

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 90754**

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

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**NATHANIEL LOCKHART**

DEFENDANT-APPELLANT

**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-492245

**BEFORE:** Blackmon, J., Gallagher, P.J., and Celebrezze, J.

**RELEASED:** May 21, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Nathaniel Lockhart assigns the following errors for our review:

**“I. Defendant was denied due process of law when his plea of guilty was induced by an implied statement by the prosecutor of his silence at sentencing.”**

**“II. Defendant was denied due process of law when he was misinformed by the court concerning the fact that felonious assault was a non-probationable offense.”**

**“III. Defendant was denied due process of law when he was misinformed concerning post-release control.”**

**“IV. Defendant was denied due process of law when the court arbitrarily imposed an eight (8) year sentence without alluding to the statutory criteria for sentencing.”**

{¶2} Having reviewed the record and pertinent law, we affirm Lockhart’s sentence. The apposite facts follow.

{¶3} The Cuyahoga County Grand Jury indicted Lockhart on two counts of felonious assault on a peace officer, one count each of failure to comply with the order or signal of a police officer, drug possession, drug trafficking, domestic violence, possession of criminal tools, and on one count each of aggravated burglary, felonious assault, domestic violence, disrupting public service, kidnaping, and burglary.

{¶4} Lockhart and the State of Ohio entered into a plea agreement. The plea agreement required Lockhart to plead guilty to felonious assault on a peace officer, drug trafficking, burglary and domestic violence; consequently, the State would dismiss the remaining charges. The trial court accepted the agreement and

thereafter sentenced Lockhart to a prison term of eight years with credit for time served.

### Involuntary Plea

{¶15} In the first assigned error, Lockhart argues the State breached the plea bargain; consequently, his plea is involuntary and void.

{¶16} In determining whether a guilty plea was entered into voluntarily, intelligently, and knowingly, we look to the totality of the circumstances.<sup>1</sup> A guilty plea must be a voluntary and intelligent choice among the alternative courses of action open to the defendant.<sup>2</sup> Crim.R. 11 requires a meaningful dialogue between the court and the defendant to ensure that the defendant entered his guilty plea both knowingly and intelligently.<sup>3</sup> In *State v. Piacella*,<sup>4</sup>

{¶17} the Ohio Supreme Court held:

**“Where the record affirmatively discloses that: (1) defendant’s guilty plea was not the result of coercion, deception or intimidation; (2) counsel was present at the time of the plea; (3) counsel’s advice was competent in light of the circumstances surrounding the indictment; (4) the plea was made with the understanding of the nature of the charges; and, (5) defendant was motivated either by a desire to seek a lesser penalty or a fear**

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<sup>1</sup>*State v. Baker*, 9<sup>th</sup> Dist. No. 22293, 2005-Ohio-991, citing *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

<sup>2</sup>*State v. Sims* (May 24, 1995), 9<sup>th</sup> Dist. Nos. 16841 and 16936, at ¶3, quoting *North Carolina v. Alford* (1970), 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162.

<sup>3</sup>*State v. Engle* (1996), 74 Ohio St.3d 525, 527, 1996-Ohio-179.

<sup>4</sup>(1971), 27 Ohio St.2d 92, at syllabus.

**of the consequences of a jury trial, or both, the guilty plea has been voluntarily and intelligently made.”<sup>5</sup>**

{¶8} In this case, after detailing the plea agreement, the prosecutor made the following statement: “We would defer to the Court on sentencing; however, we would like to be heard on that issue.”<sup>6</sup> Lockhart now argues that this statement implied that the prosecutor would be silent on the issue of sentencing.

{¶9} Initially, we note that the plain reading of the prosecutor’s statement indicates that he wanted to be heard on the issue of sentencing. Nonetheless, Lockhart claims his pleas were not voluntary. However, the record indicates otherwise.

{¶10} The following exchange took place prior to Lockhart entering his pleas:

**“Mr. Canonico: \*\*\* We’d also ask the Defendant to plead guilty to Count 3, which is domestic violence, a felony of the fourth degree in this case. If those pleas are forthcoming, we would ask the Court to dismiss Count 2, dismiss Count 4, dismiss Count 5 and dismiss Count 6. We would defer to the Court on sentencing; however, we would like to be heard on that issue.**

**The Court: Is that correct, counsel?**

**Mr. Peterson: Your Honor, in 492245, that’s exactly what we discussed with the prosecutor. The Defendant understands, so the record is clear, that he’s pleading to one Felony One, which carries up to three to ten years in an Ohio state penitentiary at the discretion of the Court; a Felony Three, which is nonprobationable, a one - to five-year sentence, and a Misdemeanor One. He understands all of his rights. He understands the possible penalties, the fines involved, and what he’s pleading to. Your Honor, we spent a lot of time on this case. There’s**

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<sup>5</sup> *Piacella*, supra.

<sup>6</sup>Tr. at 5.

**been full disclosure on behalf of the State of Ohio. They provided all the information required to get a plea, and it's the Defendant's choice to enter a plea of guilty to 492245 as set out by the State. There have been no promises made to the Defendant except that you would terminate the probation in the other case number.**

**The Court: That I will do. Mr. Spadaro?**

**Mr. Spadaro: With regard to 501273, Mr. Lockhart has indicated that he's desirous of so pleading. I'm satisfied, in pleading guilty, Mr. Lockhart understands the rights he waives as well as the potential penalties.”<sup>7</sup>**

{¶11} Following the above exchange, and before accepting the pleas, the trial court questioned Lockart about his forthcoming guilty pleas, his understanding of such pleas, and the other options that were open to him. Lockhart signaled his understanding of all pertinent matters relevant to the pleas he was about to enter. In addition, when the trial court asked if anyone, including the prosecutor, the Court, or his lawyers had made any threats or promises to induce the pleas, Lockhart indicated no threats or promises were made to induce the forthcoming pleas.

{¶12} We conclude the above evidence shows that Lockhart was not coerced into entering his guilty pleas. The trial court explained the charge and possible penalties to Lockhart, informed him of his right to jury trial, his right to counsel, his right to face his accusers, his right not to testify, his right to compulsory process, and ensured that no one had threatened him or had induced him to plead guilty. The trial court maintained a dialogue with Lockhart, who was represented by separate counsel for each case, to ensure that he comprehended all that was happening.

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<sup>7</sup>Tr. at 5-6.

Therefore, we conclude that the record shows that Lockhart entered his guilty pleas both knowingly and voluntarily.

{¶13} Moreover, prior to sentencing, the prosecutor stated to the trial court that he had spoken to the victims in both cases, including the police officers, before authorizing the plea agreement. The prosecutor further stated that the State was requesting a sentence of ten years. However, the prosecutor specifically set forth the following: “\*\*\* I think our request of at least ten years in prison reflects their wishes as well, but we respect the Court’s decision whichever way it chooses to go.”<sup>8</sup>

{¶14} Thus, the prosecutor’s statement at sentencing did not conflict with his earlier statement before Lockhart entered his pleas. Both statements indicate that the prosecutor would defer to the trial court regarding the sentence. The judge then sentenced Lockhart to eight years; accordingly, we overrule the first assigned error.

### **Criminal Rule 11**

{¶15} We will address assigned errors two and three together because they both involve alleged non-compliance with Criminal Rule 11.

{¶16} The procedure for the acceptance of a guilty plea is set forth in Crim.R. 11(C).<sup>9</sup> That rule provides, in relevant part, as follows:

**“(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:**

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<sup>8</sup>Tr. at 16-17.

<sup>9</sup>*State v. Wood* (Jan. 21, 2000), 7<sup>th</sup> Dist. No. 98 CA 80.

**(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.**

**(b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.**

**(c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself.”<sup>10</sup>**

{¶17} Though strict compliance with Crim.R. 11 is preferred, as long as the trial court substantially complies with the rule, a reviewing court will deem a defendant’s plea knowingly, intelligently, and voluntarily made.<sup>11</sup> Substantial compliance means that “under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.”<sup>12</sup>

{¶18} In this assigned error, Lockhart argues that whenever a trial court misinforms or misstates the law, the misinformation error mandates a reversal.

{¶19} In this case, the trial court made the following statement:

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<sup>10</sup>Id.

<sup>11</sup>*State v. Taylor*, 4th Dist. No. 07CA29, 2008-Ohio-484, at ¶28.

<sup>12</sup>Id., quoting *State v. Nero* (1990), 56 Ohio St.3d 106, 108.



**“In Case 492245, the first count adding the name of Officer Jopek, that’s a felony of the first degree, you’ll have to go to prison on it. You’ll have to go three, four, five, six, seven, eight, nine or ten years in a state penal institution, and a possible fine not to exceed \$20,000.”<sup>13</sup>**

{¶20} The trial court suggests that Lockhart must go to jail, and one could argue that this statement fails to acknowledge that the offense is probationable. Regardless of what the trial court stated and the inference that might be drawn, Lockhart must show prejudice.<sup>14</sup> In determining prejudice, the test is whether the plea would have otherwise been made.<sup>15</sup>

{¶21} Here, despite the misinformation, the record indicates that Lockhart pled guilty after the trial court advised of the maximum penalty and advised him that he would be serving a prison sentence. The record is devoid of any indication that Lockhart would have pled differently if he had not been misinformed. Thus, the misinformation was not prejudicial to Lockhart.

{¶22} Lockhart also argues that pleas were not knowingly, intelligently, and voluntarily made because the trial court misinformed him about the length of postrelease control. We are not persuaded.

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<sup>13</sup>Tr. at 9.

<sup>14</sup>*State v. Conrad*, Cuyahoga App. No. 88934, 2007-Ohio-5717, citing *Nero*, supra, at 108.

<sup>15</sup>*Id.*

{¶23} Postrelease control constitutes a portion of the maximum penalty involved in an offense for which a prison term is imposed.<sup>16</sup> Thus, if a trial court fails during a plea colloquy to advise a defendant that the sentence will include a mandatory term of postrelease control, the defendant may dispute the knowing, intelligent, and voluntary nature of the plea, either by filing a motion to withdraw the plea or upon direct appeal.<sup>17</sup>

{¶24} In the instant matter, the record reflects that before accepting the guilty pleas, the trial court informed defendant that he would be sentenced to five years of postrelease control in the first case and three years of postrelease control in the second case. Despite the trial court's misstatement, Lockhart was fully aware of the maximum sentence and that it included a period of postrelease control. As such, the trial court substantially complied with Crim.R. 11(C).<sup>18</sup> Accordingly, we overrule the second and third assigned errors.

### **Sentencing**

{¶25} In the fourth assigned error, Lockhart argues the trial court arbitrarily imposed an eight-year prison term without alluding to the statutory factors. We disagree.

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<sup>16</sup>*State v. Crosswhite*, Cuyahoga App. No. 86345, 2006-Ohio-1081.

<sup>17</sup>*State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509.

<sup>18</sup>*State v. Jones*, Cuyahoga App. No. 89499, 2008-Ohio-802.

{¶26} In *State v. Foster*,<sup>19</sup> the Ohio Supreme Court held that judicial fact-finding to overcome a maximum sentence is unconstitutional in light of *Blakely v. Washington*.<sup>20</sup> The *Foster* court severed and excised, among other statutory provisions, R.C. 2929.14(C), because imposing maximum sentences requires judicial fact-finding.<sup>21</sup>

{¶27} “After the severance, judicial fact-finding is not required before a prison term may be imposed within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant.”<sup>22</sup> As a result, “trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings and give reasons for imposing maximum, consecutive, or more than the minimum sentence.”<sup>23</sup>

{¶28} Thus, post-*Foster*, we now apply an abuse of discretion standard in reviewing a sentence that is within the statutory range.<sup>24</sup>

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<sup>19</sup>109 Ohio St.3d 1, 2006-Ohio-856.

<sup>20</sup>(2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403.

<sup>21</sup>*Id.*, applying *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, *Blakely*, and *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435.

<sup>22</sup>*Id.* at ¶99.

<sup>23</sup>*Foster* at paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at paragraph three of the syllabus.

<sup>24</sup>*State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. See, also, *State v. Lindsay*, 5<sup>th</sup> Dist. No. 06CA0057, 2007-Ohio-2211; *State v. Parish*, 6<sup>th</sup> Dist. No. OT-07-049, 2008-Ohio-5036; *State v. Bunch*, 9<sup>th</sup> Dist. No. 06 MA 106, 2007-Ohio-7211; and, *State v. Haney*, 11<sup>th</sup> Dist. No. 2006-L-253, 2007-Ohio-3712.

{¶29} An abuse of discretion is more than an error in judgment or law; it implies attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable.<sup>25</sup> Furthermore, when applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court.<sup>26</sup>

{¶30} In *Foster*,<sup>27</sup> the Ohio Supreme Court held that R.C. 2929.11 must still be followed by trial courts when sentencing offenders. The Court held that R.C. 2929.11 does not mandate judicial fact-finding; rather, the trial court is merely to “consider” the statutory factors set forth in this section prior to sentencing.<sup>28</sup>

{¶31} R.C. 2929.11(A) provides that a trial court that sentences an offender for a felony conviction must be guided by the “overriding purposes of felony sentencing.”<sup>29</sup> Those purposes are “to protect the public from future crime by the offender and others and to punish the offender.”<sup>30</sup> R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness

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<sup>25</sup> *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

<sup>26</sup> *State v. Murray*, 11<sup>th</sup> Dist No. 2007-L-098, 2007-Ohio-6733, citing *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 1993-Ohio-122.

<sup>27</sup> 109 Ohio St.3d 1, 2006-Ohio-856.

<sup>28</sup> *Id.*

<sup>29</sup> *State v. McCarroll*, Cuyahoga App. No. 89280, 2007-Ohio-6322.

<sup>30</sup> *Id.*

of the crime and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.<sup>31</sup>

{¶32} We have previously held that judicial fact-finding is not required under R.C. 2929.11.<sup>32</sup> Thus, trial courts must merely “consider” the statutory factors before imposing sentence.<sup>33</sup> Further, a comparison of similar cases was not mandated under R.C. 2929.11(B), noting that “[e]ach case is necessarily, by its nature, different from every other case just as every person is, by nature, not the same.”<sup>34</sup>

{¶33} Here, Lockhart pleaded guilty to felonious assault of a peace officer, a first degree felony, punishable by a term of three, four, five, six, seven, eight, nine, or ten years, and the trial court sentenced him to serve eight years in prison. Lockhart also pleaded guilty to drug trafficking, a third degree felony, punishable by a mandatory period of incarceration of one, two, three, four, or five years, and the trial court sentenced him to serve one year.

{¶34} Our review of the record indicates that the trial court considered the overriding purposes of felony sentencing. Since the sentence imposed is within the statutory range for Lockhart’s conviction, the trial court followed the statutory process for felony sentencing, and the record is devoid of any evidence of inconsistency or

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<sup>31</sup>Id.

<sup>32</sup>See *State v. Georgakopoulos*, Cuyahoga App. No. 81934, 2003-Ohio-4341.

<sup>33</sup>See *Foster*.

<sup>34</sup>*State v. Wheeler*, 6<sup>th</sup> Dist. No. L-06-1125, 2007-Ohio-6375. See, also, *State v. Donahue*, 6<sup>th</sup> Dist. No. WD-03-083, 2004-Ohio-7161.

disproportionality, we find that his sentence is supported by the record and not contrary to law. Accordingly, we overrule the fourth assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

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PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., and  
FRANK D. CELEBREZZE, JR., J., CONCUR