[Cite as *State v. Conley*, 2019-Ohio-4172.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 19CA1091
vs.	:	
PATRICK CONLEY,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Brian T. Goldberg, Cincinnati, Ohio, for appellant.

Kris D. Blanton, Assistant Adams County Prosecuting Attorney, West Union, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 9-26-19
ABELE, J.

{¶ 1} This is an appeal from an Adams County Common Pleas Court judgment of conviction and sentence. After Patrick Conley, defendant below and appellant herein, entered a guilty plea, the trial court found him guilty of (1) second-degree-felony aggravated possession of drugs in violation of R.C. 2925.11(A), and (2) first-degree-misdemeanor operating a vehicle while intoxicated in violation of R.C. 4511.19(A)(1)(a).

{¶ 2} Appellant assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. CONLEY BY IMPROPERLY DENYING HIS MOTION TO

SUPPRESS EVIDENCE BASED ON AN ILLEGAL SEARCH OF HIS PERSON."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. CONLEY BY IMPROPERLY DENYING HIS MOTION TO SUPPRESS ANY STATEMENTS MADE WHILE HE WAS IN CUSTODY."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. CONLEY BY ACCEPTING HIS GUILTY PLEA WHEN THE COURT FAILED TO DETERMINE THAT HE UNDERSTOOD THE MAXIMUM PENALTIES INVOLVED."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY INCLUDING IN THE SENTENCING ENTRY THAT MR. CONLEY SHALL BE RESERVED FOR DENIAL FOR TRANSITIONAL CONTROL AND IPP."

{¶ 3} On October 8, 2018, an Ohio State Highway Patrol Trooper Steve Rabold stopped appellant's vehicle for speeding. The ensuing traffic stop led to the discovery of a large amount of methamphetamine and resulted in appellant being charged with aggravated possession of drugs and operating a motor vehicle while under the influence.

{¶ 4} Appellant subsequently filed a motion to suppress the evidence obtained as a result of the traffic stop, as well as any incriminating statements that he made during the stop.

{¶ 5} On January 7, 2019, the trial court held a hearing to consider appellant's motion to suppress evidence. Trooper Rabold testified that after he stopped appellant and approached the vehicle from the passenger side, appellant was "rocking back and forth in the chair and talking to

himself." Rabold stated that he "just stood there for a couple moments and just watched [appellant] just to make sure he wasn't reaching for a weapon or anything like that."

{¶ 6} After watching appellant for a moment, Trooper Rabold walked around his patrol car and approached the vehicle from the driver's side. Appellant informed Rabold that appellant did not know who owned the vehicle and that he did not have a driver's license. Rabold then asked appellant to exit the vehicle. Rabold explained that he intended to ask appellant "where he was going, why he was driving so fast, just things of that nature."

{¶ 7} During the conversation, Trooper Rabold informed appellant about a pat-down check for weapons. However, immediately after Rabold advised appellant about the pat-down, appellant stated that he had methamphetamine in his right front pocket. Appellant also immediately reported that the vehicle contained additional drugs.

{¶ 8} After Trooper Rabold conducted a series of field sobriety tests, he arrested appellant. After the arrest, Rabold searched the vehicle and discovered methamphetamine, marijuana, drug paraphernalia, and some clear plastic bags. Shortly thereafter a sheriff's deputy arrived on the scene and Trooper Rabold advised appellant of the *Miranda*[1] warnings.

{¶ 9} Appellant testified at the hearing and explained that he believed that he had been placed under arrest "the moment that [he] got out of the car."

{¶ 10} On January 30, 2019, the trial court denied appellant's motion to suppress evidence. Appellant subsequently entered a no contest plea to second-degree-felony aggravated possession of drugs and to first-degree-misdemeanor operating a vehicle while intoxicated. At

[1] *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

the change-of-plea hearing, the court informed appellant that, because appellant is on postrelease control, any sentence imposed for violating postrelease control "may be required to be served in addition to or consecutive to any other prison term imposed" for the felony offense. Appellant stated that he understood. The court additionally advised appellant that the court "typically require[s]" offenders who violate postrelease control to serve the sentence for the postrelease control violation consecutively to any prison sentence imposed for the underlying felony offense. Appellant stated that he understood and that he did not have any questions.

{¶ 11} The trial court found appellant guilty and sentenced him to serve five years in prison for the aggravated drug possession offense and to serve 180 days of local incarceration for the operating a vehicle while intoxicated offense. The court also ordered the two terms to be served concurrently to one another. The court also imposed an additional 902 days for violating postrelease control and ordered that appellant serve the postrelease control sentence consecutively to the others. The court further recited that it "reserved for denial" appellant's transfer to a transitional control program and his placement in an intensive program prison upon notification that the Ohio Department of Rehabilitation and Correction desires consideration of appellant for either. This appeal followed.

I

{¶ 12} Appellant's first and second assignments of error challenge the trial court's decision to deny his motion to suppress evidence. Because the same standard of review applies to both assignments of error, for ease of analysis we combine our review of the two assignments of error.

{¶ 13} In his first assignment of error, appellant asserts that the trial court erred by denying his motion to suppress all evidence uncovered as a result of the traffic stop. In particular, appellant contends that Trooper Rabold did not have any lawful basis to conduct a pat-down search for weapons. Appellant contends that the evidence presented at the motion to suppress hearing fails to show that the trooper had a legitimate concern that appellant possessed a weapon so as to justify a pat-down search for weapons. Appellant claims that "[t]he only plausible reason the trooper could have suspected [appellant] had weapons on him was because of the movements with his hands." Appellant thus alleges that the testimony presented at the hearing fails to show that the movements appellant made with his hands led the trooper to believe that appellant might be carrying a weapon.

{¶ 14} Appellant further argues that any consent that he may have given did not validate the pat-down search. Appellant claims that any consent that he may have given occurred after Trooper Rabold had conducted the invalid pat-down search. Appellant also asserts that he did not consent to a search of his vehicle and that the evidence obtained from the search must be suppressed.

{¶ 15} In his second assignment of error, appellant asserts that the trial court erred by denying his motion to suppress the incriminating statements that he made during the traffic stop. Appellant contends that he was "in custody" during the traffic stop and that Trooper Rabold should have advised appellant of his Fifth Amendment right against self-incrimination.

A

STANDARD OF REVIEW

{¶ 16} Appellate review of a trial court's ruling on a motion to suppress evidence involves a mixed question of law and fact. *E.g.*, *State v. Castagnola*, 145 Ohio St.3d 1, 2015-Ohio-1565, 46 N.E.3d 638, ¶ 32; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8; *State v. Moore*, 2013-Ohio-5506, 5 N.E.3d 41 (4th Dist.), ¶ 7. Appellate courts "'must accept the trial court's findings of fact if they are supported by competent, credible evidence.'" *State v. Leak*, 145 Ohio St.3d 165, 2016-Ohio-154, 47 N.E.3d 821, ¶ 12, quoting *Burnside* at ¶ 8. Accepting those facts as true, reviewing courts "'independently determine as a matter of law, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.'" *Id.*, *Burnside* at ¶ 8.

B

FOURTH AMENDMENT

{¶ 17} The Fourth and Fourteenth Amendments to the United States Constitution, as well as Section 14, Article I of the Ohio Constitution, protect individuals against unreasonable governmental searches and seizures. *Delaware v. Prouse*, 440 U.S. 648, 662, 99 S.Ct. 1391, 1400, 59 L.Ed.2d 660 (1979); *State v. Gullett*, 78 Ohio App.3d 138, 143, 604 N.E.2d 176 (1992). "[S]earches [and seizures] conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967); *e.g.*, *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 98. Once the defendant demonstrates that he was subjected to a warrantless search or seizure, the burden shifts to the state to establish that the warrantless search or seizure was constitutionally permissible. *State v. Banks-Harvey*, 152 Ohio

St.3d 368, 2018-Ohio-201, 96 N.E.3d 262, ¶ 18; *Maumee v. Weisner*, 87 Ohio St.3d 295, 297, 720 N.E.2d 507 (1999); *Xenia v. Wallace*, 37 Ohio St.3d 216, 524 N.E.2d 889 (1988), paragraph two of the syllabus.

1

TRAFFIC STOPS

{¶ 18} A traffic stop initiated by a law enforcement officer constitutes a seizure within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809–810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *Prouse*, 440 U.S. at 653. Thus, a traffic stop must comply with the Fourth Amendment's general reasonableness requirement. *Whren*, 517 U.S. at 810. "[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Id.* (citations omitted); *accord Dayton v. Erickson*, 76 Ohio St.3d 3, 11–12, 665 N.E.2d 1091 (1996). Consequently, "[p]robable cause is * * * a complete justification for a traffic stop * * *." *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, ¶ 23; *accord Bowling Green v. Godwin*, 110 Ohio St.3d 58, 2006-Ohio-3563, 850 N.E.2d 698, ¶ 11.

{¶ 19} In the case sub judice, appellant does not challenge the constitutionality of the stop. We, therefore, do not address it. Instead, appellant contests the constitutionality of the events that transpired after the officer stopped his vehicle. Appellant first complains that Trooper Rabold lacked any reason to conduct a pat-down search for weapons.

2

PAT-DOWN SEARCH FOR WEAPONS

{¶ 20} During a traffic stop, a law enforcement officer may conduct a limited pat-down search for weapons "if the officer reasonably concludes that the driver 'might be armed and presently dangerous.'" *Arizona v. Johnson*, 555 U.S. 323, 330–31, 129 S.Ct. 781, 786, 172 L.Ed.2d 694 (2009); *e.g., State v. Evans*, 67 Ohio St.3d 405, 618 N.E.2d 162 (1993); *State v. Collins*, 4th Dist. Hocking No. 18CA12, 2019-Ohio-1724, 2019 WL 2004219, ¶ 22. "The pat-down search is limited to discovering weapons that might be used to harm the officer." *State v. Fowler*, 4th Dist. Ross No. 17CA3599, 2018-Ohio-241, ¶ 17. Thus, an officer cannot conduct a pat-down "to search for evidence of the crime." *Evans*, 67 Ohio St.3d at 414.

{¶ 21} In the case sub judice, even if the trooper arguably lacked a reasonable belief that appellant might possess a weapon, the suppression hearing testimony reveals that appellant volunteered the information that he had methamphetamine in his front pocket before the trooper even began the pat-down search. We also observe that the state introduced the video recording of the traffic stop. Although the video recording did not capture any images of the pat-down search and when it began, appellant volunteered that he had methamphetamine in his pocket immediately after the trooper advised appellant that the trooper intended to conduct a pat-down check for weapons.

3

CONSENT TO SEARCH

{¶ 22} Appellant next asserts that he did not consent to a search of his vehicle. However, when a law enforcement officer has probable cause to believe that a vehicle contains contraband, the officer may search a validly stopped motor vehicle based upon the well-established automobile exception to the warrant requirement. *State v. Moore*, 90 Ohio

St.3d 47, 51, 734 N.E.2d 804 (2000), citing *Maryland v. Dyson*, 527 U.S. 465, 466, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999); *see State v. Lang*, 117 Ohio App.3d 29, 36, 689 N.E.2d 994 (1st Dist.1996) (holding that discovery of cocaine in a vehicle in plain view provided probable cause to search the remainder of the vehicle for contraband). Additionally, "Ohio courts have held that the production of drugs by an occupant of a vehicle independently provides an officer with additional probable cause to believe that the vehicle contains evidence of contraband." *State v. Donaldson*, 6th Dist. Wood No. WD-18-034, 2019-Ohio-232, 2019 WL 337010, ¶ 29; *State v. Young*, 12th Dist. Warren No. CA2011-06-066, 2012-Ohio-3131, ¶ 32-33 (concluding that once driver admitted that he possessed marijuana, officers obtained probable cause to search vehicle). Thus, once appellant volunteered that he possessed methamphetamine, the officer had probable cause to search the vehicle.

{¶ 23} Accordingly, the issue of whether appellant consented to a search of his vehicle is irrelevant. Instead, Trooper Rabold possessed probable cause to search appellant's vehicle. Consequently, we do not agree with appellant that the trial court erred by overruling his motion to suppress the evidence.

{¶ 24} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

C

FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION

{¶ 25} The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." In order to safeguard a suspect's Fifth Amendment privilege against self-incrimination, law enforcement officers

seeking to perform a custodial interrogation must warn the suspect "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In the absence of these warnings, a suspect's incriminatory statements made during a custodial interrogation are inadmissible at trial. *Michigan v. Mosley*, 423 U.S. 96, 99–100, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) (footnote and citation omitted) ("[U]nless law enforcement officers give certain specified warnings before questioning a person in custody, and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be admitted in evidence against him as a defendant at trial, even though the statement may in fact be wholly voluntary."); *Miranda*, 384 U.S. at 479 (stating that no evidence stemming from result of custodial interrogation may be used against defendant unless procedural safeguards employed); *State v. Maxwell*, 139 Ohio St.3d 12, 2014–Ohio–1019, 9 N.E.3d 930, ¶ 113 (stating that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.").

{¶ 26} We note that the *Miranda* rule does not protect every person who is subjected to police questioning; the rule protects only individuals subjected to "custodial interrogation." *Miranda* defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444, 86 S.Ct. at 1611, 16 L.Ed.2d 694; *see also Stansbury v.*

California, 511 U.S. 318, 322, 114 S.Ct. 1526, 1528, 128 L.Ed.2d 293 (1994); *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977) (stating that the *Miranda* protection attaches "only where there has been such a restriction on a person's freedom as to render him in 'custody'"). Thus, "the requirement that police officers administer *Miranda* warnings applies only when a suspect is subjected to both custody and interrogation." *State v. Dunn*, 131 Ohio St.3d 325, 2012–Ohio–1008, 964 N.E.2d 1037, ¶ 24.

{¶ 27} "Determining whether questioning is 'a custodial interrogation requiring *Miranda* warnings demands a fact-specific inquiry that asks whether a reasonable person in the suspect's position would have understood himself or herself to be in custody while being questioned.'" *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 57, quoting *Cleveland v. Oles*, 152 Ohio St.3d 1, 2017-Ohio-5834, 92 N.E.3d 810, ¶ 21. We observe that the custody determination "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *State v. Henry*, 12th Dist. Preble No. CA2008-04-006, 2009-Ohio-434, 2009 WL 243094, ¶ 13. "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

{¶ 28} Moreover, determining whether an individual "has been 'interrogated,' * * * focuses on police coercion, and whether the suspect has been compelled to speak by that coercion." *State v. Tucker*, 81 Ohio St.3d 431, 436, 692 N.E.2d 171 (1998). An individual may feel compelled to speak not only "by express questioning, but also * * * by the 'functional equivalent' of express questioning, i.e., 'any words or actions on the part of the police (other than

those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Id.* at 436, quoting *Rhode Island v. Innis*, 446 U.S. 291, 300–301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Consequently, a suspect who volunteers information without being asked any questions is not subject to a custodial interrogation and is not entitled to *Miranda* warnings. *Id.* at 483; *State v. McGuire*, 80 Ohio St.3d 390, 401, 686 N.E.2d 1112 (1997); *accord Miranda*, 384 U.S. at 478 (stating that "[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today"). "Moreover, there is no requirement that officers interrupt a suspect in the course of making a volunteered statement to recite the *Miranda* warnings." *Tucker*, 81 Ohio St.3d at 483.

{¶ 29} Roadside questioning of a motorist detained pursuant to a routine traffic stop ordinarily does not constitute "custodial interrogation." *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). If, however, the motorist "thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*." *Id.*; *accord State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985.

{¶ 30} In the case at bar, our review of the record reveals that appellant readily volunteered that he possessed methamphetamine immediately after Trooper Rabold stated that he intended to conduct a pat-down search for weapons. Thus, in light of the evidence adduced at the hearing, *Miranda* does not apply to appellant's voluntary statement. *See State v. Drake*, 10th Dist. No. 16AP-258, 2017-Ohio-755, 85 N.E.3d 1055, 2017 WL 823757, ¶ 21 (determining that

even though defendant in custody, defendant volunteered incriminating statements and thus was not subjected to interrogation).

{¶ 31} Additionally, after appellant freely admitted that he possessed methamphetamine on his person, he then continued to talk and informed Trooper Rabold that he had drugs in the vehicle. Appellant expressed himself freely and without any coercion or elements of interrogation. Thus, because appellant was not subjected to a custodial interrogation, Trooper Rabold was not required to advise appellant of the *Miranda* warnings.

{¶ 32} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error.

II

{¶ 33} In his third assignment of error, appellant asserts that the trial court erred by accepting appellant's no-contest plea without ensuring that he understood the maximum penalties for the various offenses. In particular, appellant contends that the trial court failed to advise him that any sentence imposed for violating his postrelease control must be served consecutively to the sentence imposed for the underlying offense.

{¶ 34} "'When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution.'" *State v. Veney*, 120 Ohio St.3d 176, 2008–Ohio–5200, 897 N.E.2d 621, ¶ 7, quoting *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996); *accord State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶ 40; *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826, ¶ 9. "It is the trial court's duty, therefore, to ensure that a

defendant 'has a full understanding of what the plea connotes and of its consequence.'" *Montgomery* at ¶ 40, quoting *Boykin v. Alabama*, 395 U.S. 238, 244, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

{¶ 35} In general, an appellate court that is evaluating whether a criminal defendant knowingly, intelligently, and voluntarily entered a guilty plea must independently review the record to ensure that the trial court complied with the constitutional and procedural safeguards contained within Crim.R. 11. *State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014–Ohio–5601, ¶ 36; *State v. Eckler*, 4th Dist. Adams No. 09CA878, 2009-Ohio-7064, 2009 WL 5199324, ¶ 48; *accord Veney* at ¶ 13 ("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. Kelley*, 57 Ohio St.3d 127, 128, 566 N.E.2d 658 (1991) ("When a trial court or appellate court is reviewing a plea submitted by a defendant, its focus should be on whether the dictates of Crim.R. 11 have been followed."); *State v. Shifflet*, 2015–Ohio–4250, 44 N.E.3d 966 (4th Dist.), ¶ 13, citing *State v. Davis*, 4th Dist. Scioto Nos. 13CA3589 and 13CA3593, 2014–Ohio–5371, 2014 WL 6876680, ¶ 31, citing *State v. Smith*, 4th Dist. Washington No. 12CA11, 2013–Ohio–232, 2013 WL 314369, ¶ 10. Pursuant to Crim.R. 11(C)(2), a trial court should not accept a guilty plea without first addressing the defendant personally and:

> (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 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.

{¶ 36} Thus, before accepting a guilty plea, a "trial court must inform the defendant that he is waiving his privilege against compulsory self-incrimination, his right to jury trial, his right to confront his accusers, and his right of compulsory process of witnesses." *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981), paragraph one of the syllabus; *see also* Crim.R. 11(C)(2)(c). "In addition to these constitutional rights, the trial court must determine that the defendant understands the nature of the charge, the maximum penalty involved, and the effect of the plea." *Montgomery* at ¶ 41.

{¶ 37} The purpose of Crim.R. 11(C) is "to convey to the defendant certain information so that he can make a voluntary and intelligent decision whether to plead guilty." *Ballard*, 66 Ohio at 479–80. Although literal compliance with Crim.R. 11(C) is preferred, it is not required. *State v. Clark*, 119 Ohio St.3d 239, 2008–Ohio–3748, 893 N.E.2d 462, ¶ 29, citing *State v. Griggs*, 103 Ohio St.3d 85, 2004–Ohio–4415, 814 N.E.2d 51, ¶ 19. A reviewing court therefore ordinarily will affirm a trial court's acceptance of a guilty plea if the record reveals that the trial court engaged in a meaningful dialogue with the defendant and explained, "in a manner reasonably intelligible to that defendant," the consequences of pleading guilty. *Ballard* at paragraph two of the syllabus; *accord State v. Barker*, 129 Ohio St.3d 472, 2011–Ohio–4130, 953 N.E.2d 826, ¶ 14; *Veney* at ¶ 27.

{¶ 38} Moreover, a defendant who seeks to invalidate a plea on the basis that the trial court partially, but not fully, informed the defendant of his non-constitutional rights must demonstrate a prejudicial effect. *Veney* at ¶ 17; *Clark* at ¶ 31. To demonstrate that the defendant suffered prejudice as a result of the court's failure to fully inform the defendant of his non-constitutional rights, a defendant must illustrate that he would not have pled guilty but for the trial court's failure. *Clark* at ¶ 32, quoting *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990) (stating that "[t]he test is 'whether the plea would have otherwise been made' "). When, however, a trial court completely fails to inform a defendant of non-constitutional rights, "the plea must be vacated." *Id.* "'A complete failure to comply with the rule does not implicate an analysis of prejudice.'" *Id.*, quoting *State v. Sarkozy*, 117 Ohio St.3d 86, 2008–Ohio–509, 881 N.E.2d 1224, ¶ 22. Additionally, when a defendant seeks to invalidate a plea on the basis that the trial court failed to properly inform the defendant of his constitutional rights, the "plea is invalid." *Veney* at ¶ 30; *Nero*; *see Clark* at ¶ 31, quoting *State v. Griggs*, 103 Ohio St.3d 85, 2004–Ohio–4415, 814 N.E.2d 51, ¶ 12 (stating that the plea is invalid "'under a presumption that it was entered involuntarily and unknowingly.'").

{¶ 39} In the case sub judice, appellant contends that the trial court failed to ensure that appellant understood the maximum penalties that the court could impose. He asserts that under *State v. Bishop*, 156 Ohio St.3d 156, 2018-Ohio-5132, 124 N.E.3d 766, the court is required to inform him that any prison sentence imposed for violating postrelease control must be served consecutively to any sentence imposed for the underlying felony offense.

{¶ 40} In *Bishop*, it appears that the trial court completely failed to mention that the court would be required to impose the postrelease control sentence consecutively to the underlying

felony offense sentence. *Id.* at ¶ 20. On appeal to the Ohio Supreme Court, the defendant argued that the Crim.R. 11(C)(2)(a) requirement that a trial court inform a defendant of the maximum penalty involved includes notifying the defendant that any prison term imposed for violating post release control must be served consecutively to the sentence imposed for the underlying felony offense. The supreme court agreed with the defendant and explained:

> Sentences imposed under R.C. 2929.141(A) cannot stand alone. The court may impose the sentence only upon a conviction for or plea of guilty to a new felony, making the sentence for committing a new felony while on postrelease control and that for the new felony itself inextricably intertwined. By any fair reading of Crim.R. 11(C)(2), the potential R.C. 2929.141(A) sentence was part of the "maximum penalty involved" in this case.

Id. at ¶ 17. The court therefore concluded that "Crim.R. 11(C)(2)(a) requires a trial court to advise a criminal defendant on postrelease control for a prior felony, during his plea hearing in a new felony case, of the trial court's authority under R.C. 2929.141 to terminate the defendant's existing postrelease control and to impose a consecutive prison sentence for the postrelease-control violation." *Id.* at ¶ 21.

{¶ 41} In the case at bar, we do not agree with appellant that *Bishop* requires that we vacate his plea. Instead, the facts in the case at bar are distinguishable from those in *Bishop*. In *Bishop,* the trial court completely failed to mention imposing a consecutive sentence for violating postrelease control. In the present case, by contrast, the trial court advised appellant of the possibility of imposing the postrelease control sentence consecutively to the underlying felony sentence. Although the trial court did not ensure that appellant understood that the two sentences would be required to be served consecutively to one another, the court did ensure appellant understood that consecutive sentences were possible and also extremely likely. The

court advised appellant that the court "typically require[s]" postrelease control and underlying felony sentences to run consecutively to one another.

{¶ 42} Thus, although the trial court may not have fully complied with Crim.R. 11(C)(2)(a), as interpreted in *Bishop,* the court partially complied. Appellant, therefore, must show prejudice. We point out that appellant did not argue in his appellate brief that he would not have entered his no-contest plea if he knew that consecutive sentences would be definite, as opposed to likely. Moreover, he raises no other suggestion that he would have chosen not to plead no-contest if he knew that consecutive sentences would be mandatory and not merely possible. Consequently, we do not agree with appellant that we must vacate his plea.

{¶ 43} Additionally, we do not believe that *State v. Nix*, 8th Dist. Cuyahoga No. 106894, 2019-Ohio-1640, 2019 WL 1970236, mandates a different result. In *Nix,* the defendant filed an application to reopen his appeal and argued that appellate counsel performed ineffectively by neglecting to argue on direct appeal that the trial court failed to ensure that the defendant was aware that the court would be required to order the defendant's sentence for violating postrelease control to be served consecutively to the sentence imposed for the underlying felony offense. Instead, the trial court informed the defendant that "his plea 'may' result in a consecutive sentence." *Id.* at ¶ 7.

{¶ 44} In *Nix*, the appellate court granted the application to reopen. The court concluded that based upon *Bishop*, the defendant had raised a colorable claim regarding appellate counsel's ineffectiveness. We believe, however, that *Nix* is distinguishable from the case at bar. *Nix* involved reopening an appeal on the basis of ineffective assistance of appellate counsel. In granting the application to reopen, the court concluded that "a reasonable probability [exists] that

had appellate counsel presented this assigned error, the results of the appeal may have been different." Thus, the court did not definitively conclude that the trial court failed to comply with Crim.R. 11(C)(2)(a). Instead, the court allowed appellant the opportunity to reopen his appeal and argue the merits of the issue. We therefore disagree with appellant that *Nix* supports his argument that the trial court failed to comply with Crim.R. 11(C)(2)(a) as interpreted in *Bishop*.

{¶ 45} Accordingly, based upon the foregoing reasons, we overrule appellant's third assignment of error.

III

{¶ 46} In his fourth assignment of error, appellant contends that the trial court erred by including a statement in the sentencing entry that "reserved for denial" his placement into a transitional control program or an intensive program prison. Appellant asserts that the trial court could not deny his placement into either program until the Ohio Department of Rehabilitation and Correction notified the court that it was considering placing appellant into one of the programs.

A

STANDARD OF REVIEW

{¶ 47} R.C. 2953.08(G)(2) defines appellate review of felony sentences and provides in relevant part:

> The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court. The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action

> authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

{¶ 48} The statute thus indicates that "appellate courts may not apply the abuse-of-discretion standard" when reviewing felony sentences. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 10. Instead, "an appellate court may vacate or modify a felony sentence on appeal only if it determines, by clear and convincing evidence, that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id.* at ¶ 1.

{¶ 49} Clear and convincing evidence is that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. Id. at ¶ 22.

{¶ 50} Thus, our standard of review "'is * * * extremely deferential.'" *State v. Butcher*, 4th Dist. Athens Nos. 15CA33 and Athens Nos. 15CA34, 2017-Ohio-1544, 2017, 2017 WL 1507209, ¶ 84, quoting *State v. Venes*, 8th Dist. Cuyahoga No. 98682, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 20–21; *see Marcum* at ¶ 23.

{¶ 51} In the case sub judice, as we explain below, we do not believe that the trial court abused its discretion by reserving appellant's transfer to transitional control or placement in an

intensive program prison for denial. We also do not believe that the trial court's reservation of denial into either program is contrary to law under the facts of this case.

B

TRANSITIONAL CONTROL

{¶ 52} R.C. 2967.26(A)(1) allows the Department of Rehabilitation and Correction to transfer inmates into a transitional control program during the final 180 days of incarceration "for the purpose of closely monitoring a prisoner's adjustment to community supervision * * *." Before the transfer, the parole authority must provide the trial court with an opportunity to disapprove the transfer and must send the court a report on the prisoner's conduct in the institution covering the prisoner's participation in school, vocational training, work, treatment, and other rehabilitative activities and any disciplinary action taken against the prisoner. R.C. 2967.25(A)(2).

{¶ 53} Our colleagues in the Second and Fifth Districts concluded that a trial court errs when it disapproves a transfer to transitional control as part of the offender's sentencing entry. For example, in *State v. Spears*, 5th Dist. Licking No. 10–CA–95, 2011–Ohio–1538, the court concluded that denying transitional control in the sentencing entry "clearly thwarts the design and purpose of the [transitional-control] statute," which is "to promote prisoner rehabilitation effort and good behavior while incarcerated." *Id.* at ¶ 37. The Second District determined that a trial court lacks the authority to disapprove the transfer to transitional control until "the adult parole authority sends a notice to the trial court indicating that it intends to grant transitional control under R.C. 2967.26(A)." *State v. Howard*, 190 Ohio App.3d 734, 2010–Ohio–5283, 944 N.E.2d 258, ¶ 2 (2d Dist.); *e.g.*, *State v. Bailey*, 2nd Dist. Greene No. 2014-CR-569, 2016-Ohio-2957, 2016 WL 2841397, ¶ 11*; State v. Chaffin*, 2nd Dist. Montgomery No. 25220, 2014-Ohio-2671,

2014 WL 2810831, ¶¶ 52-53; *accord State v. Hempfield*, 5th Dist. Licking No. 11-CA-103, 2012-Ohio-2619, 2012 WL 2127335, ¶ 29.

{¶ 54} The First District took a different approach in *State v. Brown*, 1st Dist. Hamilton No. C-130120, 2016-Ohio-310, 2016 WL 524350, ¶¶ 13-16. The *Brown* court observed "that the trial court has the statutory authority and wide discretion to disapprove and ultimately block [the defendant]'s participation in the program as part of its sentencing powers." *Id.* at ¶ 16. The court also noted that the defendant "agreed that he would not be able to participate in this program as a condition of his 12–year prison term." The court thus concluded that "R.C. 2967.26 permits the restriction as part of the sentence under these circumstances." *Id.* at ¶ 16.

{¶ 55} The Twelfth District concluded that nothing prohibits a "trial court from predetermining that transitional control is inapplicable during sentencing." *State v. Toennisson*, 12th Dist. Butler No. CA2010-11-307, 2011-Ohio-5869, 2011 WL 5516072, ¶ 34. The court explained:

> The statutory language does not require the trial court to await a decision by the adult parole authority in order to pass on transitional control, or, for that matter, intensive prison programs. Instead, the statute simply grants an undecided court additional discretion to consider a prisoner's good behavior, if and when the adult parole authority files notice and a report. R.C. 2967.26(A)(2).

Id.

{¶ 56} This court previously considered a trial court's sentencing entry that denied transitional control in *State v. Riley*, 4th Dist. Athens No. 11CA14, 2012-Ohio-1086, 2012 WL 914923, ¶ 14. In *Riley*, the defendant asserted that the trial court erred by including a statement in its sentencing entry that disapproved his transfer to transitional control. We did not agree. We explained:

> Normally, whether a prisoner would be eligible for transitional control is uncertain because his eligibility is partially based upon his behavior while incarcerated. The APA would assess the prisoner's eligibility when his remaining sentence nears 180 days. Ohio Adm.Code 5120–12–01(F) provides, "In order to be eligible for transitional control transfer pursuant to section 2967.26 of the Revised Code, a prisoner must meet all of the following minimum criteria: * * * (8) Prisoners shall not have a designated security level of level 3, level 4 or level 5. (9) Prisoners shall not be currently confined in any institution control status as a result of any disciplinary action." (Emphasis added.) Thus, on appeal, whether a prisoner would qualify for a transitional control transfer at a later date would be uncertain because his designated security level and whether he was confined in institutional control at that later date are unknown. Without knowing whether a prisoner is eligible for transitional control, this Court cannot determine whether the trial court's entry disapproving of the prisoner's transfer to transitional control has resulted in prejudice to the prisoner; the issue would be unripe for review. *See State v. Moss*, 186 Ohio App.3d 787, 2010–Ohio–1135, 930 N.E.2d 838 (discussing ripeness).

Riley at ¶ 14.

{¶ 57} In *Riley*, we further noted that the Ohio Administrative Code provisions made the defendant ineligible to participate in the transitional control program. The defendant had been convicted of disqualifying offenses: aggravated vehicular assault and aggravated vehicular homicide. We thus concluded that the defendant's argument was moot.

{¶ 58} In the case at bar, we do not believe that the trial court erred by including a directive that "reserved for denial" appellant's transfer to transitional control "upon notification that ODRC desires consideration of the defendant for transitional control." Our interpretation of the court's language is that the trial court did not expressly deny appellant's transfer to transitional control. Instead, the language suggests that the court held its decision in abeyance until it received notice of the pendency of the transfer. Thus, the court did not outright disapprove appellant's transfer to transitional control. Instead, the court appears to have "retained the power to reconsider and, if prudent, overturn its initial objection to transitional control. As a result, the court could still review appellant's conduct upon receiving notice and a report from the adult parole authority." *State v. Toennisson*, 12th Dist. Butler No. CA2010-11-307, 2011-Ohio-5869, 2011 WL 5516072, ¶ 33.

{¶ 59} Consequently, we disagree with appellant that the trial court erred by reserving his transfer to transitional control for denial.

C

INTENSIVE PROGRAM PRISON

{¶ 60} Intensive program prisons (IPP) focus on "'educational achievement, vocational training, alcohol and other drug abuse treatment, community service and conservation work, and other intensive regimens or combinations of intensive regimens.'" *State v. Howard*, 190 Ohio App.3d 734, 2010–Ohio–5283, 944 N.E.2d 258, ¶ 10 (2d Dist.), quoting R.C. 5120.032. Trial courts have discretion to recommend placement of an offender into an IPP pursuant to R.C. 5120.032. *State v. Turner*, 8th Dist. Cuyahoga No. 103610, 2016-Ohio-3325, 2016 WL 3199943, ¶ 28. Only eligible prisoners may participate in an IPP, however. R.C.

5120.032(B)(2)(a) and (b) specifically exclude individuals serving prison terms for second-degree felonies and individuals serving mandatory prison terms.

{¶ 61} In the case sub judice, the trial court sentenced appellant to serve a mandatory prison term for a second-degree felony. Thus, appellant is not eligible to participate in an IPP. Consequently, any error that the trial court may have made by reserving appellant's placement into an IPP for denial is harmless. *State v. Walz*, 2nd Dist. Montgomery No. 23783, 2012-Ohio-4627, 2012 WL 4762080, ¶¶ 24-28 (concluding any error court made by disapproving placement in IPP harmless when defendant ineligible for IPP).

{¶ 62} Accordingly, based upon the foregoing reasons, we overrule appellant's fourth assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Adams County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.