

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 112196
 v. :
 :
 ANDRE GRAY, JR., :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 14, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-21-663716-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Lisa J. Turoso, Assistant Prosecuting Attorney, *for appellee*.

Edward M. Heindel, *for appellant*.

KATHLEEN ANN KEOUGH, J.:

{¶ 1} Defendant-appellant, Andre Gray, Jr. (“Gray”), appeals his judgment of conviction, challenging the validity of his guilty plea. Upon review, we affirm.

{¶ 2} Gray was charged in a ten-count indictment arising out of an incident where he got in a car driven by a Lyft driver and then pointed a gun in the air and

directed the driver to give him his keys. When the driver fled from the car, Gray drove off in the car, hit another vehicle, and then totaled the car he was driving upon hitting a tree.

{¶ 3} After plea negotiations, Gray entered into a plea agreement with the state. At the plea hearing, the prosecutor set forth the agreement: Gray would plead guilty to Count 1, aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree, with a one-year firearm specification and a forfeiture specification; Count 7, failure to comply in violation of R.C. 2921.331(B), a fourth-degree felony, with a forfeiture specification; Count 8, grand theft in violation of R.C. 2913.02(A)(1), a felony of the fourth degree, with a forfeiture specification; and Count 10, theft in violation of R.C. 2913.02(A)(1), a first-degree misdemeanor. The remaining counts and specifications would be nolledd.

{¶ 4} After the prosecutor explained the plea agreement, defense counsel advised the court that in light of her discussions with Gray, she believed that Gray understood his rights and the penalties associated with the offenses to which he would plead guilty, and his plea would be knowingly, intelligently, and voluntarily made. The trial court then advised Gray of the rights he would be waiving by pleading guilty, which Gray indicated he understood, and the maximum penalties for each offense to which he would plead guilty. Specifically with regard to Count 7, failure to comply, the trial court advised Gray:

So Count 7 is failure to comply, a felony of the fourth degree, in violation of 2921.331(B). It's a felony of the fourth degree and it carries

with it a maximum potential prison sentence of anywhere from six to 18 months in monthly increments and a fine of up to \$5,000.

I have to let you know that pleading guilty to that count when a prison sentence is imposed and has — a prison sentence on any other count has to run consecutive to that count. Do you understand that?

GRAY: Correct.

(Tr. 19-20.)

{¶ 5} Before accepting Gray's plea, the court found that he had been informed of his constitutional rights; that he understood the nature of the charges, the effects of a plea, and the maximum penalties that could be imposed; and that his plea would be knowingly, voluntarily, and intelligently made. (Tr. 25.) The court then accepted Gray's guilty plea to the four counts set forth in the plea agreement, found him guilty of each count, and referred him for a presentence-investigation report. (Tr. 28.)

{¶ 6} At the subsequent sentencing hearing, the state and defense counsel agreed that Counts 1 and 8 merged for purposes of sentencing, and the state elected to have the court sentence Gray on Count 1, aggravated robbery. The trial court sentenced Gray under the Reagan Tokes Law to a minimum of four years and a maximum of six years' incarceration on Count 1, consecutive to one year on the firearm specification. Before sentencing Gray on the failure to comply offense, the trial court stated:

On Count 7, failure to comply, a felony of the fourth degree, the court is going to impose a prison sentence, since it is mandatory to impose a prison sentence, of 14 months. The prison sentence on Count 7 must be served prior to and consecutive to any other prison sentence.

(Tr. 57.) The trial court sentenced Gray to 30 days with credit for jail time on Count 10, theft, for a total aggregate sentence on all counts of a minimum of six years and two months and a maximum of eight years and two months. This appeal followed.

{¶ 7} In his single assignment of error, Gray contends that his plea was not knowingly, voluntarily, and intelligently made because the trial court incorrectly advised him *at sentencing* that a prison sentence is mandatory for a failure to comply offense.

{¶ 8} It is well established that “[b]ecause a no-contest or guilty plea involves a waiver of constitutional rights, a defendant’s decision to enter a plea must be knowing, intelligent, and voluntary.” *State v. Dangler*, 162 Ohio St.3d 1, 2020-Ohio-2765, 164 N.E.3d 286, ¶ 10. “Ohio’s Crim.R. 11 outlines the procedures that trial courts are to follow when accepting pleas” and “ensures an adequate record on review by requiring the trial court to personally inform the defendant of his rights and the consequences of his plea and determine if the plea is understandingly and voluntarily made.” *Id.* at ¶ 11, quoting *State v. Stone*, 43 Ohio St.2d 163, 168, 331 N.E.2d 411 (1975).

{¶ 9} Gray contends that his plea should be vacated because the trial court failed to substantially comply with Crim.R. 11(C)(2)(a), which requires the court to determine that “the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved * * * .” He argues that the trial court did not substantially comply because the court erroneously advised him at sentencing that a prison sentence was mandatory for a failure to

comply offense, even though the offense does not require a mandatory sentence,¹ and that he would not have entered his plea if he had been properly advised.

{¶ 10} Initially, we note that the applicable standard is no longer one of strict or substantial compliance. When a criminal defendant challenges a trial court's compliance with Crim.R. 11(C), we first consider whether the trial court fully complied with the relevant portion of the rule. *Dangler*, 162 Ohio St.3d 1, 2020-Ohio-2765, 164 N.E.3d 286, at ¶ 17. If it has not fully complied, then we consider whether the failure is of a type that excuses a defendant from the burden of demonstrating prejudice, and if a showing of prejudice is required, whether the defendant's burden has been met. *Id.*

{¶ 11} The record here demonstrates that the trial court correctly advised Gray *at the plea hearing* of the maximum potential sentence on Count 7, failure to comply, and that any sentence on that count must be served prior to and consecutive to any other prison sentence. Gray told the court at the plea hearing that he understood this advisement by the court, and there is nothing in the record that suggests otherwise. Thus, not only did the trial court properly inform Gray of the maximum penalty involved for the failure to comply offense, the record reflects that Gray understood the maximum penalty for the offense before he entered his plea. The trial court's erroneous advisement at the subsequent sentencing hearing that

¹ See R.C. 2921.331(D), which states that “*if* the offender is sentenced to a prison term” for failure to comply, “the offender shall serve the prison term consecutively to any other prison term or mandatory prison term imposed upon the offender.” (Emphasis added.)

failure to comply requires a mandatory sentence could not and did not in any way affect Gray's ability to understand the consequences of his plea at the time he entered his plea. Because the record reflects that the trial court fully complied with Crim.R. 11(C) and properly advised Gray of the maximum penalties involved for a guilty plea to Count 7, failure to comply, the assignment of error is overruled.

{¶ 12} Judgment affirmed.

It is ordered that appellee recover from 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.

KATHLEEN ANN KEOUGH, JUDGE

FRANK DANIEL CELEBREZZE, III, P.J., and
EMANUELLA D. GROVES, J., CONCUR