

[Cite as *State v. Cammon*, 2017-Ohio-5587.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105124

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TYRONE D. CAMMON

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-605286-A

BEFORE: Boyle, J., Kilbane, P.J., and Jones, J.

RELEASED AND JOURNALIZED: June 29, 2017

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Tyrone Cammon, appeals from the trial court's judgment convicting him, after a guilty plea, of having weapons while under disability, with a forfeiture specification, and of drug possession. He raises one assignment of error for our review:

The trial court erred because Cammon did not make a knowing, voluntary, and intelligent change of plea.

{¶2} For the reasons that follow, we vacate Cammon's guilty plea, and remand for further proceedings consistent with this opinion.

I. Procedural History and Factual Background

{¶3} In April 2016, Cammon was indicted on one count of having weapons while under disability, in violation of R.C. 2923.13(A)(3), a third-degree felony, one count of carrying a concealed weapon, in violation of R.C. 2923.12(A)(2), a fourth-degree felony, and three counts of drug possession, in violation of R.C. 2925.11(A), fifth-degree felonies. Cammon initially pleaded not guilty to the charges.

{¶4} In September 2016, as part of a plea agreement with plaintiff-appellee, state of Ohio, Cammon withdrew his former plea of not guilty and pleaded guilty to one count of having weapons while under disability, a third-degree felony, with a forfeiture specification, and one count of drug possession, a fifth-degree felony. The remaining charges were nolle.

{¶5} At the plea hearing, the following relevant colloquy occurred:

The Court: I want to be sure you know the possible sentences. Having

weapons under disability is a third-degree felony. For that crime you may receive a period of incarceration in a state prison of a minimum of nine months, a maximum of 36 months, or one of these other possible sentences in between, 12 months, 18 months, 24 months, or 30 months. Do you understand?

Cammon: Yes, Your Honor.

The Court: Count 4, drug possession, is a fifth degree felony. For that crime you may be incarcerated in a state prison from — anywhere from six to twelve months inclusive, in monthly increments. Do you understand?

Cammon: Yes, Your Honor.

The Court: Because you have two crimes here, if you do admit to both of these crimes, it is possible sentences will be ordered to be served consecutively, meaning one after the other. Because of that you face a maximum prison term if you do plead guilty as proposed, of 30 months. Do you understand?

Cammon: Yes, Your Honor.

{¶6} In October, 2016, the trial court sentenced Cammon as follows:

Having considered all of that information, you are ordered on Count 1 to serve 36 months at the Lorain Correctional Institution. On Count 2, you're ordered to serve 10 months at the Lorain Correctional Institution. I'm going to order that the sentences be served concurrently.

{¶7} On the same day as the sentencing hearing, the trial court issued its sentencing entry. On October 18, 2016, the trial court issued a nunc pro tunc sentencing entry because of a “clerical error” in the original sentencing entry. Specifically, “[l]ine 14 of the [original sentencing] entry refers to a ten-month sentence on ‘count two.’ That should read ‘count four.’”

{¶8} It is from this judgment that Cammon appeals.

II. Voluntary, Knowing, and Intelligent Plea

{¶9} Cammon argues that he did not make a voluntary, knowing, and intelligent plea. Specifically, Cammon claims that the trial court gave him “conflicting instructions as to the potential maximum sentence he faced” prior to accepting his plea; that he relied on the trial court’s statement that a maximum of 30 months in prison could be imposed; and that the trial court erred when it then sentenced Cammon to 36 months’ imprisonment. According to Cammon, the trial court failed to comply with Crim.R. 11(C)(2)(a).

{¶10} In response, the state admits that the “trial court improperly stated that [Cammon] faced a maximum prison term of 30 months.” But, the state claims that the trial court informed Cammon of the maximum prison term for each of the two counts of having weapons while under disability and drug possession and, therefore, Cammon knew that he faced a maximum of 36 months of incarceration on the charge of having weapons while under disability alone. As such, according to the state, the trial court substantially complied with Crim.R. 11(C)(2)(a), and Cammon suffered no prejudice.

{¶11} The underlying purpose of Crim.R. 11(C) is to convey certain information to a defendant so that he or she can make a voluntary and intelligent decision regarding whether to plead guilty. *State v. Ballard*, 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981). The standard for reviewing whether the trial court accepted a plea in compliance with Crim.R. 11(C) is a de novo standard of review. *State v. Perez*, 8th Dist. Cuyahoga No. 101645, 2015-Ohio-4272, ¶ 11, citing *State v. Cardwell*, 8th Dist.

Cuyahoga No. 92796, 2009-Ohio-6827. “It requires an appellate court to review the totality of the circumstances and determine whether the plea hearing was in compliance with Crim.R. 11(C).” *Cardwell* at ¶ 26.

{¶12} Crim.R. 11(C)(2) provides that in felony cases the court may refuse to accept and shall not accept a plea of guilty 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.

{¶13} The Supreme Court of Ohio urges courts to literally comply with Crim.R. 11. “If a trial court fails to 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.” *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 30.

{¶14} 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.” *Id.* at ¶ 31. Thus, a trial court must strictly comply with the Crim.R. 11(C)(2)(c) requirements that relate to the waiver of constitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 21.

{¶15} If the trial judge imperfectly explains nonconstitutional rights under Crim.R. 11(C)(2)(a), such as the right to be informed of the maximum possible penalty and the effect of the plea, a substantial compliance rule applies. *Id.* at ¶14-17. 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.” *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990); *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977).

{¶16} When the trial court 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 completely failed to comply with the rule. If the trial court partially complied, the plea may be vacated only if the defendant demonstrates a prejudicial effect. *Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 32. The test for prejudice is “whether the plea would have otherwise been made.” *Nero* at 108. If, however, the trial judge completely failed to comply with the rule, the plea must be vacated and no analysis for prejudice is needed. *Clark* at ¶ 32.

{¶17} We note at the outset that Cammon does not contend that the trial court

failed to advise him or ensure that he understood the constitutional rights he would waive by entering into the plea agreement. Rather, the issue Cammon raises is that the trial court gave him conflicting advisements regarding the maximum sentence he faced prior to accepting his guilty plea. Therefore, the issue of whether Cammon knowingly, voluntarily and intelligently made his plea relates to a nonconstitutional right and, therefore, we review for substantial compliance.

{¶18} In this case, at the plea hearing the trial court initially addressed the charges of having weapons while under disability and drug possession separately and informed Cammon about the maximum sentence he faced for each of the charges. But immediately after these advisements, the trial court gave more detail and explained,

Because you have two crimes here, if you do admit to both of these crimes, it is possible sentences will be ordered to be served consecutively, meaning one after the other. Because of that you face a maximum prison term if you do plead guilty as proposed, of 30 months.

After advising Cammon that he faced a maximum sentence of 30 months' imprisonment, the trial court asked him if he understood. Cammon replied, "Yes, your Honor." Contrary to the advisements it gave at the plea hearing prior to accepting Cammon's guilty plea, the trial court sentenced Cammon to six additional months for a total of 36 months of imprisonment.

{¶19} We find this case similar to *State v. Dean*, 1st Dist. Hamilton No. C-150478, 2016-Ohio-3076 — a case relied on by Cammon. In *Dean*, the defendant pleaded guilty to aggravated robbery, a felony of the first-degree. During the plea hearing, the trial court informed the defendant that he faced a maximum sentence of three

years' imprisonment for this offense. Contrary to this advisement, the trial court later sentenced the defendant to five years' imprisonment.

{¶20} The *Dean* court held that by informing the defendant he could receive a maximum sentence of three years' imprisonment and then sentencing him to five years of imprisonment, the trial court failed to substantially comply with Crim.R. 11(C)(2)(a). *Id.* at ¶ 6. The *Dean* court further held that the defendant suffered prejudice because it could not say that the defendant would have still entered the plea had he known that he could be subjected to five years of imprisonment. *Id.* at ¶ 7. "The trial court's misstatement of the maximum sentence may have induced [the defendant] into pleading guilty." *Id.*

{¶21} We agree with the *Dean* court and hold that by informing Cammon that he could receive a maximum sentence of 30 months' imprisonment and then sentencing him to 36 months' imprisonment, the trial court failed to substantially comply with Crim.R. 11(C)(2)(a).

{¶22} Our analysis does not end here, however, because we still must determine whether the trial court completely disregarded its duties under Crim.R. 11 or partially complied with the rule. *Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 32. In *Clark*, the Supreme Court of Ohio held that the trial court partially complied with Crim.R. 11(C)(2)(a) when it informed the defendant of the maximum sentence he could receive for pleading guilty to aggravated murder, but then chose to offer an expanded and inaccurate explanation of the law regarding postrelease control. Similarly, the trial

court in this case initially informed Cammon of the maximum sentence he could receive for pleading guilty to the charges of having weapons while under disability and drug possession, but then gave a conflicting and inaccurate instruction when it chose to expand on the maximum sentence Cammon could ultimately receive. Because the trial court did not simply ignore its duties under Crim.R. 11(C)(2)(a), we find that the trial court partially complied with the rule. *Clark* at ¶ 40; *see also State v. Wagner*, 9th Dist. Medina No. 08CA0063-M, 2009-Ohio-2790 (the trial court partially complied with Crim.R. 11 because it informed the defendant what it believed to be the maximum sentence).

{¶23} And we hold that Cammon suffered prejudice. Like the defendant in *Dean*, we cannot say that Cammon would have still entered his guilty plea had he known that he could be subjected to a longer term than 30 months of imprisonment.

{¶24} Cammon's plea must be vacated because he did not enter it knowingly, intelligently, and voluntarily. Cammon's sole assignment of error is sustained. Therefore, we vacate Cammon's guilty plea and his conviction, and remand this case for further proceedings consistent with the law and this opinion.

{¶25} Judgment reversed and remanded.

It is ordered that appellant recover from appellee the 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.

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MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
LARRY A. JONES, SR., J., CONCUR