THE STATE OF OHIO, APPELLEE, *v.* TANCAK, APPELLANT.

[Cite as *State v. Tancak*, 172 Ohio St.3d 114, 2023-Ohio-2578.]

Appeal dismissed as having been improvidently accepted.

(No. 2022-0515—Submitted April 4, 2023—Decided August 1, 2023.)

APPEAL from the Court of Appeals for Lorain County,

No. 21CA011725, 2022-Ohio-880.

{¶ 1} This cause is dismissed as having been improvidently accepted.

KENNEDY, C.J., and STEWART and DETERS, JJ., concur.

DEWINE, J., concurs, with an opinion joined by FISCHER and DETERS, JJ.

BRUNNER, J., dissents, with an opinion joined by DONNELLY, J.

DEWINE, J., concurring.

{¶ 2} Once a case has been fully briefed and argued by the parties, I am generally reluctant to dismiss it as having been improvidently accepted. This is true even in cases, like this one, that I did not vote to take up on review. *See* 167 Ohio St.3d 1467, 2022-Ohio-2490, 191 N.E.3d 437. But it is necessary to do so here, because the question presented in this appeal is premised on an assumption that we are unable to address.

{¶ 3} Justin Tancak pleaded guilty to eight counts in a criminal indictment. One count charged him with failure to comply with an order or signal of a police officer. *See* R.C. 2921.331(B). Any prison sentence imposed for that crime must, by law, be served consecutively to any other prison term. R.C. 2921.331(D). The trial judge did not tell Tancak this before accepting his pleas. Tancak appealed, and the state conceded that this omission violated the trial court's obligation to ensure that a defendant understands "the nature of the charges and * * * the

maximum penalty involved," Crim.R. 11(C)(2)(a), before entering a plea. The Ninth District Court of Appeals agreed and vacated Tancak's plea on the failure-to-comply count. 2022-Ohio-880, ¶ 13. The court of appeals affirmed his convictions on the remaining counts. *Id*. at ¶ 23.

{¶ 4} Tancak appealed to this court, asserting that the Ninth District erred by declining to vacate his pleas on the other counts. In essence, he asks us to determine the proper remedy for a trial court's failure to notify a defendant that a particular charge carries a consecutive-sentence requirement: Should the defendant's plea be vacated on that count alone or is he entitled to have his pleas vacated on all the counts?

{¶ 5} Of course, that proposition assumes that Crim.R. 11 requires the trial court to inform the defendant about the consecutive-sentence requirement in the first place. That is an important question in its own right, and one that this court has never weighed in on. But it is not appropriate for us to answer that question in this case, because the parties did not dispute the issue below and have not briefed it in this appeal.

{¶ 6} That defect makes this case a poor vehicle for addressing the scope of the remedy. In my view, it would be nonsensical to address the remedy for a trial court's failure to tell a defendant that his sentences must be served consecutively without first deciding whether a trial court has any such obligation. For that reason, I join this court's judgment dismissing this case.

FISCHER and DETERS, JJ., concur in the foregoing opinion.

BRUNNER, J., dissenting.

INTRODUCTION

{¶ 7} While intoxicated, appellant, Justin Tancak, fled from the police on his motorcycle with his girlfriend riding double. He crashed the motorcycle, and his girlfriend died as a result. He pled guilty to and was convicted in the Lorain

County Common Pleas Court of several offenses, including aggravated vehicular homicide and felony failure to comply with an order or signal of a police officer, the latter of which required any prison sentence for that offense to be served consecutively to any other. Although the trial court advised him of the penalties for each offense to which he pled guilty, Tancak was not advised that the prison sentences could be (and here, that the failure-to-comply sentence was required to be) served consecutively.

{¶ 8} The trial court did not "personally" inform Tancak, either "in-person or by remote contemporaneous video," of "the maximum penalty involved," Crim.R. 11(C)(2), in that it failed to inform him of even the possibility of consecutive prison sentences, let alone that the failure-to-comply sentence had to be served consecutively. This was such a failure to adhere to Crim.R. 11(C)(2) that Tancak was not required to prove that he would not have entered a guilty plea if he had been properly advised by the trial court. *See State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 22. We should reverse the court of appeals' judgment and vacate Tancak's convictions because his plea was not knowingly and intelligently entered—Tancak was not made aware of the "maximum penalty," Crim.R. 11(C)(2)(a), to which his plea exposed him. And we should remand this case to the trial court for further proceedings.

{¶ 9} The majority's dismissal of this appeal as having been improvidently accepted deprives us of the opportunity to provide much-needed explanation to the trial courts that advising a defendant of the maximum penalty involved under Crim.R. 11 includes informing the defendant that individual sentences could be (or, as in this case, must be) served consecutively. Because a majority of this court decides to dismiss this case as having been improvidently accepted, there remains little instruction to trial and appellate courts to prevent the mistake that occurred in this case from happening again. One member of this court, joined by two others, writes separately, offering a reason why the majority now refuses to review the

case—that "the parties did not dispute the issue below and have not briefed it in this appeal" renders the case unsuitable for review. Concurring opinion, ¶ 5. I disagree; we should not ignore an issue that was properly preserved for appeal merely because the question's answer is so obvious that even the adverse party does not dispute it. I therefore respectfully dissent and write to explain why this case should not be dismissed and how it should be resolved.

BACKGROUND

{¶ 10} On November 23, 2016, Tancak was indicted in Lorain County on two counts of aggravated vehicular homicide, one count of third-degree-felony failure to comply with an order or signal of a police officer, one count of obstructing official business, three counts of operating a vehicle while under the influence of alcohol or drugs ("OVI"), and one count of operation of a vehicle with willful or wanton disregard of safety on a highway. The charges stemmed from an incident in which Tancak, while intoxicated by alcohol and marijuana, fled from the police on his motorcycle with his 21-year-old girlfriend riding as a passenger on the back of the motorcycle. While fleeing at high speed, Tancak crashed, and his girlfriend was pronounced dead at the scene.

{¶ 11} On August 10, 2018, Tancak pled guilty to all the counts in the indictment. During the plea hearing, the trial court engaged him in the following colloquy:

> THE COURT: All right. For the record, you are Justin Tancak.
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: How old are you, Justin.
>
> THE DEFENDANT: 21.
>
> THE COURT: 21. You're able to read and write?
>
> THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. You're a citizen of this country?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. And are you under the influence of any medications, drugs, or alcohol that would get in the way of—

THE DEFENDANT: No, Your Honor.

THE COURT: —having a conversation with me, okay. Your attorney has indicated you wish to change your plea from not guilty to guilty to the following: 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.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Do you understand the following are the potential penalties for each of these: Count 1 carries two to eight years in prison, 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[?]

The State is going to elect, obviously, you weren't guilty of three separate OVI violations, just one, and so they have to pick which one that they would have you sentenced under, and they have selected Count 6. So, for Count 6, you're required to spend at least six days in jail, or three days in jail, plus a driver's intervention program; fines ranging from $375 minimum to a maximum of $1,075.

I could order treatment for substance abuse, alcohol, in particular; your license would be suspended from one to three years, and you could have driving privileges after 15 days; is that understood[?]

THE DEFENDANT: Yes, Your Honor.

THE COURT: You know, as I'm—Madam prosecutor, and counsel, for aggravated vehicular homicide, is there a license suspension[?]

[Defense Counsel]: That's mandatory, Your Honor.

THE COURT: That's what I thought. And I didn't see that on here.

[Prosecutor]: Oh, yes, Judge. You're right.

THE COURT: What is the range of the mandatory—

[Defense Counsel]: I think it's 15 to life. 15 to life. Is that correct, felonies?

[Prosecutor]: I'm not sure.

THE COURT: I'm going to, I'm going to give you the advice of 15 years to life, and if it's less than that, your attorneys can figure that out, but I want you to know the worst case scenario when

someone is charged and found guilty of aggravated vehicular homicide, you're going to, you're going to lose your driver's license, is a strong likelihood that that will be the case.

[Defense Counsel]: I explained that to him already, Judge.

THE COURT: All right. Now, okay. So those are the potential penalties; do you understand that[?]

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Very good, Justin. You understand court costs would be assessed against you as well[?]

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Because a couple of these charges are felonies, you are now prohibited from having possession of any kind of firearm. If you are in possession of a gun that would be a brand new crime called having a weapon under disability, and you could go to prison for three, up to three years, understood[?]

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. If you were sent to prison, upon your release from prison, you would have three years of mandatory Post Release Control supervision. That means the Adult Parole Authority would have to supervise you for three years. And that means you'd have to follow the rules and regulations of being on probation.

And if you violated those rules, they could do a number of things, they could extend the time they supervise you, they could place restrictions on your freedom. The most common one is to give you a curfew and say you can't be out after a certain time, they could do that, if they felt like that was necessary. They can even send you back to prison if you violate their rules. One rule violation and you

could be in prison for nine months, and continue to go back to prison for repeat violations until you had served half of your stated prison, up to half of what was your stated prison term. So, you understand that[?]

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Very good. Let's see. Your prison term on aggravated vehicular homicide is a mandatory—

THE DEFENDANT: Yes.

THE COURT: And I didn't say that, do you understand whatever time I impose you have to serve that time[?]

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay.

[Defense Counsel]: Judge, I explained that to him in the holding cell.

THE COURT: Okay. I figured you did, but I just wanted to make sure on the record that I covered it as well and I know you'd be thorough, [defense counsel].

So I'm not going to go over community control because these other matters will be concurrent probably with what we do here.

Now, really I shouldn't go over judicial release either because once I figure out what the mandatory time is you've got to serve that time; do you understand that[?]

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. That's what we're gonna do. Now, I have the legal authority, Justin, to sentence you today after you plead guilty. I'm not going to do that, I really still want, again, a presentence investigation report, so I have some sense of who you

are, and what would be the appropriate sentence, but you understand technically I could send you to prison today[?]

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you do understand that the time you've been serving in jail, you'll be given credit for that towards your sentence; do you understand that[?]

THE DEFENDANT: Yes, Your Honor.

THE COURT: Now, you are entering a plea of guilty, Justin, but you're not required to. No one can force you to enter a plea of guilty because you have a Constitutional right to demand a jury trial with 12 jurors from the community who don't know any of the parties involved hear the evidence, or you could waive a jury and say Judge, you just hear the case without a jury, but by pleading guilty today you are giving up your Constitutional right to have a trial; do you understand that[?]

THE DEFENDANT: Yes, I do. Yes, Your Honor.

THE COURT: You understand that if you went to trial you don't have the burden of proof to prove to anybody that you're innocent, instead, it's always up to the prosecutor to come up with evidence to prove that you are guilty and they have to meet the standard of proof beyond a reasonable doubt. If they just have evidence that proves that you probably did something that's not good enough, it's got to be proof beyond a reasonable doubt, understood[?]

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. If you went forward with a trial, Justin, your attorney would have the right to cross-examine every

witness called against you, no one would get a free ride, they would be subject to cross-examination, understood[?]

THE DEFENDANT: Yes, Your Honor.

THE COURT: And if there are witnesses that could help your case, [defense counsel] could subpoena them and that's a court order, the witness has to come to court even if they don't want to be here. And if they don't show up, we'll send out a sheriff's deputy to find them and bring them here for you so you have your witnesses in court, understood[?]

THE DEFENDANT: Yes, Your Honor.

THE COURT: Now, if you went forward with a trial, but you did not want to testify, and instead wanted to exercise your Fifth Amendment right to remain silent, that's fine, and I'll protect that right, no one would be allowed to comment on your silence, or use your silence against you in any way; do you understand that[?]

THE DEFENDANT: Yes.

THE COURT: Okay.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. If you went forward with a trial, and you were found guilty, if I then imposed the maximum sentence of eight years, you would have an automatic right to appeal the sentence, so that the Court of Appeals, three judges, would be selected to judge me, to determine whether they think I was following the sentencing guidelines, or whether there was evidence that I was motivated by something I shouldn't have been motivated by, something that would have been improper, like prejudice against you, understood[?]

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Since you are pleading guilty today, we're not going to have a trial, and if there is no trial your rights to appeal the sentence are more limited; do you understand that[?]

THE DEFENDANT: Yes, Your Honor.

THE COURT: If at the time of sentencing you think I have done something wrong and you wish to exercise those limited rights to appeal, you have to file a notice of appeal within 30 days of that date that you were sentenced. If you wait beyond 30 days, you can't appeal; do you understand that[?]

THE DEFENDANT: Yes. Yes, Your Honor.

THE COURT: All right. Generally when someone comes to court and says Judge, whether it's a serious case or a small case, in any case, if you say Judge, I want to change my plea from not guilty to guilty, you are making an admission to me; you're saying Judge, when all is said and done I need to take responsibility for breaking the law here and I'm willing to do it, I'm willing to give up my Constitutional right to have a trial and all these other rights you've just covered with me, I need to get this case over with, and I need to move on with my life. Is that a pretty fair summary of why, what you're thinking today as you're changing your plea[?]

THE DEFENDANT: Pretty much. Yes, Your Honor.

THE COURT: All right. I have a guilty plea form of three pages, Justin, and I just need to confirm on this signature line that's your signature—

THE DEFENDANT: Yes, Your Honor.

THE COURT: —Mr. Tancak. Before you signed this form is it correct that you went over it and reviewed it with your attorney[?]

THE DEFENDANT: Yes. Yes, Your Honor.

THE COURT: Did he explain the form to you and answer any question you had to your satisfaction[?]

THE DEFENDANT: He explained it thoroughly and answered all my questions.

THE COURT: Were any promises made to get you to sign this, like, don't worry, the Judge will only sentence you to two weeks in jail or something—

THE DEFENDANT: No promises, Your Honor.

THE COURT: No promises, okay. Did anybody threaten you and force you to sign this against your will[?]

THE DEFENDANT: No threats, Your Honor.

THE COURT: All right. Very good. Is it fair for me to conclude that you signed this document voluntarily; is that right[?]

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Do you have any objections then to a guilty plea being entered on your behalf to the charges in this indictment[?]

THE DEFENDANT: No, Your Honor.

THE COURT: Any objection[?]

THE DEFENDANT: No.

THE COURT: Okay. Are you satisfied with the advice and services of [defense counsel][?]

THE DEFENDANT: Yes.

THE COURT: Do you have any questions for me about what we're doing?

THE DEFENDANT: No.

{¶ 12} In addition to this oral exchange, Tancak signed a plea form that, among other warnings, contained language warning him that "[p]rison terms for multiple charges, even though not mandatory consecutive, may, nonetheless, be imposed consecutively by the court." Following his guilty plea, the trial court merged several of the offenses and sentenced Tancak to a mandatory prison term of seven years for aggravated vehicular homicide; two years in prison for failure to comply with an order or signal of a police officer, to be served consecutively to the aggravated-vehicular-homicide sentence; and 180 days in jail for OVI, to be served concurrently.

{¶ 13} In 2021, the Ninth District Court of Appeals granted Tancak's request for leave to file a delayed appeal. 2022-Ohio-880, ¶ 5. On appeal, Tancak raised two interrelated assignments of error: (1) the trial court erred when it failed to notify him during the plea colloquy that the prison sentences for the aggravated-vehicular-homicide and failure-to-comply convictions would, as a matter of law, run consecutively and (2) his entire plea was obtained in violation of the United States Constitution and Crim.R. 11(C). 2022-Ohio-880 at ¶ 7, 15. The state conceded in the court of appeals that the trial court erred by failing to advise Tancak during the plea hearing that the failure-to-comply sentence would be served consecutively to any other sentence. *Id.* at ¶ 7.

{¶ 14} The Ninth District concluded, in accord with the state's concession, that the trial court had failed to even partially comply with Crim.R. 11 as to the failure-to-comply count, vacated Tancak's conviction on that count, and remanded as to that count only. *Id.* at ¶ 13, 23. It concluded that because Ohio has rejected the "sentence package" doctrine and because Tancak's plea was not part of "a plea agreement between * * * [him] and the State that would unify [his] plea to all of the charges against him," the counts were separate and the trial court's failure to properly inform him as to one of them did not necessitate reversal as to all of them. *Id.* at ¶ 19-21. And it observed that Tancak acknowledged in his written plea that

the trial court had the authority (at least in theory) to impose consecutive sentences for all the offenses. *Id.* at ¶ 21.

{¶ 15} We accepted Tancak's appeal to consider 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.

See 167 Ohio St.3d 1467, 2022-Ohio-2490, 191 N.E.3d 437.

ANALYSIS

Crim.R. 11 Requires Oral Advisement by the Trial Court of the Maximum Penalty Faced by the Defendant

{¶ 16} Because a no-contest or guilty plea involves a waiver of constitutional rights, a defendant's decision to enter such a plea must be knowing, intelligent, and voluntary. *Parke v. Raley*, 506 U.S. 20, 28-29, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992). If the plea was not made knowingly, intelligently, and voluntarily, enforcement of it is unconstitutional. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 25. Because of this legal truth, Crim.R. 11(C) requires a trial court to advise a defendant who seeks to plead no contest or guilty to a felony as follows:

> (2) In felony cases the court * * * *shall not accept a plea of guilty or no contest without first addressing the defendant personally either in-person or by remote contemporaneous video* in conformity with Crim.R. 43(A) 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.

(Emphasis added.) Our focus in enforcing Crim.R. 11 "has not been on whether the trial judge has '[incanted] the precise verbiage' of the rule, *State v. Stewart*, 51 Ohio St.2d 86, 92, 364 N.E.2d 1163 (1977), but on whether the dialogue between the court and the defendant demonstrates that the defendant understood the consequences of his plea, *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 15-16; *Clark* at ¶ 26; *State v. Miller*, 159 Ohio St.3d 447, 2020-Ohio-1420, 151 N.E.3d 617, ¶ 19." (Brackets added in *Dangler*.) *State v. Dangler*, 162 Ohio St.3d 1, 2020-Ohio-2765, 164 N.E.3d 286, ¶ 12.

{¶ 17} Not all the advisements under Crim.R. 11 are treated equally. For example, "[w]hen 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.' " *Clark* at ¶ 31, quoting *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12. However, when a court's advice is defective as to an aspect of the plea that does not concern a constitutional right, "a defendant must show prejudice before [the] plea will be vacated for [the] court's error involving Crim.R. 11(C) procedure." *Veney* at ¶ 17. In essence, the defendant must show that but for the court's failure to properly advise, he or she would not have entered the plea. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). But even in cases in which the trial court failed to advise the defendant about aspects of the plea not involving the defendant's constitutional rights, the "trial court's complete failure to comply with [that] portion of Crim.R. 11(C) eliminates the defendant's burden to show prejudice." *Dangler* at ¶ 15, citing *Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, at ¶ 22.

{¶ 18} The issues in this case are what was "the maximum penalty involved," Crim.R. 11(C)(2)(a), and whether Tancak was sufficiently advised of the maximum penalty such that he understood it before he entered his guilty plea. The "maximum penalty involved" does not implicate a constitutional right such that defective advisement on it obviates the defendant's need to prove prejudice. *Dangler* at ¶ 23. But a complete failure (as we have here) to advise a defendant about a portion of his maximum sentence obviates the defendant's need to prove prejudice. *See Sarkozy* at ¶ 22.

{¶ 19} Absent certain exceptions, "a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States." R.C. 2929.41(A). However, one such exception exists in the Revised Code provision making it a crime to "operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop,"

R.C. 2921.331(B). Specifically, such "willfully" fleeing and eluding becomes a felony when "the offender was fleeing immediately after the commission of a felony," R.C. 2921.331(C)(4), "[t]he operation of the motor vehicle by the offender was a proximate cause of serious physical harm to persons or property," R.C. 2921.331(C)(5)(a)(i), or "[t]he operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property," R.C. 2921.331(C)(5)(a)(ii). For felony violations of the prohibition on willfully fleeing and eluding, R.C. 2921.331(D) provides that "if the offender is sentenced to a prison term for th[e] violation, the offender shall serve the prison term consecutively to any other prison term or mandatory prison term imposed upon the offender."

{¶ 20} It is undisputed that Tancak, who was pleading guilty for having fled on a motorcycle from a police officer, crashing the motorcycle, and thereby causing the death of his girlfriend, qualified as an offender required to serve the prison term for the fleeing-and-eluding offense "consecutively to any other prison term or mandatory prison term imposed upon [him]," R.C. 2921.331(B), (C)(5)(a)(i), and (D). Yet the trial-court judge merely advised Tancak:

> Do you understand the following are the potential penalties for each of these: Count 1 carries two to eight years in prison, 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[?]

Tancak answered in the affirmative. The judge then added the following about the mandatory nature of the sentences:

> THE COURT: Okay. Very good. Let's see. Your prison term on aggravated vehicular homicide is a mandatory—
>
> THE DEFENDANT: Yes.
>
> THE COURT: And I didn't say that, do you understand whatever time I impose you have to serve that time.
>
> THE DEFENDANT: Yes, Your Honor.

But at no point did the judge advise Tancak that any portion of his sentence could be ordered to run consecutively, and the judge certainly never mentioned that part of the sentence was required to be served consecutively.

{¶ 21} It is true that Tancak signed a plea form that, among other warnings, stated that "[p]rison terms for multiple charges, even though not mandatory consecutive, may, nonetheless, be imposed consecutively by the court." But what might be "mandatory consecutive" was never identified, and such boilerplate language does not satisfy Crim.R. 11, which provides that a court "*shall not* accept a plea of guilty or no contest without first *addressing the defendant personally either in-person or by remote contemporaneous video* in conformity with Crim.R. 43(A)" (emphasis added), Crim.R. 11(C)(2). A boilerplate form is not a sufficient substitute for the trial court's personally addressing the defendant to satisfy the plain terms of Crim.R. 11.

{¶ 22} The trial court never advised Tancak according to the terms of Crim.R. 11(C)(2) of the "maximum penalty involved," in that it failed to inform him of even the possibility, to say nothing of the certainty, of his being ordered to serve consecutive sentences. This complete failure to comply with the rule excuses Tancak from having to prove that he would not have entered the plea had he been properly advised. *See Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, at ¶ 22. The correctness of this conclusion is aided, certainly, by the state's

concession on the issue. But analysis of this question, as demonstrated, is by no means impeded by the state's concession.

A Trial Court's Complete Failure to Orally Inform a Defendant of "the Maximum Penalty Involved" Means the Defendant's Entire No-Contest or Guilty Plea Was Entered Without the Required Knowledge or Understanding

{¶ 23} As discussed above, Crim.R. 11(C)(2) requires a trial court to "address[] the defendant *personally either in-person or by remote contemporaneous video*" and "[d]etermin[e] that the defendant is making the plea voluntarily, *with understanding of* the nature of the charges and of *the maximum penalty involved*." (Emphasis added.) Here, Tancak was informed of the maximum sentence for each count to which he was pleading guilty but not "the maximum penalty" to which his guilty plea exposed him, because he was not told that the sentences could be (or, with respect to the failure-to-comply sentence, was required to be) served consecutively. The result of that failure, under the plain language of Crim.R. 11, is that Tancak did not make the plea "voluntarily, *with understanding of* the nature of the charges and of *the maximum penalty involved*." (Emphasis added.) His plea was entered without his understanding of the maximum penalty involved and was not knowingly and intelligently made, requiring that all his convictions be vacated and his plea withdrawn.

{¶ 24} The Ninth District's decision below and the state and amicus curiae Ohio Attorney General here correctly point out that Ohio has rejected the sentence-package doctrine. *See* 2022-Ohio-880 at ¶ 19; *see also State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, paragraphs one and two of the syllabus. This means that in Ohio, a sentence is "the sanction or combination of sanctions imposed for each separate, individual offense," *id.* at paragraph one of the syllabus, and that regarding errors in imposing a sentence for an offense, "[a]n appellate court may modify, remand, or vacate only a sentence for an offense that

is appealed by the defendant and may not modify, remand, or vacate the entire multiple-offense sentence based upon an appealed error in the sentence for a single offense," *id.* at paragraph three of the syllabus.

{¶ 25} However, this holding in *Saxon* does not apply to the circumstances here. The question here is not whether Tancak was appropriately sentenced for one or more offenses. The question is whether he was personally advised by the judge of the "maximum penalty," Crim.R. 11(C)(2)(a), that could result from his guilty plea before he entered the plea. Because he was not advised that the prison sentences for his offenses could be ordered to be served consecutively (and, in fact, that the failure-to-comply sentence was required to be served consecutively), the inescapable conclusion is that Tancak was not advised of the "maximum penalty involved," *id*. That conclusion is not an example of treating sentences as a package; it is merely a recognition that individual sentences can (and, in this case, must) run consecutively. And here, Tancak was not properly advised of that fact, with the result being that his entire plea was made without the required knowledge.

We Should Adhere to Our Decision to Accept this Case for Review

{¶ 26} The majority dismisses this case as having been improvidently accepted without providing any reasoning for doing so. But one member of the majority writes separately, suggesting that dismissing the case is appropriate "because the question presented in this appeal is premised on an assumption that we are unable to address" due to the fact that the state conceded that the trial court's failure to inform Tancak that his failure-to-comply sentence must be served consecutively amounted to failing to inform him of the maximum penalty involved. Concurring opinion at ¶ 2. I respectfully disagree with both the majority's judgment and the reasoning given in the concurring opinion.

{¶ 27} Tancak raised the Crim.R. 11 deficiency issue at every appropriate opportunity, and it remains an important predicate issue now. It is true that "[a]s a general rule, this court will not consider arguments that were not raised in the courts

below." *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 279, 617 N.E.2d 1075 (1993), citing *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170, 522 N.E.2d 524 (1988). But "if we must resolve a legal issue that was not raised below in order to reach a legal issue that was raised, we will do so." *Id.* Furthermore, the fact that the state conceded the issue and the Ninth District accepted the concession as a correct statement of the law is no failure of Tancak's. There is no impediment to our reviewing the predicate question whether the trial court erred by not informing Tancak of the prospect of consecutive sentences and considering the proposition of law regarding the appropriate scope of the remedy. To the extent that the majority might be uncomfortable with the lack of briefing on the predicate question here, it could order additional briefing—as we have done sua sponte in a number of recent cases. *See, e.g.*, *State v. Jordan*, 169 Ohio St.3d 1478, 2023-Ohio-1027, 206 N.E.3d 715; *State v. Johnson*, 169 Ohio St.3d 1478, 2023-Ohio-1027, 206 N.E.3d 716; *Repp v. Best*, 169 Ohio St.3d 1478, 2023-Ohio-1027, 206 N.E.3d 716; *see also Davis v. McGuffey*, 169 Ohio St.3d 1499, 2023-Ohio-1331, 207 N.E.3d 833 (ordering parties to show cause why case should not be dismissed).

{¶ 28} The facts of this case are not unique, nor are the questions raised by it unusual. People plead guilty to crimes in Ohio every day. Every day, Ohio's trial courts "address * * * defendant[s] *personally* either *in-person or by remote contemporaneous video*" to "[d]etermin[e] that the defendant is making the plea voluntarily, *with understanding of* the nature of the charges and of *the maximum penalty involved*" (emphasis added), Crim.R. 11(C)(2). And Ohio's trial and appellate courts need to know that informing a defendant in a criminal case of "the maximum penalty involved" means informing the defendant of any possibility (or certainty) of consecutive prison sentences, and they need to know the consequences for failing to provide such advisement. We should not shy away from our duty to decide this case of great general and public interest, *see* Ohio Constitution, Article

IV, Section 2(B)(2)(e), and we should aid trial and appellate courts across the state by providing clarity on these issues.

CONCLUSION

{¶ 29} Tancak pled guilty without being personally addressed and advised by the trial court of "the maximum penalty involved," Crim.R. 11(C)(2)(a), under his plea. He was advised of the maximum sentences for each count but not of the possibility—and, in fact, the certainty—that sentences would run consecutively. Thus, he was not advised of "the maximum penalty" to which his plea exposed him. This was obvious—so obvious, in fact, that the state conceded the point and the parties merely briefed for this court the question whether the trial court's failure to properly inform Tancak affects just one of his convictions under the plea or all of them.

{¶ 30} Rather than provide much-needed guidance on the common issue of a trial court's duty to advise a defendant about a plea of no contest or guilty and its consequences, the majority dismisses this case as having been improvidently accepted, and three justices justify the dismissal based on the state's concession that the trial court's failure to inform Tancak that his failure-to-comply sentence must be served consecutively amounted to failing to inform him of the maximum penalty involved. I respectfully dissent. The concession of a predicate issue is no bar to examining the issue briefed. And if the majority is uncertain of the answer to the predicate issue conceded, it could request further briefing—as we have done in a number of other recent cases.

{¶ 31} We owe it to the lower courts and to practitioners to provide clarity in this area of the law. We should instruct that a trial court's advisement under Crim.R. 11 as to "the maximum penalty involved" must include informing the defendant, when applicable, that sentences may or must be served consecutively. We should further determine that a trial court's complete failure to advise the defendant of "the maximum penalty involved" means the plea was entered without

the required knowledge and understanding and permits withdrawal of the entire plea. Because the majority declines to resolve this appeal, I respectfully dissent.

DONNELLY, J., concurs in the foregoing opinion.

J.D. Tomlinson, Lorain County Prosecuting Attorney, and Lindsey C. Poprocki, Assistant Prosecuting Attorney, for appellee.

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Dave Yost, Attorney General, Benjamin M. Flowers, Solicitor General, and Stephen P. Carney, Deputy Solicitor General, urging affirmance for amicus curiae Ohio Attorney General Dave Yost.

Russell S. Bensing, urging reversal for amicus curiae Ohio Association of Criminal Defense Lawyers.
