[Cite as *State v. Allen*, 2012-Ohio-2986.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
		Nos. 11AP-640
Plaintiff-Appellee,	:	(C.P.C. No. 07CR-4295)
		11AP-641
v.	:	(C.P.C. No. 10CR-4319) and
		11AP-642
Daville D. Allen,	:	(C.P.C. No. 08CR-1420)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on June 29, 2012

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Jeffrey A. Berndt, for appellant.

APPEALS from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, Daville D. Allen ("appellant"), appeals from two June 30, 2011 judgments of the Franklin County Court of Common Pleas, in which the court accepted his guilty pleas in case Nos. 07CR-4295 and 08CR-1420, and sentenced him for possession of crack cocaine with a major drug offender ("MDO") specification, in violation of R.C. 2925.11, a felony of the first degree, and possession of crack cocaine without specification, in violation of R.C. 2925.11, a felony of the second degree. For the following reasons, we affirm in part and reverse in part.

{¶ 2} On June 18, 2007, a Franklin County Grand Jury indicted appellant in case No. 07CR-4295 on one count of possession of cocaine with specification, in violation of R.C. 2925.11, a felony of the second degree, one count of possession of cocaine with specification, in violation of R.C. 2925.11, a felony of the first degree, and one count of

possession of marijuana with specification, in violation of R.C. 2925.11, a felony of the fifth degree.

{¶ 3} Further, on February 27, 2008, a Franklin County Grand Jury indicted appellant in case No. 08CR-1420 on one count of possession of cocaine with specification, in violation of R.C. 2925.11, a felony of the first degree, one count of possession of cocaine with specification, in violation of R.C. 2925.11, a felony of the third degree, and one count of having a weapon under disability, in violation of R.C. 2923.13, a felony of the third degree.

{¶ 4} On December 7, 2009, appellant, with counsel, entered a guilty plea in case No. 07CR-4295 as to Count 1 of the indictment, possession of crack cocaine, a felony of the first degree, with an MDO specification but without a gun specification. In return for this guilty plea, the prosecutor dismissed Counts 2 and 3 of the June 18, 2007 indictment. Appellant also entered a guilty plea in case No. 08CR-1420 as to Count 1 of the indictment, possession of crack cocaine without specification, a felony of the second degree. In return for this guilty plea, the prosecutor dismissed Counts 2 and 3 of the February 27, 2008 indictment. Additionally, appellant entered a guilty plea in case No. 09CR-6103, as to Count 4, having a weapon under disability. We note that case No. 09CR-6103 has not been appealed.

{¶ 5} That same day, the trial court accepted appellant's guilty pleas in case Nos. 07CR-4295, 08CR-1420, and 09CR-6103. The trial court set the matter for sentencing on February 26, 2010; however, appellant failed to appear at the sentencing hearing and the trial court issued a warrant for his arrest. On May 4, 2011, appellant was arrested and subsequently incarcerated.

{¶ 6} On June 23, 2011, the trial court sentenced appellant as follows: in case No. 07CR-4295, a mandatory 10 years' incarceration and another mandatory 10 years' incarceration consecutive to that for the MDO specification, making a total of 20 years' incarceration and a mandatory fine of $10,000; in case No. 08CR-1420, a mandatory 5 years' incarceration to run consecutive with case No. 07CR-4295, and a mandatory fine of $7,500; and in case No. 09CR-6103, 5 years' incarceration to run concurrent with case Nos. 07CR-4295 and 08CR-1420. Further, due to appellant's incarceration, the trial court suspended costs in all three cases and also disapproved any early release.

{¶ 7} Additionally, on June 23, 2011, appellant entered guilty pleas in case No. 10CR-2013, to an offense of failure to appear, a felony of the fourth degree, and in case No. 10CR-4319, to an offense of possession of crack, a felony of the first degree, and the trial court sentenced appellant as follows: in case No. 10CR-2013, 12 months' incarceration to run concurrent with all of the other cases; and in case No. 10CR-4319, 3 years' mandatory incarceration to run consecutive with all of the other cases and a mandatory fine of $10,000.

{¶ 8} On July 29, 2011, appellant filed timely notices of appeal in case Nos. 07CR-4295, docketed as 11AP-640, 08CR-1420, docketed as 11AP-642, and 10CR-4319, docketed as 11AP-641. However, in his brief, appellant indicated that his appeal in case No. 10CR-4319 (11AP-641) is withdrawn. Therefore, the appeal docketed as case No. 11AP-641 is voluntarily dismissed. With regard to case Nos. 07CR-4295 (11AP-640) and 08CR-1420 (11AP-642), appellant sets forth two assignments of error for our consideration:

> [1.] THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ACCEPTED THE GUILTY PLEAS OF DEFENDANT WHEN SAME WERE NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE SINCE THE TRIAL COURT FAILED TO ADEQUATELY INFORM DEFENDANT OF HIS TRIAL RIGHTS AND THE WAIVER OF SAME AND FAILED TO ADEQUATELY INFORM DEFENDANT OF THE MAXIMUM PENALTY INVOLVED, ALL IN VIOLATION OF OHIO RULE OF CRIMINAL PROCEDURE 11(C)(2).
>
> [2.] THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT SENTENCED DEFENDANT TO CONSECUTIVE SENTENCES AS TO 07CR-4295 AND 08CR-1420, THE TRIAL COURT MISTAKENLY BELIEVING THAT THESE CHARGES WERE CONSECUTIVE AS A MATTER OF LAW.

{¶ 9} In his first assignment of error, appellant contends that, in accepting his guilty pleas in case Nos. 07CR-4295 and 08CR-1420, the trial court failed to strictly comply with Crim.R. 11(C)(2)(c) in explaining appellant's constitutional privilege against compulsory self-incrimination and his waiver of the same. (*See* appellant's brief, 11.) In addition, appellant contends that the trial court did not satisfy Crim.R. 11(C)(2)(a)

because it never informed appellant as to the potential terms of post-release control and what would occur if he violated post-release control. (*See* appellant's brief, 11-12.)

{¶ 10} "Before accepting a guilty or no-contest plea, the court must make the determinations and give the warnings required by Crim.R. 11(C)(2)(a) and (b) and notify the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c)." *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶ 13. "While the trial court must strictly comply with [Crim.R. 11(C)(2)(c)] regarding the constitutional notifications listed in it, the trial court need only substantially comply with the non-constitutional provisions of the rule." *State v. Enyart*, 10th Dist. No. 08AP-184, 2008-Ohio-6418, ¶ 15.

{¶ 11} Crim. R. 11(C)(2) provides:

> In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest 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 of guilty or no contest, 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 [1] to jury trial, [2] to confront witnesses against him or her, [3] to have compulsory process for obtaining witnesses in the defendant's favor, and [4] to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which [5] the defendant cannot be compelled to testify against himself or herself.

{¶ 12} In *Veney* at ¶ 22, the Supreme Court of Ohio reaffirmed that "a court must strictly comply with Crim.R. 11(C)(2)(c)" when advising a defendant of his constitutional rights. The Supreme Court stated that "[a] trial court must strictly comply with Crim.R.

11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination." *Id*. at syllabus.

{¶ 13} The *Veney* court, in discussing "strict compliance," referenced *State v. Ballard*, 66 Ohio St.2d 473 (1981). *Ballard* modified the "scrupulous adherence" rule set forth in *State v. Caudil*, 48 Ohio St.2d 342 (1976). In *Ballard*, the Supreme Court stated that "[f]ailure to use the exact language contained in Crim.R. 11(C), in informing a criminal defendant of his constitutional right to a trial and the constitutional rights related to such trial, including the right to trial by jury, is not grounds for vacating a plea as long as the record shows that the trial court explained these rights in a manner reasonably intelligible to that defendant." *Id*. at paragraph two of the syllabus. In reaching this conclusion, the Supreme Court reasoned that "[t]o hold otherwise would be to elevate formalistic litany of constitutional rights over the substance of the dialogue between the trial court and the accused. This is something we are unwilling to do." *Id*. at 480.

{¶ 14} Therefore, "the trial court must orally inform the defendant of the rights set forth in Crim.R. 11(C)(2)(c) during the plea colloquy for the plea to be valid." *Veney* at ¶ 29. In doing so, "the trial court may vary slightly from the literal wording of the rule in the colloquy"; however, "the court cannot simply rely on other sources to convey these rights to the defendant." *Id*. Further, "a signed written waiver of constitutional rights does not effect a legal waiver in the absence of the necessary colloquy between the court and the defendant." *State v. Reece*, 10th Dist. No. 05AP-527, 2006-Ohio-4073, ¶ 18.

{¶ 15} First, we will discuss appellant's argument that, in accepting his guilty pleas in case Nos. 07CR-4295 and 08CR-1420, the trial court failed to strictly comply with Crim.R. 11(C)(2)(c) in explaining appellant's constitutional privilege against compulsory self-incrimination and his waiver of the same. Appellant contends that "[t]his portion of the Rule 11(C)(2) colloquy fell short in that the lower court did not adequately explain to [appellant] his right to testify if he so desired or to not testify if he did not desire and to not have his lack of testimony held against him in any way, shape or form in determining

his guilt." (*See* appellant's brief, 9.) Additionally, appellant contended that "[t]his constitutional right against self-incrimination was merely referred to as 'the right to remain silent' with no further explanation as to what that right entailed and did not entail." (Appellant's brief, 9.) For the following reasons, we are not persuaded by appellant's argument.

{¶ 16} In *State v. Truitt*, 10th Dist. No. 10AP-795, 2011-Ohio-2271, ¶ 4, we recently addressed a similar issue wherein the appellant argued, among other things, that the trial court, in its colloquy, failed to inform him that, by entering a guilty plea, he waived his privilege against compulsory self-incrimination. In finding that the trial court strictly complied with Crim.R. 11(C)(2)(c), we stated:

> Here * * * the trial court advised appellant of his "right to remain silent." The plain meaning of the trial court's words suggest that appellant had the right to say absolutely nothing at trial, if he so desired. Intuitively, if a person remains silent at trial, they opt to engage the privilege against self-incrimination and do not testify against themselves. In addition, as previously stated, the trial court inquired whether appellant had any questions regarding the colloquy, and appellant answered "no, sir." Therefore, pursuant to *Ballard*, we find that the trial court explained waiver of the privilege against self-incrimination in a reasonably intelligible manner and in strict compliance with Crim.R. 11(C)(2)(c).

(Transcript references omitted.) *Truitt* at ¶ 21.

{¶ 17} In the present matter, similar to *Truitt* at ¶ 12, the trial court inquired in its colloquy as follows:

> THE COURT: Mr. Allen, will you state your full name for the record, please?
>
> [APPELLANT]: Daville Allen, sir.
>
> THE COURT: And how old are you?
>
> [APPELLANT]: Twenty-five years old.
>
> THE COURT: How far did you go in school?
>
> [APPELLANT]: Ninth grade, but I got my GED.

THE COURT: From that may I assume that you can read, write, and understand the English language?

[APPELLANT]: Yes, sir.

THE COURT: Mr. Allen, you have three cases before this Court that I just referred to. In the 2009 case I have this entry of guilty plea with that signature on it that I am showing you. Is that your signature?

[APPELLANT]: Yes, sir.

THE COURT: In the 2008 case, I have an entry of guilty plea with that signature I am showing you. Is that your signature?

[APPELLANT]: Yes, sir.

THE COURT: And finally in the 2007 case, I have an entry of guilty plea with that signature. Is that also your signature?

[APPELLANT]: Yes, sir.

THE COURT: Now, before you signed these documents, did you go over them with Mr. Nemann?

[APPELLANT]: Yes, sir.

THE COURT: Did he explain them to you?

[APPELLANT]: Yes, sir.

THE COURT: Do you feel you understand them?

[APPELLANT]: Yes, sir.

THE COURT: Do you understand that first of all, by signing these documents, you are waiving your right to a jury trial in each case?

[APPELLANT]: Yes, sir.

THE COURT: There is [sic] three cases, so you are waiving three jury trials. Do you understand that?

[APPELLANT]: Yes, sir.

> THE COURT: I am required by law to explain to you that when you waive your right to a jury trial, you waive all of the rights that you would have had during that trial. Those rights are: the right to remain silent, the right to require the prosecutor to prove your guilt beyond a reasonable doubt. You would have the right to, in each case, to issue subpoenas for your witnesses, if you have them, and have this Court enforce them for you. You would have the right to confront and cross-examine your accusers. And finally, you would have the right to appeal if the jury found against you.
>
> Do you understand those rights and voluntarily give them up or waive them once in each case, or three times? Do you understand that?
>
> [APPELLANT]: Yes, sir.
>
> THE COURT: Do you waive those rights?
>
> [APPELLANT]: Yes, sir.
>
> * * *
>
> THE COURT: Do you have any questions about any of these three cases that you would like to ask either me or Mr. Nemann, your attorney?
>
> [APPELLANT]: No, sir.
>
> THE COURT: You don't have any questions at all?
>
> [APPELLANT]: No, sir.
>
> THE COURT: All right. I will accept your plea. You may be seated.

(Dec. 7, 2009 Tr. 9-11; 13-14.)

{¶ 18} In reviewing the above colloquy, we find that the trial court strictly complied with Crim.R. 11(C)(2)(c). First, as we reasoned in *Truitt*, the trial court clearly informed appellant of his "right to remain silent," which intuitively means that, if appellant chose to remain silent, appellant would opt to engage his privilege against self-incrimination and not testify against himself. (Dec. 7, 2009 Tr. 11.) *See also Truitt* at ¶ 21. Second, the trial court inquired as to appellant's level of education, and appellant admitted that, although

he only attended school until the ninth grade, he obtained his GED and could read, write and understand the English language. (Dec. 7, 2009 Tr. 9.) Finally, the trial court inquired as to whether appellant understood his rights and voluntarily waived them in each case and whether appellant had any questions for the trial court and/or his attorney. (Dec. 7, 2009 Tr. 11, 13.) Appellant answered "[y]es, sir," to whether he understood his rights and voluntarily waived them, and "[n]o, sir," to whether he had any questions for the trial court and/or his attorney. (Dec. 7, 2009 Tr. 11, 13.) Therefore, based upon the record before us, we find that the trial court explained appellant's privilege against compulsory self-incrimination in a reasonably intelligible manner. *See Ballard* at paragraph two of the syllabus.

{¶ 19} Second, we address appellant's contention that the trial court failed to satisfy Crim.R. 11(C)(2)(a) because it: (1) never informed appellant as to the potential terms of post-release control, and (2) never informed appellant as to what would occur if he violated his post-release control. (*See* appellant's brief, 11-12.) We note that appellant directs us specifically to the colloquy which took place at the plea hearing, not the sentencing hearing.

{¶ 20} As stated above, Crim.R. 11(C)(2) provides in pertinent part that:

> In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest 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.

Additionally, "[s]ubstantial compliance with Crim.R. 11(C) is sufficient when a defendant is waiving non-constitutional rights." *State v. Williams*, 10th Dist. No. 10AP-1135, 2011-Ohio-6231, ¶ 36, citing *State v. Nero*, 56 Ohio St.3d 106, 108 (1990). "Substantial compliance means that under the totality of the circumstances, the defendant subjectively understands the implications of the plea and the rights he is waiving." *Williams* at ¶ 36. "Failure to comply with non-constitutional rights does not invalidate a plea unless the

defendant suffers prejudice." *Id.* "The test for prejudice is 'whether the plea would have otherwise been made.' " *Id*. quoting *Nero* at 108.

{¶ 21} In *Williams*, we recently addressed a similar issue where, during the plea hearing, the trial court did not specifically raise the issue of post-release control. *Id*. at ¶ 37. In upholding the appellant's guilty plea, we held that:

> Based upon the information contained in the plea form, combined with the trial court's inquiry regarding whether appellant had discussed the possible consequences of the plea with his attorney, we find the trial court substantially complied with the requirement to advise appellant of the maximum penalties, including the imposition of post-release control and the consequences for violating post-release control, as set forth in Crim.R. 11(C) and R.C. 2943.032. The totality of the circumstances here indicates that appellant knew about post-release control and the sanctions for violating post-release control.

Id. at ¶ 39.

{¶ 22} Here, during the course of the plea hearing, the trial court informed appellant of his possible maximum sentence for case No. 07CR-4295, as follows:

> In the third case, which was indicted in—it is a 2007 case. You're withdrawing your earlier pleas of not guilty, you are pleading guilty to Count 1, possession of crack cocaine, with MDO specification, but without a gun specification.
>
> The maximum possible penalty for that is 20 years in prison. Ten of those 20 years is mandatory, so there is a mandatory ten-year sentence. In addition to that, there is a possible fine of up to $20,000, *and if you got out of prison, there is a five-year mandatory post-release control*.

(Emphasis added.) (Dec. 7, 2009 Tr. 13.) Further, the trial court informed appellant of his possible maximum sentence for case No. 08CR-1420, as follows:

> In the 2008 case, you are withdrawing your earlier plea of not guilty and you are pleading guilty to Count 1, to possession of crack cocaine as a felony 2, without specification. Maximum penalty is eight years. Two of those eight years are mandatory. Do you understand there is a mandatory two-year sentence?
> * * *

> And in addition to that, there is a possibility of a fine of up to $15,000 *and there would be a three-year mandatory post-release control after you got out of prison.*

(Emphasis added.) (Dec. 7, 2009, Tr. 12.) Also, with respect to the imposition of post-release control, the guilty plea forms stated that, if the trial court imposed a prison term, appellant would be subject to mandatory post-release control of five years for pleading guilty to a felony of the first degree and three years for pleading guilty to a felony of the second degree. Further, with respect to the consequences for violating post-release control, the guilty plea forms stated:

> I understand that a violation of post-release control conditions * * * could result in more restrictive non-prison sanctions, a longer period of supervision or control up to a specified maximum, and/or reimprisonment for up to nine months. The prison term(s) for all post-release control violations may not exceed one-half of the prison term originally imposed. I understand that I may be prosecuted, convicted, and sentenced to an additional prison term for a violation that is a felony. I also understand that such felony violation may result in a consecutive prison term of twelve months or the maximum period of unserved post-release control, whichever is greater. Prison terms imposed for violations or new felonies do not reduce the remaining post-release control period(s) for the original offense(s).

Prior to accepting his guilty pleas, the trial court inquired as to whether appellant: (1) went over the guilty plea forms with his attorney, (2) understood the guilty plea forms, and (3) signed the guilty plea forms. (Dec. 7, 2009 Tr. 10.) Appellant answered "[y]es, sir" to all of the trial court's inquiries regarding the guilty plea forms. (Dec. 7, 2009 Tr. 10.)

{¶ 23} Based upon the trial court's explanation of appellant's maximum penalties, including the terms of mandatory post-release control, combined with the information contained in the guilty plea forms and the trial court's inquiries regarding whether appellant discussed the guilty plea forms with his attorney, understood the guilty plea forms, and signed the guilty plea forms, we find that the trial court substantially complied with Crim.R. 11(C)(2)(a). Therefore, pursuant to Crim.R. 11(C)(2), appellant made his guilty pleas knowingly, intelligently, and voluntarily in case Nos. 07CR-4295 and 08CR-1420. *See Williams* at ¶ 30.

{¶ 24} Appellant's first assignment of error is overruled.

{¶ 25} In his second assignment of error, appellant contends that the trial court committed reversible error when it imposed consecutive sentences in case Nos. 07CR-4295 and 08CR-1420 because it mistakenly believed that, pursuant to R.C. 2929.13(F), the sentences were to be imposed consecutively as a matter of law. In support of this argument, appellant cites *State v. Johnson*, 116 Ohio St.3d 541, 2008-Ohio-69.

{¶ 26} In *Johnson* at ¶ 19, the trial court "imposed consecutive sentences for [the appellant's] four rape convictions based upon its mistaken belief that R.C. 2929.13(F) required it to do so." In remanding the matter for re-sentencing, the Supreme Court of Ohio reasoned that:

> [T]he plain language of R.C. 2929.13(F) requires the sentencing court to impose a prison term for certain serious offenses and limits that court's discretion to reduce that term pursuant to R.C. 2929.20 (judicial release), R.C. 2967.193 (deduction for participation in certain prison programs), or any other provision of R.C. Chapter 2967 or 5120 (pardon, parole, probation), except in certain enumerated circumstances. The word "consecutive" does not appear in the statute.
>
> [W]hile R.C. 2929.13(F) reveals the intent of the legislature that a sentencing court impose mandatory prison terms for the enumerated offenses, our review of that statute reveals no language demonstrating any legislative intent to require a sentencing court to impose those terms consecutively to each other or to any other sentence. Therefore, we hold that R.C. 2929.13(F) does not require a sentencing court to impose consecutive sentences for multiple rape convictions.

Id. at ¶ 16-17.

{¶ 27} Here, the trial court sentenced appellant as follows:

> With regard to 07CR-4295, the defendant stands convicted of possession of crack-cocaine, a felony of the first degree with a MDO specification, meaning that the sentence range is from 10 to 20 years.
>
> I am going to impose a sentence of ten years and another ten years consecutive to that for the MDO specification, making a total of 20 years. The incarceration is mandatory in both situations. * * *

> * * *
>
> The second case is 08CR-1420. In that case the defendant stands convicted of a felony of the second degree. The sentence range on that is anywhere between two and eight years. This is one of those offenses, as I understand it, that any sentence I choose becomes a mandatory sentence.* * *
>
> So with regard to the felony 2, I will impose a sentence of five years. *That becomes mandatory, but because of the operation of the statute as I understand it, it is, therefore, consecutive to the first case*[.]

(Emphasis added.) (June 23, 2011 Tr. 11-12.) Additionally, the judgment entries for case Nos. 07CR-4295 and 08CR-1420 indicate that the prison terms are mandatory pursuant to R.C. 2929.13(F).

{¶ 28} The transcript of the June 23, 2011 sentencing hearing, in conjunction with the judgment entries journalized in both cases, reveals that the trial court incorrectly believed that, because appellant's prison terms were mandatory pursuant to R.C. 2929.13(F), the sentences in case Nos. 07CR-4295 and 08CR-1420 must also be consecutive by operation of statute. Based upon this faulty reasoning, it appears that the trial court sentenced appellant to consecutive sentences of 20 years in case No. 07CR-4295 and 5 years in case No. 08CR-1420, for a total of 25 years' incarceration. In so doing, the trial court erred.

{¶ 29} The state argues that, pursuant to the Second District Court of Appeal's decision in *State v. Kline*, 2d Dist. No. 2009-CA-02, 2010-Ohio-3913, appellant has waived all but plain error because he did not object to the imposition of consecutive sentences at his sentencing hearing. (*See* appellee's brief, 9.) In *Kline* at ¶ 13, the Second District found no plain error stating:

> Although [the appellant's] consecutive sentences were not required by law, they were authorized by law. Nothing before us suggests that the trial court would have imposed concurrent sentences if it had recognized its discretion to do so. * * * As a result, [the appellant] has not shown that the outcome would have been different but for the trial court's misunderstanding of the law.

The state urges us to overlook this error since the resulting sentence was authorized by law.

{¶ 30} We are not persuaded by the *Kline* court's reasoning. Rather, we will follow the direction of the Supreme Court of Ohio in *State v. Damron*, 129 Ohio St.3d 86, 2011-Ohio-2268. In *Damron*, the trial court found that the offenses of domestic violence and felonious assault had to merge, but then proceeded to impose two separate sentences to be served concurrently. The court indicated that, because it was required to merge the two offenses, it felt it had "no alternative but to run [the sentences] concurrent"; otherwise, it "would have found * * * that those would run consecutive to each other." *Id*. at ¶ 8.

{¶ 31} On appeal, the state alleged the court erred by purporting to merge the convictions. This court, however, refused to address the issue and ultimately overruled the assignment of error because, although the trial court concluded that it was required to merge the convictions, it did not do so. Furthermore, we reasoned that, by imposing two sentences to be served concurrently, the resulting sentences were authorized by law. *Id*. at ¶ 9. We thus overlooked that, had we concluded the trial court erred in finding that merger was necessary, the option of imposing the sentences concurrently may have been available to the court.

{¶ 32} The state appealed our decision to the Supreme Court, alleging that "[e]ven when the sentence falls within the permitted statutory range, the sentence is contrary to law if the court fails to consider the mandatory provisions in R.C. Chapter 2929, or if the court relies on an erroneous legal determination that removes a sentencing option from its consideration." *Id*. at ¶ 11. The Supreme Court determined that the trial court erred and remanded the case to the trial court for resentencing. The court ordered the trial court to determine if merger was appropriate, pursuant to applicable law, and to resentence accordingly.

{¶ 33} We conclude that *Damron* directs us not to overlook a trial court sentencing error, even if the challenged sentence is authorized by law. Here, the trial court's imposition of consecutive sentences was authorized by law. Had the court correctly interpreted R.C. 2929.13(F), it still could have imposed consecutive sentences. However, by erroneously believing that the imposition of consecutive sentences was required, the

trial court removed from its consideration the option of imposing concurrent sentences. Therefore, we must vacate the sentences and remand this case to the trial court for resentencing. We do note, however, that, at appellant's resentencing hearing, the trial court may still "exercise its discretion to determine whether consecutive sentences are appropriate based upon the particular facts and circumstances of the case." *Johnson* at ¶ 18.

{¶ 34} Appellant's second assignment of error is sustained.

{¶ 35} As noted above, appellant's appeal in case No. 11AP-641 is voluntarily dismissed. As to his appeals in case Nos. 11AP-640 and 11AP-642, we overrule appellant's first assignment of error and sustain appellant's second assignment of error. Therefore, we affirm in part and reverse in part the judgments of the Franklin County Court of Common Pleas in case Nos. 11AP-640 and 11AP-642, and remand these cases back to that court for further proceedings in accordance with law and consistent with this decision.

Case No. 11AP-641 dismissed; judgments affirmed in part, reversed in part, and cause remanded in case Nos. 11AP-640 and 11AP-642.

SADLER and TYACK, JJ., concur.

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