[Cite as *State v. Holmes*, 2023-Ohio-2585.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 112137
v.	:	
TYRONE HOLMES,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 27, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-21-665233-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Glen Ramdhan, Assistant Prosecuting Attorney, *for appellee*.

P. Andrew Baker, *for appellant*.

MICHELLE J. SHEEHAN, J.:

{¶ 1} Defendant-appellant Tyrone Holmes appeals from a judgment of the trial court that convicted him of rape and gross sexual imposition after he pled guilty to these offenses pursuant to a plea agreement. The plea agreement included an

agreed sentence of ten years for his offenses. On appeal, Holmes argues his plea was not made knowingly, intelligently, and voluntarily because the trial court did not inform him that his prison sentence would be mandatory. Having reviewed the plea proceeding, we find no merit to the appeal and affirm the trial court's judgment.

{¶ 2} The victim in this case is Holmes's then-girlfriend's 11-year-old daughter. He committed the sex offenses when she entrusted the child's care to him while she was working. Holmes was indicted for rape under R.C. 2907.02(A)(1)(b) (sexual conduct with a minor less than 13 years old) and three counts of gross sexual imposition under R.C. 2907.05(A)(4). Pursuant to the plea agreement, Holmes would plead guilty to rape under R.C. 2907.02(A)(2) (forcible rape) and one count of gross sexual imposition; these two offenses would not be considered allied offenses; the state would dismiss the remaining two counts of gross sexual imposition; and the parties agreed to a ten-year prison term for Holmes's offenses.

{¶ 3} At the plea hearing, the trial court recited the plea agreement and engaged in a Crim.R. 11 colloquy with Holmes. Holmes pleaded guilty, and the trial court subsequently imposed the agreed ten-year sentence: six years for rape and 48 months for gross sexual imposition, to run consecutively; under the Reagan Tokes Law, he is to serve an indefinite sentence of ten to 13 years.

{¶ 4} On appeal, Holmes raised one assignment of error, claiming his plea was not knowing, intelligent, and voluntary. Specifically, he argues the trial court did not specifically advise him that a prison sentence is mandatory for his offenses.

{¶ 5} To ensure that a defendant enters a plea knowingly, voluntarily, and intelligently, a trial court must engage in colloquy with the defendant in accordance with Crim.R. 11(C). *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). Crim.R. 11(C)(2) requires that a trial court determine from a colloquy with the defendant whether the defendant understands the nature of the charge and maximum penalty, the effect of the guilty plea, and the constitutional rights waived by a guilty plea. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621. The reviewing court conducts a de novo review to determine whether the trial court accepted a plea in compliance with Crim.R. 11(C). *State v. Cardwell*, 8th Dist. Cuyahoga No. 92796, 2009-Ohio-6827, ¶ 26.

{¶ 6} When reviewing the validity of a guilty plea, the Supreme Court of Ohio now directs us to ask the following questions: "(1) has the trial court complied with the relevant provision of the rule? (2) if the court has not complied fully with the rule, is the purported failure of a type that excuses a defendant from the burden of demonstrating prejudice? and (3) if a showing of prejudice is required, has the defendant met that burden?" *State v. Dangler*, 162 Ohio St.3d 1, 2020-Ohio2765, 164 N.E.3d 286, ¶ 17.

{¶ 7} Here, the answer to the first question would appear to be yes. Pursuant to Crim.R. 11(C)(2)(a), the trial court is required to "[d]etermin[e] that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant

is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing."

{¶ 8} The word "mandatory" does not appear in Crim.R. 11(C)(2)(a). Rather, the rule requires the court to advise the defendant, "if applicable," that the defendant is not eligible for probation or community control sanctions. Here, under the plea agreement, Holmes was to plead guilty to rape in violation of R.C. 2907.02(A)(2), a felony of the first degree, which, as Holmes acknowledges, subjects him to a mandatory prison sentence pursuant to R.C. 2929.13(F)(2).

{¶ 9} This court has consistently held that it is not a failure of Crim.R. 11(C)(2)(a) if the trial court does not specifically inform the defendant that he is subject to a mandatory prison term where the defendant was subjectively aware that he would receive a mandatory prison sentence. *State v. Pippen*, 2020-Ohio-4297, 158 N.E.3d 196, ¶ 19 (8th Dist.) (the trial court did not violate Crim.R. 11(C)(a)(2) in not specifically advising the defendant that he was subject to a mandatory term of imprisonment because the record reflects the defendant was subjectively aware that he would be sentenced to a mandatory prison time); *State v. Gary*, 8th Dist. Cuyahoga No. 109074, 2020-Ohio-4069, ¶ 5 ("a court need not specifically inform a defendant that a particular conviction mandates prison or precludes a community control sanction where the record clearly indicates that the defendant so understood"), citing *State v. Smith*, 8th Dist. Cuyahoga No. 83395,

2004-Ohio-1796, ¶ 11, and *State v. McLaughlin*, 8th Dist. Cuyahoga No. 83149, 2004-Ohio-2334, ¶ 19.

{¶ 10} Here, Holmes *agreed* to a ten-year prison term for his offenses under the plea agreement. Inherent in his agreement is his understanding that he would be serving a prison term (of ten years). It is apparent from our review of the record that Holmes subjectively understood a ten-year prison term would be imposed upon the trial court's acceptance of his plea.[1] *See, e.g. State v. Thomas*, 8th Dist. Cuyahoga No. 94788, 2011-Ohio-214 (defendant agreed to an eight-year term for his offenses and this court rejected his claim that the trial court failed to comply with Crim.R. 11 (C)(2)(a) in not specifically informing him that he was not eligible for probation). Under the circumstances of this case, the trial court's advisement was in compliance of Crim.R. 11(C)(2)(a). Holmes entered the guilty plea knowingly, intelligently, and voluntarily. The sole assignment of error is without merit.

{¶ 11} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

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[1] We note that the trial court, after informing Holmes of the sentencing range for his offenses and of the required postrelease control following his prison term, stated that "you *could* be placed under a community control sentence for up to 5 years." (Emphasis added.) (Tr. 18.) Holmes points to this portion of the plea colloquy in support of his claim that the trial court failed to inform him that his prison sentence was mandatory, a violation of Crim.R. 11(C)(2)(a). Notably, the trial court did not state that Holmes *was eligible* for community control, only that he *could* be placed under community-control sanctions. The trial court's extraneous statement, considered in light of the mandatory nature of Holmes's rape sentence and the agreed sentence of ten years, would not have affected his understanding that he was to serve a prison term under the plea agreement. The transcript reflects Holmes was afforded an opportunity to ask about the statement but did not express any confusion.

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.

MICHELLE J. SHEEHAN, JUDGE

ANITA LASTER MAYS, A.J., and
FRANK DANIEL CELEBREZZE, III, J., CONCUR