[Cite as *State v. McCollins*, 2023-Ohio-3248.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	No. 112205
v.	:	
NATHANIEL McCOLLINS,	:	
Defendant-Appellee.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
RELEASED AND JOURNALIZED: September 14, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-22-672612-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Carl M Felice, Assistant Prosecuting Attorney, *for appellant*.

Cullen Sweeney, Cuyahoga County Public Defender, and John T. Martin and Michael Wilhelm, Assistant Public Defenders, *for appellee*.

MICHELLE J. SHEEHAN, P.J.:

{¶ 1} Plaintiff-appellant, the state of Ohio, appeals the concurrent prison sentence imposed on defendant-appellee, Nathaniel McCollins, for the crime of

failure to comply. Because the trial court sentenced McCollins to a prison term for a misdemeanor offense and despite errors committed by both parties on appeal, in the interests of justice, we reverse the judgment appealed in part and remand the case to the trial court.

PROCEDURAL HISTORY AND RELEVANT FACTS

{¶ 2} McCollins was indicted for five felony offenses for events occurring on July 17, 2022. He entered into a plea agreement with the state of Ohio and pled guilty to three charges, having weapons while under disability in violation of R.C. 2923.13(A)(3) with forfeiture of a firearm, failure to comply with the order or signal of police in violation of R.C. 2921.331(B), and attempted tampering with evidence in violation of R.C. 2923.02 and 2921.12(A)(1) with forfeiture of a firearm.

{¶ 3} Of relevance to this appeal, McCollins was charged in the indictment with failure to comply in violation of R.C. 2921.331(B), which indictment reads in part that McCollins

> did operate a motor vehicle so willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop.
>
> FURTHERMORE, and the operation of the motor vehicle be the offender caused a substantial risk of serious physical harm to persons or property.

As indicted, the level of offense of this charge was a felony of the third degree. R.C. 2921.331(C)(5)(a)(ii). At the time of the plea, the assistant prosecuting attorney stated that this count "would be amended to remove the furthermore language, making it failure to comply, a felony of the fourth degree." The court accepted the

amendment and informed McCollins that the offense to which he would plead would be a felony of the fourth degree. McCollins entered a plea of guilty to the amended charge.

{¶ 4} At the sentencing hearing, the trial court imposed 12-month concurrent prison sentences on the three charges to which McCollins pleaded guilty. The state objected to the trial court's order that the sentences be served concurrently on the basis that R.C. 2921.331(D) provides that if an offender is convicted of a violation of R.C. 2921.331(B), which is a felony of the third or fourth degree, any prison sentence imposed is to be served consecutively to any other prison term or mandatory prison term imposed on the offender.

LAW AND ARGUMENT

{¶ 5} The state's sole assignment of error reads:

The trial court erred by imposing a sentence contrary to law.

{¶ 6} In its appellant's brief, the state argued that the sentence imposed for failure to comply should have been ordered to be served consecutively to the other prison sentences imposed by the trial court. In his appellee's brief, McCollins agreed that the sentence imposed for the charge of failure to comply is contrary to law, but for a different reason than presented by the state. McCollins argued that the state amended the charge of failure to comply to a misdemeanor level offense, that the

trial court accepted the plea, but that the trial court imposed a sentence as if he had pleaded guilty to a felony offense.

{¶ 7} In its reply brief, the state conceded McCollins pleaded guilty to a misdemeanor level offense and then asked this court to either amend the sentence imposed or, alternatively, to vacate the plea entered because the parties entered into the plea agreement based upon a mutual mistake of fact.

The sentence imposed by the trial court for the failure to comply charge is contrary to law

{¶ 8} Both the state and McCollins asserted in their briefs and at oral argument that the sentence imposed for failure to comply was contrary to law because, at the time of the plea, the state amended the failure to comply charge to a misdemeanor offense and the trial court then imposed a sentence as if McCollins had pleaded guilty to a felony offense. We agree.

{¶ 9} When the state amended the indictment by removing the furthermore language, it stated that the level of the offense would be a felony of the fourth degree. However, the amendment offered by the state as part of the plea bargain, which was agreed to by McCollins and accepted by the trial court, reduced the level of the offense to a violation of R.C. 2921.331(B)[1] that, pursuant to R.C. 2921.331(C)(3), was a misdemeanor of the first degree. Having pleaded guilty to a misdemeanor of the

[1] Had the state wished to amend the level of the offense to a felony of the fourth degree, it would have had to amend the body of the indictment or the furthermore specification pursuant to R.C. 2921.331(C)(4) that provides that the level of offense of a violation of R.C. 2921.331(B) is a felony of the fourth degree if "the offender was fleeing immediately after the commission of a felony."

first degree, McCollins was subject to a sentence of incarceration of not more than 180 days in jail. R.C. 2929.24(A)(1).

{¶ 10} The record shows the state offered an amendment to the charge of failure to comply that reduced the offense to a misdemeanor. The trial court accepted the amendment, and McCollins pleaded guilty to that misdemeanor offense. However, the trial court sentenced McCollins to a 12-month prison sentence as if he had pleaded guilty to a felony offense, without objection by McCollins's trial counsel. This prison sentence imposed is not a sentence authorized by R.C. 2929.24 and as such is contrary to law.

This court will generally not consider arguments first made to this court on appeal or improperly raised by an appellee

{¶ 11} At the plea hearing, the state amended the charge of failure to comply to a misdemeanor level offense. The trial court accepted the amendment, and McCollins pleaded guilty to the amended offense. Although it is apparent by the record that the state, McCollins, and the trial court believed McCollins would plead guilty to a felony offense, he did not. Further, on appeal the state only argued that that the sentence imposed was contrary to law because it was not ordered to be served consecutively.[2]

{¶ 12} Having conceded that its assignment of error was without merit, the state raised two new arguments in its reply brief asking this court to resolve this

[2]Had McCollins actually entered a plea of guilty to a violation of R.C. 2921.331(C)(4), a felony of the fourth degree, as intended, the trial court would have been required to order that McCollins "serve the prison term consecutively to any other prison term or mandatory prison term imposed upon the offender." R.C. 2921.331(D).

appeal in either of two ways. The state first asked that we find plain error in the sentence and remand for resentencing. The state next asked in the alternative that this court rescind the plea agreement.

{¶ 13} Generally, an error not raised to the trial court is not to be considered on appeal. *State v. Castagnola*, 145 Ohio St.3d 1, 2015-Ohio-1565, 46 N.E.3d 638, ¶ 67. Pursuant to App.R. 12, the scope of the errors to be considered on appeal are limited to those errors properly raised in an assignment of error with citation to the record and which are separately argued within the appellant's brief. App.R. 12(A) reads:

> (A) Determination.
>
> (1) On an undismissed appeal from a trial court, a court of appeals shall do all of the following:
>
> (a) Review and affirm, modify, or reverse the judgment or final order appealed;
> (b) Determine the appeal on its merits on the assignments of error set forth in the briefs under App.R. 16, the record on appeal under App.R. 9, and, unless waived, the oral argument under App.R. 21;
> (c) Unless an assignment of error is made moot by a ruling on another assignment of error, decide each assignment of error and give reasons in writing for its decision.
>
> (2) The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A).

{¶ 14} Pursuant to this rule, we are to determine an appeal on the assignments of error set forth in the briefs, the record on appeal, and the oral

argument. As to the state's belated argument that the plea should be rescinded, "'appellate courts will generally not consider arguments that are raised for the first time in a reply brief.'" *Mundy v. Golightly*, 8th Dist. Cuyahoga No. 110382, 2022-Ohio-83, ¶ 6, fn. 1, quoting *Tax Ease Ohio, II, L.L.C. v. Leach*, 8th Dist. Cuyahoga No. 110119, 2021-Ohio-2841, ¶ 21, fn. 4, citing *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 18. We elect to not address the state's argument regarding its apparent mistake in effecting the plea bargain by offering an amendment to the indictment that did not encompass the intended plea bargain as the state's claim of error was made for the first time on appeal. Moreover, the state offered the amendment to the trial court and is prohibited from claiming error that it invited. *State v. Brunson*, Slip Opinion No. 2022-Ohio-4299, ¶ 50 ("[A] party is not permitted to take advantage of an error that he invited or induced the court to make."), citing *Lester v. Leuck*, 142 Ohio St. 91, 50 N.E.2d 145 (1943), paragraph one of the syllabus.

{¶ 15} As to McCollins's assertion that the sentence should be reversed, McCollins failed to file a cross-appeal as mandated by App.R. 3(C). As the appellee, this failure foreclosed McCollins's ability to challenge his sentence. "Where an appellee 'seeks to change the order,' a notice of cross-appeal must be filed." *State v. Wilcox*, 1st Dist. Hamilton No. C-190495, 2021-Ohio-2282, ¶ 7, quoting App.R. 3(C)(1). The failure to file a cross-notice of appeal pursuant to App.R. 3(C)

will result in the court failing to consider the noted error.[3] *State v. Cover*, 8th Dist. Cuyahoga No. 109959, 2021-Ohio-1303, ¶ 7 (Court is without jurisdiction to review the trial court's erroneous imposition of concurrent sentences because the state failed to cross-appeal.); *State v. Bronkar*, 5th Dist. Muskingum Nos. CT2001-0003, CT2000-0033, and CT2001-0001, 2001-Ohio-1570 (Court would not consider the state's argument that the trial court should have ordered a greater amount of restitution where the state did not file a cross-appeal.).

In cases in which the interests of justice demand, this court has discretion to correct error not properly raised by the parties

{¶ 16} Despite the procedural errors committed by the state and by McCollins by not filing an appeal or cross-appeal, it remains within our discretion to notice errors in the proceedings below that were not properly raised on appeal where the interests of justice so demand. *Toledo's Great Eastern Shoppers City, Inc. v. Abde's Black Angus Steak House No. III, Inc.,* 24 Ohio St.3d 198, 203, 494 N.E.2d 1101 (1986) ("It is evident from the discretionary language employed in App.R. 12(A) that a court of appeals may pass upon an error which was neither assigned nor briefed by a party.") citing *C. Miller Chevrolet, Inc. v. Willoughby Hills*, 38 Ohio St.2d 298, 313 N.E.2d 400 (1974), *overruled in part, Hungler v. Cincinnati*, 25 Ohio St.3d 338, 341-42, 496 N.E.2d 912 (1986); *Bond v. de Rinaldis*, 2018-Ohio-

[3] McCollins did not file a cross-appeal or an appeal of his sentence. His failure to file an appeal would also preclude his ability to challenge his sentence. "If a sentencing error renders the defendant's sentence voidable, the error must be challenged on direct appeal, or the sentence will be subject to res judicata." *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, ¶ 43.

930, 108 N.E.3d 657, ¶ 17-18 (10th Dist.); *State v. Wheat*, 10th Dist. Franklin No. 05AP-30, 2005-Ohio-6958, ¶ 28-29 (Sadler, J., concurring opinion).

{¶ 17} Our ability to notice error not properly raised in an appeal is limited. In *Hungler*, the Ohio Supreme court found that the appellate court's ability to notice error not raised by the parties must be based upon a sufficient record. *Id.* at 342 ("[I]t can be stated that although a court of appeals may recognize error not assigned by the parties, there must be sufficient basis in the record before it upon which the court can decide that error."). Also, our ability to notice error not raised to the trial court is further limited to cases in which the parties have been given an opportunity to brief issues regarding the error. *See State v. Moore*, 154 Ohio St.3d 94, 2018-Ohio-3237, 111 N.E.3d 1146, ¶ 20.

{¶ 18} The error in sentencing McCollins to prison is apparent on the record. The state amended the failure to comply charge in the indictment to a misdemeanor level offense. The amendment was accepted by the trial court, and McCollins pleaded guilty. As such, the trial court's ability to sentence McCollins was limited to a term of 180 days in jail, but the trial court sentenced McCollins to a 12-month prison term. Both the state and McCollins acknowledged in briefing and at oral argument that this error occurred. And this error is significant. McCollins was sentenced to serve a term of incarceration of twice the length to which he could be sentenced for the crime he pleaded guilty to and the sentence was ordered to be

served in prison, not jail. Because of the significant nature of the error, it is necessary we exercise our limited discretion to correct it.

{¶ 19} We find the sentence imposed for the charge of failure to comply in this case to be contrary to law, sustain the state's assignment of error, reverse the sentence imposed for the charge of failure to comply, and remand this matter to the trial court for the limited purpose of resentencing McCollins on the failure to comply charge.

CONCLUSION

{¶ 20} McCollins entered a plea of guilty to a misdemeanor offense but was sentenced to prison. On appeal, the state raised an error in the sentence that did not occur. McCollins neither appealed nor filed a cross-appeal, but raised an error that did occur. Despite the procedural errors committed by the parties, because the error is antithetical to the administration in justice, we find it necessary to notice and correct the error. Accordingly, we reverse the sentence imposed for the charge of failure to comply and remand this case to the trial court to resentence McCollins on the misdemeanor offense to which he pleaded guilty to.

{¶ 21} This cause is affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the 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.

MICHELLE J. SHEEHAN, PRESIDING JUDGE

LISA B. FORBES, J., and
MARY J. BOYLE, J., CONCUR