

[Cite as *State v. Mosby*, 2011-Ohio-926.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 94676**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JEFFREY MOSBY**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-528493

**BEFORE:** Keough, J., Cooney, P.J., and Rocco, J.

**RELEASED AND JOURNALIZED:** March 3, 2011

## **ATTORNEY FOR APPELLANT**

Timothy R. Sterkel  
1414 South Green Road  
Suite 310  
South Euclid, OH 44121

## **ATTORNEYS FOR APPELLEE**

William D. Mason  
Cuyahoga County Prosecutor

BY: Brian Kraft  
Assistant Prosecuting Attorney  
The Justice Center, 8<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, OH 44113

KATHLEEN ANN KEOUGH, J.:

{¶ 1} Defendant-appellant, Jeffrey Mosby (“Mosby”), appeals his guilty plea and the juvenile court’s decision to transfer his case to the general division of the common pleas court. Finding no merit to the appeal, we affirm.

{¶ 2} In 2009, Mosby was charged in a four-count complaint in the Juvenile Division of the Cuyahoga County Court of Common Pleas. He was

charged with three counts of aggravated robbery, with one- and three-year firearm specifications, and one count of intimidation of a crime victim.

{¶ 3} Following a probable cause hearing, the juvenile court determined that Mosby would be tried as an adult for the offenses, transferring his case to the general division of the common pleas court for further proceedings.

{¶ 4} Mosby was subsequently indicted in the general division for three counts each of aggravated robbery and kidnapping, each containing one- and three-year firearm specifications, and one count of having a weapon under disability.

{¶ 5} Mosby ultimately entered into a plea agreement, pleading guilty to one count of aggravated robbery with the three-year firearm specification and to the weapon under disability charge.

{¶ 6} Mosby was sentenced to five years for both the aggravated robbery charge and for having a weapon under disability. These sentences were ordered to run concurrent to each other but consecutive to the three-year firearm specification, for a total sentence of eight years in prison.

{¶ 7} Mosby appeals, raising two assignments of error.

#### Transfer to the General Division

{¶ 8} In his first assignment of error, Mosby argues that the trial court committed error when it transferred his case from the juvenile division to the general division of the common pleas court. We disagree.

{¶ 9} R.C. 2152.10(A) provides, in pertinent part, that a “child who is alleged to be delinquent is eligible for mandatory transfer and shall be transferred as provided in section 2152.12 of the Revised Code [if] \* \* \* (2) The child is charged with a category two offense, \* \* \* the child was sixteen years of age or older at the time of the commission of the act charged, and \* \* \* (b) The child is alleged to have had a firearm on or about the child’s person or under the child’s control while committing the act charged and to have displayed the firearm, brandished the firearm, indicated possession of the firearm, or used the firearm to facilitate the commission of the act charged.”

{¶ 10} Pursuant to R.C. 2152.12(A)(1)(b), “[a]fter a complaint has been filed alleging that a child is a delinquent child by reason of committing a category two offense, the juvenile court at a hearing shall transfer the case if section 2152.10 of the Revised Code requires the mandatory transfer of the case and there is probable cause to believe that the child committed the act charged.”

{¶ 11} After conducting a hearing and considering witness testimony, the juvenile court found that Mosby was 17 years old at the time of the alleged offense and that probable cause existed that he committed the alleged

offenses, one of which was a category two offense (aggravated robbery). The court further found that it was alleged that Mosby had a firearm on his person or under his control during the commission of the offense and that he displayed, brandished, indicated possession of, or used the firearm to facilitate the commission of the offense.

{¶ 12} Accordingly, Mosby was subject to mandatory bindover pursuant to R.C. 2152.10 and R.C. 2152.12(A)(1)(b). The juvenile court was without discretion to maintain jurisdiction over the matter and was not required to conduct an amenability hearing to weigh any factors favoring amenability or transfer.

{¶ 13} Mosby's first assignment of error is overruled.

#### Postrelease control

{¶ 14} In his second assignment of error, Mosby argues that the trial court committed reversible error when it accepted his plea without first informing him that he would be subject to a mandatory five-year period of postrelease control.

{¶ 15} Before accepting a guilty plea, a trial court is bound by the requirements of Crim.R. 11(C)(2). *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, \_27. Crim.R. 11(C)(2)(a) requires a trial court to inform a criminal defendant of the maximum penalty for the offense to which he is pleading guilty. The trial court must also provide the defendant

information pertaining to postrelease control during the plea hearing. *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d 78, \_44, citing *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171, 733 N.E.2d 1103, paragraph two of the syllabus. In cases involving a mandatory period of postrelease control, the postrelease control is part “of the maximum penalty involved in an offense for which a prison term will be imposed.” *State v. Perry*, Cuyahoga App. No. 82085, 2003-Ohio-6344, at ¶10, citing *State v. Jones* (May 24, 2001), Cuyahoga App. No. 77657, discretionary appeal not allowed, 93 Ohio St.3d 1434, 755 N.E.2d 356. See, also, *State v Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224.

{¶ 16} It has been repeatedly held that literal compliance with Crim.R. 11(C)(2) is preferred. *Clark* at \_29, quoting *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, \_19, citing *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474.

{¶ 17} In *Clark*, the Ohio Supreme Court considered that when a trial court does not “literally comply with Crim.R. 11, reviewing courts must engage in a multitiered analysis to determine whether the trial judge failed to explain the defendant’s constitutional or nonconstitutional rights and, if there was a failure, to determine the significance of the failure and the appropriate remedy. “\* \* \* [I]f 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. 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.

{¶ 18} “When the trial judge does not substantially comply with Crim.R. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court partially complied or failed to comply with the rule. If the trial judge partially complied, e.g., by mentioning mandatory postrelease control without explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect. The test for prejudice is whether the plea would have otherwise been made.” (Internal citations and quotations omitted.) *Clark* at ¶30-32.

{¶ 19} In the instant case, Mosby pled guilty to felonies of various degrees, including a first degree felony that carries a mandatory term of five years of postrelease control. R.C. 2967.28(B)(1).

{¶ 20} At the time of the plea hearing, the trial court advised him: “[y]ou have to understand also that upon your release from prison, you would be subject to post-release control which is like parole for up to five years. It’s three years maybe on the [having weapons under disability], but five years on the [aggravated robbery]. That’s up to the discretion of the parole board, and

should you be released while you are on post-release control and you violate post-release control, they can actually take you back without even a trial for half the time you were sentenced to, do you understand that?”

{¶ 21} We find that the trial court misinformed Mosby that he would be subject to postrelease control when it said “for up to five years.” Additionally, the trial court did not use the word “mandatory” as it pertained to postrelease control at any time during his plea colloquy with Mosby. With these deficiencies, we cannot say that the trial court substantially complied with Crim.R. 11(C)(2)(a) because the information, or lack thereof, was not a “slight” deviation from the rule. *Clark* at \_31.

{¶ 22} Despite the failure to substantially comply with Crim.R. 11(C)(2), we find that the trial court partially complied with the rule because it did not completely ignore the requirements of Crim.R. 11(C)(2). The trial court informed Mosby that he would be subject to some term of postrelease control of “up to” five years. Although the trial court did not definitively say “for five years,” the explanation given that aggravated robbery was “five years,” indicates that Mosby knew that postrelease control was for five years. The trial court also advised him of the consequences he faced if he violated the terms of the postrelease control. Accordingly, because the trial court partially complied with the Crim.R. 11(C)(2), Mosby’s plea can only be



vacated if he demonstrates a prejudicial effect. *Clark* at \_32, citing *Nero* at 108.

{¶ 23} On appeal, Mosby does not indicate how he was prejudiced by the trial court's failure to literally comply with Crim.R. 11(C)(2). His blanket assertion that he was prejudiced is insufficient to withstand his burden of demonstrating a prejudicial effect, i.e. that absent the error he would not have entered a plea of guilty to the offenses.

{¶ 24} Accordingly, Mosby's final assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

KATHLEEN ANN KEOUGH, JUDGE

KENNETH A. ROCCO, J. CONCURS;  
COLLEEN CONWAY COONEY, P.J., CONCURS IN JUDGMENT ONLY