

[Cite as *State v. Maddox* , 2018-Ohio-3056.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 106505 and 106506

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KELVON MADDOX

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeals from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-17-618705-A and CR-17-619164-A

BEFORE: Boyle, J., E.T. Gallagher, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: August 2, 2018

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Kelvon Maddox, appeals his convictions and sentence from two cases: Cuyahoga C.P. Nos. CR-17-618705 and CR-17-619164. He raises two assignments of error for our review:

1. Appellant did not enter into his guilty plea knowingly, intelligently, and voluntarily as the trial court failed to properly inform him of the maximum and correct penalties as required by [Crim.R.] 11(C)(2)(a).
2. The trial court imposed a sentence that is contrary to law when it failed to make all the factual findings necessary to sentence appellant to consecutive sentences under R.C. 2929.14.

{¶2} Finding no merit to his arguments, we affirm.

I. Procedural History and Factual Background

{¶3} In June 2017, the Cuyahoga County Grand Jury indicted Maddox on six counts in Cuyahoga C.P. No. CR-17-618705: two counts of attempted murder and four counts of felonious assault. All counts carried one- and three-year firearm specifications. The police report leading to this indictment indicates that on January 18, 2017, at around 12:45 a.m., Maddox was at a gas station on Kinsman Road in Cleveland, Ohio, when he began exchanging words with two people inside a blue SUV. Video footage from the gas station shows that Maddox pulled a handgun from his waistband and began shooting inside the vehicle. When police arrived, they found that one victim had been shot in the shoulder, which caused the bone to break, and the other victim had a cut on her head from broken glass.

{¶4} In July 2017, the Cuyahoga County Grand Jury indicted Maddox on three counts in Cuyahoga C.P. No. CR-17-619164, including one count each of attempted murder, felonious assault, and vandalism. The attempted murder and felonious assault counts carried one- and

three-year firearm specifications. The police report from this incident indicates that Maddox was at the same gas station on June 21, 2017, at around 1:45 a.m. The door to the gas station was locked, but the gas station was still open at the drive-through window. Maddox got mad that he could not go inside the station. The clerk said something to Maddox, and Maddox responded by pulling a gun out of his waistband, and placing the gun against the glass door. The clerk “was standing on the other side of the door with his head turned.” Maddox shot the gun at the victim’s head. The bullet shattered the glass door, and the victim was hit by the glass “but somehow was able to avoid the bullet.”

{¶5} The trial court held a joint plea hearing on both cases in September 2017. In Case No. CR-17-618705, Maddox pleaded guilty to felonious assault in violation of R.C. 2903.11(A)(2), a felony of the second degree, with a one-year firearm specification. In Case No. CR-17-619164, Maddox pleaded guilty to felonious assault in violation of R.C. 2903.11(A)(2), a felony of the second degree, with a three-year firearm specification. The remaining counts in both cases were dismissed.

{¶6} The trial court sentenced Maddox to seven years in prison for felonious assault in Case No. CR-17-618705, plus one year for the firearm specification, and seven years in prison for felonious assault in Case No. CR-17-619164, plus three years for the firearm specification. The trial court ordered that the firearm specifications be served prior to and consecutive to the base charges of felonious assault and to each other, and ordered the seven years on each felonious assault charge to be served consecutive to each other, for an aggregate sentence of 18 years in prison. The trial court further notified Maddox that he would be subject to a mandatory period of three years of postrelease control upon his release from prison, and it waived costs and fines. Maddox now appeals from the sentencing judgments in both cases.

II. Maximum Penalty Notification under Crim.R. 11(C)(2)(a)

{¶7} In his first assignment of error, Maddox argues that his guilty pleas were not knowingly, voluntarily, and intelligently entered into because the trial court failed to advise him of the maximum penalty he would face under Crim.R. 11(C)(2)(a).

{¶8} The standard for reviewing whether the trial court accepted a plea in compliance with Crim.R. 11(C) is *de novo*. It requires an appellate court to review the totality of the circumstances and determine whether the plea hearing was in compliance with Crim.R. 11(C). *State v. Cardwell*, 8th Dist. Cuyahoga No. 92796, 2009-Ohio-6827, ¶ 26, citing *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977).

{¶9} Crim.R. 11(C)(2)(a) provides in pertinent part that the court

shall not accept a plea of guilty or no contest without first addressing the defendant personally and * * * [d]etermining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved[.]

{¶10} The requirements of Crim.R. 11(C)(2)(a) are nonconstitutional, and thus, this court reviews “to ensure substantial compliance” with this rule. *State v. Esner*, 8th Dist. Cuyahoga No. 90740, 2008-Ohio-6654, ¶ 4. “Under this standard, a slight deviation from the text of the rule is permissible; so long as the totality of the circumstances indicates that ‘the defendant subjectively understands the implications of his plea and the rights he is waiving.’” *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 31, quoting *State v. Nero*, 56 Ohio St.3d 106, 564 N.E.2d 474 (1990).

{¶11} When the trial court does not “*substantially* comply” with Crim.R. 11(C)(2)(a), a reviewing court must then “determine whether the trial court *partially* complied or *failed* to comply with this rule.” (Emphasis sic.) *Clark* at ¶ 32. “If the trial judge partially complied,

e.g., by mentioning mandatory postrelease control without explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect.” *Id.*, citing *Nero*. As repeatedly recognized by the Ohio Supreme Court, “a defendant must show prejudice before a plea will be vacated for a trial court’s error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the colloquy are at issue.” *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 17; *see also State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12; *Nero* at 108.

{¶12} “The test for prejudicial effect is ‘whether the plea would have otherwise been made.’” *Clark* at ¶ 32, quoting *Nero*. “If the trial judge completely failed to comply with the rule * * *, the plea must be vacated.” *Id.*, citing *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224. A complete failure to comply with the rule, however, does not implicate an analysis of prejudice. *Sarkozy* at ¶ 22.

{¶13} Specifically, Maddox contends that his plea was not knowingly, voluntarily, and intelligently entered into because the trial court did not properly advise him of the consecutive nature of the firearm specifications as set forth in R.C. 2929.14(B)(1)(g), which provides:

If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies [is] * * * felonious assault * * *, and if the offender is convicted of or pleads guilty to a [firearm] specification * * * under division (B)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty[.]

{¶14} The plain language of this statute mandates that a trial court is precluded from merging firearm specifications underlying separate charges where: (1) a defendant pleads guilty to two felonies, one of which is felonious assault; and (2) the defendant also pleads guilty to firearm specifications under R.C. 2929.14(B)(1)(a) in connection with both of those felonies.

{¶15} In the instant case, Maddox pleaded guilty to two separate felonious assault charges, one of which included a one-year firearm specification under R.C. 2941.141(A) and one that included a three-year firearm specification under R.C. 2941.145(A). Both of these firearm-specification provisions are listed under R.C. 2929.14(B)(1)(a). Accordingly, R.C. 2929.14(B)(1)(g) applies, and the trial court was precluded from merging the firearm specification underlying the two felonious assault convictions.

{¶16} The following relevant exchange occurred at the plea hearing between the trial court and Maddox:

THE COURT: * * * In 618705, you'll be pleading guilty to felonious assault. The three-year firearm specification is going to be deleted, and [the victims] will be added to Count 2. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: So that's a felony of the second degree. Now, that's punishable by first serving time for the one-year gun specification. All right?

THE DEFENDANT: Yes.

THE COURT: And when you're done with that, you would serve anywhere from two to eight for the felonious assault itself. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: And do you understand you could also be fined up to \$15,000?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, in 619164 you'll be pleading guilty to Count 2 as amended, once again, but this time it's going to be pleading guilty to felonious assault plus the three-year gun specification. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: So first you'll have to serve three years and then you would get anywhere from two to eight for the felonious assault itself. Do you understand that?

THE DEFENDANT: Yes. Yes, your Honor.

THE COURT: Now, felonious assault is in violation of 2903.11(A)(2). Do you understand that?

THE DEFENDANT: Yes.

THE COURT: All right. Now, the first case you have a one-year gun specification. The second case you have a three-year gun specification.

THE DEFENDANT: Yes, your Honor.

THE COURT: They can be served together and then serve your time on the felonious assault. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Or they could be sentenced consecutively. So you would do the one year for the first case gun, three years for the second case. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: And the felonious assaults themselves can be served concurrently, which means at the same time, or consecutively, which means one after another. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. Now, do you understand that this is a non-probationable offense? In other words, you'll be sent to the penitentiary at the time of your sentencing. Do you understand that?

THE DEFENDANT: Yes, your Honor.

{¶17} After the trial court outlined the provisions of postrelease control, the state then expressed the following to the trial court:

[PROSECUTOR]: Yes, your Honor. Just that I still want to express my concern about the two gun counts being possibly ran together.

THE COURT: Okay. And you believe that possibly it would be required that they be served consecutively?

[PROSECUTOR]: I believe so, your Honor. I just had a similar case, and I'm

quoting from an Eighth District case, *State versus Murphy*, and they were citing to another Eighth District case, *Lazada*, and I have the cites for those, and that court ruled that the statute requires the trial court to impose the two most serious specifications if the defendant has been convicted of multiple felonies, at least one of which is felonious assault.

THE COURT: Thank you. Off the record.

(Thereupon, a discussion was had off the record.)

THE COURT: Back on the record. All right. Mr. Troup, I appreciate your comments. And here. This is what I'm going to say. I ask each of you to look into it a little further. I know, Mr. Troup, you just started looking into that while we were in court doing this plea. And you know, Mr. Maddox, if it should turn out that I'm wrong and they cannot be served concurrently, the gun specifications, I mean, I would allow you to withdraw your plea and we would go from there. Okay, sir?

THE DEFENDANT: Yes, your Honor.

THE COURT: If I misstate the law, it's certainly not intentionally or to mislead you in any way. But, you know, like anybody, I could be wrong. Okay?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right.

[DEFENSE COUNSEL]: Thank you, Judge.

{¶18} Based upon those exchanges, Maddox contends that his plea was not knowingly, voluntarily, and intelligently entered into because the trial court failed to inform him that the firearm specifications must be served consecutive to each other. Maddox "acknowledges that the rights contained in Crim.R. 11(C)(2)(a) regarding a defendant's understanding of the maximum penalty involved are nonconstitutional thus requiring a demonstration of prejudice." Maddox claims that he was prejudiced when he received a "sentence of 18 years of incarceration which included four years of consecutive time on the firearm specifications for which he was not advised."

{¶19} We disagree with Maddox's arguments. First, since the maximum penalty is a

nonconstitutional right, the trial court only had to substantially comply. In this case, the trial court informed Maddox that he could serve the one-year firearm specification consecutive to the three-year specification. Further, the state also informed the court that it believed that the specifications had to be served consecutively. Maddox was also represented by counsel. Although Maddox claims that he was not aware that he had to serve the firearm specifications consecutive to each other, he was well aware that he may have to serve the prison terms for the firearm specifications consecutive to each other.

{¶20} Thus, based upon the “totality of the circumstances” in this case, we find that the record establishes that Maddox ““subjectively underst[ood] the implications of his plea and the rights he [was] waiving.”” *Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 31, quoting *Nero*, 56 Ohio St.3d 106, 564 N.E.2d 474 (setting forth the test for “substantial compliance”).

{¶21} Because we found the trial court substantially complied, we do not need to get to the “partial compliance” versus “no compliance” test under *Clark*. But assuming for the sake of argument that the trial court’s explanation regarding the consecutive nature of the firearm specifications did not amount to substantial compliance, then we would still find that the trial court partially complied — based upon its extensive discussion about the subject at the plea hearing.

{¶22} As *Clark* dictates, when there is “partial compliance,” the defendant must show prejudice. *Id.* at ¶ 32, citing *Nero*. After review, we find no prejudice here. Maddox argues that he was prejudiced because he received 18 years with four years of that sentence being the firearm specifications. But even if the trial court could have ordered the firearm specifications to be served concurrently, Maddox would have still received 17 years. Additionally, Maddox

does not contend that he would not have entered into his plea had he known that the firearm specifications had to be served consecutively. *See Clark* at ¶ 32, quoting Nero (“The test for prejudicial effect is ‘whether the plea would have otherwise been made.’”). Indeed, Maddox was facing a much higher sentence if he had gone to trial on all charges rather than plead guilty to two counts of felonious assault with the firearm specifications.

{¶23} Accordingly, Maddox’s first assignment of error is overruled.

III. Consecutive Sentences

{¶24} In his second assignment of error, Maddox contends that the trial court failed to make required findings under R.C. 2929.14(C)(4) before imposing consecutive sentences.

{¶25} R.C. 2953.08(G)(2) provides that our review of consecutive sentences is not for an abuse of discretion. Instead, an appellate court must “review the record, including the findings underlying the sentence or modification given by the sentencing court.” *Id.* If an appellate court clearly and convincingly finds either that (1) “the record does not support the sentencing court’s findings under [R.C. 2929.14(C)(4)],” or (2) “the sentence is otherwise contrary to law,” then “the appellate court may increase, reduce, or otherwise modify a sentence * * * or may vacate the sentence and remand the matter to the sentencing court for resentencing.” *Id.*

{¶26} R.C. 2929.14(C)(4) provides that to impose consecutive sentences, the trial court must find that (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) such sentences would not be disproportionate to the seriousness of the conduct and to the danger the offender poses to the public, and (3) one of the following applies:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under postrelease control for a prior offense;

(b) At least two of the multiple offenses were committed as part of one or more

courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct;

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶27} A trial court is required not only to make the statutory findings required for consecutive sentences at the sentencing hearing, but also to incorporate its findings into its sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. *Bonnell* also made it clear that “a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld.” *Id.* at ¶ 29. Indeed, the Ohio Supreme Court expressly rejected the claim that a trial court must give a “talismanic incantation of the words of the statute” when imposing consecutive sentences. *Id.* at ¶37.

{¶28} At the sentencing hearing in this case, defense counsel informed the trial court that Maddox was only 19 years old at the time of these crimes. He stated that Maddox never really “fit in anywhere,” and that his “burgeoning use of alcohol and cocaine were a recipe for disaster.”

Maddox also had mental health issues “earlier” in his life and took medications for it. Defense counsel requested the court to “mitigat[e] his sentence downward” because he accepted responsibility and because Maddox “has something to say to you that is worthwhile.”

{¶29} Maddox told the court that he was sorry, told the victims that he was sorry, and told his family that he was sorry. He told the court that he accepted responsibility for all that he did.

He also said that he was ready to change his life “for the better” and take care of his children and his family. Maddox said that he intended to get his GED while he was “down there,” take

“a couple of classes,” and start his life over.

{¶30} The victim from the June 2017 incident spoke to the court. He requested the court give Maddox the maximum prison sentence. The other victims, from the incident in January 2017, never cooperated with police.

{¶31} The state explained that when Maddox fired the gun at the clerk in the June 2017 incident, he aimed the gun right at the clerk and the “[p]rojection of that bullet went right past his face.” According to the state, the June 2017 victim “should not be sitting here.” The state further indicated that these were two separate instances where Maddox fired a gun at three people over verbal arguments. The state requested the trial court to give Maddox the maximum sentence.

{¶32} The trial court reviewed Maddox’s criminal history as a juvenile, which included at least ten cases where he was adjudicated delinquent. These cases included multiples counts of theft, possessing criminal tools, receiving stolen property, and criminal damaging, as well as adjudications for violating probation, obstructing official business, unauthorized use of a motor vehicle, menacing, unruly, falsification, and escape. He only faced one other case as an adult, but that had been dismissed so the trial court indicated that it would not consider it. According to the presentence investigation report, Maddox also had an active warrant out for his arrest out of Garfield Heights for domestic violence at the time of his sentencing.

{¶33} The trial court stated that it had “given this a great deal of thought,” and “according to the legislature, I have an obligation to not only punish you, but to protect the public.” The trial court explained, “[i]t is only by the grace of God, those three individuals and in particular this young man who spoke this morning, is alive and able to come and talk to us.” The trial court informed Maddox that if the victim would have died, Maddox would have been facing

aggravated murder where he would have spent the rest of his life in prison. The trial court then imposed its sentence and ordered that it be served consecutively, stating:

And I do that because I believe and I find that consecutive sentences are necessary because your criminal history shows that consecutive sentences are necessary to protect the public. You have a slew of crimes as a juvenile and you are just 19 now.

I also find that the harm is so great or unusual that a single term does not adequately reflect the seriousness of the conduct. On two occasions, you took a gun, which we all know is capable of causing death, and pointing it in such a way that three individuals could very easily be dead today. I'm not giving you a discount, so to speak, because you are a poor shot. That kind of behavior is absolutely contrary to the laws of society. I have to do this to punish you and to protect the public. I have no confidence that if you were out on the street that you would not do the exact same thing again.

{¶34} Maddox contends that the trial court failed to “engage in a proportionality analysis comparing the seriousness of [his] conduct to the need for consecutive sentences,” and that it “did not make the finding that the consecutive sentence [was] not disproportionate to the danger [he] poses to the public.”

{¶35} In *State v. Rufus*, 8th Dist. Cuyahoga 105026, 2017-Ohio-5583, ¶ 9, we explained:

Although the court did not use the specific statutory language for its proportionality finding, the court found that one concurrent sentence was not appropriate in the matter and discussed the severity of appellant’s conduct, which caused the death of one victim and serious injury to another; appellant’s leaving the scene of the accident and failure to come forth; and the pattern of behavior exhibited by appellant’s criminal history. The court also found that the offenses involved two victims and that the harm was so great or unusual that a single term does not adequately reflect the seriousness of the conduct. Additionally, the court found that the offender’s criminal history, which included prior drug-related offenses and OVI offenses, demonstrated that a consecutive term is needed to protect the public.

{¶36} We find that the trial court in this case made similar findings as the court did in *Rufus*. Although the trial court in the present case did not use the word “proportionate” in its analysis, it discussed how serious Maddox’s actions were — shooting a gun at three victims. The court also found that the harm was so great that a single term would not adequately reflect

the seriousness of the conduct. The trial court stated that three people could be dead based on Maddox shooting a gun at them. The trial court further believed that if it let Maddox out on the street, he would do the exact same thing again. The court also discussed Maddox's extensive criminal history, which demonstrated the need to protect the public. This is simply not the case where the trial court did not consider its statutory obligation under R.C. 2929.14(C)(4).

{¶37} Thus, we find that the trial court made all of the requisite findings for imposing consecutive sentences. Accordingly, we overrule Maddox's second assignment of error.

{¶38} Judgment affirmed.

It is ordered that appellee recover from appellant the 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. 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.

MARY J. BOYLE, JUDGE

EILEEN T. GALLAGHER, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR