

[Cite as *State v. Collins*, 2018-Ohio-1845.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 106050**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**ANTHONY COLLINS, JR.**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-16-611426-B

**BEFORE:** Kilbane, P.J., E.T. Gallagher, J., and Celebrezze, J.

**RELEASED AND JOURNALIZED:** May 10, 2018

**ATTORNEY FOR APPELLANT**

Michael P. Maloney  
24441 Detroit Road, Suite 200  
Westlake, Ohio 44145

**ATTORNEYS FOR APPELLEE**

Michael C. O'Malley  
Cuyahoga County Prosecutor  
By: Brian D. Kraft  
Assistant County Prosecutor  
The Justice Center, 9th Floor  
1200 Ontario Street  
Cleveland, Ohio 44113

MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Anthony Collins, Jr. (“Collins”), appeals from the trial court’s judgment, rendered after his guilty plea, finding him guilty of attempted murder and aggravated robbery and sentencing him to 12 years in prison. Collins contends that his plea was not knowingly, voluntarily, and intelligently made because the trial court did not tell him at the plea hearing that he was ineligible for community control sanctions and would definitely be sentenced to prison. For the reasons that follow, we affirm.

### I. Procedural Background

{¶2} Collins was indicted in an eight-count indictment. Counts 1 and 2 charged attempted murder in violation of R.C. 2923.02 and 2903.02(A); Count 3 charged aggravated robbery in violation of R.C. 2911.01(A)(1); Counts 4 and 5 charged felonious assault in violation of R.C. 2903.11(A)(1); and Counts 6 and 7 charged felonious assault in violation of R.C. 2903.11(A)(2). All counts carried one- and three-year firearm specifications. Count 8 did not apply to Collins. The charges arose out of an incident where Collins and two codefendants robbed two victims of a hoverboard at gunpoint, and then shot them.

{¶3} Collins pleaded not guilty to the charges. He subsequently entered into a plea agreement with the state and pleaded guilty to an amended Count 1, attempted murder, modified to include the victims’ names; and an amended Count 3, aggravated robbery, amended to delete the firearm specifications and add the victims’ names. The

remaining counts were nulled. As part of the agreement, Collins agreed to offer truthful testimony against the codefendants.

{¶4} At the plea hearing, after engaging in a Crim.R. 11 colloquy with Collins, the court found that Collins had been advised of the constitutional rights he was waiving by pleading guilty, and that he understood the nature of the charges, the effect of his plea, and the maximum penalties that could be imposed. The court determined that his plea was knowingly, voluntarily, and intelligently made, and found him guilty of attempted murder and aggravated robbery.

{¶5} The court subsequently sentenced him to six years on Count 1, consecutive to three years on the firearm specification, and three years on Count 3. The court ordered both counts to be served consecutively, for an aggregate term of 12 years in prison. This appeal followed.

## II. Law and Analysis

{¶6} Under Crim.R. 11(C)(2), a court shall not accept a guilty or no contest plea in a felony case without first addressing the defendant personally and doing all of the following:

- (a) Determining 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.
- (b) Informing the defendant of and determining that the defendant understands the effect of the plea \* \* \*, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶7} The purpose of Crim.R. 11(C) is to convey specific information to a defendant so that he or she can make a voluntary and intelligent decision regarding whether to plead guilty or no contest. *State v. Schmick*, 8th Dist. Cuyahoga No. 95210, 2011-Ohio-2263, ¶ 5. Whether the trial court accepted a plea in conformance with Crim.R. 11(C) is subject to de novo review. *State v. Lunder*, 8th Dist. Cuyahoga No. 101223, 2014-Ohio-5341, ¶ 22.

{¶8} In considering whether a trial court satisfied its duties under Crim.R. 11(C)(2), reviewing courts distinguish between constitutional and nonconstitutional rights. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 30. The trial court must strictly comply with the requirements of Crim.R. 11(C)(2) relating to the waiver of constitutional rights. *Id.* at ¶ 31.

{¶9} With respect to nonconstitutional rights, such as the right to be informed of the maximum penalty involved, substantial compliance is required. *Id.* Where substantial compliance is implicated, a reviewing court must consider whether the trial court partially complied with Crim.R. 11(C), or completely failed to comply with the rule. *Id.* at ¶ 32. Where the trial court partially complied, the defendant's plea may be vacated only upon a showing of prejudice, i.e., that the plea would not have otherwise been made. *Id.*, citing *State v. Nero*, 56 Ohio St.3d 106, 564 N.E.2d 474 (1990).

However, where the trial court completely failed to comply with the rule, no showing of prejudice is required, and the plea must be vacated. *Id.*; *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224; *Cleveland v. Mayfield*, 8th Dist. Cuyahoga No. 100494, 2014-Ohio-3712, ¶ 8; *State v. Dundics*, 11th Dist. Trumbull No. 2015-T-0047, 2016-Ohio-1368, 62 N.E.23d 1013, ¶ 27; *Toledo v. Mroczkowski*, 6th Dist. Lucas No. L-04-1338, 2005-Ohio-5742, ¶ 19.

{¶10} The transcript of the plea hearing in this case demonstrates that the court began by informing Collins of the seven charges against him as set forth in the indictment. The prosecutor then explained the plea agreement, and defense counsel confirmed that the prosecutor's recitation of the agreement was correct. The judge then told Collins that he should advise the court if he had any questions during the proceeding because she would give him time to consult with his lawyer. The judge then confirmed with Collins that he was not under the influence of any drugs, alcohol, or medication and was thinking clearly, no threats or promises had been made to induce his plea, and he was satisfied with his lawyer's representation.

{¶11} The judge then asked Collins whether he understood that by pleading guilty, he was admitting that he had committed the offenses as charged, and that the court could find him guilty and sentence him. Collins responded affirmatively. The judge then advised Collins of the constitutional rights he would waive by pleading guilty. Collins indicated that he understood these rights and that he would waive them by pleading guilty.

{¶12} The judge then confirmed that Collins understood that he would be pleading guilty to Count 1, attempted murder in violation of R.C. 2903.02(A) and 2923.02, a first-degree felony, and to the one- and three-year firearm specifications contained under Count 1, as well as to Count 3, aggravated robbery in violation of R.C. 2911.01(A)(1), also a first-degree felony.

{¶13} The judge then continued the colloquy with Collins as follows:

THE COURT: I'm going to advise you of the potential penalty under those counts that you're expected to plead guilty to. *A first degree felony is punishable by a period of incarceration of three to eleven years in yearly increments; a fine of up to \$20,000. There is a presumption in favor of prison for a felony of the first degree, and there is a mandatory period of postrelease control on felonies of the first degree. Do you understand that, sir?*

THE DEFENDANT: Yes.

THE COURT: Now, with regard to Count 1, which will include the one-year and three-year firearm specifications, *do you understand then that the three years on the three-year firearm specification will be served prior to and consecutive to the time imposed on the felony of the first degree, the attempted murder charge?*

THE DEFENDANT: Yes.

THE COURT: All right. And you've explained that to him; correct, Mr. DeFranco?

MR. DEFRANCO: Yes. Yes, I have.

THE COURT: All right. Do you have any questions about that?

THE DEFENDANT: Umm, no.

THE COURT: All right. Just so we're clear, the Court can impose time on both Count 1 and Count 3 because they do not merge for purposes of sentencing. Correct, Mr. DeFranco?

MR. DEFRANCO: Yes.

THE COURT: Do you understand that? *The Court will sentence on each of those counts*; do you understand that?

THE DEFENDANT: Yes.

THE COURT: They don't merge for purposes of sentencing; correct? You understand that is what I mean.

THE DEFENDANT: Yes.

THE COURT: All right. Thank you, sir. Again, do you understand that *upon release from prison*, you will have to serve a period of postrelease control, that's mandatory and that will be for five years. Do you understand that?

THE DEFENDANT: Yes.

(Emphasis added.)

{¶14} The judge then asked Collins if he had any questions about the penalties he faced, and he said he did not.

{¶15} In his single assignment of error, Collins contends that the trial court failed to comply with Crim.R. 11(C) because it did not correctly explain the maximum penalty involved. Specifically, Collins contends that the trial court completely failed to comply with Crim.R. 11(C), and therefore, no showing of prejudice is necessary because the court did not advise him that the underlying attempted murder count would mandate a prison sentence separate and distinct from the prison sentence on the firearm specification. He further contends that the trial court did not advise him that he would be sentenced to prison on the aggravated robbery count.



{¶16} The record does not support Collins’s arguments. The record reflects that the trial court told Collins that he would be sentenced to prison for his convictions on both Counts 1 and 3 and the firearm specification. The trial court told him that he would be pleading guilty to two first-degree felonies, and that first-degree felonies are punishable by “a period of incarceration” ranging from three to eleven years. The court further told him that the three-year firearm specification for Count 1 would be served “prior to and consecutive to the time imposed” on the attempted murder count. When questioned, Collins told the court that he understood the possible penalties and had no questions about them. On this record, it is apparent that the trial court told Collins, and Collins understood, that he was facing three to eleven years incarceration for each felony, with an additional three years for the firearm specification.

{¶17} Contrary to Collins’s argument, the court’s isolated statement that “there is a presumption in favor of prison” for a first-degree felony did not convey to Collins that the first-degree offenses to which he was pleading guilty were probationable offenses. Considering the transcript as a whole, it is apparent that the court advised Collins, and he understood, that both felonies were punishable by prison terms. Accordingly, we find that the court substantially complied with Crim.R. 11(C) in advising Collins of the maximum penalty involved.

{¶18} Because the court substantially complied with Crim.R. 11(C), Collins must demonstrate prejudice before his plea may be vacated. He contends that he was prejudiced because the trial court did not specifically tell him that he was ineligible for

probation. However, even where a defendant is not directly informed that he is not eligible for probation, “a trial court substantially complies with the requirements of Crim.R. 11(C)(2)(a) when the court informs a defendant that a mandatory prison sentence will be imposed and the defendant subjectively understands that his sentence must include prison time.” *State v. Brown*, 11th Dist. Geauga No. 2003-G-2504, 2004-Ohio-1843, ¶ 12, citing *Nero*, 56 Ohio St.3d 106, 564 N.E.2d 474, at syllabus. “The reasoning is that a defendant who understands that actual incarceration is mandatory necessarily understands that he is ineligible for probation or community control sanctions.” *Id.*

{¶19} Here, the trial court advised Collins that the three-year gun specification on Count 1 involved mandatory prison time. He was further advised that the first-degree felonies to which he was pleading guilty were punishable by three to eleven years in prison. Collins indicated that he understood these advisements. Thus, Collins understood that prison was mandatory and that he was ineligible for probation or community control sanctions. Although the trial court may not have used the word “mandatory,” it did indeed advise Collins that prison was an absolute certainty.

{¶20} Furthermore, the test for prejudice is whether the plea would have otherwise been made. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621. Collins makes no assertion whatsoever that he would not have pleaded guilty had the trial court advised him that the first-degree felonies were not probationable offenses. Accordingly, he has failed to demonstrate prejudice.

{¶21} The trial court substantially complied with Crim.R. 11(C) before accepting his guilty plea by advising Collins and ascertaining that he understood the maximum penalty involved in the offenses to which he would be pleading guilty. His guilty plea was therefore knowingly, voluntarily, and intelligently made, and the assignment of error is overruled.

{¶22} 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.

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MARY EILEEN KILBANE, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and  
FRANK D. CELEBREZZE, JR., J., CONCUR