Supreme Court of Ohio Clerk of Court - Filed November 29, 2022 - Case No. 2022-0515

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2022-0515
	:	
Appellee,	:	On Appeal from the
	:	Lorain County
v.	:	Court of Appeals,
	:	Ninth Appellate District
JUSTIN TANCAK,	:	
	:	Court of Appeals
Appellant.	:	Case No. 21CA011725

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO

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INTRODUCTION

When Justin Tancak pleaded guilty to eight offenses, the trial court informed him—accurately—of the maximum penalty that each count carried. The trial court did not mention that one count, for failure to comply with a police order, R.C. 2921.331(B), (C)(5), carried a mandatory consecutive sentence. In other words, the court failed to mention that any sentence on this count would not run concurrently with the sentences for the others. The Ninth District said that was an error, under Criminal Rule 11, which implements the constitutional requirement that pleas be knowing, intelligent, and voluntary. The court vacated the plea—and thus the conviction and sentence—as to that count only. It left untouched the other seven pleas and sentences. *State v. Tancak*, 2022-Ohio-880 ¶13 (9th Dist.) ("App. Op.").

This Court agreed to review the question whether *all* of Tancak's guilty pleas should be thrown out, despite his having been properly informed of the maximum penalties for each one, on the ground that he was not told about the mandatory-consecutive-sentences requirement. The answer to that question is no.

But the question ought not even arise. It *presumes* that the trial court erred by failing to explicate the non-concurrent nature of the sentence associated with the failure-to-comply conviction. That presumption—which both the State and Tancak embrace—is wrong. In fact, the trial court fully complied with Criminal Rule 11, properly informing Tancak of the "nature of the charges and of the maximum penalty involved,"

as to *each and every count*. This Court held long ago that "[f]ailure to inform a defendant who pleads guilty to more than one offense that the court may order him to serve any sentences imposed consecutively, rather than concurrently, is not a violation of Crim. R. 11(C)(2), and does not render the plea involuntary." *State v. Johnson*, 40 Ohio St. 3d 130, syllabus (1998). *Johnson* remains good law. This Court should say so. In other words, when the Court answers the question posed by the faulty premise, it should clarify Ohio law by confirming that the premise is mistaken.

On the remedy question, Tancak is not entitled to relief on his other counts *regardless* of whether one accepts the unchallenged premise that the trial court erred with respect to the failure-to-comply count. Each count stands alone. On each count—such as Count One, aggravated vehicular homicide—Tancak was properly informed of the consequences of pleading guilty. Just as Ohio has no "sentencing package" doctrine, *State v. Saxon*, 109 Ohio St. 3d 176, 2006-Ohio-1245 ¶1 & Syl.¶2, Ohio has no "plea package" doctrine under which an error relating to a guilty plea on one charge infects guilty pleas as to every other charge in the case. While contract principles typically apply to *negotiated* plea deals, this case does not involve any such deal: Tancak pleaded guilty on his own, without any agreement from the State.

The Court should make clear, for future cases, that the trial court committed no error—regardless of any effect of the State's concession as to Tancak himself. Separately, it should affirm the Ninth District's decision, which vacated Tancak's guilty plea *only*

as to the one charge with respect to which the trial court allegedly committed a Rule 11 violation.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law enforcement officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. The State is directly interested here in seeing justice done throughout Ohio, and in seeing valid guilty pleas and sentences upheld.

STATEMENT OF THE CASE AND FACTS

1. Justin Tancak pleaded guilty to eight criminal counts after he recklessly killed his girlfriend in a motorcycle crash—a crash precipitated by Tancak's futile efforts to evade police. Though Tancak's brief might leave a different impression, Tancak's plea was *not* part of a negotiated plea agreement. He simply pleaded guilty, perhaps owing to the obviousness of his guilt.

The trial court, before accepting Tancak's guilty plea, informed Tancak correctly of the maximum penalty for each of the eight counts to which he pleaded guilty. The court first itemized the nature of the counts for which Tancak was indicted, and for which he was about to plead guilty:

> one count of aggravated vehicular homicide, a violation of 2903.06(A)(1)(a), a second degree felony;

another count of aggravated vehicular homicide, under 2903.06(A)(2)(a), a third degree felony;

one count of failure to comply with order of a police officer, under 2921.331(B), a third degree felony;

one count of obstructing official business, under 2921.31(A), a fifth degree felony;

one count of driving under the influence, under 4511.19(A)(1)(a), a first degree misdemeanor;

one count of operating a vehicle under the influence, under 4511.19(A)(1)(F), a first degree misdemeanor; and

another count of driving under the influence, under 4511.19(B)(1), a first degree misdemeanor; and

lastly, one count of willful and wanton disregard of safety, under 4511.20(A), a minor misdemeanor.

So are those the eight counts that you understand you're pleading guilty to.

R.70, Plea Hearing Tr. (Vol. II) (Aug. 10, 2018), 152–53. Tancak responded, "Yes, Your Honor." *Id.* at 153.

The court then itemized the maximum penalties for each individual count, saying:

Okay. Do you understand the following are the potential penalties for each of these:

Count 1 carries two to eight years in prison, 24 maximum fine, $15,000;
Count 2, nine to 36 months in prison, maximum fine, $10,000;
Count 3, nine to 36 months in prison, maximum fine, $10,000;
Count 4, six to 12 months in prison, maximum fine, $2,500;

> Counts 5, 6, and 7 all carry with it up to 180 days in the county jail, maximum fine a thousand dollars.

Id. at 153–54. The court went on to explain other potential consequences. For example, the court informed Tancak that a guilty plea would make him potentially subject to mandatory substance-abuse treatment, the suspension of his driver's license, a prohibition on possessing firearms, and post-release control. *Id.* at 154–57. The court also explained the rights Tancak was giving up, including the right to a jury trial. *Id.* at 159. Tancak affirmed, piece by piece, that he understood everything. *Id.* at 156, 157, 158, 159, 160.

The court sentenced Tancak at a hearing six weeks later, after obtaining a presentencing report and hearing from various witnesses. R.70, Sentencing Hearing Tr. (Sept. 21, 2018) (Vol. II)("Sentencing Tr."), 170–272. The court sentenced Tancak as follows:

> on Count 1, to a term of seven years at the Lorain Correctional Institution, which is a mandatory sentence;
> Count 2, no sentence;
> Count 3, two years at the Lorain Correctional Institution, and that, because it's a failure to comply, that must be served consecutively to the underlying crime;
> Count 4, Count 5, no sentence;
> Count 6, the maximum sentence is 180 days at the Lorain County Correctional Facility;
> Count 7, and 8, no sentence.
>
> The jail term will be served concurrently with the term of nine years in prison. These are, this is a mandatory sentence. I cannot let the defendant out as I do in some cases who show improvement in prison. This is a fixed sentence of nine years.

Id. at 267–69. The court also ordered restitution, costs, fines, and a suspension of his driver's license. And it advised Tancak he would be subject to three years of mandatory post-release control. *Id.* at 269. Neither Tancak nor his counsel objected. The court reiterated everything in a Judgment Entry of Conviction and Sentence. *See* R.66, Sentencing Entry (Sept. 24, 2018).

2. On Tancak's appeal, the Ninth District affirmed in part and reversed in part. *State v. Tancak*, 2022-Ohio-880 ¶1 (9th Dist.) ("App. Op."). In Tancak's first assignment of error, he "argued, and the State concede[d], that the trial court erred during the plea hearing when it failed to advise" him that "there was a statutory requirement that any sentence imposed for failure to comply with an order or signal of a police officer would be served consecutively, and not concurrently, with any other sentence imposed." *Id.* ¶7. The State likely made that concession based on Ninth District precedent, which established that, to satisfy Criminal Rule 11, a court must specify whether any counts carry a sentence that is mandated to run consecutively with other sentences. *Id.* ¶12 (citing *State v. Gonzalez*, 2019-Ohio-4882 ¶8 (9th Dist.)); *State v. Bailey*, 2016-Ohio-4937 ¶17 (9th Dist.). Following that concession and district-court precedent, the court "vacate[d] the trial court's judgment as to that count." *Id.* ¶7.

But the appeals court rejected Tancak's second assignment of error, in which he claimed that "his plea of guilty to the other seven counts must also be invalidated." *Id.* ¶15. Tancak compared his plea to plea agreements. But the appeals court noted that

"the record indicates that Mr. Tancak's plea was not the result of any plea agreement between Mr. Tancak and the State," citing the prosecutor's confirmation at the hearing that no agreement existed. *Id.* ¶17 (citing Plea Tr. 151). The Ninth District cited, and agreed with, the First District's reasoning in a similar case. *Id.* ¶20 (citing *State v. Maggard*, 2011-Ohio-4233 (1st Dist. 2011)). And the Ninth District, relying on that case, held that "errors that inured to only some of the counts do not automatically result in the reversal of the pleas on all counts, absent some showing that the defect should be treated more broadly." App. Op. ¶20 (quoting *Maggard*, 2011-Ohio-4233 ¶22). The court added that Tancak knew it was possible that *all* his sentences would run consecutively. *Id.* ¶21. Since that warned-of maximum was even higher than the sentence he in fact received, Tancak could not show prejudice. The court thus affirmed the pleas and sentences relating to charges other than the failure-to-comply charge with respect to which the trial court supposedly erred.

3. Tancak appealed. The State, which had conceded the trial court's error as to the failure-to-comply charge, did not cross-appeal. And this Court accepted jurisdiction as to a single proposition of law:

> 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.

Mem.Jur.7; *see also 7/27/2022 Case Announcements*, 2022-Ohio-2490.

ARGUMENT

***Amicus* Attorney General's Proposition of Law No. 1:**

Failure to inform a defendant who pleads guilty to more than one offense that one or more sentences may be, or must be, imposed consecutively, rather than concurrently, is not a violation of Crim. R. 11(C)(2), and does not render the plea involuntary.

Tancak's opening brief presents a single question: When a trial court violates Rule 11 by failing to inform a defendant that one of the counts with which he is charged carries a mandatory consecutive sentence, does its violation require invalidating the defendant's guilty pleas as to the *other* counts? This question rests on the premise that trial courts err when they fail to inform defendants that one of the counts to which they are pleading guilty carries a mandatory consecutive sentence. That premise, which the State conceded below, is wrong. Indeed, the premise contradicts this Court's holding in *Johnson*, 40 Ohio St. 3d 130 (1998). The Court should say so, even if it holds the State to its concession. Failure to do so would sow unnecessary confusion in Ohio law.

1. When a defendant pleads guilty to a crime, the U.S. and Ohio constitutions require that "the plea … be made knowingly, intelligently, and voluntarily." *State v. Engle*, 74 Ohio St. 3d 525, 527 (1996). "Failure on any of those points renders" the plea invalid. *Id.* In Ohio, these "constitutional guarantees, along with other requirements, are set forth in Ohio's Crim. R. 11(C)(2)." *Johnson*, 40 Ohio St. 3d at 132. The relevant part of Rule 11 requires a court, before accepting a guilty or no-contest plea, to "first address[] the defendant personally," *id.*, and to "[d]etermin[e] that he is making the

plea voluntarily, with understanding of the nature of the charges and of the *maximum penalty involved*, and, if applicable, that he is not eligible for probation," Crim.R. 11(C)(2)(a) (emphasis added); *see Johnson,* 40 Ohio St. 3d at 132–33. The court must also meet requirements not relevant here, such as informing the defendant that his plea waives certain rights, like the right to a jury. Crim.R. 11(C)(2)(a).

In *Johnson,* this Court held that a trial court need not inform a defendant, when he pleads guilty to multiple charges, that the sentences may be imposed consecutively or concurrently. *Id.* at 130, syl. The Court first explained that "plain error" review applies when a defendant does not first attempt to withdraw the plea under Criminal Rule 32.1. *Id.* at 132. The Court then laid out Criminal Rule 11's requirements, noting that the rule "fully encompasses those procedural requirements established by the United States Constitution upon this issue." *Id.* at 133 (citation omitted).

Johnson further explained that the trial court must specify only the maximum potential sentence: "knowledge of the maximum *and minimum* sentences is not constitutionally required." *Id.* (emphasis added). That makes sense, because Rule 11 requires the trial court to disclose the "maximum penalty" but does not mention a minimum. In cases involving multiple counts, a court will necessarily inform the defendant about the maximum for all counts, *provided that* it correctly itemizes the sentences for each count. Adding the potential sentence for each count together reveals the overall maximum penalty the defendant faces if the sentences are imposed consecutively. Thus, in a case

involving multiple counts, the trial court complies with Rule 11 and constitutional guarantees when it correctly informs the defendant of the maximum penalty on each count. "[N]either the United States Constitution nor the Ohio Constitution requires that in order for a guilty plea to be voluntary a defendant must be told the maximum total of the sentences he faces, or that the sentence could be imposed consecutively." *Id.*

Johnson, in addition to comporting with constitutional guarantees, comports with basic notions of fairness. If a defendant knows the grand total he faces, he is on notice of what he risks by pleading guilty. He has no reason to expect anything lesser—whether because the court chooses a lesser sentence within any one count, or because the court collapses some sentences together to run concurrently. Either of those variations changes his minimum, or his expected midrange, but not his *maximum* penalty.

2. *Johnson*'s holding—that trial courts need not warn defendants about the risk of consecutive sentences—remains binding.

For one thing, *Johnson* rests on an interpretation of Criminal Rule 11, which has not been materially altered in the years since. Indeed, the only change is microscopic. In 1998, the requirement to inform the defendant of the "nature of the *charge* and maximum penalty involved" was changed to require warning the defendant about the "nature of the *charges* and maximum penalty involved." *See* 83 Ohio St. 3d xciii, cix (adopting change) (emphases added). The shift from the singular "charge" to the plural "charges" is irrelevant to *Johnson*'s holding. Even before the addition of the plural

"charges," *Johnson* already recognized that defendants must be informed about the maximum penalty associated with each count in a multi-count case; rightly so, as sound interpretation dictates that the "singular includes the plural, and the plural includes the singular." R.C. 1.43(A); *accord* Scalia and Garner, *Reading Law* §14, p.129 (2012). The alteration to Rule 11 reflects "changes in terminology used in the criminal law of Ohio effective July 1, 1996,' by Am.Sub.S.B. No. 2, 146 Ohio Laws, Part IV, 7136 ("S.B. 2"), and the staff comment to the amendment does not indicate that making the word 'charge' plural was intended to be a substantive change." *State v. Bishop*, 156 Ohio St. 3d 156, 2018-Ohio-5132 ¶47 (Kennedy, J., dissenting); *see id.* ¶¶72–73 (Fischer, J, dissenting). While a non-binding plurality opinion noted the singular-to-plural shift in the context of addressing a "judicial sanction" for post-release-control violations, *id.* ¶¶14–16, nothing in that opinion undermines the holding of *Johnson*.

To be sure, several appeals courts have said that the *Johnson* rule does not apply in cases involving mandatory consecutive sentences. But those courts are mistaken. *See, e.g., State v. Bailey*, 2016-Ohio-4937 ¶¶14–15 (9th Dist.); *State v. Norman*, 2009-Ohio-4044 ¶13 (8th Dist.). The decision in *Norman* is illustrative. It concluded that *Johnson*'s "use of the word 'may' shows that it concerns the discretionary imposition of consecutive sentences." 2009-Ohio-4044 ¶7. "When consecutive sentences are mandatory," *Norman* said, "the consecutive sentence directly affects 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)." *Id.* That reasoning is flawed because the mandatory-consecutive nature of one sentence does *not* change the maximum sentence. Instead, it changes either the minimum sentence or the likely midrange sentence: rather than leaving the court with discretion to stack the sentences, laws imposing mandatory consecutive sentences ensure that the sentences *will be* stacked. That does not alter the maximum sentence, since sentences always *can be* stacked.

In sum: Rule 11 requires that defendants be informed only of the potential maximum sentences they face; mandatory consecutive sentences do not affect defendants' potential maximum sentences; therefore, Rule 11 does not require that defendants be warned that charges carry mandatory consecutive sentences.

3. It follows from *Johnson* that the trial court committed no error. It correctly informed Tancak about all of the charges he faced and the maximum sentence for each. Under *Johnson*, that is all Rule 11, the Ohio Constitution, and the United States Constitution require. *See Johnson*, 40 Ohio St. 3d at 132–33. It makes no difference whether Tancak *expected* concurrent sentences, either because of the statutory presumption for such sentences, *see* Tancak Br. at 11–12, R.C. 2929.41(A), or because of advice from counsel, Tancak Br. at 5. The presumption changes nothing, because Tancak was warned of the per-count maximums, meaning he had no justification for *relying on* the presumption of concurrent sentences. In any event, if Tancak is assumed to know about the

statute creating a presumption of concurrent sentences, he should also be presumed to be aware of the statute making his failure-to-comply sentence consecutive to any others. And any question about counsel's advice belongs in an ineffective-counsel claim, not a Criminal Rule 11 claim about the *court*'s colloquy. Defendants are entitled to know the maximum number of years they face from pleading guilty—not the minimum or the likeliest sentence. *See Johnson*, 40 Ohio St. 3d at 133. Tancak received that. He was entitled to nothing further.

One aside before proceeding. Most of Tancak's brief implicitly treats his case as if it involved a plea deal. It did not. The assistant prosecutor said so in her opening statement during the plea hearing: "Judge, there are absolutely no agreements regarding sentencing." Plea Tr. at 151. And the appeals court recognized as much. App. Op. ¶17. Without an agreement to tie the counts together, there is no "package" approach here. Just as Ohio has no "sentencing package" doctrine, *State v. Saxon,* 109 Ohio St 3d 176 ¶1 & syl.¶2 (2006), it has no inherent "plea package" doctrine. Each count stands alone, absent a deal, for all purposes. Thus, even assuming defendants might sometimes need to be warned about mandatory consecutive sentences in the context of a negotiated plea deal—with each case presumably turning on the specifics of a particular deal—that requirement has no bearing on this case.

***Amicus* Attorney General's Proposition of Law No. 2:**

> *Even if a defendant's guilty plea is invalid as to one count, that invalidity warrants vacating only the plea for that count—it does not implicate pleas on other counts, absent a plea agreement to connect the separate counts into a package.*

1. In Ohio, each criminal count stands on its own, in all respects, from indictment through sentencing and appeal. At the outset, each individual count in an indictment must be legally and factually sufficient, or a court will selectively dismiss failed counts—no "package" approach lets a prosecutor use "good counts" to add in "bad counts" as riders. If some but not all counts violate speedy-trial requirements, only the bad ones are dismissed. *See State v. Sanford*, 2022-Ohio-3107, ¶¶18–20, 32. If a case goes to trial, the jury rules on each count. On appeal, a court might affirm or reverse on each count.

The same is true of both pleas and sentencing: each count stands alone, with no "packaging." This Court has already said so about sentencing, rejecting a "sentencing package" doctrine. *Saxon*, 109 Ohio St. 2d 176 syl.¶2. And as to pleas, it implicitly said so in *Johnson*, where the Court held that explaining the maximum penalty *for each count* satisfies Rule 11. *See* above 8–9.

As explained above, these principles establish that the trial court did not err here. But even if the Court declines to say so—either because it disagrees or because the State conceded the point below—it should nonetheless deny Tancak the windfall he seeks. It should hold that the sole remedy for any supposed failure to warn about a mandatory

consecutive sentence is to vacate the plea for the count that carried the mandatory consecutive sentence.

This follows as a matter of simple logic. The trial court, even assuming it erred, committed an error with respect to just one count: the count for failure to comply with a police order. Once the sentence for *that* count is vacated, the harm is cured, unless the defendant can somehow show that the mistake as to one count made the guilty pleas to the rest of the counts unknowing, unintelligent, or involuntary.

Here, it is inconceivable that the alleged mistake tainted the knowing, intelligent, and voluntary nature of Tancak's other guilty pleas. The most serious crime with which Tancak was charged was aggravated vehicular homicide. He pleaded guilty after being properly informed the charge carried an eight-year maximum, and he received seven years on that count. How could his guilty plea as to *that* count be tainted by misinformation? The answer: it was not tainted. Tancak knew the maximum sentence associated with *that count*. He also knew about the maximum sentences for the other counts, all of which were lower than the possible sentences for aggravated vehicular homicide. And in fact, all of those other sentences (aside from the failure-to-comply sentence) added no net time, because some were merged as allied offenses and the remainder were made to run concurrently with the homicide sentence. So Tancak, after being told the potential consequences of pleading guilty, received far less prison time than he

could have. The supposed error as to one count did not prejudice Tancak with respect to the other counts.

Every court of appeals to have expressly considered the issue agrees. *Maggard*, 2011-Ohio-4233 ¶22; App. Op. ¶¶20–22. As then-Judge Fischer wrote for the court in *Maggard*, "where no plea agreement existed between the state and" the defendant who pleaded guilty or no-contest, "errors that inured to only some of the counts do not automatically result in the reversal of the pleas on all counts, absent some showing that the defect should be treated more broadly." *Maggard*, 2011-Ohio-4233 ¶22. The Attorney General could find no case in which the issue was expressly examined and resolved in the case-wide manner that Tancak seeks. While there are opinions in which it is unclear whether the remedy for an error with respect to one count was count-specific or case-wide, it appears the State did not argue for (and the courts thus failed to consider) count-specific relief in any of those cases. *See, e.g.*, *Bailey*, 2016-Ohio-4937; *Norman*, 2000-Ohio-4044. As a result, those decisions provide no on-point precedent.

2. In resisting this conclusion, Tancak argues that the plea was a package, such that an error with respect to any part taints the entire deal. *See, e.g.*, Tancak Br.9–10. But again, there was no deal: Tancak pleaded guilty of his own accord, not in response to an offer from the prosecutor.

It is true, of course, that a "plea bargain itself is contractual in nature and subject to contract-law standards." *State v. Dye*, 127 Ohio St. 3d 357, 2010-Ohio-5728 ¶21 (quota-

tions omitted). That means that defendants deserve the benefits of the bargains they strike. But that principle cannot apply, and has never been applied, in the absence of such an agreement. To be sure, an on-the-record statement of "no deal" does not always reflect reality. *See generally* Donnelly, Justice Michael P., *Sentencing by Ambush: An Insider's Perspective*, 54 Akron L. Rev.223 (2021). But the trial court and the Ninth District both concluded that Tancak pleaded guilty *without* receiving any deal from the State. And Tancak has not challenged that conclusion.

The Court should reject Tancak's attempt to obtain a reversal of all his guilty pleas.

CONCLUSION

The Court should affirm the judgment of the Ninth District, all while making clear that the trial court committed no error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellee State of Ohio was served this 29th day of November, 2022, by e-mail on the following:

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