[Cite as *State v. Avery*, 2015-Ohio-4251.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 14CA3613
vs.	:	
KHADEJA S. AVERY,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Andrea L. Reino, Cincinnati, Ohio, for appellant.[1]

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Pat Apel, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:9-29-15
ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. Khadeja S. Avery, defendant below and appellant herein, pled guilty to (1) three counts of drug trafficking in violation of R.C. 2925.03(A)(2), and (2) one count of tampering with evidence in violation of R.C. 2921.12. Appellant assigns the following errors for review:[2]

[1] Different counsel represented appellant during the trial court proceedings.

[2] Appellant neglects to include in her brief a separate statement of the assignments of error. See App.R. 16(A)(3). We take her assignments of error from her ''table of contents.''

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY ACCEPTING A GUILTY PLEA WHICH WAS NOT MADE KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY NOTIFYING DEFENDANT-APPELLANT THAT SHE WAS ELIGIBLE FOR EARNED CREDIT WHEN SHE IN FACT INELIGIBLE FOR EARNED CREDITS PURSUANT TO R.C. 2967.193."

THIRD ASSIGNMENT OF ERROR:

"IT WAS REVERSIBLE ERROR FOR THE PROSECUTOR TO REFER TO MATTERS AND CASES OUTSIDE THE RECORD WHICH WERE PREJUDICIAL, INFLAMMATORY AND IRRELEVANT TO DEFENDANT-APPELLANT'S CASE."

FOURTH ASSIGNMENT OF ERROR:

"DEFENSE COUNSEL'S FAILURE TO OBJECT TO

PORTIONS OF THE STATE'S ARGUMENT IS [sic]

INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 2} Appellant and a co-defendant, Ashley Inez-Larice Johnson, were apparently recruited in Detroit, Michigan, to drive what the State has characterized as a "huge load of dope" to Huntington, West Virginia. Although the record is unclear as to how, authorities apparently stopped and arrested the two women while driving through Scioto County.

{¶ 3} On December 23, 2013, the Scioto County Grand Jury returned a seven count indictment that charged appellant with three counts of drug trafficking, three counts of drug

possession and tampering with evidence. Although she initially pled not guilty to all the charges, she later agreed to plead guilty to the trafficking counts and tampering counts.

{¶ 4} The matter came on for hearing on February 19, 2014 at which time the trial court endeavored to ascertain if appellant (and her co-defendant) understood the various rights that she would be waiving. Satisfied that she did, the trial court accepted appellant's pleas and found her guilty of the aforementioned offenses. The court sentenced appellant to serve a mandatory sentence of eleven years in prison on the first trafficking count and three years on the remaining counts, with all sentences to be served consecutively for a cumulative total of twenty years. The court dismissed the remaining three counts. This appeal followed.

I

{¶ 5} Before we consider the merits of the assignments of error, we first address the appropriate standard review. When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. The failure to satisfy any of these requirements renders the enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution. See *State v. Veney*, 120 Ohio St.3d 176, 2008–Ohio–5200, 897 N.E.2d 621, ¶7; *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). Appellate courts employ a de novo standard of review to determine whether a plea was knowing, intelligent and voluntary. *State v. Redavide*, 2nd Dist. Montgomery No. 26070, 2015-Ohio-3056, at ¶10; *State v. Green*, 8th Dist. Cuyahoga No. 101990, 2015-Ohio-2700, at ¶6; *State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014-Ohio-5601, at ¶36. In other words, this court will conduct our own independent review of the record without any deference to the trial court.

II

{¶ 6} Appellant asserts in her first assignment of error that her guilty plea was not knowing, intelligent or voluntary. She points to that portion of the February 19, 2014 hearing transcript where, when asked by the trial court if she was satisfied "with the efforts of [her] lawyer, appellant responded by saying "[n]ot really."

{¶ 7} After that answer, however, the trial court brought the proceeding to an immediate halt and announced that "we cannot proceed." The trial court also indicated that it would not accept the guilty pleas and announced that the matter would be set for trial. The transcript indicates that appellant then (1) turned to her attorney to ask a question, and (2) asked "[w]hat's going on?" The following colloquy ensued.

"[DEFENSE COUNSEL]	I think she misunderstood your question.
THE COURT:	And this is not – as a matter of putting pressure on you.
[APPELLANT]:	I misunderstood your question.
THE COURT:	Okay.
[APPELLANT]:	Yeah"

{¶ 8} Appellant then affirmed that she was both satisfied with counsel's representation and that no additional promises or threats were made to induce her to enter a guilty plea. Appellant now argues on appeal that the trial court erred by accepting her plea without any additional follow-up as to her confusion. We disagree with appellant.

{¶ 9} Our review reveals that appellant herself, as well as defense counsel, indicated that she simply misunderstood the trial court's question. When asked again if she was satisfied with counsel's efforts, appellant then replied in the affirmative. We also note that no other exchange or language appears in the transcript to indicate that appellant was confused about the

proceedings. Thus, we are not persuaded that the trial court had any duty to inquire further, nor are we persuaded from this exchange that appellant's guilty plea was unknowing, involuntary or unintelligent.

{¶ 10} Appellant cites two cases that she claims support her position, but we find both to be unavailing. In *State v. Bailey*, 2nd Dist. Clark No. 2013CA37, 2014-Ohio-639, the trial court inquired of the defendant "[h]ave you discussed your case and possible defenses with your attorney?" Id. at ¶17. The defendant responded in the negative, but rather than stop and inquire about the defendant's answer, the trial court simply continued to question him. Id. The Second District Court of Appeals concluded that this constitutes error and the trial court has a duty to make further inquiry into the answer. A failure to do so was, among other reasons, sufficient reason to vacate the guilty pleas. Id. at ¶21.

{¶ 11} In the case sub judice, however, we have the opposite situation. When appellant responded negatively to the trial court's question, the court immediately halted the change of plea colloquy and indicated that it would not accept her plea and the matter should proceed to trial. Only after both counsel and appellant assured the court that appellant simply misunderstood the question did the matter continue and the court accepted her plea.

{¶ 12} Appellant also cites *State v. Walker*, 2nd Dist. Clark Nos. 2013CA8 & 2013CA9, 2014-Ohio-526. In *Walker*, the Second District expressed concern over the following colloquy:

> "THE COURT: Has anyone made any promise to you other than what's been placed on record today to get you to enter these pleas?
>
> DEFENDANT: No, sir, just—" Id. at ¶18.

As in *Bailey*, the trial court continued with the colloquy and the defendant said nothing more on that particular subject. The Second District noted that it had no idea what the court reporter

meant by the use of the dashes, but taking the transcript as a whole, the court was not satisfied that the plea was knowing and intelligent. Id. at ¶¶20-21.

{¶ 13} We do not believe that the *Walker* scenario occurred in the case sub judice. Here, the moment appellant answered "[n]ot really," the trial court halted the colloquy and waited to continue until appellant and her counsel assured the court that the question had simply been misunderstood. If appellant continued to be confused, or if she misunderstood the proceedings in general, there must be some onus on her part to make that fact known.

{¶ 14} The final issue appellant raises to support her claim that her plea was not knowing, voluntary or intelligent stems from a decision of this court, *State v. Ruby*, 4th Dist. Adams No. 03CA780, 2004-Ohio-3708, for the propositions that (1) a first degree drug trafficking felon is not eligible for community control, and (2) mistakenly advising a defendant that she is so eligible renders a plea "not knowing or voluntary."

{¶ 15} As the State points out, however, the problem with this argument is that the trial court did not advise appellant as such. Appellant cites to comments from her defense counsel that she would be "a good candidate for release," as well as the trial court's pronouncement she was not amenable to any "community control sanctions." Appellant claims that the combination of these two remarks is tantamount to erroneously advising her that she was eligible for community control.

{¶ 16} Appellant, however, cites nothing in the record to show that the trial court directly and concretely informed appellant of her eligibility for community control. Thus, we find no merit to this argument and we hereby overrule appellant's first assignment of error.

III

{¶ 17} We jointly consider appellant's second, third and fourth assignments of error because they can be resolved on the same basis. Appellant's arguments in those assignments of errors are as follows: (1) the trial court erroneously informed her that she was eligible for "earned credits" pursuant to R.C. 2967.193; (2) the prosecutor made inflammatory remarks during sentencing; and (3) appellant received constitutionally ineffective assistance from trial counsel.

{¶ 18} First, the events that appellant cites all occurred after the trial court accepted her guilty pleas. Therefore, those events had no bearing on the pleas. Second, this is a negotiated plea between the parties. Defense counsel agreed to the sentencing before any of these alleged sentencing errors occurred and, thus, they had no bearing on her plea. In fact, the trial court asked both the prosecutor and defense counsel if the sentence was the agreed sentence and both answered in the affirmative. Third, we find no indication that any of these events prejudiced the appellant. Fourth, the issues appellant raised in her second, third and fourth assignments of error do not directly involve the issue of whether her plea was knowing, intelligent and voluntary. Instead, the pleas had already been negotiated, given and accepted. These extraneous matters had no bearing on the course of the trial court proceedings. See *State v. Thomas*, 80 Ohio App.3d 452, 459, 609 N.E.2d 601 (3rd Dist.1992); *State v. Verity*, 7th Dist. Mahoning No. 12MA139, 2013-Ohio-1158, at ¶¶ 11-12; *State v. Randle*, 2nd Dist. Montgomery No. 21931, 2007- Ohio-2967, at ¶3. We acknowledge that our Second District colleagues expressed in *Randle* that ineffective assistance of counsel could also be raised on an appeal from a guilty plea. However, the problem here is that although appellant makes the argument in her fourth assignment of error, she does not state what it is that trial counsel did to constitute ineffective assistance for her.

{¶ 19} For these reasons, we find no merit in appellant's second, third and fourth assignments of error and they are hereby overruled.

{¶ 20} Having considered all of the errors appellant assigned and argued, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and judgment be entered in favor of appellee. Appellee to 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 Scioto County Common Pleas Court to carry this judgment into execution.

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

Harsha, J. & McFarland, A.J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, 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.