

[Cite as *State v. Nave*, 2019-Ohio-1123.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION  
No. 107032

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**CHRISTOPHER L. NAVE**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
APPLICATION DENIED

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Cuyahoga County Court of Common Pleas  
Case Nos. CR-16-600628-C and CR-15-601090-B  
Application for Reopening  
Motion No. 525969

**RELEASE DATE:** March 26, 2019

## **FOR APPELLANT**

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## **ATTORNEYS FOR APPELLEE**

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SEAN C. GALLAGHER, J.:

{¶1} Applicant, Christopher Nave, pursuant to App.R. 26(B), timely seeks to reopen his appeal in *State v. Nave*, 8th Dist. Cuyahoga 107032, 2019-Ohio-348. He claims that appellate counsel was ineffective for not raising and arguing that Nave entered his plea less than knowingly, intelligently, and voluntarily because the trial court did not properly inform Nave of the maximum penalties involved. We deny the application.

{¶2} Nave pleaded guilty to several charges in two criminal cases related to separate burglary incidents. He received five-year sentences in each case and the trial court ordered those sentences to be served consecutively, for a total ten-year sentence.

{¶3} Nave appealed. This court overruled Nave's assigned errors and affirmed his convictions and sentences. *Id.* Then, Nave timely filed an application for reopening.

{¶4} App.R. 26(B) provides a criminal defendant with a limited means of reopening an appeal by asserting that counsel on appeal provided ineffective assistance. In order to establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Therefore, Nave must show that appellate counsel was deficient for failing to raise an issue, and there was a reasonable probability of success had the issue been asserted in the direct appeal.

{¶5} App.R. 26(B)(2)(c) requires the application to contain "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation[.]" Here, Nave advances one proposed assignment of error: "Appellant's trial counsel provided ineffective assistance of counsel when it failed to argue that Nave's plea was not made knowingly, intelligently and voluntarily when the trial court failed to advised [sic] him of the maximum penalty(s) he was pleading guilty to."

{¶6} Crim.R. 11(C) governs the procedure for accepting the guilty pleas Nave entered in the lower cases. Under this rule,

prior to accepting a guilty plea to a felony charge, the trial court must personally address the defendant and engage in an "oral dialogue" with the defendant to (1) determine that the defendant is making the plea voluntarily, with an understanding of the nature of the charges and the maximum penalty involved; (2) inform the defendant of and determine that the defendant understands the effect of the guilty plea and that the court, upon acceptance of the plea, may proceed with judgment

and sentence; and (3) inform the defendant of and determine that the defendant understands the constitutional rights he or she waives by pleading guilty \* \* \*.

*State v. Scott*, 8th Dist. Cuyahoga No. 100668, 2014-Ohio-3500, ¶ 7, citing Crim.R. 11(C). An explanation of the maximum penalty is a nonconstitutional right that is subject to review for substantial compliance. *State v. Ballard*, 66 Ohio St.2d 473, 477, 423 N.E.2d 115 (1981).

{¶7} Nave contends the trial court failed to properly inform him of the maximum penalty involved because the court did not include an advisement about the possibility of consecutive sentences.

{¶8} After explaining the constitutional rights Nave was giving up by pleading guilty, the trial court explained the range of punishment applicable to the levels of felonies to which Nave was expected to plead guilty. The trial court set forth the appropriate sentencing ranges that could be imposed for each offense. The court did not include an advisement about the potential for consecutive sentence under R.C. 2929.14(C)(4).

{¶9} Nave seizes on this as a failure of the trial court to explain the maximum penalties as required by Crim.R. 11(C)(2)(a). However, such an advisement is not required by Crim.R. 11 in this case. *State v. Johnson*, 40 Ohio St.3d 130, 134, 532 N.E.2d 1295 (1988). “Failure to inform a defendant who pleads guilty to more than one offense that the court may order him to serve any sentences imposed consecutively, rather than concurrently, is not a violation of Crim.R. 11(C)(2), and does not render the plea involuntary.” *Id.* at the syllabus.

{¶10} This court has followed *Johnson* on numerous occasions and concluded that Crim.R.11(C)(2)(a) does not require a trial court to advise a defendant of the potential for discretionary consecutive sentencing. *State v. Vinson*, 2016-Ohio-7604, 73 N.E.3d 1025, ¶ 24 (8th Dist.), citing, among others, *State v. Dansby-East*, 2016-Ohio-202, 57 N.E.3d 450, ¶ 16-17

(8th Dist.), and *State v. Dotson*, 8th Dist. Cuyahoga No. 101911, 2015-Ohio-2392, ¶ 12. In *State v. Norman*, 8th Dist. Cuyahoga No. 91302, 2009-Ohio-4044, this court found that where a trial court is required to impose a sentence consecutively, the failure to advise the defendant of that fact constituted a failure to substantially explain the maximum penalty. *Id.* at \_ 13. See also *State v. Abernathy*, 8th Dist. Cuyahoga No. 107123, 2018-Ohio-4414, \_ 4. However, where the decision to impose consecutive sentences arises purely from the trial court's discretion under R.C. 2929.14(C)(4), such an advisement is not required. See *Johnson* at the syllabus; *Vinson* at \_ 24-26.

{¶11} The Ohio Supreme Court recently examined the decision in *Johnson*, but did not overrule it. *State v. Bishop*, Slip Opinion No. 2018-Ohio-5132. There, the court held that a trial court failed to explain the maximum penalty involved when it did not inform the defendant that if the trial court, in its discretion, imposed a prison term for a violation of postrelease control, that term, by operation of law, was required to be imposed consecutive to any other potential prison term. *Id.* at \_ 21.

{¶12} When a consecutive sentence is discretionary under R.C. 2929.14(C)(4), however, the failure to inform a criminal defendant that a prison term may be run consecutive to another is not a violation of Crim.R. 11(C)(2)(a). The Ohio Supreme Court's decision in *Bishop* did not disturb this holding in *Johnson*. Existing law does not support Nave's claim that appellate counsel was ineffective for failing to argue this issue. Therefore, Nave did not raise a colorable claim of ineffective assistance of appellate counsel for failing to raise and argue this issue.

{¶13} Application denied.

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SEAN C. GALLAGHER, JUDGE

MARY EILEEN KILBANE, A.J., and  
EILEEN T. GALLAGHER, J., CONCUR