

[Cite as *State v. Norman*, 2009-Ohio-4044.]

[Please see original opinion at 2009-Ohio-1793.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91302

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EZELL NORMAN

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-499712

BEFORE: Stewart, J., McMonagle, P.J., and Celebrezze, J.

RELEASED: August 13, 2009

JOURNALIZED: August 13, 2009

ATTORNEY FOR APPELLANT

Margaret Amer Robey
Robey & Robey
14402 Granger Road
Maple Heights, OH 44137

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Kevin L. Rosenberg
Assistant County Prosecutor
The Justice Center
1200 Ontario Street, 8th Floor
Cleveland, OH 44113

ON RECONSIDERATION¹

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Ezell Norman, appeals from his guilty pleas to drug trafficking, failure to comply, and tampering with evidence. He maintains that his pleas were not knowingly entered because the court failed to advise him that the sentence for failure to comply would have to be served

¹The original announcement of decision, *State v. Norman*, Cuyahoga App. No. 91302, 2009-Ohio-1793, released on April 16, 2009, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See App.R. 22(C); see, also, S.Ct.Prac.R. II, Section 2(A)(1).

consecutively to the other counts. He also complains that his overall sentence was grossly disproportionate to his conduct. We conclude that the court erred by failing to advise Norman that he would be subject to a mandatory consecutive sentence for the failure to comply count, thus rendering his guilty plea unknowing.

{¶ 2} Count 3 of the indictment charged Norman with failure to comply in violation of R.C. 2921.331(B), alleging that he unlawfully operated a motor vehicle so as to willfully elude or flee from a police officer after receiving a visible or audible signal from the officer to bring his motor vehicle to a stop. The count also contained a furthermore clause stating that while committing the offense, Norman was fleeing after the commission of a felony and/or his operation of the vehicle caused a substantial risk of serious physical harm to persons or property. During the plea proceedings, the state told the court that count 3 was a third degree felony, meaning that under R.C. 2921.331(C)(5)(a)(ii), Norman agreed that his operation of the motor vehicle “caused a substantial risk of serious physical harm to persons or property.”

{¶ 3} Norman’s guilty plea implicated R.C. 2921.331(D), which states: “If an offender is sentenced pursuant to division (C)(4) or (5) of this section for a violation of division (B) of this section, and if the offender is sentenced to a prison term for that violation, the offender shall serve the prison term consecutively to any other prison term or mandatory prison term imposed

upon the offender.” At no point during the plea colloquy, however, did the court advise Norman that his sentence for failure to comply would have to be served consecutively to any other prison term imposed for the counts to which he pleaded guilty.

{¶ 4} Crim.R. 11(C)(2)(a) states that the court shall not accept a guilty plea without first “[d]etermining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved * * *.”

{¶ 5} When the rights involved are of a constitutional nature, the court must strictly comply with Crim.R. 11. *State v. Ballard* (1981), 66 Ohio St.2d 473, 477. When the rights involved are statutory, the court need only substantially comply with Crim.R. 11. *Id.* Among the nonconstitutional rights enumerated under Crim.R. 11 are that the defendant be informed of the maximum penalty. See Crim.R. 11(C)(2)(a).

{¶ 6} In *State v. Johnson* (1988), 40 Ohio St.3d 130, the syllabus states: “[f]ailure to inform a defendant who pleads guilty to more than one offense that the court may order him to serve any sentences imposed consecutively, rather than concurrently, is not a violation of Crim.R. 11(C)(2), and does not render the plea involuntary.”

{¶ 7} *Johnson* is not dispositive because its use of the word “may” shows that it concerns the discretionary imposition of consecutive sentences.

When consecutive sentences are mandatory, the consecutive sentence directly affects the length of the sentence, thus becoming a crucial component of what constitutes the “maximum” sentence, and the failure to advise a defendant that a sentence must be served consecutively does not amount to substantial compliance with Crim.R. 11(C)(2). See *State v. Ricks* (1977), 53 Ohio App.2d 244, 246-247.

{¶ 8} In *State v. Bragwell*, Mahoning App. No. 06-MA-140, 2008-Ohio-3406, the Seventh Appellate District noted that in *Johnson* the consecutive sentences ordered were discretionary, not mandatory:

{¶ 9} “Here the trial court did not simply fail to inform appellant that it might order him to serve his sentences consecutively. Instead it completely neglected to inform him that he was required to serve his sentences consecutively. Whether appellant was to serve his sentences consecutively or concurrently was not up to the trial court’s discretion as was the case in *Johnson*, supra. R.C. 2929.13(G)(2) directs that the court impose a mandatory prison term for the repeat offender specification prior to and consecutive to the sentence on the underlying DUI. Unlike *Johnson*, in this case a mandatory, consecutive prison term was a guaranteed consequence of appellant’s guilty plea.

{¶ 10} “For all of these reasons, we cannot conclude that the trial court substantially complied with Crim.R. 11(C)(2) in informing appellant of the

consequences of his guilty plea. Appellant did not enter a knowing and intelligent plea.” Id. at ¶57-58. See, also, *State v. Pitts*, 159 Ohio App.3d 853, 2005-Ohio-1389, at ¶22 (finding that because R.C. 2921.331(D) mandates consecutive sentences, that sentence was “part of the maximum penalty appellant faced and the trial court erred by failing to inform appellant of this at the plea hearing.”); *State v. Hankison*, Scioto App. No. 01CA2792, 2002-Ohio-6161, at ¶16 (reversing guilty plea because “the trial court did not advise Hankison that, by pleading guilty to failure to comply, it was mandatory that his sentence be served consecutively to any other sentence.”).

{¶ 11} The only precedent from this court on the issue is *State v. Dudenas*, Cuyahoga App. Nos. 81461 and 81774, 2003-Ohio-1000, which involves R.C. 2921.331(D) with facts similar to those in this case. Citing to *Johnson*, this court summarily rejected Dudenas’s argument regarding the trial court’s failure to inform him of having to serve consecutive sentences. Id. at ¶19.

{¶ 12} In our original decision of the present case, we acknowledged that *Dudenas* was something of an outlier among appellate districts and reluctantly adhered to it as precedent, despite misgivings that it offered no analysis on the distinction between discretionary and mandatory consecutive sentences for purposes of Crim.R. 11. After further reflection, we are now persuaded that *Dudenas’s* failure to address the mandatory nature of the

consecutive sentences for purposes of Crim.R. 11(C)(2)(a) makes it unviable as precedent for this case. We therefore hold, in conformance with other appellate districts in this state, that compliance with the “maximum” penalty provision of Crim.R. 11(C)(2) requires the court to inform the defendant, prior to taking a guilty plea, that a charge carries a mandatory consecutive sentence.

{¶ 13} The court did not inform Norman that any sentence for a violation of R.C. 2921.331 would have to be served consecutively to sentences imposed on the other counts to which Norman pleaded guilty. This constituted a lack of substantial compliance with Crim.R. 11(C)(2)(a) and requires a reversal of Norman’s guilty plea.

Judgment reversed and remanded.

It is ordered that appellant recover of appellee its 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 Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, JUDGE

CHRISTINE T. McMONAGLE, P.J., and

FRANK D. CELEBREZZE, JR., J., CONCUR