[Cite as *State v. Irizarry*, 2011-Ohio-607.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94727

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSE IRIZARRY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-454596

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

RELEASED AND JOURNALIZED: February 10, 2011

ATTORNEY FOR APPELLANT

Susan J. Moran
55 Public Square
Suite 1616
Cleveland, OH 44113-1901

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Steven E. Gall
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

SEAN C. GALLAGHER, J.:

{¶ 1} Appellant Jose Irizarry appeals the judgment of the Cuyahoga County Court of Common Pleas that denied his motion to withdraw his guilty plea. Further, he appeals his sentence. For the reasons stated herein, we affirm.

{¶ 2} On May 25, 2004, Irizarry and several codefendants were indicted on 11 counts of drug-related offenses, six of which named Irizarry. Specifically, Irizarry was indicted on three counts of drug trafficking, all with

juvenile specifications, two counts of drug possession, and one count of possessing criminal tools.

{¶ 3} Irizarry initially pleaded not guilty. On September 20, 2004, Irizarry failed to appear in court and a capias was issued. After Irizarry surrendered, trial was set for January 24, 2005. On the day of trial, Irizarry appeared in court and agreed to plead guilty to Count 4 for trafficking, in violation of R.C. 2925.03, a second-degree felony. The state deleted the juvenile specification attached to Count 4 and dismissed the remaining counts against Irizarry.

{¶ 4} At the plea hearing, the prosecutor reviewed the penalties, including a mandatory prison term from two to eight years and a mandatory fine of up to $10,000. The prosecutor also acknowledged that there were certain conditions that Irizarry agreed to as part of his plea, and that the court was made aware. Those conditions were not disclosed on the record. Defense counsel acknowledged that Irizarry had agreed to certain undisclosed terms as set forth by the prosecutor.

{¶ 5} The trial court then engaged Irizarry in Crim.R. 11 colloquy to determine that he was knowingly, voluntarily, and intelligently entering a guilty plea. The trial court reviewed the possible prison term, mandatory fine, and postrelease control it could impose. The court then asked, "Mr. Irizarry, your lawyer and the prosecutor have talked about certain conditions

that you must satisfy. And you'll do that, is that right?" Irizarry responded, "Yes, your honor." The court then asked, "There isn't any need for me to review that on the record with you, is that right?" Irizarry responded, "No, your honor."

{¶ 6} Following this exchange, the court specifically asked Irizarry, "Has anyone made any promises or threats in order to induce you to change your plea, other than what's already been indicated on the record?" to which Irizarry responded, "No, your honor." The trial court accepted Irizarry's guilty plea to the amended indictment. A sentencing hearing was set for March 21, 2005.

{¶ 7} On March 21, 2005, Irizarry did not appear for sentencing, and the court issued a capias. On December 21, 2009, Irizarry appeared for sentencing. At the hearing, the trial court sentenced Irizarry to seven years for trafficking, ordered a fine of $75,000, imposed postrelease control for up to three years, and suspended his driver's license for six months. The journal entry reflected the same, except that the fine imposed was for $7,500, consistent with a second-degree felony.

{¶ 8} Irizarry's motion to file a delayed appeal was granted. He raises two assignments of error for our review.

{¶ 9} In his first assignment of error, Irizarry argues that "[t]he court erred in accepting appellant's guilty plea and appellant's guilty plea is void

and invalid in light of the fact that the plea was not entered knowingly, voluntarily, and intelligently under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution." We disagree.

{¶ 10} Irizarry argues that his plea was conditioned on an undisclosed agreement that was not "revisited" prior to sentencing. According to Irizarry, this undisclosed agreement demonstrates his plea was premised on a promise, thus negating that his plea was knowingly and intelligently made.

{¶ 11} Crim.R. 11(F) states: "When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court."

{¶ 12} "[I]n order to portray a claimed error of failure to comply with Crim.R. 11(F), it must affirmatively appear in the record that such an 'underlying agreement' existed." *State v. Triplett* (Oct. 26, 1995), Cuyahoga App. No. 68707, citing *State v. Butler* (1974), 44 Ohio App.2d 177, 337 N.E.2d 633. "It is only necessary to read the agreement into the record where it affirmatively appears that such an agreement existed." *State v. Washington* (Mar. 31, 1983), Cuyahoga App. Nos. 45372 and 45373. Furthermore, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect.

State v. Stewart (1977), 51 Ohio St.2d 86, 93, 364 N.E.2d 1163; Crim.R. 52(A). The test is whether the plea would have otherwise been made. Id.

{¶ 13} In *Washington*, supra, this court found obvious references to plea negotiations, but nothing about the terms of the agreement appeared on the record; consequently, this court determined that there was no way for it to determine if the defendant had knowingly and intelligently entered a plea. Id.

{¶ 14} We cannot say the same is true for Irizarry. Despite the trial court's failure to outline the terms of the "undisclosed agreement," we find evidence that Irizarry's plea was knowingly, intelligently, and voluntarily entered. In fact, Irizarry received the benefit of the bargain through a plea deal to a reduced charge. From the dialogue in the plea and subsequent sentencing transcripts, we can discern that Irizarry agreed to cooperate with authorities in an unidentified criminal investigation. The specifics of this agreement were obviously undisclosed so as not to compromise the nature of the investigation and to protect Irizarry from exposure for his cooperation.

{¶ 15} Irizarry pleaded to the indictment as amended to one count of drug trafficking, a second-degree felony, with a potential term of incarceration of two to ten years and up to a $7,500 fine. A juvenile specification was removed by the prosecutor from that specific count. The remaining five counts were nolled in exchange for the plea.

{¶ 16} At no point during either the plea or subsequent sentencing hearing did Irizarry indicate he was unaware of the terms of his undisclosed agreement or that he was being promised a specific sentence in relation to the undisclosed agreement. In fact, Irizarry stated on the record at sentencing that he fled the jurisdiction of the court because he was afraid that people with whom he was involved discovered he was cooperating with the authorities. He did not indicate that his plea was based on an undisclosed term or a condition he did not understand or was not apprised of.

{¶ 17} Had Irizarry asserted that he had an agreed sentence or a specific condition that was to be fulfilled by the state at sentencing, such an "undisclosed" agreement or condition would render the plea invalid. Irizzary got the benefit of the bargain as stated on the record, and he cannot now complain about the undisclosed nature of the agreement. Irizarry must show actual prejudice, and this record is devoid of any.

{¶ 18} Nevertheless, this case raises questions about the practical effect of such "undisclosed" agreements on both sides in criminal cases. While we appreciate there may be reasons not to disclose the specifics of a plea agreement on the record, this should not prevent the parties from, at the very least, memorializing its terms and having the court place the document under seal.

{¶ 19} In this case, however, we find that Irizarry's plea was knowingly, intelligently, and voluntarily made, and he suffered no prejudice by the court's acceptance of his plea. Accordingly, we overrule Irizarry's first assignment of error.

{¶ 20} Irizarry's second assignment of error provides as follows: "The trial court erred and imposed a sentence contrary to law." He argues specifically that his sentence is contrary to law because the trial court imposed a $75,000 fine at the sentencing hearing, which is not permitted under the statute. We acknowledge that the hearing transcript shows that the court did impose a drug fine of $75,000; however, a review of the record clearly shows that the sentencing entry indicates a $7,500 fine, which is permissible.

{¶ 21} Where there is an inconsistency between the journal entry and the judge's remarks at sentencing, the journal entry controls. *State v. Scovil* (1998), 127 Ohio App.3d 505, 510, 713 N.E.2d 452. In this case, a fine of $7,500 is proper and legal for a second-degree felony. Furthermore, Irizarry failed to raise an objection at the time of sentencing, and the proper fine was entered in the judgment entry. Irizarry's argument has no merit, and his second assignment of error is overruled.

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 conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

SEAN C. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
JAMES J. SWEENEY, J., CONCUR