

[Cite as *State v. McFarland*, 2015-Ohio-4839.]

STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 15 MA 17
V.	)	
	)	OPINION
BRET McFARLAND,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 12-CR-1306
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JUDGMENT:	Affirmed. Remanded in part.
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APPEARANCES:	
For Plaintiff-Appellee	Paul Gains Prosecutor Ralph Rivera Assistant Prosecutor 21 West Boardman Street, 6 <sup>th</sup> Floor Youngstown, Ohio 44503-1426

For Defendant-Appellant	Attorney Timothy J. Cunning 940 Windham Court, Suite 4 Boardman, Ohio 44512
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JUDGES:

Hon. Gene Donofrio  
Hon. Cheryl L. Waite  
Hon. Carol Ann Robb

Dated: November 19, 2015

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DONOFRIO, P.J.

{¶1} Defendant-appellant, Brett McFarland, appeals from a Mahoning County Common Pleas Court judgment sentencing him to ten and a half years in prison following his guilty plea to one count of breaking and entering and 33 counts of grand theft.

{¶2} A Mahoning County Grand Jury indicted appellant on one count of breaking and entering, a fifth-degree felony in violation of R.C. 2911.13(A)(C), and 33 counts of grand theft, first-degree felonies in violation of R.C. 2913.02(A)(1)(B)(4). The grand theft counts were first-degree felonies because the stolen items were firearms and they were stolen from a federally licensed firearms dealer.

{¶3} Appellant initially entered a not guilty plea. But later, pursuant to a plea agreement with plaintiff-appellee, the State of Ohio, appellant changed his plea to guilty to all counts. The trial court held a change of plea hearing, accepted appellant's guilty plea, and set the matter for sentencing.

{¶4} At the sentencing hearing, the trial court sentenced appellant to six months in prison on the breaking and entering count and ten years on each of the 33 grand theft counts. It ordered the 33 ten-year sentences to be served concurrent to one another but consecutive to the six-month breaking and entering sentence for a total prison sentence of ten and a half years.

{¶5} This court granted appellant's motion for leave to file a delayed notice of appeal, which he filed on February 11, 2015. Appellant now raises two assignments of error.

{¶6} Appellant's first assignment of error states:

THE TRIAL COURT DID NOT COMPLY WITH CRIM.R.  
11(C)(2)(a).

{¶7} Appellant asserts that the trial court failed to comply with Crim.R. 11(C)(2)(a) because it failed to inform him that his sentence on the grand theft counts contained mandatory prison time. Therefore, appellant claims his plea was not made knowingly, intelligently, and voluntarily.

{¶8} Pursuant to Crim.R. 11(C)(2), the trial court must follow a certain procedure for accepting guilty pleas in felony cases. Before the court can accept a guilty plea to a felony charge, it must conduct a colloquy with the defendant to determine that he understands the plea he is entering and the rights he is voluntarily waiving. Crim.R. 11(C)(2). If the plea is not knowing and voluntary, it has been obtained in violation of due process and is void. *State v. Martinez*, 7th Dist. No. 03-MA-196, 2004-Ohio-6806, ¶11, citing *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709 (1969).

{¶9} A trial court must strictly comply with Crim.R. 11(C)(2) pertaining to the waiver of federal constitutional rights. *Martinez*, 7th Dist. No. 03-MA-196, ¶12. These rights include the right against self-incrimination, the right to a jury trial, the right to confront one's accusers, the right to compel witnesses to testify by compulsory process, and the right to proof of guilt beyond a reasonable doubt. Crim.R. 11(C)(2)(c).

{¶10} In this case, the trial court strictly complied with Crim.R. 11(C)(2) in informing appellant of the constitutional rights he was waiving by entering a guilty plea. The court specifically informed appellant that he was waiving the right to a jury trial, the right to be proven guilty by proof beyond a reasonable doubt, the right to confront the witnesses against him, the right to compel witnesses on his behalf, and the right to remain silent. (Plea Tr. 4-6). Appellant stated that he understood all of these rights. (Plea Tr. 4-6).

{¶11} The trial court need only substantially comply with Crim.R. 11(C)(2) pertaining to non-constitutional rights such as informing the defendant of “the nature of the charges with an understanding of the law in relation to the facts, the maximum penalty, and that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence.” *Martinez*, supra, ¶12, citing Crim.R. 11(C)(2)(a)(b). If applicable, the court is also to inform the defendant that he or she “is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.” Crim.R. 11(C)(2)(a).

**{¶12}** Appellant's only allegation here is that the trial court failed to advise him at the sentencing hearing that his prison time was mandatory. Crim.R. 11(C)(2)(a) instructs that the court inform the defendant that, if applicable, he is not eligible for probation or community control.

**{¶13}** On this point, the following colloquy occurred:

THE COURT: Okay. I am obligated to tell you that, of course, you are not eligible for community control.

MR. ZENA [appellant's counsel]: We understand that, Your Honor, and we waive the Court's duty to give any admonitions. We understand any sentence on the grand theft would be a mandatory sentence to whatever year you would pick.

(Plea Tr. 9).

**{¶14}** This exchange demonstrates that the trial court substantially complied with its duty to inform appellant that he was not eligible for probation or community control. The court clearly informed appellant that he was not eligible for community control. Appellant's counsel then stated that appellant understood that his sentence on the grand theft counts would be a mandatory sentence. There is no indication that appellant did not understand this information. Thus, the trial court did not err in accepting appellant's guilty plea.

**{¶15}** Accordingly, appellant's first assignment of error is without merit.

**{¶16}** Appellant's second assignment of error states:

THE SENTENCING ENTRY DOES NOT COMPLY WITH R.C.  
2929.19(B)(2)(b).

**{¶17}** Here appellant contends the trial court failed to state in the sentencing entry that portions of his prison term were mandatory. He claims this is reversible error. Appellant points out that R.C. 2929.19(B)(2) states that the court "shall" include in the sentencing entry whether a prison term is mandatory.

**{¶18}** Pursuant to R.C. 2929.19(B)(2)(b), the sentencing judgment entry shall include, among other things, “the sentence or sentences imposed and whether the sentence or sentences contain mandatory prison terms.”

**{¶19}** But according to R.C. 2929.19(B)(7):

*The failure of the court to notify the offender that a prison term is a mandatory prison term pursuant to division (B)(2)(a) of this section or to include in the sentencing entry any information required by division (B)(2)(b) of this section does not affect the validity of the imposed sentence or sentences. If the sentencing court notifies the offender at the sentencing hearing that a prison term is mandatory but the sentencing entry does not specify that the prison term is mandatory, the court may complete a corrected journal entry and send copies of the corrected entry to the offender and the department of rehabilitation and correction, or, at the request of the state, the court shall complete a corrected journal entry and send copies of the corrected entry to the offender and department of rehabilitation and correction.*

**{¶20}** Reading these two statutory sections together, it is clear that while the court is required to state in the sentencing judgment entry if a sentence is mandatory, its failure to do so is not reversible error. The proper remedy is to issue a nunc pro tunc sentencing entry adding a statement that the prison term is mandatory. R.C. 2929.19(B)(7) provides that even if a court fails to include the required mandatory sentence language in the original sentencing entry, the sentence is still valid.

**{¶21}** In this case, the trial court did not state in the sentencing judgment entry that appellant’s ten-year concurrent sentences on the grand theft counts were mandatory as required by R.C. 2929.19(B)(2)(b). It did, however, inform appellant at his sentencing hearing that these ten-year sentences were “definite.” (Sentencing Tr. 18). Thus, the court made appellant aware at the sentencing hearing that his sentences for grand theft were mandatory.

{¶22} The Ninth District faced a similar argument in *State v. Benitez-Maranon*, 9th Dist. Nos. 26461, 26659, 2014-Ohio-3575. In *Benitez-Maranon*, the trial court failed to inform the defendant at the sentencing hearing that his sentence was mandatory as is required by R.C. 2929.19(B)(2)(a). The defendant appealed asserting, in part, that his sentence must be vacated because the court failed to tell him that his sentence was mandatory. *Id.* at ¶13. The appellate court relied on R.C. 2929.19(B)(7) and found that pursuant to that section, the remedy for a failure to comply with R.C. 2929.19(B)(2)(a), was to require the trial court to give the notification. *Id.* at ¶15. The court found that the sentence would not be vacated. *Id.* Instead, the proper remedy was to remand the matter to the trial court to provide the notification set out in R.C. 2929.19(B)(2)(a). *Id.*

{¶23} In *State v. Ware*, 141 Ohio St.3d 160, 2014-Ohio-5201, 22 N.E.3d 1082, ¶10, the Ohio Supreme Court was faced with the certified question: “When the imposition of a mandatory prison term is statutorily-mandated for a specific felony offense, is the trial court permitted to impose a total prison term within the maximum allowed, only a portion of which is mandatory under the statute?” In analyzing this issue, the court commented on R.C. 2929.19(B)(7)’s requirement that the court inform the offender that his sentence is mandatory in the sentencing judgment entry:

It is also irrelevant that the original sentencing entry did not refer to the four-year term as “mandatory.” The trial court used the term “mandatory” in its subsequent nunc pro tunc entry, and even if it had not, Ware's prison term still would have been mandatory. R.C. 2929.19(B)(7) says that “[t]he failure of the court to notify the offender that a prison term is a mandatory prison term \* \* \* or to include [that fact] in the sentencing entry \* \* \* does not affect the validity of the imposed sentence or sentences.”

*Id.* at ¶19.

{¶24} While the *Ware* Court did not address the same issue we are faced

with, the Court's comment suggests that the proper remedy in our case is a nunc pro tunc sentencing entry.

{¶25} Pursuant to R.C. 2929.19(B)(7), *Benitez-Maranon*, and *Ware*, the proper remedy in this case is to remand this matter to the trial court so that it can issue a nunc pro tunc sentencing entry stating that appellant's grand theft sentences are mandatory.

{¶26} Accordingly, appellant's second assignment of error has merit only to the extent that the matter will be remanded for a nunc pro tunc sentencing entry.

{¶27} For the reasons stated above, the trial court's judgment is hereby affirmed. The matter is remanded solely for the trial court to issue a nunc pro tunc sentencing entry providing that appellant's sentences for grand theft are mandatory.

Waite, J., concurs.

Robb, J., concurs.