The Supreme Court of Ohio

CASE ANNOUNCEMENTS

September 18, 2023

[Cite as *09/18/2023 Case Announcements #2,* 2023-Ohio-3288.]

APPEALS NOT ACCEPTED FOR REVIEW

2023-0692. State v. Berry.
Cuyahoga App. No. 111453, 2023-Ohio-605.
Donnelly, J., dissents, with an opinion joined by Stewart and Brunner, JJ.

DONNELLY, J., dissenting.

{¶ 1} This appeal offers an opportunity to clear up uncertainty about whether a change to the language of Crim.R. 11 prevents trial courts from accepting a defendant's single guilty plea to multiple offenses without first ensuring that the defendant understands the maximum aggregate penalty for those offenses. I dissent from this court's decision not to exercise jurisdiction and provide some much-needed clarity.

{¶ 2} Appellant, Lawrence Berry, faced multiple counts of aggravated vehicular homicide, aggravated vehicular assault, and operating a vehicle while under the influence of alcohol. The state offered to dismiss various counts in exchange for Berry's guilty plea to one count each of the charged offenses. The trial court explained the maximum terms of confinement that could be imposed for each separate count: 11 years in prison for aggravated vehicular homicide, 8 years in prison for aggravated vehicular assault, and 6 months in jail for operating a vehicle under the influence. But before accepting his plea, the trial court did not inform Berry that the prison terms might run consecutively or that Berry faced a maximum total prison term of 19 years. At a subsequent sentencing hearing, the court imposed consecutive prison terms totaling 17 years. The Eighth District Court of Appeals rejected Berry's argument

that the trial court had failed to comply with Crim.R. 11(C)(2)(a) and affirmed the sentencing decision. 2023-Ohio-605, ¶ 11.

{¶ 3} A previous version of Crim.R.11(C)(2)(a) forbade a trial court from accepting a defendant's guilty or no-contest plea without first determining that the defendant understood " 'the nature of *the* charge and of *the* maximum penalty involved.' " (Emphasis added in *Johnson*.) *State v. Johnson*, 40 Ohio St.3d 130, 133, 532 N.E.2d 1295 (1988), quoting former Crim.R. 11. Because the rule referred to "the charge," in the singular, this court reasoned that the reference to "the maximum penalty" required a trial court to ensure only that a defendant understood the penalty for each charge individually, not cumulatively. *Id.*

{¶ 4} Ten years after *Johnson*, Crim.R. 11(C)(2)(a) was amended and now forbids a trial court from accepting a defendant's guilty or no-contest plea without first determining that the defendant understands "the nature of the *charges* and of the maximum *penalty* involved." (Emphasis added.) 83 Ohio St.3d xciii, cix (effective July 1, 1998). This court explained that the change from "charge" to "charges" means "that a single plea can now apply to multiple charges." *State v. Bishop*, 156 Ohio St.3d 156, 2018-Ohio-5132, 124 N.E.3d 766, ¶ 15. However, because the controversy in *Bishop* involved a defendant's plea to a single new offense and the trial court's failure to inform the defendant of the potential additional prison term for violating community control imposed for a previous offense, this court did not determine the effect of the current Crim.R. 11(C)(2)(a) language on pleas to multiple offenses.

{¶ 5} Appellate courts in Ohio have been left to guess as to whether this court might think that the change from "charge" to "charges" in Crim.R. 11(C)(2)(a) is significant in cases like this one involving a trial court's acceptance of a single plea to multiple "charges" without explaining "the maximum penalty" that could apply to that group of charges. Those courts—including the court of appeals in this case—have resorted to citing dissenting opinions in *Bishop* to predict what the answer might be and to point out that we did not explicitly overturn *Johnson*. *See* 2023-Ohio-605 at ¶ 13-14, quoting *Bishop* at ¶ 47 (Kennedy, J., dissenting) and ¶ 73-74 (Fischer, J., dissenting); *State v. Whitman*, 2021-Ohio-4510, 182 N.E.3d 506, ¶ 27-28 (6th Dist.); *State v. Willard*, 2021-Ohio-2552, 175 N.E.3d 989, ¶ 65 (11th Dist.).

{¶ 6} Ohio's appellate courts would benefit from this court's clear guidance on the meaning of Crim.R. 11(C)(2)(a) and should not have to resort to reading the tea leaves that we left behind in *Bishop*. Because I would accept Berry's jurisdictional appeal, I dissent.

STEWART and BRUNNER, JJ., concur in the foregoing opinion.