[Cite as *State v. Jackson*, 2023-Ohio-2480.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOE'VON JACKSON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case Nos. 22 MA 0051, 22 MA 0055

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case Nos. 2020 CR 263, 2020 CR 75 A

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Rhys B. Cartwright-Jones, 42 N. Phelps Street, Youngstown, Ohio 44503 for Defendant-Appellant and

Atty. Gina DeGenova, Mahoning County Prosecutor*, Atty. Edward A. Czopur,* Assistant Mahoning County Prosecutor*,* Mahoning County Prosecutor's Office, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503 for Plaintiff-Appellee.

Dated: July 19, 2023

Robb, J.

{¶1} Defendant-Appellant Joe'Von Jackson appeals after pleading guilty in two cases in the Mahoning County Common Pleas Court. The parties informed the trial court about a negotiated agreement, which included the prosecution's recommendation the sentence be imposed concurrently with Appellant's federal sentence. The court granted Appellant's request for more time to consider the plea after noting the court would run any sentence consecutively to the federal sentence if he were convicted after trial. Appellant contends his resulting decision to enter the plea was not voluntary. For the following reasons, Appellant's convictions are affirmed.

STATEMENT OF THE CASE

{¶2} On February 27, 2020, Appellant was indicted for improperly discharging a firearm at or into a habitation (a second-degree felony), felonious assault (a second-degree felony), and improperly handling firearms in a motor vehicle (a fourth-degree felony). A three-year firearm specification and a five-year "drive by shooting" firearm specification were attached to the first two counts.

{¶3} Appellant's bond was initially revoked after he was arrested on two separate occasions for drug possession. These arrests resulted in the second case at issue, wherein a June 23, 2020 indictment charged Appellant with possession of cocaine (on March 11, 2020) and possession of a fentanyl-related compound (on May 23, 2020). Both drug offenses were fifth-degree felonies.

{¶4} On April 4, 2022, Appellant appeared for a jury trial in the first case and for a pretrial in the second case. The court was informed of a global plea offer, whereby Appellant would plead guilty to felonious assault with a three-year firearm specification in the first case and to possession of a fentanyl-related compound in the second case. The other three charges would be dismissed as would the five-year firearm specification. As for the sentence, the state agreed to recommend four to six years for felonious assault, plus three years for the firearm specification, and a concurrent sentence of twelve months

for the fentanyl charge. The state also agreed to express no objection to the state sentence being served concurrently to his federal sentence (of eighteen months).

{¶5} Defense counsel said he negotiated the deal the prior week and shared the details with Appellant. He opined the offered agreement was in Appellants best interest, noting he spent a "considerable amount of time" that morning explaining the logic behind it to Appellant. (Tr. 3). When the court asked Appellant if he was accepting the offer, Appellant did not respond. The court thus said trial would proceed the next day and began dismissing the parties. Appellant interjected by asking for more time to consider the plea offer.

{¶6} The court granted Appellant time to think about the offer and then noted: "You either take the offer or go to trial. I will tell you if you go to trial it's not going to run concurrent with your federal time. It will run consecutive to whatever your sentence is." (Tr. 4). The court explained Appellant had until the court left the bench for the day and allowed Appellant to occupy the jury room to discuss the plea further with his attorney.

{¶7} After this recess, Appellant informed the court he was "not satisfied." When the court inquired if he wanted to go to trial the next day, Appellant responded, "I'll sign for it. I'll take the deal." (Tr. 5). Noting Appellant had not yet signed the plea agreement, defense counsel pointed out Appellant was familiar with the plea, reiterating that he explained the plea and how it relates to the two state cases and the federal sentence. Counsel also said Appellant understood how the process worked. The court asked Appellant if he wanted defense counsel to go through the agreement with him again, and Appellant answered in the affirmative.

{¶8} The court then called another recess, during which Appellant consulted with counsel again and signed the plea. Upon return from the second recess, the court conducted a Crim.R. 11 plea colloquy. In each case, the court accepted the guilty plea and imposed the recommended sentence on the charges remaining after the negotiated dismissals; as agreed, the court did not run the state sentences consecutively to the federal sentence. Appellant filed a timely notice of appeal from each of the May 2, 2022 sentencing entries (with the first case resulting in 2022 MA 0055 and the second case resulting in 2022 MA 0051). The same brief was filed in both cases.

ASSIGNMENT OF ERROR

{¶9} Appellant's sole assignment of error contends:

"A trial court errs in taking a plea, such plea being other-than-voluntary, following its indication to a defendant that if a defendant proceeded to trial, the trial court would not exercise discretion in sentencing the defendant."

{¶10} Appellant cites a portion of a Second District case stating if the trial court promises a certain sentence at a plea hearing, then the promise is an inducement to enter the plea and the plea is not voluntary unless that sentence is given. *State v. Harrison*, 2nd Dist. Montgomery No. 28526, 2020-Ohio-4154, ¶ 22. Here, the precise sentence the parties discussed while disclosing the offer to the court was the sentence later imposed by the court. Appellant then cites the next sentence in the *Harrison* case as follows: "However, a trial court generally does not improperly participate in plea negotiations as to sentencing when it does not promise a particular sentence or otherwise encourage the defendant to enter a plea in order to receive a more lenient sentence." *Id.* at ¶ 23 (finding the record did not reveal a degree of participation in the plea bargaining process akin to the coercive tactics found in the Supreme Court's *Byrd* case). Appellant contends the trial court encouraged him to take the plea to obtain a more lenient sentence (one which would run concurrently with his federal sentence).

{¶11} As the state points out, in order to avoid a situation where a defendant could later claim his defense counsel did not communicate formal plea offers to him, the court was placing the formal offer on the record as recommended in *Missouri v. Frye*, 566 U.S. 134, 145-147, 182 L.Ed.2d 379, 132 S.Ct. 1399 (2012). The state cites a case where the judge spoke about his "policy" by making the following comments: "jury comes back, they find you guilty, I think nothing of giving you the maximum"; "you have the potential to be out by the time you're 20"; "if you go to trial and a jury comes back and finds you guilty * * * you're looking at getting out when you're 50"; "just so you know, I don't think twice about the maximum consec[utive]; and "I just like to be up front and honest about it." *State v. Finroy*, 10th Dist. Franklin No. 09AP-795, 2010-Ohio-2067, ¶ 2. The Tenth District concluded the trial judge's participation did not render the plea involuntary under the totality of the record, recognizing the defendant was being notified what could happen if he were found guilty at trial. *Id.* at ¶ 5-11, citing *State v. Carmicle*, 8th Dist. Cuyahoga

No. 75001 (Nov. 4, 1999) (upholding a guilty plea where the court informed the defendant he would receive a less severe sentence under the plea than if he went to trial and was found guilty) and *Caudill v. State*, 12th Dist. Madison No. 761 (Nov. 24, 1982) (upholding a plea where the court said it "would have no hesitation or reservation in imposing the death penalty" if the jury verdict supported it).

{¶12} "Because a no-contest or guilty plea involves a waiver of constitutional rights, a defendant's decision to enter a plea must be knowing, intelligent, and voluntary." *State v. Dangler*, 162 Ohio St.3d 1, 2020-Ohio-2765, 164 N.E.3d 286, ¶ 10. "When 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." *Id.* at ¶ 13.[1] The prejudice test asks whether the defendant would otherwise have made the plea, and the defendant has the burden to demonstrate prejudice by pointing to the face of the record. *Id.* at ¶ 13, 17, 24.

{¶13} Appellant argues his "case presents a *Byrd* scenario." In considering whether a judge's conduct led a defendant to believe he could not obtain a fair trial and rendered a plea involuntary, the Ohio Supreme Court observed, the "judge's participation in the actual bargaining process presents a high potential for coercion." *State v. Byrd*, 63 Ohio St.2d 288, 292, 407 N.E.2d 1384 (1980). This type of conduct may lead a defendant to believe a trial would be "a hopeless and dangerous exercise in futility" as the judge believes he is guilty. *Id.* However, the Court made the following additional observations:

> Although this court strongly discourages judge participation in plea negotiations, we do not hold that such participation per se renders a plea invalid under the Ohio and United States Constitutions. Such participation, however, due to the judge's position in the criminal justice system presents a great potential for coerced guilty pleas and can easily compromise the impartial position a trial judge should assume.
>
> As a consequence we hold that a trial judge's participation in the plea bargaining process must be carefully scrutinized to determine if the judge's

[1] There are exceptions to the prejudice requirement for failure to strictly comply with the constitutional rights part of the colloquy or for a complete failure to comply with a non-constitutional portion of Crim.R. 11(C). *Dangler*, 162 Ohio St.3d 1 at ¶ 14-15.

> intervention affected the voluntariness of the defendant's guilty plea. Ordinarily, if the judge's active conduct could lead a defendant to believe he cannot get a fair trial because the judge thinks that a trial is a futile exercise or that the judge would be biased against him at trial, the plea should be held to be involuntary * * *.

Id. at 293-94 (and violative of the right against self-incrimination).

{¶14} In *Byrd*, a capital defendant pled guilty to a lesser degree of murder after heavy involvement of the trial judge in the plea process. After a competency hearing where it was disclosed the defendant was on methadone, the judge asked the defendant to have his parents contact the court. The defendant's mother and sister met the judge after the judge continued to seek a meeting; the meeting was arranged by a deputy, who was a friend of the family. The judge informed these individuals why he thought a trial would be futile (partly based on the low proportion of blacks who would end up on the jury) and asked the relatives to bring a plea offer to the defendant in jail and ask him to enter a plea. The defendant's family did as the judge asked; the defendant's mother begged him to plead guilty to avoid the death penalty. *Id.* at 289.

{¶15} In the cited *Byrd* case, the deputy also pressured the defendant about taking the plea. The judge then met with the defendant on the record but in chambers with the prosecutor present. The defendant's attorney was not present, and the judge advised against involving him. The judge noticed the defendant seemed "half asleep" and urged him to get off drugs. The judge told the defendant if the case went through a long trial and the jury found him guilty of aggravated murder, then the judge would decide whether to impose a life sentence or the electric chair. The judge then actively negotiated a plea with the prosecutor (fifteen to life for murder) and concluded by opining it was a good deal. The next day, the defendant appeared in court with his attorney's law partner and pled guilty under the agreement negotiated by the judge. *Id.* at 290.

{¶16} Upon considering these facts, the Supreme Court in *Byrd* found, "The undisputed evidence in the case at bar shows that the judge's conduct in all probability led appellant to believe he could not get a fair trial." *Id.* at 294. The Court therefore vacated the plea upon concluding "the trial judge's active efforts to secure appellant's plea" rendered the plea involuntary. *Id.*

{¶17} Contrary to Appellant's contention, his case is highly distinguishable from *Byrd*. Here, there were no indications of psychiatric problems or being under the influence when speaking to the court, as existed in the *Byrd* case. There was no indication of intense pressure or a coercive atmosphere. The court here did not express opinions on the futility of taking the case to trial or the evidence against Appellant. The court did not criticize jurors, and this was not a death penalty case. The court did not recruit family members or friends in law enforcement to persuade Appellant to enter a plea. The court did not negotiate with the prosecutor to formulate a plea. The offer had already been negotiated between the state and defense counsel. Moreover, defense counsel was present when the court made the comment about a consecutive federal sentence in the absence of the plea (unlike in *Byrd* where the judge spoke to the defendant without his attorney). The court did not recommend Appellant take the plea or opine it was a good deal.

{¶18} The court did mention it would impose the state sentence consecutively to a pre-existing federal sentence after a trial (in the absence of the state's recommendation under the negotiated plea). Yet, the federal sentence was only eighteen months (as opposed to being some large amount of potential consecutive time in relation to the recommended state sentence). Moreover, the trial court did not indicate a position on the length or concurrency of the *state* sentences if the case were taken to trial, which has been upheld in other cases. This situation does not even approach a *Byrd* scenario.

{¶19} Appellant had multiple pretrial hearings in the years before entering the plea. The second case resulted after he was arrested two separate times for drug possession while he was out on bond in the first case. After the offer was placed on the record before the scheduled jury trial and Appellant did not respond when asked if he wanted to take the plea, the trial court did not pressure him and instead began to adjourn the hearing, stating the trial would proceed as scheduled the next day. When Appellant interjected to seek more time, the court granted this request. In fact, he was provided two unrushed recesses to discuss the plea with his attorney after the comment by the court at issue. Thereafter, counsel opined the plea was being made voluntarily. The defendant said he was making the plea freely and voluntarily, no one forced him to change his plea, and he was not promised anything in exchange for the plea. *See* Crim.R. 11(C)(2)(a).

{¶20} Furthermore, as defense counsel pointed out below, the plea was highly favorable to Appellant. The plea resulted in the dismissal of the charges for improperly discharging a firearm at or into a habitation (a second-degree felony), improperly handling firearms in a motor vehicle (a fourth-degree felony), and possession of cocaine (a fifth-degree felony). Notably, the five-year firearm specifications were also dismissed under the plea, leaving only a three-year firearm specification. We note these three additional charges and the five-year specification would all remain in the absence of the plea agreement (and would be reactivated if the plea were to be vacated on appeal). We also note a person who is complicit is treated the same as the principal at trial. *See* R.C. 2923.03(F) (a person who is complicit can be prosecuted and punished as if he were a principal offender, even if the charge is stated in terms of the principal offense).

{¶21} In addition to the dismissals, Appellant obtained favorable sentencing recommendations. The felonious assault charge carried a maximum sentence of eight to twelve years (plus the firearm specification). Due to the plea agreement, Appellant received a recommendation of four to six years on that count. Appellant also received a concurrent sentence for fentanyl possession, which occurred while he was out on bond for the higher-degree offenses (and after the separate incident of cocaine possession). Additionally, the state sentence was run concurrently to his federal sentence, which was the only aspect of the plea mentioned by the court prior to the uncontested plea hearing. Moreover, Appellant also avoided a presentence investigation, which could have disclosed prior arrests, adjudications, or convictions to be considered by a sentencing judge. *See State v. Chavez*, 2d Dist. Montgomery No. 22892, 2009-Ohio-3758, ¶ 36 (upholding a plea where the court advised, "If you don't plead, then the Court will order [sic] presentence investigation and I will sentence you according to what I find in the investigation").

{¶22} It does not appear, based on this record, that the trial judge actively participated in the plea bargaining process. The contested statement of the judge would not "lead a defendant to believe he cannot get a fair trial because the judge thinks that a trial is a futile exercise or that the judge would be biased against him * * *." See *Byrd*, 63 Ohio St.2d at 293. We "carefully scrutinized" the contested judicial statement as instructed by *Byrd* and conclude it did not affect the voluntariness of the defendant's guilty

plea under the totality of the circumstances. There is no indication the trial court's statement about Appellant's federal sentence rendered involuntary his decision to take the plea offer negotiated by defense counsel in his two state cases. Accordingly, the plea was valid, and Appellant's sole assignment of error is overruled.

{¶23} For the foregoing reasons, Appellant's convictions are affirmed.

Waite; J., concurs.

D'Apolito, P.J., dissents with dissenting opinion.

D'Apolito, P.J., dissenting.

{¶24} While I agree that many of the egregious actions taken by the trial court in *Byrd, supra,* did not occur here, I find nonetheless that Appellant's plea was not freely and voluntarily entered. Prior to the entry of Appellant's guilty plea, the trial court plainly stated that it would, in effect, add an additional eighteen months to Appellant's sentence if he chose to exercise his constitutional right to a jury trial.

{¶25} It is axiomatic that a defendant is guaranteed the right to a trial and should never be punished for exercising that right or for refusing to enter a plea agreement. *State v. O'Dell*, 45 Ohio St.3d 140, 543 N.E.2d 1220 (1989), paragraph two of the syllabus. Any sentencing increase based on a "defendant's decision to stand on his right to put the government to its proof rather than plead guilty is improper" and violates the right to due process. *State v. Scalf*, 126 Ohio App.3d 614, 620–621, 710 N.E.2d 1206 (8th Dist.1998); see also *United States v. Stockwell*, 472 F.2d 1186, 1187–1188 (9th Cir.1973) (a sentence based on a defendant's refusal to accept a plea bargain, even if only in part, infringes upon the defendant's right to trial).

{¶26} At the hearing on the day before the scheduled trial, the state described the details of the proposed plea deal, including the state's agreement to stand silent on the determination of whether Appellant's state sentence should run consecutively with his federal sentence. Defense counsel confirmed the state's summation of the plea offer, then represented that he had spent a considerable amount of time that morning explaining the terms of the plea agreement with Appellant. Defense counsel further represented that Appellant, who defense counsel described as "young" (age 22) and having "never been to prison before [sic]," was non-communicative and clearly struggling with the decision. (4/4/22 Plea Hrg. Tr., p. 3.)

{¶27} The trial court asked the length of Appellant's federal sentence, which the state warranted was eighteen months. Then, the trial court asked Appellant, "do you want to take that plea agreement?" Appellant did not respond. Regarding Appellant's silence, defense counsel interjected, "[t]his is what I got."

{¶28} The trial court continued, "[You are] not speaking? Okay then [we will] go to trial tomorrow." (*Id.*) In response, Appellant requested additional time to consider the plea offer.

{¶29} Although the trial court granted Appellant's request for additional time to consider the deal, the trial court stated:

> [Defense counsel] has been talking to you. What else is there to think about? You either take the offer or go to trial. *I will tell you if you go to trial it's not going to run concurrent with your federal time. It will run consecutive to whatever your sentence is.*
>
> So do you want to take the offer or not? I have another hearing. You have time. [I am] willing to allow your client to go to the jury room with you and discuss it further with him.

(Emphasis added.)(*Id.* at p. 4.)

{¶30} When the hearing resumed, defense counsel represented that Appellant had once again been non-responsive in the jury room. The following colloquy occurred between the trial court and Appellant:

> THE COURT: Okay. Mr. Jackson, what's going on?
>
> APPELLANT: [I am] not satisfied –
>
> THE COURT: [You are] not satisfied? Then we go to trial tomorrow; okay? Is that what you want?
>
> APPELLANT: I take it.
>
> THE COURT: I [cannot] understand you.
>
> APPELLANT: [I will] sign for it. [I will] take the deal.

(*Id.* at p. 5.)

{¶31} The trial court asked if Appellant believed he would benefit from another discussion of the terms of the plea with his counsel. Appellant answered in the affirmative, and the trial court stood in recess in order to facilitate a second conversation between Appellant and his counsel. When the hearing resumed, Appellant entered his plea.

{¶32} In the cases cited by the majority, Ohio intermediate appellate courts recognize that a trial court's efforts to inform a defendant of the charges against him, and the possible penalties should he forego a plea deal, do not constitute an infringement of

the defendant's constitutional right to a voluntary plea. In other words, a trial court does not affect the voluntariness of a subsequent plea when it informs the defendant of his potential sentence or the trial court's *propensity* to impose consecutive, maximum sentences following jury convictions.

{¶33} For instance, in *Finroy, supra,* the trial court explained the alternative plea deals offered by the state, then cautioned Finroy, "let me just tell you what my policy is * * * [a] jury comes back, they find you guilty, I think nothing of giving you the maximum." The trial court continued, "you have the potential to be out by the time [you are] 20" by taking a plea offer, but "if you go to trial and a jury comes back and finds you guilty * * * you're looking at getting out when [you are] 50." *Id.* at ¶ 2. Then the trial court repeated, "just so you know, I [do not] think twice about the maximum consec[utive]. * * * I just like to be up front and honest about it." *Id.*

{¶34} In its analysis, the Tenth District first recognized that "the trial court's comment – that it is would not hesitate to impose maximum consecutive sentences if [Finroy] were found guilty at trial – makes our review more difficult." *Id.* at ¶ 7. Like Appellant, Finroy was young (17 years old) and had no previous experience in the adult criminal justice system.

{¶35} Based on the totality of the circumstances, the Tenth District concluded that no constitutional violation had occurred. The *Finroy* panel predicated its conclusion on the fact that the trial court addressed Appellant during plea negotiations for purposes of ensuring that he understood the consequences of accepting a plea offer or going to trial. For instance, the trial court's colloquy with Finroy began, "I need to hear from you that you understand what the [prosecution] is offering and what is at risk if you go forward with trial." At another point, the trial court noted that it wanted no "misunderstanding" about the consequences of a trial. When the trial court ended the colloquy, it indicated that it warned Finroy about the maximum consecutive sentences in order "to be up front and honest." *Id.* at ¶ 8.

{¶36} The majority attempts to contextualize the trial court's comment as part of its effort "to plac[e] the formal offer on the record," that is, "in order to avoid a situation where a defendant could later claim that his defense counsel did not communicate formal plea offers." (Majority Opinion at ¶ 11). However, the trial court did not engage in any

discussion of the charges or the potential penalties. Neither did it juxtapose the potential sentences resulting from a plea versus a jury trial.

{¶37} Instead, the trial court gave Appellant two choices – plead or go to trial, then added the assurance that any sentence imposed following a jury trial would run consecutively to Appellant's federal sentence. Unlike the statements at issue in the cases cited by the majority, the trial court's statement does not *caution* Appellant regarding his potential sentence following a jury trial. Instead, the trial court *guaranteed* that any state sentence would be imposed consecutively to his federal sentence if he exercised his constitutional right to a jury trial.

{¶38} Of equal import, the trial court's statement reveals a pre-determination of Appellant's guilt prior to the testimony of a single witness. In *Finroy*, the trial court forewarned the defendant that consecutive, maximum sentences were possible, "if" the jury found him guilty. Here, the trial court did not predicate the imposition of sentence consecutive to his federal sentence on the possibility of a guilty verdict/verdicts, but instead solely upon Appellant's decision to go to trial. The trial court made no mention of the requirement that a jury must first adjudge Appellant guilty prior to the determination of his sentence.

{¶39} Finally, the majority opines that the federal sentence was "only eighteen months (as opposed to being some large amount of potential consecutive time in relation to the recommended sentence)." I do not consider a year-and-a-half of any person's freedom to be *de minimis* regardless of the length of the recommended sentence.

{¶40} Challenges to a perceived "trial tax" are typically asserted on appeal *following* a jury trial. A sentence vindictively imposed on a defendant for exercising his constitutional right to a jury trial is contrary to law, but the Ohio Supreme Court has recognized "the more difficult question is how a defendant proves vindictiveness." *State v. Rahab*, 150 Ohio St.3d 152, 2017-Ohio-1401, 80 N.E.3d 431, ¶ 8. Here, the trial court's intent is plainly stated in the record.

{¶41} Insofar as Appellant's plea was based in part on his knowledge that his sentence would be effectively increased by eighteen months if he exercised his constitutional right to a jury trial, I find that his plea was not free and voluntary. Accordingly, I would vacate the plea and remand the matter to the trial court for further

proceedings, with instructions that the administrative judge assign the case to a different judge.

{¶42} I respectfully dissent.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.