

[Cite as *State v. McGinnis*, 2009-Ohio-6102.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92244

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARYL MCGINNIS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART AND
REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512037

BEFORE: Dyke, P.J., Celebrezze, J., and Jones, J.
RELEASED: November 19, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this courts announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, P.J.:

{¶ 1} Defendant-appellant, Daryl McGinnis (“appellant”), appeals his guilty plea for one count of drug trafficking. For the reasons that follow, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

{¶ 2} On August 20, 2008, appellant pled guilty to attempted drug trafficking in violation of R.C. 2923.02/2925.03(A)(2), a felony of the third degree, as charged in Count 1 of the indictment. Additionally, appellant pled guilty to drug trafficking in violation of R.C. 2925.03(A)(1), a felony of the fourth degree, as charged in Count 8 of the indictment. Each count also included a forfeiture specification.

{¶ 3} During the plea hearing, the trial court addressed appellant personally and informed him that, with regards to Count 8, he would be subject to six to 18 months imprisonment and a \$5,000 potential fine, as well as three years postrelease control. Additionally, the court notified appellant that he was required to serve one to five years in prison for Count 1, five years postrelease control, and pay up to a \$15,000 fine. The trial court, however, failed to tell appellant that a mandatory fine of \$5,000 would be imposed for Count 1 of the indictment.

{¶ 4} Nevertheless, the trial court determined, pursuant to Crim.R. 11(C)(2)(b), that appellant understood the nature of the charges and penalties and that he entered the pleas knowingly, intelligently and voluntarily. As a result, the court accepted appellant’s guilty pleas to both Counts 1 and 8.

{¶ 5} On September 19, 2008, the trial court sentenced appellant to five

years for Count 1 and 12 months for Count 8. Additionally, the court also imposed five years of postrelease control for Count 1 and three years for Count 8.

The court ordered that the sentences for Counts 1 and 8 be served concurrently to each other, but that the sentence for Count 8 be served consecutively to the sentences imposed in two other criminal cases. Finally, as to Count 1, the court also imposed the mandatory fine of \$5,000.

{¶ 6} Appellant now appeals and presents two assignments of error for our review. His first assignment states:

{¶ 7} “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.”

{¶ 8} Within this assignment, appellant argues that he did not knowingly, intelligently, and voluntarily enter his plea of guilty as to Count 1. He maintains that the trial court failed to advise him pursuant to Crim.R. 11 of the mandatory fine of \$5,000 prior to sentencing. The state concedes this assertion. Finding merit to this contention, we reverse appellant’s conviction as to Count 1 only and remand the matter to the trial court for proceedings consistent with this opinion.

{¶ 9} Pursuant to Crim.R. 11(C)(2) a trial court “shall not accept a plea of guilty * * * without first addressing the defendant personally and * * * determining that the defendant is making the plea voluntarily, with understanding * * * of the maximum penalty involved * * *.” Inasmuch as it is a non-constitutional requirement, a reviewing court must determine whether there was substantial

compliance. *State v. Nero* (1990), 56 Ohio St.3d 106, 107-108, 564 N.E.2d 474.

“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.” *Nero*, supra at 108, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 92-93, 364 N.E.2d 1163.

{¶ 10} Here, the trial court did not substantially comply with the requirements of Crim.R. 11(C)(2) as it failed to inform appellant of the mandatory penalty involved prior to accepting his guilty plea to Count 1. The trial court in this case merely notified appellant that he was subject to a fine of up to \$15,000 for Count 1. It never informed appellant that, by pleading guilty to Count 1, he was responsible for the mandatory fine of \$5,000. Accordingly, we find that appellant was unaware of the full extent of the charges and penalties associated with Count 1, and thus, did not enter his guilty plea to this charge knowingly, intelligently, and voluntarily. See, also, *State v. West* (Mar. 25, 1993), Cuyahoga App. Nos. 63497 and 63498 (finding that the trial court failed to substantially comply with Crim.R. 11(C)(2) when it failed to notify the defendant of the mandatory \$5,000 fine until after acceptance of the guilty plea).

{¶ 11} Appellant’s conviction as to Count 1 is reversed. His conviction and sentence for Count 8 remains. Furthermore, because our ruling with regard to appellant’s first assignment of error is dispositive, we decline to address the

merits of appellant's second assignment of error.¹ Accordingly, the matter is remanded to the trial court for proceedings consistent with this opinion.

Judgment affirmed in part, reversed in part, and remanded.

It is ordered that appellee and appellant split the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed in part, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, J., CONCUR

¹Appellant's second assignment of error states:

"The appellant was not afforded effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United State[s]."