[Cite as *State v. Gatson*, 2011-Ohio-460.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94668

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARNELL GATSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506508

BEFORE: Celebrezze, P.J., Sweeney, J., and Gallagher, J.

RELEASED AND JOURNALIZED: February 3, 2011

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FRANK D. CELEBREZZE, JR., P.J.:

{¶ 1} Appellant, Darnell Gatson, appeals from convictions arising from his guilty plea to drug trafficking and failure to comply with the order of a police officer. Appellant argues that his plea was not made knowingly, intelligently, or voluntarily, and that his sentence was impermissibly increased after his failure to report. After a thorough review of the record and law, we affirm.

{¶ 2} Appellant was indicted on charges of drug trafficking, drug possession, and failure to obey the order or signal of a police officer. As part of a plea arrangement, one count of drug trafficking was reduced to a third-degree felony and one count each of drug trafficking and drug

possession were nolled. At a plea hearing on September 8, 2008, appellant pled guilty to the amended indictment and was sentenced to the minimum term of incarceration, 18 months. Appellant requested that he be permitted to attend a funeral prior to reporting to serve his sentence, and the trial court acquiesced. The court held back his sentencing paperwork and it was not journalized at that time. Appellant failed to appear at the agreed upon time, and a second sentencing hearing was conducted on February 19, 2009, where appellant received a two-year sentence for drug trafficking, to be served consecutively to a one-year sentence for failure to obey the order of a police officer. Appellant now appeals raising two assignments of error.

Law and Analysis

Crim.R. 11

{¶ 3} Appellant argues that "[t]he proceedings below were defective in that the court erred in accepting a plea which was neither knowingly, willingly nor intelligently made in violation of Crim.R. 11 and [appellant's] constitutional rights." More specifically, appellant alleges that the trial court did not adequately inquire of him whether he understood the nature of the charges against him.

{¶ 4} The standard of review we must apply for compliance with the requirements set forth in Crim.R. 11(C) is de novo. *State v. Roberts*, Cuyahoga App. No. 89453, 2010-Ohio-3302, ¶19. Crim.R. 11(C)(2)(a) and (b),

which deals with a trial court's acceptance of a plea of guilty to a felony offense, provides, "the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and * * * [d]etermining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation[,]" and "[i]nforming the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment sentence."

{¶ 5} In order to comply with Crim.R. 11(C), a trial court must determine whether the defendant fully comprehends the consequences of his guilty plea. "Adherence to the provisions of Crim.R. 11(C)(2) requires an oral dialogue between the trial court and the defendant which enables the court to determine fully the defendant's understanding of the consequences of his plea of guilty or no contest." *State v. Caudill* (1976), 48 Ohio St.2d 342, 358 N.E.2d 601, paragraph two of the syllabus.

{¶ 6} Literal compliance with Crim.R. 11 is the preferred practice. However, the fact that the trial court did not strictly comply with Crim.R. 11 does not necessarily compel vacation of the defendant's guilty plea if the reviewing court determines that there was substantial compliance in regard

to a non-constitutional right.[1] *State v. Nero* (1990), 56 Ohio St.3d 106, 564 N.E.2d 474. Whether a defendant understands the nature of the charges is not a constitutional duty and should be reviewed for substantial compliance. *State v. Holly*, Cuyahoga App. No. 92111, 2009-Ohio-1697, ¶16, citing *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶14. "Unlike * * * constitutional rights, which necessitate strict compliance, non constitutional rights require that the trial court demonstrate substantial compliance. * * * 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. Fink*, Ashtabula App. No. 2006-A-0035, 2007-Ohio-5220, ¶18, quoting *White,* supra, at ¶25.

{¶ 7} Appellant argues that the trial court should have not only explained the nature of the crimes, but also reviewed each constituent element the state would have to prove and inquire of defense counsel whether counsel had explained these crimes and their elements. A similar argument was recently addressed and rejected by this court in *Roberts*, supra, where it was noted that "[w]e have repeatedly held that 'courts are not required to explain the elements of each offense, or even to specifically ask the defendant whether he understands the charges, unless the totality of the circumstances

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[1]For a discussion of the constitutional and non-constitutional rights involved, see *State v. White*, Lake App. No. 2002-L-146, 2004-Ohio-6474, ¶24-25.

shows that the defendant does not understand the charges.'" Id. at ¶24, quoting *State v. Cobb*, Cuyahoga App. No. 76950, 2001-Ohio-4132; *State v. Swift* (1993), 86 Ohio App.3d 407, 412, 621 N.E.2d 513; *State v. Rainey* (1982), 3 Ohio App.3d 441, 442, 446 N.E.2d 188; *State v. Kavlich* (June 15, 2000), Cuyahoga App. No. 77217; *State v. Burks* (Nov. 13, 1997), Cuyahoga App. No. 71904.

{¶ 8} In the present case, the state noted that appellant was charged in the amended indictment with drug trafficking in violation of R.C. 2925.03(A)(1), a third-degree felony, and failure to comply with the order or signal of a police officer in violation of R.C. 2921.221(B)(4), a fourth-degree felony. The state indicated it would not seek more than the minimum sentence. The court asked appellant if he understood the statement of the charges and the plea agreement, and he indicated that he did on three separate occasions. From the record, it is clear that the charges were explained to appellant and that if he did not understand them, contrary to his admission in court, he had ample opportunity to ask the trial court or defense counsel for further explanation. From the totality of the circumstances, the trial court did not err in accepting appellant's plea because it was entered knowingly, intelligently, and voluntarily.[2]

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[2]Appellant also makes no showing of prejudice, a necessary element in order to vacate a plea. *Roberts* at ¶20.

Unlawful Increase in Sentence

{¶ 9} Appellant also argues that "[t]he trial court erred in punishing him for a failure to appear by increasing his sentence." The trial court increased appellant's sentence after he failed to report to the court following a funeral he was granted permission to attend. Citing cases where trial courts imposed sentences greater than an agreed sentence, appellant claims the cause must be remanded for resentencing. See *State v. Asberry*, 173 Ohio App.3d 443, 2007-Ohio-5436, 878 N.E.2d 1082; *State v. Patrick*, 163 Ohio App.3d 666, 2005-Ohio-5332, 839 N.E.2d 987. However, these cases are inapplicable because appellant was not promised a specific sentence.

{¶ 10} He acknowledged this in his plea colloquy when the court asked, "You understand there's no promise of a particular sentence?" Appellant responded that he was aware. Appellant then pled guilty.

{¶ 11} "Principles of contract law are generally applicable to the interpretation and enforcement of plea agreements." *State v. Bethel,* 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶50, citing *United States v. Wells* (C.A.6, 2000), 211 F.3d 988, 995. Here, there was no agreed sentence. The trial court did not ignore any terms of a plea deal by imposing a more severe sentence after appellant failed to report.

{¶ 12} "The elements of a breach of contract claim are the existence of a contract, performance by the plaintiff, breach by the defendant, and damage

or loss to the plaintiff." *State v. Ferreira*, Lucas App. No. L-06-1136, 2006-Ohio-6060, ¶13, citing *Doner v. Snapp* (1994), 98 Ohio App.3d 597, 600, 649 N.E.2d 42. Here appellant received what he bargained for. The plea agreement did not have a promised sentence. Appellant was convicted of a lower degree felony, and two charges were dismissed.

{¶ 13} The court held back appellant's paperwork so he could attend a funeral and report back to the court on a given date. The court noted it was holding back both the plea[3] and the sentence and further noted, "[i]f you don't appear, then you know I'll find you and then this plea will be vacated. There will be no plea and you'll proceed on the charges, all right?" This exchange occurred after appellant had entered his plea and after the court had handed down his sentence. Five months after appellant failed to appear as directed, he was arrested and brought back before the trial court. The court stated that his sentence had not been journalized. It then sentenced appellant to a different term of incarceration. Appellant had not begun serving his original sentence, and therefore, the trial court was free to amend it. See *State v. Dawkins*, Cuyahoga App. No. 88022, 2007-Ohio-1006, ¶7 ("A trial court has the authority to amend its sentence and impose a more severe punishment at any time before the execution of its initial sentence commences.").

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[3]While the court stated it was holding back appellant's plea paperwork, this was actually not withheld and was journalized on September 23, 2008.

{¶ 14} Appellant argues the trial court's only option was to vacate his plea due the court's statement referenced above. It was within the discretion of the trial court to act on appellant's properly journalized guilty plea or to revoke the plea agreement and proceed with trial after appellant failed to report. While the appellant in *Dawkins* was specifically informed that her sentence would increase should she fail to report at the assigned time, this does not distinguish the cases. What appellant characterizes as a contract between himself and the trial court has no consideration. Generally, "consideration must consist of a 'benefit to the promisor' or a 'detriment to the promisee[.]'" Restatement Second of Contracts, comment to Section 79 (2010). Appellant gave up nothing when the trial court allowed him to attend a funeral, and the court received no benefit. Appellant had already pled guilty and had already received a sentence, albeit one that was withheld until he reported. Therefore, no valid contract existed between the trial court and appellant regarding the above statement.

{¶ 15} Also, a trial court has full discretion to impose a prison sentence within the statutory range. See *State v. Freeman*, Delaware App. No. 07CAA01-0001, 2008-Ohio-1410. In order to find an abuse of discretion, we must find that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. The trial court is afforded wide latitude in sentencing and did

not abuse that discretion in sentencing appellant to a term of incarceration within the statutory parameters,[4] even though it was greater than that imposed on September 8, 2008, since that sentence had not been executed.

Judgment affirmed.

It is ordered that appellee recover from 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 convictions 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.

FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

JAMES J. SWEENEY, J., and
SEAN C. GALLAGHER, J., CONCUR

[4]Appellant faced a maximum aggregate term of incarceration of six-and-one-half years. See R.C. 2929.14.