

[Cite as *State v. Dunn*, 2010-Ohio-5000.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93640

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KEVIN D. DUNN

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521605

BEFORE: Cooney, J., Gallagher, A.J., and McMonagle, J.

RELEASED AND JOURNALIZED: October 14, 2010

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Kevin Dunn (“Dunn”), appeals his convictions and consecutive sentences for two counts of obstructing official business and one count of misdemeanor domestic violence. We find no merit to the appeal and affirm.

{¶ 2} In March 2009, Dunn was indicted on two counts of felonious assault and one count of misdemeanor domestic violence. The charges arose out of a domestic dispute wherein Dunn called EMS to his home because his girlfriend,

Regina Reed ("Reed") was experiencing difficulty breathing. According to the presentence investigation report ("PSI"), Dunn had physically assaulted Reed. After EMS arrived, Dunn continued to argue with Reed and when EMS personnel asked him to leave so they could take care of the patient, Dunn became hostile to the EMS crew and threatened to release a pit bull to attack them. The EMS crew fled the house when they heard the dog approaching and escaped without any injury.

{¶ 3} In May 2009, Dunn pled guilty to two amended counts of obstructing official business in violation of R.C. 2921.31(A), felonies of the fifth degree, and the count of misdemeanor domestic violence as charged. After a presentence investigation, the court sentenced Dunn to maximum prison terms of 12 months on each of the obstruction convictions, to be served consecutively, for a total two-year prison term. The court also assessed a \$250 fine on each of the felonies and \$25 for the misdemeanor. Finally, the court imposed postrelease control for a period of three years. Dunn now appeals, claiming his plea was not knowingly and voluntarily made and his sentence is contrary to law.

Voluntariness of the Plea

{¶ 4} In the first assignment of error, Dunn argues the trial court failed to comply with the requirements of Crim.R. 11 and that, as a result, his plea was not made knowingly, voluntarily, and intelligently. We disagree.

{¶ 5} Under Crim.R. 11(C), prior to accepting a guilty plea, a court must conduct an oral dialogue with the defendant to determine whether the plea is voluntary and that the defendant understands the nature of the charges and the maximum penalty involved. Crim.R. 11(C) also requires the court to personally inform the defendant of the constitutional rights he is waiving by entering a guilty plea.

{¶ 6} A trial court must strictly comply with the Crim.R. 11(C)(2) requirements regarding the waiver of constitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 876 N.E.2d 621, ¶18. With respect to the other requirements of Crim.R. 11(C)(2) regarding nonconstitutional rights, “substantial compliance” is sufficient. *Id.* at ¶14, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163.

{¶ 7} “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* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. A defendant alleging that his plea was not knowingly, intelligently, and voluntarily made must show that his plea would not have otherwise been made in order to have the plea vacated. *Id.* The reviewing court should focus not on whether the trial court recited the words of Crim.R. 11(C), but rather on whether the record shows that “the trial court explained or referred to the right in

a manner reasonably intelligible to that defendant.” *State v. Ballard* (1981), 66 Ohio St.2d 473, 475, 423 N.E.2d 115.

{¶ 8} Dunn contends that his plea was not knowingly, voluntarily, or intelligently made because the trial court failed to accurately describe the charges and the maximum penalties that could be imposed. Dunn claims the trial court never informed him that he could serve up to twelve months in prison on each of the felonies or that he would be subject to postrelease control. The right to be informed of the potential penalties prior to entering a plea is a nonconstitutional right. Therefore, we review the plea proceedings to determine if there was substantial compliance with the rule. *State v. Johnson*, Cuyahoga App. No. 91567, 2009-Ohio-3088, ¶7, citing *State v. Esner* Cuyahoga App. No. 90740, 2008-Ohio-6654.

{¶ 9} The record reflects that Dunn understood the charges to which he pled guilty. The court began the hearing by identifying the original charges and the prosecutor explained the amended charges. The court asked Dunn general questions regarding his level of education, whether he was under the influence of drugs or alcohol, whether he understood the proceedings, and whether he was satisfied with his legal counsel. Dunn responded affirmatively that he understood the proceedings and that he was satisfied with counsel. He also indicated that he understood the constitutional rights he was waiving by pleading guilty.

{¶ 10} With respect to Dunn's potential sentence, the following exchange took place:

"THE COURT: Do you understand the offense to which you are pleading guilty, that being two felonies of the fifth degree?

"Each is possibly punishable from six to twelve months in monthly increments. Each carry with it a maximum discretionary fine of \$2,500.00.

"THE DEFENDANT: Yes, ma'am.

"THE COURT: Sir, if you are sentenced to prison on this case, and upon your release from prison, the Ohio Parole Board can impose a period of postrelease control not to exceed three years.

"They may impose conditions and sanctions.

"Should you decide to commit an act that causes you to be found in violation of your postrelease control, you can be remanded to an Ohio penal institution for an additional 50 percent of your original sentence. Do you understand that?

THE DEFENDANT: Yes, your Honor."

{¶ 11} Thus the record reflects that the court informed Dunn that he could be sentenced to prison. The court also informed him that each offense "is possibly punishable from six to twelve months in monthly increments." Dunn contends this statement is ambiguous because the court does not expressly state that "the six to twelve months" relate to possible prison time. However, in the next sentence the court advised him that he could be sentenced to prison. Thus, taken to together, it is clear that the six to twelve months relates to possible prison time. And the advisement regarding postrelease control further

emphasizes Dunn could be remanded to prison for a violation. Therefore, we find that Dunn’s pleas were made knowingly, voluntarily, and intelligently and that the trial court substantially complied with the requirements of Crim.R. 11(C) when it accepted Dunn’s guilty pleas.

{¶ 12} Accordingly, the first assignment of error is overruled.

Maximum Consecutive Sentences

{¶ 13} In the second assignment of error, Dunn contends the trial court erred in sentencing him to maximum, consecutive sentences because the sentences are contrary to law and constitute an abuse of discretion. We disagree.

{¶ 14} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Ohio Supreme Court severed R.C. 2929.14(C) and (E), which required judicial fact-finding for an imposition of maximum and consecutive sentences, respectively, because they were unconstitutional. As a result, trial courts now “have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” *Foster* at paragraph seven of the syllabus. Further, judicial fact-finding is no longer required before the imposition of consecutive sentences. *Id.* at ¶99, 845 N.E.2d 470.

{¶ 15} In reviewing a felony sentence, we employ the two-step analysis set forth by the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶26. Following *Kalish*, appellate courts are now required to “examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law.” *Kalish* at ¶26, 896 N.E.2d 124. To that end, the trial court must consider the felony sentencing statutes R.C. 2929.11 and 2929.12, which are not fact-finding statutes, but rather “serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence.” *Kalish* at ¶17.

{¶ 16} R.C. 2929.11(A) states that:

“[A] court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.”

{¶ 17} R.C. 2929.12 sets forth a nonexhaustive list of factors that the trial court is required to consider when determining whether the defendant’s conduct is more or less serious than conduct normally constituting the offense. In addition, the trial court must consider the likelihood that the offender will commit future crimes.

{¶ 18} Dunn was sentenced to the maximum 12 months' imprisonment on each count of obstructing official business, which are fifth degree felonies, to be run consecutively for a total two-year prison term. Dunn was also fined \$25 for his domestic violence conviction. Although the court did not expressly state that it considered the purposes and principles of R.C. 2929.11 and the factors listed in R.C. 2929.12, the prison terms are within the permissible statutory range.

{¶ 19} Further, the court stated that it found Dunn's conduct to be "one of the worst forms of misbehavior" because he threatened to release a pit bull on EMS workers who were attempting to care for a victim of domestic violence. Although Dunn's trial counsel attempted to minimize the gravity of the offense by stating that the dog was in a back room and that no one was harmed, the PSI report indicated that Dunn threatened the EMS crew and intended to harm them with his dog because they had called the police to arrest him.

{¶ 20} Although none of the crew was injured, the PSI report also reflects that Dunn had an extensive criminal record including several drug and burglary convictions. Dunn also had a prior conviction for failure to license dogs that suggests he keeps dogs and is likely to commit similar offenses with dogs in the future. Therefore, although the court did not list all of its reasons, we find no abuse of discretion in imposing maximum consecutive sentences under the circumstances presented in the instant case.

{¶ 21} Accordingly, the second assignment of error is overruled.

Merger and Ineffective Assistance of Counsel

{¶ 22} In the third assignment of error, Dunn argues his convictions for two counts of obstructing official business arose out of the same conduct, committed at the same time, and therefore should have merged for purposes of sentencing. In the fourth assignment of error, he argues he was denied the effective assistance of counsel because his trial counsel did not object to the trial court's failure to merge the two felony convictions.

{¶ 23} Although Dunn did not assert this allied offense argument in the trial court, under Crim. R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Indeed, the Ohio Supreme Court has held that imposition of multiple sentences for allied offenses of similar import constitutes plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶31, citing *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶¶96-102.

{¶ 24} An attorney is presumed to be competent and to perform his or her duties ethically and competently. *State v. Lytle* (1976), 48 Ohio St.2d 391, 396, 358 N.E.2d 623. In order to establish a claim of ineffective assistance of counsel, Dunn must demonstrate that his trial counsel's performance was deficient and that, but for his deficient performance, the result would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 25} Dunn contends that had his trial counsel objected at the sentencing hearing and asserted that the two felony convictions should merge, his sentence would have been different. However, even if Dunn's trial counsel had argued that the felony convictions should merge for sentencing, it would have made no difference to his sentence. R.C. 2941.25, Ohio's multi-count statute, states:

"(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

"(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 26} This court has held that where a defendant commits the same offense against different victims during the same course of conduct, a separate animus exists for each victim, so that the defendant can properly be convicted of and sentenced on multiple counts. *State v. White*, Cuyahoga App. No. 92972, 2010-Ohio-2342, ¶55, citing *State v. Jones* (1985), 18 Ohio St.3d 116, 117, 480 N.E.2d 408.

{¶ 27} In this case, there were two victims, i.e., the two EMS crew members. Further, Dunn entered a plea agreement whereby two more serious charges of felonious assault, each naming the crew member, were reduced to two counts of obstructing official business, fifth degree felonies. Dunn pled guilty

to two charges. Because there were two victims and the two felony counts included a separate animus for each victim, the trial court was not required to merge the felonies. See *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, ¶24. Therefore, because trial counsel's failure to object made no difference to the end result, Dunn's trial counsel was not ineffective.

{¶ 28} Therefore, the third and fourth assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant 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, 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.

COLLEEN CONWAY COONEY, JUDGE

SEAN C. GALLAGHER, A.J., and
CHRISTINE T. McMONAGLE, J., CONCUR