[Cite as *State v. Tackett*, 2023-Ohio-2298.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 111998
v.	:	
FREDDIE TACKETT, JR.,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: VACATED AND REMANDED
RELEASED AND JOURNALIZED: July 6, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-21-657032-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Mallory Buelow, Assistant Prosecuting Attorney, *for appellee*.

Robert A. Dixon, *for appellant*.

MICHAEL JOHN RYAN, J.:

{¶ 1} Defendant-appellant, Freddie Tackett, Jr. (Tackett") appeals his conviction and sentence after he pleaded guilty to two counts of felonious assault. He also challenges the constitutionality of the Reagan Tokes Law. After a thorough review of the facts and the law, we vacate his guilty plea.

Background

{¶ 2} In June 2022, Tackett pleaded guilty to two counts of felonious assault, in violation of R.C. 2903.11(A)(1), with attendant three-year firearm specifications. On August 2, 2022, the trial court sentenced Tackett to five years in prison plus three years on the firearm specification for each count, running the terms and specifications consecutively for a total of 16 years in prison. On August 15, 2022, the trial court held a resentencing hearing and sentenced Tackett to 16 to 18.5 years in prison pursuant to the Reagan Tokes Act.

Assignments of Error

> I. The appellant's pleas of guilty must be vacated due to the failure of the trial court to advise the appellant of the potential maximum sentence he faced via operation of the Reagan Tokes Law, resulting in a plea that was not knowing, intelligent, and voluntary as required by due process of law and Crim.R. 11.
>
> II. The appellant's pleas of guilty must be vacated should this court determine that there was any waiver or other procedural bar on the part of the defendant which precludes consideration of this issue on appeal, then it is asserted that any such failure was the result of ineffective assistance of counsel and reversal is mandated on that ground.
>
> III. S.B. 201, (Reagan Tokes Act) is unconstitutional under the constitutions of the State of Ohio and United States as it violates Due Process, Separation of Powers and the Right to Trial by Jury.

Law and Analysis

{¶ 3} In the first assignment of error, Tackett argues that the trial court did not comply with Crim.R. 11 because the trial court failed to inform him that his maximum sentence would be determined by operation of the Reagan Tokes Law.

{¶ 4} Crim.R. 11(C)(2) provides that when accepting a guilty or no-contest plea in a felony case, the trial court must personally address the defendant and

> (a) Determin[e] 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) Inform[ ] the defendant of and determin[e] 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) Inform[ ] the defendant and determin[e] 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.

{¶ 5} Tackett does not contest that the trial court complied with Crim.R. 11(C)(2)(b) and (c); he argues that the court failed to comply with Crim.R. 11(C)(2)(a). The state posits that the trial court substantially complied with Crim.R. 11(C)(2)(a); however, as this court recently noted, "the applicable standard is no longer one of strict or substantial compliance." *State v. Stewart*, 8th Dist. Cuyahoga No. 112017, 2023-Ohio-1673, ¶ 17.

{¶ 6} In *State v. Dangler*, 162 Ohio St.3d 1, 2020-Ohio-2765, 164 N.E.3d 286, the Ohio Supreme Court addressed a trial court's compliance with Crim.R. 11(C) and the method of reviewing a trial court's plea colloquy to ensure that

a defendant's plea is knowingly and voluntarily entered.[1] The *Dangler* Court recognized that prior case law has "muddied the analysis by suggesting different tiers of compliance" with Crim.R. 11(C). In an attempt to simplify the analysis, the *Dangler* Court clarified the questions to be asked when reviewing a trial court's plea colloquy under Crim.R. 11(C):

> (1) [H]as the trial court complied with the relevant provision of the rule? (2) if the trial court has not complied fully with the rule, is the purported failure of a 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?

Id. at ¶ 17. S*ee also State v. Kauffman*, 2021-Ohio-1584, 170 N.E.3d 952 (8th Dist.); *State v. Gabbard*, 12th Dist. Butler No. CA2020-12-125, 2021-Ohio-3646.

{¶ 7} But for two exceptions, a defendant is also not entitled to have his or her plea vacated unless the defendant demonstrates he or she was prejudiced by a failure of the trial court to comply with Crim.R. 11(C)'s provisions. *Dangler* at ¶ 16. The first exception is "[w]hen a trial court fails to explain the constitutional rights [set forth in Crim.R. 11(C)(2)(c)] that a defendant waives by pleading guilty or no contest[.]" *Id.* at ¶ 14. When this occurs, "we presume that the plea was entered involuntarily and unknowingly, and no showing of prejudice is required." *Id.* The second exception occurs because of "a trial court's *complete* failure to comply with a

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[1] In *Dangler*, the court considered whether the classification, and obligations attendant to the classification of a sex offender are part of the "penalty" that the court imposes on a defendant. *Id.* at ¶ 18. The court concluded in the affirmative but found that the trial court did not completely fail to comply with Crim.R. 11(C)(2)(a)'s maximum-penalty-advisement requirement and the defendant was unable to show prejudice. *Id.* at ¶ 22, 24.

portion of Crim.R. 11(C)[.]" (Emphasis sic.) *Id.* at ¶ 15. If a trial court completely fails to comply with a portion of Crim.R. 11(C), the defendant need not show prejudice. *Id.*

{¶ 8} Tackett argues that his guilty pleas were not made knowingly, intelligently, and voluntarily because the trial court failed to mention that it would sentence Tackett pursuant to the Reagan Tokes Law or how that law would impact his maximum sentence.

{¶ 9} The Reagan Tokes Law provides that first-degree and second-degree felonies not already carrying a life sentence will be subject to indefinite sentencing. R.C. 2929.144. Under Reagan Tokes, when imposing prison terms for defendants found guilty of first- or second-degree-felony offenses, sentencing courts must impose an indefinite sentence with a stated minimum term as provided in R.C. 2929.14(A) and a calculated maximum term as provided in R.C. 2929.144. *Ohio v. Jackson*, 1st Dist. Hamilton No. C-200332, 2022-Ohio-3449, ¶ 11, citing *State v. Fikes*, 1st Dist. Hamilton No. C-200221, 2021-Ohio-2597, ¶ 8.[2]

{¶ 10} At the time of the plea, the state outlined the plea agreement it was offering Tackett, which was an offer to plead guilty to two counts of felonious assault with three-year firearm specifications. In addition, the state informed the court that

[2] The two, three-year firearm specifications Tackett pleaded guilty to are excluded from the calculation of the indefinite tail. R.C. 2929.144(B)(4).

the parties agreed that the felonious assaults were not allied offenses of similar import and that Tackett would serve mandatory prison time.

{¶ 11} At Tackett's plea hearing, the trial court addressed Tackett as follows:

> Court: * * * You [would] enter a plea to the two amended felonious assault charges. * * * [The state] would remove the one-year firearm specification from each of those but leave the three-year firearm specifications. Do you understand?
>
> Tackett: Yes, your Honor.
>
> Court: The underlying charge, felonious assault, is a felony of the second degree, punishable by a prison term of two to eight years in annual increments plus one-half of the longest imposed sentence, a potential total of up to 12 years in prison and/or a fine of up to $15,000. Do you understand?
>
> Tackett: Yes, sir.
>
> Court: The state is setting forth on the record these offenses are not allied offenses of similar import, meaning that I could run this time consecutively, that is back-to-back. Do you understand?
>
> Tackett: Yes, sir.
>
> Court: Worst case scenario for you, sir, would be that I could impose a term of eight years in prison as to each count for *then a total of 16 years*. Do you understand?
>
> Tackett: Yes, sir.

(Emphasis added.)

{¶ 12} Thus, the information the trial court relayed to Tackett was that the felonious assault convictions were punishable by a prison term of "two to eight years in annual increments plus one-half of the longest imposed sentence for a potential

total of up to 12 years in prison," but also the "worst case scenario" was that Tackett could receive a total of 16 years in prison.

{¶ 13} At Tackett's first sentencing hearing, the trial court imposed a definite sentence of 16 years in prison. The trial court held a resentencing hearing, advised Tackett of the implications of the Reagan Tokes Law, and imposed an indefinite sentence of 16 to 18.5 years in prison. The 18.5-year sentence was two and one-half years more than the court had informed Tackett he could receive if he accepted the state's plea offer.

{¶ 14} Pursuant to *Dangler*, this court must determine whether the trial court complied with Crim.R. 11(C)(2)(a). The trial court's advisement that the felonious assault counts were "punishable by a prison term of two to eight years in annual increments plus one-half of the longest imposed sentence, a potential total of up to 12 years in prison," coupled with the advisement that "worst case scenario" Tackett was facing "a total of 16 years," and did not inform Tackett that he was subject to an indefinite sentence under the Reagan Tokes Law.

{¶ 15} Next, we consider whether the trial court's failure to properly inform Tackett of his sentence under the Reagan Tokes Law was a complete failure of Crim.R. 11(C)(2)(a). At least one appellate district has considered this issue and answered in the negative.

{¶ 16} In *State v. Gabbard*, 12th Dist. Butler No. CA2020-12-125, 2021-Ohio-3646, the trial court incorrectly informed the defendant at his plea hearing

that he was facing a maximum, mandatory eight-year prison term instead of an indefinite sentence of eight to 12 years in prison under the Reagan Tokes Law.

{¶ 17} The Twelfth District Court of Appeals applied the *Dangler* test and found that the trial court failed to comply with Crim.R. 11(C)(2)(a), but the failure did not relieve the defendant from his burden of demonstrating prejudice on appeal. The *Gabbard* Curt noted that "[a] criminal sentence consists of several distinct components, including a prison sentence, a fine, postrelease control, and where applicable, certain criminal statutory registration and notification requirements." *Id.* at ¶ 20, citing *State v. Fabian*, 12th Dist. Warren No. CA2019-10-119, 2020-Ohio-3926, ¶ 20. Thus, the *Gabbard* court reasoned, although a trial court's "'total failure to inform a defendant of a distinct component of the maximum penalty during plea constitutes a complete failure to comply with Crim.R. 11(C)(2)(a), thereby requiring the vacation of the defendant's guilty or no contest plea,'" a trial court's "mention of a component of the maximum penalty" during the plea colloquy, "'albeit incomplete or perhaps inaccurate, does not constitute a complete failure to comply with Crim.R. 11(C)(2)(a).'" *Gabbard* at ¶ 17, quoting *Fabian* at *id.*[3] The *Gabbard* Court concluded that although the trial court had advised the defendant of an inaccurate maximum sentence, because the court did advise the defendant of a prison sentence,

[3] *Fabian* considered a trial court's failure to give a proper advisement regarding postrelease control obligations. The *Fabian* Court determined that the trial court's failure to make any mention of the defendant's postrelease control obligations during the plea colloquy was a complete failure of Crim.R. 11(C)(2)(a) because postrelease control is part of the maximum penalty. *Id.* at ¶ 24.

the failure was not a *complete* failure that alleviated the defendant's need to demonstrate prejudice. *Gabbard* at *id.*

{¶ 18} We are not persuaded by the Twelfth District's reasoning as it applies to this case. If we were to follow *Gabbard*, so long as the trial court informs the defendant that he or she is being sentenced to a prison term, definite or indefinite, notwithstanding that inaccuracy of the information, there cannot be a complete failure of Crim.R. 11(C)(2)(a). We decline to make such a bright line rule.

{¶ 19} ""In the absence of evidence to the contrary or anything in the record that indicates confusion, it is typically presumed that the defendant actually understood the nature of the charges against him [or her]."" *Stewart*, 8th Dist. Cuyahoga No. 112017, 2023-Ohio-1673, at ¶ 18, quoting *State v. Young*, 8th Dist. Cuyahoga No. 106843, 2018-Ohio-4892, ¶ 15, quoting *State v. Vialva*, 8th Dist. Cuyahoga No. 104199, 2017-Ohio-1279, ¶ 9. The state conceded that the court's advisement was "clunky" and "convoluted," but nonetheless argues that nothing in the record indicated that Tackett was confused about his plea. We disagree. Although Tackett may have stated to the court that he understood the plea, the information the court relayed to Tackett — that he was subject to up to 12 years in prison and that he was facing a "worst case scenario" total of 16 years in prison - was per se contradictory.

{¶ 20} Considering the above, the trial court's failure to inform Tackett that he was subject to an indefinite sentence under the Reagan Tokes Law was a complete failure of Crim.R.11(C)(2)(a).

{¶ 21} We further note that even if we were to follow *Gabbard* and find that the trial court's advisement was not a complete failure of Crim.R. 11(C)(2)(a), the court's incorrect statement of the maximum time Tackett faced prejudiced him. Again, the trial court informed Tackett during the plea hearing that he was facing a possible maximum sentence of "a total of 16 years" in prison. By operation of the Reagan Tokes Law, Tackett's maximum possible sentence was 26 years, and the trial court imposed an actual sentence of 18.5 years, two and one-half years longer than the court advised Tackett he could receive if he accepted the state's plea offer.

{¶ 22} A defendant must know the maximum penalty involved before a trial court accepts his or her guilty plea. *State v. Corbin*, 141 Ohio App.3d 381, 386-387, 751 N.E.2d 505 (8th Dist.2001), citing *State v. Wilson*, 55 Ohio App.2d 64, 379 N.E.2d 273 (1st Dist.1978) and *State v. Gibson*, 34 Ohio App.3d 146, 517 N.E.2d 990 (8th Dist.1986). When a defendant receives a sentence that exceeds what the trial court previously informed the defendant was the maximum penalty, the prejudice is apparent on its face. *State v. Drake*, 9th Dist. Medina No. 16CA0056-M, 2017-Ohio-4027, ¶ 12.

{¶ 23} By operation of law, Tackett faced an indefinite sentence of two to eight years in prison on each felonious-assault conviction plus an additional four years pursuant to the Reagan Tokes Law and an additional mandatory consecutive sentence of three years for each three-year firearm specification. Tackett pleaded guilty to two counts of felonious assault with three-year firearm specifications, thereby exposing him to a possible indefinite sentence of up to 26 years in prison:

(8 years + 8 years = 16 years) plus 50% of the minimum for the most serious offense (50% of 8 years = 4 years) plus the two three-year firearm specifications (3 years + 3 years = 6 years), for a maximum possible sentence of 26 years in prison.

{¶ 24} Although statutorily permissible, Tackett's sentence exceeds the maximum sentence the trial court advised him he could receive when he entered his plea. Therefore, we find that the sentence also prejudiced Tackett. Based upon the totality of the circumstances, we cannot conclude that Tackett subjectively understood the implications of his plea and, consequently, his plea was not made knowingly, intelligently, and voluntarily.

Conclusion

{¶ 25} In *Gabbard*, 12th Dist. Butler No. CA2020-12-125, 2021-Ohio-3646, in addition to finding that there was not a complete failure of Crim.R. 11(C)(2)(a), the court also found that the defendant did not show prejudice, in part because the defendant was sentenced to less time than the trial court told him he faced at his plea hearing. While we decline to follow the bright line rule the *Gabbard* Court appeared to draw, we also note that the facts of this case are unique because the trial court informed Tackett that he was subject to different indefinite and definite sentences, for the same convictions, during his plea colloquy. While it would be premature at this juncture to determine whether advising a defendant that he or she is subject to a definite sentence instead of an indefinite sentence under The Reagan Tokes Law is a complete failure under Crim.R. 11(C)(2)(a), we note that best practice

would mandate that a trial court faced with this situation hold a new plea hearing in compliance with Crim.R. 11(C).

{¶ 26} The first assignment of error is sustained.

{¶ 27} The second assignment of error is moot. *See* App.R. 12(A)(1)(c).

{¶ 28} Although we are vacating Tackett's plea, we briefly mention his third assigned error, in which he claims that the trial court erred when it sentenced him to an indefinite sentence under the Reagan Tokes Law because the law violates constitutional guarantees of due process, the separation-of-powers doctrine, and the right to trial by jury. He acknowledges that this court's en banc decision of *State v. Delvallie*, 2022-Ohio-470, 185 N.E.3d 536, ¶ 17-51 (8th Dist.), rejected these arguments challenging the constitutionality of the Reagan Tokes Law, thus affirming that his arguments are advanced to preserve the claim for further review. Based on the authority of *Delvallie*, we summarily overrule Tackett's challenges and his third assignment of error.

{¶ 29} Accordingly, Tackett's plea is vacated. Case remanded.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

_____
MICHAEL JOHN RYAN, JUDGE

KATHLEEN ANN KEOUGH, P.J., CONCURS;
MICHELLE J. SHEEHAN, J., DISSENTS (WITH SEPARATE OPINION)

MICHELLE J. SHEEHAN, J., DISSENTING:

{¶ 30} I respectfully dissent.

{¶ 31} This case concerns the maximum-penalty advisement involving potentially consecutive sentences in the context of Reagan Tokes sentencing. In *State v. Dangler*, 162 Ohio St.3d 1, 2020-Ohio-2765, 164 N.E.3d 286, the Supreme Court of Ohio requires a defendant to demonstrate prejudice unless the trial court (1) fails to explain the constitutional rights waived by a guilty plea, or (2) completely fails to comply with a portion of CrimR.11 (C). *Id.* at ¶ 14 and 15. Furthermore, if the court has not complied completely with the rule, the question is then: "[I]s the purported failure of a type that excuses a defendant from the burden of demonstrating prejudice?" *Id.* at ¶ 17. Having reviewed the plea colloquy, I cannot agree with the majority's holding that the trial court *completely* failed to comply with Crim.11 (C)(2)(a). The trial court's recitation of the potential maximum penalty Tackett faced, while arguably incomplete, is not the type of failure that excuses him from demonstrating prejudice pursuant to *Dangler*. And, because Tackett has not demonstrated that he suffered prejudice from the manner in which trial court

informed him of the maximum penalty, I find his guilty plea to be knowingly, intelligent, and voluntary and would affirm his conviction and sentence.

{¶ 32} Tackett was indicted for two counts of attempted murder, each with one- and-three-year firearm specifications. Under the plea agreement, Tackett was to plead to two counts of felonious assault offenses. At the plea hearing, the trial court first explained to Tackett that each attempted murder charge was accompanied by one- and-three-year firearm specifications and that the sentence for the firearm specifications would be served before the term for the underlying offense. The court then advised Tackett that, under the plea agreement, he would plead to two felonious assault offenses, each with a three-year firearm specification. As the court advised Tackett, the underlying charge of felonious assault, a second-degree felony offense, was punishable "by a prison term of two to eight years in annual increments plus one-half of the longest imposed sentence, a potential total of up to 12 years in prison."

{¶ 33} The court's advisement is accurate and complete regarding the maximum penalty Tackett faced under the Reagan Tokes Law for each of the underlying two felonious-assault charges. It is well established that the "maximum penalty" referred to in Crim.R. 11(C)(2)(a) is for the single crime for which the plea is offered. *State v. Berry*, 8th Dist. Cuyahoga No. 111453, 2023-Ohio-605. *Id.* at ¶ 9, citing *State v. Johnson*, 40 Ohio St.3d 130, 532 N.E.2d 1295 (1988). "[A] trial court properly complies with Crim.R. 11(C) by informing the defendant of the maximum sentences faced for each of the individual charged crimes." *State v.*

Poage, 8th Dist. Cuyahoga No. 110577, 2022-Ohio-467, ¶ 13. While it may be a best practice for the trial court to inform a defendant of the possibility that the individual counts may be imposed consecutively or of the maximum aggregate term if consecutive sentences *are* imposed, the trial court is not required to do so. *State v. Cobbledick*, 8th Dist. Cuyahoga No. 108959, 2020-Ohio-4744, ¶ 6 ("Under Ohio law, there is no requirement for the trial court to advise of the possibility that each individual sentence may be imposed consecutively, such that a plea can be considered as involuntary in the absence of such an advisement."); *Berry* (this court rejecting appellant's claim that the trial court failed to comply with Crim.R. 11 in not advising him of the maximum, aggregate prison term if the sentences were to be imposed consecutively). Consequently, the court here complied with Crim.R. 11(C)(2)(a) by informing Tackett of the maximum sentence he faced for each felonious assault count under the Reagan Tokes Law.

{¶ 34} The trial court, however, went beyond what is required under Crim.R. 11 and further advised Tackett that the court could order him to serve the terms for the felonious assault consecutively and, therefore, the "worst case scenario" for him would be "a term of eight years in prison as to each count for then a total of 16 years." Considered in context, the court's advisement of the aggregate maximum sentence of 16 years is evidently referring to the potential consecutive sentence that it could impose for the two felonious-assault charges and it is an accurate tatement: the potential aggregate consecutive term is 16 years (8 years + 8 years =16 years) if the court was to impose a maximum term on each of the two felonious-assault charges.

{¶ 35} As such, even if we are to consider the trial court to have incompletely advised Tackett in not *additionally* informing him that his potential aggregate consecutive term for the two felonious charges under the Reagan Tokes Law would be 20 years (8 years + 8 years +4 years= 20 years), the court's advisement is inadequate at worst and not a complete failure of Crim.R. 11(C)(2)(a) as the majority determines.

{¶ 36} In *State v. Gabbard*, 12th Dist. Butler No. CA2020-12-125, 2021-Ohio-3646, the trial court did not advise Gabbard that the maximum penalty he faced included an indefinite sentence of eight to 12 years in prison under the Reagan Tokes Law and the Twelfth District held that the trial court's failure was not the type of failure that would excuse the defendant from demonstrating prejudice on appeal pursuant to *Dangler,* 162 Ohio St.3d 1, 2020-Ohio-2765, 164 N.E.3d 286. In the present case, even if the trial court's advisement regarding the consecutive sentences is deemed inadequate, I would adopt the holding of *Gabbard* and find that Tackett would be required to demonstrate prejudice. Tackett must demonstrate that, but for the trial court's error, he would not have pleaded guilty to the charges. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 32. Furthermore, "[p]rejudice must be established on the face of the record." *Dangler* at ¶ 24.

{¶ 37} Tackett is required to show that he would not have entered the guilty plea if he had been more completely advised by the trial court regarding the total consecutive sentences under the Reagan Tokes Law. Tackett does not argue on

appeal he was actually prejudiced and nothing in the record indicates he would not have entered the plea if the trial court's advisement had been more complete. The record reflects that, before imposing the indefinite sentence, the trial court reviewed the Reagan Tokes Law and afforded both the state and Tackett's counsel the opportunity to speak on how such sentence would be imposed. Further, the trial court addressed Tackett personally to explain the Reagan Tokes law. Finally, after imposing the Reagan Tokes sentence, the trial court gave Tackett's counsel the ability to raise any issue. Following the imposition of the sentence, Tackett did not seek to vacate his plea before the trial court and present evidence regarding any purported prejudice resulting from the trial court's maximum-penalty advisement. At no time did Tackett raise the claim that he suffered prejudice due to his understanding of the maximum penalty he faced.

{¶ 38} The majority cites *State v. Drake*, 9th Dist. Medina No. 16CA0056-M, 2017-Ohio-4027, for the holding that when a defendant receives a sentence that exceeds what the trial court previously informed the defendant was the maximum penalty, the prejudice is "apparent on its face." In that case, the trial court advised the defendant the maximum sentence for his third-degree felony was 36 months when a third-degree felony actually carries a maximum sentence of 60 months, and the defendant later received a 60-month term. The Ninth District explained that the misinformation would not be prejudicial if the defendant was sentenced to less than the amount he was informed he faced, but the prejudice would be "apparent on its

face" when the defendant received a sentence exceeding the maximum penalty the defendant was advised of.

{¶ 39} In this case the court imposed five years, rather than the maximum 8 years, on each of Tackett's second-degree offenses. Even if we do not consider the fact that the trial court had fully informed him of the additional sentence *for each individual count* under the Reagan Tokes Law, Tackett was aware from the court's advisement that he faced a maximum of eight years for each individual felonious-assault charge as well as the mandatory three-year gun specification accompanying each charge, which would total 22 years ((8 years + 3 years) x 2 = 22 years). The court imposed an indefinite sentence of 16 to 18.5 years, less than that amount. Consequently, *Drake* is not applicable.

{¶ 40} For all the foregoing reasons, I dissent and would affirm the judgment of the trial court.