[Cite as *State v. Deeb*, 2013-Ohio-5175.]

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

State of Ohio — Court of Appeals No. E-12-052

Appellee — Trial Court No. 2011-CR-228

v.

David M. Deeb — **DECISION AND JUDGMENT**

Appellant — Decided: November 22, 2013

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Ashley L. Thomas, Assistant Prosecuting Attorney, for appellee.

Paul Mancino, Jr., for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, David M. Deeb, appeals the August 8, 2012 judgment of the Erie County Court of Common Pleas which, following guilty pleas to one count of rape and two counts of importuning, was sentenced to a total imprisonment term of ten years and found to be a Tier III and Tier I sexual offender requiring lifetime registration.

{¶ 2} The relevant facts are as follows. On July 15, 2011, a ten count indictment was filed charging appellant with five counts of rape of a minor, first degree felonies, and five counts of importuning, third degree felonies. The charges related to the same minor victim and spanned from June 2010 through January 2011. On July 25, 2011, appellant entered not guilty pleas to the charges.

{¶ 3} Appellant raises seven assignments of error for our consideration:

I. Defendant was denied due process of law when the court imposed a consecutive sentence which was unauthorized by law.

II. Defendant was denied due process of law when the court misadvised of the penalty for a first degree felony.

III. Defendant was denied due process of law when the court accepted a plea from defendant without determining that he understood the nature of the offenses.

IV. Defendant was denied due process of law when the court did not fully and personally inform the defendant concerning the maximum penalty which included lifetime sexual registration.

V. Defendant was denied due process of law when the court imposed more than a minimum sentence.

VI. Defendant was denied due process of law when the court imposed consecutive sentences without making appropriate statutory findings.

VII. Defendant was denied due process of law when the court arbitrarily determined that the offenses were not allied offenses of a similar nature.

{¶ 4} Appellant's first assignment of error asserts that the consecutive sentences were contrary to law. Appellant's sixth assignment of error argues that appellant was denied due process of law where the court imposed consecutive sentences without first making the necessary statutory findings. Because the alleged errors are related, they will be jointly addressed.

{¶ 5} R.C. 2929.14(C)(4), effective September 30, 2011, revived the former R.C. 2929.14(E) requirement that a sentencing judge make certain findings prior to the imposition of consecutive sentences. The section provides:

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction

imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 6} "A trial court satisfies the statutory requirement of making the required findings when the record reflects that the court engaged in the required analysis and selected the appropriate statutory criteria." *State v. Smith*, 12th Dist. Clermont No. CA2012-01-004, 2012-Ohio-4523, ¶ 26. "However, it is not required to recite any 'magic' or 'talismanic' words when imposing consecutive sentences provided it is 'clear from the record that the trial court engaged in the appropriate analysis.'" *State v. Bratton*, 6th Dist. Lucas Nos. L-12-1219, L-12-1220, 2013-Ohio-3293, ¶ 17, quoting *State v. Murrin*, 8th Dist. Cuyahoga No. 83714, 2004-Ohio-3962, ¶ 12.

{¶ 7} The state does not represent that the required findings were made; rather, the state contends that because appellant was sentenced pursuant to a negotiated plea agreement and the sentence was authorized by law, we are precluded from reviewing it

for error. R.C. 2953.08(D)(1) provides: "A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge."

{¶ 8} In support of its argument, the state cites a Sixth Appellate District case wherein the defendant was sentenced pursuant to a negotiated plea agreement to an eight-year imprisonment term. *State v. Bryant*, 6th Dist. Lucas App. No. L-03-1359, 2005-Ohio-3352. In *Bryant*, the appellant agreed to enter an *Alford* plea to possession of crack cocaine, in exchange for a dismissal of an additional possession charge. Appellant specifically agreed to serve an eight-year prison sentence. *Id.* at ¶ 3. We determined that because the sentence was jointly recommended and imposed by the sentencing judge it was not subject to review. *Id.* at ¶ 14.

{¶ 9} Reviewing the cases relied upon by the parties and our independent research of the issue, we find that Ohio courts have affirmed the negotiated sentence where, in addition to the term of imprisonment, the defendant agreed to consecutive sentences. *See State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690; *State v. Berryman*, 2d Dist. Montgomery No. 20611, 2005-Ohio-2531; *State v. Cremeens*, 4th Dist.Vinton No. 06CA646, 2006-Ohio-7092.

{¶ 10} In the present case, the plea form states that "defendant agrees to a ten-year prison term with three years mandatory" While it is true that appellant was sentenced to the agreed-upon term, the record is silent as to whether he agreed to be sentenced to

consecutive terms. In fact, during the plea hearing the state indicated that appellant had been informed that "the counts can be ordered to be served concurrently or consecutively." At the July 26, 2012 sentencing hearing, the trial court stated: "On Count 1, felony of the first degree, Rape, the Court is sentencing you to prison six years; on Count 3, Importuning, 24 months or two years; Count 7, Importuning, two years. Those would run consecutive for a total of the ten year sentence." Although the court certainly had the ability to sentence appellant to consecutive terms, because appellant did not consent to consecutive terms the court was first required to make the requisite statutory findings.

{¶ 11} Accordingly, because the court failed to make the necessary statutory findings under R.C. 2929.14(C)(4), we find that appellant's first and sixth assignments of error are well-taken.

{¶ 12} In appellant's second assignment of error, he argues that he was denied due process of law when the trial court erroneously informed him that the maximum penalty for the rape charge was three to eleven years, instead of three to ten years. Appellant states that the error likely occurred due to the felony sentencing changes in H.B. 86, effective in September 2011. The offense occurred in 2010.

{¶ 13} We note that before accepting a guilty plea, Crim.R. 11(C)(2) demands that the trial court inform a defendant of various rights he is waiving by entering the plea. In that regard, the rule provides in pertinent part:

(2) In felony cases the court * * * shall not accept a plea of guilty * * * without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, * * *

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty * * * 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.

{¶ 14} The rights contained within Crim.R. 11(C) are considered "nonconstitutional" and the court need only substantially comply in its notification relative thereto. "'Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.'" *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 15, quoting *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶ 15} If a trial court fails to substantially comply with Crim.R. 11 regarding a nonconstitutional right, then the reviewing court must determine whether the court failed to comply or only partially complied. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 32. Partial compliance requires the plea to be vacated only if the defendant also demonstrates a prejudicial effect. *Id.*, citing *Nero* at 108. "To demonstrate prejudice in this context, the defendant must show that the plea would otherwise not have been entered." *Veney* at ¶ 15.

{¶ 16} While the court did err in stating that appellant faced an 11 year prison term for rape and a total maximum of 17 years, appellant has failed to demonstrate a prejudicial effect of the misstatement; thus, his plea is not rendered invalid. In other words, appellant has presented no evidence demonstrating that, but for the misstatement, he would not have entered the plea. Appellant's second assignment of error is not well-taken.

{¶ 17} In his third assignment of error, appellant contends that his plea was not knowing and voluntary because the court failed to determine whether he understood the nature of the offenses. The Supreme Court of Ohio has held that trial courts are not required to engage in a detailed recitation of the elements of a charge prior to accepting a plea. *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 57. The court explained:

> [T]he Constitution does not require that a trial court explain the elements of the charge, at least where the record contains a representation

> by defense counsel that the nature of the offense has been explained to the accused. *See Henderson*, 426 U.S. at 647, 96 S.Ct. 2253, 49 L.Ed.2d 108. *See* 5 LaFave, Israel & King, Criminal Procedure (2d Ed.1999) 164, Section 21.4(c). "Apart from the small class of rights that require specific advice from the court under Rule 11(c), it is the responsibility of defense counsel to inform a defendant of * * * the attendant statutory and constitutional rights that a guilty plea would forgo." *Libretti*, 516 U.S. at 50-51, 116 S.Ct. 356, 133 L.Ed.2d 271. *Id.*

In determining whether a defendant understands the nature of the offenses, we consider the totality of the circumstances. *State v. Sahr*, 10th Dist. Franklin Nos. 05AP-503, 05AP-504, 2006-Ohio-3260, ¶ 13.

{¶ 18} At appellant's plea hearing he was asked whether he had any questions about the indictment that he had received; he answered negatively. Additionally, a bill of particulars was filed by the state and detailed the facts leading to the indictment. The court, the prosecutor and defense counsel explained the charges and the potential penalties for each. Even assuming that the specific nature of the offenses was not fully explained to appellant, he has failed to demonstrate how he was prejudiced by any such failure. Appellant does not contend that he would not have entered guilty pleas if the court had directly questioned him about the nature or elements of the offenses. *See State v. Lomax*, 8th Dist. Cuyahoga No. 98125, 2012-Ohio-4167, ¶ 14. Thus, appellant's third assignment of error is not well-taken.

{¶ 19} In appellant's fourth assignment of error, he argues that the trial court erred by failing to personally inform him, at the plea hearing, of the maximum penalty he faced which included lifetime sexual registration. As with our analysis in appellant's prior assignments of error because the requirements under R.C. Chapter 2950 are now considered a part of the penalty of the offense, *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, substantial compliance with Crim.R. 11(C) was required regarding the sexual offender registration requirements.

{¶ 20} Reviewing the totality of the circumstances and, particularly, the plea hearing we find that appellant was informed of and understood that by entering the pleas he would be subject to lifetime registration. The state indicated that "defendant would be classified as a Tier III sex offender, which means that he would have to report for life with the sheriff's department in the county in which he would be living and the state in which he would be living." Defense counsel then addressed the court stating that he "had advised [appellant] all of what the prosecution has just recited * * *." The court, ensuring that appellant's plea was knowing and voluntary stated:

> THE COURT: Okay. Now, because these are sexually related offenses, there's also classifications, I'm sure your counsel has talked with you about them, but there's a Tier III classification and a Tier I classification for the offenses. They, they provide reporting requirements and a duration, so many years, every year you got to report and how long that duration or reporting goes on. Did you counsel explain that to you?

MR. DEEB: Yes, Your Honor.

{¶ 21} Finally, the plea agreement, which appellant signed, lists that he was to be sentenced as a Tier III and Tier I sex offender. Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 22} In appellant's fifth assignment of error he argues that the trial court erred when it sentenced him to a non-minimum sentence. Although we concluded that appellant did not specifically agree to consecutive sentences, he did, by entering into the plea agreement, agree to a non-minimum sentence. Accordingly, appellant has waived the argument. *See State v. Tillman*, 6th Dist. Huron No. H-04-040, 2005-Ohio-2347. Appellant's fifth assignment of error is not well-taken.

{¶ 23} Appellant's seventh and final assignment of error disputes the court's "arbitrary" finding that the offenses at issue were not allied and, thus, not subject to merger at sentencing. Appellant asserts that because the indictment lists "on or about June 2010" as to the rape and importuning charges there needed to be an inquiry and determination as to whether they arose from the same conduct. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. Conversely, the state contends that appellant has failed to meet his burden to show that the offenses were allied pursuant to R.C. 2941.25.

{¶ 24} Upon review, we agree with the state's argument that the mere fact that the indictment alleged that both offenses occurred in June 2010, is not sufficient to establish that they were allied, or committed with the same conduct. *See State v. Goshade*, 1st

Dist. Hamilton No. C-120586, 2013-Ohio-4457, ¶ 22; *State v. Hudson*, 2d Dist. Clark No. 2011 CA 100, 2013-Ohio-2351, ¶ 52; *State v. Dunkle*, 6th Dist. Williams No. WM-08-024, 2010-Ohio-938, ¶ 8. Thus, appellant's seventh assignment of error is not well-taken.

{¶ 25} On consideration whereof, we find that appellant was prejudiced and we reverse the portion of the trial court's judgment imposing consecutive sentences and we remand the matter to the trial court only to the extent necessary to consider whether consecutive sentences are appropriate under R.C. 2929.14(C), and, if so, to make the proper findings on the record. The remainder of the trial court's judgment is affirmed. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

Judgment affirmed, in part
and reversed, in part.

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

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P. J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE