

[Cite as *State v. Harvey*, 2019-Ohio-715.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107168

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSHUA HARVEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-623299-A

BEFORE: Headen, J., Kilbane, A.J., and Boyle, J.

RELEASED AND JOURNALIZED: February 28, 2019

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RAYMOND C. HEADEN, J.:

{¶1} Defendant-appellant Joshua Harvey (“Harvey”) appeals from his sentence following a guilty plea. For the reasons that follow, we affirm.

Procedural and Substantive History

{¶2} On November 28, 2017, Harvey was indicted on two counts of aggravated burglary, one count of attempted aggravated murder, two counts of attempted murder, two counts of kidnapping, and four counts of felonious assault. This indictment was the result of a brutal premeditated attack on his 17-year-old ex-girlfriend and her mother. The attack resulted in both victims sustaining multiple stab wounds, one victim sustaining significant facial nerve damage, and approximately \$18,000 in damage to the victims’ home.

{¶3} On February 12, 2018, Harvey pleaded guilty to the indictment. The trial court engaged Harvey in a plea colloquy and informed Harvey of the maximum potential penalties he was facing for each of the 11 counts to which he pleaded guilty. The court informed Harvey that he faced up to 109 years in prison.

{¶4} On April 11, 2018, the court held a sentencing hearing. Prior to sentencing, the state advised the court that the state and defense counsel had requested that the trial court sentence Harvey in the range of 30 to 40 years. At sentencing, the state asked for a sentence of 40 years. The court also heard from one of the victims, the father of the second victim, defense counsel, and Harvey. The court ultimately sentenced Harvey to 32 years in prison.

{¶5} Harvey now appeals, presenting one assignment of error for our review.

Guilty Plea

{¶6} In his sole assignment of error, Harvey argues that his “agreed sentence” was not a true agreement because it was not entered into via a knowing, voluntary, and intelligent plea, and therefore should be vacated. According to Harvey, the sentencing range noted by the state at sentencing added a new material term to his plea agreement, thereby changing the potential consequences of his plea as outlined during his colloquy. We disagree.

{¶7} As an initial matter, we must address the distinction between an agreed sentence and a recommended sentence. “Implicit in an agreed sentence is an understanding that in exchange for the plea, the defendant and the state have agreed to be mutually bound to a specific sentence or a sentence authorized by law within a prescribed range.” *State v. Huffman*, 8th Dist. Cuyahoga No. 105805, 2018-Ohio-1192, ¶ 17. As Harvey points out, R.C. 2953.08(D)(1) precludes appellate review of agreed sentences. A recommended sentence, however, is one in

which the parties make a nonbinding recommendation to the court, which the court is not required to accept or comment on. *Id.* at ¶ 16.

{¶8} Here, the state placed a recommended sentence on the record at the sentencing hearing after negotiations with Harvey’s counsel. We agree with Harvey that because the sentencing range was not agreed upon in exchange for his plea, there was no agreed sentence in this case. Because there was no agreed sentence in this case, R.C. 2953.08(D)(1) does not preclude our review of Harvey’s sentence. We disagree, though, that the sentencing recommendation in any way invalidates his guilty plea.

{¶9} The underlying purpose of Crim.R. 11(C) is to convey certain information to a defendant so that he or she can make a voluntary and intelligent decision regarding whether to plead guilty. *State v. Ballard*, 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981). “‘The standard for reviewing whether the trial court accepted a plea in compliance with Crim.R. 11(C) is a de novo standard of review.’” *State v. Cardwell*, 8th Dist. Cuyahoga No. 92796, 2009-Ohio-6827, ¶ 26, quoting *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977).

{¶10} In order to ensure that a defendant enters a plea knowingly, voluntarily, and intelligently, a trial court must engage in an oral dialogue with the defendant in accordance with Crim.R. 11(C). *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). Crim.R. 11(C) outlines the trial court’s duties in accepting guilty pleas:

(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, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶11} Harvey argues that he was not properly advised of the full consequences of his plea. The advisement of the maximum penalty of a guilty plea is a nonconstitutional right that is reviewed for substantial compliance. *State v. Malenda*, 8th Dist. Cuyahoga Nos. 104736 and 104829, 2017-Ohio-5574, ¶ 5, citing *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 31. "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). A review for substantial compliance requires us to consider whether the defendant was prejudiced and whether the plea would have otherwise been made. *Id.*

{¶12} At his plea hearing, the court engaged Harvey in a thorough plea colloquy and informed him of the maximum potential penalties of each of the 11 counts to which he pleaded guilty. Further, the court informed Harvey that the maximum potential aggregate sentence he could receive as a result of his plea was 109 years. At sentencing, after hearing the recommended sentencing range of 30 to 40 years, the trial court sentenced Harvey to 32 years in

prison. Harvey has not made a compelling argument that a sentence that is 77 years less than the maximum sentence prejudiced him. Similarly, we cannot conclude that had the negotiations surrounding his recommended sentencing range been made prior to the plea hearing, he would not have pleaded guilty to the indictment. Therefore, we overrule Harvey's assignment of error.

{¶13} Judgment affirmed.

It is ordered that appellee recover of 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 conviction having been affirmed, any bail pending appeal is terminated.

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

RAYMOND C. HEADEN, JUDGE

MARY EILEEN KILBANE, A.J., and
MARY J. BOYLE, J., CONCUR