

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-966
Franklin Black,	:	(C.P.C. No. 11CR-02-1080)
Defendant-Appellant.	:	(REGULAR CALENDAR)

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D E C I S I O N

Rendered on August 21, 2012

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*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

*Richard D. Brown Law Office, LLC*, and *Richard D. Brown*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Franklin Black is appealing from the judgments and sentences entered against him following his guilty pleas. He assigns three errors for our consideration:

[I.] The Trial Court Erred When It Accepted Appellant's Guilty Pleas Without Making a Meaningful Determination Whether Appellant's Pleas Were Knowing, Voluntary, and Intelligent; and, Whether Appellant Fully Understood the Possible Penalties to Which He Could Be Sentenced, in Violation of Crim.R. 11 and Constitutional Due Process Guarantees.

[II.] Appellant Was Denied Effective Assistance of Counsel During the Sentencing Phase of the Trial Court Proceedings.

[III.] The Trial Court Erred By Imposing an Excessive Sentence.

{¶ 2} Black was indicted on ten charges, the most serious of which were aggravated robbery with a gun specification, kidnapping, and felonious assault. He entered into a plea bargain under the terms of which he pled guilty to seven of the charges with the associated gun specifications.

{¶ 3} After a pre-sentence investigation was prepared, a sentencing hearing was conducted at which two of the victims of Black's crimes testified. A videotape of some of the criminal events was also played.

{¶ 4} The trial judge assigned to the case then sentenced Black to a total of 33 years of incarceration.

{¶ 5} The transcript of the plea proceedings and the written plea of guilty form are unique in that they do not inform Black of the maximum sentence he could face or receive in return for his pleas of guilty. The trial court judge assigned to the case began to address the subject of maximum sentences and then got diverted into a discussion of whether several of the charges merged for purposes of sentencing. The trial court judge never got back to Black and told him that he risked a sentence of 33 years or more as a result of his pleas.

{¶ 6} The standard entry of guilty plea form used in this case also did not inform Black of how long his sentence could be if the periods of incarceration were ordered to be served consecutively. Major felonies were grouped and the maximum for each individual felony was entered without informing Black the sentences could be ordered to be served consecutively.

{¶ 7} Crim.R. 11(C)(2) requires:

**Pleas of guilty and no contest in felony cases**

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

(2) 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:

(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 regarding federal constitutional rights, and the trial court need only substantially comply with the non-constitutional provisions of the rule. *State v. Enyart*, 10th Dist. No. 08AP-184, 2008-Ohio-6418, ¶ 15, citing *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶ 14–17. The non-constitutional rights about which a defendant must be informed are the nature of the charges with an understanding of the law in relation to the facts, the maximum penalty, and that, after entering a guilty plea, the court may proceed to judgment and sentence. Crim.R. 11(C)(2)(a) and (b).

{¶ 9} "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. Furthermore, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect." (Citations omitted.) *State v. Nero*, 56 Ohio St.3d 106, 108 (1990). To demonstrate prejudice in this context, the defendant must show that the plea would otherwise not have been entered. *Id.*

{¶ 10} The proceedings in the trial court did not comply with the requirements of Crim.R. 11(C).

{¶ 11} The trial judge was required to address Black personally and make sure that Black understood the maximum penalty involved. The maximum penalty, for purposes of Crim.R. 11(C)(2)(a) is the total amount of incarceration being faced, not just the penalty being faced if Black were to be convicted of a single charge or a single count of an offense. In Black's situation, he was pleading guilty to aggravated robbery, two counts of kidnapping as a felony of the first degree and two counts of felonious assault. He potentially could have received a sentence of 46 years of incarceration on those charges alone without additional periods of incarceration attached to the 5 specifications to which he also was pleading guilty.

{¶ 12} For most or all of the plea proceedings and even part of the sentencing hearing, the trial court judge did not seem to clearly understand the maximum period of incarceration permissible under the applicable statutes. This was due in large part to the existence of provisions in the Ohio Revised Code which mandate merger of some offenses in certain circumstances, which require or allow merger of firearm specifications under certain circumstances.

{¶ 13} To be safe, some trial judges simply add up all the maximum sentences and tell the criminal defendant that he or she could be sentenced to that maximum. Some trial court judges are reluctant to take that approach because if the criminal defendant feels he or she is entering guilty pleas which could result in spending the rest of his or her life in prison, the criminal defendant might opt for a lengthy trial as opposed to a guilty plea proceeding.

{¶ 14} We do not fault the trial judge here, except to note that he did not conduct a guilty plea proceeding which fully or substantially complied with Crim.R. 11(C)(2).

{¶ 15} Based on the totality of the circumstance, Black was not aware of the maximum possible penalty that he faced. This is based on the maximum penalty not being conveyed in court, and the penalty's failure to appear in the written plea of guilty form.

{¶ 16} There is also a question of whether Black fully understood the nature of the charges he pled to. Generally, a defendant can enter a guilty plea with an understanding

of the nature of the charges when: "(1) the trial court personally addresses the defendant and the defendant indicates that he understands the charges to which he is pleading guilty; (2) his signed guilty plea indicates that he has reviewed the law and the facts with his counsel; and (3) counsel advises the court that he or she has reviewed the facts and the law with his client and that his client has read the plea form." *State v. Triplett*, 10th Dist. No. 11AP-30, 2011-Ohio-4480, ¶ 22. In *Triplett* we cited the fact that the defendant "signed and understood the guilty plea form, and that his counsel reviewed the guilty plea form with him." *Id.* We must examine the totality of the circumstance to determine whether a defendant understood the charges. *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, ¶ 56.

{¶ 17} In the case at bar, the record does not reflect that defense counsel told the court he went over the entry of guilty plea form with the defendant before he signed it or that Black had read the guilty plea form. Black's trial counsel only affirmatively answered that he felt his efforts in representing Black met the requirements of representation as set forth in the guilty plea form. This question is ambiguous and the answer cannot be taken to mean that Black's counsel affirmatively stated that Black had read the guilty plea form or that counsel had reviewed the law and facts with Black. Further, Black never states to the trial court that he reviewed the law or facts with his counsel or that counsel reviewed the guilty plea form with him. Based on the totality of these circumstances, we cannot find sufficient evidence that Black understood the nature of the charges he plead to.

{¶ 18} We believe that these errors and omissions had a prejudicial effect on Black, he could not understand the nature of his plea nor was he aware of the maximum penalty. Thus, the proceeding in the trial court did not substantially comply with Crim.R. 11(C). As a result, we have no choice but to sustain the first assignment of error.

{¶ 19} Our findings with respect to the first assignment of error render the second and third assignments of error moot.

{¶ 20} We, therefore, sustain the first assignment of error and render the second and third assignments of error moot. As a result, we vacate the findings of guilt as to the seven charges to which Black pled guilty. We remand the case to the Franklin County Court of Common Pleas for further appropriate proceedings.

*Judgment reversed and remanded*

*for further proceedings.*

**KLATT and CONNOR, JJ., concur.**

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