

[Cite as *State v. Barnes*, 2020-Ohio-3659.]

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, :  
 : No. 108360  
 v. :  
 :  
 DEYONTE BARNES, A.K.A., :  
 DEYONTE BARNES, SR., :  
 :  
 Defendant-Appellant. :

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JOURNAL ENTRY AND OPINION

**JUDGMENT:** APPLICATION DENIED  
**RELEASED AND JOURNALIZED:** July 8, 2020

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Cuyahoga County Court of Common Pleas  
Case No. CR-18-632526-A and CR-19-636606-A  
Application for Reopening  
Motion No. 538675

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***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting  
Attorney, and Tasha L. Forchione, Assistant Prosecuting  
Attorney, *for appellant.*

Deyonte Barnes, a.k.a., Deyonte Barnes, Sr., *pro se.*

PATRICIA ANN BLACKMON, J.:

{¶ 1} Applicant, Deyonte Barnes, a.k.a. Deyonte Barnes, Sr., timely seeks to  
reopen his appeal in *State v. Barnes*, 8th Dist. Cuyahoga No. 108360, 2020-Ohio-

665. He claims that appellate counsel was ineffective for not advancing the following proposed assignment of error: “Mr. Barnes[’s] guilty plea was at odds with the U.S. Constitutional rights [to] due process because his plea [was not] knowingly, intelligently, or voluntarily [entered].” The application is denied for the following reasons.

{¶ 2} Barnes entered guilty pleas in two cases. In the first, Cuyahoga C.P. No. CR-18-632526-A, he pled guilty to one count of robbery. In Cuyahoga C.P. No. CR-19-636606-A, he pled guilty to one count of domestic violence and one count of drug possession. The drug possession charged included a one-year firearm specification. Barnes appealed his convictions raising two assignments of error challenging his sentences. This court overruled these assigned errors and affirmed his convictions and sentences in an opinion journalized on February 27, 2020. *Barnes*, 8th Dist. Cuyahoga No. 108360, 2020-Ohio-665. On May 18, 2020, Barnes filed a timely application to reopen his appeal. The state filed a timely brief in opposition. **Standard for an Application for Reopening**

{¶ 3} App.R. 26(B) provides a limited means of asserting a claim of ineffective assistance of counsel on appeal. The rule provides that an application “shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.” App.R. 26(B)(5). Claims of ineffectiveness of appellate counsel are judged using the standard for claims of ineffective assistance of counsel established by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Reed*, 74 Ohio St.3d 534, 535,

660 N.E.2d 456 (1996). A successful application will demonstrate that appellate counsel was deficient for failing to raise an issue and there was a reasonable probability of success had the issue been asserted in the direct appeal. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶ 5, citing *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus.

### **Knowing, Intelligent, and Voluntary Nature of Guilty Pleas**

{¶ 4} Barnes's application for reopening raises a single proposed assignment of error claiming that appellate counsel was ineffective for not challenging the knowing, intelligent, and voluntary nature of his guilty pleas. He claims that he did not use a gun during the commission of the offenses for which he was charged, so there could be no valid gun specifications attached to those charges.

{¶ 5} First, it must be noted that Barnes argues he did not knowingly, intelligently, and voluntarily plead guilty to firearm specifications attached to his domestic violence and drug possession convictions. However, only the drug possession conviction carried a firearm specification.

{¶ 6} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). Compliance with the procedures outlined in Crim.R. 11 ensures that a defendant's plea is entered knowingly, intelligently, and voluntarily.

{¶ 7} Crim.R. 11(C)(2) provides that a trial court shall not accept a defendant's guilty plea without addressing the defendant personally and doing all of the following:

(a) Determining 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) Informing the defendant of and determining 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) Informing the defendant and determining 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.

{¶ 8} A trial court must strictly comply with Crim.R. 11(C)(2)(c) when advising a defendant about the constitutional rights being waived prior to accepting a guilty plea. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, syllabus. A court must substantially comply with the other provisions of Crim.R. 11(C)(2) when informing a defendant of nonconstitutional rights. *Id.* At ¶ 14. "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." *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶ 9} Here, the trial court engaged Barnes in a lengthy colloquy where the court explained the constitutional and nonconstitutional rights Barnes was waiving by pleading guilty. This included the nature of the firearm specification attached to the drug possession charge. This included how the specification related to the maximum penalty. There was a thorough discussion of his constitutional and non-constitutional rights, which included the penalties associated with the firearm specification. When discussing the maximum penalty for the drug possession charge, the following exchange occurred:

THE COURT: \* \* \* You'll also be pleading guilty to Count 3, drug possession with the one-year firearm specification, correct? One-year firearm specification, [assistant prosecutor]?

THE ASSISTANT PROSECUTOR: Yes, your Honor.

THE COURT: And that's a felony of the fifth degree. Now, each of those felonies of the fifth degree are punishable by six to twelve months in prison, a fine of up to \$2,500 or both. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Now, the drug possession also has a one-year firearm specification. So, first, you'll have to serve one year for the gun, and then you'll receive somewhere between six and twelve for the offense of drug possession itself.

Do you understand that?

THE DEFENDANT: Yes, ma'am.

(Tr. 37.)

{¶ 10} The trial court explained that appellant was pleading guilty to a firearm specification related to his drug possession charge and explained the impact

of the specification. Barnes indicated he understood and that he did not have any questions about the plea, the charges, or the rights he was waiving. (Tr. 39.)

{¶ 11} Later, when taking the plea, the court asked,

THE COURT: And how do you plead to Count 3, drug possession, with a one-year firearm specification in violation of 2925.11, a felony of the fifth degree?

THE DEFENDANT: Guilty.

(Tr. 39.)

{¶ 12} Finally, when imposing sentence, the court stated,

So, in 632526, I sentence you on Count 2, the felony of the second degree, to five years. You'll have the three-year mandatory period of Post Release Control.

In 636606, on Count 2, the felony of the fifth degree, I sentence you to twelve months.

On Count 3, the felony of the fifth degree, I sentence you to twelve months, plus one year for the gun specification.

(Tr. 48.)

{¶ 13} The trial court complied with Crim.R. 11, and Barnes has failed to show that his plea was not entered knowingly, intelligently, or voluntarily.

{¶ 14} A similar assignment of error was raised in *State v. Pullens*, 12th Dist. Clermont No. CA2015-03-024, 2016-Ohio-260. There, a defendant claimed that his guilty pleas were not entered knowingly, intelligently, and voluntarily because defense counsel was ineffective where counsel advised him to enter a plea of guilty to the firearm specification attached to a count where the facts as submitted by the state did not support that he committed the offense with a firearm. *Id.* at ¶ 7. The

*Pullens* court reviewed the plea colloquy and found that the trial court thoroughly explained the implications relevant to the firearm specification and that the defendant understood those implications, the charges he faced, and the significance of this guilty plea. *Id.* at ¶ 11.

{¶ 15} Based on the arguments Barnes raises, there is no indication in the record that appellate counsel was ineffective for not arguing this point on appeal. Barnes was aware that he was pleading guilty to a one-year firearm specification and he did not raise any concern about its applicability during the plea colloquy or the fact that he was waiving his right to have the charges against him proven beyond a reasonable doubt. “It must be noted that this court, as well as numerous other courts, have affirmed convictions based on guilty pleas to offenses the state could not prove where the defendant knowingly, intelligently, and voluntarily entered a guilty plea as part of a ‘negotiated plea agreement.’” *State v. Robinson*, 8th Dist. Cuyahoga No. 107598, 2020-Ohio-98, ¶ 12, citing *e.g.*, *State v. Lester*, 8th Dist. Cuyahoga No. 106850, 2018-Ohio-4893; *State v. Brawley*, 8th Dist. Cuyahoga No. 79705, 2002-Ohio-3115, *State v. Wickham*, 5th Dist. Muskingum No. CA 76-40, 1977 Ohio App. LEXIS 10210 (Sept. 28, 1977).

{¶ 16} Barnes has failed to show a colorable claim of ineffective assistance of appellate counsel. Appellate counsel was not ineffective for failing to raise this issue on appeal.

## Supplementation of the Record

{¶ 17} Barnes makes an argument in a section of his application labeled “statement of the case and facts” that appellate counsel was ineffective for failing to supplement the appellate record with records from a federal criminal prosecution. He does not illustrate why records from the federal case are necessary to resolve his state criminal appeal, or how the outcome would have been different had such records been added to the appellate record. The mere assertion of an allegation of error is insufficient to meet the burden of proof necessary to show that appellate counsel was deficient for failing to raise an issue. *State v. Holloway*, 8th Dist. Cuyahoga No. 101289, 2015-Ohio-4578, ¶ 13, citing *State v. Kelly*, 8th Dist. Cuyahoga No. 74912, 2000 Ohio App. LEXIS 2907 (June 21, 2000).

{¶ 18} Accordingly, Barnes’s application for reopening is denied.

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PATRICIA ANN BLACKMON, JUDGE

MARY J. BOYLE, P.J., and  
EILEEN A. GALLAGHER, J., CONCUR