

[Cite as *State v. Felder*, 2015-Ohio-4701.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102780

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KEVIN FELDER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-587305-A

BEFORE: S. Gallagher, J., Jones, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: November 12, 2015

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SEAN C. GALLAGHER, J.:

{¶1} Appellant Kevin Felder appeals his conviction for burglary. Upon review, we affirm.

{¶2} Appellant was charged under a multicount indictment. Pursuant to a plea agreement, appellant entered a plea of guilty to Count 1 of the indictment for burglary, as amended, a higher tier felony of the third degree, and the remaining charges against him were dismissed.

{¶3} In outlining the plea agreement on the record, the prosecutor stated appellant would plead guilty to Count 1 as amended, burglary in violation of R.C. 2911.12(A)(3), “making that a high tier felony of the third degree.” Further, the trial court informed appellant that the burglary charge under Count 1, as amended, was “a higher tier felony of the third degree” and that the court could place appellant on probation or sentence appellant to a term of prison for “a minimum of 12 months and a maximum of 60 months, and six months in increments in between[, which] would be 18, 24, 30, 36, 42, 48, or 54 months.” In accepting appellant’s plea of guilty, the trial court expressly asked, “How do you plead to amended Count 1, burglary, as amended, a higher tier felony in the third degree?”

{¶4} A presentence investigation report was requested, which reflected appellant’s lengthy criminal history. Included in his criminal history, appellant had previously pleaded guilty to attempted robbery, a third-degree felony, in Cuyahoga C.P. No. CR-98-364578-A (Sept. 10, 1998), and attempted robbery, a fourth-degree felony, in Cuyahoga C.P. CR-00-387740 (June 16, 2000).

{¶5} At sentencing, the trial court indicated it was going to place appellant on community control sanctions. The court sentenced appellant to 120 days in the county jail, with jail-time

credit, and two years of community control. Appellant was advised a violation of the terms of his community control could result in a prison term of 60 months.

{¶6} Appellant filed this appeal. He raises two assignments of error for our review.

{¶7} Under his first assignment of error, appellant claims his guilty plea was not knowingly, intelligently, or voluntarily entered because the trial court failed to properly inform him of the correct penalty pursuant to Crim.R. 11(C)(2)(a). Appellant argues that the offense was incorrectly stated as a higher tier felony of the third degree because there is nothing in the indictment or the record to establish that appellant had previously been convicted of or pleaded guilty in two or more separate proceedings to two or more violations of R.C. 2911.01, 2911.02, 2911.11, or 2911.12 as required for sentencing under R.C. 2929.14(A)(3)(a). As such, appellant argues he was not properly advised of the maximum penalty for which he could have been sentenced, which he claims was 36 months under R.C. 2929.14(A)(3)(b).

{¶8} Count 1 of the indictment charged appellant with burglary, a felony of the second degree, in violation of R.C. 2911.12(A)(2). Appellant entered a guilty plea to Count 1 as amended to burglary, a higher tier felony of the third degree. Third-degree burglary is a lesser included offense of second-degree burglary. An accused may plead guilty to a lesser included offense of the charge for which he was indicted. *Gunnell v. Lazadroff*, 90 Ohio St.3d 76, 2000-Ohio-26, 734 N.E.2d 829. Pursuant to Crim.R. 11(B), a guilty plea is a “complete admission of the defendant’s guilt.” Therefore, the trial court was not required to make any determination that there was a factual basis for the guilty plea. *State v. Heisa*, 8th Dist. Cuyahoga No. 101877, 2015-Ohio-2269, ¶ 11.

{¶9} The record reflects that the plea offer was stated on the record and appellant was fully informed of the nature of the charge against him, the consequences of the plea, and the

rights he was waiving. He was specifically informed by the court that the burglary charge, as amended, was a higher tier felony of the third degree. The trial court properly advised him of the maximum penalty associated with that charge. Further, the record shows that he knowingly, intelligently, and voluntarily pleaded guilty to the amended charge.

{¶10} Finally, even if the maximum penalty for which he could have been sentenced was 36 months under R.C. 2929.14(A)(3)(b), appellant has not demonstrated any prejudice. Appellant has not argued or pointed to anything in the record suggesting that he would not have entered a plea of guilty. Courts must only substantially comply in informing defendants of the nonconstitutional notifications under Crim.R. 11, and a defendant must show prejudice before a plea will be vacated. *See State v. Mahone*, 8th Dist. Cuyahoga No. 102023, 2015-Ohio-3139, ¶ 10. Here, the indictment charged appellant with burglary, a second-degree felony, along with three other fifth-degree felony charges. Pursuant to a plea agreement, appellant entered a plea of guilty to a lesser offense of burglary and the remaining counts were dismissed. Further, the record reflects that the trial court imposed community control sanctions.

{¶11} Appellant's first assignment of error is overruled.

{¶12} Under his second assignment of error, appellant claims he was denied effective assistance of counsel. In order to substantiate a claim of ineffective assistance of counsel, the appellant must show "(1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that but for counsel's errors, the proceeding's result would have been different." *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 200, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio

St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. The defendant has the burden of proving his counsel rendered ineffective assistance. *Perez* at ¶ 223.

{¶13} The record reflects that defense counsel secured a favorable plea agreement and successfully advocated for community control sanctions. The details of the offense were stated on the record, and appellant took responsibility for his actions. Appellant had a lengthy criminal history. As the trial court recognized, this was appellant's sixth felony and it was his second felony since 2013. Under these circumstances, we are unable to find that counsel's performance was deficient or that any prejudicial result occurred. Appellant's second assignment of error is overruled.

{¶14} 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.

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

SEAN C. GALLAGHER, JUDGE

LARRY A. JONES, SR., P.J., and
ANITA LASTER MAYS, J., CONCUR

