[Cite as *State v. Perry*, 2012-Ohio-1566.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Robert Perry, III

Appellant

Court of Appeals Nos. L-11-1126
L-11-1127

Trial Court Nos. CR0201002131
CR0201101438

DECISION AND JUDGMENT

Decided: April 6, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Diana L. Bittner, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the May 4, 2011 judgment of the Lucas County Court of Common Pleas, which sentenced appellant, Robert Perry, III, after he was convicted by the court following acceptance of an *Alford* guilty plea to three counts of violating R.C. 2907.05(A)(4) and (C), gross sexual imposition. Upon consideration of the assignments

of error, we reverse the decision of the lower court. Appellant asserts the following assignments of error on appeal:

> 1. DEFENDANT-APPELLANT'S PLEA WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY MADE REGARDING THE MANDATORY SENTENCE HE WAS SUBJECT TO [sic].
>
> 2. THE TRIAL COURT ERRED IN FINDING DEFENDANT-APPELLANT A TIER II CHILD VICTIM OFFENDER, IN DISCREPANCY WITH DEFENDANT-APPELLANT'S WRITTEN PLEA FORM, IN CASE 2010-2131.

{¶ 2} On June 30, 2010, appellant was indicted in a multi-count indictment alleging three violations of R.C. 2907.02(A)(1)(b) and (B), rape, first degree felonies, and three violations of R.C. 2907.05(A)(4) and (C), gross sexual imposition, third degree felonies. Appellant entered pleas of guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to the lesser offenses of gross sexual imposition. The guilty plea agreement indicated that appellant understood that he would be classified as a Tier II sex offender and sentenced to five years of mandatory postrelease control. However, his conviction indicated that he was classified as a Tier III sex offender.

{¶ 3} On March 16, 2011, appellant was charged by information with three counts of violating R.C. 2907.02(A)(2) and (B), rape, first degree felonies. Appellant later

waived his right to prosecution by indictment. Appellant entered pleas of guilty pursuant to *Alford, supra*. The guilty plea indicated that appellant understood he would be classified as a Tier III sex offender and his conviction reflects this same classification.

{¶ 4} On May 4, 2011, the trial court entered its judgment of conviction and sentence in both cases. The trial court accepted the pleas, found appellant guilty of counts to which appellant had entered *Alford* guilty pleas, and sentenced appellant to a total term of imprisonment of 18 years. Appellant then sought an appeal to this court.

{¶ 5} In his first assignment of error, appellant argues that the pleas entered in these cases were not knowingly, voluntarily, and intelligently made because at the time of the plea hearing the court indicated that the minimum period of mandatory imprisonment would be three years when he was in fact subject to mandatory imprisonment for whatever sentence he was given, which turned out to be 18 years.

{¶ 6} Because the defendant gives up significant constitutional rights by entering a guilty or no contest plea, compliance with Crim.R. 11(C), (D), and (E) is required to ensure that the plea is knowingly, intelligently, and voluntarily made. *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, ¶ 15. The court must strictly comply with Crim.R. 11(C)(2) regarding federal constitutional rights, but need only substantially comply with the rule regarding non-constitutional rights. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 31-32. Crim.R. 11(C)(2)(a), which requires the court to notify the defendant of the maximum penalty that

could be imposed, involves non-constitutional rights. *State v. Nero* (1990), 56 Ohio St.3d 106, 107-108, 564 N.E.2d 474 (1990) and *State v. Johnson*, 40 Ohio St.3d 130, 133, 532 N.E.2d 1295 (1988). Therefore, before a trial court accepts a plea of guilty, the court need only substantially comply with the rule and inform the defendant of the maximum penalty involved. *Id.* To satisfy the substantive compliance burden, it must be apparent "under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *Nero, supra* at 108 and *State v. Lamb*, 6th Dist. No. L-07-1181, 2008-Ohio-1569, ¶ 11.

{¶ 7} In the case before us, the plea agreement for the gross sexual imposition charges indicated appellant could be sentenced to up to 15 years of imprisonment, but there was no mandatory term of imprisonment. Appellant was sentenced to five years of incarceration on each count, but these prison terms were ordered to run consecutively with each other and concurrently with the sentence for the rape convictions.

{¶ 8} The plea agreement for the rape charges indicated that by entering the plea, appellant faced "a maximum basic prison term of up to 30 years of imprisonment, of which 3 years is mandatory" imprisonment. At the sentencing hearing, appellant was informed the "minimum period of mandatory prison would be three years" and there were three rape charges, with each charge carrying a prison sentence of three-to-ten years. Therefore, the court informed appellant that "if you were given the minimum sentence, ordered served together with each other, concurrent, the minimum term of incarceration you face here if I accepted your pleas is three years in prison." The court

indicated that the maximum term of imprisonment would be 45 years. The court concluded by informing appellant that he would face a prison term if the plea was accepted, but the length of the prison term was yet to be determined.

{¶ 9} Appellant asserts that this information led him to believe that he faced only three mandatory years of imprisonment, not that he could be sentenced to a greater mandatory sentence.

{¶ 10} R.C. 2929.14(A) provides that the court shall impose a definite prison term within the range determined by statute for felonies of the first degree. While the court used the term "mandatory," when it indicated appellant's 18-year sentence, it is clear that the court was referring to the fact that appellant would serve a definite term of 18 years of imprisonment. In any event, appellant was given notice that while he could be sentenced to the minimum of three years mandatory prison time, he could receive a sentence imposing a longer prison term. Therefore, we find the trial court substantially complied with Crim.R. 11(C)(2)(a) and notified appellant of his potential maximum sentence. Appellant's first assignment of error is not well-taken.

{¶ 11} In his second assignment of error, appellant argues that the trial court erred in finding him to be a Tier III sex offender rather than a Tier II sex offender as stated in the plea agreement for the gross sexual imposition conviction. Appellant asserts that this error constitutes plain error.

{¶ 12} Appellee argues that courts routinely use a single classification when multiple sexually-oriented convictions are involved. Appellee cites to *State v.*

McGovern, 6th Dist. No. E-08-066, 2010-Ohio-1361; *State v. McFarland*, 2d Dist. No. 23411, 2010-Ohio-2395; *State v. Calhoun*, 9th Dist. No. 09CA009701, 2011-Ohio-769; and *State v. Bradley*, 3d Dist. No. 15-10-03, 2010-Ohio-5422. In the recitation of the facts of each of these cases, the facts reveal that the defendants were convicted of multiple sexual offenses, but they were classified as a sexual offender based upon the highest level conviction. However, none of the cases cited involve the issue of whether the trial court should have used a single classification. Just because trial courts have commonly used a single classification does not demonstrate that it is correct to do so.

{¶ 13} Appellee also argues that dual classifications would not serve any practical purpose since the higher classification would control registration requirements. We disagree for the simple reason that one conviction might be overturned while the lesser conviction could stand. Even though multiple count indictments in these types of cases are common, the General Assembly failed to provide a process for combining classifications. Therefore, we hold that the trial court should treat each conviction individually. We believe this rule is even more important in this case where there were two separate criminal actions pending and both involve guilty pleas. Appellant's second assignment of error is found well-taken.

{¶ 14} Having found that the trial court did commit error prejudicial to appellant, the judgment of the Lucas County Court of Common Pleas is reversed. This matter is remanded to the trial court for resentencing to correct the sex offender classification for

the gross sexual imposition conviction. Appellee is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE