

[Cite as *State v. Lewis*, 2015-Ohio-5267.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102939

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARK A. LEWIS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED; REMANDED FOR
CORRECTION OF SENTENCING ENTRY

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-581968-A

BEFORE: Keough, P.J., McCormack, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: December 17, 2015

ATTORNEY FOR APPELLANT

Paul A. Mancino
Mancino, Mancino & Mancino
75 Public Square Building, Suite 1016
Cleveland, Ohio 44113-2098

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
By: Gregory J. Ochocki
Timsi Pathak
Assistant Prosecuting Attorneys
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

KATHLEEN ANN KEOUGH, P.J.:

{¶1} Defendant-appellant, Mark A. Lewis, appeals from the trial court’s judgment, rendered after his guilty plea, finding him guilty of gross sexual imposition and abduction and sentencing him to 36 months incarceration. We affirm but remand for correction of the sentencing entry.

I. Background

{¶2} In February 2014, while imprisoned in Minnesota, Lewis was indicted on two counts of gross sexual imposition in violation of R.C. 2907.05(A)(1), both fourth-degree felonies, and one count of kidnapping in violation of R.C. 2905.01(A)(4), a first-degree felony, with a sexual motivation specification. The charges arose from an incident involving Lewis’s 16-year-old niece.

{¶3} On September 12, 2014, Lewis filed a notice of untried indictment, information, or complaint and of right to request disposition pursuant to the Interstate Agreement on Detainers (“IAD”).¹ He was transported to Ohio in December; at his arraignment, he pleaded not guilty to the indictment, was declared indigent, and was assigned counsel.

{¶4} Lewis’s assigned counsel filed discovery motions in December 2014, and the state subsequently responded to the requests. From December 2014 through March 2015, the trial court held a number of pretrials. In February 2015, Lewis’s counsel

¹The IAD is an interstate compact that establishes procedures for the resolution of one state’s outstanding charges against another state’s prisoner. *New York v. Hill*, 528 U.S. 110, 111, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000).

joined in a request with the state to continue the trial to complete ongoing discovery; the trial court granted the motion and rescheduled the trial to March 25, 2015.

{¶5} On that day, Lewis withdrew his earlier plea and plead guilty to Count 1, gross sexual imposition in violation of R.C. 2907.05(A)(1), a fourth-degree felony, and an amended Count 3, abduction in violation of R.C. 2905.02(A), a third-degree felony. The trial court dismissed Count 2, gross sexual imposition.

{¶6} The parties agreed the offenses were allied and subject to merger at sentencing, and the state elected to proceed to sentencing on Count 3. The trial court found Lewis to be a Tier I sex offender and sentenced him to 36 months incarceration to run concurrent with his Minnesota prison sentence. This appeal followed.

II. Analysis

A. The Guilty Plea

{¶7} Under Crim.R. 11(C), a court shall not accept a guilty plea in a felony case without first addressing the defendant personally and (1) determining that the defendant is making the plea voluntarily, and understands the nature of the charges and the maximum penalty involved, (2) informing the defendant of and determining that the defendant understands the effect of the plea, and that upon acceptance of the plea, the court may proceed with judgment and sentence, (3) informing the defendant and determining that the defendant understands that by pleading guilty, he is waiving his rights to a jury trial, to call and confront witnesses, and to require the state to prove his guilt beyond a reasonable doubt.

{¶8} In his first assignment of error, Lewis contends that his guilty plea was not knowingly, voluntarily, and intelligently made, in violation of his due process rights, because the trial court failed to advise him of the maximum penalty, and then imposed a sentence greater than that allowed by his plea. Specifically, Lewis contends that the trial court did not tell him that by entering a plea to abduction, he would be subject to sexual offender registration requirements. Lewis further contends that the trial court erred in imposing the sexual offender registration requirements because he could only be subject to the registration requirements if he had pleaded guilty to abduction with a sexual motivation specification, and there was no specification attached to his plea.

{¶9} In his fourth assignment of error, Lewis contends that he was denied due process because he was classified as a sexual offender even though he did not plead guilty to a sexually oriented offense. Because these assignments of error are related, we consider them together.

{¶10} “Although a defendant may not be punished for both allied offenses, the finding of guilt remains intact, both before and after the merger of allied offenses for sentencing.” *State v. Sanders*, 8th Dist. Cuyahoga No. 97383, 2012-Ohio-3566, ¶ 13, citing *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 27. Thus, Lewis’s plea of guilty to gross sexual imposition survived the merger of Counts 1 (gross sexual imposition) and 3 (abduction) for sentencing purposes.

{¶11} Under R.C. 2950.01(E)(1)(C), a defendant may be adjudicated a Tier I sex offender when he is convicted of *or pleads guilty* to gross sexual imposition:

“Tier I sex offender/child-victim offender” means any of the following: * *
* a sex offender who is convicted of, pleads guilty to, has been convicted
of, or has pleaded guilty to any of the following sexually oriented offenses:
* * * [a] violation of division (A)(1), (2), (3), or (5) of section 2907.05 of
the Revised Code * * *.

{¶12} The record reflects that the trial court explained to Lewis that he would be considered a Tier I sex offender as a result of his plea. When explaining the proposed plea agreement to Lewis, the trial court advised him that the gross sexual imposition count would merge into the abduction count for sentencing. The judge told Lewis:

THE COURT: So I couldn't give you any additional penalty or length of prison sentence or monetary fine for that. However, you would still be required to register as a sex offender. But this would be what we refer to as a Tier I sex offender. A Tier 1 sex offender, as a Tier 1 sex offender you would have to register once a year for — I believe ten, or is it 15 years? I think it's 15 years. Hang on.

THE PROSECUTOR: Your Honor, registration on the Tier 1? 15 years.

THE COURT: So it's once a year for 15 years as opposed to 90 days, every 90 days for the rest of your life.

(Tr. 12-13.)

{¶13} Later, before accepting his plea, the trial court explained the nature of the charges and the possible penalties to Lewis:

THE COURT: Also, we referred to earlier this notion of merger or allied offenses which means these two offenses are so related that the law requires you can only be sentenced upon one of these counts. It's my understanding the state would elect to proceed to have you sentenced under Count 3. So the maximum sentence I could give you is a 36-month sentence and a \$10,000 fine. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: But I still would — you would still be required to register as a Tier 1 sex offender as a result of your plea to the GSI count in Count 1. Do you understand that?

THE DEFENDANT: Yes.

(Tr. 31.)

{¶14} It is apparent from the record that Lewis understood he was pleading guilty to gross sexual imposition, a sexually oriented offense, and that he would be considered a Tier I sex offender upon entering his plea. Thus, his plea was knowingly, voluntarily, and intelligently made. Furthermore, because Lewis’s guilty plea to gross sexual imposition survived the merger of Counts 1 and 3 for sentencing purposes, the trial court properly sentenced him to the Tier I sex offender reporting requirements. The first and fourth assignments of error are therefore overruled.

B. Interstate Agreement on Detainers

{¶15} There were 193 days from the filing of Lewis’s notice of untried indictment (September 12, 2014) and his guilty plea on March 25, 2015. In his second assignment of error, Lewis contends that he was denied due process of law because he was not brought to trial within 180 days of the filing of his notice of untried indictment, as required by the IAD. *See* R.C. 2963.30.

{¶16} It is well settled that “a guilty plea waives all nonjurisdictional defects (other than errors affecting the validity of the guilty plea) in the prior proceedings.” *State v. Moore*, 2d Dist. Montgomery No. 22365, 2008-Ohio-4322, ¶ 12, citing *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 78. In other words,

“a guilty plea waives all appealable errors except for a challenge as to whether the defendant made a knowing, intelligent and voluntary acceptance of the plea.” *State v. Elliott*, 8th Dist. Cuyahoga No. 102226, 2015-Ohio-3766, ¶ 14, quoting *State v. Robinson*, 4th Dist. Lawrence No. 13CA18, 2015-Ohio-2635, ¶ 45.

{¶17} Rights created by the IAD are nonjurisdictional. *State v. Bowman*, 3d Dist. Crawford No. 3-89-18, 1990 Ohio App. LEXIS 5733 (Dec. 21, 1990), citing *Howalak v. United States*, 645 F.2d 534, 537 (6th Cir.1981). Accordingly, Lewis’s guilty plea waived any alleged errors regarding the IAD.

{¶18} Furthermore, a defense counsel’s consent to a trial date outside the IAD’s 180-day time limitation constitutes a waiver of the issue. *State v. Golden*, 177 Ohio App.3d 771, 776, 2008-Ohio-3227, 896 N.E.2d 170, ¶ 16 (3d Dist.). The record reflects that on February 18, 2015, Lewis’s counsel joined with the state in requesting that the trial be continued to March 25, 2015, in order to allow for ongoing discovery and exchange of records. The court granted the motion, finding that “justice would be served by allowing this continuance at joint party request.” Accordingly, Lewis has waived any issue regarding the IAD’s speedy trial provision. The second assignment of error is therefore overruled.

C. Defendant’s Choice of Counsel

{¶19} On December 2, 2014, the trial court declared Lewis indigent and assigned Stephen McGowan as his counsel. McGowan filed a motion for discovery and a motion for a bill of particulars in December, and in January, a motion to dismiss. He

participated in a series of pretrials from December 2014 through March 2015, including a pretrial on February 18, 2015, at which he moved jointly with the state to continue the trial date from February 19, 2015.

{¶20} When the case was called for trial on March 25, 2015, attorney Paul Mancino appeared with McGowan. Mancino, who had not filed a notice of appearance, stated that Lewis’s family had recently contacted him about representing Lewis, and that he had met with Lewis the week prior to trial. Mancino stated that he was not prepared to go forward with trial as scheduled, however, and asked for a continuance so he “could get up to speed on the case.”

{¶21} The trial court declined to continue the case. The judge noted that Lewis had been indicted in December 2014, a series of pretrials had been held, and trial had been continued to March 25, 2015, at Lewis’s request. The court also noted that Lewis and his family had “quite some time” to retain Mancino. The court indicated that it was happy to have Mancino on the case, but the court was prepared to go to trial that day. The record reflects that Mancino did, in fact, assist in representing Lewis that day.

{¶22} In his third assignment of error, Lewis asserts that he was denied his Sixth Amendment right to counsel of choice when the trial court refused to grant a continuance of trial.

{¶23} We review a trial court’s decision to grant or deny a continuance upon the withdrawal or discharge of counsel for an abuse of discretion, keeping in mind that the right to counsel must be balanced against the public’s right to prompt, orderly, and

efficient administration of justice. *Thurston v. Maxwell*, 3 Ohio St.2d 92, 93, 209 N.E.2d 204 (1965); *Bowman*, 3d Dist. Crawford No. 3-89-18, 1990 Ohio App. LEXIS 5733 at *6.

{¶24} Here, substitute counsel Mancino did not file a notice of appearance prior to trial nor a written request for a continuance, even though he apparently met with Lewis and his family a week prior to trial. Likewise, Mancino admitted that he was not prepared to go forward with trial, even though the trial had been continued to March 25 at Lewis's joint request with the state for a continuance. Despite his failure to file a notice of appearance, Mancino was present for the entirety of the plea hearing and acted as co-counsel with McGowan. Upon questioning by the court prior to entering his plea, Lewis stated that he was satisfied with McGowan and Mancino's representation. Under these circumstances, we find no abuse of discretion in the trial court's denial of Lewis's request for a continuance, and no Sixth Amendment violation. The third assignment of error is overruled.

D. Journal Entry of Sentencing

{¶25} In his fifth assignment of error, Lewis contends that the trial court erred in entering a journal entry of sentencing that did not conform with its oral pronouncement at sentencing. Specifically, the trial court's journal entry states that Lewis entered a plea on Count 3 to abduction, R.C. 2905.02(B), with a sexual motivation specification, R.C. 2941.147, even though Lewis pled guilty to abduction, R.C. 2905.02(A)(2), and the sexual motivation specification was deleted.

{¶26} The state concedes the error. Accordingly, the case is remanded to the trial court for the limited purpose of correcting the March 25, 2015 journal entry, nunc pro tunc, to reflect the correct subsection of R.C. 2905.02 and to remove the sexual motivation specification. The fifth assignment of error is sustained.

E. Judicial Factfinding

{¶27} In his sixth assignment of error, Lewis contends that the trial court violated his Sixth Amendment right to a jury trial when it sentenced him to the maximum sentence as a result of judicial factfinding. He argues that because no facts regarding the offense were stipulated to or agreed upon prior to sentencing, the maximum sentence was necessarily based on judicial factfinding. He further contends that the trial court did not consider the mandated statutory considerations before sentencing him.

{¶28} In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the United States Supreme Court held that a jury must determine any fact, other than a prior conviction, that increases the maximum authorized penalty for a crime. Subsequently, in *Alleyne v. United States*, 570 U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), the United States Supreme Court held that Sixth Amendment principles are violated where facts not found by a jury are used to enhance the mandatory minimum penalty for a crime. The Supreme Court stated that “any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury.” *Id.* at paragraph one of the syllabus.

{¶29} We find no impermissible judicial factfinding in this case. At sentencing, Lewis admitted that he had prior criminal convictions. He told the judge, “I’m not an angel, you know. I’ve committed crimes before. I have. I’m in prison right now for burglary. If something come up missing, a safe, a wad of cash or some drugs, out of a safe or something like that, I did it.” Under *Apprendi*, *Blakely*, and *Alleyne*, a court may consider the fact of a defendant’s prior convictions in determining the appropriate sentence without engaging in improper judicial factfinding.

{¶30} Likewise, we find that the trial court properly considered the applicable statutory considerations before imposing sentence. Under R.C. 2929.11(A), a felony sentence shall be reasonably calculated to achieve two “overriding purposes” of felony sentencing: to protect the public from future crimes by the offender, and to punish the offender using the minimum sanctions the court determines will achieve those purposes. In addition, the sentence imposed for a felony must be commensurate with the seriousness of the offender’s conduct and consistent with sentences imposed for similar crimes committed by similar offenders. R.C. 2929.11(B).

{¶31} A court sentencing a felony offender has discretion to determine the most effective way to comply with the purposes and principles of sentencing outlined in the statute. R.C. 2929.12(A). In exercising its discretion, however, the sentencing court must consider the seriousness, recidivism, and other mitigating factors set forth in R.C. 2929.12. *Id.*

{¶32} Although the trial court must consider the principles and purposes of sentencing as well as the mitigating factors as outlined above, the court is not required to use particular language or make specific findings on the record regarding its consideration of those factors. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31; *State v. Jones*, 8th Dist. Cuyahoga No. 99759, 2014-Ohio-29, ¶ 13. Consideration of the appropriate factors can be presumed unless the defendant affirmatively shows otherwise. *Id.*, citing *State v. Stevens*, 1st Dist. Hamilton No. C-130279, 2013-Ohio-5218, ¶ 12. Moreover, a trial court’s statement in its sentencing journal entry that it considered the required statutory factors is sufficient to fulfill a trial court’s obligations under R.C. 2929.11 and 2929.12. *State v. Sutton*, 8th Dist. Cuyahoga Nos. 102300 and 102302, 2015-Ohio-4074, ¶ 72, citing *State v. Clayton*, 8th Dist. Cuyahoga No. 99700, 2014-Ohio-112, ¶ 9.

{¶33} Prior to sentencing, Lewis addressed the trial court. He showed little to no remorse and admitted that he had prior convictions. The victim and her mother then provided written statements that detailed the serious psychological harm the minor victim suffered as a result of Lewis’s actions: the victim’s grades plummeted, she contemplated suicide and was hospitalized for five days as a result, and she now suffers from nightmares every night.

{¶34} The trial judge then told Lewis that “after considering the purposes and principles set forth in the felony sentencing [statutes],” he had concluded that Lewis was not amenable to community control sanctions, and he was sentencing him to 36 months

incarceration. The journal entry of sentencing likewise states that the trial court “considered all required factors of the law.”

{¶35} The record therefore refutes Lewis’s claim that the trial court did not consider the appropriate statutory factors before sentencing him. Furthermore, there was no improper judicial factfinding and the sentence was not contrary to law. R.C. 2953.08(G)(2). The sixth assignment of error is overruled.

{¶36} Judgment affirmed; remanded for correction of the sentencing entry. 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.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

TIM McCORMACK, J., and
SEAN C. GALLAGHER, J., CONCUR