[Cite as *State v. Coffman*, 2015-Ohio-2990.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
		CASE NO. CA2015-01-014
Plaintiff-Appellee,	:	
		O P I N I O N
	:	7/27/2015
- vs -		
	:	
SHANE S. COFFMAN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2013-11-1833

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Repper, Pagan, Cook Ltd., Christopher J. Pagan, 1501 First Avenue, Middletown, Ohio 45044, for defendant-appellant

S. POWELL, J.

{¶ 1} Defendant-appellant, Shane S. Coffman, appeals from the conviction and sentence he received in the Butler County Court of Common Pleas resulting from his admitted violation to the terms and conditions of his intervention in lieu of conviction treatment plan after he pled guilty to single counts of attempted tampering with evidence and possession of heroin. For the reasons outlined below, we affirm.

{¶ 2} On February 5, 2014, a Butler County Grand Jury returned an indictment charging Coffman with one count of tampering with evidence, a third-degree felony, one count of possession of heroin, a fifth-degree felony, and one count of possessing drug abuse instruments, a second-degree misdemeanor. The charges stemmed from allegations that on November 7, 2013, while in possession of a syringe and a baggie of heroin, Coffman attempted to flush the baggie of heroin down the toilet while officers executed a search warrant on the property located at 1629 Lawn Avenue, Middletown, Butler County, Ohio.

{¶ 3} On February 28, 2014, Coffman filed a motion requesting he be granted intervention in lieu of conviction (ILC) and be placed on an ILC treatment plan. The trial court held a hearing on the matter on April 23, 2014. During this hearing, the state informed the trial court that it had reached a plea agreement with Coffman, wherein Coffman would plead guilty to a reduced charge of attempted tampering with evidence, a fourth-degree felony, as well as the originally charged possession of heroin offense, in exchange for his placement on ILC. However, before Coffman entered his guilty plea, the trial court engaged Coffman in the following discussion:

> THE COURT: Okay. Now, you're going to be going into the intervention in lieu program. But I can tell you now that, sir, if you're not able to complete that program there's a mandatory – you must go to prison –
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: -- as there – if you violate the conditions in that.
>
> On the attempted tampering of evidence, which is an F4, you can get 18 months in prison; on the F5, possession of heroin, that's 12 months in prison. So you're exposing yourself to a possible 2 1/2 years in prison if you're not able to complete the program. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: I'm also – there's a $5,000 fine on Count I and a $2500 fine possible on Count II, for a total of $7500. Do you

understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And, also, there's a license suspension of 6 months to 5 years. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now, I'm also going to tell you that if you end [up] going to prison – which I hope you don't – but if you do, you'd be subject to optional post-release control for up to three years.

What that means is once you get out of serving the prison sentence that is imposed, the Adult Parole Authority could impose certain conditions or rules on you; and if you violate those conditions, then they can send you back to prison for up to one half the originally stated prison sentence and then commence for up to nine months for each violation. Do you understand that?

THE DEFENDANT: Yes, sir.

{¶ 4} Following this discussion, and after the trial court completed the remaining Crim.R. 11(C) plea colloquy, Coffman entered his guilty plea to both charges. The trial court then referred the matter to the Butler County Court of Common Pleas Court-Directed Addiction Treatment Program (CDAT), also known as the Drug Court Program, so that Coffman could begin his ILC treatment plan. As part of the conditions for placement on ILC, the trial court informed Coffman that he must successfully complete the CDAT program and comply with all conditions of his CDAT participation agreement. As relevant here, the conditions of his CDAT participation agreement required Coffman to be placed under the general control and supervision of the adult probation department and to "always keep [his] supervising officer informed of my residence and place of employment" and "obtain permission from [his] supervising officer before changing [his] residence or [his] employment."

{¶ 5} On August 1, 2014, a mere three months and nine days after Coffman was

placed on ILC, Coffman's probation officer filed a notice with the trial court alleging Coffman had violated the terms and conditions of his ILC treatment plan as he had "absconded from probation and at this time his whereabouts are unknown." After receiving this notice, on January 20, 2015, the trial court held an ILC revocation hearing, wherein Coffman appeared with counsel and admitted to the violation. The trial court then sentenced Coffman to serve a total aggregate sentence of 28 months in prison, which consisted of an 11-month prison term for possession of heroin to be served consecutively to a 17-month prison term for attempted tampering with evidence. Coffman now appeals from his conviction and sentence, raising three assignments of error for review.

{¶ 6} Assignment of Error No. 1:

{¶ 7} COFFMAN'S PLEAS WERE NEITHER KNOWING, INTELLIGENT, NOR VOLUNTARY.

{¶ 8} In his first assignment of error, Coffman argues his guilty pleas to the single counts of attempted tampering with evidence and possession of heroin were not knowingly, intelligently and voluntarily made. We disagree.

{¶ 9} "When a defendant enters a guilty plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily, and the failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Butcher*, 12th Dist. Butler No. CA2012-10-206, 2013-Ohio-3081, ¶ 8, citing *State v. Douglass*, 12th Dist. Butler Nos. CA2008-07-168 and CA2008-08-199, 2009-Ohio-3826, ¶ 9. To ensure that a defendant's plea is entered knowingly, intelligently and voluntarily, the trial court must engage the defendant in a colloquy pursuant to Crim.R. 11(C). *State v. Henson*, 12th Dist. Butler No. CA2013-12-221, 2014-Ohio-3994, ¶ 10. Pursuant to Crim.R. 11(C)(2), the trial court may not accept a defendant's guilty plea without first addressing the defendant personally and:

> (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.

{¶ 10} A guilty plea is invalid if the trial court does not strictly comply with Crim.R. 11(C)(2)(c), which requires the trial court to verify the defendant understands the constitutional rights that he is waiving. *State v. Shavers*, 12th Dist. Butler No. CA2014-05-119, 2015-Ohio-1485, ¶ 9. However, the trial court need only substantially comply with the nonconstitutional notifications required by Crim.R. 11(C)(2)(a) and (b), which includes notification of the maximum penalty involved. *Id*. Under the substantial compliance standard, the appellate court must review the totality of the circumstances surrounding the defendant's plea and determine whether the defendant subjectively understood the effects of his plea. *State v. Givens*, 12th Dist. Butler No. CA2014-02-047, 2015-Ohio-361, ¶ 12.

{¶ 11} Yet, even where we find the trial court did not substantially comply with Crim.R. 11(C)(2)(a) and (b), we must then make a further determination whether the trial court partially complied or failed to comply with the rule. *State v. Phillips*, 12th Dist. Butler No. CA2008-05-126, 2009-Ohio-1448, ¶ 14, citing *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶ 32. If the trial court wholly failed to comply, the plea must be vacated, whereas if the trial court partially complied, the plea may be vacated only if the defendant demonstrates

prejudicial effect. *State v. Hendrix*, 12th Dist. Butler No. CA2012-12-265, 2013-Ohio-4978, ¶ 11. The test for prejudicial effect "is whether the plea would have otherwise been made." *State v. Hartsook*, 12th Dist. Warren No. CA2014-01-020, 2014-Ohio-4528, ¶ 18.

{¶ 12} At the outset, we note that Coffman argues he actually entered two guilty pleas, "one at the ILC plea hearing and the second at the ILC-revocation hearing." According to Coffman, "[t]he right to understand a plea's effects extends equally to a second plea at an ILC-revocation hearing." However, similar to a community control revocation hearing, we find the so-called "effect of the plea" requirement found in Crim.R. 11(C)(2)(b) does not apply to an ILC revocation hearing. *See State v. Brown*, 3d Dist. Logan No. 8-14-04, 2015-Ohio-468, ¶ 15 (finding requirements of Crim.R. 11[C][2] do not pertain to a hearing on a revocation of community control); *State v. Alexander*, 1st Dist. Hamilton No. C0070021, 2007-Ohio-5457, ¶ 7 (same); *see also* R.C. 2951.041(D) (stating that an offender whose ILC request is granted shall be placed under "the general control and supervision of the county probation department * * * as if the offender was subject to a community control sanction").

{¶ 13} Rather, contrary to Coffman's claim otherwise, Crim.R. 11(C) only "mandates certain requirements with which the trial court must comply prior to accepting a guilty or no contest plea to a felony offense." *State v. Orr*, 11th Dist. Geauga No. 2008-G-2861, 2009-Ohio-5515, ¶ 23. On the other hand, R.C. 2951.041(F) provides the procedural framework that is to occur at an ILC revocation hearing. Pursuant to that statute, if the trial court determines that the offender failed to comply with any of the terms and conditions of ILC, "it shall enter a finding of guilty and shall impose an appropriate sanction under Chapter 2929. of the Revised Code." That is exactly what the trial court did here.

{¶ 14} Moreover, although Coffman cites to our decision in *State v. Davis*, 12th Dist. Warren Nos. CA2013-12-129 and CA2013-12-130, 2014-Ohio-2122, we find that case distinguishable. Unlike the case at bar, our decision in *Davis* addressed the issue of whether

R.C. 2941.041(F) permitted the trial court to continue an offender on an ILC treatment plan after the offender admitted to violating the terms and conditions of his ILC. Concluding that a trial court is not so permitted, this court stated:

> As noted above, after being notified of [the offender's] alleged positive drug test, the trial court held a hearing, wherein [the offender] admitted to the violation of the terms and conditions of his ILC. Yet, although entering a guilty finding, the trial court merely ordered [the offender] to continue with his ILC treatment plan after serving only four days in jail. This is not an appropriate sanction under R.C. Chapter 2929.

Id. at ¶ 11.

{¶ 15} Furthermore, although this court did permit the offender in *Davis* to move to withdraw the plea he entered admitting to the violation of the terms and conditions of his ILC, that was because the offender's decision to admit to the violation was based on the trial court misinforming him that he could remain on ILC if he admitted to the violation at the ILC revocation hearing. *Id* at ¶ 12. In turn, our decision in *Davis* presents a strikingly different set of facts and circumstances than the case at bar. Therefore, besides the general principles regarding ILC and the ILC statute, we find our decision in *Davis* is simply not applicable here.

{¶ 16} That said, turning to the facts and circumstances of this case, while it is undisputed the trial court strictly complied with the constitutional requirements of Crim.R. 11(C)(2)(c), because the trial court conveyed inaccurate information to Coffman at the ILC hearing regarding the maximum penalty he faced if he violated his ILC treatment plan, we find the trial court only partially complied with Crim.R. 11(C)(2)(a). *See State v. Wagner*, 9th Dist. Medina No. 08CA0063-M, 2009-Ohio-2790, ¶ 14 (partial compliance where court conveyed inaccurate information about maximum penalty). As noted above, if the trial court merely partially complies with the nonconstitutional notification requirements of Crim.R. 11(C)(2)(a), such as the case here, the plea may be vacated only if the defendant

demonstrates prejudicial effect. *Hendrix*, 2013-Ohio-4978 at ¶ 11.

{¶ 17} To that end, Coffman argues he was prejudiced by the trial court's partial compliance with the nonconstitutional notification requirements of Crim.R. 11(C)(2)(a) at the trial court's ILC hearing held on April 23, 2014 given the fact he then opted not to pursue a "non-prison sanction" and instead "passively accepted a prison term" at the trial court's ILC revocation hearing held on January 20, 2015. However, although we agree the trial court only partially complied with Crim.R. 11(C)(2)(a) by mistakenly informing Coffman that a prison term was "mandatory" and that he "must go to prison" if he violated the conditions of his ILC treatment plan, we fail to see how Coffman's decision not to pursue a non-prison sanction at the subsequent ILC revocation hearing had any impact on his earlier decision to enter a guilty plea approximately nine months prior.[1]

{¶ 18} As noted above, the test for prejudicial effect "is whether the plea would have otherwise been made." *Hartsook*, 2014-Ohio-4528 at ¶ 18. Coffman has not shown that had he known he was not subject to a mandatory prison sentence if he violated the terms of his ILC treatment plan that he would not have pled guilty. *See, e.g., State v. Younker*, 2d Dist. Montgomery No. 26414, 2015-Ohio-2066, ¶ 22-27 (finding appellant "has not demonstrated prejudice such that his pleas are void based upon the trial court's determination that he was subject to a mandatory sentence, when in fact he was not"); *see also State v. Gulley*, 1st Dist. Hamilton No. C-040675, 2005-Ohio-4592, ¶ 22 (holding "where the trial court erroneously overstates the length of additional prison time that can be imposed for a violation of post-release-control conditions, the defendant is not prejudiced"); *State v. Scott*, 8th Dist. Cuyahoga No. 73071, 1998 WL 413773, *3 (July 23, 1998) (determining that "[a]lthough the

1. It should be noted, contrary to Coffman's claim otherwise, the record indicates Coffman actually did inquire about the potential for non-prison sanctions when he asked the trial court if it would consider foregoing a prison sentence and instead order him to "go to a [community based correctional facility] and stay in Drug Court if the Court would consider that an option." The record also indicates the trial court did consider placing Coffman on community control, but found he was "not amenable to available community control sanctions."

trial court misinformed [appellant] by overstating the amount of the fine it could have imposed, [appellant] was not affected by the misstatement because he nonetheless entered a plea voluntarily to the greater potential fine"). Therefore, because Coffman has not demonstrated any resulting prejudice by the trial court's overstatement, Coffman's first assignment of error is overruled.

{¶ 19} Assignment of Error No. 2:

{¶ 20} COFFMAN'S CONVICTIONS REQUIRED MERGER AS ALLIED OFFENSES OF SIMILAR IMPORT.

{¶ 21} In his second assignment of error, Coffman argues the trial court committed plain error by failing to merge his convictions for attempted tampering with evidence and possession of heroin as they were allied offenses of similar import.[2] We disagree.

{¶ 22} Pursuant to R.C. 2941.25, Ohio's multiple-count statute, the imposition of multiple punishments for the same criminal conduct is prohibited. *State v. Brown*, 186 Ohio App.3d 437, 2010-Ohio-324, ¶ 7 (12th Dist.). Specifically, R.C. 2941.25 states:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 23} Although previously applying the two-part test as outlined in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Ohio Supreme Court clarified the test for allied

2. Coffman failed to raise the issue of allied offenses to the trial court. As recently stated by the Ohio Supreme Court, "[a]n accused's failure to raise the issue of allied offenses of similar import in the trial court forfeits all but plain error, and a forfeited error is not reversible error unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice." *State v. Rogers*, Slip Opinion No. 2015-Ohio-2459, ¶ 3.

offenses in *State v. Ruff*, Slip Opinion No. 2015-Ohio-995. Under the *Ruff* test, in determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, "courts must evaluate three separate factors – the conduct, the animus, and the import." *Id.* at paragraph one of the syllabus. In conducting this analysis, if any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance, in other words, each offense caused separate, identifiable harm; (2) the offenses were committed separately; and; (3) the offenses were committed with separate animus or motivation. *Id*. at ¶ 25. In other words, "offenses are not allied offenses of similar import if they are not alike in their significance and their resulting harm." *Id.* at ¶ 21.

{¶ 24} Here, Coffman argues the trial court committed plain error by failing to merge his attempted tampering with evidence conviction with his possession of heroin conviction because the "offenses involved a single act: Coffman possessed the heroin as he attempted to flush it." However, comparable to our holding as it relates to carrying a concealed weapon and having a weapon while under disability, *see State v. Dillingham*, 12th Dist. Butler No. CA2011-03-043, 2011-Ohio-6348, ¶ 28, because possession of heroin is itself a crime, we find Coffman's attempt to then flush the heroin down the toilet while officers executed a search warrant on the property constitutes a separate offense that was committed with a separate animus or motivation; i.e., to destroy or conceal the heroin with the purpose to impair its availability as evidence. As this court has stated previously, the term "animus" means "'purpose' or 'more properly, immediate motive.'" *State v. Lewis*, 12th Dist. Clinton No. CA2008-10-045, 2012-Ohio-885, ¶ 13, quoting *State v. Logan*, 60 Ohio St.2d 126, 131 (1979). Therefore, because we find the two offenses were committed separately and with a separate animus or motivation, the trial court did not err, let alone commit plain error, by failing to merge Coffman's attempted tampering with evidence conviction with his possession

of heroin conviction. Accordingly, Coffman's second assignment of error is overruled.

{¶ 25} Assignment of Error No. 3:

{¶ 26} THE REVOCATION-HEARING COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES.

{¶ 27} In his third assignment of error, Coffman argues the trial court erred by imposing consecutive sentences because the record did not contain evidence to support the trial court's consecutive sentence findings under R.C. 2929.14(C)(4). We again disagree.

{¶ 28} Pursuant to R.C. 2929.14(C)(4), a trial court must engage in a three-step analysis and make certain findings before imposing consecutive sentences. *State v. Blair*, 12th Dist. Butler No. CA2014-01-023, 2015-Ohio-818, ¶ 52. First, the trial court must find a consecutive sentence is necessary to protect the public from future crime or to punish the offender. *State v. Dillon*, 12th Dist. Madison No. CA2012-06-012, 2013-Ohio-335, ¶ 9. Second, the trial court must find that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. *State v. Heard*, 12th Dist. Butler Nos. CA2014-02-024, CA2014-02-025, and CA2014-05-118, 2014-Ohio-5394, ¶ 10. Third, the trial court must find that at least one of the three circumstances listed in R.C. 2929.14(C)(4)(a)-(c) applies; namely:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from

future crime by the offender.

{¶ 29} "A trial court satisfies the statutory requirement of making the required findings when the record reflects that the court engaged in the required analysis and selected the appropriate statutory criteria." *State v. Setty*, 12th Dist. Clermont Nos. CA2013-06-049 and CA2013-06-050, 2014-Ohio-2340, ¶ 113. When imposing consecutive sentences, a trial court is not required to provide a word-for-word recitation of the language of the statute or articulate reasons supporting its findings. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶ 27, 29. "Nevertheless, the record must reflect that the trial court engaged in the required sentencing analysis and made the requisite findings." *State v. Moore*, 12th Dist. Clermont No. CA2014-02-016, 2014-Ohio-5191, ¶ 12. The court's findings must then be incorporated into its sentencing entry. *Id*., citing *Bonnell* at ¶ 37. Therefore, "as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Bonnell* at ¶ 29.

{¶ 30} As noted above, Coffman does not dispute that the trial court made all the necessary findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences. Rather, Coffman merely argues that the record does not contain sufficient evidence to support the trial court's consecutive sentence findings that his history of criminal conduct demonstrated that consecutive sentences were necessary to protect the public from future crime. However, while we acknowledge that his criminal record does not contain any felony convictions, the record does indicate Coffman had been placed on house arrest as a juvenile, as well as received several misdemeanor convictions as an adult. Moreover, while this case was pending, it is undisputed that Coffman not only absconded, but was also arrested and charged with two additional counts of possessing drug abuse instruments.

{¶ 31} Furthermore, as the trial court found, after absconding, Coffman ridiculed

several probation staff members, as well as others involved with the trial court, which included posting pictures of their family members online. Specifically, as the trial court stated:

> This Defendant has expressed, through his conduct, zero desire to accept rehabilitation efforts that were then extended towards him and not just rejected it but did so in a fashion that not only attempts to poke fun, or whatever the case may be, at probation staff, who are the representatives – the arms – of the Court and, therefore, ridicule and poke fun and publicly attempt to embarrass the Court and its staff, but also members of TASC.

While Coffman attempts to downplay these facts by implying he is a model citizen who has no criminal history at all, the record before this court clearly proves otherwise. Therefore, because we find no error in the trial court's decision imposing consecutive sentences in this matter, Coffman's third assignment of error is overruled.

{¶ 32} Judgment affirmed.

PIPER, P.J., and M. POWELL, J., concur.