[Cite as *Cleveland v. Bowman*, 2016-Ohio-1545.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103287

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

TONY BOWMAN

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2015CRB005176

BEFORE: Celebrezze, J., Stewart, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: April 14, 2016

ATTORNEY FOR APPELLANT

Timothy R. Sterkel
1414 South Green Road
Suite 310
Cleveland, Ohio 44121

ATTORNEYS FOR APPELLEE

Barbara A. Langhenry
Director of Law
BY: Ashley M. Garrett
Victor R. Perez
City of Cleveland Prosecutors
Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant, Tony Bowman, appeals his conviction for violating Cleveland Codified Ordinances ("C.C.O.") 627.23, titled "Facsimile Firearm."[1] He claims the trial court failed to comply with Crim.R. 11 prior to accepting a no contest plea and that he did not actually enter a plea to the charge. Further, he claims that without a plea or trial, the court erred in sentencing him. The city of Cleveland (the "city") filed a pleading conceding that the court erred in the manner alleged by appellant.

I. Factual and Procedural History

{¶2} On March 22, 2015, Cleveland police officers found appellant in possession of a cap gun that resembled a firearm after police received a complaint from a female victim that appellant threatened her with a gun. A criminal complaint was filed, Cleveland M.C. No. 2015CRB005176, on March 23, 2015. The complaint charged appellant with violating C.C.O. 627.23, by threatening the victim with an object that resembled a firearm.

{¶3} Appellant, with the assistance of counsel, entered a no contest plea. On May 23, 2015, the trial court conducted a plea hearing. The court, however, did not engage in any plea colloquy as required by Crim.R. 11. Further, appellant did not actually enter a plea. However, the trial court acted as though appellant did enter a plea and set the matter for sentencing on June 23, 2015. On that date, the court sentenced appellant to

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[1] The ordinance at issue was renumbered to C.C.O. 627.19, effective April 21, 2015. *See* Cleveland Ordinance No. 931-14.

180 days in jail with all days suspended, and fined appellant $1000 with $700 suspended. The court also ordered that appellant be subject to one year of active probation.

{¶4} Appellant then filed this appeal arguing the following errors:

> I. The trial court committed error when it failed to comply with Ohio Criminal Rule 11.
>
> II. The trial court committed error when it sentenced [appellant].

II. Law and Analysis

{¶5} Appellant argues the trial court failed to properly advise him of certain requirements mandated by Crim.R. 11 before accepting a plea, and at no time did appellant actually enter a plea of no contest. Appellant also asserts that he could not be sentenced without having pled guilty or no contest or been found guilty after a trial. The city filed a notice of conceded error acknowledging that the court failed to comply with Crim.R. 11 and failed to take a plea from appellant. *See* Loc.App.R. 16(B).

{¶6} Before accepting a guilty or no contest plea in a petty misdemeanor case, the trial court must make the determinations and give the warnings required by Crim.R. 11(E), and notify the defendant of the effects of the plea as set forth in Crim.R. 11(B)(1) through (3). *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, paragraphs one and two of the syllabus (addressing petty misdemeanor offenses under Crim.R. 11(E)). For a petty misdemeanor offense, that is one which does not subject a person to a possible penalty of more than six months in jail, a defendant must show prejudice where the court failed to set forth the effects of a plea. *Jones* at ¶ 52. That is because this is a nonconstitutional right for which the court must substantially comply.

Id., citing *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12. However, soon after *Jones*, the Ohio Supreme Court held that "[w]hen a trial judge fails to explain the constitutional rights set forth in Crim.R. 11(C)(2)(c), the guilty or no-contest plea is invalid 'under a presumption that it was entered involuntarily and unknowingly.'" *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 31, citing *Griggs* at ¶ 12. The court went on to hold that "'[a] complete failure to comply with the rule does not implicate an analysis of prejudice.'" *Id.* at ¶ 32, quoting *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 22. While *Clark* dealt with felony sentencing, its admonition that a complete failure to engage in a plea colloquy required by Crim.R. 11 is equally applicable here. *See State v. Johnson*, 9th Dist. Summit No. 27550, 2016-Ohio-480, ¶ 10.

{¶7} A review of the transcripts in this case reveals that the trial court did not accept a plea from appellant. While the city set forth the proposed plea agreement, and appellant's attorney indicated appellant would accept the plea, the court never addressed appellant and appellant never entered a plea. Similar to the present case, *Johnson* involved a misdemeanor plea where the court failed to engage a defendant in a Crim.R. 11 colloquy and failed to elicit a plea on the record. *Id*. at ¶ 10. The Ninth District determined that the trial court completely failed to comply with Crim.R. 11 and therefore, Johnson was not required to show prejudice. *Id*.

{¶8} Therefore, the court erred in completely failing to conduct a plea colloquy required by Crim.R. 11, and subsequently finding appellant guilty and sentencing him

without any basis for so doing. Appellant's other assigned error regarding the trial court's authority to impose any sentence is rendered moot.

{¶9} This cause is reversed, plea vacated, and the case is remanded for further proceedings.

It is ordered that appellant recover of said appellee 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 municipal court to carry this judgment into execution.

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

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., and
ANITA LASTER MAYS, J., CONCUR