

[Cite as *State v. Jones*, 2019-Ohio-993.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107275

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL JONES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED; REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-17-619399-A and CR-17-620268-A

BEFORE: Keough, J., E.T. Gallagher, P.J., and E.A. Gallagher, J.

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KATHLEEN ANN KEOUGH, J.:

{¶1} Defendant-appellant, Michael Jones, challenges his guilty plea to rape, contending that his plea was not knowingly, voluntarily, and intelligently made because he was not advised before he pleaded guilty of the reporting requirements attendant to his classification as a Tier III sex offender. Finding no merit to the appeal, we affirm. We remand, however, for the trial court to enter nunc pro tunc orders reflecting Jones's correct sex offender status.

I. Background

{¶2} In April 2018, Jones pleaded guilty in Cuyahoga C.P. No. CR-17-619399 to one count of attempted unlawful sexual conduct with a minor in violation of R.C. 2923.02/2907.04, a felony of the fourth degree; and in Cuyahoga C.P. No. CR-17-620268 to one count of rape in violation of R.C. 2907.02, a first-degree felony. At the plea hearing, the prosecutor set forth the plea agreement in both cases. With regard to Jones's guilty plea to rape in Cuyahoga C.P. No. CR-620268, the prosecutor explained that Jones would be subject to a minimum of three years

incarceration, and would be a Tier III sex offender subject to registration every 90 days for his lifetime. Defense counsel told the court that she had spoken “at length” with Jones about the plea agreement, and that the prosecutor’s explanation was accurate.

{¶3} Prior to accepting Jones’s guilty pleas, the court reviewed with him the constitutional rights he was waiving by pleading guilty. Then, with regard to the rape charge, the court advised Jones that the offense was a first-degree felony punishable by three to eleven years in prison and mandatory five years postrelease control; Jones stated that he understood. The court further advised Jones that he would be classified as a Tier III sex offender, and that “upon your release, you’ll be required for the rest of your life to register as a sex offender Tier III and you’ll be subject to all of the requirements of that registration.” Jones responded “okay.” The court asked Jones, “[D]o you understand that?” and Jones responded affirmatively. The court then accepted Jones’s guilty pleas.

{¶4} At sentencing, the trial court sentenced Jones to 18 months incarceration on the attempted unlawful-sexual-conduct-with-a-minor conviction, concurrent with 11 years on the rape conviction and found him to be a Tier III sex offender.

{¶5} This appeal followed.

II. Law and Analysis

{¶6} In his single assignment of error, Jones challenges the validity of his guilty plea to rape, contending that his plea was not knowingly, voluntarily, and intelligently made because the court did not advise him of all the reporting requirements attendant to his classification as a Tier III sex offender.

{¶7} 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). Failure on any of these points renders the plea unconstitutional under both the United States and Ohio Constitutions. *Id.*

{¶8} Crim.R. 11(C) governs the process that a trial court must use before accepting a felony plea of guilty or no contest. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 8. Under Crim.R. 11(C)(2), before accepting a plea of guilty or no contest in a felony matter, the trial court must personally address the defendant and (a) determine that the defendant is making the plea voluntarily, with an understanding of the nature of the charges and the maximum penalty; (b) inform the defendant of and determine that the defendant understands the effect of the plea, and that the court may proceed with judgment after accepting the plea; and (c) inform the defendant and determine that the defendant understands that he is waiving his constitutional rights to a jury trial, to confront the witnesses against him, to call witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial where the defendant cannot be forced to testify against himself. Whether the trial court accepted a plea in conformance with Crim.R. 11(C) is subject to de novo review. *State v. Linder*, 8th Dist. Cuyahoga No. 101223, 2014-Ohio-5341, ¶ 22.

{¶9} In considering whether a trial court satisfied its duties under Crim.R.11(C)(2), reviewing courts distinguish between constitutional and nonconstitutional rights. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 30. A trial court must strictly comply with the mandates of Crim.R. 11(C)(2)(c) regarding the waiver of constitutional rights, meaning the court must actually inform the defendant of the constitutional rights he is waiving and make sure the defendant understands them. *Veney* at ¶ 27.

{¶10} A trial court need only substantially comply with the requirements of Crim.R. 11(C)(2)(a) and (b) regarding nonconstitutional rights. *State v. Bishop*, Slip Opinion

2018-Ohio-5132, ¶ 19, citing *Veney* at ¶ 18. “Under this standard, a slight deviation from the text of the rule is permissible: so long as the totality of the circumstances indicates that ‘the defendant subjectively understands the implications of his plea and the rights he is waiving,’ the plea may be upheld.” *Clark* at ¶ 31, quoting *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶11} If 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 at all with the rule. *Bishop* at ¶ 19, citing *Clark* at ¶ 32. If the trial court partially complied, the plea may be vacated only upon a showing of prejudice, i.e., that the plea would not have otherwise been made. *Clark* at *id.*, citing *Nero* at 108. If the trial court completely failed to comply with the rule, however, no showing of prejudice is required, and the plea must be vacated. *Id.*; *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224.

{¶12} Jones concedes that the trial court advised him before his plea that he would be classified as a Tier III sex offender and subject to the requirements of that registration, but asserts that his plea is invalid because the court should have advised him that upon his release from prison, he would be required to register with the sheriff every 90 days, and would be subject to the mandatory community notification provisions of R.C. 2950.11 and the residential restrictions set forth in R.C. 2950.034.

{¶13} The state, on the other hand, contends that the trial court need not even explain sex offender reporting requirements prior to accepting a plea because they are not punitive in nature and, therefore, not part of the maximum penalty for an offense. In *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, however, the Ohio Supreme Court determined

that R.C. Chapter 2950, as amended after the federal Adam Walsh Act, is punitive and not remedial, as it was viewed after Megan’s Law. *Id.* at ¶ 20-21. Accordingly, this court has recognized that sex offender classification requirements are “part of the penalty for the offense and must be addressed during a Crim.R. 11 colloquy.” *State v. Johnson*, 8th Dist. Cuyahoga No. 106322, 2018-Ohio-5029, ¶ 14, quoting *State v. Creed*, 8th Dist. Cuyahoga No. 97317, 2012-Ohio-2627, ¶ 16. Because sex offender advisements involve nonconstitutional rights, i.e., the defendant’s understanding of the maximum penalty for the offense under Crim.R. 11(C)(2)(a), we consider whether the trial court in this case complied with the rule.

{¶14} We find substantial compliance. The record reflects that the trial court advised Jones during the Crim.R. 11 colloquy that he would be labeled a Tier III sex offender and that he would be subject to the reporting requirements of that classification for life. The trial court’s advisement, coupled with defense counsel’s statement that she had reviewed the plea “at length” with Jones, the prosecutor’s recitation of the plea agreement indicating that Jones would be a Tier III sex offender subject to registration every 90 days for his lifetime, and Jones’s unequivocal affirmation to the trial court that he understood the Tier III registration requirements demonstrate that under the totality of the circumstances, Jones subjectively understood that by pleading guilty to rape, he would be subject to certain restrictions and obligations as a Tier III sex offender. The trial court’s failure to advise Jones prior to accepting his plea of the community notification requirements and residential restrictions under R.C. Chapter 2950 does not alter our finding of substantial compliance. In *State v. Johnson*, 8th Dist. Cuyahoga No. 106322, 2018-Ohio-5029, this court concluded that although R.C. 2950.11 establishes what the community at large will be notified of with regard to a sex offender’s registration, it does not impose any community notification requirements upon the offender. *Id.* at ¶ 17. Rather, the

sex offender has the duty under the statute to register with the sheriff, and *the sheriff* then has the duty to notify the community and various individuals as set forth in R.C. 2950.11(A)(1) through (10). *Id.* Accordingly, in *Johnson*, this court rejected the appellant's argument that prior to accepting his plea, the trial court was required to discuss with him any of the community notifications that would result from his sex offender registration duties. In light of *Johnson*, we find no merit to Jones's argument that the trial court's failure to advise him of the community notification provision of R.C. 2950.11(F) invalidated his plea.

{¶15} Likewise, we find no merit to Jones's argument that the trial court's failure to advise him of the residential restrictions of R.C. 2950.034¹ invalidated his plea. Even without this advisement, the totality of circumstances demonstrates that Jones understood that by pleading guilty, he would be subject to certain restrictions and obligations as a Tier III sex offender.

{¶16} Moreover, even if we were to conclude that the trial court did not substantially comply with Crim.R. 11(C)(2)(a) regarding Jones's sex offender registration requirements, we would find that, at a minimum, the trial court's advisement *partially* complied with the rule. In the context of postrelease control, the Ohio Supreme Court has stated that a trial court partially complies with Crim.R. 11(C)(2)(a) when it mentions mandatory postrelease control at the plea hearing without explaining it. *Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, at ¶ 32. In this case, the trial court mentioned Jones's Tier III sex offender classification and advised him that he would be subject to the attendant registration requirements for his lifetime. Thus, applying the reasoning in *Clark* to this case, we find that even though the trial court did not

¹R.C. 2950.034(A) provides that "[n]o person who has * * * pleaded guilty to * * * a sexually oriented offense * * * shall establish a residence or occupy residential premises within one thousand feet of any school premises or preschool or child day-care center premises."

explain the community notification consequences and residential restrictions of the registration requirements, at a minimum, it partially complied with Crim.R. 11(C)(2)(a).

{¶17} Consequently, in order to vacate the plea, Jones must demonstrate prejudice, i.e., that he would not have pleaded guilty if the trial court had explained his Tier III classification and reporting requirements more thoroughly. *Clark* at ¶ 32 (“If the trial judge partially complied * * * the plea may be vacated only if the defendant demonstrates a prejudicial effect.”); *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12 (“failure to comply with nonconstitutional rights will not invalidate a plea unless the defendant thereby suffered prejudice”).

{¶18} Jones has failed to demonstrate, much less even assert, any prejudicial effect of the trial court’s alleged error. Simply put, he has not presented any evidence that the trial court’s advisement regarding his Tier III sex offender classification affected his decision to plead guilty in any way. And the record supports a conclusion that Jones did not, in fact, suffer any prejudice. At the subsequent sentencing hearing, Jones signed a form provided by the court regarding his registration duties; upon signing the form, he raised no objection to the registration requirements and did not move to vacate his plea. His failure to question the detailed registration information provided by the trial court at sentencing demonstrates that Jones understood his registration duties and was not prejudiced by the trial court’s advisement at the plea hearing. *State v. Jirousek*, 11th Dist. Trumbull Nos. 2013-G-3128 and 2013-G-3130, 2013-Ohio-5467, ¶ 73 (defendant’s failure to object upon learning at sentencing that he would be subject to the residency restriction supported a conclusion that he did not find the restriction problematic or prejudicial); *State v. Young*, 2d Dist. Greene No. 2013-CA-22, 2014-Ohio-2213, ¶ 26 (trial court only partially complied by mentioning the Tier II registration requirement but not

explaining it, but defendant's failure to question the detailed registration information provided by the trial court at sentencing demonstrated his understanding and lack of surprise or prejudice); *State v. Wild*, 8th Dist. Cuyahoga No. 98057, 2012-Ohio-4724, ¶ 23 (where the trial court informed defendant at the plea hearing that he would be a Tier I offender and detailed the reporting requirements, defendant failed to demonstrate how the trial court's failure to advise him that the reporting requirement was for 15 years prejudiced him where he did not allege or provide any argument as to how the trial court's omission prejudiced him, and where he failed to object at sentencing upon learning of the 15-year reporting requirement).

{¶19} Despite his failure to demonstrate any prejudice, Jones argues that this court should adopt "a more stringent approach" in evaluating whether the trial court has complied with Crim.R. 11(C)(2)(a) "in cases where the trial court provides some, but not all, of the ramifications of pleading to an offense with a Tier III registration." He directs us to *State v. Dornoff*, 6th Dist. Wood No. WD-16-072, 2018-Ohio-3084, and *State v. Jackson*, 1st Dist. Hamilton No. C-110645, 2012-Ohio-3348, as support for this argument.

{¶20} In *Jackson*, the trial court did not inform the defendant that his plea to gross sexual imposition would result in his classification as a Tier I sex offender, and did not inform him of the reporting requirements attached to that classification. *Id.* at ¶ 6. Accordingly, the First District found that Jackson did not enter a knowing plea. *Id.*

{¶21} In *Dornoff*, the prosecutor advised the court at the plea hearing that the defendant was entering a guilty plea to rape, felonious assault, and kidnapping, and "will be registered as a Tier III sex offender." *Dornoff* at ¶ 17. However, during the plea hearing, "the trial judge did not advise [the defendant] that he would have to register as a sexual offender, nor was [he] informed of any of the punitive consequences of entering a guilty plea and having a sexual

offender classification.” *Id.* During the sentencing hearing, which occurred immediately after the guilty plea was accepted, the trial judge informed the defendant that he would be required to register as a Tier II sex offender, which requires in-person registration every 180 days for 25 years, and as a Tier III sex offender, which requires in-person registration every 90 days for life. *Id.* at ¶ 18. The defendant acknowledged that he understood. *Id.*

{¶22} On appeal, the Sixth District found that the trial court had failed to comply with Crim.R. 11(C) by not informing defendant of the registration requirements, community notifications, and residential restrictions associated with being classified as a Tier II and III sexual offender prior to accepting the defendant’s guilty plea. *Id.* The appellate court found that the trial court’s failure to comply rendered the defendant’s plea involuntary, unknowing, and invalid. *Id.*

{¶23} Neither *Dornoff* nor *Jackson* change our analysis in this case. In both cases, the trial court did not comply *at all* with the Crim.R. 11(C)(2)(a) requirement of advising the defendant of the maximum penalty for the offense to which he was pleading guilty because both judges failed to even advise the defendants that they would have to register as a sexual offender. Although in *Dornoff* the Sixth District found that the trial court should have also advised the defendant of the community notification requirement and residential restrictions associated with being a Tier II and III sex offender, it clearly found that the trial court did not even advise the defendant that he would have to register as a sexual offender before it accepted his guilty plea. We concur that because the trial courts’ advisements in both cases did not comply *at all* with the Crim.R. 11(C)(2)(a) requirement, the appellate courts properly vacated the defendants’ pleas without a showing of prejudice.² *State v. Brown*, 8th Dist. Cuyahoga No. 106410,

²In *State v. Dangler*, 6th Dist. Williams No. WM-16-010, 2017-Ohio-7981, the Sixth District held that

2019-Ohio-527, ¶ 13.

{¶24} In this case, because the trial court, at a minimum, partially complied with the requirements of Crim.R. 11(C)(2)(a) before accepting Jones’s plea, he must show prejudice to invalidate his plea. He has not done so. Accordingly, we find that his plea of guilty to rape was knowingly, intelligently, and voluntarily made. The assignment of error is overruled, and the trial court’s judgment is affirmed.

{¶25} Nevertheless, we remand for the trial court to issue a nunc pro tunc order in Cuyahoga C.P. No. CR-17-620268 to reflect that Jones was sentenced as a Tier III sex offender, not Tier II, and a nunc pro tunc order in Cuyahoga C.P. CR-17-619399 to reflect that Jones was sentenced as a Tier II sex offender.

{¶26} Judgment affirmed and remanded.

although the trial court informed the defendant of the lifetime registration and verification requirements he faced, its failure to inform the defendant before accepting his guilty plea of the community notification requirements and the residential restrictions associated with his Tier III sex offender classification was a complete failure to comply with Crim.R. 11(C), obviating the need for any showing of prejudice. Accordingly, it vacated his plea. The Sixth District certified its judgment to the Ohio Supreme Court as in conflict with this court’s decision in *Creed*, 8th Dist. Cuyahoga No. 97317, 2012-Ohio-2627, and the Second District’s decision in *Young*, 2d Dist. Greene No. 2013-CA-22, 2014-Ohio-2213.

In *Creed*, this court held that the trial court substantially complied with Crim.R. 11(C)(2)(a) because before accepting the defendant’s plea, the court informed him that he would be labeled a Tier III offender and notified him that he would be subject to various reporting and notification requirements for life. *Id.* at ¶ 17. This court found that the trial court is not required to review each of the numerous individual restrictions and requirements set forth in R.C. Chapter 2950 in order to substantially comply with the nonconstitutional provisions of Crim.R. 11, and thus, the fact that the defendant was not specifically informed that he would be prohibited from living within 1,000 feet of a school did not invalidate his plea. *Id.* at ¶ 16-17.

In *Young*, the Second District found that “the trial court need not elaborate on every specific registration requirement before accepting a plea” and, accordingly, that the trial court had partially complied with Crim.R. 11(C)(2)(a) by mentioning the sexual offender registration requirement, even though it did not explain it. *Id.* at ¶ 20, ¶ 22. The court further found that Young had not demonstrated prejudice as a result of the trial court’s advisement, and it affirmed his conviction. *Id.* at ¶ 26.

The Ohio Supreme Court certified a conflict between the cases, certifying the following question for review: “During a plea hearing, does the failure of the sentencing court to inform a defendant of all of the penalties associated with a sex offender classification imposed by R.C. Chapter 2950 constitute a complete failure to comply with Crim.R. 11 and render the plea void without the need to show prejudice resulted?” *State v. Dangler*, 02/28/2018 Case Announcements, 2018-Ohio-723.

The Sixth District subsequently certified its decision in *Dornoff* to the Ohio Supreme Court as also in conflict with *Creed*. The Supreme Court determined there was a conflict and ordered the case held for the decision in *Dangler*. *State v. Dornoff*, 153 Ohio St.3d 1502, 2018-Ohio-4288, 109 N.E.3d 1259.

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 conviction 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, JUDGE

EILEEN T. GALLAGHER, P.J., and
EILEEN A. GALLAGHER, J., CONCUR