

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO, : Case No. 14CA19
Plaintiff-Appellee, :
v. : DECISION AND
ALAN D. BRIGNER, : JUDGMENT ENTRY
Defendant-Appellant. : **RELEASED: 6/5/2015**

APPEARANCES:

Eric C. Nemecek, McCarthy, Leibt, Crystal & Liffman Co., L.P.A., Cleveland, Ohio, for appellant.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Merry M. Saunders, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for appellee.

Harsha, J.

{¶1} Alan Brigner pleaded guilty to three counts of rape after the trial court informed him that a prison sentence was only presumed and that release on community control was possible. The trial court subsequently sentenced Brigner to an aggregate 20-year prison term. In his first assignment of error Brigner asserts that the trial court failed to substantially comply with Crim.R. 11 by failing to advise him that a prison term was required for the rape charges he pleaded guilty to and that he was consequently ineligible for community control sanctions in lieu of confinement. The state agrees that this constitutes reversible error, and so do we. The trial court failed to substantially comply with Crim.R. 11(C)(2)(a), which resulted in Brigner's guilty plea not being knowingly, intelligently, and voluntarily made. Therefore, we sustain Brigner's first assignment of error, reverse his convictions and sentence, and remand the cause for further proceedings. This renders his second assignment of error moot.

{¶2} Insofar as the parties raise arguments concerning the propriety of bail on remand, that is a matter that should be determined by the trial court in the first instance, and we will not give an advisory opinion on that matter.

I. FACTS

{¶3} The Athens County Grand Jury returned an indictment charging Brigner with six counts of rape, all first-degree felonies, with three of the counts in violation of R.C. 2907.02(A)(1)(a) and the remaining three counts in violation of R.C. 2907.02(A)(2). At his arraignment Brigner appeared with counsel and pleaded not guilty to the charges.

{¶4} Ultimately, the parties entered into a plea agreement requiring Brigner to plead guilty to the three counts of rape in violation of R.C. 2907.02(A)(2) in return for the dismissal of the remaining three counts of rape in violation of R.C. 2907.02(A)(1)(a). The plea agreement specified that Brigner understood that his maximum penalty “COULD” be a prison term of 33 years, during which he would not be eligible for judicial release or community control. The agreement further specified that Brigner could be eligible for and granted community control: “If I am eligible for and am granted community control at any point in my sentence, and if I violate any of the conditions imposed, I could be given a longer period under Community control, greater restrictions, or a prison term from the basic range.” The parties did not agree on Brigner’s sentence, but the state noted that it would argue for a maximum prison term of 22 years, and the parties emphasized that “[t]here is a presumption of prison and the State will adamantly oppose any judicial or other early release of any kind.”

{¶5} At a hearing on Brigner’s change of plea, the trial court engaged in a colloquy with him under Crim.R. 11. In this exchange the trial court noted that the rape

counts he was pleading guilty to “can result in a sentence of up to eleven years on each count, or a total of thirty three years * * *.” The trial court indicated that “[t]here is a presumption in each of these counts that the Court will impose prison time.” The trial court did not inform Brigner that by pleading guilty to the rape charges that he would be subject to a required prison term, which would render him ineligible for community control sanctions in lieu of prison. Brigner stated that he understood the potential penalties for each of the rape counts based on the trial court’s statements. The trial court noted that the state would argue for a prison term and that his counsel would have the opportunity to argue for the minimum sentence. The trial court stated that the plea agreement “reminds that there is a presumption that the Court will sentence you to some prison time” and that “the Court is likely to sentence you to prison.” The trial court then advised Brigner of the constitutional rights he was waiving by pleading guilty. The trial court accepted Brigner’s guilty plea, granted the state’s motion to dismiss the remaining rape counts, and ordered a presentence investigation report.

{¶6} The trial court subsequently held a sentencing hearing where several witnesses testified. The state argued for a 22-year aggregate prison sentence, and both Brigner and his counsel argued that he not be imprisoned, but that he instead be given community control sanctions. The trial court noted that there was a “presumption of imprisonment,” and it further noted that it “could” impose only community control, but that it would be “irresponsible” to do so under the circumstances of the case. Instead, the trial court sentenced Brigner to an aggregate prison term of 20 years and a postrelease control term of five years, ordered him to pay restitution, and classified him as a Tier III sexual offender.

II. ASSIGNMENTS OF ERROR

{¶7} Brigner assigns the following errors for our review:

I. THE TRIAL COURT FAILED TO SUBSTANTIALLY COMPLY WITH CRIMINAL RULE 11 BY IMPROPERLY ADVISING BRIGNER AS TO THE PENALTIES ASSOCIATED WITH THE OFFENSES; AS A RESULT, BRIGNER'S GUILTY PLEA WAS NOT KNOWINGLY, VOLUNTARILY AND/OR INTELLIGENTLY ENTERED.

II. THE TRIAL COURT ERRED AND IMPOSED A SENTENCE CONTRARY TO LAW.

III. LAW AND ANALYSIS

A. Validity of Guilty Plea

{¶8} In his first assignment of error Brigner asserts that the trial court failed to substantially comply with Crim.R. 11 by improperly advising him of the penalties associated with the rape counts, resulting in his guilty plea not being knowingly, voluntarily, and intelligently made. “ ‘When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution.’ ” *State v. Veney*, 120 Ohio St.3d 176, 2008–Ohio–5200, 897 N.E.2d 621, ¶ 7, quoting *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). “ ‘An appellate court determining whether a guilty plea was entered knowingly, intelligently, and voluntarily conducts a de novo review of the record to ensure that the trial court complied with the constitutional and procedural safeguards.’ ” *State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014-Ohio-5601, ¶ 36, quoting *State v. Moore*, 4th Dist. Adams No. 13CA965, 2014–Ohio–3024, ¶ 13.

{¶9} “Crim.R. 11(C) governs the process that a trial court must use before accepting a felony plea of guilty or no contest.” *Veney* at ¶ 8. Before accepting a guilty

plea in a felony case a trial court must address the defendant personally and determine 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.” Crim.R. 11(C)(2)(a). The court must also inform the defendant of other matters under Crim.R. 11(C)(2)(b) and (c).

{¶10} This case involves the trial court’s notification of nonconstitutional rights under Crim.R. 11(C)(2)(a), for which substantial compliance is sufficient; this means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. *Veney* at ¶ 15, citing *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶11} A defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must generally prove prejudice, which in this context means that the plea would otherwise have not been entered. *Veney* at ¶ 15. An exception to the prejudice requirement occurs when the trial court failed to comply with the rule:

When 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 with the rule. If the trial judge partially complied, e.g., by mentioning mandatory postrelease control without explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect. See *Nero*, 56 Ohio St.3d at 108, 564 N.E.2d 474, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 93, 5 O.O.3d 52, 364 N.E.2d 1163, and Crim.R. 52(A); see also *Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 23. The test for prejudice is “whether the plea would have otherwise been made.” *Nero* at 108, 564 N.E.2d 474, citing *Stewart*, *id.* If the trial judge completely failed to comply with the rule, e.g., by not informing the defendant of a mandatory period of postrelease control, the plea must be vacated. See *Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d, 1224, paragraph

two of the syllabus. “A complete failure to comply with the rule does not implicate an analysis of prejudice.” *Id.* at ¶ 22.

State v. Clark, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 32 (emphasis sic).

{¶12} Brigner asserts that the trial court failed to comply with Crim.R. 11(C)(2)(a) because it advised him that a prison sentence was not required for the rape charges he was pleading guilty to and failed to inform him that he was ineligible for community control sanctions in lieu of a prison term for these offenses. R.C. 2929.13(F)(2) requires that the sentencing court impose a prison term for “[a]ny rape, regardless of whether force was involved and regardless of the age of the victim * * *.” Because Brigner pleaded guilty to three counts of rape, the trial court had to sentence him to prison and he was ineligible to be sentenced to community control sanctions. The state suggests that R.C. 2929.13(F)(2) does not apply to Brigner because he was not convicted of rape under R.C. 2907.02(A)(1)(b). But the portion of R.C. 2929.13(F)(2) the state is referring to relates to *attempted* rape that would have resulted in a violation of R.C. 2907.02(A)(1)(b) if the offender had completed the offense—that part is not applicable here because Brigner was charged with and convicted of rape instead of attempted rape. Consequently, as the state ultimately concedes, Brigner was improperly advised of his maximum sentence and his ineligibility for community control sanctions in lieu of prison at his change of plea hearing.

{¶13} The state agrees that Brigner’s plea was not knowingly, intelligently, and voluntarily made because of the trial court’s erroneous notification that a prison sentence was simply presumed instead of required and failing to advise him that he was ineligible for community control sanctions.

{¶14} We agree with the conclusion of the parties that the trial court did not substantially comply with the notification requirement of Crim.R. 11(C)(2)(a) by wholly failing to advise Brigner that he was subject to a mandatory prison term, which made him ineligible for community control sanctions in lieu of prison. Thus his plea was not knowingly, voluntarily, and intelligently made. *See, e.g., State v. Givens*, 12th Dist. Butler No. CA2014-02-047, 2015-Ohio-361, ¶ 15-16 (trial court's failure to advise defendant that guilty plea to robbery charge carried a mandatory prison term that rendered him ineligible for community control or judicial release rendered the plea invalid so as to require reversal of the conviction and sentence); *State v. Smith*, 5th Dist. Licking No. 13-CA-44, 2014-Ohio-2990, ¶ 11-12 (trial court's failure to notify defendant that guilty plea to rape charges of the amount of mandatory prison time and the time during which he would be ineligible for community control resulted in invalid plea that required reversal); *State v. Rand*, 10th Dist. Franklin No. 03AP-745, 2004-Ohio-5838, ¶ 23 (trial court committed reversible error when it accepted defendant's guilty plea because it misinformed him that his sentence was not mandatory). "When a defendant on whom a mandatory prison sentence must be imposed enters a plea of guilty or no contest, the court must, before accepting the plea, determine the defendant's understanding that the defendant is subject to a mandatory sentence and that the mandatory sentence renders the defendant ineligible for probation or community control sanctions." *State v. Balidbid*, 2d Dist. Montgomery No. 24511, 2012-Ohio-1406, ¶ 10. Even if Brigner and his counsel "believed the community control was unlikely, such an understanding would not constitute substantial compliance, given the mandatory nature of his sentence." *Id.* at ¶ 12. *See, also, State v. Ruby*, 4th Dist. Adams No. 03CA780,

2004-Ohio-3708, ¶ 10, quoting *State v. Floyd*, 4th Dist. Scioto No. 92CA2102, 1993 WL 415287, *6 (Oct. 13, 1993) (“ ‘The prejudice to a defendant is apparent when the court informs him/her that he/she is eligible for probation although it is actually unavailable. In such case, a defendant might be coerced into pleading guilty because of the possibility of probation’ ”). In fact, by specifying that a prison sentence was only presumed and reiterating that it could impose community control sanctions, the trial court reinforced the parties’ misunderstanding that the trial court was authorized to impose community control for Brigner’s rape convictions. In fact, Brigner and his counsel requested community control sanctions in lieu of prison based on that misunderstanding. Under these circumstances, the trial court wholly failed to comply with Crim.R. 11(C)(2)(a) and an additional analysis of prejudice is unnecessary. See *Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, at ¶ 32. And even assuming that an analysis of prejudice is required, Brigner’s and his counsel’s actions established that he proceeded with his guilty plea based on his ability to argue that he should be subjected to community control sanctions instead of a prison term—therefore, he has made any requisite showing of prejudice. See *Balidbid* at ¶ 14. Indeed, the state does not contend to the contrary.

{¶15} Therefore, we sustain Brigner’s first assignment of error.

B. Remaining Contentions

{¶16} In his second assignment of error Brigner contends that the trial court erred by imposing a sentence that was contrary to law. In light of our disposition of Brigner’s first assignment of error, we decline to address his second assignment of error

because it is rendered moot. *State v. Bethel*, 4th Dist. Jackson No. 13CA11, 2014-Ohio-3861, ¶ 17, citing App.R. 12(A)(1)(c).

{¶17} The state concedes that based on our disposition of his first assignment of error Brigner should be able to withdraw his guilty plea. Nevertheless, the state requests that he “remain incarcerated in the Southeastern Ohio Regional Jail on \$250,000 cash/surety bond and a recognizance bond due to the nature of the offenses, the admission of guilt, and the victim being a family member.” In his reply brief, Brigner counters that this court should direct the trial court to reinstate Brigner’s original bond.

{¶18} We decline the parties’ requests. The setting of bond upon remand is for the trial court to determine in the first instance. See Crim.R. 46; *compare* App.R. 8. It is not for this court to determine in the context of this appeal. See *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658, ¶ 34, quoting *PDK Laboratories, Inc. v. United States Drug Enforcement Administration* (D.C.Cir.2004), 362 F.3d 786, 799 (Roberts, J., concurring in part and in the judgment) (“ ‘This is a sufficient ground for deciding this case, and the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more— counsels us to go no further’ ”).

IV. CONCLUSION

{¶19} The trial court erred in accepting Brigner’s guilty plea without advising him that he was subject to a mandatory prison term that made him ineligible for community control sanctions. We sustain his first assignment of error, reverse his convictions and sentence, and remand the cause to the trial court for further proceedings.

JUDGMENT REVERSED
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Hoover, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.