

[Cite as *State v. Williams*, 2018-Ohio-4426.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106570

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KASSIUS WILLIAMS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; VACATED IN PART;
REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-615721-B

BEFORE: E.T. Gallagher, J., E.A. Gallagher, A.J., and Jones, J.

RELEASED AND JOURNALIZED: November 1, 2018

ATTORNEYS FOR APPELLANT

Donald M. Gallick
The Law Offices of Donald Gallick
5755 Granger Road, #610
Independence, Ohio 44131

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor

BY: Kevin R. Filiatraut
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Kassius Williams, appeals his convictions and sentence. He claims the following four assignments of error:

1. Appellant's guilty plea violates the Sixth Amendment right to the effective assistance of counsel as appellant repeatedly told the trial court that his lawyers were ineffective and the record shows a breakdown in the attorney-client relationship.
2. The plea must be vacated as it violated the Fifth Amendment right to due process where the record shows that appellant was confused, suggested that he had a mental health diagnosis, and potentially suffering from withdrawal from prescription drugs, and the trial court made no further inquiry on appellant's mental health condition.
3. The plea must be vacated as a matter of law because it was not intelligently, knowingly, and voluntarily made under the Ohio and the United States constitutions.

4. The consecutive sentences must be vacated as a matter of law because the court imposed consecutive sentences on two separate defendants before making findings required by *State v. Bonnell*, and without making findings for each defendant independently.

{¶2} Finding some merit to the appeal, we affirm Williams's convictions, vacate his consecutive sentence, and remand the case to the trial court for the limited purpose of complying with the requirements of R.C. 2929.14(C) for the imposition of consecutive sentences.

I. Facts and Procedural History

{¶3} Williams was charged with two counts of aggravated murder, four counts of murder, two counts of discharging a firearm at or near a prohibited premises, four counts of felonious assault, and one count of carrying a concealed weapon. All counts, except the carrying a concealed weapon charge, included one-, three-, and five-year firearm specifications as well as forfeiture specifications for three handguns.

{¶4} The state alleged that on March 25, 2017, at approximately 1:30 p.m., Williams and his codefendants, Terrell Gray and Charles Walker, were seated in a black Volkswagen sedan at the corner of Woodland Avenue and Woodhill Road when they happened to see a red SUV traveling westbound on Woodland Avenue. Walker, who was driving the Volkswagen, chased the red SUV at a high rate of speed for several blocks. As the Volkswagen approached the red SUV, Williams and Gray fired several shots at it and continued to shoot at it as their vehicle passed the SUV. Williams continued to shoot at the SUV after the Volkswagen had passed it.

{¶5} A 15-year-old passenger in the red SUV, later identified as T.J.,¹ sustained three gunshots to his head. The gunshots also caused 20 bullet defects in the red SUV. A stray bullet

¹ We refer to juveniles by their initials pursuant to this court's policy of nondisclosure of juveniles' identities.

that missed the SUV traveled an estimated 1,400 feet, passed through David Wilder's windshield, and struck Wilder in his left eye. Wilder and T.J. both died as a result of their injuries. The incident was captured on surveillance cameras installed at various businesses along Woodland Avenue.

{¶6} Williams accidentally shot Gray's hand during the shooting, and Walker drove Gray to St. Vincent Charity Hospital for treatment immediately after the shooting. Williams and Gray left their guns in the car when they entered the hospital. Walker entered the hospital with his handgun on his person. Walker's gun was confiscated, and the other two guns were later recovered from Walker's car.

{¶7} The state claimed that evidence at Walker's trial showed that 36 rounds were fired at the SUV from the Volkswagen during the high speed chase, and that 29 of the rounds came from Williams's .40-caliber handgun. Seven rounds came from Gray's 9 mm handgun. All the spent shell casings found at the scene matched Williams's and Gray's guns. No shots were fired from the red SUV, and the occupants of the red SUV were unarmed. Cleveland police discovered that Gray and Williams purchased a gun the day before the shooting. Since both individuals were adults with no criminal records, they were legally permitted to possess the guns. Charles Walker had a concealed carry permit that expired less than a month prior to the shooting.

{¶8} Walker and Gray were both convicted following jury trials. Williams waived his right to trial and pleaded guilty to two counts of aggravated murder and two counts of felonious assault, which were amended to delete all the firearm specifications except for the three-year firearm specifications attendant to the aggravated murder charges. The remaining charges were dismissed. The court sentenced Williams to 30 years to life plus three years on the attendant firearm specifications on each of the aggravated murder charges alleged in Counts 1 and 2. The

court ordered these sentences to be served consecutively for a total of 66 years to life in prison. The court also sentenced Williams to seven years on each of his felonious assault convictions to be served concurrently with each other and with the sentences on the aggravated murder convictions. Williams now appeals the trial court's judgment and raises four assignments of error. We consider some assignments of error out of order, and consolidate others, to avoid repetition.

II. Law and Analysis

A. Guilty Plea

{¶9} In the second assignment of error, Williams argues his guilty pleas should be vacated because the trial court failed to inquire about his mental health condition even though he was confused, suffered from a mental health diagnosis, and was potentially suffering from withdrawal of prescription drugs at the time of the plea hearing. In the third assignment of error, Williams argues his guilty pleas should be vacated because he did not enter them knowingly, intelligently, or voluntarily. We discuss these assigned errors together because they are interrelated.

{¶10} In determining whether the defendant entered a plea knowingly, intelligently, and voluntarily, we examine the totality of the circumstances through a de novo review of the record. *State v. Spock*, 8th Dist. Cuyahoga No. 99950, 2014-Ohio-606, ¶ 7.

{¶11} Crim.R. 11(C) provides that a trial court must inform a defendant of certain constitutional and nonconstitutional rights before accepting a felony plea of guilty or no contest. The purpose of Crim.R. 11(C) is to convey relevant information to the defendant so that he or she can make an intelligent and voluntary decision regarding whether to plead guilty. *State v. Ballard*, 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981).

{¶12} Before accepting a guilty plea in a felony case, Crim.R. 11(C) requires that the trial court conduct an oral dialogue with the defendant to ensure (1) that the plea is voluntary, with the understanding of the nature of the charges and the maximum penalty involved and, if applicable, that the defendant is not eligible for community control sanctions; (2) that the defendant understands the effect of his or her plea; and (3) that the defendant understands the constitutional rights he or she waives by pleading guilty, including the rights to a 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. Crim.R. 11(C)(2)(a)-(c); *see, e.g., State v. Hussing*, 8th Dist. Cuyahoga No. 97972, 2012-Ohio-4938, ¶ 18.

{¶13} Strict compliance by the trial court is required for the waiver of the constitutional rights set forth under Crim.R. 11(C)(2)(c). *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 18. When the trial court fails to explain the constitutional rights set forth in Crim.R. 11(C)(2)(c), it is presumed the plea was entered involuntarily and is, therefore, invalid. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 31.

{¶14} With respect to the nonconstitutional rights described in Crim.R. 11(C)(2)(a), such as the right to be informed of the maximum penalty involved, substantial compliance with the rule is generally sufficient. *Veney* at ¶ 14, citing *State v. Stewart*, 51 Ohio St.2d 86, 92, 364 N.E.2d 1163 (1977). "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he [or she] is waiving." *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990), citing *Stewart* at 92-93. "[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.’” *Clark* at ¶ 31, quoting *Nero* at 108.

{¶15} Furthermore, a trial court’s failure to properly advise a defendant of his or her nonconstitutional rights will not invalidate a plea unless the defendant demonstrates prejudice. *Nero* at 108. The test for prejudice is whether the plea would have otherwise been made. *Id.*

{¶16} At the plea hearing, the trial court asked Williams if he was undergoing any psychiatric treatment. Williams did not indicate he was taking, or was prescribed, any psychiatric medication, but stated that he had post-traumatic stress disorder and had an individualized education program in school. He also stated that he “didn’t learn as — as fast as other students.” Therefore, despite Williams’s statement to the contrary, there is no indication in the record that Williams was withdrawing from prescription drugs at the time of the plea hearing. Furthermore, there is nothing in the record to suggest that Williams had a psychiatric diagnosis that prevented him from understanding the proceedings.

{¶17} When asked whether Williams understood the plea proceedings, Williams replied: “I don’t fully understand.” On further questioning, Williams clarified: “I don’t understand like a cop out or all that or, like, how much time.” (Tr. 4-5.) Williams’s trial counsel informed him that the trial court would explain everything to him as they proceeded through the hearing.

{¶18} The court began by explaining that Counts 1 and 2 of the indictment charged Williams with aggravated murder and that each count included one-, three-, and five-year firearm specifications. The court further explained that the firearm specifications carried additional prison time that had to be served prior to and consecutive to the base penalties for each count of aggravated murder. The court also described the potential penalties for aggravated murder, and Williams indicated that he “somewhat” understood these things.

{¶19} The court informed Williams that less than a complete understanding was not sufficient and again described the potential penalties. In response to Williams's questions, the court also explained the nature and function of the parole board, and Williams indicated that he understood that part. (Tr. 7.)

{¶20} The trial court then reiterated that Williams was charged with two counts of aggravated murder and explained that, as amended, each of the charges included a three-year firearm specification because the state deleted the one- and five-year firearm specifications. The court again explained that the three-year firearm specifications required prison time to be served prior to and consecutive to the base penalty of 20 years to life, 25 years to life, or 30 years to life, or life without parole on each of the aggravated murder charges. Williams indicated that he understood these charges and penalties. (Tr. 8-9.) Following additional explanation on sentencing, Williams indicated that he also understood the nature of consecutive sentences. (Tr. 9, 14.)

{¶21} The trial court next explained that Williams was also pleading guilty to two counts of felonious assault and that he could be sentenced to "anywhere from two to eight years in prison in yearly increments and/or a fine up to \$15,000" on those charges. (Tr. 9.) The court informed Williams that while the sentences on the felonious assault charges were not mandatory, the sentences on the aggravated murder charges were mandatory. Williams indicated he understood that mandatory means "you have to do that." (Tr. 10.) He also indicated he understood the fact that aggravated murder means that he "planned" it. (Tr. 11-12.) Thus, the record shows that Williams understood the charges and the potential penalties attendant to the charges to which he was pleading guilty.

{¶22} In accordance with Crim.R. 11(C), the trial court described the constitutional rights Williams was waiving by virtue of his guilty pleas, and Williams indicated that he understood those rights. (Tr. 12-13.) Indeed, Williams does not dispute that the trial court complied with Crim.R. 11(C). However, when the court asked whether any threats or promises had been made to induce his plea other than what had already been described in open court, Williams indicated he believed he would receive a 23-year prison term. The court responded: “No, that’s not a guarantee.” (Tr. 13.)

{¶23} Williams then changed the subject and asked: “What’s a subpoena?” (Tr. 13.) After explaining the subpoena power to Williams’s satisfaction, the court again asked Williams if any threats or promises were made to induce his plea, and reiterated that no particular prison term was guaranteed. Williams replied that no promises or threats had been made and that his comment about receiving “23 to life” referred to the court’s earlier explanation of the potential prison terms in open court. (Tr. 14.) When asked whether Williams understood that the court could run his prison terms consecutively, Williams replied: “I understand.” (Tr. 14.)

{¶24} The record shows that the trial court complied with all the requirements of Crim.R. 11 and that Williams understood the constitutional and nonconstitutional rights he was waiving by pleading guilty, the nature of the charges, and the potential penalties he could receive. Indeed, Williams was actively engaged in an appropriate dialogue and asked questions whenever he needed clarification. Although Williams indicated that he suffers from post-traumatic stress disorder and that he has some kind of learning disability, there is no evidence that these conditions interfered with his understanding of the proceedings. And as previously stated, there is nothing in the record to suggest that Williams was withdrawing from prescription drugs.

Rather, the record shows that Williams entered his guilty pleas knowingly, intelligently, and voluntarily.

{¶25} Therefore, the second and third assignments of error are overruled.

B. Ineffective Assistance of Counsel

{¶26} In the first assignment of error, Williams argues his guilty pleas violate the Sixth Amendment right to the effective assistance of counsel. He contends his trial lawyers were ineffective because they failed to request more than \$500 to hire an investigator and because they failed to demand a bill of particulars. Williams also argues the record demonstrates a breakdown in the attorney-client relationship.

{¶27} Under certain circumstances, ineffective assistance of counsel may constitute a manifest injustice warranting the withdrawal of a guilty plea. *State v. Montgomery*, 8th Dist. Cuyahoga No. 103398, 2016-Ohio-2943, ¶ 4. However, where a defendant enters a guilty plea, he or she waives any claim of ineffective assistance of counsel, except to the extent that the ineffective assistance of counsel caused the defendant's plea to be less than knowing, intelligent, and voluntary. *State v. Williams*, 8th Dist. Cuyahoga No. 100459, 2014-Ohio-3415, ¶ 11.

A defendant who has entered a guilty plea can prevail on a claim of ineffective assistance of counsel only by demonstrating (1) deficient performance by counsel, i.e., that counsel's performance fell below an objective standard of reasonable representation, that caused the defendant's guilty plea to be less than knowing, intelligent and voluntary and (2) that there is a reasonable probability that, but for counsel's deficient performance, the defendant would not have pled guilty to the offenses at issue and would have, instead, insisted on going to trial.

Id., citing *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992), and *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *see also Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Strickland* at 694.

{¶28} As previously stated, Williams claims his trial counsel was ineffective because they failed to request more than \$500 for an investigator and failed to request a bill of particulars. However, there is nothing in the record demonstrating that defense counsel needed more than \$500. Had they needed more money, there is no reason to believe that they would not have requested it or that the trial court would have denied the request. Therefore, Williams cannot demonstrate that his trial counsel's performance was deficient or that he was prejudiced by counsel's failure to request more than \$500 for an investigator. Nor can Williams demonstrate he was prejudiced by counsel's failure to demand a bill of particulars since the state filed a bill of particulars within its initial discovery responses.

{¶29} Williams nevertheless argues that a breakdown in the attorney-client relationship deprived him of his right to the effective assistance of counsel. Indeed, when the trial court asked if Williams was satisfied with his lawyers, he responded: "No, your Honor." (Tr. 14.) The trial court inquired as to the cause of his dissatisfaction, and Williams stated: "Sometimes y'all don't come see me, like, I mean, I need y'all to come see me, I be needin' extra help with, like, this situation." (Tr. 14.) On further questioning, Williams explained that he expected to see his lawyers every time he had a pretrial. Defense counsel informed the court that they reviewed every piece of discovery with Williams, discussed the case with him several times, and discussed the case with his parents.

{¶30} Further questioning revealed that Williams was disappointed that he did not receive his own copy of a motion served on defense counsel by the prosecutor that was labeled "Counsel Only." (Tr. 16.) Defense counsel explained that they reviewed the motion with Williams and explained it to him, but could not give him a copy. (Tr. 17.) The prosecutor advised the court that defense counsel were "diligent in their efforts to get discovery," and that the case involved "a

large amount of surveillance video from different businesses along Woodland Avenue.” (Tr. 17.) The state turned over 80 gigabytes worth of electronic discovery to defense counsel. (Tr. 17.)

{¶31} The trial court asked Williams if he understood the work his lawyers rendered on his behalf, and he replied: “Yes, I understand, your Honor.” The court continued: “So you’re satisfied with them?” Williams replied: “I am, your Honor.” (Tr. 18.) Therefore, rather than demonstrating a complete breakdown of the attorney-client relationship, the record reveals that Williams was simply displeased with his counsel because he could not possess a motion intended for “Counsel Only.” And there is no evidence that Williams’s displeasure impacted his lawyers’ ability to prepare a defense. Moreover, as previously explained, the record shows that Williams entered his guilty pleas knowingly, intelligently, and voluntarily. Therefore, Williams cannot establish a claim for ineffective assistance of counsel.

{¶32} The first assignment of error is overruled.

C. Consecutive Sentences

{¶33} In the fourth assignment of error, Williams argues his consecutive sentence must be vacated or modified to concurrent sentences because the trial court imposed consecutive sentences on two separate defendants before making the findings required by R.C. 2929.14(C) and without make separate findings for each defendant independently.

{¶34} We review felony sentences under the standard set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 16. Pursuant to R.C. 2953.08(G)(2), a reviewing court may overturn the imposition of consecutive sentences only if it clearly and convincingly finds that either (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.”

{¶35} R.C. 2929.14(C)(4) requires a sentencing judge to make three statutory findings before imposing consecutive sentences. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 29. First, the trial court must find that the “consecutive service is necessary to protect the public from future crime or to punish the offender.” R.C. 2929.14(C)(4). Second, the trial court must find that “consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public.” *Id.* And third, the trial court must find that at least 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.

{¶36} The trial court must make the statutory findings mandated under R.C. 2929.14(C)(4) at the sentencing hearing and incorporate those findings into its sentencing entry. *Bonnell* at the syllabus. Moreover, *Bonnell* holds that the trial court must make the statutory findings on the record before imposing consecutive sentences on a defendant. *Id.* at ¶ 28 (“[T]he record must contain a basis upon which a reviewing court can determine that the trial court made the findings required by R.C. 2929.14(C)(2) before it imposed consecutive sentences.”).

{¶37} The trial court sentenced Williams and Walker together in a single sentencing hearing. The court sentenced Walker to “30 years to life” on each count of the two counts of aggravated murder and indicated that the sentences would be served consecutively without

making any of the statutorily mandated findings. The court then sentenced Williams to “30 years to life” on each of the two counts of aggravated murder and stated that the sentences would be served consecutively, again without making the findings required by R.C. 2929.14(C). The court also imposed three-year sentences on each of the two firearm specifications and imposed concurrent sentences on the felonious assault convictions. Hence, the trial court concluded: “So you will be doing 66 years.” (Tr. 71.)

{¶38} After imposing consecutive sentences and three years of mandatory postrelease control, and after advising Williams and Walker of their appellate rights, the court stated, almost as an afterthought, that it had to make the findings required for the imposition of consecutive sentences. (Tr. 73.) The court then made the findings set forth in R.C. 2929.14(C), but failed to specify whether the findings applied to Walker’s sentence, Williams’s sentence, or both. These errors were likely the result of simultaneously imposing sentences on two defendants instead of sentencing each defendant individually, which is the better practice.

{¶39} Moreover, the trial court made the findings after it had already imposed consecutive sentences on both defendants in violation of *Bonnell’s* mandate that the findings be made prior to imposing consecutive sentences. Therefore, the imposition of consecutive sentences was contrary to law and must be vacated.

{¶40} The fourth assignment of error is sustained.

{¶41} The trial court’s judgment is affirmed in part and vacated in part. Williams’s convictions are affirmed, but his consecutive sentence is vacated. We remand the case to the trial court for the limited purpose of considering whether consecutive sentences are appropriate under R.C. 2929.14(C), and if so, to make the necessary findings.

It is ordered that appellee and appellant share 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. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, A.J., and
LARRY A. JONES, SR., J., CONCUR