[Cite as *State v. Minton*, 2014-Ohio-2218.]

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

State of Ohio

Appellee

v.

Billy Minton

Appellant

Court of Appeals Nos. OT-13-030
OT-13-031

Trial Court Nos. 13 CR 113
13 CR 059

DECISION AND JUDGMENT

Decided: May 23, 2014

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

Amanda A. Krzystan, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals his conviction on two counts of drug trafficking and a misdemeanor attempted possession of drugs entered on guilty pleas in the Ottawa County Court of Common Pleas. For the reasons that follow, we affirm.

{¶ 2} On three successive days in December 2012, appellant, Billy Minton, sold Oxycodone tablets to a police confidential informant. On April 11, 2013, the Ottawa County Grand Jury handed down a three count indictment charging appellant with two counts of drug trafficking, felonies of the fourth degree, and one count of drug trafficking in the vicinity of a juvenile, a third degree felony. Prior to the entry of that indictment, on March 30, 2013, appellant overdosed on heroin, resulting in a second indictment for heroin possession, a fifth degree felony.

{¶ 3} On April 13, 2013, appellant was arrested on the original indictment and entered a plea of not guilty. He was later arraigned on the second indictment to which he also pled not guilty.

{¶ 4} Following discussions with the state, appellant entered into a written plea agreement in which he agreed to amend his plea to guilty to two counts of fourth degree drug trafficking and an amended charge of attempted possession of heroin, a first degree misdemeanor. The state agreed to dismiss the third degree trafficking count.

{¶ 5} The trial court conducted a plea hearing pursuant to Crim.R. 11, following which the court accepted appellant's guilty plea to the trafficking offenses, found him guilty and ordered a presentence investigation. The court combined a second plea hearing on the misdemeanor with a sentencing hearing. At the second hearing, the court accepted appellant's guilty plea to the misdemeanor and found appellant guilty.

{¶ 6} The court then sentenced appellant to 16-month terms of incarceration for each of the two felony counts and a six-month term for the misdemeanor. The court

ordered the felony sentences to be served consecutively. The misdemeanor sentence was ordered to be served concurrent to the felony sentences. The court also suspended appellant's operator's license for four years. The court designated the sentence a risk reduction sentence pursuant to R.C. 2929.143.

{¶ 7} From this judgment of conviction, appellant now brings the appeal. Appellant sets forth three assignments of error:

> I. The appellant's plea of guilty must be vacated as it was not entered with full advice of the consequences as required by Crim.R.11 and the Due Process Clause of the Constitution of the United States.
>
> II. The appellant was not afforded effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.
>
> III. The appellant's sentence should be vacated because the trial court failed to comply with R.C. 2929.11 and R.C. 2929.12.

I. Crim.R. 11

{¶ 8} In his first assignment of error, appellant complains that his plea was not knowingly and intelligently entered because the trial court did not orally advise him during the plea colloquy that it could suspend his operator's license as part of his sentence. The state responds that appellant was advised of the potential suspension of his operator's license in the written plea agreement that he signed and ratified in open court.

This, the state insists, constitutes substantial compliance with Crim.R. 11 and should not form the grounds for reversal.

{¶ 9} Crim.R. 11 governs the manner in which a court will accept a plea. Crim.R. 11(C)(2) requires, prior to accepting a plea of guilty or no contest, the court personally address the defendant, determine that the plea is voluntary and that the defendant understands the charges and potential penalties. The court must also advise the defendant of the constitutional rights he is waiving by entering such a plea. Crim.R. 11(C)(2)(a) and (c). Additionally, the court must inform the defendant of, and determine that the defendant understands, the effect of the guilty or no contest plea. Crim.R. 11(C)(2)(b).

{¶ 10} Strict compliance with the rule is required with respect to a defendant's waiver of constitutional rights. *State v. Gibson*, 8th Dist. Cuyahoga No. 93878, 2010-Ohio-3509, ¶ 13, citing *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). When the rights involved are not constitutional, however, substantial compliance with the rule is sufficient. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). "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." *Id.*

{¶ 11} Informing a defendant in a written plea agreement of an operator's license suspension as the result of a guilty plea constitutes substantial compliance with Crim.R. 11, irrespective of whether an oral notice is also given. *State v. Green*, 10th Dist. Franklin No. 10AP-934, 2011-Ohio-6451, ¶ 11; *State v. Schultz*, 5th Dist. Fairfield No. 12 CA 24, 2013-Ohio-2218, ¶ 50-51. *Compare State v. Waltz*, 2d Dist. Montgomery No.

23783, 2012-Ohio-4627, ¶ 14 (Failed to inform of possible license suspension orally or in the plea agreement). Appellant was provided with written notice of the potential license suspension. This constitutes substantial compliance with the rule. Accordingly, appellant's first assignment of error is not well-taken.

II. Ineffective Assistance of Counsel

{¶ 12} Appellant maintains in his second assignment of error that he was denied his right to effective assistance of counsel because his trial counsel failed to inform him that an operator's license suspension was a consequence of a guilty plea and because counsel, at the last minute, advised him to accept the plea agreement offer.

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction * * * has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. * * * Unless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Accord State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

{¶ 13} Scrutiny of counsel's performance must be deferential. *Strickland* at 689. In Ohio, a properly licensed attorney is presumed competent and the burden of proving ineffectiveness is the defendant's. *Smith, supra*. Counsel's actions which "might be considered sound trial strategy," are presumed effective. *Strickland* at 687. "Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance of counsel." *State v. Stevenson*, 5th Dist. Stark No. 2005-CA-00011, 2005-Ohio-5216, ¶ 43. "Prejudice" exists only when the lawyer's performance renders the result of the trial unreliable or the proceeding unfair. *Id*. Appellant must show that there exists a reasonable probability that a different verdict would have been returned but for counsel's deficiencies. *Strickland* at 694. *See also State v. Lott*, 51 Ohio St.3d 160, 555 N.E.2d 293 (1990), for Ohio's adoption of the *Strickland* test.

{¶ 14} When a defendant pleads guilty, he or she waives all appealable errors which occurred prior to the plea, unless such errors precluded the defendant from entering a knowing and voluntary plea. *State v. McClusky*, 6th Dist. Wood No. WD-03-018, 2004-Ohio-85, ¶ 20, citing *State v. Barnett*, 73 Ohio App.3d 244, 248, 596 N.E.2d 1101 (2d Dist.1991). A guilty plea waives even the right to claim that the defendant was prejudiced by ineffective assistance of counsel, except to the extent that the defects complained of caused the plea to be less than knowing and voluntary. *Id.; United States v. Broce*, 488 U.S. 563, 574, 109 S.Ct. 757, 102 L.Ed.2d 927 (1988).

{¶ 15} In this matter, as we have already seen, appellant was advised of a potential operator's license suspension, so his assertion of counsel deficiency for failing to inform

him of this consequence is meritless. With respect to trial counsel's advice to take the plea, the record contains numerous assurances by appellant that the decision to change his plea was his. Neither at the plea hearings, nor here, does appellant assert that the plea was coerced or somehow fraudulently obtained. Consequently, appellant directs our attention to no deficiency in trial counsel's performance which caused his plea to be less than knowingly and intelligently entered. Appellant's second assignment of error is not well-taken.

III. Sentencing

{¶ 16} In his remaining assignment of error, appellant maintains that the trial court abused its discretion in determining his sentence. According to appellant, the trial court failed to properly consider the statutory sentencing factors articulated in R.C. 2929.11 and 2929.12. The result, appellant suggests, is an excessive sentence.

{¶ 17} Both appellant and the state cite *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, for the standard of review for criminal sentencing. This standard has been superseded by statute. *State v. Tammerine*, 6th Dist. Lucas No. L-13-1081, 2014-Ohio-425, ¶ 11.

{¶ 18} An appeals court hearing a statutory felony sentence appeal must review the record, including the findings underlying the sentence. The appellate court may increase, reduce, modify, or vacate and remand a disputed sentence if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under [R.C. 2929.13(B) or (D)], [R.C. 2929.14(B)(2)(e) or (C)(4)], or [R.C. 2929.20 (I)], whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law. R.C. 2953.08(G)(2).

{¶ 19} The standard of review for an appeal of a sentence is not abuse of discretion. *Tammerine* at ¶ 11. If a sentencing court is statutorily required to make findings or state findings on the record concerning the imposition of a sentence and fails to do so, the appeals court is directed to remand the case and instruct the sentencing court to state, on the record, the required findings. R.C. 2953.08(G)(1).

{¶ 20} A conviction of a fourth or fifth degree felony carries a presumption that the offender receive community control unless the offender has previously been convicted of a felony. The court has the discretion to impose imprisonment if the felony four or five offender has previously served a prison term. R.C. 2929.13(B)(1)(a)(i) and (b)(x). The court found appellant not amenable to community control. This finding is supported by the record.

{¶ 21} Consecutive sentences may be imposed if the sentencing court finds, inter alia, the offender has committed one or more of the multiple offenses while awaiting trial or sentencing, R.C. 2929.14(C)(4)(b), or consecutive sentences are necessary to protect the public from future crime by the offender. R.C. 2929.14(C)(4)(c). The trial court made both findings. The trial court's findings are supported by the record.

{¶ 22} R.C. 2929.20(I) is inapplicable in this case.

{¶ 23} R.C. 2929.14(A)(4) provides that the range of appropriate prison sentences for a fourth degree felony are "six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months." The 16-month sentences imposed upon appellant are consequently not contrary to law. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 24} On consideration, the judgment of the Ottawa County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE