[Cite as *State v. Garrett*, 2009-Ohio-2339.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. MACK GARRETT, JR. AKA MARCUS GARRETT Appellant	C.A. No. 24143 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 06 07 2635

DECISION AND JOURNAL ENTRY

Dated: May 20, 2009

CARR, Judge.

{¶1} Appellant, Mack Garrett, appeals his conviction and sentence out of the Summit County Court of Common Pleas. This Court reverses.

I.

{¶2} On August 1, 2006, Garrett was indicted on one count of possession of cocaine in violation of R.C. 2925.11(A), a felony of the fourth degree; one count of possession of cocaine in violation of R.C. 2925.11(A), a felony of the fifth degree; one count of aggravated possession of drugs (oxycontin) in violation of R.C. 2925.11(A), a felony of the fifth degree; and one count of driving under suspension in violation of R.C. 4510.11, a misdemeanor of the first degree. On August 18, 2006, the State filed a first supplemental indictment, charging Garrett with one count of tampering with evidence in violation of R.C. 2921.12(A)(1), a felony of the third degree; one count of possession of cocaine in violation of R.C. 2925.11(A), a felony of the third degree; one count of open container in violation of R.C. 4301.62, a minor misdemeanor; and one count of

turn and stop signals in violation of R.C. 4511.39, a minor misdemeanor. On November 14, 2006, the State filed a second supplemental indictment, charging Garrett with one count of possession of cocaine in violation of R.C. 2925.11(A), a felony of the fifth degree; and one count of turn and stop signals in violation of R.C. 4511.39, a minor misdemeanor. Garrett entered pleas of not guilty to all the charges.

{¶3} A change of plea hearing was held on January 2, 2007, at which time Garrett withdrew his not guilty plea and pled guilty to one count of possession of cocaine, a felony of the third degree; one count of possession of cocaine, a felony of the fourth degree; one count of possession of cocaine, a felony of the fifth degree; one count of aggravated possession of drugs (oxycontin), a felony of the fifth degree; and one count of tampering with evidence, a felony of the third degree. The remaining five counts were dismissed. The trial court sentenced Garrett accordingly.

{¶4} On February 8, 2007, Garrett filed a motion to withdraw his guilty plea, arguing that he was never informed of the nature of the charges against him or the consequences of his plea, and that the pills in question were not his. On March 6, 2007, the trial court denied the motion. This Court granted leave to Garrett to file a delayed appeal. Garrett raises three assignments of error for review.

II.

ASSIGNMENT OF ERROR I

"THE DEFENDANT'S PLEA WAS NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY MADE BECAUSE THE TRIAL COURT FAILED TO INFORM HIM THAT HIS PLEA TO DRUG POSSESSION, R.C. 2925.11, A FELONY THREE REQUIRED A MANDATORY PRISON TERM IN VIOLATION OF [CRIM.R.] 11(C)(2)(A)."

{¶5} Garrett argues that he did not enter a knowing, intelligent and voluntary guilty plea because the trial court failed to comply with the mandates of Crim.R. 11(C)(2)(a). Accordingly, he argues that his plea must be vacated. This Court agrees.

{¶6} A plea is invalid where it has not been entered in a knowing, intelligent and voluntary manner. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, at ¶25, citing *State v. Engle* (1996), 74 Ohio St.3d 525, 527. Crim.R. 11(C)(2)(a) provides:

> "In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> "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."

{¶7} The Ohio Supreme Court has urged literal compliance with the mandates of Crim.R. 11. *Clark* at ¶29. However, in the absence of literal compliance, "reviewing courts must engage in a multitiered analysis to determine whether the trial judge failed to explain the defendant's constitutional or nonconstitutional rights and, if there was a failure, to determine the significance of the failure and the appropriate remedy." Id. at ¶30. The *Clark* court set forth the following rules for analysis:

> "When a trial judge fails to explain the constitutional rights set forth in Crim.R. 11(C)(2)(c), the guilty or no-contest plea is invalid under a presumption that it was entered involuntarily and unknowingly. However, if the trial judge imperfectly explained nonconstitutional rights such as the right to be informed of the maximum possible penalty and the effect of the plea, a substantial-compliance rule applies. 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, the plea may be upheld.
>
> "When the trial judge does not *substantially* comply with CrimR. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court *partially* complied or *failed* to comply with the rule. 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. The test for prejudice is whether the plea would have otherwise been made. If the trial judge completely failed to comply with the rule, e.g., by not informing the defendant of a mandatory period of postrelease control, the plea must be vacated. A complete failure to comply with the rule does not implicate an analysis of prejudice." (Emphasis in original.) (Internal quotations and citations omitted.) *Clark* at ¶31-2.

{¶8} Garrett pled guilty to one count of possession of crack cocaine, in an amount that equals or exceeds 5 grams, but is less than 10 grams, in violation of R.C. 2925.11(A). R.C. 2925.11(C)(4)(c) states:

> "If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows: *** If the amount of the drug involved *** equals or exceeds five grams but is less than ten grams of crack cocaine, possession of cocaine is a felony of the third degree, and the court shall impose as a mandatory prison term one of the terms prescribed for a felony of the third degree."

{¶9} Garrett would be subject to a mandatory prison term for this offense. Accordingly, in order to comply with the mandates of Crim.R. 11(C)(2)(a), the trial court must have informed Garrett at the plea hearing that he would not be eligible for probation or the imposition of community control sanctions. In addressing Garrett at the plea hearing, the trial court stated:

> "Let's talk about the range of sentences here available to me when I accept your plea.
>
> "The most serious offense I contemplate accepting here is a felony of the third level which is one that, while it can be supervised in the community, it also carries a potential of one to five years in prison."

{¶10} The State argues that, because Garrett had spoken to counsel about the charges and had "been here several times[,]" the totality of the circumstances indicated his subjective understanding that he was facing mandatory prison time. In this case, however, there was no partial compliance by the trial court with the rule. Accordingly, this Court does not analyze

whether the totality of the circumstances indicates that Garrett subjectively understood the implications of his plea. Rather, the trial court completely failed to comply with Crim.R. 11(C)(2)(a) by not informing Garrett of a mandatory prison term. Under those circumstances, prejudice is presumed, thereby necessitating the vacation of his plea. See *Clark* at ¶32. Garrett's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT FAILED TO CONSIDER THE PRINCIPLES OF SENTENCING AND BALANCING OF THE FACTORS OF SERIOUSNESS AND RECIDIVISM PURSUANT TO R.C. 2929.11 AND 12."

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT IMPOSED AN INCONSISTENT SENTENCE IN THAT AT SENTENCING HEARING THE COURT NOTED THAT IT WAS IMPOSING A MANDATORY SENTENCE FOR THE DRUG POSSESSION, FELONY 3 CHARGE, PER RC 2925.11 OF ONE YEAR BUT IN THE SENTENCING ENTRY THE COURT IMPOSED A MANDATORY SENTENCE FOR TWO YEARS FOR TAMPERING WITH EVIDENCE, PER RC 2921.12(A) WHICH DOES NOT REQUIRE A MANDATORY SENTENCE, AND DOES NOT IMPOSE A MANDATORY SENTENCE ON THE DRUG POSSESSION CHARGE, FELONY THREE." (sic)

{¶11} Garrett argues that the trial court erred in the imposition of his sentence. Because this Court's resolution of his first assignment of error is dispositive, we decline to address Garrett's remaining assignments of error as they have been rendered moot. See App.R. 12(A)(1)(c).

III.

{¶12} Garrett's first assignment is sustained. We decline to address the remaining assignments of error. The judgment of the Summit County Court of Common Pleas is reversed, and the cause remanded for further proceedings consistent with this decision.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

DICKINSON, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

WESLEY A. JOHNSTON, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.