

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 21CA1135
	:	
v.	:	
	:	
JEREMIAH TOLLE,	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	

APPEARANCES:

Brian T. Goldberg, Cincinnati, Ohio, for Appellant.

C. David Kelley, Adams County Prosecuting Attorney, and Kris. D. Blanton, Assistant Adams County Prosecuting Attorney, West Union, Ohio, for Appellee.

Smith, P.J.

{¶1} Appellant, Jeremiah Tolle, appeals the judgment entered by the Adams County Court of Common Pleas convicting him of one count of aggravated possession of drugs. Tolle pleaded guilty to the charge after the trial court denied his motion to suppress evidence. On appeal, Tolle raises a single assignment of error contending that his plea of guilt was not entered knowingly, intelligently, and voluntarily. Because we find merit to the argument raised under Tolle’s sole assignment of error, it is sustained. Accordingly, the judgment of the trial court is reversed and this matter is remanded with instructions for further proceedings.

FACTS

{¶2} On November 13, 2019, Tolle was indicted on three third-degree felony counts that each contained specifications. The charges stemmed from the execution of a search warrant at Tolle’s residence that was issued after Tolle was arrested during a traffic stop. Count one charged Tolle with aggravated possession of drugs in violation of R.C. 2925.11(A) and alleged that Tolle had a firearm on or about his person or under his control while committing the offense. Count two charged Tolle with having weapons while under disability in violation of R.C. 2923.13(A)(3) and alleged that Tolle was the owner of a “Raven Arms .25 cal handgun” that was used in the commission of a felony offense. Count three charged Tolle with having weapons while under disability in violation of R.C. 2923.13(A)(3) and alleged that Tolle was the owner of a “black Walther PH 380 handgun” that was used in the commission of a felony.

{¶3} Tolle pleaded not guilty to all of the charges and filed a dual motion to suppress and a motion in limine on February 18, 2020. In his dual motion, Tolle argued that all evidence seized as a result of the search warrant should be suppressed and that any testimony relating to the search warrant should be excluded from trial. A suppression hearing was held on March 31, 2020, and after taking the matter under advisement, the trial court issued a decision denying the motion to suppress on April 20, 2020. There is nothing in the record to suggest a

separate hearing was held on the motion in limine or that a separate decision was issued on that portion of the motion.

{¶4} Thereafter, Tolle entered into a plea agreement whereby he would plead guilty to the aggravated possession of drugs charge contained in count one of the indictment, as amended.¹ In exchange for Tolle's guilty plea, the remaining counts of the indictment were dismissed. At the plea hearing, the State outlined the agreement reached with Tolle and noted that this was a case with "a rather lengthy motion to suppress." After confirming the agreement reached between the parties and advising Tolle of the constitutional rights he was waiving and the maximum penalty he was facing, the trial court engaged Tolle in the following colloquy:

[COURT:] Now, the other right, that you'll still retain, even if you do enter a plea of guilty is you'll keep the right to appeal any and all decisions of this court in your case, but that appeal must be timely filed. It must be filed within 30 days of the judgment entry of sentence. I think you're batting a thousand on my questions about definitions. Do you understand what an appeal is?

[TOLLE:] Yes, sir.

COURT: What do you think an appeal would be?

[TOLLE:] Uh it's to overturn your case and the findings of the case?

COURT: Sure. Yeah, you have it we're going to say it a little bit different terms [sic]. So, an appeal is where you would

¹Appellant represents to this Court that count one was amended to eliminate the firearm specification; however, the record is unclear as to the exact manner in which the count was amended.

ask judges and courts that have higher and superior authority than this court to review the decisions of this court in your case, to see if those decisions were fair and legal and appropriate. So, I think we're saying the same thing.

[TOLLE:] Yeah.

COURT: Higher review.

[TOLLE:] Yes, sir.

{¶5} Thereafter, the trial court accepted Tolle's guilty plea to count one of the indictment, as amended. Tolle was ultimately convicted on the sole count and sentenced to a prison term of 30 months on February 24, 2021. It is from this sentencing entry that Tolle now brings his timely appeal, setting forth a single assignment of error for our review.

ASSIGNMENT OF ERROR

I. THE PLEA OF GUILTY WAS NOT ENTERED KNOWINGLY, INTELLIGENTLY [SIC], AND VOLUNTARILY.

{¶6} In his sole assignment of error, Tolle contends that his guilty plea was not entered knowingly, intelligently, and voluntarily. In support of his assignment of error, Tolle directs our attention to the fact that the trial court advised him that despite pleading guilty, he would "keep the right to appeal any and all decisions" of the court. Tolle argues that such advisement "would suggest that [he] had the right to appeal any decision made by the court throughout the entire case[,]” which would include the trial court's denial of his motion to suppress. Tolle further

argues that the Supreme Court of Ohio has invalidated a plea where all parties were under the mistaken belief that a defendant could appeal certain pretrial rulings after a guilty plea. Moreover, he notes that this Court has previously held that a defendant's plea is not made knowingly and intelligently when it is based on incorrect information about his right to appeal.

{¶7} The State counters by arguing that an appellant who challenges his plea on the basis that it was not knowingly and voluntarily made must show a prejudicial effect. The State further argues that the trial court had no duty to advise Tolle about his right to appeal at the plea hearing stage and therefore “any discussion or colloquy the trial court had with the appellant would be harmless error.” Thus, the State argues that Tolle “has failed to provide anything to this Court that indicates he was prejudiced by the alleged inadequacy of the instructions of the trial court, nor has the appellant even specifically complained in his brief that he was prejudiced.”

Applicable Law and Standard of Review

{¶8} Crim.R. 11(C)(2) governs the acceptance of guilty pleas by the trial court in felony cases and provides that a trial court should not accept a guilty plea without first addressing the defendant personally and:

(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.

{¶9} Thus, prior to accepting a guilty plea, a “court must inform the defendant that he is waiving his privilege against compulsory self-incrimination, his right to jury trial, his right to confront his accusers, and his right of compulsory process of witnesses.” *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115, paragraph one of the syllabus (1981). *See also* Crim.R. 11(C)(2)(c). “In addition to these constitutional rights, the trial court must determine that the defendant understands the nature of the charge, the maximum penalty involved, and the effect of the plea.” *State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶ 41.

{¶10} When reviewing a defendant's constitutional rights (right to a jury trial, right to call witnesses, etc.), a trial court must strictly comply with Crim.R. 11(C)(2)(c). *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d

621, ¶ 18. However, “strict compliance does not mean literal compliance.” *State v. Adams*, 4th Dist. Washington No. 15CA44, 2016-Ohio-2757, ¶ 11, citing *State v. Kerns*, 4th Dist. Highland No. 15CA6, 2016-Ohio-63, ¶ 30-33. A court does not need to engage in “a word-for-word recitation of the criminal rule, so long as the trial court actually explains the rights to the defendant.” *Id.* at ¶ 12, citing *State v. Veney*, *supra*, at ¶ 27.

{¶11} In contrast, when reviewing a defendant's non-constitutional rights (maximum penalty involved, understanding effect of plea, etc.), a trial court must substantially comply with Crim.R. 11(C)(2)(a) and (b). *State v. Veney*, *supra*, ¶ 18. “ ‘[S]ubstantial compliance’ means that ‘under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.’ ” *State v. Morrison*, 4th Dist. Adams No. 07CA854, 2008-Ohio-4913, ¶ 9, quoting *State v. Puckett*, 4th Dist. Scioto No. 3CA2920, 2005-Ohio-1640, ¶ 10, citing *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977); *State v. Carter*, 60 Ohio St.2d 34, 396 N.E.2d 757 (1979).

{¶12} In *Veney*, the Court held as follows regarding the acceptance of guilty pleas:

“When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution.”

Veney, supra, at ¶ 7, quoting *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996); *State v. Montgomery, supra*, at ¶ 40; *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826, ¶ 9.

{¶13} “It is the trial court's duty, therefore, to ensure that a defendant ‘has a full understanding of what the plea connotes and of its consequence.’ ”

Montgomery at ¶ 40, quoting *Boykin v. Alabama*, 395 U.S. 238, 244, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *State v. Conley*, 4th Dist. Adams No. 19CA1091, 2019-Ohio-4172, ¶ 34.

{¶14} When appellate courts evaluate whether a defendant knowingly, intelligently, and voluntarily entered a guilty plea, a court must independently review the record to ensure that the trial court complied with the Crim.R. 11 constitutional and procedural safeguards. *See State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014-Ohio-5601, ¶ 36; *State v. Eckler*, 4th Dist. Adams No. 09CA878, 2009-Ohio-7064, ¶ 48; *Veney, supra*, at ¶ 13 (“Before accepting a guilty or no-contest plea, the court must make the determinations and give the warnings required by Crim.R. 11(C)(2)(a) and (b) and notify the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c).”); *State v. Kelley*, 57 Ohio St.3d 127, 128, 566 N.E.2d 658 (1991) (“When a trial court or appellate court is reviewing a plea submitted by a defendant, its focus should be on whether the dictates of Crim.R. 11 have been followed.”); *See also, State v. Shifflet*, 2015-

Ohio-4250, 44 N.E.3d 966 (4th Dist.), ¶ 13, citing *State v. Smith*, 4th Dist.

Washington No. 12CA11, 2013-Ohio-232, ¶ 10.

{¶15} The purpose of Crim.R. 11(C) is “to convey to the defendant certain information so that he can make a voluntary and intelligent decision whether to plead guilty.” *Ballard, supra*, at 479-480. As stated above, although literal compliance with Crim.R. 11(C) is preferred, it is not required. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 29, citing *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 19. Therefore, an appellate court will ordinarily affirm a trial court's acceptance of a guilty plea if the record reveals that the trial court engaged in a meaningful dialogue with the defendant and explained, “in a manner reasonably intelligible to that defendant,” the consequences of pleading guilty. *Ballard* at paragraph two of the syllabus; *Barker* at ¶ 14; *Veney* at ¶ 27; *Conley* at ¶ 37.

{¶16} Additionally, it has been held that a defendant who seeks to invalidate a plea on the basis that the trial court partially, but not fully, informed the defendant of his or her non-constitutional rights must demonstrate a prejudicial effect. *See Veney* at ¶ 17; *Clark* at ¶ 31. To demonstrate that a defendant suffered prejudice due to the failure to fully inform the defendant of his or her non-constitutional rights, the defendant must establish that, but for the trial court's failure, a guilty plea would not have been entered. *See Clark* at ¶ 32, citing *State v.*

Nero, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990)(stating that “[t]he test is ‘whether the plea would have otherwise been made’ ”). However, when a trial court completely fails to inform a defendant of his or her non-constitutional rights, the plea must be vacated, and no analysis of prejudice is required. *See Clark* at ¶ 32, citing *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 22.

Legal Analysis

{¶17} Here, the record before us indicates Tolle initially pleaded not guilty to the charge at issue but then changed his plea to guilty after his motion to suppress was denied. When accepting Tolle’s guilty plea, the trial court affirmatively stated on the record that Tolle would “keep the right to appeal any and all decisions of [the] court in [his] case, but that appeal must be timely filed.” As set forth above, the trial court went on to engage Tolle in a colloquy asking him if he understood what an appeal was and asking Tolle to provide the court with his understanding of what an appeal was, to which Tolle responded that “it’s to overturn your case and the findings of the case.” The trial court thereafter stated as follows:

* * * So, an appeal is where you ask judges and courts that have higher and superior authority than this court to review the decisions of this court in your case, to see if those decisions were fair and legal and appropriate.

{¶18} All of the information provided to Tolle during this colloquy was incorrect as Crim.R. 11(B)(1) provides that “[t]he plea of guilty is a complete admission of the defendant’s guilt[,]” and this Court has repeatedly held that “a defendant waives the right to appeal the denial of a motion to suppress by pleading guilty.” *State v. Lask*, 4th Dist. Adams No. 18CA1081, 2019-Ohio-2753, ¶ 11, citing *State v. Woods*, 4th Dist. Lawrence No. 18CA10, 2018-Ohio-5460, ¶ 12-14; *State v. Spangler*, 4th Dist. Lawrence No. 16CA1, 2016-Ohio-8583, ¶ 17; *State v. Johnson*, 4th Dist. Hocking No. 14CA16, 2015-Ohio-854, ¶ 4-6. Furthermore, in *Lask* we also observed that “Ohio courts, including the Supreme Court of Ohio, ‘have held that a plea is not entered knowingly and intelligently where it is premised on the mistaken impression that a trial court’s decision is appealable.’ ” *Id.* at ¶ 9, quoting *State v. Felts*, 4th Dist. Ross No. 13CA3407, 2014-Ohio-2378, ¶ 19, in turn citing *State v. Engle*, 74 Ohio St.3d 525, 527-528, 660 N.E.2d 450 (1996). *See also State v. Buggs*, 4th Dist. Scioto No. 20CA3913, 2021-Ohio-39, ¶ 10. In *Lask* there was no claim of prejudice and in *Buggs*, although prejudice was alleged, it was not part of this Court’s analysis on appeal.

{¶19} In *State v. Engle*, the Supreme Court of Ohio held that the “defendant's [no contest] plea was predicated on a belief that she could appeal the trial court's rulings that her counsel believed had stripped her of any meaningful defense[,]” and therefore “her plea was not made knowingly or intelligently.”

Engle at 528. As a result, the Supreme Court of Ohio remanded the case to the trial court with instructions that Engle be given the opportunity to withdraw her plea and proceed to trial. *Id.* In reaching its decision, the Supreme Court noted language contained in the appellate court’s dissent which stated that “[a]ppellant's agreement to the plea bargain implies her understanding that she could appeal those issues.” *Engle* at 528.² The statement that was made in the dissent, which was noted by the Supreme Court, suggests there was prejudice on the face of the record. Importantly, the appellate court decision in the *Engle* case, which rejected Engle’s argument that the trial court erred in accepting her plea, specifically stated that “there is nothing in the record to support appellant's claim that she entered the plea for the sole reason of appealing certain issues, and would not have entered the plea had she not believed such issues were appealable.” *State v. Engle*, 5th Dist. Fairfield No. 38-CA-OCT-92, 1994 WL 476390, *4. Thus, despite the fact that there was nothing in the record indicating Engle would not have entered her plea but for the misrepresentation, the Supreme Court of Ohio nevertheless found that Engle’s plea was not made knowingly or intelligently where it was “predicated on a belief that she could appeal the trial court's rulings[.]” *Engle, supra*, at 528.

²At issue in *Engle* was the appealability of the denial of a pretrial motion in limine after the defendant entered a no contest plea. *Engle* at 526. Here, the trial court failed to expressly rule on Tolle’s motion in limine. Thus, we presume the motion was denied. *State v. Powell*, 4th Dist. Gallia No. 20CA3, 2021-Ohio-200, ¶ 7; *Chrysler Fin. Servs. v. Henderson*, 4th Dist. Athens No. 11CA4, 2011-Ohio-6813, ¶ 13 (“* * * when a court does not expressly rule on a motion, we ordinarily presume that the court overruled the motion”), citing *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 13 and *Ohio Univ. Bd. of Trustees v. Smith*, 132 Ohio App.3d 211, 223, 724 N.E.2d 1155 (4th Dist. 1999).

Engle has not been overturned, is still valid law and, in our view, controls our disposition of this matter.

{¶20} More recently, the Supreme Court of Ohio was confronted with an argument that a “plea was invalid because the trial court failed to comply fully with Crim.R. 11(C)(2)(a)’s requirement that the court explain the ‘maximum penalty’ for the offense at the time it accepted the plea.” *State v. Dangler*, 162 Ohio St.3d 1, 2020-Ohio-2765, 164 N.E.3d 286, ¶ 1. Dangler argued that although the trial court informed him he would have to register as Tier III sex offender for the rest of his life, it erred in failing to more fully explain the restrictions and obligations that went along with his status as a sex offender. *Id.* Dangler further argued that the failure by the trial court gave “him an automatic right to withdraw his plea, without any need to demonstrate prejudice.” *Id.* The Court rejected Dangler’s argument, holding that when a trial court has informed a defendant that he or she is subject to the “sex-offender-registration scheme,” the defendant is only entitled to have his conviction vacated for lack of a more complete explanation if he demonstrates prejudice. *Id.* at ¶ 2. In other words, the Court held that Dangler had to demonstrate “that he would not have entered the plea but for the incomplete explanation[.]” and that Dangler was not entitled to withdraw his plea because he had not demonstrated prejudice. *Id.* Thus, *Dangler* essentially reiterated the “traditional rule” which states that “a defendant is not entitled to have his plea

vacated unless he demonstrates he was prejudiced by a failure of the trial court to comply with the provisions of Crim.R. 11(C).” *Id.* at ¶ 16, citing *State v. Nero*, *supra*, at 108.

{¶21} However, as discussed in *Dangler* at length, there are exceptions to the traditional rule that relieve defendants from the requirement of demonstrating prejudice. *Dangler* at ¶ 14-17. For example, if a trial court fails to strictly comply, and instead only substantially complies with the Crim.R. 11(C)(2)(c) constitutional notifications, no prejudice must be shown. *Id.* at ¶ 14. Further, “a trial court’s *complete* failure to comply with a portion of Crim.R. 11(C) eliminates the defendant’s burden to show prejudice.” *Id.* at ¶ 15, citing *State v. Sarkozy*, *supra*, at ¶ 22. Thus, a defendant must show prejudice if the trial court fails to substantially comply with the nonconstitutional notifications contained in Crim.R. 11(C)(2)(a) and (b), but is not required to demonstrate prejudice if the trial court completely fails to comply. Finally, the *Dangler* Court noted that its own prior precedent had “muddled” the analysis even further by stating that “partial compliance” by the court was sufficient absent a showing of prejudice from the trial court’s failure to substantially comply. *Id.* at ¶ 17. Ultimately, the *Dangler* Court reaffirmed the “substantial compliance” and “complete failure to comply” exceptions to the “traditional rule” that require prejudice to be alleged and proven when seeking invalidation of a plea due the trial court’s failure to comply with the

requirements of Crim.R. 11. *Dangler* at ¶ 14-15. In doing so, the *Dangler* Court seemingly abandoned the third compliance category that had arisen over time, which was referred to as “partial compliance.” *Id.* at ¶ 17.

{¶22} However, neither *Dangler* nor *Nero* involved a trial court incorrectly informing a defendant that he or she retained the right to appeal all decisions of the court when entering a guilty plea. Moreover, and importantly, although *Dangler* was decided after *Engle*, *Dangler* relied on *Nero*, which was decided six years before *Engle*. This is important because although *Nero* specifically discussed the “but-for” and “prejudice” requirements of the traditional rule which must be alleged when seeking to invalidate a guilty plea, *Engle* was decided six years after *Nero*. As set forth above, the *Engle* Court found that Engle’s plea was invalid because it was predicated on her understanding that she had the right to appeal. The *Engle* Court reached this decision despite the fact that there was no claim made that she would not have entered her plea but for the misinformation. Thus, it appears that the prejudice caused by a trial court’s error in informing a defendant that he or she retains the right to appeal all decisions of the court when entering a guilty plea is apparent on the face of the record and must not be specifically alleged or demonstrated by a defendant. As such, in accordance with *Engle* as well as our prior decisions in *Lask* and *Buggs*, we conclude that Tolle’s guilty plea was not knowing, intelligent or voluntary in light of the fact that it was entered while

being advised by the trial court that he would retain the right to appeal all of the prior decisions of the court related to his case.

{¶23} Alternatively, we conclude that this type of error by the trial court not only fails to constitute substantial compliance with Crim.R. 11(C)(1)(b), it falls within another exception to the “traditional rule” as discussed in *Dangler, supra*, in that it constituted a “complete failure to comply with a portion of Crim.R. 11(C),” which “eliminates the defendant’s burden to show prejudice.” *Dangler* at ¶ 15, *supra*, citing *State v. Sarkozy, supra*, at ¶ 22. After reaffirming the “substantial compliance” and “complete failure to comply” exceptions to the traditional rule, and after appearing to abandon the “partial compliance” exception to the traditional rule, the *Dangler* Court summarized as follows:

Properly understood, the questions to be answered are simply: (1) has the trial court complied with the relevant provision of the rule? (2) if the court has not complied fully with the rule, is the purported failure of the type that excuses a defendant from the burden of demonstrating prejudice? And (3) if a showing of prejudice is required, has the defendant met that burden?

Dangler at ¶ 17.

{¶24} In answer to the first question, we cannot conclude that the trial court substantially complied with Crim.R. 11(C)(2)(b), which required that it inform Tolle of the effect of his guilty plea. In *State v. Keene*, this Court explained that “substantial compliance” in this context “means that under the totality of the circumstances the defendant subjectively understands the implications of his plea

and the rights he is waiving.” *State v. Keene*, 2017-Ohio-7058, 95 N.E.3d 597, ¶ 18 (4th Dist. 2017). Here, there is no disagreement about the fact that Tolle did not subjectively understand that his guilty plea waived his right to appeal nearly all of the decisions of the court, including the denial of his motion to suppress, because he was directly informed to the contrary by the trial court and neither the prosecutor or defense counsel corrected the misinformation that was provided to him. In reaching this conclusion, we are mindful of the fact that informing a defendant that a guilty plea waives his or her right to argue a suppression motion on appeal is not one of the matters a trial court is obligated to address under Crim.R. 11(C). *See State v. Jordan, supra*, at ¶ 13. However, although the trial court may not be required to inform a defendant that a guilty plea results in a limited right of appeal, we conclude that if the trial court chooses to inform a defendant of his or her right of appeal after entering a guilty plea and incorrectly informs a defendant that he or she retains a full right of appeal, there is resulting prejudice. Thus, based upon the totality of the circumstances, we cannot conclude that there was substantial compliance here. Further, with respect to the second question, we must conclude that the trial court completely failed to comply with its duty to inform Tolle regarding the effect of his plea to the extent it incorrectly advised him that he retained a full right of appeal despite entering a guilty plea. Left with no other option, post-*Dangler*, than categorizing this scenario as a

“complete failure to comply,” Tolle was exempted from the requirement to plead or prove prejudice.

Conclusion

{¶25} In light of the foregoing, we conclude that the disposition of this matter is controlled by our prior precedent as set forth in *State v. Lask* and *State v. Buggs, supra*, as well as what we conclude is binding precedent contained in *State v. Engle, supra*. More specifically, in *Lask, Buggs* and *Engle*, pleas were invalidated in situations where defendants were wrongly advised regarding a guilty plea’s effect on their rights of appeal, without any express discussion regarding the existence of prejudice or lack thereof. As set forth above, in our view, prejudice is apparent on the face of the record in these circumstances. Alternatively, because we have concluded that the trial court’s misrepresentation regarding Tolle’s right of appeal did not constitute substantial compliance with the rule and instead constituted a complete failure to comply with Crim.R. 11(C)(1)(b), Tolle was not required to allege or prove prejudice. Accordingly, the judgment of the trial court is reversed and this matter is remanded to the trial court with instructions that Tolle be given the opportunity to withdraw his guilty plea.

JUDGMENT REVERSED AND CAUSE REMANDED.

Wilkin, J., dissenting

{¶26} The majority in vacating Tolle’s guilty plea considers the trial court’s mis-notification that he retains the right to appeal all its prior decisions on the same level as a constitutional notification that a trial court must strictly comply with. The law is well-established in that “[w]hen a criminal defendant seeks to have his conviction reversed on appeal, the traditional rule is that he must establish that an error occurred in the trial-court proceedings and that he was prejudiced by that error.” *State v. Dangler*, 162 Ohio St.3d 1, 2020-Ohio-2765, 164 N.E.3d 286, ¶ 13. The only two carved exceptions to the prejudice requirement with regard to errors committed during a guilty plea colloquy, strict compliance and complete failure to comply, do not apply here. Accordingly, Tolle is not absolved of his burden to demonstrate he was prejudiced by the trial court’s inaccurate notification. Because Tolle failed to establish, let alone claim he was prejudiced by the trial court’s incorrect statement relating to his right to appeal its prior rulings, I would affirm his convictions. I, therefore, respectfully dissent.

{¶27} When a defendant pleads guilty, the trial court is required to comply with the notifications as set forth in Crim.R. 11(C) to ensure the plea is entered knowingly, intelligently, and voluntarily. *See State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 7, 8. For the provisions which relate to a defendant’s constitutional rights that he waives by pleading guilty, the trial court

must strictly comply with those notifications. *Id.* at syllabus; Crim.R. 11(C)(2).

Failure to strictly comply with the constitutional notifications mandates automatic reversal of the plea without requiring the defendant to demonstrate prejudice:

We have made a limited exception to the prejudice component of that rule in the criminal-plea context. When a trial court fails to explain the constitutional rights that a defendant waives by pleading guilty or no contest, we presume that the plea was entered involuntarily and unknowingly, and no showing of prejudice is required. We have identified these constitutional rights as those set forth in Crim.R. 11(C)(2)(c): the right to a jury trial, the right to confront one's accusers, the privilege against self-incrimination, the right to compulsory process to obtain witnesses, and the right to require the state to prove guilt beyond a reasonable doubt. (Citation omitted.)

Dangler at ¶ 14.

{¶28} The matter at bar does not involve any of the constitutional notifications, yet the majority presumes prejudice simply because an error occurred: “it appears that the prejudice caused by a trial court’s error in informing a defendant that he or she retains the right to appeal all decisions of the court when entering a guilty plea is apparent on the face of the record and must not be specifically alleged or demonstrated by a defendant.” Majority opinion, ¶ 22. I agree that the trial court erred when it notified Tolle he still retained “the right to appeal any and all decisions of this court in your case” even after pleading guilty. (Plea hearing, T.p. 28) *See State v. Beasley*, 152 Ohio St.3d 470, 2018-Ohio-16,

97 N.E.3d 474, ¶ 15 (A valid guilty plea “generally waives the right to appeal all prior nonjurisdictional defects, including the denial of a motion to suppress.”). But this error involves a non-constitutional notification, thus, the strict compliance exception does not apply and Tolle is required to demonstrate prejudice before his plea could be vacated.

{¶29} Similarly, the complete failure to comply exception to the prejudice component does not apply here. In *Dangler*, the Supreme Court explained that “a trial court’s *complete* failure to comply with a portion of Crim.R. 11(C) eliminates the defendant’s burden to show prejudice.” (Emphasis sic.) *Dangler*, 162 Ohio St.3d 1, 2020-Ohio-2765, 164 N.E.3d 286, ¶ 15. This exception is inapplicable first because a “complete failure” is defined as an omission and not an inaccurate or incomplete notification. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 22. Second, as the majority acknowledges, “[t]he fact that a guilty plea waives a defendant’s right to argue a suppression motion on appeal is not one of the matters a trial court is obligated to address under Crim.R. 11(C).” *State v. Jordan*, 2d Dist. Clark No. 2020-CA-62, 2021-Ohio-2332, ¶ 13, citing *State v. Hatton*, 2d Dist. Montgomery No. 21153, 2006-Ohio-2670, ¶ 6; Majority opinion, ¶ 24. Accordingly, because the trial court’s notification that Tolle retained the right to appeal all its prior decisions even after pleading guilty is an incorrect non-constitutional, non-required Crim.R. 11(C)(2) notification, Tolle is

required to demonstrate he was prejudiced by this error. *See Dangler* at ¶ 16, citing *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990) (“a defendant is not entitled to have his plea vacated unless he demonstrates he was prejudiced by a failure of the trial court to comply with the provisions of Crim.R. 11(C).”)

{¶30} “The test for prejudice is ‘whether the plea would have otherwise been made.’” *Id.*, quoting *Nero* at 108. Tolle has not demonstrated prejudice in this case. During the plea colloquy, Tolle did not indicate that he intends to appeal any of the trial court’s prior rulings, but more importantly, he fails to claim in his appellate briefing that he would not have otherwise pleaded guilty but for the trial court’s incorrect notification.

{¶31} The majority deviates from the traditional rule requiring Tolle to demonstrate prejudice without providing a legal basis, and, in support of its conclusion to vacate his plea, simply applies the holding from several cases without noting key procedural distinctions. Majority opinion, ¶ 18, 19, 22. Two of the cases are previous decisions from this court: *State v. Lask*, 4th Dist. Adams No. 18CA1081, 2019-Ohio-2753; and *State v. Buggs*, 4th Dist. Scioto No. 20CA3913, 2021-Ohio-39. In both cases the defendant demonstrated prejudice. In *Lask*, the record established Lask’s intention to appeal when defense counsel stated: “it’s my understanding that when pleading guilty the defendant will waive his right to appeal a motion to suppress ruling unless it’s specifically stated on the record or in

the paper work that he reserves that right, and that is why it was brought up.” *Lask* at ¶ 4. Similarly, Buggs asserted in his appellate brief: “but for the trial court’s incorrect statements of law concerning his appellate rights, [he] would not have entered a guilty plea in this matter.” *Buggs* at ¶ 6. Again, there is nothing in the record of this case that Tolle informed the trial court of his intent to appeal or an assertion in his appellate briefing that he would not have otherwise pleaded guilty but for the trial court’s inaccurate notification that he retained the right to appeal its prior decisions.

{¶32} The majority also relies on the Supreme Court’s decision in *State v. Engle* that vacated Engle’s plea without addressing the procedural background of the case. Majority opinion, ¶ 19; *Engle* 74 Ohio St.3d 525, 660 N.E.2d 450 (1996). Engle pleaded no contest and the record demonstrated her intent to appeal where “the prosecutor, in explaining the plea bargain to the court, made no fewer than six references to an appeal by the defendant in a colloquy that covers only seven sentences in the trial transcript.” *Engle* at 527.

{¶33} There are no cases that support the majority’s position that any error in advising a defendant of his right to appeal during a guilty plea colloquy mandates automatic reversal. To the contrary, a recent Seventh District Court of Appeals case addressing a similar issue reiterated the traditional rule that:

a defendant who challenges his guilty plea on the basis that the advisement for the non-constitutional rights did not substantially comply with Crim.R. 11(C)(2)(a)(b) must also show a prejudicial effect, meaning the plea would not have been otherwise entered.

* * *

“The failure to inform a defendant that a guilty plea waives certain rights on appeal is not one of the specifically enumerated rights the trial court is required to discuss during the Crim. R. 11 colloquy.” *State v. Reynolds*, 12th Dist. Madison No. CA2018-02-005, 2018-Ohio-4942, ¶ 12. Prior to accepting a guilty plea, a trial court need not inform a defendant that he is waiving the right to appeal the overruling of a motion to suppress. *State v. Jones*, 1st Dist. Hamilton No. C-050833, 2006-Ohio-4284, ¶ 8.

State v. Hackathorn, 7th Dist. Belmont No. 21 BE 0013, 2022-Ohio-1612, ¶ 12.

{¶34} In *Hackathorn*, at the change of plea hearing in which the defendant pleaded guilty, the trial court misadvised him that he would retain the right to appeal its prior decisions, which included the denial of his motion to suppress. *Id.* at ¶ 8, 16. The Seventh District overruled the assignment of error that *Hackathorn*’s plea was not knowingly, intelligently and voluntarily entered and held

While the court told appellant he had the right to appeal, it did not break down his right to explain that defendant could appeal his plea and sentence but could not appeal the ruling on the motion to suppress. But the court was not required to discuss with appellant what he would and would not be able to appeal based on his guilty plea.

Accordingly, appellant’s second assignment of error is without merit and is overruled.

Id. at ¶ 18, 19.

{¶35} As recent as June 9, 2022, this court sustained a defendant’s assignment of error finding his trial counsel was ineffective for advising him to plead guilty as opposed to a no contest plea with the key finding that the defendant intended to appeal the denial of his motion to suppress. *State v. Sloan*, 4th Dist. Lawrence No. 20CA6, 2022-Ohio-1930. In *Sloan*, the trial court misadvised the defendant that he has the right to appeal its prior decisions. *Id.* at ¶ 12. Sloan’s counsel interjected and informed the trial court “I’ve already talked to my client, we would wish to uh, even though this is a negotiated plea, uh, we do wish to pursue some appellate issues.” *Id.* But a valid guilty plea “generally waives the right to appeal all prior nonjurisdictional defects, including the denial of a motion to suppress.” *State v. Beasley*, 152 Ohio St.3d 470, 2018-Ohio-16, 97 N.E.3d 474, ¶ 15. This court found in favor of Sloan and held that his plea was not knowingly and intelligently entered. *Sloan* at ¶ 12. In reaching this conclusion, a key holding was that Sloan demonstrated prejudice because the record established Sloan’s “desire to appeal the trial court’s denial of his suppression motion.” *Id.*

{¶36} Another recent case to mention is *State v. West*, in which the Second District Court of Appeals addressed whether the defendant’s plea was valid when the trial court misadvised him that he was subject to Tier II designation by pleading guilty to illegal use of a minor in nudity oriented material, when in fact he was subject to the less severe Tier I sex offender classification. 2d Dist.

Montgomery No. 29251, 2022-Ohio-1611, ¶ 19. The Second District overruled the assignment of error first finding that the record did “not reflect a *complete* failure to comply with Crim.R. 11(C)(2)(a)[,]” since West acknowledged in the hearing he was subject to the most severe Tier III registration requirement based on another offense and that he had to register “every 90 days for life.” (Emphasis sic.) *Id.* The court also rejected West’s argument because it could not “conclude that West has shown prejudice; he has failed to even argue that he would not have entered his plea to illegal use of a minor in nudity oriented material if had he been advised that he was in fact subject to the less onerous Tier I designation for that count.” *Id.* at ¶ 20. The Second District thus affirmed West’s convictions. *Id.* at ¶ 22.

{¶37} Sexual offender classification is a required notification pursuant to Crim.R. 11(C)(2) as part of the “maximum penalty involved.” *See State v. Baker*, 8th Dist. Cuyahoga No. 108301, 2020-Ohio-107, ¶ 17. With that in mind, the Second District still required West to demonstrate he was prejudiced. *West* at ¶ 20.

{¶38} What we have here, however, is a notification that is not even required pursuant to Crim.R. 11(C)(2). *See State v. Jordan*, 2d Dist. Clark No. 2020-CA-62, 2021-Ohio-2332, ¶ 13 (A trial court is not required pursuant to Crim.R. 11(C) to notify a defendant that by pleading guilty he waives the right to appeal its prior decisions.) Therefore, if a trial court during the plea colloquy misadvises a defendant that even if he pleads guilty he retains the right to appeal its

prior decisions, the plea should not be vacated unless the defendant demonstrates prejudice. Because the majority holds otherwise and is vacating Tolle's guilty plea without requiring him to establish he was prejudiced, I respectfully dissent.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND CAUSE REMANDED and costs be assessed to Appellee.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hess, J. concurs in Judgment and Opinion.

Wilkin, J., dissents with Dissenting Opinion.

For the Court,

Jason P. Smith
Presiding Judge

NOTICE TO CLERK

The clerk shall serve a copy of this order on all counsel of record and unrepresented parties at their last known addresses by ordinary mail. IT IS SO ORDERED.