[Cite as *State v. Dixon*, 2004-Ohio-4262.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 03CA0045

vs. : T.C. CASE NO. 03CR0320

JASON A. DIXON : (Criminal Appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 13th day of August, 2004.

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Attorney for Plaintiff-Appellee

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Attorney for Defendant-Appellant

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GRADY, J.

{¶1} Defendant, Jason A. Dixon, appeals from his conviction and sentence for Attempted Burglary, R.C. 2923.02 and 2911.12(A)(4), a felony of the fifth degree for which the court imposed a prison term of eleven months.

{¶2} On April 21, 2003, Defendant was charged by indictment with Aggravated Burglary, R.C. 2911.11(A)(1), a

felony of the first degree. On June 23, 2004, Defendant appeared in open court and offered a plea of guilty to the lesser-included offense of Attempted Burglary.

{¶3} Crim.R. 11(F) provides: "When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court."

{¶4} The record of the June 23, 2003 plea hearing contains no reference made in open court, either by the State, the court, or the Defendant, to a plea bargain agreement or its terms. However, the written guilty plea agreement signed by Defendant, his attorney, and the Prosecuting Attorney states, inter alia: "No promises have been made to me to get me to plead guilty except for the terms of this plea agreement which are stated entirely as follows: 'The State recommends a period of community control with a condition of a jail sentence equal to the time already served.'"

{¶5} The court, after the colloquy required by Crim.R. 11(C), accepted Defendant's guilty plea. The matter came on for sentencing on July 8, 2003. The prosecuting attorney affirmed that the State had promised to recommend community control, and that the victims had said "that this was an outcome that would be satisfactory to them." (T. 4).

{¶6} The court rejected the State's recommendation. The court viewed the several victims' statements as lacking

in credibility, and found that the Defendant's relationship with them had facilitated his offense and that it involved threats of physical harm. Based on those findings, and the fact that Defendant was on post-release control, the court rejected the community control alternative recommended by the State and imposed an eleven month term of incarceration.

{¶7} Defendant filed a timely notice of appeal. He presents two assignments of error.

FIRST ASSIGNMENT OF ERROR

{¶8} "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO A PRISON TERM IN CONTRAVENTION OF HIS PLEA AGREEMENT."

{¶9} The due process clause of the Fourteenth Amendment requires that any plea of guilty or no contest in a criminal case must be entered knowingly, intelligently, and voluntarily. *State v. Engle* (1996), 74 Ohio St.3d 525. A plea procured on promises made by the State fails to satisfy those requirements when the State breaches its promise or promises. *Santobello v. New York* (1971), 404 U.S. 257. The same reasonably applies to any such promises which were made by the court itself but which the court did not keep.

{¶10} When the court conducted the Crim.R. 11(C) plea colloquy it asked Defendant whether any promises had been made to him "to get you to make this plea," and he replied "No." (T. 5-6). The court obtained a further acknowledgment of that from him when it summarized Defendant's responses to the court's inquiries and he affirmed his earlier statements.

{¶11} Defendant argues that "[u]nder these circumstances, the Court clearly conveyed to Appellant the impression that the State's recommendation was a promise that bound the Court." (Brief, p. 2). We cannot see how that follows. Furthermore, before it accepted the plea the court reviewed its several sentencing options with Defendant, including the prospect of incarceration, and Defendant said he understood them. (T. 11-12). It is thus difficult to read any promises by the court into the plea or the transactions that induced it.

{¶12} The genesis of Defendant's contention is more likely the court's omission of the admonition usually given that in imposing sentence the court would not be bound by any recommendation the State had promised to make. That's not required by Crim.R. 11(C), but it's clearly the preferred practice. The admonition clears the air of any false hope a defendant harbors that the court is in anyway bound or is likely to follow the state's recommendation. We urge the trial courts to apply it uniformly when a plea of guilty or no contest is the product of a plea bargain. The court may have failed to give the admonition here because the State's omission of the recitation required by Crim.R. 11(F) didn't alert the court to the need of it.

{¶13} We cannot find that, on this record, the trial court in any way promised the Defendant that it would impose a sentence different from the one it imposed, such that this guilty plea was the product of a breach that rendered it

less than knowing, intelligent, and voluntary. The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶14} "APPELLANT WAS DENIED HIS CONSTITUTIONALLY MANDATED RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL."

{¶15} In order to prevail on a claim of ineffective assistance of counsel it must first be shown that counsel's performance failed to satisfy prevailing professional norms in some respect. Second, it must be shown that as a result of that defect the defendant was prejudiced to such an extent that, absent the defect, the outcome of the proceeding probably would have been otherwise. Further, that prejudice must be affirmatively demonstrated. ***Strickland v. Washington*** **(1984), 466 U.S. 668.**

{¶16} Defendant argues that his trial counsel failed in his professional duty to Defendant when he failed to object when the court imposed a sentence different from what it had promised to impose, breaching the plea agreement. Having found that the court made no such promise, we cannot find that Defendant's attorney failed in his duty in the respect alleged.

{¶17} The second assignment of error is overruled. The judgment of the trial court will be affirmed.

Judgment affirmed.

BROGAN, J. and YOUNG, J., concur.

Copies mailed to:

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Alan Gabel, Esq.
Hon. Richard J. O'Neill