[Cite as *State v. Douglas*, 2018-Ohio-5389.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

LLOYD GEORGE DOUGLAS, JR.,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 BE 0052

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 17 CR 203

BEFORE:
Gene Donofrio, Carol Ann Robb, Kathleen Bartlett, Judges.

JUDGMENT:
Affirmed

Atty. Scott Lloyd, 147-A West Main Street, St. Clairsville, Ohio 43950, for Plaintiff-Appellee, and

Atty. Brent Clyburn, White & Clyburn, 604 Sixth Street, Moundsville, West Virginia 26041, for Defendant-Appellant.

Dated:
December 31, 2018

Donofrio, J.

{¶1} Defendant-appellant, Lloyd George Douglas, Jr., appeals his sentence in the Belmont County Common Pleas Court following his guilty plea to one count of trafficking drugs in violation of R.C. 2925.03(A)(1)(C)(4)(a), a felony of the fifth degree.

{¶2} Appellant was indicted on two counts of trafficking drugs, specifically cocaine. Both charges carried specifications that the offenses occurred within the vicinity of a school, making both charges felonies of the fourth degree pursuant to R.C. 2925.03(A)(1)(C)(4)(b).

{¶3} Appellant reached a plea agreement with plaintiff-appellee, the State of Ohio. Pursuant to the plea agreement, the state agreed to dismiss one count of trafficking drugs and dismiss the school vicinity specification on the other count. In exchange, appellant agreed to plead guilty to one count of trafficking drugs, a felony of the fifth degree. The plea agreement also specified that the parties agreed to a recommended sentence of 12 months of incarceration. The trial court accepted appellant's guilty plea and scheduled a sentencing hearing.

{¶4} At the sentencing hearing, the parties verified the joint recommendation of 12 months of incarceration. The trial court accepted the joint recommendation and sentenced appellant to 12 months of incarceration. This sentence was to run consecutively to a term of imprisonment appellant was currently serving in West Virginia. The trial court did not provide appellant an opportunity to speak on his own behalf at the sentencing hearing.

{¶5} Appellant's sentence was memorialized in a judgment entry dated November 8, 2017. Appellant timely filed a notice of appeal on November 21, 2017. Appellant now raises one assignment of error.

{¶6} Appellant's sole assignment of error states:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED THE DEFENDANT-APPELLANT, LLOYD GEORGE DOUGLAS, JR., HIS RIGHT TO ALLOCUTION AT SENTENCING.

{¶7} Appellant argues that the trial court was required to provide him with an opportunity to speak at his sentencing hearing. Appellant argues that the trial court's failure to address him directly at the sentencing hearing constitutes reversible error.

{¶8} Pursuant to Crim.R. 32(A)(1), at the time of imposing a sentence, the trial court shall "[a]fford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment." This is known as the right of allocution.

{¶9} The trial court has the affirmative obligation to personally ask the defendant if he wishes to exercise his allocution right. *State v. Green*, 90 Ohio St.3d 352, 359, 738 N.E.2d 1208 (1998), *State v. Campbell*, 90 Ohio St.3d 320, 324–325, 738 N.E.2d 1178 (2000), *see also Green v. U.S.*, 365 U.S. 301, 305, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961). The right is not waived by a mere lack of objection by the defense. *Campbell*, 90 Ohio St.3d at 324, 738 N.E.2d 1178.

{¶10} However, a violation of Crim.R. 32(A)(1) is subject to an analysis under the doctrine of harmless error and the doctrine of invited error. *Id*. at 324–326, 738 N.E.2d 1178. As to harmless error, "a trial court's failure to address the defendant at sentencing is not prejudicial in every case." *Id*. at 325 citing *State v. Reynolds*, 80 Ohio St.3d 670, 684, 687 N.E.2d 1358 (1998).

{¶11} Appellant's written guilty plea contains a provision which states "[t]he parties agree to a recommended sentence of 12 months in prison to run consecutive to the Defendant's current [West Virginia] prison sentence." Moreover, at appellant's sentencing hearing, the following occurred:

> **The Court**: * * * However I've studied your plea of guilty form, and you have agreed that you recommend a sentence of 12 months in prison. Is that correct, Mr. Lloyd?
>
> **Mr. Lloyd [the prosecutor]**: Yes, consecutive to his prison term in West Virginia.
>
> **The Court**: Correct. Mr. Ryncarz, you agree with that?

> **Mr. Ryncarz [defense counsel]**: Yes, Your Honor. That's correct. Based on the plea that was entered, that was pretty much the agreement that was reached between the parties.

(Sentencing Tr. 2).

{¶12} The trial court accepted the joint recommendation and sentenced appellant to 12 months of incarceration to run consecutively with his West Virginia sentence. (Sentencing Tr. 2). The trial court then informed appellant of the consequences if he violated post-release control. (Sentencing Tr. 3). Finally, the trial court informed appellant that he was ordered to pay court costs, provide a DNA sample, and has the right to appeal. (Sentencing Tr. 4).

{¶13} Appellant argues that the trial court violated Crim.R. 32(A)(1) by not affording him the opportunity to speak at his sentencing hearing.

{¶14} The only people who spoke at the hearing were the trial court, appellant's counsel, and the prosecutor. The trial court did not directly address appellant. The trial court verified a joint recommendation from the parties, accepted the joint recommendation, informed appellant about post-release control, and concluded the hearing.

{¶15} Even though the trial court did not directly address appellant and allow him to exercise his right to speak at the sentencing hearing, it was harmless error in this case.

{¶16} The written plea agreement indicates that the parties agreed to a recommended sentence of 12 months of incarceration. This recommendation was confirmed at the sentencing hearing and imposed by the trial court. (Sentencing Tr. 2).

{¶17} Pursuant to R.C. 2953.08(D)(1), appellate courts cannot review a sentence if it is authorized by law, has been recommended jointly by the defendant and prosecution, and is imposed by the sentencing court. When the trial court imposes a jointly-recommended sentence but fails to provide the defendant with his right of allocution, the error is harmless. *State v. Chionchio*, 11th Dist. No. 2012-P-0057, 2013-Ohio-4296, ¶ 47 ("If the defendant has agreed to the sentence to be imposed, a request for mercy from the judge has no impact on the sentence that will be imposed on the

defendant."); *State v. Nieves*, 8th Dist. No. 92797, 2010-Ohio-514, ¶ 13 ("[S]ince the trial court imposed a sentence previously agreed to by appellant, any error in limiting appellant's comments on his own behalf or in mitigation at sentencing would be harmless.")

{¶18} Based on the above, appellant's lack of allocution at the sentencing hearing is harmless error.

{¶19} Accordingly, appellant's sole assignment of error lacks merit and is overruled.

{¶20} For the reasons stated above, the trial court's judgment is hereby affirmed.

Robb, P., J., concurs.

Bartlett, J., concurs.

For the reasons stated in the Opinion rendered herein, the sole assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.