[Cite as *State v. Duty*, 2017-Ohio-451.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 16CA6
v.	:	
ROBERT A. DUTY,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	RELEASED 02/01/2017

APPEARANCES:

James S. Sweeney, James Sweeney Law, LLC, Columbus, Ohio, for appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, and C. Michael Gleichauf, Assistant Lawrence County Prosecuting Attorney, Ironton, Ohio, for appellee.

Hoover, J.

{¶ 1} This is an appeal from a judgment of conviction and sentence entered by the Lawrence County Common Pleas Court following the entry of a guilty plea by Robert A. Duty ("Duty"), appellant herein, to one count of Trafficking in Heroin, a felony of the second degree in violation of R.C. 2925.03(A)(2). In his first assignment of error, Duty contends that his guilty plea was not knowingly, voluntarily, and intelligently made because the trial court failed to explain the maximum potential sentence. We agree. Crim.R. 11(C)(2)(a) requires that the trial court address the defendant to ensure the defendant understands the maximum possible penalty. Here, the trial court failed to comply with Crim. R. 11(C)(2)(a), or even substantially comply with the rule, because it did not inform Duty of the maximum prison sentence, and also

misinformed Duty that the imposition of post-release control was optional. Consequently, Duty's guilty plea was not knowingly, voluntarily, and intelligently made.

{¶ 2} Because our resolution of Duty's first assignment of error is dispositive of this case, his remaining assignment of error is rendered moot and we need not address it. Accordingly, we reverse the judgment of the trial court, and remand this matter so that Duty's guilty plea may be vacated.

I. Facts and Procedural Posture

{¶ 3} On September 22, 2015, a Lawrence County grand jury indicted Duty on the following five counts: (Count 1) Trafficking in Heroin in violation of R.C. 2925.03(A)(1)(C)(6)(c), a felony of the fourth degree; (Count 2) Trafficking in Heroin in violation of R.C. 2925.03(A)(1)(C)(6)(c), a felony of the fourth degree; (Count 3) Trafficking in Heroin in violation of R.C. 2925.03(A)(2)(C)(6)(e), a felony of the second degree; (Count 4) Trafficking in Cocaine in violation of R.C. 2925.03(A)(2)(C)(4)(a), a felony of the fifth degree; and (Count 5) Trafficking in Drugs in violation of R.C. 2925.03(A)(2)(C)(1)(a), a felony of the fourth degree.

{¶ 4} As the underlying facts of the indictment are not relevant to this appeal, we will not address them.

{¶ 5} Duty was arraigned on September 30, 2015, during which Duty pleaded not guilty to the charges of the indictment. For each of the charges, the trial court advised Duty of the maximum penalties.

{¶ 6} Approximately two months later, on November 25, 2015, the trial court held a change of plea hearing. At the hearing, the State offered to "nolle counts one, two, four and five" in exchange for Duty's plea of guilty to count three of the indictment, Trafficking in Heroin (F2).

However, no mention was made of the sentence that Duty would receive in exchange for a guilty plea. The trial court also explained Duty's constitutional rights at the hearing; but it did not discuss the possible prison sentences that Duty could face if he were found guilty. The trial court also informed Duty that "post release control is optional and the maximum term is three years."

{¶ 7} After hearing his rights, Duty waived them and entered a plea of guilty. The trial court accepted the guilty plea and asked Duty, "Is this plea of your own free will and accord?" to which Duty answered, "Yes." The trial court then found Duty guilty of one count of Trafficking in Heroin, a felony of the second degree. The trial court proceeded to sentencing; however, the State requested that sentencing take place on December 23, 2015. Upon no objection from Duty, the sentencing was rescheduled.

{¶ 8} The sentencing hearing ultimately took place on February 17, 2016. The State recommended that Duty be sentenced to a total of four years in the appropriate penal institution, be ordered to pay the minimum mandatory fine, be imposed the appropriate license suspension, receive credit for time served, and ordered to pay court costs. Duty's trial counsel agreed that was, in fact, the agreed sentence, with the exception of the imposition of a mandatory fine.

{¶ 9} Prior to the actual imposition of sentence, Duty told the trial court, "I would like to appeal it, the sentencing." Duty explained to the trial court that he felt that the proposed sentence of four years was too harsh for his "part in it." In response, the trial court told Duty:

> Well, let me stop right here. This is a negotiated and a [sic] agreed plea or it's not. If it isn't I'm not going to take it. And we'll have to go to trial. Now you can appeal up to thirty days after this if you feel like there are constitutional irregularities but you'll have to talk with counsel about that. But my question right

now is, is this an agreed and negotiated plea of sentence? Are you still agreeing to this or not?

{¶ 10} Next, the following colloquy between Duty and the trial court occurred:

DUTY: Yes, yes. I'll agree to it. If I can appeal and…that's fine.

TRIAL COURT: You can still do that. We just have to be clear that if we are going to say this is an [sic] negotiated and agreed, plea and sentence that it truly is as of this moment.

DUTY: That's fine, yes.

TRIAL COURT: And you understand the charges in the indictments and the facts and so forth and so on?

DUTY: Yes, yes.

{¶ 11} The trial court then sentenced Duty to four years in the appropriate state penal institution, imposed a driver's license suspension, informed Duty that he was subject to three years of post-release control, and ordered that Duty pay court costs. The mandatory fine was not imposed due to Duty's indigent status. Shortly thereafter, the trial court's sentence was memorialized into a judgment entry of sentence.

{¶ 12} Duty filed a timely notice of appeal.

II. Assignments of Error

{¶ 13} Duty sets forth the following assignments of error for review:

First Assignment of Error:

> DEFENDANT-APPELLANT'S GUILTY PLEA WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY MADE.

Second Assignment of Error:

THE TRIAL COURT ERRED IN FAILING TO PROPERLY ADVISE APPELLANT OF POSTRELEASE CONTROL RENDERING APPELLANT'S CONVICTION PARTIALLY VOID.

III. Law and Analysis

A. Duty's Guilty Plea was Not Knowingly, Voluntarily, and Intelligently Made.

{¶ 14} In his first assignment of error, Duty contends that the trial court failed to inform him of the maximum possible prison sentence that he could receive by pleading guilty to a second-degree felony. In addition, Duty claims that he was not properly informed of the mandatory nature of post-release control as part of the maximum penalty involved. As a result, Duty asserts that his guilty plea was not knowingly, voluntarily, and intelligently made. We agree.

{¶ 15} In deciding whether to accept a guilty plea, the trial court must determine whether the plea was made knowingly, intelligently, and voluntarily. *State v. McDaniel,* 4th Dist. Vinton No. 09CA677, 2010–Ohio–5215, ¶ 8. The failure to satisfy any one of these requirements renders 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, limited on other grounds by *State v. Barker*, 129 Ohio St.3d 472, 2011–Ohio–4130, 953 N.E.2d 826, ¶ 25; *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. "In other words, appellate courts will conduct their own, independent review of the record without any deference to the trial court." *State v. Johnson,* 4th Dist. Scioto No.

14CA3612, 2016-Ohio-1070, ¶ 5.

{¶ 16} The State argues that since the sentence was an agreed negotiated sentence, the minimum and maximum sentences are the same. In addition, the State contends that: "To say the appellant was somehow injured or suffered some prejudice by not restating the maximum penalty when the penalty was agreed to is incredulous." In light of the State's argument, we must consider the fact that this was a negotiated plea and sentence. An agreed-upon sentence may not be appealable if (1) both the defendant and the state recommend the sentence, (2) the trial court imposes the agreed sentence, and (3) the sentence is authorized by law. R.C. 2953.08(D)(1); *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 16. However, while a reviewing court cannot review an agreed sentence, it can review the validity of the plea leading to the agreed sentence. *State v. Houston*, 4th Dist. Scioto No. 12CA3472, 2014-Ohio-2827, ¶ 17 citing *State v. Royles*, 1st Dist. Hamilton No. C-060-875, C-060-876, 2007-Ohio-5348, ¶ 10. Thus, we ultimately must decide the question of whether Duty's guilty plea was made knowingly, voluntarily, and intelligently.

{¶ 17} "Before accepting a guilty plea, the trial court should engage in a dialogue with the defendant as described in Crim.R. 11(C)." *McDaniel* at ¶ 8, citing *State v. Morrison*, 4th Dist. Adams No. 07CA854, 2008–Ohio–4913, ¶ 9. The 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." (Emphasis added.) Crim.R. 11(C)(2)(a). The trial court must also inform the defendant of other matters under Crim.R. 11(C)(2)(b) and (c).

{¶ 18} When this rule concerns the waiver of constitutional rights, strict compliance is

mandatory. *Johnson*, 2016-Ohio-1070, at ¶ 10. However, " '[s]ubstantial compliance with the provisions of Crim.R. 11(C)(2)(a) and (b) is sufficient to establish a valid plea.' " *McDaniel*, 2010–Ohio–5215, at ¶ 13, quoting *State v. Vinson,* 10th Dist. Franklin No. 08AP–903, 2009–Ohio–3240, ¶ 6. " 'Substantial compliance means that, under the totality of the circumstances, appellant subjectively understood the implications of his plea and the rights he waived.' " *Id*.

{¶ 19} As the Ohio Supreme Court explained in *State v. Clark,* 119 Ohio St.3d 239, 2008–Ohio–3748, 893 N.E.2d 462, ¶ 32:

> 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. The test for prejudice is "whether the plea would have otherwise been made." 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. "A complete failure to comply with the rule does not implicate an analysis of prejudice."

(Emphasis sic.) (Citations omitted.)

{¶ 20} In the case sub judice, because the explanation of maximum penalties involves a non-constitutional right, we must decide whether under the totality of the circumstances, Duty subjectively understood the implications of his plea and the rights he was waiving. First, the journal entry from the change of plea hearing states that the trial court "advised the Defendant of the possible penalties involved"; however, it is clear from a review of the transcript of the change

of plea hearing that the trial court never advised Duty of the possible penalties. In fact, the trial court failed to inform Duty of any possible prison term for the second-degree felony. In addition, the journal entry from the change of plea hearing states that the trial court informed Duty that he shall be subject to a mandatory period of post-release control. However, after reading the transcript, it is apparent that the trial court actually told Duty that post-release control was optional. Furthermore, Duty answered twenty-six questions on the "Proceeding on Plea of Guilty" document and also signed the document; however, the document does not include notifications of the maximum penalties involved.

{¶ 21} The State argues, in part, that because the trial court informed Duty of the possible maximum penalties at Duty's arraignment, the court provided sufficient notification to comply with Crim. R. 11(C)(2)(a). We disagree. The arraignment was held on September 30, 2015; and the change of plea hearing was held almost two months later on November 25, 2015. Duty cannot reasonably be expected to retain the information regarding possible maximum penalties for almost two months. *See State v. Davis*, 3d Dist. Hardin No. 6-90-20, 1992 WL 276630, *2 (Apr. 8, 1992) (implying two week time span between arraignment and change of plea hearing was too long).

{¶ 22} In addition, the State contends that because Duty agreed to the sentence "[t]o say [Duty] was somehow injured or suffered some prejudice by not restating the maximum penalty * * * is incredulous." However, the trial court did not merely misinform Duty about the possible maximum penalties regarding the term of incarceration. Rather, the court failed to explain the maximum penalties at all during the plea colloquy. Therefore, the "complete failure to comply with the rule does not implicate an analysis of prejudice." *Clark*, 119 Ohio St.3d 239, 2008–Ohio–3748, 893 N.E.2d 462, at ¶ 32. Moreover, the trial court incorrectly informed Duty that the

term of post-release control was optional, not mandatory. *See State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, paragraph two of the syllabus (holding that when a sentence includes mandatory post-release control, the trial court must inform the defendant of that fact in the plea colloquy or the plea will be vacated).

{¶ 23} After reviewing the totality of the circumstances, it is clear that the trial court failed to inform Duty of the maximum penalties within a reasonable time prior to accepting his guilty plea. Thus, we conclude that the trial court did not substantially comply with the requirements of Crim. R. 11(C)(2)(a). Accordingly, Duty's guilty plea could not have been knowingly and intelligently made, and his first assignment of error is sustained.

B. Duty's Second of Assignment of Error is Moot.

{¶ 24} Because we have sustained Duty's first assignment of error, his plea shall be vacated. Consequently, the second assignment of error is moot and we decline to address it. *See* App.R. 12(A)(1)(c).

IV. Conclusion

{¶ 25} Based on the foregoing, we conclude that the trial court did not properly accept Duty's guilty plea. The judgment of the trial court is reversed. This matter shall be remanded; and upon remand, Duty's guilty plea shall be vacated.

JUDGMENT REVERSED AND CAUSE REMANDED.

Harsha, J., concurring:

{¶ 26} I concur in the judgment and opinion sustaining Duty's first assignment of error, and finding that his guilty plea was invalid because he was not informed of his maximum potential prison sentence for trafficking in heroin. Doing so has caused me to reevaluate my vote

in our recent decision in *State v. Johnson*, 4th Dist. Scioto No. 14CA3612, 2016-Ohio-1070. I now conclude the language at ¶ 12, was ill-advised:

> As a negotiated plea, the minimum and maximum are the same sentence. It is difficult to conceive how the trial court could have been more explicit with appellant than (1) expressly stating that she would serve a twenty year prison term, and (2) asking her if that was her understanding of the plea agreement.

{¶ 27} This language suggests that a trial court's reference at a change-of-plea hearing to an agreed sentence may satisfy the trial court's duty under Crim.R. 11(C)(2)(a) to inform the defendant of the maximum penalty involved for each offense. But the "maximum penalty involved" is the one authorized by statute, which the trial court is free to impose regardless of the parties' agreement. *See State v. Mayle*, 5th Dist. Muskingum No. CT2016-0014, 2016-Ohio-7499, ¶ 13 ("R.C. 2953.08(D)(1) does not require a trial court to follow a joint recommendation" for an agreed sentence). It is not the sentence that forms the basis of a plea agreement. Therefore, a trial court reference at a change-of-plea hearing to an agreed sentence that is less than the permissible maximum sentence would not substantially comply with Crim.R. 11(C)(2)(a).

{¶ 28} Although I concurred in judgment and opinion in *Johnson*, I am persuaded that the cited language is problematic and that the holding in that case should be limited to its unique facts, which included the defendant's execution of two forms in which he acknowledged the maximum statutory penalties for all of the charges to which she pleaded guilty. *Johnson* at ¶ 22-23. Duty did not execute a form that identified the maximum penalty.

{¶ 29} *Johnson* also concluded that the appellant suffered no prejudice under the facts of her case. I continue to agree with that conclusion.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED AND CAUSE IS REMANDED. Appellee shall pay 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 Lawrence County Common Pleas Court to carry this judgment into execution.

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

Harsha, J.: Concurs with Concurring Opinion.
McFarland, J.: Dissents.

For the Court

By: _____
Marie Hoover, 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.