[Cite as *State v. Hartrum*, 2015-Ohio-3333.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	Case Nos. 14-CA-87
SHAWN A. HARTRUM	:	14-CA-106
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case Nos. 14-CR-0188 and 14-CR-0266
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	August 13, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JUSTIN T. RADIC 20 South Second Street 4th Floor Newark, OH 43055	WILLIAM T. CRAMER 470 Old Worthington Road Suite 200 Westerville, OH 43082

Farmer, J.

{¶1} On March 13, 2014, the Licking County Grand Jury indicted appellant, Shawn Hartrum, on one count of aggravated drug possession and one count of drug possession in violation of R.C. 2925.11, and one count of possessing drug paraphernalia in violation of R.C. 2925.14 (Case No. 14-CR-0188). On April 9, 2014, a criminal complaint was filed charging appellant with two additional counts, one each of aggravated drug possession and drug possession (Case No. 14-CR-0266).

{¶2} On October 2, 2014, appellant pled guilty to all charges. By judgment entry filed same date, the trial court sentenced appellant to an aggregate term of two years and nine months. The trial court imposed an additional year for a post-release control violation (Case No. 13-CR-0064), to be served consecutively, for a total term of three years and nine months.

{¶3} Appellant filed an appeal in each case and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND CRIM.R. 11 BY FAILING TO ENSURE THAT HE UNDERSTOOD THE MAXIMUM PENALTIES HE FACED UPON PLEADING GUILTY."

II

{¶5} "THE TRIAL COURT RENDERED APPELLANT'S NO CONTEST PLEA INVOLUNTARY AND VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS BY IMPOSING A SENTENCE THAT EXCEEDED THE AGREED-UPON SENTENCING RECOMMENDATION."

I

{¶6} Appellant claims the trial court erred in failing to inform him of the maximum penalties involved, as the trial court failed to inform him of the possibility of additional prison time for a post-release control violation and that the time could be imposed consecutively. We disagree.

{¶7} Crim.R. 11 governs pleas. Subsection (C)(2) states the following:

> (2) 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 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.

{¶8} In *State v. Clark,* 119 Ohio St.3d 239, 2008-Ohio-3748, ¶ 31, the Supreme Court of Ohio explained the following:

> When a trial judge fails to explain the constitutional rights set forth in Crim.R. 11(C)(2)(c), the guilty or no-contest plea is invalid "under a presumption that it was entered involuntarily and unknowingly." *Griggs,* 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12; see also *Nero,* 56 Ohio St.3d at 107, 564 N.E.2d 474, citing *Boykin,* 395 U.S. at 242–243, 89 S.Ct. 1709, 23 L.Ed.2d 274. However, if the trial judge imperfectly explained nonconstitutional rights such as the right to be informed of the maximum possible penalty and the effect of the plea, a substantial-compliance rule applies. *Id.* Under this standard, a slight deviation from the text of the rule is permissible; so long as the totality of the circumstances indicates that "the defendant subjectively understands the implications of his plea and the rights he is waiving," the plea may be upheld. *Nero,* 56 Ohio St.3d at 108, 564 N.E.2d 474.

{¶9} The "Admission of Guilt" forms signed on October 2, 2014 by appellant and his trial counsel informed appellant of the possibility of revocation and additional

sentencing: "If I am now on felony probation or parole, this plea may result in revocation proceedings and any new sentence could be imposed consecutively. If I am on misdemeanor probation, this plea may also result in revocation proceedings."

{¶10} During the Crim.R. 11 plea colloquy between the trial court and appellant, the following discussion was had (October 2, 2014 T. at 15-16):

> Q. Mr. Hartrum, are you currently on probation, parole or community control?
>
> A. I was on PRC, yes, sir.
>
> Q. Do you understand, Mr. Hartrum, that any plea or - - plea of guilty or guilty finding here today could be used as a basis to revoke any probation, parole or community control you may be currently serving, causing you to serve any sentence that might have been suspended in that case or cases in addition to or consecutively with any sentence you receive in this case, as well as to cause any imposition of your PRC time? Do you understand that?
>
> A. Yes, sir.

{¶11} Upon review, we find the trial court adequately informed appellant of a possible revocation and imposition of a consecutive sentence. Based upon the totality of the circumstances, we find appellant understood the implications of his plea.

{¶12} Assignment of Error I is denied.

II

{¶13} Appellant claims his guilty pleas were rendered involuntary when the trial court failed to follow the agreed sentencing recommendation. We disagree.

{¶14} As explained by this court in *State v. Bailey,* 5th Dist. Knox No. 05-CA-13, 2005-Ohio-5329, ¶ 15-17:

> Sentencing is within the sound discretion of the trial court. *State v. Mathews* (1982), 8 Ohio App.3d 145, 456 N.E.2d 539. The trial court is not bound by a recommendation proffered by the State. *State v. Kitzler,* Wyandot App. No. 16-02-06, 2002-Ohio-5253; *Akron v. Ragsdale* (1978), 61 Ohio App.2d 107, 109, 399 N.E.2d 119. In fact, Crim.R. 11 "does not contemplate that punishment will be a subject of plea bargaining, this being a matter either determined expressly by statute or lying with the sound discretion of the trial court." *State v. Mathews* (1982), 8 Ohio App.3d 145, 146, 8 OBR 202, 456 N.E.2d 539. As this court stated in *State v. Hutchison* (Oct. 30, 2001), Tuscarawas App. No.2001AP030020, at 8, 2001 WL 1356356:
>
> "Philosophically, a trial court is not bound by a plea agreement unless there has been active participation by the trial court in the agreement. Such participation was not present sub judice. If we accept appellant's argument, we would be abrogating the constitutional right of the trial court to determine the appropriate sentence. It would abrogate

> the separation of powers doctrine if the state was permitted to force a particular sentence upon a trial court."
>
> Therefore, a trial court does not err by imposing a sentence greater than a sentence recommended by the State when the trial court forewarns the defendant of the range of penalties which may be imposed upon conviction. *State v. Buchanan,* 154 Ohio App.3d 250, 2003-Ohio-4772, 796 N.E.2d 1003.

{¶15} By judgment entry filed October 2, 2014, the trial court sentenced appellant to an aggregate term of two years in prison in Case No. 14-CR-0188, and an aggregate term of nine months in prison in Case No. 14-CR-0266, to be served consecutively for a total term of two years and nine months. Appellant does not challenge the unlawfulness of the sentence, only that he did not get the benefit of the plea deal which was a two year sentencing recommendation. October 2, 2014 T. at 20, 21-22.

{¶16} In the "Admission of Guilt" form signed October 2, 2104 in Case No. 14-CR-0188, appellant acknowledged the maximum sentence was "a basic prison term of 48 months of which 0 is mandatory." In the "Admission of Guilt" form signed October 2, 2104 in Case No. 14-CR-0266, appellant acknowledged the maximum sentence was "a basic prison term of 12 months of which 0 is mandatory."

{¶17} During the sentencing hearing, defense counsel noted the maximum sentence was five years, and asked the trial court to follow the jointly recommended

sentence of two years. October 2, 2014 T. at 20. The prosecutor then stated the following (*Id.* at 21-22):

> THE COURT: ***Mr. Waltz, do you wish to make any recommendation?
>
> MR. WALTZ: Yes, Your Honor. Thank you. Your Honor, the State would recommend a two-year prison sentence. Understanding the Defendant has a - - just a terrible record, just absolutely awful, and I wasn't sure until I looked through the PSI that - - how bad it was, but he is here accepting responsibility today, so the State would submit that's appropriate.

{¶18} The trial court then sentenced appellant to the aggregate two year, nine month prison term, finding the additional counts were committed while the first case was pending and while he was on post-release control. *Id.* at 24-25. The trial court noted the following (*Id.* at 23-24):

> THE COURT: I mean, the only time you've really done well is when you've been incarcerated where you've gotten a chance to, you know, not abuse illegal drugs, get the right medical care, and, you know, regular meals and sleep and all that stuff. I mean, you know, I can't keep you locked up forever. You know, five years or maybe six is about as much as I can go, which you get your daughter to adulthood, but you've never had

> any ability to behave yourself even when you were incarcerated, and, you know, nor have you ever been good on supervision. This is not the first time you've been - - committed criminal offenses while on post-release control or been revoked. And it's also really been your whole life or at least since you've been 16 anyway.

{¶19} No objection was made to the sentence and when the trial court asked appellant if he had any questions about the sentence, appellant stated, "No, sir." *Id.* at 26-27.

{¶20} During the change of plea hearing, the trial court specifically asked appellant if there have been "any threats or promises or anything offered to you or given to you today to make you do this" and appellant responded, "No, sir." *Id.* at 13-14. The trial court then explicitly informed appellant of the possibility of a five year sentence (*Id.* at 14-15):

> Q. Do you understand, Mr. Hartrum, that should the Court permit you to change your plea here today, should the Court then enter a guilty finding, generally all that would remain to be done is to proceed with sentencing and the maximum sentence for these offenses in these two cases would consist of a term of five years at a state penitentiary, a fine of $15,400.00, a suspension of your driver's license, and three years of post-release control? Do you understand that?
>
> A. Yes, sir.

Q. Do you understand that's the maximum possible penalty you could receive in this case?

A. Yes, sir.

Q. Do you understand that's the maximum amount of time you could be required to serve at a state penitentiary without any type of credit for good behavior?

A. Yes, sir.

Q. Do you also understand, Mr. Hartrum, that if you were to be sentenced to the penitentiary, released early pursuant to judicial release and placed on community control, that if you were to violate the terms of community control, you'd be subject to being returned to the penitentiary for the balance of your sentence?

A. Yes, sir

Q. Do you also understand that if you were sentenced directly to a term of community control and you were to violate the terms of community control, you'd be subject to being sent to the penitentiary for that entire five year period of time?

A. Yes, sir.

{¶21} The plea colloquy adequately informed appellant of the possibility of receiving the maximum sentence (which appellant did not receive) despite the joint sentencing recommendation, and during sentencing, the trial court adequately explained why it sentenced appellant to the two year, nine month sentence. The

imposition of the additional year was for a post-release control violation in Case No. 13-CR-0064 which appellant was adequately informed of as discussed in Assignment of Error I.

{¶22} Assignment of Error II is denied.

{¶23} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By Farmer, J.

Wise, J. concur and

Hoffman, P.J., dissents.

SGF/sg 721

Hoffman, P.J., dissenting

{¶24} I respectfully dissent from the majority opinion.

{¶25} I find the trial court's explanation concerning reimposition of PRC time fails to clearly inform Appellant such time would be required to be served consecutively to the sentence in the present case. While the trial court informed Appellant suspended time on prior case(s) could be reimposed and served consecutively, the trial court did not clearly and unambiguously explain imposition of PRC time would be required to be served consecutively pursuant to R.C. 2929.141. For the same result see *State v. Branham*, 2nd Dist. No. 2013CA49, 2014-Ohio-5067. I would sustain Appellant's first assignment of error.

{¶26} I would also sustain Appellant's second assignment of error. I do not find advising Appellant of the maximum possible sentence required by Crim.R. 11 satisfies, implicitly or otherwise, the trial court's duty to forewarn a defendant it does not have to accept the recommended sentence. In his second assignment of error, Appellant is not challenging the sufficiency of the Crim.R. 11 colloquy, but rather whether his plea was knowingly and voluntarily made because he was not separately advised by the trial court it did not have to follow the state's recommended sentence.