

[Cite as *State v. Perry*, 2015-Ohio-1542.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101667

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CEDRIC PERRY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-584386-A

BEFORE: Kilbane, J., Keough, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: April 23, 2015

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Cedric Perry (“Perry”), appeals from his convictions following guilty pleas for failure to comply with the order or signal of a police officer and drug trafficking. For the reasons set forth below, we affirm.

{¶2} On April 16, 2014, Perry was indicted on four counts in Cuyahoga C.P. No. CR-14-584386. Count 1 charged him with failure to comply with an order or signal of a police officer, in violation of R.C. 2921.331(B). Count 2 charged him with possession of 10-50 grams of heroin, in violation of R.C. 2925.11(A). Count 3 charged him with trafficking of 10-50 grams of heroin, in violation of R.C. 2925.03(A)(2). Count 4 charged him with possession of criminal tools, in violation of R.C. 2923.24(A). Each count also contained forfeiture specifications for drug paraphernalia.

{¶3} On May 15, 2014, Perry entered into a plea agreement with plaintiff-appellee, the state of Ohio (“the state”), and pled guilty to Count 1, failure to comply with an order or signal of a police officer, and guilty to Count 3, trafficking in heroin. Counts 2 and 4 were nolle. In accepting the guilty pleas, the trial court acknowledged that Perry was, at the time of the offenses, on probation in Cuyahoga C.P. Nos. CR-10-535074 and CR-12-561568, and had been sentenced during the previous month to three years in prison in Lake County, Ohio, on two counts of fourth-degree felony drug trafficking and possession of criminal tools. The trial court identified the potential penalties of the instant matter as follows:

THE COURT: Are you currently on any community control sanctions, probation, or parole?

DEFENDANT PERRY: I’m on probation, Your Honor.

THE COURT: Mr. Perry, you may face additional penalties in those other cases, including prison time which may run consecutive to any time you might see in this case if you plead guilty, do you understand?

DEFENDANT PERRY: Yes, Your Honor.

* * *

THE COURT: Now, if I sentence you and I'm required to sentence you on Count 3, Count 1 must run prior to and consecutive with Count 3, do you understand that?

DEFENDANT PERRY: Yes, Your Honor.

* * *

THE COURT: Since I do have to impose a prison term on you on Count [3], then Count 1 will run prior to and consecutive. So essentially the sentence for these two counts can run from 2 years and nine months up to 11 years in prison, do you understand that?

DEFENDANT PERRY: Yes, Your Honor.

THE COURT: Count 1 would run first, then Count [3], do you understand that?

* * *

DEFENSE COUNSEL: I believe the count the State is offering, failure to comply 2921.331, although would require the sentence be run consecutive, it doesn't require a mandatory prison term be imposed. So thereby stating the way it was indicted by the State of Ohio, if the court still elected to impose a term of incarceration, then that term would have to run consecutive but it still is at the election of the court and the court's discretion.

THE COURT: Right, I'm sorry, it's not mandatory to impose the prison term in Count 1, but that if I do impose a prison term on Count [3], then also on Count 1 will run consecutively. That's what I was trying to say.

(Tr. 10-16.)

{¶4} Then on June 11, 2014, the trial court held a hearing on the charges of violating community control sanctions in Case Nos. CR-10-535074 and CR-12-561568. The court sentenced Perry to 17 months in prison in Case No. CR-10-535074 and 18 months in prison in Case No. CR-12-561568, to be served concurrently to each other, but consecutively to the sentence imposed in the instant case.

{¶5} On the same day, Perry was also sentenced in the instant case to a total of six years and five months of imprisonment as follows: 30 months for Count 1 (failure to comply) and a mandatory four-year term for Count 3. The court also ordered that the instant sentence be served consecutively to Case No. 13CR000717, the Lake County matter. In the journal entry for the instant case, the trial court did not indicate that this sentence is to be served consecutively to the sentences issued for violating community control sanctions in Case Nos. CR-10-535074 and CR-12-561568, even though the journal entries in those separate matters specifically state that these sentences are to be served consecutively to the instant matter.

{¶6} Perry now appeals, assigning the following errors for our review:

Assignment of Error One

The trial court erred in failing to inform appellant of the consecutive sentence mandate he faced in entering a guilty plea to failure to comply.

Assignment of Error Two

Defense counsel provided ineffective assistance by failing to advise his client of the consecutive sentence mandate in the failure to comply statute.

Guilty Plea

{¶7} Within the first assignment of error, Perry asserts that the trial court failed to inform him that a conviction for failure to comply requires a defendant to serve a mandatory consecutive term of imprisonment. He further argues that the trial court erroneously advised him of the potential maximum term that he faced when it did not explain that the sentence imposed for failure to comply would have to be served consecutively to the sentence for trafficking as well as the probation violations and the Lake County conviction.

{¶8} Crim.R. 11(C)(2) governs guilty pleas and provides:

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.

{¶9} In determining whether the trial court has satisfied its duties under Crim.R. 11 in taking a plea, reviewing courts have distinguished between constitutional and nonconstitutional rights. The trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights. *State v. Stewart*, 51 Ohio St.2d 86, 88-89, 364 N.E.2d 1163 (1977); *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981), paragraph one of the syllabus. For nonconstitutional rights, scrupulous adherence to Crim.R. 11(C) is not required; the trial court must substantially comply. *Stewart*. “Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implication of his plea and the rights he is waiving.” *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). Moreover, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. *Id.* The test for prejudice is whether the plea would have otherwise been made. *Nero* at 107. Among the nonconstitutional rights enumerated under Crim.R. 11 is that the defendant be informed of the maximum penalty. *See* Crim.R. 11(C)(2)(a).

{¶10} We note that R.C. 2921.331(D) provides:

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.

{¶11} The consecutive sentence mandate in R.C. 2921.331(D) extends to any other term of imprisonment, no matter if the sentence is being imposed on the same or different case. *State v. Spicer*, 8th Dist. Cuyahoga No. 92384, 2010-Ohio-61, ¶ 19. The consecutive sentence mandate also applies even if the defendant’s other offenses occurred in a different county and predates the charge of failure to comply in the present case. *State v. Jeffery*, 5th Dist. Richland No. 10 CA 120, 2011-Ohio-2654, ¶ 48.

{¶12} In *State v. Norman*, 8th Dist. Cuyahoga No. 91302, 2009-Ohio-4044, *appeal not allowed*, 124 Ohio St.3d 1416, 2009-Ohio-6816, 919 N.E.2d 215, this court held that when consecutive sentences are mandatory as opposed to discretionary, the trial court must advise the defendant of that fact. We found that the trial court’s failure to 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” constituted a “lack of substantial compliance with Crim.R. 11(C)(2)(a) and requires a reversal of Norman’s guilty plea.” *Id.* at ¶ 13. We explained:

When consecutive sentences are mandatory, the consecutive sentences directly affect 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, 372 N.E.2d 1369.

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.

Id. at ¶ 7, 12. *Accord State v. Anderson*, 8th Dist. Cuyahoga No. 94598, 2010-Ohio-5487, ¶ 12 (“because the trial court never informed Anderson that any prison sentence imposed for a violation of R.C. 2921.331 would have to be served consecutively to sentences imposed for the other charges,” the trial court failed to substantially comply with Crim.R. 11).

{¶13} In reaching our decision in *Norman*, we relied on *State v. Bragwell*, 7th Dist. Mahoning No. 06-MA-140, 2008-Ohio-3406. In *Bragwell*, the defendant pled guilty to operating a vehicle while under the influence of alcohol with a repeat offender specification. At the time of the plea, however, the trial court neglected to inform the defendant that the sentence carried a mandatory prison term for the repeat offender specification that has to be served prior to and consecutive to the sentence on the underlying offense. In light of that omission, the *Bragwell* court held that the trial court failed to inform Bragwell of the maximum term and did not substantially comply with Crim.R. 11. In reaching this conclusion, the *Bragwell* court applied *Norman*, and distinguished the matter from *State v. Johnson*, 40 Ohio St.3d 130, 532 N.E.2d 1295 (1988), syllabus, which did not involve a mandatory consecutive term.

{¶14} In this matter, the trial court stated:

THE COURT: Are you currently on any community control sanctions, probation or parole?

DEFENDANT PERRY: I’m on probation, Your Honor.

THE COURT: Mr. Perry, you may face additional penalties in those other cases, including prison time which may run consecutive to any time you might see in this case if you plead guilty, do you understand?

DEFENDANT PERRY: Yes, Your Honor.

* * *

THE COURT: Now, if I sentence you and I'm required to sentence you on Count 3, Count 1 must run prior to and consecutive with Count 3, do you understand that?

DEFENDANT PERRY: Yes, Your Honor.

THE COURT: Now, Count 3 is trafficking in drugs, in violation of Revised Code Section 2925.03. That's a felony of the third degree — I'm sorry, felony of the second degree. That felony of the second degree carries a mandatory incarceration of between 2 and 8 years inclusive in annual increments and/or fines of up to \$15,000. Now, any term I impose on you between 2 and 8 years is a mandatory term. In other words, if I say 6 years, then you serve a mandatory term of 6 years. It's not mandatory 2 years, it's mandatory any term I give you between 2 and 8 years, do you understand that?

DEFENDANT PERRY: Yes.

* * *

THE COURT: Since I do have to impose a prison term on you on Count [3], then Count 1 will run prior to and consecutive. So essentially the sentence for these two counts can run from 2 years and nine months up to 11 years in prison, do you understand that?

DEFENDANT PERRY: Yes, Your Honor.

THE COURT: Count 1 would run first, then Count [3], do you understand that?

* * *

THE COURT: [I]f I do impose a prison term on Count [3], then also on Count 1 will run consecutively. That's what I was trying to say.

{¶15} In analyzing the foregoing, we conclude that the trial court did advise Perry that any prison sentence imposed for a violation of R.C. 2921.331 would have to be served

consecutively to sentences imposed for other counts to which he pled guilty. *Norman* at ¶ 13. The trial court stated, at four different times, that Count 1 (failure to comply) must run prior to and consecutive with Count 3 (trafficking heroin). Therefore, we find that the trial court complied with the “maximum penalty” provision of Crim.R. 11(C)(2).

{¶16} Accordingly, first assignment of error is overruled.

Ineffective Assistance of Counsel

{¶17} Perry next asserts that his trial counsel was ineffective for failing to advise him that the penalty for failure to comply has to be served consecutively to any other prison term or mandatory prison term imposed. In support of this claim, Perry notes that his counsel advocated for concurrent terms of imprisonment for the failure to comply and trafficking in heroin.

{¶18} In order to prevail on an ineffective assistance of counsel claim, an appellant must establish: (1) that his trial counsel’s performance was deficient; and (2) that such deficiency prejudiced the defense to the point of depriving the appellant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Trial counsel’s performance will not be deemed deficient unless it “fell below an objective standard of reasonableness.” *Id.* at 688. To show prejudice, the appellant must prove there exists “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “A defendant’s failure to satisfy one prong of the *Strickland* test negates a court’s need to consider the other.” *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52.

{¶19} In this matter, following the trial court's advisement to Perry, the defense counsel reiterated that the penalty for failure to comply had to be served consecutively to any other term imposed and stated:

DEFENSE COUNSEL: I believe the count the State is offering, failure to comply 2921.331, although would require the sentence be run consecutive, it doesn't require a mandatory prison term be imposed. So thereby stating the way it was indicted by the State of Ohio, if the court still elected to impose a term of incarceration, then that term would have to run consecutive but it still is at the election of the court and the court's discretion.

THE COURT: Right, I'm sorry, it's not mandatory to impose the prison term in Count 1, but that if I do impose a prison term on Count [3], then also on Count 1 will run consecutively. That's what I was trying to say.

(Tr. 16.)

{¶20} From the foregoing, we find no deficient performance. Defense counsel clearly expressed his understanding that the sentence for failure to comply had to be served consecutively, but advocated for Perry to receive a minimum term for this offense. This comports with R.C. 2921.331(D) that 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.

Perry pled guilty to a violation of R.C. 2921.331(B), a third-degree felony, which carries a prison sentence term of 9, 12, 18, 24, 30, or 36 months. *See* R.C. 2929.14(A). Since the first prong of *Strickland* was not met, the claim of ineffective assistance of counsel must fail.

{¶21} The second assignment of error is without merit.

{¶22} Judgment is affirmed.

It is ordered that appellee recover of 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.

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

MARY EILEEN KILBANE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
MELODY J. STEWART, J., CONCUR