

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-160676
		TRIAL NO. B-1601470
Plaintiff-Appellee,	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
DERRICK GIBBS,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.*

Defendant-appellant Derrick Gibbs pleaded guilty to one count of burglary under R.C. 2911.12(A)(3), a third-degree felony. The trial court sentenced him to 36 months' imprisonment. We find no merit in Gibbs's two assignments of error, and we affirm his conviction.

In his first assignment of error, Gibbs contends that the trial court erred in accepting his plea. He argues that it was not made knowingly, intelligently and voluntarily because the court did not inform him of the correct minimum penalty for a third-degree felony. This assignment of error is not well taken.

Gibbs claims that the trial court incorrectly told him that the minimum penalty he could have received was 12 months' imprisonment when it was actually nine months. But former R.C. 2929.14(A)(3)(a) provided that an offender who had previously "been convicted of or pleaded guilty in two or more separate proceedings to two or more violations of sections 2911.01, 2911.02, 2911.11. or 2911.12 of the Revised Code" faced a

minimum prison term of 12 months. The record shows that Gibbs had previously been convicted in separate proceedings of aggravated burglary under R.C. 2911.11 and burglary under R.C. 2911.12. Therefore, the trial correctly informed him of the minimum term he was facing by pleading guilty.

Gibbs also argues that his plea was not knowingly, intelligently or voluntarily made because of his trial counsel's representation that he would receive a lesser sentence. But that argument involves matters outside the record on appeal, which this court cannot consider. *See State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus; *State v. Dieterle*, 1st Dist. Hamilton No. C-070796, 2009-Ohio-1888, ¶ 49.

The record shows that the trial court strictly complied with the provisions of Crim.R. 11(C) relating to the constitutional rights Gibbs would be waiving by pleading guilty and substantially complied with the rule in all other respects. *See State v. Ballard*, 66 Ohio St.2d 473, 475-478, 423 N.E.2d 115 (1981); *State v. Fields*, 1st Dist. Hamilton No. C-090648, 2010-Ohio-4114, ¶ 8. The court conducted a meaningful dialogue to ensure that Gibbs's plea was made knowingly, intelligently, and voluntarily. *See Fields* at ¶ 10. Therefore, we overrule his first assignment of error.

In his second assignment of error, Gibbs contends that the sentence imposed was not supported by the record. He argues that the court failed to consider the mitigating factors he presented and the purposes and principles of sentencing. This assignment of error is not well taken.

The sentence was within the statutory range for a third-degree felony for an offender with prior convictions for aggravated burglary and burglary. *See* former R.C. 2929.14(A)(3). While a trial court is required to consider the principles and purposes of sentencing and the various factors under R.C. 2929.11 and 2929.12, it need not make specific findings. We can presume from a silent record that the court considered the

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appropriate factors unless the defendant affirmatively shows that the court failed to do so.

State v. Bohannon, 1st Dist. Hamilton No. C-130014, 2013-Ohio-5101, ¶7.

The record shows that the trial court heard Gibbs's arguments in mitigation and considered them. In fact, the court said that it had originally intended to give him a harsher sentence, but that it had reconsidered after hearing Gibbs's arguments.

Gibbs has not affirmatively demonstrated that the trial court did not consider the appropriate factors. On the record before us, we cannot say that Gibbs's sentence was clearly and convincingly contrary to law. *See State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1; *State v. White*, 2013-Ohio-4225, 997 N.E.2d 629, ¶ 11 (1st Dist.). Consequently, we overrule Gibbs's second assignment of error and affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., CUNNINGHAM and MYERS, JJ.

To the clerk:

Enter upon the journal of the court on November 9, 2017
per order of the court _____.

Presiding Judge