

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102741

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTONIO TURNER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-13-580767-A and 14-583979-A

BEFORE: Blackmon, J., Celebrezze, A.J., and Boyle, J.

RELEASED AND JOURNALIZED: October 22, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Antonio Turner (“Turner”) appeals his guilty pleas and assigns the following four errors for our review:

I. Antonio Turner’s guilty plea was not knowingly, intelligently, or voluntarily entered when the trial court misadvised Turner about the financial penalties associated with his plea.

II. Antonio Turner was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Ohio Constitution when his attorney failed to file an indigency affidavit to waive the mandatory fine.

III. The trial court erred and violated appellant’s due process rights when it imposed a 27½ year prison sentence in a drug case based upon a misunderstanding of appellant’s criminal history.

IV. Antonio Turner was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Ohio Constitution when his attorney failed to object to the trial court’s misstatements regarding his client’s criminal history.

{¶2} Having reviewed the record and relevant law, we affirm Turner’s pleas but reverse and remand for the trial court to determine if Turner is indigent for purposes of paying the mandatory fines. The apposite facts follow.

{¶3} In Case No. CR-13-580767, the Cuyahoga County Grand Jury indicted Turner for 13 counts of drug trafficking, seven counts of drug possession, one count of having a weapon while under disability, one count of child endangerment, one count of carrying a concealed weapon, one count of improper handling of a firearm, and one count of receiving stolen property. Turner pleaded guilty to two counts of drug trafficking, both of which are first-degree felonies and both of which had schoolyard specifications.

Turner also pleaded guilty to one count of having a weapon while under disability, a third-degree felony, one count of improperly handling firearms in a motor vehicle, a fourth-degree felony, and one count of endangering children, a first-degree misdemeanor.

The remaining counts were nolle.

{¶4} In Case No. CR-14-583979, the Cuyahoga County Grand Jury indicted Turner for one count of drug possession, a fifth-degree felony. Turner entered a plea to the drug possession charge. The trial court continued the sentencing on both cases until a presentence investigation report (“PSI”) was compiled.

{¶5} In Case No. CR-13-580767, the trial court sentenced Turner to a total of 26½ years in prison. This consisted of 11 years on each drug trafficking charge, three years for having weapons while under disability charge, and 1½ years for improperly handling of firearms in a motor vehicle. All charges were ordered to be served consecutively. In addition, he was fined \$10,000 for each drug trafficking charge, and \$250 for each charge related to the improper handling of a firearm, having a weapon while under disability, and child endangerment.

{¶6} In Case No. CR-14-583979, the trial court sentenced Turner to one year in prison to be served consecutively to the sentence he received in CR-13-580767. Thus, in total, the trial court sentenced Turner to 27½ years in prison.

Guilty Plea

{¶7} In his first assigned error, Turner argues that his plea was not knowingly, intelligently, or voluntarily entered because the trial court failed to inform him that the \$10,000 fine for the first-degree felonies was mandatory.

{¶8} In order for a plea to be given knowingly and voluntarily, the trial court must follow the mandates of Crim.R. 11(C). If a defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and is void. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

{¶9} A trial court must strictly comply with Crim.R. 11 as it pertains to the waiver of federal constitutional rights. These include the right to trial by jury, the right of confrontation, and the privilege against self-incrimination. *Id.* at 243-44. However, substantial compliance with Crim.R. 11(C) is sufficient when waiving nonconstitutional rights. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). The nonconstitutional rights that a defendant must be informed of are 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. Crim.R. 11(C)(2)(a) and (b). 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* at 108.

{¶10} 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*, 51 Ohio St.2d 86, 93, 364 N.E.2d 1163 (1977); Crim.R. 52(A). The test is whether the plea would have been otherwise made. *Id.* at 108.

{¶11} The mandatory nature of the fine would fall under the requirement that the defendant be advised of the maximum penalty, which requires substantial compliance. We conclude that the trial court substantially complied in explaining the maximum penalty. Although the trial court did not state it was mandatory, it did state as follows:

Court: Possible sentence on each of those counts is one — I'm sorry, 3 to 11 years, in one-year increments, with a maximum discretionary fine of \$20,000. A drug fine on each count could be \$5,000.

Do you understand that?

{¶12} Thus, although the trial court was incorrect in its explanation regarding the possible fines to be imposed, Turner was advised that a maximum of \$20,000 could be imposed. Thus, the trial court's eventual imposition of \$10,000 on each count did not result in prejudice to Turner because he was advised he could receive more than \$10,000 on each count, yet still chose to enter the plea.

{¶13} Moreover, in explaining the plea agreement, the prosecutor stated as follows:

Prosecutor:

Each one of those is a felony of the first degree, which carries with it a mandatory term of incarceration of 3 to 11 years.

Also, Your Honor, they're subject to a mandatory fine of at least \$10,000 and a mandatory license suspension from 6 months to 5 years and also 5 years post-release control for those offenses.

Tr. 4.

{¶14} After the prosecutor explained the plea, the following colloquy between the court, Turner and his counsel occurred:

Attorney: It's a fair and accurate representation of the plea agreement as we understand it, Your Honor.

Court: Mr. Turner, do you wish to take this plea agreement?

Turner: Yes, Your Honor.

Tr. 5.

{¶15} Accordingly, because the trial court substantially complied in explaining the fines associated with the two felony one counts and because no prejudice resulted from the trial court's advisement, Turner's first assigned error is overruled.

Ineffective Assistance of Counsel

{¶16} In his second assigned error, Turner argues he was deprived of the effective assistance of counsel when, before he was sentenced, his trial counsel failed to file an affidavit of indigency alleging that Turner was unable to pay the mandatory \$10,000 fine for his felony drug convictions.

{¶17} R.C. 2929.18(B)(1) establishes a procedure for avoiding imposition of mandatory fines applicable to certain felony drug offenses. That section provides:

If an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine upon the offender.

{¶18} Therefore, in order for an offender to avoid the imposition of a fine at the time of sentencing, two things must occur: (1) the defendant must submit an affidavit of indigency to the court prior to sentencing; and (2) the court must make a determination

that the offender is, in fact, indigent. *Id.*; *State v. Hubbard*, 8th Dist. Cuyahoga No. 99093, 2013-Ohio-1994, ¶ 8, citing *State v. Gilmer*, 6th Dist. Ottawa No. OT-01-015, 2002-Ohio-2045, ¶ 5.

{¶19} Ohio courts have held that the failure to file an affidavit of indigency for purposes of waiving a mandatory fine constitutes ineffective assistance of counsel where the record shows a “reasonable probability” that the trial court would have found the defendant indigent and unable to pay the fine had the affidavit been filed. *Hubbard* at ¶ 9; *Gilmer* at ¶ 5; *State v. Huffman*, 8th Dist. Cuyahoga No. 63938, 1995 Ohio App. LEXIS 233 (Jan. 26, 1995), citing *State v. Powell*, 78 Ohio App.3d 784, 605 N.E.2d 1337 (3d Dist.1992).

{¶20} In this case, there is a reasonable probability that the trial court would have found Turner to be indigent and unable to pay the mandatory drug fine of \$10,000. A review of the PSI shows that Turner has an extensive criminal history, beginning as a juvenile through the present time; he has been in and out of jail throughout the years; he has seven children and owes money for child support; he lives with his mother, and the presentence investigation report indicates he is unemployed and sells drugs to support himself. According to the PSI, “he was asked to rate his current financial status on a scale of a 1 (cannot pay bills) to a 5 (pay bills and have extra money); he stated a 1.” Moreover, at his arraignment, the court, in fact, found Turner to be indigent and appointed counsel to represent Turner.

{¶21} Based upon these facts and circumstances, we conclude that a reasonable probability exists that Turner could have proven himself indigent had his counsel

submitted an affidavit of indigency. Therefore, to the limited extent that Turner's trial counsel failed to file an affidavit of indigency when Turner faced imposition of a mandatory fine, we conclude that Turner was denied the effective assistance of counsel.

{¶22} Accordingly, Turner's second assigned error is sustained. This matter is remanded to the trial court to allow Turner to file an affidavit of indigency as to the mandatory fines. The trial court is then required to conduct a hearing to determine the indigency status of Turner in accordance with R.C. 2929.18(B)(1). *See State v. Calhoun*, 8th Dist. Cuyahoga No. 101816 , 2015-Ohio-2155; *State v. McDowell*, 11th Dist. Portage No. 2001-P-0149, 2003-Ohio-5352, ¶ 78 (in both cases the matter was remanded for the appellant to file an affidavit of indigency and for the trial court to conduct a hearing).

Criminal History

{¶23} In his third assigned error, Turner argues that the trial court's sentence was based on its erroneous conclusion that this was Turner's fifteenth drug trafficking case, when it was actually only his second in the common pleas court.

{¶24} Our review of the record shows that other considerations went into the trial court's decision to order consecutive sentences besides his drug trafficking record. The court noted that "while he was on bond on this case, he incurred additional cases. Some of them were not drug cases, but one in particular was a drug case, and sent to Judge Barker's docket and to the U.S. Attorney's Office."

{¶25} The court also found that Turner's history of criminal conduct demonstrated that the sentences were necessary to protect the public. In support of this conclusion, the court then stated that it noted he had "13 prior drug convictions alone." Drug

convictions would include both possessions, preparation of drugs for sale, and trafficking.

Moreover, his PSI shows that along with the drug cases, he also has an extensive juvenile and adult record on other charges. He has prior delinquencies for sexual imposition, receiving stolen property, possession of criminal tools, theft, attempted weapons control, having weapons while under disability, and aggravated robbery. As an adult he has prior convictions for disorderly conduct, endangering children, false information, burglary, several counts of domestic violence, criminal damaging, robbery, criminal trespass, and attempted felonious assault.

{¶26} Thus, given Turner's extensive criminal history, the fact that the trial court initially misstated he had 15 drug trafficking cases, was not reversible error because it was not the sole factor the court considered in imposing the sentence. Turner's criminal history as a whole and the fact he acquired more cases while out on bond also supported the imposition of consecutive sentences. Accordingly, Turner's third assigned error is overruled.

Ineffective Assistance for Failure to Object

{¶27} In his fourth assigned error, Turner argues his counsel was ineffective because he failed to correct the trial court when it stated that Turner had 15 prior drug trafficking cases.

{¶28} To succeed on a claim of ineffective assistance, a defendant must establish that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

Counsel will only be considered deficient if his or her conduct fell below an objective standard of reasonableness. *Strickland* at 688.

{¶29} As we stated above, the trial court relied on other factors in imposing the sentence that support the sentence given, therefore, no prejudicial error occurred by counsel's failure to correct the trial court. Accordingly, Turner's fourth assigned error is overruled.

{¶30} Judgment affirmed in part, reversed in part and remanded.

It is ordered that the parties share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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.

PATRICIA ANN BLACKMON, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
MARY J. BOYLE, J., CONCUR