[Cite as *State v. Tunison*, 2014-Ohio-2692.]

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

State of Ohio — Court of Appeals No. WD-13-046

Appellee — Trial Court No. 2012CR0649

v.

Paul B. Tunison — **DECISION AND JUDGMENT**

Appellant — Decided: June 20, 2014

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Heather Baker and Jacqueline M. Kirian, Assistant Prosecuting Attorneys, for appellee.

Andrew R. Schuman, for appellant.

* * * * *

JENSEN, J.

Introduction

{¶ 1} Appellant pled guilty to attempting to engage in a pattern of corrupt activity. The trial court sentenced appellant to a prison term of 24 months. On appeal, appellant

alleges that the trial court failed to comply with the procedural safeguards set forth in R.C. 2947.23, Crim.R. 11(C)(2)(b), and 32. For the following reasons, we affirm appellant's conviction.

Statement of Facts and Procedural History

{¶ 2} On November 21, 2012, a grand jury seated in Wood County, Ohio, indicted appellant Paul B. Tunison on one count of "engaging in a pattern of corrupt activity" in violation of R.C. 2923.32(A)(1) and 2923.32(B)(1), a second degree felony. The indictment identifies thirteen incidents of theft perpetrated by appellant and four co-conspirators. Appellant participated in various methods of thievery including "no-receipt returns," "past all points of purchase" and stealing checks. Appellant targeted large retailers throughout Northwest Ohio.

{¶ 3} Appellant was arrested on December 20, 2012. On March 11, 2013, appellant pled guilty to an amended charge of "attempted engaging in a pattern of corrupt activity" in violation of R.C. 2923.02 and 2923.32(A)(1), a felony in the third degree. The Wood County Court of Common Pleas found appellant guilty and referred the matter to the probation department for preparation of a presentence investigation report. The trial court set a sentencing date of May 3, 2013. At the request of both parties, the matter was continued until June 14, 2013. Appellant requested a second continuance, until June 28, 2013, which was granted.

{¶ 4} On June 28, 2013, the trial court sentenced appellant to a term of incarceration of 24 months. It also ordered appellant to pay restitution, jointly and

severally, with his co-defendants, in the amount of $14,362.37 to the various retailers from whom he had stolen.

{¶ 5} On July 8, 2013, appellant filed a pro se notice of appeal. On July 31, 2013, this court assigned an attorney to represent appellant. Appellant sets forth three assignments of error:

1. The trial court failed to comply with Ohio Revised Code § 2947.23 at the sentencing hearing. Transcript ("T2") of sentencing hearing, June 28, 2013, and Nunc Pro Tunc Judgment Entry on Sentencing F3, July 11, 2013.

2. The trial court failed to comply with Criminal Rule 11 at the plea hearing. Transcript volume 1 ("T1") of plea hearing, March 11, 2013 and Entry of Plea of Guilty to Amended Indictment, March 11, 2013.

3. The trial court failed to comply with Criminal Rule 32 at the sentencing hearing. Transcript ("T2") of sentencing hearing, June 28, 2013, and Nunc Pro Tunc Judgment Entry on Sentencing F3, July 11, 2013.

Law and Analysis

{¶ 6} In the July 11, 2013 nunc pro tunc judgment entry, the trial court stated, "[Appellant] is ordered to pay the costs of prosecution with judgment and execution awarded. [Appellant] is notified that if [sic] failure to pay court costs may result in the imposition of community service in lieu of payment of said costs."

{¶ 7} Appellant characterizes the trial court's statement as an "offer" which it was unauthorized to make. Appellant argues, "the court was without authority to inform the [appellant that] he could complete community service work in lieu of payment of costs."

{¶ 8} We disagree with appellant's characterization that any such "offer" was made. R.C. 2947.23(A)(1)(a) requires a court to include the costs of prosecution in the sentence. The statute also requires that "[i]f the judge * * * imposes a community control sanction or other nonresidential sanction, the judge * * * shall notify the defendant * * * [that if] the defendant fails to pay that judgment * * * the court may order the defendant to perform community service * * *." Thus, the statute does not provide a choice of paying costs or performing community service. Rather, it requires notification that a consequence for failing to pay costs may include the imposition of community service. Moreover, we have reviewed the file. The trial court did not offer appellant the choice of one or the other.

{¶ 9} We also note that R.C. 2947.23(A)(1) was amended on March 22, 2013, such that it no longer requires the community service notification to those offenders who are sentenced to prison. 2012 Am.Sub.H.B. No. 247. Thus, because appellant was sentenced to prison in this case, the trial court was not required to notify him that community service could be ordered if he failed to pay court costs. *State v. Lane*, 12th Dist. Butler No. CA2013-05-074, 2014-Ohio-562, ¶ 37, and *State v. Bailey*, 1st Dist. Hamilton Nos. C-130245 and C-130246, 2013-Ohio-5512, ¶ 6. That the court did so, however, does not amount to error. That is, we find that the trial court did not err when it

advised appellant in the judgment entry that his failure to pay court costs could result in the imposition of community service. Appellant's first assignment of error is not well-taken.

{¶ 10} In his second assignment of error, appellant claims that the trial court failed to comply with Crim.R. 11(C)(2)(b). The rule provides that, prior to accepting a guilty plea, a trial court shall inform the defendant "that the court, upon acceptance of the plea, may proceed with judgment and sentence."

{¶ 11} Appellant complains that the court "did not advise [him] that he would immediately be found guilty and that the court could proceed with sentencing forthwith, without the detriment of a pre-sentence report. Had the court done so, [appellant] might well have moved to proceed directly to sentencing * * *."

{¶ 12} The underlying purpose of Crim.R. 11 is to insure that certain information is conveyed to the defendant which would allow him to make a voluntary and intelligent decision regarding whether to plead guilty. *State v. Ballard*, 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981). In determining whether the trial court has satisfied its duties under Crim.R. 11 in taking a plea, reviewing courts have distinguished constitutional and nonconstitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 18. With respect to constitutional rights, a trial court must strictly comply with the dictates of Crim.R. 11(C). *State v. Colbert*, 71 Ohio App.3d 734, 737, 595 N.E.2d 401 (11th Dist.1991). For nonconstitutional rights, the trial court must substantially comply, provided no prejudicial effect occurs before a guilty plea is

accepted. *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977). "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. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶ 13} The mandate set forth in Crim.R. 11(C)(2)(b) does not involve a constitutional right and, therefore, substantial compliance with the rule is required. *State v. Mendez-Lopez*, 6th Dist. Huron No. H-06-034, 2007-Ohio-5745, ¶ 13. Additionally, a defendant who claims that his plea was not knowingly, intelligently, or voluntarily made must show a prejudicial effect. *Nero*, at 108, citing *Stewart*, at 93.

{¶ 14} Prior to accepting appellant's guilty plea, the trial court did not inform him that it could proceed with judgment and sentence upon acceptance of the plea. However, the record reflects that the trial court did not, in fact, proceed directly to sentencing but rather referred the matter for a presentence investigation.

{¶ 15} "Where a trial court does not proceed immediately to sentencing upon accepting a guilty plea, the defendant is not prejudiced by the court's failure to warn that it *could* have done so." (Emphasis in original.) *State v. Boyd*, 8th Dist. Cuyahoga No. 98342, 2013-Ohio-30, ¶ 13, citing *State v. Johnson*, 11th Dist. No. 2002-L-024, 2004-Ohio-331, ¶ 20. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 16} Finally, appellant claims that the trial court violated Crim.R. 32 during the sentencing phase. Crim.R. 32(A) provides that a sentence "shall be imposed without

unnecessary delay." Appellant claims that there was no reason for a presentence investigation and that the order for such an investigation "caused unnecessary delay."

{¶ 17} "The decision to order a presentence report lies within the sound discretion of the trial court." *State v. Adams*, 37 Ohio St.3d 295, 525 N.E.2d 1261 (1988), paragraph four of the syllabus; *see also* R.C. 2947.06(A)(1). We have reviewed the file and see no evidence that the trial court abused its discretion in ordering the presentence investigation. Moreover, we note that the sentencing hearing was twice postponed at the request of appellant, causing a 56 day delay between the originally scheduled sentencing date and the actual sentencing date. In sum, we see no evidence of "unnecessary delay" by the trial court.

{¶ 18} Finally, appellant argues that the court "gave short shrift" to Crim.R. 32(B)(3). The rule provides that, after a sentence has been imposed, the court shall advise a defendant of all of the following:

> (a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;
>
> (b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;
>
> (c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;
>
> (d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf.

{¶ 19} Appellant complains that the court neglected to advise him of the contents of Crim.R. 32(B)(3)(a), (c), and (d). There is no question, however, that appellant filed his pro se notice of appeal in a timely fashion. Because appellant's appeal was timely filed, any error by the trial court was harmless. *State v. Thomas*, 6th Dist. Wood No. WD-10-022, 2010-Ohio-6522, ¶ 17, citing *State v. Gagnon*, 6th Dist. Lucas No. L-08-1235, 2009-Ohio-5185, ¶ 32. Finding no prejudice to appellant, his third assignment of error is not well-taken.

{¶ 20} The judgment of the Wood County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant 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

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE