[Cite as *State v. Mack*, 2015-Ohio-1430.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-140054 TRIAL NO. B-1305133
Plaintiff-Appellee,	:	
vs.	:	*O P I N I O N.*
JORMELL MACK,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed as Modified

Date of Judgment Entry on Appeal: April 15, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Judith Anton Lapp*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

John Sinclair, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

FISCHER, Judge.

{¶1} Defendant-appellant Jormell Mack appeals his conviction for trafficking in cocaine, a second-degree felony, following his guilty plea. In three assignments of error, he challenges the trial court's imposition of a four-year prison sentence, the voluntariness of his guilty plea, and the effectiveness of his trial counsel. Because the trial court's imposition of a four-year prison sentence was contrary to law, we modify the sentence to two years in prison. We affirm Mack's conviction and sentence in all other respects.

Factual and Procedural Posture

{¶2} On August 23, 2013, Mack was indicted in this case for one count of trafficking in cocaine in violation of R.C. 2925.03(A) and one count of possession of cocaine in violation of R.C. 2925.11(A). On January 15, 2014, the state and Mack informed the trial court that they had entered into a plea agreement. Mack would plead guilty to trafficking in cocaine and, in exchange, the state would dismiss the possession charge and recommend that Mack be sentenced to a two-year prison term.

{¶3} The trial court informed Mack that even though the state had recommended a two-year sentence on the trafficking charge, it was not required to accept the state's recommendation. The trial court asked Mack if he still wished to plead guilty. Mack responded affirmatively. The trial court then asked the assistant prosecuting attorney to read the facts into the record.

{¶4} Thereafter, the trial court engaged Mack in a Crim.R. 11 dialogue on the record to determine whether he was making the plea knowingly, voluntarily, and intelligently. The trial court explained the nature of the charge and the maximum penalty for the trafficking offense. The trial court told Mack

that the trafficking offense was a second-degree felony that carried a potential sentence of two to eight years in prison, a $15,000 fine, and a five-year driver's license suspension. The trial court also told Mack that it could order him to pay court costs and the lab fee.

{¶5} The trial court informed Mack he was subject to three years' postrelease control, and explained the ramifications of any violation of his postrelease-control obligations. The trial court then asked Mack if he was currently on any type of probation, parole, or postrelease control. When Mack replied that he was on probation to the court, the court stated, "You understand by pleading guilty to this offense, it's a violation of your probation. I can give you a sentence of incarceration to this new charge and run it concurrent to the sentence on your probation violation. You understand that?" Mack replied, "Yes, ma'am, I do."

{¶6} The trial court explained to Mack the constitutional rights he would be waiving by pleading guilty, including the right to a jury trial, the right to confront his accusers, the right to compulsory process to obtain witnesses, the right to require the state to prove his guilt beyond a reasonable doubt, and the privilege against self-incrimination. The trial court then questioned Mack about the plea form. Mack indicated that he had discussed the form thoroughly with counsel, that he understood the form, and that he had signed the form of his own free will. The trial court then accepted Mack's guilty plea.

{¶7} The trial court then addressed Mack's community-control violation in a separate case. Mack had been serving a community-control sentence for failure to comply with an order or signal of a police officer, a felony of the third degree. *See State v. Mack*, 1st Dist. Hamilton No. C-140054, 2014-

Ohio-4072, ¶ 1. Mack's indictment on the trafficking and possession charges had triggered a violation of his community control. After some discussion between the trial court and Mack's court appointed counsel, who had just recently begun representing Mack, the trial court stated that Mack had already pleaded no contest to violating his community control at a prior hearing and that Mack was before the court for sentencing.

{¶8} Mack's counsel asked the trial court to continue sentencing to a later date, because he wanted to present further evidence in mitigation. The trial court denied counsel's request, and stated that it was proceeding with sentencing in both cases.

{¶9} Mack's counsel then relayed a number of facts about Mack in mitigation, including that Mack was 25 years old, had never been to prison, and that he had a substantial drug problem. Counsel stated that despite the drug problem, Mack had remained employed and had been caring for three young children. Mack also had substantial family support, and he had completed a prior term of probation successfully. Mack spoke thereafter. He told the court that he was caring for three children and his mother who was not in good health.

{¶10} The assistant prosecuting attorney then spoke. He asked the court to impose the recommended two-year sentence on the trafficking offense, but stated that the state was leaving the sentence for the community-control violation for the trial court to determine. Mack's probation officer also stated that he would submit the matter on the recommendation. The trial court told Mack:

> Mr. Mack, it's good of you to take care of your children. A lot of people before me do not. But here's the issue, here's the

problem I have. You have been on probation several years. You never said you needed help, that you had a drug problem. When you were back before me, all you said you were using was marijuana. That's all you said you were using, marijuana. I think you were using more than that.

You have been before me on probation violations before and you picked up other offenses. Not once did I ever hear you say I need some help, get me into a treatment program. In fact, you were back before me last summer and that was never mentioned to me. I gave you some consideration for things you did last summer and that was never mentioned to me. I gave you some consideration for some things that you did last summer and I told you, Mr. Mack, I looked you in the eye and I said, you come back before me on anything, you're gone. Do you remember me saying that?

{¶11} Mack replied, "Yes, ma'am I do."

{¶12} The trial court stated:

Okay. Mr. Mack, I'm a woman of my word. So here's what I am going to do. I am going to terminate probation on the old charge. But you get a penalty for that. I will give you the two years on the new charge, but you are getting two more on the probation violation. So on case number B-1305133, it will be four years Ohio Department of Corrections. Court costs. I will give you no fine, except that you have a $90 lab fee and you

> have a five year driver's license suspension. You will get credit for 142 days.

{¶13} Twelve days later, the trial court journalized an entry in this case sentencing Mack to four years only on the trafficking offense. Mack appealed. Mack's original appellate counsel filed a no-error brief pursuant to *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). This court found legal points arguable upon their merits relating to Mack's guilty plea and sentence. *See State v. Mack*, 1st Dist. Hamilton No. C-140054, 2014-Ohio-4072, ¶ 7. We stated that "the trial court may have erred in the manner in which it executed the entry and may not have properly supported its imposition of consecutive sentences with appropriate findings." *Id*. We further stated, "Alternatively if Mack was sentenced to four years in prison for trafficking in cocaine, as the judgment entry states, the sentence imposed was twice what he had agreed to as part of his plea agreement." *Id*. We appointed new appellate counsel for Mack, and ordered that counsel address these legal points and any other matter that counsel discovered in a diligent review of the record. *Id*. at ¶ 9. Mack's new appellate counsel has filed a brief raising error as to his guilty plea, his sentence, and his counsel's representation.

Mack's Sentence is Contrary to Law

{¶14} In his first assignment of error, Mack argues that his sentence is contrary to law. *See* R.C. 2953.08(A)(4). We review felony sentences under R.C. 2953.08(G). *State v. White*, 2013-Ohio-4225, 997 N.E.2d 629, ¶ 11 (1st Dist.). R.C. 2953.08(G)(2) provides:

> The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying

> the sentence or modification given by the sentencing court. The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds * * * :
>
> (b) That the sentence is otherwise contrary to law.

See State v. Jordan, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 23 ("As a general rule, if an appellate court determines that a sentence is clearly and convincingly contrary to law, it may remand for resentencing.")

{¶15} Mack argues that the trial court erred in imposing a four-year sentence on the trafficking offense, when the trial court had stated at the sentencing hearing that it was imposing a two-year sentence for the trafficking offense and a two-year sentence for the community-control violation. He further argues that the trial court failed to make the necessary findings to order the sentence imposed for the trafficking offense in this case to be served consecutively to the sentence imposed for a community-control violation in a separate case.

{¶16} The state argues that the trial court speaks only through its journalized entry, which reflects that the trial court imposed a four-year sentence on the trafficking offense, and therefore, the trial court did not order the terms to be served consecutively, and thus, was not required to make consecutive-sentencing findings.

{¶17} While we recognize that the four-year prison sentence the trial court imposed on the cocaine-trafficking offense was within the range of prison terms for a second-degree felony, and the journalized entry reflects a four-year sentence on the trafficking offense alone, the record reflects that the trial court orally announced its intent to impose only a two-year sentence on the cocaine-trafficking offense. The trial court further stated that it was terminating Mack's community control, and imposing another, separate, two years in prison for Mack's violation of his community control. But rather than ordering that the two sentences be served consecutively, the trial court added the two sentences together and imposed them as one four-year prison sentence on the cocaine-trafficking offense.

{¶18} Because Mack's community-control violation had occurred in a separate case, the trial court had no authority to add the two-year sentence for the violation of his community control in that separate case to the two-year sentence it was imposing for his cocaine-trafficking offense.

{¶19} In *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 9, the Ohio Supreme Court held that "under Ohio's sentencing statutes, a judge lacks the authority to consider multiple offenses as a group and to impose only an omnibus sentence for a group of offenses." Rather, "a judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense." (Citations omitted.) *Id*.

{¶20} Here, by adding the two-year prison sentence for Mack's violation of his community control in a separate case to his two-year prison sentence in this case, the trial court failed to follow Ohio's statutory sentencing

scheme and impose a separate sentence for each felony offense. By sentencing Mack to one combined sentence, the trial court effectively shielded Mack's sentence in the separate case from appellate review. *See id.* at ¶ 20 ("the legislature crafted the sentencing statutes in a manner that mandates individual consideration of each offense during sentencing and allows meaningful review of the sentence for each offense individually on appeal"); *see also* R.C. 2929.15 and 2929.19(B)(4) (providing specific requirements a trial court must follow to revoke a community-control sanction and impose a prison term). We, therefore, sustain Mack's first assignment of error and we modify the judgment entry to reflect a two-year prison term on the cocaine-trafficking offense, as stated by the trial court at the sentencing hearing. *See* R.C. 2953.08(G)(2).

Mack's Guilty Plea

{¶21} In his second assignment of error, Mack argues that his guilty plea was involuntary because the trial court failed to comply with Crim.R. 11.

{¶22} 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, 660 N.E.2d 450 (1996). Before accepting a guilty plea in a felony case, a trial court must inform the defendant that he is waiving certain constitutional rights, including the privilege against compulsory self-incrimination, the right to a jury trial, the right to confront his accusers, and his right of compulsory process of witnesses. *See State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, ¶ 2. In addition to these constitutional rights, the trial court is required to determine that the defendant understands the nature of the charge, the maximum penalty involved, and the effect of the plea. Crim.R. 11(C)(2)(a-b); *Jones* at 214.

{¶23} While trial courts must strictly comply with Crim.R. 11 when notifying a defendant of the constitutional rights set forth in the rule, they need only substantially comply when informing the defendant of the nonconstitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 14 and 18. Substantial compliance means that under the totality of the circumstances, the defendant understands the implications of his plea and the rights he is waiving. *Id.* at ¶ 15. A trial court's "failure to comply with nonconstitutional rights will not invalidate a plea unless the defendant thereby suffered prejudice." *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12. The test for prejudice is whether the plea would have otherwise been made. *Id.*

{¶24} Mack argues that the trial court failed to inform him about the effects of the guilty plea on the pending community-control violation. He argues that while the trial court told him that it could "give him a sentence of incarceration on the new charge and run it concurrent to the sentence of incarceration on [his] probation violation," it failed to inform him that it could also order that the sentences be served consecutively. Mack contends that absent such an advisement, his plea could not have been entered voluntarily. We disagree.

{¶25} The Ohio Supreme Court has held that when a trial court has the option to impose consecutive sentences pursuant to the statute, its failure to inform a defendant who pleads guilty that his sentence may run consecutively rather than concurrently is not a violation of Crim.R. 11(C) and does not render the plea involuntary. *See State v. Johnson*, 40 Ohio St.3d 130, 532 N.E.2d 1295 (1998), syllabus; *see also State v. Clark*, 1st Dist. Hamilton

No. C-010532, 2002-Ohio-3135, ¶ 5-8; *State v. Cummings*, 8th Dist. Cuyahoga No. 89093, 2007-Ohio-6305, ¶ 7. Mack, moreover, can demonstrate no prejudice from the trial court's statement that it could order his sentence on the trafficking offense to be served concurrently to any sentence on his community-control violation, because the guilty-plea form Mack signed expressly stated that any plea [on the trafficking offense] "may result in revocation proceedings and any new sentence could be imposed consecutively."

{¶26} Because the record reflects that the trial court complied with Crim.R. 11, and Mack's plea was entered voluntarily, we overrule his second assignment of error.

Mack's Counsel was not Ineffective

{¶27} In his third assignment of error, Mack argues his counsel should have moved to withdraw his guilty plea to the trafficking offense once counsel learned that Mack was being separately sentenced on the community-control violation.

{¶28} To succeed on his ineffective-assistance-of-counsel claim, Mack must show that defense counsel violated an essential duty and that he was prejudiced by the violation. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show prejudice, Mack must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the proceeding would have been different. *Id.* at 694.

{¶29} The record reflects that at the January 15, 2013 hearing, when Mack entered into the plea agreement with the recommendation of the two-year prison term on the trafficking offense, both Mack and his counsel were aware that Mack had violated the terms of his community control in the separate case,

because both cases had been set for hearing the same day. The separate case, however, was not made a part of Mack's plea agreement with the state. The trial court discussed the maximum penalty for the cocaine-trafficking offense, and informed Mack that "by pleading guilty to the trafficking offense, he could violate the terms of his community control." Thus, Mack cannot demonstrate that his guilty plea was unknowing. As a result, we cannot conclude that Mack's counsel was ineffective for failing to file a motion to withdraw his plea on this basis. We, therefore, overrule his third assignment of error.

Conclusion

{¶30} In conclusion, Mack's second and third assignments of error are overruled. His first assignment of error is sustained, but only insofar as he is entitled to a modification of his cocaine-trafficking sentence from four years in prison to two years in prison. We, therefore, modify the trial court's judgment to reflect a two-year sentence for the cocaine-trafficking offense, and affirm the sentence as modified. We affirm the trial court's judgment in all other respects.

Judgment affirmed as modified.

CUNNINGHAM, P.J, concurs.
DEWINE, J., concurs in part and dissents in part.

DEWINE, J., concurring in part and dissenting in part.

{¶31} I agree that the sentence imposed by the court was contrary to law and concur in that part of the majority's opinion. But I must dissent from the decision of my colleagues to modify the sentence imposed by the trial court. The appropriate course in this instance is to vacate the sentence and remand to the trial court for resentencing.

{¶32} R.C. 2953.08(G)(2) provides that an appellate court "may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing." R.C. 2953.08(G)(2). "As a general rule," if a sentence is contrary to law, an appellate court will remand for resentencing. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 23. Although the statute does allow for an appellate court to modify a sentence, such a remedy has typically been limited to instances where the lower court has no sentencing discretion. In the words of the Ohio Supreme Court, "[c]orrecting a defect in a sentence without a remand is an option that has been used in Ohio and elsewhere for years in cases in which the original sentencing court * * * had no sentencing discretion." (Citations omitted.) *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 29. Thus in *Fischer*, the court adopted the modification remedy for cases in which a trial court did not impose postrelease control properly because the trial court had no sentencing discretion in that area. In doing so, the court was careful to explain that it was only selecting modification as a remedy in a "narrow area." *Id*. at ¶ 30.

{¶33} Here, the trial court had sentencing discretion. The sentencing range for trafficking was two to eight years. R.C. 2929.14(A)(2). While the trial court erred by consolidating the sentences for the probation violation with the sentence for the trafficking charge, it would be perfectly appropriate for the trial court to consider in crafting its sentence that Mack was on community control at the time that he committed the offense. R.C. 2929.12(D)(1). Sentencing is a matter that has long been left to the discretion of the trial court. We have been cautioned that when it comes to sentencing,

we are not to "simply substitute [our] judgment for that of the trial court." *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 14-15. But in this case, by choosing to modify rather than remand, I fear the majority is doing exactly that.

{¶34} Because I don't see this case as fitting in a narrow area where modification is appropriate, I would vacate Mack's sentence and remand the case for a de novo sentencing hearing. *See id*.

Please note:

The court has recorded its own entry this date.