

[Cite as *State v. Corbin*, 2001-Ohio-4140.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 77079

STATE OF OHIO	:	
	:	
Plaintiff-appellee	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
KEVIN CORBIN	:	
	:	
Defendant-appellant	:	
	:	

DATE OF ANNOUNCEMENT	:	
OF DECISION	:	FEBRUARY 1, 2001

CHARACTER OF PROCEEDING	:	Criminal appeal from
	:	Court of Common Pleas
	:	Case No. CR-368,404

JUDGMENT	:	VACATED AND REMANDED.
----------	---	-----------------------

DATE OF JOURNALIZATION	:	
------------------------	---	--

APPEARANCES:

For plaintiff-appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor JOCELYN CONWELL, Assistant Justice Center, Courts Tower 1200 Ontario Street Cleveland, Ohio 44113
For defendant-appellant:	KEVIN CORBIN, <i>pro se</i> Richland Correctional Institution Post Office Box 8107 Mansfield, Ohio 44901  PATRICIA KOCH WINDHAM Attorney at Law 400 Terminal Tower

50 Public Square  
Cleveland, Ohio 44113-2203

KENNETH A. ROCCO, P.J.:

Defendant-appellant Kevin Corbin appeals from his conviction after entering a guilty plea to a charge of trafficking in crack cocaine with a schoolyard specification.

In his three assignments of error, appellant challenges his conviction on the basis that his guilty plea was not entered knowingly, voluntarily or intelligently.

Appellant contends the trial court failed to adequately explain the nature of the offense and also incorrectly stated the maximum penalty involved; appellant asserts that as a result of the foregoing, the sentence imposed upon him was improper. Appellant further contends his trial counsel rendered ineffective assistance for his failure to object to the errors that occurred at appellant's plea hearing and sentencing.

Following a review of the record, this court cannot find trial counsel's assistance was inadequate. However, the trial court's failure to inform appellant of the correct maximum penalty involved in the precise offense to which he entered a plea rendered appellant's plea invalid. Appellant's conviction, therefore, must be reversed and this case remanded for further proceedings.

Appellant's conviction stems from a series of incidents that eventually resulted in the filing of a twelve-count indictment against him. Counts one through four charged appellant with

trafficking in crack cocaine on September 16, 19, 24 and 25, 1998 in amounts from one to ten grams in violation of R.C. 2925.03. Counts five and six charged appellant with trafficking in crack cocaine on September 29 and 30, 1998 in amounts not exceeding five grams; both of these counts contained a schoolyard specification. Counts seven through eleven charged appellant with felonious assault on September 30, 1998 in violation of R.C. 2903.11.

Since each of these latter four counts named an automobile as the weapon appellant used and each further named a different police officer as the victim, and since each count contained a peace officer specification, it can be assumed appellant attempted to flee when the officers approached to arrest him on September 30, 1998. The remaining count of the indictment charged appellant with possession of criminal tools, to-wit: money, on that same date in violation of R.C. 2923.24.

Appellant pleaded not guilty to the charges at his arraignment and retained counsel to represent him. Following some discovery, the prosecutor notified the trial court a plea agreement had been reached. The trial court thereupon held a hearing on the matter.

At the outset of the hearing, the prosecutor briefly set forth the counts of the indictment and informed the trial court appellant would be entering a guilty plea to only count five. The prosecutor incorrectly stated count five was a felony of the first degree

rather than a felony of the third degree as set forth in R.C. 2925.03 (C) (4) (c).<sup>1</sup>

Appellant's counsel added that the agreement included a sentence of five years; the prosecutor supported that addition, stating the agreed sentence would be "[i]nstead of the actual

---

<sup>1</sup>In pertinent part, RC. 2925.03 (C) (4) states:

(c) Except as otherwise provided in this division, if the amount of the drug involved exceeds five grams but does not exceed ten grams of cocaine that is not crack cocaine or *exceeds one gram but does not exceed five grams of crack cocaine*, trafficking in cocaine is a felony of the fourth degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within one of those ranges *and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile*, trafficking in cocaine is a felony of the third degree, and there is a presumption for a prison term for the offense. (Emphasis added.)

mandatory time, which would have been three to ten years pursuant to the statute." Appellant's counsel further informed the trial court appellant had made his choice to accept the agreement after "full discovery," which counsel had "shared" with appellant.

The trial court thereupon conducted a colloquy with appellant. Appellant answered, "Yes," when asked if it were his decision to enter into the plea agreement "as outlined thus far." At the conclusion of the colloquy, the following exchange occurred:

THE COURT:       Based upon the statement of the prosecutor's attorney and your lawyer, I believe it is your intention at this time to plead guilty to count five as indicted, this is *trafficking in cocaine* under 2925.03 with a school yard specification under 2925.03(C)(2)(B) (*sic*).

Now, as indicted, this is a *felony of the 1<sup>st</sup> degree*, carries with it a possible prison term of *three years up to ten years* in prison and a fine up to \$20,000.   \*\*\*

\* \* \*

Other than the agreed sentence of five years and the delayed sentence, there have been no threats or promises.

THE DEFENDANT: No.

(Emphasis added.)

The trial court thereafter accepted appellant's plea of guilty to count five and dismissed the remaining counts of the indictment.

During appellant's sentencing, the trial court observed:

THE COURT:        You're looking at a lot of time  
                     in this case.

THE DEFENDANT: Yes.

THE COURT:        I don't know what the agreement  
                     was between the prosecutor and  
                     you and your attorney, but the  
                     agreed sentence is five years,  
                     you're looking at an awful lot  
                     of time with 12 counts maximum  
                     penalty of ten years.

THE DEFENDANT: Right.

THE COURT:        Do you understand that? You  
                     have agreed to a five year sen-  
                     tence.

THE DEFENDANT: Yeah.

Appellant was sentenced accordingly. This court has granted appellant's motion to file a delayed appeal of his conviction.

Appellant presents one assignment of error by and through counsel and two assignments of error *pro se*. Since all are related, they are addressed together as follows:

- I. TRIAL COURT ERRED IN ACCEPTING APPELLANT'S PLEA OF GUILTY AS IT WAS NOT ENTERED KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY.

- - - -

- I. APPELLANT'S DUE PROCESS RIGHTS WERE ABRIDGED WHEN HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

II. THE TRIAL COURT ERRED IN SENTENCING APPELLANT.

Appellant asserts his plea is invalid both because the nature of the offense to which he entered his plea was inadequately explained and also because the maximum penalty involved for that offense was improperly stated. Appellant thus contends his plea was neither knowingly, voluntarily nor intelligently made. Appellant further contends in his first assignment of error *pro se* his trial counsel rendered ineffective assistance for permitting the plea and sentencing proceedings to occur without objecting to them on the foregoing grounds. This court must agree with appellant in part.<sup>2</sup>

Crim.R. 11(C)(2) provides in pertinent part as follows:

**RULE 11. Pleas, Rights Upon Plea**

---

<sup>2</sup>The state points out in its appellate brief this court previously has stated a defendant's failure to file a motion to withdraw his plea constitutes a waiver of an appellate challenge to the plea. See, e.g., *State v. Carmon* (Nov. 18, 1999), Cuyahoga App. No. 75377, unreported. However, the supreme court has mentioned no such requirement. *State v. Green* (1998), 81 Ohio St.3d 100; *State v. Nero* (1990), 56 Ohio St.3d 106. Moreover, this court has not been consistent in that position. *State v. Arnold* (July 16, 1998), Cuyahoga App. No. 72813, unreported.

\* \* \*

**(C) Pleas of guilty and no contest in felony cases.**

\* \* \*

(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 he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.*

(Emphasis added.)

The supreme court has stated there must be "substantial compliance" with the requirements of Crim.R. 11(C). *State v. Nero* (1990), 56 Ohio St.3d 106. The Nero court defined that term thusly:

Substantial compliance means that under the *totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.* *Stewart* [(1977) 51 Ohio St.2d 86]; *State v. Carter* (1979), 60 Ohio St.2d 34, 38, 14 O.O.3d 199, 201, 498 N.E.2d 757, 760, *certiorari denied* (1980), 445 U.S. 953. Furthermore, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. *Stewart, supra*, at 93, 5 O.O.3d at 56, 364 N.E.2d at 1167; Crim.R. 52(A). The test is whether the plea would have otherwise been made. *Id.*

*Id.*, at 108. (Emphasis added.)



**[Cite as *State v. Corbin*, 2001-Ohio-4140.]**

It is clear from a perusal of the relevant provisions of R.C. 2925.03 that offenses involving cocaine are treated differently depending on the drug's form. R.C. 2925.01(X) and (GG) define the differences between forms of cocaine; they indicate that because crack cocaine is highly addictive and is "generally intended for individual use," it is the more insidious substance. Thus, trafficking in *crack* cocaine is an offense of a different nature than trafficking in cocaine in one of its other states.

The trial court in this case, however, made no such distinction. The trial court indicated at appellant's plea hearing that appellant was entering a plea of guilty only to "trafficking in cocaine under R.C. 2925.03 with a schoolyard specification." This was inadequate to inform appellant of the precise nature of the offense to which he was entering his change of plea. See, e.g., *State v. Keefer* (1998), 128 Ohio App.3d 262.

Furthermore, it is axiomatic that a defendant must know the maximum penalty involved before the trial court may accept his guilty plea. *State v. Wilson* (1978), 55 Ohio App.2d 64; *State v. Gibson* (1986), 34 Ohio App.3d 146. The record in this case affirmatively demonstrates that at the plea hearing no one, including the trial court, correctly informed appellant that in pleading guilty to trafficking in crack cocaine in an amount not exceeding five grams, with a schoolyard specification, he was pleading guilty to a felony of the *third* degree, which carried a presumption of

incarceration of one, two, three, four or five years. R.C. 2929.14(A)(3) and R.C. 2929.13(E)(1).

The trial court also failed to explain that the presumption could be *rebutted* depending on the trial court's consideration of certain factors and the trial court's statement on the record of certain findings. R.C. 2929.13(C) and (D). In entering his guilty plea, appellant believed the agreed sentence was only half the potential penalty involved for that offense, rather than the maximum. *State v. Keefer, supra*.

The record, therefore, reveals the trial court did not substantially comply with the requirements of Crim.R. 11(C). Since appellant did not fully understand either the nature of the charge or the consequences of his plea, his plea was invalid; the only appropriate remedy, therefore, is to vacate his plea and to remand this case. *State v. Caplinger* (1995), 105 Ohio App.3d 567; *State v. Calvillo* (1991), 76 Ohio App.3d 714; *Metropolitan Park District v. Pauch* (Dec. 16, 1999), Cuyahoga App. No. 74792, unreported; *State v. Barrett* (Dec. 5, 1996), Cuyahoga App. Nos. 70038-70041, unreported; *State v. Myers* (Oct.13, 1994), Cuyahoga App. No. 66916, unreported; *State v. Jones* (Sept. 22, 1994), Cuyahoga App. No. 65160, unreported; *State v. Walker* (Jan. 20, 1994), Cuyahoga App. No. 63437, unreported.

That conclusion, however, does not dispose of appellant's claim of ineffective assistance of counsel. To prevail on this

claim, appellant first must demonstrate counsel's performance was deficient and then must show counsel's errors prejudiced his defense. *State v. Bradley* (1989), 42 Ohio St.3d 136; *State v. Xie* (1992), 62 Ohio St.3d 521. Counsel is presumed to have rendered adequate assistance unless appellant proves otherwise. *State v. Smith* (1985), 17 Ohio St.3d 98.

The record in this case reflects counsel was well-prepared and knowledgeable. Moreover, as the trial court noted, appellant was facing "a lot of time in this case." Defense counsel was able to broker a plea agreement by which eleven of the twelve outstanding counts against appellant were dismissed; four of those counts were felonies of the first degree. R.C. 2903.11(B). Counsel's arrangement in this case of an agreed sentence of only five years for appellant in the face of all these charges, therefore, hardly can be consider deficient. Thus, appellant's claim of ineffective assistance of counsel cannot be credited. *State v. Smith* (Mar. 9, 2000), Cuyahoga App. No. 75512, unreported; *State v. Hill* (Feb. 4, 1993), Cuyahoga App. Nos. 61685, 61686, unreported. Appellant's first assignment of error *pro se*, accordingly, is overruled.

Since the trial court improperly accepted appellant's plea without an adequate explanation of either the nature of the offense or the maximum penalty involved for that offense, however, appellant's first assignment of error and his second assignment of error *pro se* are sustained.

Appellant's conviction is vacated; this case is remanded for further proceedings.

**[Cite as *State v. Corbin*, 2001-Ohio-4140.]**

This cause is vacated and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

JAMES D. SWEENEY, J. and

FRANK D. CELEBREZZE, JR., J. CONCUR

PRESIDING JUDGE  
KENNETH A. ROCCO

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).