[Cite as *State v. Dotson*, 2015-Ohio-2392.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101911

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT D. DOTSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-585052-A

BEFORE: Stewart, J., Keough, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: June 18, 2015

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant Robert Dotson asks this court to vacate his guilty pleas to having a weapon while under disability and carrying a concealed weapon on the ground that his pleas were involuntary. For the following reasons, we affirm the convictions.

{¶2} The Cuyahoga County Grand Jury charged Dotson with carrying a concealed weapon, improperly handling firearms in a motor vehicle, having a weapon while under disability, tampering with evidence, and obstruction of justice. At the time he was charged with these offenses, Dotson was on postrelease control ("PRC") from another case, and had 765 days of PRC remaining on that conviction. As a result of plea negotiations, Dotson pled guilty to carrying a concealed weapon and the weapon disability charge in exchange for the state's dismissal of the remaining charges.

{¶3} Prior to accepting Dotson's guilty plea, the judge inquired if Dotson was on PRC from another case. When told that he was, the court did not explain to Dotson that R.C. 2929.141 permitted the court to terminate Dotson's PRC and sentence him to prison for the remaining time on postrelease control, and that the prison term would run consecutive to his sentence on the new offenses. *See* R.C. 2929.141 (explaining a court's statutory authority to terminate postrelease control and order a term of imprisonment of up to 12 months or the remainder of the time left on postrelease control, whichever is greater).

{¶4} After accepting Dotson's guilty plea, the court sentenced him to 18 months on the concealed weapon charge to run concurrent to 36 months on the disability charge. Additionally, the trial court terminated Dotson's postrelease control and sentenced him to prison for the 765 remaining days of his PRC to be served consecutively to the 36-month sentence.

{¶5} On appeal, Dotson argues that his guilty plea must be vacated because his plea was not knowing and voluntary, as the trial court did not advise him that it could terminate his PRC and impose a prison term for the remainder of that time. Dotson argues that this advisement falls under the Crim.R. 11 requirement that a defendant be advised of the maximum penalties he faces. We disagree, and overrule Dotson's sole assignment of error.

{¶6} The United States Constitution requires a trial court, prior to accepting a plea of guilty or no contest, to determine that the plea is made knowingly, intelligently, and voluntarily. *State v. Johnson*, 40 Ohio St.3d 130, 132, 532 N.E.2d 1295 (1988), citing *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 274 (1969). From a constitutional standpoint, this requires the court to inform a defendant of five rights: his privilege against compulsory self-incrimination, the right to trial by jury, the right to confront one's accusers, his right to have guilt proven by the state beyond a reasonable doubt, and the right to compulsory process to obtain witnesses — and then determine if the defendant understands these rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 19-21.

{¶7} Crim.R. 11(C)(2) codifies the protections guaranteed by the United States Constitution in subsection (c),[1] but adds some additional requirements in subsections (a) and (b). *See id.* at ¶ 18.

{¶8} Crim.R. 11(C)(2)(a) and (b) state:

> In felony cases 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 doing all of the following:
>
> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation * * *.
>
> (b) Informing 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 and sentence.

{¶9} The requirement that the trial court inform the defendant of the maximum penalty involved under Crim.R. 11(C)(2)(a) is what Dotson argues obligated the court to inform him of the court's authority under R.C. 2929.141 to terminate PRC and impose a consecutive prison sentence.

{¶10} R.C. 2929.141 provides in relevant part:

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[1] This subsection states:

> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(A) Upon the conviction of or plea of guilty to a felony by a person on post-release control at the time of the commission of the felony, the court may terminate the term of postrelease control, and the court may do either of the following regardless of whether the sentencing court or another court of this state imposed the original prison term for which the person is on post-release control:

(1) In addition to any prison term for the new felony, impose a prison term for the post-release control violation. The maximum prison term for the violation shall be the greater of twelve months or the period of postrelease control for the earlier felony minus any time the person has spent under postrelease control for the earlier felony. In all cases, any prison term imposed for the violation shall be reduced by any prison term that is administratively imposed by the parole board as a postrelease control sanction. A prison term imposed for the violation shall be served consecutively to any prison term imposed for the new felony. The imposition of a prison term for the post-release control violation shall terminate the period of post-release control for the earlier felony.

{¶11} The question of if and when a court must notify a defendant of its authority to terminate postrelease control and impose an additional prison sentence under R.C. 2929.141 was recently addressed by this court. In *State v. Bybee*, 2015-Ohio-878, 28 N.E.3d 149 (8th Dist.), we stated that there is no requirement for the trial court to inform a defendant at sentencing that included the imposition of postrelease control of the court's authority under R.C. 2929.141. *Id.* at ¶ 11-12 (explaining that unlike R.C. 2929.19, which gives the parole board authority to impose additional prison time for a PRC violation, R.C. 2929.141 does not include a notification requirement at sentencing and therefore does not mandate that the court inform the defendant of its similar authority under the statute).[2] However, the issue presented in *Bybee* did not lend itself to a discussion of whether the Crim.R. 11(C)(2)(a) requirement to advise a defendant of the maximum penalty involved on each charge mandates that the court advise a defendant of the court's authority under R.C. 2929.141 to terminate PRC and impose a prison sentence.

[2] We note that Dotson does not argue that his plea should be vacated because he was not advised of R.C. 2929.141 at his original sentencing. And, as the record of the original sentencing is not before us, we do not know if Dotson was ever notified of the court's authority pursuant to R.C. 2929.141.

{¶12} The Ohio Supreme Court has stated that the Crim.R. 11(C)(2)(a) requirement of informing a defendant of "the nature of the charge and the maximum penalty involved" only applies to "the maximum penalty" for the single crime for which "the plea" is offered. *Johnson*, 40 Ohio St.3d at 133, 532 N.E.2d 1295. The court explained that it does not "[refer] cumulatively to the total of all sentences received for all charges which a criminal defendant may answer in a single proceeding." *Id.* at 133. Thus, the court's explanation of the term "maximum penalty" suggests that Crim.R. 11 does not require the trial court to inform a defendant in Dotson's position of its authority under R.C. 2929.141 to impose an additional prison term, because any term of imprisonment that the court may impose is derived from violating PRC from a prior conviction, not the conviction of the current case.

{¶13} Dotson urges us to follow the decision of the Second District in *State v. Landgraf*, 2d Dist. Clark No. 2014 CA 12, 2014-Ohio-5448, holding that Crim.R. 11 requires a trial court to inform a defendant who is pleading guilty to a new felony offense while on PRC for a prior felony conviction, that the trial court is authorized by R.C. 2929.141 to terminate the remainder of his PRC for violating it, impose a prison term for the violation, and then run the prison term consecutive to any prison term imposed on the new felony conviction. However, we decline to do so. At the time of this writing, the Second District appears to be the only Ohio appellate court that makes advisement of a trial court's authority under R.C. 2929.141 a requirement under Crim.R. 11.[3] Although we agree that notifying a defendant of the additional prison time he could face if the court exercises its authority under the statute is certainly a better practice and would be just, *accord State v. Mullins*, 12 Dist. Butler No. CA2007-01-028, 2008-Ohio-1995, ¶ 14, without direction from the General Assembly or the Supreme Court that such notification is required, we refrain from adopting the holding in *Landgraf*.

{¶14} However, even if the Second District is correct in concluding that Crim.R. 11 requires trial courts to inform defendants of its authority under R.C. 2929.141, we would still overrule Dotson's assignment of error because Dotson failed to show that the court's nonadvisement prejudiced him.

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[3] Additionally, *Landgraf* has two concurring opinions, both questioning the analysis of the lead opinion. *See Landgraf* at ¶ 28-30.

{¶15} The Ohio Supreme Court has explicitly held that the requirement that the court inform a defendant of the maximum penalty for the offenses involved is a statutory requirement, and has no constitutional basis. *Johnson,* 40 Ohio St.3d at 133, 532 N.E.2d 1295. While strict compliance is the standard for constitutional Crim.R. 11 notifications, courts must only substantially comply in informing defendants of the nonconstitutional notifications under Crim.R. 11. *Veney,* 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, at ¶ 18. 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. *Veney* at ¶ 15. Further, when nonconstitutional aspects of the Crim.R. 11 colloquy are at issue, a defendant must show prejudice before a plea will be vacated. *Id.* Prejudice in this context requires that the defendant show that but for the error, there is a reasonable probability that the defendant would not have entered a plea of guilty. *State v. Simmons*, 8th Dist. Cuyahoga Nos. 99513 and 100552, 2013-Ohio-5026, ¶ 5.

{¶16} Although the record reflects that the court did not advise Dotson of its ability under R.C. 2929.141 to terminate postrelease control and impose a prison sentence, Dotson has failed to present evidence that shows a reasonable likelihood that but for the trial court's nonadvisement, he would not have entered a guilty plea and would have chosen to go to trial. Dotson never mentions in his brief, or otherwise, that he would not have entered a guilty plea if he had known of the trial court's ability to terminate postrelease control.

{¶17} Furthermore, an independent review of the record does not convince us that Dotson would not have entered a plea had the court advised him of the potential sentencing consequences of R.C. 2929.141. In addition to the charges to which he pled guilty, Dotson was charged with improperly handling firearms, a felony of the fourth degree, that included a one-year firearm specification; tampering with evidence, a felony of the third degree, also with a one-year firearm specification; and obstructing justice, with a furthermore specification that made it a felony of the fifth degree, that also included a one-year firearm specification. Without analyzing the issue of potential merger, Dotson was facing up to three years on the tampering with evidence charge, 18 months on the improper handling of firearms charge, and 12 months on the obstruction charge. If the court chose to run these sentences consecutively, Dotson could have received a possible five and one-half year sentence, on top of the time he received on the other charges and gun specifications.

{¶18} Thus, we conclude that in the absence of contrary evidence, Dotson was not prejudiced by the court's failure to advise, as he faced the possibility of harsh prison time had he gone to trial and been convicted. Indeed, R.C. 2929.141 does not mandate that a court terminate postrelease control and enter a prison sentence; rather, it only gives the court the discretion to do so. Thus, it was entirely reasonable for Dotson to take the plea that dramatically reduced his possible prison time.

{¶19} Judgment affirmed.

It is ordered that appellee recover of 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.

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MELODY J. STEWART, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
PATRICIA A. BLACKMON, J., CONCUR