In the Supreme Court of Ohio

STATE OF OHIO,	}	
	}	CASE NO. 2022-0515
Plaintiff-Appellee,	}	
	}	ON APPEAL FROM THE LORAIN
v.	}	COUNTY COURT OF APPEALS
	}	NINTH APPELLATE DISTRICT
JUSTIN TANCAK,	}	
	}	COURT OF APPEALS CASE NO.
Defendant-Appellant.	}	21CA011725

MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF AMICUS

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured by law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

The primary mission of the Association is to advocate for the rights secured by law to persons accused of the commission of a criminal offense.

STATEMENT OF THE CASE AND THE FACTS

Amicus concurs in the Statement of the Case and the Facts presented in the Merit Brief of Appellee.

LAW AND ARGUMENT

APPELLANT'S PROPOSITION OF LAW NO 1: When the Court fails to inform the Defendant of mandatory consecutive sentences required on one or more of the counts of the indictment at the time of plea, is the plea entered knowingly, intelligently, and voluntary on the remaining counts that do not have mandatory consecutive sentences, rendering the entire plea invalid under Crim. R.11.

1. Sentencing from the defendant's perspective. Justice Kennedy's observation in *Lafler v. Cooper*, 556 U.S. 156, 157, 132 S.Ct. 1376, 182 L.Ed.2d 398, that "criminal justice today is for the most part a system of pleas, not a system of trials," was not a novel insight, but simply a recognition of reality. Indeed, the phrase "for the most part" grossly underestimates the predominance of plea-bargaining as a means of resolving criminal cases, and the increased frequency of its usage. Since 1977 the ratio of federal criminal defendants who opt for a jury trial has decreased from one in four cases (25%) to one in thirty-two; the corresponding figure for state cases was 8%; thirty years later, it was 2.3%. Clark, *Dramatic Increase in Percentage of Criminal Case Being Plea Bargained*, Prison Legal News, January 15, 2013, https://www.prisonlegalnews.org/news/2013/jan/15/dramatic-increase-in-percentage-of-criminal-cases-being-plea-bargained/.

As a result, the question a defendant asks his attorney is more rarely, "Can I win at trial?" but more commonly, "Will I have to do time, and if so, how much?" It is the total time the defendant is concerned with, not the individual sentences given on individual counts. Susan Gwynne was much less troubled by the judge giving her a maximum sentence for second-degree felony burglary as by the fact that the judge ordered those sentences to be served consecutively for a total of 65 years. *State v. Gwynne*, 158 Ohio St.3d 279, 2019-Ohio-4761, 141 N.E.3d 169. Similarly, Justin Tancak was concerned with his total sentence. The trial court's failure to advise

him that his sentence for failure to comply would have to run consecutive to the rest of his sentence was clearly consequential: it affected his evaluation of what his total sentence would be.

The court below agreed that the plea to the failure to comply charge was invalid because of that failure, a point the State concedes. The remaining question for this Court to resolve is the effect of that failure on Tancak's plea to the remaining charges.

2. The failure of the court to advise Tancak of the requirement of a consecutive sentence for the failure to comply charge affected Tancak's decision to plead guilty. The court below makes much of the State's argument that "Mr. Tancak's plea was not the result of any plea agreement between Mr. Tancak and the State." *State v. Tancak*, 9th Dist. Lorain No. 21CA011725, 2022-Ohio-880, ¶13. But this is based on the prosecutor's statement at the outset of the sentencing hearing that "there are absolutely no agreements *regarding sentencing.*" (Emphasis supplied.)

While there were no agreements as to what the ultimate sentence would be, Tancak did in fact agree to plead guilty. To be sure, he pled guilty to the indictment, rather than to an arranged bargain in which he would plead to some charges and others would be reduced or dismissed. In other circumstances that might be significant. It was in *State v. Azeen*, 163 Ohio St.3d 447, 2021-Ohio-1735, 170 N.E.3d 864. In the earlier case of *State v. Carpenter*, 68 Ohio St.3d 59, 1993-Ohio-226, 623 N.E.2d 66, the Court held that a plea to a lesser charge of attempted felonious assault foreclosed a later murder charge, because the State had not reserved the right, as part of the plea, to pursue that. In *Azeen*, however, the defendant had pled guilty to the indictment, and the Court held that the lack of a bargained plea, where charges were reduced, allowed the State to later pursue murder charges.

But that is not the context here. There are many reasons for a defendant to plead guilty to an indictment: an unyielding prosecutor, the near-certainty of conviction, the hope that a defendant will receive a lesser sentence by pleading guilty and accepting responsibility for his actions. In all those situations, though, it is ultimately the defendant's agreement to plead guilty.

The cases relied upon by the court below and the State do not address this situation. Neither *Selvester v. United States*, 170 U.S. 262, 18 S.Ct. 580, 42 L.Ed.2d 1029 (1898), nor *United States v. Powell*, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984) involved pleas at all; they held that inconsistent *verdicts* in a trial could not be the basis for reversal. This was based on the rule to that effect announced in *Dunn v. United States*, 284 U.S.390, 52 S.Ct. 189, 76 L.Ed. 356 (1932), recognizing that such inconsistency "may have been the result of compromise, or of a mistake on the part of the jury."

The court below also relied on *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824. In *Saxon*, the defendant had pled guilty to two offenses, and appealed the one in which the court had given him four years on a fourth-degree felony. The State conceded the error, but the court of appeals also vacated the sentence on the other count, despite the defendant having raised no argument with regard to that sentence.

But again, *Saxon* is not a case involving a plea, but one involving a sentence, and mainly stands for the rejection of the "sentencing package" doctrine used in some states, in which the judge simply imposes a generic sentence on all counts; in Ohio, the judge has to impose a separate sentence on each count. In *Saxon*, the defendant appealed only a single *sentence*. Here, Tancak appealed the entire plea.

That is a significant difference. A criminal defendant's choice to enter a guilty plea is a serious decision. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 25.

Due process requires that a defendant's plea be made knowingly, intelligently, and voluntarily; otherwise, the defendant's plea is invalid. *State v. Bishop*, 156 Ohio St. 3d 156, 2018-Ohio-5132, ¶ 10, 124 N.E.3d 766.

Here, Tancak engaged in a certain calculus in agreeing to plead guilty. That calculus did not include the fact that consecutive sentences were not a mere possibility, but a certainty. The failure of the trial court to advise him of that certainty infected the entire plea process, and that necessitates vacating the entire plea.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully prays the Court to reverse the decision of the court of appeals, vacate the Defendant's plea, and remand the case to the trial court

Respectfully submitted,

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SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Association of Criminal Defense Lawyers was served upon all parties by email.

/s/Russell S. Bensing
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