

[Cite as *State v. Wagner*, 2009-Ohio-2790.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF MEDINA    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No.     08CA0063-M

Appellee

v.

THOMAS J. WAGNER

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF MEDINA, OHIO  
CASE No.     08-CR-0108

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 15, 2009

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BELFANCE, Judge

{¶1} Defendant/Appellant Thomas Wagner appeals from his convictions in the Medina County Court of Common Pleas. For the reasons set forth below, we affirm.

FACTS

{¶2} On March 1, 2008, Wagner consumed at least four beers before leaving his job at a restaurant in Brecksville. Wagner was driving towards his home in Wadsworth when his car spun out on black ice and became stuck in a grassy median. Police contacted a tow truck to help free Wagner’s vehicle. While waiting for the tow truck, Wagner drank a pint of vodka he had in his car. After his vehicle was removed from the median, Wagner drove to the parking lot of a bar in Wadsworth, where he planned to continue drinking.

{¶3} Upon exiting his vehicle, a Wadsworth Police Department officer confronted Wagner. The officer indicated that the police had received phone calls about erratic driving. The officer had Wagner perform field sobriety tests. Blood alcohol testing revealed Wagner’s

blood alcohol level was .295, well above the legal limit. Wagner was arrested and indicted for two counts of driving under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a) and 4511.19(A)(1)(h), both are felonies of the fourth degree. As Wagner was convicted of five violations of R.C. 4511.19 or similar statutes in the twenty years prior to this offense, the specification found in R.C. 2941.1413 accompanied both counts.

{¶4} On June 6, 2008, a change of plea hearing was held. Count I of the indictment was dismissed and Wagner pled guilty to a violation of R.C. 4511.19(A)(1)(h) with the repeat offender specification. The trial court sentenced Wagner to eighteen months in prison, fined him \$800.00, suspended his driver's license for life, and released his vehicle to the lien holder bank.

{¶5} Wagner has timely appealed, asserting one assignment of error. Wagner argues that his plea of guilty was not knowing, voluntary and intelligent where the trial court did not correctly advise Wagner of the maximum sentence he could receive. While we conclude that the trial court did err, we cannot conclude that the error prejudiced Wagner; we therefore overrule Wagner's sole assignment of error.

#### STANDARD OF REVIEW

{¶6} Prior to accepting a guilty plea, the trial court is required to inform the defendant of the rights contained in Crim.R. 11(C)(2) which the defendant waives by entering a plea. *State v. Anderson* (1995), 108 Ohio App.3d 5, 8, quoting *State v. Abuhilwa* (March 29, 1995), 9th Dist. No. 16787, at \*2.

{¶7} Crim.R. 11(C)(2)(a) provides that:

“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:

“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.”

{¶8} An appellate court’s review of a trial court’s compliance with Crim.R. 11(C)(2) will vary depending on whether the right at issue is a constitutional or nonconstitutional right. *Anderson*, 108 Ohio App.3d at 8-9. “The right to be informed of the maximum penalty for an offense is not a constitutional right.” *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, at ¶48 (O’Donnell, J., dissenting.)

“[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.

“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 \* \* \* 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 ¶¶31-32.

#### MAXIMUM SENTENCE

{¶9} Wagner pled guilty to a violation of R.C. 4511.19(A)(1)(h) and the accompanying specification under R.C. 2941.1413. R.C. 4511.19(A)(1)(h) prohibits a person from operating a vehicle when “[t]he person has a concentration of seventeen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person's breath.” The specification becomes applicable to the underlying offense when, within the past twenty years of the offense, the defendant has been convicted of, or pled guilty to, at least five additional equivalent offenses. R.C. 2941.1413. Wagner was convicted of, or pled guilty to five similar offenses in the past

twenty years, making Wagner's violation a felony of the fourth degree, see R.C. 4511.19(G)(1)(d), and implicating the specification under R.C. 2941.1413.

{¶10} R.C. 4511.19(G)(1)(d)(ii) directs the trial court to sentence offenders in Wagner's situation to the following:

“If the sentence is being imposed for a violation of division (A)(1)(h) \* \* \* of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code \* \* \*. If the court imposes a mandatory prison term, notwithstanding division (A)(4) of section 2929.14 of the Revised Code, it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months and the prison terms shall be imposed as described in division (G)(2) of section 2929.13 of the Revised Code.”

R.C. 2929.13(G)(2) paraphrases much of R.C. 4511.19(G)(1)(d)(ii), but in addition states that “[t]he offender shall serve the one-, two-, three-, four-, or five-year mandatory prison term consecutively to and prior to the prison term imposed for the underlying offense and consecutively to any other mandatory prison term imposed in relation to the offense.”

{¶11} Thus, the maximum total sentence the trial court could have sentenced Wagner to was seven and one-half years in prison; Wagner could have received up to five years for the specification and thirty months for the underlying offense. See R.C. 4511.19(G)(1)(d)(ii) and 2929.13(G)(2).

{¶12} The trial court informed Wagner at his plea hearing that he was subject to a maximum of thirty months in prison. As Wagner was in actuality subject to seven and one half years imprisonment, the trial court's statement to Wagner was incorrect. Regardless of what sentence Wagner actually received, we cannot conclude based on the totality of the circumstances that Wagner understood the effect of his plea when the trial court provided

Wagner with inaccurate information concerning the possible term of his sentence. Therefore, the trial court failed to substantially comply with Crim.R. 11(C)(2).

{¶13} However, our analysis does not end here. *Clark* provides that if a trial court does not substantially comply with Crim.R. 11, the appellate court must still determine whether the trial court partially complied with the rule or completely failed to comply. *Clark* at ¶32. If there is partial compliance with the rule, the appellant must demonstrate prejudice in order for the appellate court to vacate his plea. *Id.* at ¶40.

{¶14} Here, the trial court did not completely disregard its duties under Crim.R. 11; rather the trial court did inform Wagner of what the trial court believed was the maximum penalty for the offense. If the trial court had slightly deviated from the proper explanation of the maximum sentence, we would conclude the trial court had substantially complied with the rule. However, as the trial court conveyed inaccurate information to Wagner regarding the maximum penalty he faced upon sentencing, the trial court only partially complied with Crim.R. 11.

{¶15} Wagner thus must demonstrate that he was prejudiced by the trial court's error. *Id.* The test for prejudice is whether Wagner would have otherwise entered into the plea. *Id.* at ¶32. While the cases Wagner cites, *State v. Caplinger* (1995), 105 Ohio App.3d 567, and *State v. Eckles*, 173 Ohio App.3d 606, 2007-Ohio-6220, support a determination that the trial court did not substantially comply with Crim.R. 11 in the instant case, we are not persuaded that the cases also require us to determine that Wagner suffered prejudice. We note that both cases were decided prior to the Supreme Court of Ohio's decision in *Clark*, which we find instructive in our analysis.

{¶16} *Clark* specifically states that upon a determination by the appellate court that the trial court partially complied with Crim.R. 11, “ \* \* \* the plea may be vacated only if the

defendant demonstrates a prejudicial effect.” *Clark* at ¶32. A trial court’s misstatement of the maximum penalty clearly could prejudice the defendant; but it is the duty of the defendant to make and substantiate the argument that, absent the trial court’s error, the defendant would not have entered into the plea. See *id.* at ¶¶32, 40. Thus, as Wagner has not argued that he was prejudiced by the trial court’s error, we cannot vacate his plea.

#### CONCLUSION

{¶17} In light of the foregoing, we affirm the judgment of the Medina County Court of Common Pleas.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

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EVE V. BELFANCE  
FOR THE COURT

MOORE, P. J.  
DICKINSON, J.  
CONCUR

APPEARANCES:

ANDREW M. KORDUBA, Attorney at Law, for Appellant.

JOSEPH F. SALZGEBER, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and MICHAEL P. MCNAMARA, Assistant Prosecuting Attorney, for Appellee.