[Cite as *State v. Thurman*, 2016-Ohio-7254.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 15CA4
vs.	:	
STEVEN THURMAN,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Stephen P. Hardwick, Assistant State Public Defender, Columbus, Ohio, for appellant.

Colleen S. Williams, Meigs County Prosecuting Attorney, and Jeremy L. Fisher, Meigs County Assistant Prosecuting Attorney, Pomeroy, Ohio, for appellee.

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 9-23-16
ABELE, J.

{¶ 1} This is an appeal from a Meigs County Common Pleas Court judgment of conviction and sentence. The trial court found appellant guilty of attempted endangering children, a fourth degree felony, in violation of R.C. 2919.22. Steven Thurman, defendant below and appellant herein, assigns the following error for review:

> "THE TRIAL COURT ERRED BY ACCEPTING AN INVOLUNTARY PLEA."

{¶ 2} On June 18, 2013, a Meigs County grand jury returned an indictment that charged appellant with serious-physical-harm endangering children, a third-degree felony, in violation of

R.C. 2919.22(A). See R.C. 2919.22(E)(2)(c) (specifying that child endangering is a third degree felony if the offender causes serious physical harm to the child). Appellant entered a not guilty plea.

{¶ 3} In October 2014, appellant agreed to plead guilty to an amended charge of attempted endangering children, a fourth degree felony. Appellant's counsel informed the court:

> "The proposal is that my client would change his plea to guilty to an amended offense of attempted child endangering, which lowers it to an F4. The proposal from the parties would be for community control with a community based correctional facility SEPTA as a part of community control."

The court twice asked appellant if he read the guilty plea documents and if he understood them. Appellant responded affirmatively both times. Appellant additionally stated that he was not under the influence of any medicine, drugs, or alcohol and that no threats or promises induced him to plead guilty. Appellant asserted that defense counsel "explained everything and answered all [of his] questions."

{¶ 4} The court continued the colloquy and asked appellant the following questions, inter alia: (1) whether appellant understood "that, while [appellant] and the State [have] presented the Court [with] a recommendation as to sentencing, this Court is not bound to accept that recommendation"; (2) whether appellant understood that the attempted child endangering offense carried a maximum sentence of eighteen months in prison; (3) whether appellant believed that his guilty "plea will be voluntarily, knowingly and intelligently made[.]" Appellant answered all of the foregoing questions affirmatively.

{¶ 5} The prosecutor recited the parties' plea agreement and stated that appellant agreed to "plead guilty to an amended charge of attempted child endangering, a felony of the fourth degree, and the parties would recommend community control with the recommendation that the

defendant successfully complete the SEPTA Correctional Institute." Defense counsel concurred with the prosecutor's recitation.

{¶ 6} The court continued questioning appellant regarding his plea:

> "You understand… Mr. Thurman, you understand if any promises or inducements have been made to you by any person to cause you to plead guilty, they are not binding upon this Court, and if you plead guilty, the Court alone, that is the Judge, will decide your sentence after considering a pre-sentence investigation report and recommendation prepared by the probation department and that you may receive the maximum sentence prescribed by law? You understand that?"

Appellant responded: "Yes, sir." The court continued: "If you're going to enter a guilty plea because your attorney or anyone promises that you would be placed on probation, then do not enter a guilty plea. Do you understand that?" Appellant responded: "Yes, sir." The court then asked appellant how he wished to plead to "the crime of Attempted Child Endangering, in violation of [R.C.] 2919.22(A), a felony of the fourth degree, carrying a maximum sentence of eighteen months[.]" Appellant stated that he pled "[g]uilty."

{¶ 7} The court subsequently found appellant guilty. The court additionally determined that appellant entered his guilty plea "freely, understandably, voluntarily, with full knowledge of the nature of the accusations, consequences of the plea and waivers and without any undue influence, compulsion, duress or promise of leniency."

{¶ 8} The entry concerning appellant's guilty plea recites:

> "I am represented by an attorney. He has advised me of my rights, of the nature of the allegations against me, of the possible penalties, possible defense which I might have and of the consequences of any admissions or pleas of guilty. I am satisfied with his competence, advice and counsel to me in this matter.
> * * * *
> I understand the nature of these charges and the possible defense(s) I might have. I understand that the Court and the Court alone does sentencing and that the plea agreement is only a recommendation, and is not binding upon the Court. * * *

> No promises have been made except as part of this plea agreement stated entirely as follows: Defendant to plead to amended charge of attempted child endangering, F4; parties to recommend community control with SEPTA.
> * * * *
> I further understand that the recommendation of the Prosecution [sic] Attorney is only a recommendation and that the Court and the Court alone determines the appropriate sentence. I understand that the Court could Order me to serve the maximum sentence(s), as to the offense(s) and can Order said sentence(s) to be served consecutively."

The entry additionally listed the offense to which appellant agreed to plead guilty as attempted child endangering, in violation of R.C. 2919.22(A), a fourth-degree felony, with a possible prison term between six and eighteen months.

{¶ 9} On April 27, 2015, the trial court held a sentencing hearing. The prosecutor stated that the "plea agreement was * * * that the State would recommend community control with a special condition that he successfully complete the SEPTA program." Defense counsel stated:

> "[W]e believe that this is mandated, a mandatory community control sanction in this case. * * * * It is not an offense of violence. The offender did not cause physical harm to another person * * *. * * * * [T]he statutes require the Court to place [appellant] on community control, which is what the State and [appellant] have negotiated in this matter."

After considering the parties' statements and their recommendation, the court stated as follows:

> "The Court is going to find that [appellant] is not amendable to community control and that a prison term is consistent with the purposes and principles of sentencing. The Court is going to find that, specifically, that the two-year-old was caused physical harm and specifically, that the defendant was in a position of trust and while in * * * this position of trust, did commit this charge of choking the two-year-old. And based upon that, the Court is going to find that a community control is not amenable but that a prison term is consistent with the purposes and principles of sentencing."

Defense counsel "strongly object[ed] to this sentence" and explained:

> "I think this Court has gone beyond what was pled to. He pled to an attempted child endangering offense. There's been no stipulation that he hurt anybody. This

> Court is finding facts that are beyond what has been stipulated to, beyond what he's pled to and under Foster, those factors are not to be considered in sentencing. He did not cause harm to anybody or it would not have been attempt. It is still an F4. All those factors still apply. It is a non-violent offense. It is not an offense of violence. House Bill 86 would mandate that this Court sentence him to a term of community control and we just want to make a record to that offense."[1]

On April 30, 2015, the trial court sentenced appellant to fifteen months in prison. This appeal followed.

{¶ 10} In his sole assignment of error, appellant asserts that the trial court erred by accepting his guilty plea without ensuring that appellant entered it knowingly, intelligently, and voluntarily. Specifically, appellant contends that the court failed to ensure that appellant understood that the court could impose a prison sentence. Appellant contends that he "did not understand that prison was a real possibility." Appellant claims that his trial counsel incorrectly believed that community control was mandatory, when R.C. 2929.13(B)(1)(b)(viii) states that the mandatory community control provision does not apply if the defendant was in a "position of trust." Appellant concedes, however, that "the plea agreement stated that the prison range went up to eighteen months in prison and that the judge said something similar during the colloquy." Nevertheless, appellant claims that both he and his attorney "believed that community control was mandated by statute." Appellant thus asserts that he could not have understood that he actually faced the possibility of a prison term.

{¶ 11} Generally, a guilty plea constitutes a complete admission of guilt and operates as a waiver of non-jurisdictional defects in the proceedings. See Crim.R. 11(B)(1); see, e.g., United States v. Broce, 488 U.S. 563, 569, 109 S.Ct. 757, 102 L.Ed.2d 92 (1989); State v. Obermiller, —

[1] Appellant's counsel did not clarify to which "Foster" decision he was referring.

N.E.3d —, 2016-Ohio-1594, ¶55; State v. Fitzpatrick, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶78, quoting Menna v. New York, 423 U.S. 61, 62, 96 S.Ct. 241, 46 L.Ed.2d 195, fn.2 (1975) ("'[A] guilty plea * * * renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established."). A guilty plea does not, however, preclude a defendant from challenging the trial court's determination that the defendant knowingly, intelligently, and voluntarily entered the plea: "'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).

{¶ 12} An appellate court that is evaluating whether a criminal defendant knowingly, intelligently, and voluntarily entered a guilty plea must independently review the record to ensure that the trial court complied with the constitutional and procedural safeguards contained within Crim.R. 11. Veney at ¶13 ("Before accepting a guilty or no-contest plea, the court must make the determinations and give the warnings required by Crim.R. 11(C)(2)(a) and (b) and notify the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c)."); State v. Kelley, 57 Ohio St.3d 127, 128, 566 N.E.2d 658 (1991) ("When a trial court or appellate court is reviewing a plea submitted by a defendant, its focus should be on whether the dictates of Crim.R. 11 have been followed."); accord State v. Shifflet, 4th Dist. No. 13CA23, 2015-Ohio-4250, 44 N.E.3d 966, ¶13, citing State v. Davis, 4th Dist. Scioto Nos. 13CA3589 and 13CA3593, 2014-Ohio-5371, 2014 WL 6876680, ¶31, citing State v. Smith, 4th Dist. Washington No. 12CA11, 2013-Ohio-232, 2013 WL

314369, ¶10.

{¶ 13} Pursuant to Crim.R. 11(C)(2), a trial court should not accept a 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.

The purpose of Crim.R. 11(C) is "to convey to the defendant certain information so that he can make a voluntary and intelligent decision whether to plead guilty." State v. Ballard, 66 Ohio St.2d 473, 479-80, 423 N.E.2d 115 (1981). Although literal compliance with Crim.R. 11(C) is preferred, it is not required. State v. Clark, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶29, citing State v. Griggs, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶19. Thus, a reviewing court ordinarily will affirm a trial court's acceptance of a guilty plea if the record reveals that the trial court engaged in a meaningful dialogue with the defendant and explained, "in a manner reasonably intelligible to that defendant," the consequences of pleading guilty. Ballard at paragraph two of the syllabus; accord State v. Barker, 129 Ohio St.3d 472, 2011-Ohio-4130, 953

N.E.2d 826, ¶14; Veney at ¶27.

{¶ 14} Moreover, a defendant who seeks to invalidate a plea on the basis that the trial court partially, but not fully, informed the defendant of his non-constitutional rights must demonstrate a prejudicial effect. Veney at ¶17; Clark at ¶31. To demonstrate that the defendant suffered prejudice as a result of the court's failure to fully inform the defendant of his non-constitutional rights, a defendant must illustrate that he would not have pled guilty but for the trial court's failure. Clark at ¶32, quoting State v. Nero, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990) (stating that "[t]he test is 'whether the plea would have otherwise been made'"). When, however, a trial court completely fails to inform a defendant of non-constitutional rights, "the plea must be vacated." Id. "'A complete failure to comply with the rule does not implicate an analysis of prejudice.'" Id., quoting State v. Sarkozy, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶22. Additionally, when a defendant seeks to invalidate a plea on the basis that the trial court failed to properly inform the defendant of his constitutional rights, the "plea is invalid." Veney at ¶30; Nero; see Clark at ¶31, quoting State v. Griggs, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶12 (stating that the plea is invalid "'under a presumption that it was entered involuntarily and unknowingly.'").[2]

{¶ 15} In the case sub judice, appellant does not claim that the trial court failed to comply with Crim.R. 11(C). Instead, appellant argues that his plea was involuntary because he and his trial counsel wrongly believed that the trial court would be required to impose community control rather than a prison term.

[2] Justice Lanzinger's decision in Veney, in which she concurred in part and dissented in part, indicated that the Veney majority made the presumption of invalidity irrebuttable. Id. at ¶34.

{¶ 16} This court has recognized that a plea agreement generally should be rescinded "'if the parties and the trial court have made a mutual mistake regarding the terms of a plea agreement.'" State v. Moore, 4th Dist. Adams No. 13CA965, 2014-Ohio-3024, ¶16, appeal not allowed, 141 Ohio St.3d 1455, 2015-Ohio-239, 23 N.E.3d 1196, quoting State v. Johnson, 182 Ohio App.3d 628, 2009–Ohio–1871, 914 N.E.2d 429, ¶14 (4th Dist.). We have also stated: "When a defendant's guilty plea is induced by erroneous representations as to the applicable law * * * the plea is not knowingly, intelligently, and voluntarily made." State v. Bryant, 4th Dist. Meigs No. 11CA19, 2012–Ohio–3189, ¶8.

{¶ 17} In the case at bar, after our review of the transcript of the change of plea hearing, we do not believe that it is apparent from the record that a mutual mistake occurred among the parties and the trial court. During the plea hearing, the trial court fully questioned appellant regarding his guilty plea and the consequences of pleading guilty. The trial court asked appellant multiple times whether he understood that the maximum term of imprisonment is eighteen months and that the court is not bound by the parties' plea agreement. Each time, appellant responded that he understood. During the plea hearing, appellant did not indicate that he believed that community control is mandated. Moreover, the court even cautioned appellant that he should not plead guilty if anyone promised him that he would receive "probation." Appellant nevertheless entered a guilty plea. In sum, we believe that the record plainly demonstrates that the trial court fully questioned appellant regarding his decision to plead guilty, explained the rights he waived, explained the consequences of pleading guilty, and explained the maximum sentence that he could receive. Appellant explicitly stated that he understood that the court is not bound by any sentencing recommendations and that he understood the maximum penalty that the court could

impose. Under these circumstances, we cannot conclude that the trial court wrongly determined that appellant knowingly, intelligently, and voluntarily entered his plea.

{¶ 18} We do, however, recognize that trial counsel vehemently objected at the sentencing hearing to the trial court's fifteen-month prison sentence and related his belief that community control was mandated. Trial counsel's statement, however, occurred several months after the plea hearing. Thus, at the time of the plea hearing, nothing in the record shows that trial counsel or appellant labored under this apparent misunderstanding and that this misunderstanding influenced appellant's plea.

State v. Fite, 4th Dist. Adams No. 14CA998, 2016-Ohio-284, ¶14, appeal not allowed, 145 Ohio St.3d 1472, 2016-Ohio-3028, 49 N.E.3d 1314 (determining that guilty plea not unknowing, involuntary or unintelligent due to claim that trial court misinformed defendant about post-release control when "first mention of post-release control occurred" two weeks later, at the sentencing hearing). It may well be that trial counsel, before appellant entered his guilty plea, could have misinformed appellant about whether the court could sentence him to prison sentence. The record, however, does not support any finding that appellant, his trial counsel, the state, or the trial court operated under this allegedly incorrect assumption at the time appellant entered his plea. None of the parties to the plea proceeding (defense counsel, the prosecutor, the trial judge) made any statement during the plea hearing that would have led appellant to believe that the court would be required to impose community control. Consequently, we have no basis to conclude that appellant's guilty plea was involuntary, unknowing, or unintelligent.[3] However, the fact remains

[3] To the extent appellant claims that trial counsel made off-the-record statements regarding the sentence that the trial court could impose, those statements are not part of the record on appeal and they would not be proper for this court to consider. See State v. Davis,

that the trial court fully informed the appellant about the consequences or ramifications of his guilty plea, including the maximum sentence and that the trial court was not bound by any sentencing recommendation. This detailed, explicit advisement should have corrected any notion in the appellant's mind that his mandated sanction would only include community control.

{¶ 19} Accordingly, based upon the foregoing reasons, we overrule appellant's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

4th Dist. Highland No. 06CA21, 2007-Ohio-3944. We further point out that to the extent appellant objects to the trial court's imposition of a fifteen-month sentence, he could have assigned the trial court's sentence as error on appeal, but did not. See State v. Rush, 2013-Ohio-2728, 996 N.E.2d 503 (5th Dist.). We, however, express no opinion regarding the merits of either of these issues.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Meigs County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. & McFarland, 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.