

[Cite as *State v. Kushlan*, 2017-Ohio-7177.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105369

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GREGORY RYAN KUSHLAN

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-607386-A

BEFORE: Kilbane, J., Keough, A.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: August 10, 2017

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Gregory Kushlan (“Kushlan”), appeals from his guilty plea for aggravated vehicular homicide and driving while under the influence. Kushlan raises three assignments of error in which he contends: (1) the trial court did not comply with Crim.R. 11; (2) the trial court erred in failing to investigate his complaint about the adequacy of appointed counsel; and (3) the trial court erred in imposing restitution. The state of Ohio (“state”) concedes the error with respect to Kushlan’s guilty plea, and our review of the record substantiates the error.

{¶2} In July 2016, Kushlan was charged with two counts of aggravated vehicular homicide, one count of failure to stop after an accident, and one count of driving while under the influence. In September 2016, Kushlan pled guilty to one count of aggravated vehicular homicide (which is subject to a mandatory prison term) and the one count of driving while under the influence. The remaining counts were nolle. With respect to the aggravated vehicular homicide count, the trial court advised Kushlan at the plea hearing: “Do you understand if a sentence of community control sanctions is imposed, and the terms of the sanction are violated, you could be sentenced to prison?”

[W]here a defendant faces a mandatory prison sentence as a result of a guilty or no contest plea, the trial court must determine, prior to accepting a plea, that the defendant understands that he or she is subject to a mandatory prison sentence and that as a result of the mandatory prison sentence, he or she is not eligible for probation or community control sanctions.

State v. Tutt, 2015-Ohio-5145, 54 N.E.3d 619, ¶ 19 (8th Dist.), citing *State v. Balidbid*, 2d Dist. Montgomery No. 24511, 2012-Ohio-1406, ¶ 10; *State v. Brigner*, 4th Dist. Athens No. 14CA19, 2015-Ohio-2526; *State v. Hendrix*, 12th Dist. Butler No. CA2012-12-265, 2013-Ohio-4978. See also *State v. Dawson*, 8th Dist. Cuyahoga No. 61828, 1993 Ohio App. LEXIS 223, *5-6 (Jan. 23, 1993). (“Substantial compliance requires that an on the record dialogue take place, where defendant is orally informed of the possible sentence. * * * The court must inform defendant if he would be required to serve actual time in prison * * * and must disclose the length of the mandatory actual incarceration.”)

{¶3} The trial court can meet this requirement either by “expressly informing the defendant that he or she is subject to a mandatory prison sentence and is therefore ineligible for probation or_ community control sanctions or by confirming the defendant’s subjective understanding of that fact in some other way[.]” *Tutt* at ¶ 20.

{¶4} In the instant case, a review of the record reveals that at the plea hearing, the trial court outlined the potential sentence range Kushlan could receive on the aggravated vehicular homicide count as anywhere from “two to eight years in prison, a fine of up to \$15,000 or both[.]” The trial court went on to state that “with respect to [the aggravated vehicle homicide count, if] a sentence of community control sanctions is imposed, and the terms of the sanction are violated, you could be sentenced to prison[.]”

{¶5} Considering this record, it does not appear that Kushlan subjectively understood at the plea hearing that he was subject to a mandatory prison term on the aggravated vehicle homicide count.

{¶6} Accordingly, we agree with Kushlan and the state and sustain the first assignment of error. Our disposition of the first assignment of error renders the remaining assignments of error moot. App.R.12.

{¶7} Judgment is reversed, and the matter is remanded with instructions for the trial court to vacate Kushlan's plea.

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.

MARY EILEEN KILBANE, JUDGE

KATHLEEN ANN KEOUGH, A.J., and
SEAN C. GALLAGHER, J., CONCUR