[Cite as *State v. Dye*, 2025-Ohio-1973.]

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

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Case No. 24CA2
	:	
v.	:	
	:	DECISION AND
John Thomas Dye, Jr.,	:	JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	

APPEARANCES:

Christopher Pagan, Middletown, Ohio, for Appellant.

Keller Blackburn, Athens County Prosecutor, and Merry M. Saunders, Assistant Athens County Prosecutor, Athens, Ohio, for Appellee.

Smith, P.J.

{¶1} Appellant, John Dye, appeals the judgment of the Athens County Court of Common Pleas convicting him of one count of possession of a fentanyl-related compound, a fifth-degree felony in violation of R.C. 2925.11(A), one count of complicity to commit the offense of corrupting another with drugs, a third-degree felony in violation of R.C. 2923.03(A)(2) and 2925.02(A)(3), and one count of aggravated possession of drugs, a fifth-degree felony in violation of R.C. 2925.11(A).

FACTS AND PROCEDURAL HISTORY

{¶2} Appellant was initially indicted on June 21, 2023 in case number 23CR0252 in the Athens County Court of Common Pleas on one count of possession of a fentanyl-related compound, a fifth-degree felony in violation of R.C. 2925.11(A). Appellant was later indicted on July 10, 2023 in case number 23CR0271 in the Athens County Court of Common Pleas for one count of corrupting another with drugs, a second-degree felony in violation of R.C. 2925.02(A)(3), and one count of aggravated possession of drugs, a fifth-degree felony in violation of R.C. 2925.11(A). The cases were consolidated below and were handled together.

{¶3} Appellant initially pled not guilty to the charges but thereafter entered into plea negotiations with the State. The plea agreement called for the State to amend the corrupting another with drugs charge to a charge of complicity to corrupt another with drugs, a third-degree felony in violation of R.C. 2923.03(A)(2), and to jointly recommend a prison term of 12 months in exchange for Appellant's agreement to plead guilty to the amended charge, as well as the other two charges. Appellant and the State executed a written plea agreement and thereafter a combined change-of-plea and sentencing hearing was held on December 13, 2023.

{¶4} The trial court accepted Appellant's guilty pleas after engaging in a Crim.R. 11(C) colloquy with Appellant. It then sentenced Appellant to a 12-month prison term on the possession of a fentanyl-related compound charge, a 12-month prison term on the aggravated possession of drugs charge, and a 36-month prison term on the complicity to corrupting another with drugs charge. The trial court ordered that the prison terms be served concurrently. Appellant now brings his timely appeal, setting forth a single assignment of error.

ASSIGNMENT OF ERROR

I. THE TRIAL COURT VIOLATED DUE PROCESS BY ACCEPTING DYE'S GUILTY PLEA AND PLEA AGREEMENT BUT IMPOSING A LONGER PRISON TERM THAN PROVIDED IN THE PARTIES' PLEA AGREEMENT.

{¶5} In his sole assignment of error, Appellant contends that the trial court violated his right to due process when it accepted his guilty plea and plea agreement, but imposed a longer prison term than provided in the parties' plea agreement. Appellant argues that the trial court failed to forewarn him that it was not bound by the agreement reached between the parties regarding sentencing before it accepted his guilty plea. He further claims that because of this violation of his due process rights, he "could not knowingly enter a plea that waived his trial rights without information that the trial court could impose a longer prison term, and render futile his waived trial rights, than was provided in the parties'

agreement." The State responds by arguing that the trial court complied with Crim.R. 11 in accepting Appellant's guilty pleas and did not violate due process by not sentencing him in accordance with the "proposed joint recommendation."

Standard of Review

{¶6} Appellant argues that the trial court erred and violated his right to due process by imposing a harsher sentence than the one jointly recommended by himself and the State and that because of this violation, he "could not knowingly enter a plea that waived his trial rights." 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.

{¶7} "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. Tolle*, 2022-Ohio-2839, ¶ 9 (4th Dist.), quoting *State v. Ballard*, 66 Ohio St.2d 473 (1981), paragraph one of the syllabus. *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.' " *Tolle* at ¶ 9, quoting *State v. Montgomery*, 2016-Ohio-5487, ¶ 41.

{¶8} 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). *Tolle, supra*, at ¶ 10; *State v. Veney*, 2008-Ohio-5200, ¶ 18. 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). *Tolle* at ¶ 11; *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*, 2008-Ohio-4913, ¶ 9 (4th Dist.), quoting *State v. Puckett*, 2005-Ohio-1640, ¶ 10 (4th Dist.), citing *State v. Stewart*, 51 Ohio St.2d 86 (1977); *State v. Carter*, 60 Ohio St.2d 34 (1979).

{¶9} As this Court observed in *Tolle, supra*, the *Veney* 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.

See Tolle, at ¶ 12.

" '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." ' " *Tolle*, at ¶ 13; quoting *Montgomery* at ¶ 40, in turn quoting *Boykin v. Alabama*, 395 U.S. 238, 244 (1969); *State v. Conley*, 2019-Ohio-4172, ¶ 34 (4th Dist.).

{¶10} When an appellate court evaluates whether a defendant knowingly, intelligently, and voluntarily entered a guilty plea, the court must independently review the record to ensure that the trial court complied with the Crim.R. 11 constitutional and procedural safeguards. *See Tolle*, at ¶ 14; *State v. Leonhart*, 2014-Ohio-5601, ¶ 36 (4th Dist.); *State v. Eckler*, 2009-Ohio-7064, ¶ 48 (4th Dist.); *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 (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, ¶ 13 (4th Dist.), citing *State v. Smith*, 2013-Ohio-232, ¶ 10 (4th Dist.).

{¶11} "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.' " *Tolle* at ¶ 15, quoting *Ballard, supra*, at 479-480. As set forth above, although literal compliance with Crim.R. 11(C) is preferred, it is not required. *See State v. Clark*, 2008-Ohio-3748, ¶ 29, citing *State v. Griggs*, 2004-Ohio-4415, ¶ 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.

{¶12} 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 Tolle* at ¶ 16; *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, (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*, 2008-Ohio-509, ¶ 22.

Legal Analysis

{¶13} As set forth above, the present case involves a trial court's imposition of a sentence that exceeded the sentence that was agreed upon by the parties, an agreement which was memorialized in the parties' plea agreement and also discussed by both defense counsel and the State on the record during the plea hearing. We initially note that generally, "a 'trial court is not bound by a [sentencing] recommendation.' " *State v. Howard*, 2017-Ohio-9392, ¶ 58 (4th Dist.), quoting *State v. Bailey*, 2005-Ohio-5329, ¶ 15 (5th Dist). We explained in *Howard* that " ' "[a] trial court does not err by imposing a sentence greater than 'that forming the inducement for the defendant to plead guilty when the trial court forewarns the defendant of the applicable penalties, including the possibility of imposing a greater sentence than that recommended by the prosecutor.' " ' " *Howard* at ¶ 58, quoting *State ex rel. Duran v. Kelsey*, 2005-Ohio-3674, ¶ 6,

quoting *State v. Buchanan*, 2003-Ohio-4772, ¶ 13 (5th Dist.), in turn quoting *State v. Pettiford*, 2002 WL 652371, *3 (12th Dist. Apr. 22, 2002).

{¶14} This Court recently considered similar arguments in both *State v. Harp*, 2024-Ohio-2120 (4th Dist.), and *State v. Darrington*, 2024-Ohio-2299 (4th Dist.). In *Harp*, we found that the trial court did not unequivocally agree to impose the jointly-recommended sentence, but instead that it warned Harp multiple times that "imposition of the agreed-upon nine-month prison term was contingent on Harp obeying the law." *Harp* at ¶ 25.[1] Therefore we found, based upon the totality of the circumstances, that Harp failed to prove that his plea was not knowing, intelligent, and voluntary and that the trial court did not err in its imposition of a sentence that exceeded the jointly-recommended sentence. *Id.* at ¶ 30. *Darrington* also involved the trial court's imposition of a sentence that exceeded a jointly-recommended sentence. *Darrington* at ¶ 3, 7. Again, we found, based upon the totality of the circumstances, that because the trial court forewarned Darrington during the plea hearing that it was not bound by the joint-sentencing recommendation, that the trial court did not err in imposing a harsher sentence. *Id.* at ¶ 26-27.

[1] In *Harp*, the trial court accepted the guilty plea and then set the sentencing hearing for a later date, warning Harp on the record that any legal infractions between the plea and sentencing hearings would void the agreement between Harp and the State regarding sentencing. *Harp* at ¶ 4.

{¶15} In *Harp*, after conducting an extensive review of relevant case law on the subject of trial courts imposing harsher sentences than those agreed upon between defendants and the State, we summarized as follows:

> Thus, we read the above cases together to mean that if it is determined that a trial court accepted a jointly recommended sentence and unequivocally agreed to impose it, and then imposes a harsher sentence than that agreed upon without warning a defendant that it might vary from the agreement if certain conditions are not met, then reversible error occurs which necessitates either remand for resentencing in accordance with the terms of the original plea agreement, or to allow the defendant to withdraw his guilty plea. However, no reversible error occurs when it is determined that a trial court sufficiently warned a defendant that a harsher sentence may be imposed than the one agreed upon if certain conditions are not met, or if certain conduct occurs, between the plea and sentencing hearings.

Harp at ¶ 24.

{¶16} Both *Harp* and *Darrington* involved arguments that jointly-recommended sentences had been accepted by the trial court and as such, had become agreed sentences which the trial court was bound to impose. However, we essentially found that they were simply jointly-recommended sentences that were not unequivocally agreed to by the trial court, resulting in the trial court not being bound to impose them because it had provided the required forewarning. Here, Appellant argues that the terms "recommended," "agreed," "stipulated," and "promise" were all used to describe what we now determine was, in fact, a jointly-recommended sentence that was reached between Appellant and the State.

{¶17} Appellant seems to suggest that because these terms were at times used interchangeably, that he was unclear as to the nature of the agreement, or that he subjectively believed that a 12-month sentence was "agreed" and therefore the trial court was required to impose it. However, the record before us contradicts this assertion. Further, in our view, the question in this case is not whether Dye was forewarned, but rather the questions are whether the trial court must personally forewarn a defendant that it is not bound to follow a joint-sentencing recommendation and if not, what constitutes an adequate forewarning.

{¶18} Turning to the record before us, we note that Appellant's written plea agreement contained the following statement in bold lettering: "I understand that the State's recommended sentence in this Agreement is not binding on the Court." Appellant and his counsel both signed this form. The signing of this form is what led to the change of plea hearing, where Appellant was represented by counsel who "ask[ed]" the court to "go along with [the] recommendation" and stated that he would reserve his arguments for sentencing. This was after the State informed the court that there was a "joint recommendation" for a 12-month prison term, but that the victim's mother wanted to make a statement and was not in agreement with the "resolution."

{¶19} In engaging Appellant in a Crim.R. 11 compliant colloquy, the trial court asked Appellant if he had been offered anything in exchange for his plea, to

which he responded "No your honor."[2] The trial court then informed Appellant of the maximum penalty he was facing for each offense, including a 36-month prison term on the complicity charge. Appellant stated he understood. The trial court further stated as follows:

> Uh, let me make, just to make clear you understand all the possible ramifications. This is not the agreed sentence that is being proposed today and I certainly make no representation whatsoever that this is the likely outcome but statutorily these offenses would be eligible for a term of community control of up to five years. Do you understand that?

Appellant voiced his understanding. The trial court then accepted Appellant's guilty pleas and immediately proceeded to sentencing.

{¶20} At the start of the sentencing hearing, defense counsel stated "we would ask the court again to go along with the joint recommendation of one year." Although the statement was technically made during the sentencing portion of the combined hearing, it makes reference to the defense's position during the plea hearing and it supports the State's argument that both Appellant and his counsel understood that a 12-month sentence, while jointly-recommended, was ultimately up to the trial court.

{¶21} In response to Appellant's arguments that he was not forewarned that the trial court was not bound to impose the jointly-recommended sentence, the

[2] Appellant does not argue that the trial court failed to comply with Crim.R. 11 in accepting his guilty pleas.

State directs our attention to the language contained in the written plea form putting Appellant on notice that the trial court was not bound by the agreement. Appellant responds, in turn, by arguing that "[t]he trial court must forewarn – not the prosecutor on papers[,]" claiming that "[t]he trial court must itself forewarn the defendant." Appellant further argues that "[n]o court has held that forewarning in a written agreement suffices to eliminate the trial court's own duty to forewarn the defendant on the record – and the State cites none."

{¶22} It is true that the trial court did not expressly inform Appellant during the change of plea hearing that it was not bound by the sentencing recommendation; however, it is also clear that the trial court never accepted the joint-sentencing recommendation. Further, the hearing transcript indicates that at all times, both the State and defense counsel described the agreement as being a "recommendation." As set forth above, defense counsel was "asking" the trial court to go along with the "recommendation."

{¶23} Based upon fact patterns similar to this, this Court and other courts have held that statements of counsel during plea hearings can be considered in determining whether an appellant subjectively understood that the trial court was not bound by a joint sentencing recommendation. *See State v. Clark*, 2002-Ohio-6684, ¶ 13 (4th Dist.) ("We agree that statements of counsel on the record may demonstrate a defendant's subjective understanding that a recommended sentence

is not binding upon the court"); *State v. Hough*, 2011-Ohio-6425, ¶ 30 (7th Dist.) (noting the court's own prior rejection of an argument that a plea was unknowing due to the trial court's failure to inform the defendant that it was not bound by the recommended sentence, in part due to the fact that during the plea hearing, defense counsel was " 'asking' the Court for imposition of the community control sanctions as 'recommended' by the prosecutor," which, in the court's view, demonstrated that appellant subjectively understood that the trial court was not bound by the jointly-recommended sentence), quoting *Youngstown v. Cohen*, 2008-Ohio-1191, ¶ 68 (7th Dist.) (observing that the Fourth District Court of Appeals has acknowledged " 'that statements of counsel on the record may demonstrate a defendant's subjective understanding that a recommended sentence is not binding upon the court' ").[3] We find this non-binding reasoning to be persuasive and sound.

{¶24} Moreover, and contrary to Appellant's assertions, there is a line of cases out of the Seventh District Court of Appeals that holds that defendants may be effectively forewarned, through a written plea agreement form, that trial courts are not bound by sentencing recommendations. *See State v. Hough, supra*, at ¶ 32-33 (holding that "Hough's no contest plea was knowing, voluntary and intelligent,

[3] In *Clark*, we ultimately found that because the statements of counsel were only made during the sentencing hearing that Clark may not have understood the trial court was not bound by the sentencing recommendation. *Clark* at ¶ 13-14. Here, however, statements were made not only during the sentencing hearing, but also during the plea hearing itself, prior to Appellant entering his guilty pleas.

notwithstanding the court's failure to inform her during the plea hearing that it was not bound by the sentencing recommendation[,]" where the written plea agreement signed by both Hough and her counsel stated that the court could accept or reject the sentencing recommendation"); *Youngstown v. Cohen, supra*, at ¶ 69 (upholding a guilty plea where the plea form stated the trial court was free to accept or reject the sentencing recommendation, noting the court's prior holding that "[o]ral ambiguities in the oral colloquy can be reconciled in some cases by a written acknowledgment of the plea and waiver of trial rights"), citing *State v. Green*, 2004-Ohio-6371, ¶ 15 (7th Dist.) (holding that although "[o]ral ambiguities in the oral colloquy can be reconciled in some cases by a written acknowledgment of the plea and waiver of trial rights[,]" with respect to informing a defendant of the waiver of his right to compulsory process, a writing cannot substitute for an oral exchange when it is wholly omitted).[4] We likewise find this reasoning to be persuasive and applicable to the present case.

{¶25} Further, in *State v. Harp*, *supra*, this Court observed as follows:

> "Due process concerns are implicated in 'whether the accused was put on notice that the trial court might deviate from the recommended sentence or other terms of the agreement before the accused entered his plea and whether the accused was given

[4] As stated, Appellant does not argue that the trial court failed to comply with the Crim.R. 11 required notifications in accepting his plea and thus, the underlying facts in *State v. Green* differ somewhat from the facts presently before us. Nevertheless, we find the reasoning regarding the reconciliation of oral ambiguities by reference to written acknowledgements to be applicable to the present case, which involves notifications which do not strictly fall within the penumbra of the Crim.R. 11(C) notifications, but which nevertheless must be found to have been provided under the totality of the circumstances.

> an opportunity to change or to withdraw his plea when he received this notice.' [*City of Warren v. Cromley*, 11th Dist. Trumbull No. 97-T-0213, 1999 WL 76756, *3], citing Katz & Giannelli, Criminal Law, Section 44.8, at 154-155, (1996).
>
> There is no due process violation where the defendant is forewarned of the possibility that the trial court may impose a greater penalty than the one forming the inducement for the plea. *State ex rel. Duran v. Kelsey*, 106 Ohio St.3d 58, 2005-Ohio-3674, 831 N.E.2d 430, ¶ 6.
>
> '[T]he touchstone for determining constitutional fairness in plea submissions is notice.' [*State v. Elliott*, 1st Dist., 2021-Ohio-424, 168 N.E.3d 33], ¶ 18. Where the trial court does not provide adequate notice that it will not accept a stipulated plea, 'the remedy is to resentence the defendant in accordance with the recommendation or allow the defendant to withdraw his plea.' *Id*. at ¶ 19; *See* [*State v. Allgood*, 9th Dist. Lorain Nos. 90CA004903, 90CA004905 and 90CA004907, 1991 WL 116269, *3 (June 19, 1991)]."

Harp at ¶ 21, quoting *State v. Bakos*, 2023-Ohio-2827, ¶ 28-30 (11th Dist.).

{¶26} Because "[t]he touchstone for determining constitutional fairness in plea submissions is notice[,]" and because the contents of a written plea form may be used in conjunction with statements made by counsel during the plea hearing to discern whether Appellant was forewarned that the trial court was not bound to follow the joint-sentencing recommendation, we find, based upon the totality of the circumstances, that Appellant was placed on notice that the joint-sentencing recommendation of a 12-month prison term was not binding upon the trial court. We reach this holding despite the fact that the trial court failed to expressly and orally provide this notification to Appellant during the plea hearing. Having so

found, we reject the arguments raised by Appellant in his sole assignment of error. Therefore, this assignment of error is overruled. Accordingly, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens 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.

Abele, J., and Wilkin, J. concur in Judgment and Opinion.

For the Court,

_____

Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.