[Cite as *State v. Dailey*, 2019-Ohio-356.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107554

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LARRY D. DAILEY, JR.

DEFENDANT-APPELLANT

JUDGMENT:
VACATED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-17-623693-A, CR-18-626228-A, and CR-18-628612-A

BEFORE: Celebrezze, J., Laster Mays, P.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: January 31, 2019

ATTORNEY FOR APPELLANT

Michael P. Maloney
24441 Detroit Road, Suite 200
Westlake, Ohio 44145

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
BY: Brandon Piteo
Daniel T. Van
Assistant Prosecuting Attorneys
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., J.:

{¶1} Defendant-appellant, Larry Dailey, Jr. ("appellant"), brings this appeal challenging his convictions for rape and attempted felonious assault. Specifically, appellant argues that his guilty plea was not knowingly and intelligently entered because the trial court failed to advise him that the rape offense carried a mandatory prison sentence. Pursuant to Loc.App.R. 16(B), the state concedes this error. After a thorough review of the record and law, this court vacates appellant's convictions and remands for further proceedings consistent with this opinion.

I. Factual and Procedural History

{¶2} In Cuyahoga C.P. No. CR-18-626228-A, the Cuyahoga County Grand Jury returned a five-count indictment on March 6, 2018, charging appellant with three counts of rape, in violation of R.C. 2907.02(A)(2); attempted felonious assault, in violation of R.C. 2923.02 and 2903.11(A)(1); and kidnapping, in violation of R.C. 2905.01(A)(4). All five counts contained

notice of prior conviction, repeat violent offender, and sexually violent predator specifications. The attempted felonious assault and kidnapping counts also contained sexual motivation specifications. Appellant was arraigned on March 9, 2018. He pled not guilty to the indictment.

{¶3} The parties reached a plea agreement. The state agreed to delete the specifications underlying the rape offense charged in Count 2, and the specifications underlying the attempted felonious assault offense charged in Count 4. On June 13, 2018, appellant pled guilty to Counts 2 and 4 as amended. The remaining counts and specifications were nolled.

{¶4} The trial court held a sentencing hearing on July 9, 2018. The trial court sentenced appellant to a prison term of 11 years: 11 years on the rape count and three years on the attempted felonious assault count. The trial court ordered the counts to run concurrently to one another.[1] The trial court determined that appellant was a Tier III sex offender/child offender registrant, and reviewed the registration requirements with appellant.

{¶5} On August 15, 2018, appellant filed the instant appeal challenging his convictions. He assigns one error for our review:

> I. Appellant's guilty plea was not knowingly and intelligently made where the court did not advise appellant that he was subject to a mandatory term of imprisonment.

II. Law and Analysis

{¶6} As an initial matter, we note that appellant's notice of appeal appeals from the trial

[1] The trial court ordered appellant's 11-year sentence to run consecutively with appellant's aggregate three-year prison sentence in Cuyahoga C.P. Nos. CR-18-628612-A (prison sentence of three years) and CR-17-623693-A (prison sentence of one and one-half years). The trial court ordered the three-year and one and one-half year prison sentences to run concurrently with one another, but consecutively to the 11-year sentence in CR-18-626228-A.

court's judgments in three criminal cases: (1) CR-18-626228-A, (2) CR-18-628612-A, and (3) CR-17-623693-A. After reviewing appellant's brief, however, we find that appellant is only challenging the guilty plea he entered in CR-18-626228-A. Furthermore, the state's notice of conceded error provides, in relevant part, "the state's assessment is that only [appellant's] plea in Case No. CR-626228 is subject to reversal and not the plea and conviction in CR-17-623693 (Escape) and CR-628612 (Failure to Register)." Accordingly, our review in this appeal will be limited to appellant's guilty plea and convictions for rape and attempted felonious assault in CR-18-626228-A.

A. Guilty Plea

{¶7} In his sole assignment of error, appellant argues that his guilty plea was not knowingly and intelligently entered because the trial court failed to advise him that the rape count carried a mandatory prison sentence.

{¶8} Before accepting a guilty plea, a trial court is bound by the requirements of Crim.R. 11(C)(2). *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 27. Crim.R. 11(C)(2)(a) requires a trial court to inform a criminal defendant of the maximum penalty for the offense to which he is pleading guilty.

{¶9} This court has determined that the advisement regarding the maximum penalty for an offense is a nonconstitutional right. *State v. Owens*, 8th Dist. Cuyahoga Nos. 100398 and 100399, 2014-Ohio-2275, ¶ 7, citing *State v. McKissic*, 8th Dist. Cuyahoga Nos. 92332 and 92333, 2010-Ohio-62, ¶ 13. When advising a defendant about nonconstitutional rights, substantial compliance with Crim.R. 11 is sufficient. *Clark* at ¶ 30. "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." *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶10} Accordingly, where a defendant faces a mandatory prison sentence as a result of a guilty plea, the trial court must determine, prior to accepting a plea, that the defendant understands that (1) he or she is subject to a mandatory prison sentence and (2) as a result of the mandatory prison sentence, he or she is not eligible for probation or community control sanctions. *State v. Allen*, 8th Dist. Cuyahoga No. 105757, 2018-Ohio-586, ¶ 11, citing *State v. Tutt*, 2015-Ohio-5145, 54 N.E.3d 619, ¶ 19 (8th Dist.).

{¶11} In the instant matter, in the notice of conceded error, the state acknowledged that during the June 13, 2018 change of plea hearing, the trial court failed to advise appellant of the mandatory prison term associated with the rape offense. Rather, the trial court informed appellant that the rape offense carried a presumption of prison. (Tr. 5-6.) As such, the state asserts that appellant's assignment of error should be sustained, his rape and attempted felonious assault convictions vacated, and the matter should be remanded for further proceedings, pursuant to *State v. Johnson*, 8th Dist. Cuyahoga No. 92364, 2009-Ohio-5821.

{¶12} Appellant was charged with, and pled guilty to rape, a first-degree felony in violation of R.C. 2907.02(A)(2). R.C. 2907.02(B) provides, in relevant part, "[w]hoever violates this section is guilty of rape, a felony of the first degree." Pursuant to R.C. 2929.13(F)(2), any conviction for rape requires a mandatory prison sentence.

{¶13} During the change of plea hearing, the prosecutor stated that the rape offense in Count 2 was "punishable by 3 to 11 years in prison, and a fine." (Tr. 4.) Thereafter, the following exchange took place between the prosecutor and the trial court regarding the maximum sentence appellant could face on the first-degree felony rape count:

THE COURT: Is there mandatory for [the rape count], mandatory prison?

[THE STATE]: Yes, Judge. Well, I guess technically you could —

THE COURT: Well, is there a presumption?

I mean, there is a presumption of prison with regard to Count — with a felony of the first degree. But does rape change that to mandatory?

[THE STATE]: No. But the notice of prior conviction specification which I'm deleting would make it mandatory. But that's no longer — that specification would no longer be there.

I mean, the state certainly anticipates that it will be asking for prison, and in all sincerity expects prison in this matter, but it's not mandatory.

THE COURT: Well, my notes indicate mandatory prison terms. Certain sexual offenses, any rape and certain attempted rapes, 2929.13(F)(2). I don't know if that qualifies for here.

It doesn't appear to be. It's not the case citation, or it's not the revised code citation. This is just the straight rape citation. All right. So it does not look like it's mandatory.

[THE STATE]: It would have been mandatory with the specification, Judge. But we're deleting the specification.

THE COURT: Right. Okay, thank you.

(Tr. 4-6.)

{¶14} During the Crim.R. 11 colloquy, the trial court provided the following advisement to appellant regarding the maximum penalty for the rape count:

With regard the these three cases and the four counts that you're pleading guilty to, we'll start with the rape charge, rape count, Count 2, in Case [CR-18-626228], that is a felony in the first degree.

As it stands now, there is a presumption you are going to prison for a minimum of 3 years, a maximum of 11 years, and any year in between. A presumption means that you can — in all probability, you're going to prison based on how the statute is written.

> There is a possibility that you would not go to prison. And in that situation you would have to convince me, along with your counsel, that the possibility and placing you on probation is the more appropriate sentence, and you have to provide sufficient evidence to me that defeats the probability that you're going to go to prison.

(Tr. 14-15.) Appellant confirmed that he understood this advisement regarding the maximum penalty on the rape count.

{¶15} After reviewing the record, we find that the trial court failed to expressly inform appellant that he was subject to a mandatory prison sentence on the rape count. Rather, the trial court stated that the rape count carried a presumption of prison. The trial court also informed appellant that a possibility existed that appellant would not be sentenced to prison if he presented sufficient evidence to the court to overcome the presumption.

{¶16} Nor does the record reflect that appellant subjectively understood that he faced a mandatory prison sentence and was not eligible for community control. The prosecutor asserted that without the underlying notice of prior conviction specification, the rape count did not carry a mandatory prison sentence. Although the trial court initially stated that rape offenses carried mandatory prison sentences under R.C. 2929.13(F)(2), the court ultimately concluded that the rape count did not carry a mandatory prison sentence. Finally, as noted above, the trial court advised appellant that the rape count carried a presumption of prison, not a mandatory prison sentence.

{¶17} For all of the foregoing reasons, we find that the trial court failed to substantially comply with Crim.R. 11 in advising appellant of the maximum penalty he faced on the rape count. Appellant's sole assignment of error is sustained.

{¶18} Appellant's rape and attempted felonious assault convictions in CR-18-626228-A are vacated, and the matter is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee 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.

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

FRANK D. CELEBREZZE, JR., JUDGE

ANITA LASTER MAYS, P.J., and
EILEEN A. GALLAGHER, J., CONCUR