of Crim.R. 11(C). *Id.* at ¶ 14-15. "Aside from these two exceptions, the traditional rule continues to apply: a defendant is not entitled to have his plea vacated unless he demonstrates he was prejudiced by a failure of the trial court to comply with the provisions of Crim.R. 11(C)." *Id.* at ¶ 16.

{¶21} The Court then observed: "Unfortunately, our caselaw has muddled that analysis by suggesting different tiers of compliance with the rule." *Id.* at ¶ 17, citing, *e.g.*, *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462. The cited case said the imperfect explanation of non-constitutional rights, such as the right to be informed of the maximum penalty, is subject to a substantial compliance test which views the totality of the circumstances to see if the defendant "subjectively understands the

implications of his plea and the rights he is waiving." *Clark*, 119 Ohio St.3d 239 at ¶ 31. The *Clark* case then stated: ""When the trial judge does not *substantially* comply with Crim.R. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court partially complied or failed to comply with the rule. If the trial judge partially complied * * * the plea may be vacated only if the defendant demonstrates a prejudicial effect." (Emphasis original). *Id.* at ¶ 32.

{¶22} Although the state argued substantial compliance, the Supreme Court did not say whether or not the trial court substantially complied with Crim.R. 11, instead finding "the trial court did not completely fail to comply" with the rule. *Dangler*, __ Ohio St.3d __, 2020-Ohio-2765 at ¶ 25. Upon saying *Clark* "muddled" the analysis, the *Dangler* Court clarified: "the questions to be answered are simply: (1) has the trial court complied with the relevant provision of the rule? (2) if the court has not complied fully with the rule, is the purported failure of a type [constitutional right or complete failure] that excuses a defendant from the burden of demonstrating prejudice? and (3) if a showing of prejudice is required, has the defendant met that burden?" *Dangler*, __ Ohio St.3d __, 2020-Ohio-2765 at ¶ 17.

{¶23} The Court did "encourage trial courts to be thorough in reviewing consequences of a defendant's decision to enter a plea, including those stemming from classification as a sex offender: the duty to register and provide in-person verification, the community-notification provisions, and the residency restrictions." *Dangler*, __ Ohio St.3d __, 2020-Ohio-2765 at ¶ 25. However, the Court rejected the contention that the sex offender label involved various separate maximum penalties related to each restriction within the statutory scheme. *Id.* at ¶ 18-22. The Court concluded: "Because the trial court in this case advised Dangler that he would be subject to the registration requirements of that statutory scheme, the trial court did not completely fail to comply with Crim.R. 11(C)(2)(a)'s maximum-penalty-advisement requirement." *Id.* at ¶ 22.

{¶24} As there was not a complete failure to comply with Crim.R. 11, the Court concluded the defendant was required to show prejudice by demonstrating that he would not have entered the plea "but for the trial court's failure to explain the sex-offender-classification scheme more thoroughly." *Id.* at ¶ 23. The Court then found "nothing in the record indicating that Dangler would not have entered his plea had he been more

thoroughly informed of the details of the sex-offender-classification scheme." *Id.* at ¶ 24 (emphasizing that prejudice must be established on the face of the record). In that case, the defendant made no comments when the registration was explained at the later sentencing hearing except to clarify the initial date. *Id.* at ¶ 5.

{¶25} On the topic of "complete failure," Appellant's attorney urged at oral argument that *Dangler* is distinguishable because that trial court mentioned the lifetime duration of the sex offender's obligation. Although the trial court did not mention the duration of Appellant's obligation, we cannot find that the trial court "completely failed" to advise Appellant and ensure Appellant understood that he would have various registration obligations due to the fact that his plea would result in him being labeled a Tier III sex offender. There is no indication the *Dangler* Court elevated the duration of the classification over other aspects of the statutory scheme. Before accepting the plea, the trial court advised Appellant of the proper Tier III sex offender label that matched his offense and that it would be applied to him if he pled guilty. The court explained that this Tier III sex offender label required him to register when he was released into the community and to give notice of residency changes. This was not a "complete failure" to advise on the sex offender label and its effects. As the trial court advised Appellant that he would be subject to these requirements of the statutory sex offender scheme, the trial court did not completely fail to comply with the maximum penalty language in Crim.R. 11(C)(2)(a).

{¶26} Accordingly, Appellant is required to show prejudice. Appellant relies on the "complete failure" exception to avoid the prejudice requirement. He does not specifically argue the record shows prejudice or say he would not have pled guilty if the trial court had specified the registration duties lasted for his lifetime. Still, in arguing against a finding of substantial compliance, Appellant's brief says the following items on the record at sentencing show his subjective lack of understanding about lifetime registration: the need to remove him from the courtroom at the initial sentencing after the court repeated the advisement that the registration requirement was for his lifetime (when he declared that he had to take his kids to school); and his question to the court at the continued sentencing asking why the sex offender obligations had to last a lifetime (and

whether the label would prevent him from retrieving his children from school). (Apt.Br. 10); (9/4/19 Sent.Tr. 25); (9/9/19 Sent.Tr. 11, 14).

{¶27} The test for prejudice is "whether the plea would have otherwise been made." *Dangler*, __ Ohio St.3d __, 2020-Ohio-2765 at ¶ 16, quoting *Nero*, 56 Ohio St.3d at 108. In other words, to establish prejudice, a defendant must establish that he would not have entered the plea "but for the trial court's failure to explain the sex-offender-classification scheme more thoroughly." *Id.* at ¶ 23. Here, Appellant focuses on the trial court's failure to mention the registration was lifetime. Consequently, he must show that the plea would not have been entered if the trial court told him before he entered his guilty plea at the plea hearing that his sex offender registration obligation would last until his death. Prejudice must be demonstrated on the face of the record. *Id.* at ¶ 24.

{¶28} Before the plea, the case had been pending for 17 months during which time he had the assistance of counsel and attended plea negotiations at various pretrials. Appellant was charged with rape (a first degree felony) but was able to negotiate a deal allowing him to plead guilty to attempted rape (a second degree felony). This lowered the maximum prison term from 11 years to 8 years. And, the state agreed to recommend 7 years, which is less than the maximum prison term (and which the trial court imposed).

{¶29} This was a favorable plea agreement considering the totality of the circumstances in Appellant's case. It was alleged that he engaged in sexual conduct (vaginal intercourse) with an unconscious 17-year-old. This was captured on a surveillance video camera located inside the house of a 14-year-old girl whose father was away. Appellant, who was 28 years old at the time, had just spent hours with these two teens as they ingested alcohol and marijuana. Appellant committed the act after his co-defendant engaged in sexual conduct with the victim's unconscious body. Appellant acknowledged the act and blamed the co-defendant for leading him into the situation. Appellant did not assert his innocence or refer to a valid legal defense if his case went to trial for rape (a greater charge than the one to which he pled). Notably as to the dismissed sexual battery count, a conviction on this count would also have required a Tier III sex offender label. R.C. 2950.01(G)(1)(a),(i).

{¶30} Regarding Appellant's reactions at sentencing, we note that sentencing occurred two months after the plea hearing. We also note that Appellant started acting

disruptive after the court imposed the sentence of seven years in prison with five years of post-release control and generally referred to his Tier III sex offender status; that is to say, his interruptions began *before the court mentioned the lifetime duration* of his registration requirement. He engaged in his final disruption (requiring removal from the courtroom) when the court repeated the information on the duration of registration. Yet, the court had already explained his obligation to register every 90 days for life earlier in the sentencing proceedings without response. (9/4/19 Sent.Tr. 22, 25). Moreover, Appellant's expressed concern appeared to be about whether he would be able to transport his children to or from school (after he was released from his seven-year prison term). Chapter 2950 does not refer to this scenario. *Compare* R.C. 2950.034(A) (no person convicted of a sexually oriented offense shall establish a residence or occupy residential premises within 1,000 feet of a school, preschool, or child day-care premises; enforceable through injunction only).

{¶31} Appellant did not indicate on the record regret in entering a plea. There is no indication he would have taken the rape charge to trial if the court would have specified at the plea hearing that his Tier III sex offender registration obligation lasted for life. At the second sentencing hearing, set after his removal from the courtroom for his disruption, Appellant asked questions and concluded by saying he thinks about killing himself, but this did not indicate that his decision to take the plea deal would have been affected by the lifetime duration of the Tier III sex offender obligations. Just as he does not argue prejudice to this court, Appellant did not express or imply to the trial court that he would not have pled guilty if the court had provided more specific details on his sex offender obligations before he entered his plea. *See State v. King*, 8th Dist. Cuyahoga No. 95492, 2011-Ohio-2916, ¶ 17 ("Neither before this court nor the trial court has [the defendant] contended that he would not have entered his plea had he known and understood" the information omitted from the plea colloquy).

{¶32} In sum, the record does not show Appellant would not have pled guilty to attempted rape but for the trial court's failure to explain the sex offender classification scheme more thoroughly by specifying that the sex offender obligations lasted for his lifetime, where the court informed him the plea would result in a Tier III sex offender label requiring him to register upon his release into the community and to provide notice of any

change in residence. As this was not a complete failure by the trial court and there was no showing of prejudice, this assignment of error is overruled.

{¶33} For the foregoing reasons, the trial court's judgment is affirmed.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

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.