

[Cite as *State v. Austin*, 2018-Ohio-173.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105712

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL RESHAN AUSTIN

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-15-600992-A, CR-16-602395-A, and CR-16-611144-B

BEFORE: Stewart, J., Kilbane, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: January 18, 2018

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant Michael Reshan Austin pleaded guilty in three separate cases: in Cuyahoga C.P. No. CR-15-600992-A, he pleaded guilty to drug trafficking and possession of criminal tools; in Cuyahoga C.P. No. CR-16-602395-A, he pleaded guilty to possession of criminal tools; and in Cuyahoga C.P. No. CR-16-611144-B, he pleaded guilty to drug possession. The court sentenced him to serve concurrent prison terms of 24 and 12 months in CR-15-600992; 12 months in prison in CR-16-602395; and 12 months in prison in CR-16-611144. The sentences imposed in each case were ordered to be served consecutively for a total of four years in prison.

{¶2} In this direct appeal, we reject Austin’s argument that his guilty pleas were involuntary because the court had him plead guilty to the wrong offenses in two of the three cases — the court was made aware of the error and corrected it without objection from Austin before accepting his guilty plea. We do, however, agree with Austin that the court erred by characterizing one of the offenses as requiring mandatory prison time. That error requires resentencing, and moots consideration of Austin’s two remaining assignments of error.

I. Guilty Plea

{¶3} We first address Austin’s claim that his guilty pleas in CR-16-602395 and CR-16-611144 were involuntary because the court misspoke regarding the specific counts to which he would be pleading guilty: in CR-16-602395, the court mistakenly told Austin

that he would be pleading guilty to possession of drugs, when in fact, he was pleading guilty to possession of criminal tools; in CR-16-611144, the court mistakenly told Austin that he would be pleading guilty to possession of criminal tools, when in fact, he was pleading to possession of drugs. Austin maintains that these errors meant that he did not have a full understanding of the charges to which he pleaded guilty.

{¶4} Before accepting a guilty plea, the court must, among other things, determine that “the defendant is making the plea voluntarily, with understanding of the nature of the charges[.]” Crim.R. 11(C)(2)(a). Although the term “nature of the charge” is not defined in the Rules of Criminal Procedure, *State v. Esner*, 8th Dist. Cuyahoga No. 90740, 2008-Ohio-6654, ¶ 3, the court must accurately describe the charges that are part of the guilty plea. Absent a correct recitation of the charges forming the plea bargain, there is no meeting of the minds sufficient to form the necessary agreement. *State v. Robinson*, 8th Dist. Cuyahoga No. 82801, 2004-Ohio-740, ¶ 12.

{¶5} It appears that the court “mismarked” the specific charges contained under the separate case numbers, causing it to transpose the counts. Nevertheless, the assistant county prosecutor caught the mistake and called it to the court’s attention. The court corrected the mistake, and Austin made it clear that he understood the specific charge under CR-16-602395:

THE COURT: Mismarked. Mr. Austin, in 602395, I misspoke when I said that you’ll be pleading to possession of drugs. In fact, you’ll be pleading to possessing criminal tools in count 2. And that also is a felony of the fifth degree, also punishable by time of incarceration in prison in monthly increments of between 6 and 12 months inclusive and/or a fine of up to \$2,500. Do you understand that?

DEFENDANT AUSTIN: Yes, sir.

{¶6} The court then asked defense counsel if he would “waive any defect in the sentencing hearing * * * on behalf of Mr. Austin, as to the court misstating the nature of the crime? The court had the correct degree of felony, but not the right crime. It was mismarked.” Defense counsel replied, “[y]es.” The court then asked, “[d]o I have to repeat those?” Defense counsel replied, “[n]o, Judge.”

{¶7} With respect to CR-16-611144, the court made the same mistake, telling Austin that he would be pleading to possession of criminal tools rather than possession of drugs. Again, the assistant county prosecutor noted the mistake to the court. With no objection from Austin, the court said, “I accept your plea of guilty to count 6 of the indictment and find you guilty thereon.”

{¶8} It is true that the court did not specifically state that Count 6 of the indictment in CR-16-611144 was drug possession, but the context was such that Austin knew that he was pleading to drug possession. Not only did the court clearly explain that it had mixed up the counts in the two case numbers, there was no objection from either Austin or defense counsel. Nor is there any basis for finding that the court’s momentary confusion over the specific counts in each case resulted in Austin being unaware of that to which he pleaded guilty. *State v. Woodall*, 8th Dist. Cuyahoga No. 102823, 2016-Ohio-294, ¶ 14.

II. Mandatory Prison Time

{¶9} When the state explained the nature of the plea agreement in CR-15-600992, it informed the court that the trafficking count, a third-degree felony, required a

mandatory prison term of 9 to 36 months because Austin had previously been convicted of two or more drug offenses. When the court imposed sentence on this count, it stated: “Count 4 is mandatory time — no judicial release or community control.” Austin complains that the court erroneously characterized his sentence as mandatory time and that he suffered prejudice, regardless of whether the court would have sentenced him the same for the offense because he has been deprived of an opportunity for judicial release at an earlier date.

{¶10} The state concedes that the court erred by informing Austin that the trafficking count required mandatory time, but argues that the error was harmless because the court’s decision to sentence Austin to more than the minimum sentence (he received 24 months) reflected the court’s intention to impose a prison term regardless of whether a prison term was mandatory. The state urges us to “allow the Appellant to be eligible to apply for judicial release but uphold the 24 month sentence imposed by the trial court.”

{¶11} Imposing a prison sentence under the mistaken belief that a prison term is mandatory does not necessarily constitute reversible error; if the defendant was not prejudiced, the error can be harmless. *State v. Warren*, 7th Dist. Mahoning No. 05 MA 91, 2006-Ohio-1281, ¶ 62. However, the record belies the state’s argument that the court would have sentenced Austin to a prison term regardless of whether it erroneously believed that prison time was mandatory.

{¶12} In remarks made just after imposing sentence, the court stated, “[a]nd but for the constraint of the mandatory sentence, maybe it wouldn’t have happened. But, you

know, you — you put the Court in a box by doing what you did.” This statement could indicate that the court imposed a prison term, regardless of duration, only because it believed that a prison term was mandatory. Admittedly, it seems unlikely that the court would have sentenced Austin to prison on the three, fifth-degree felony counts but not on the third-degree felony count. But to constitute harmless error, the error must not affect the “substantial rights” of the defendant. *See* Crim.R. 52(A). The court’s statement that the mandatory aspect of the third-degree felony count put it “in a box” is enough that we cannot conclude beyond a reasonable doubt that the court’s error did not result in any prejudice to Austin. The assignment of error is sustained, and the case remanded for resentencing. The remaining assignments of error are rendered moot by the resentencing. *See* App.R. 12(A)(1)(c).

{¶13} Judgment reversed and remanded to the trial court for further proceedings consistent with the opinion.

It is ordered that appellant recover of 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 common pleas 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.

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
TIM McCORMACK, J., CONCUR