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*State v. Melton*, Cuyahoga App. No. 89568, 2008-Ohio-925

WHY THIS APPEAL IN A FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT GENERAL OR PUBLIC INTEREST

This cause presents for review the question of what constitutes a knowing, intelligent, and voluntary plea of guilt. In addition to the constitutional rights a defendant waives upon a guilty plea, a defendant must be informed of certain other matters before a court can accept that a plea has been entered into knowingly, intelligently and voluntarily. In fact, it must be clear from the totality of the circumstances that the defendant *subjectively* understood the implications of the plea entered into.

In this case the appellate court overlooked the totality of circumstances and failed to realize that the defendant did not have a thorough understanding of the plea entered into and its ramifications.

This case is a matter of great public importance as any person accused of a crime who chooses to enter into a plea must have a subjective understanding of all the rights they waive by entering into such a plea, and a thorough understanding of the complete ramifications of the plea they enter into.

**STATEMENT OF THE FACTS AND THE CASE**

On February 16, 2006, Appellant, Maurice Melton, was charged in case number CR-06-477036 with two counts of drug possession, two counts of trafficking offenses, tampering with evidence, illegal manufacture, two counts of possession of criminal tools, and having a weapon with a disability. Appellant retained counsel and pleaded not guilty on March 3, 2006.

On December 13, 2006, Appellant entered a plea of guilty to trafficking offenses 2925.03 in count two of the indictment. During the plea colloquy, Appellant was advised neither of the fact that he was ineligible for probation nor was Appellant advised of his appellate rights. (T. 18-23, 28-30, 32-39.) On January 12, 2007, Appellant was sentenced to eight years at the Lorain Correctional Institution. During sentencing, Appellant manifested that he did not completely understand the terms of the plea agreement that he had agreed to. (T. 47-49.) Subsequently, Appellant hired undersigned counsel to file an appeal with the Eighth District Appellate Court. Said court affirmed the judgment of the trial court on March 17, 2008. Defendant now timely appeals to this Honorable Court to hear his matter.

## ARGUMENT

**PROPOSITION OF LAW: THE COURTS BELOW ERRED IN FINDING APPELLANT SUBJECTIVELY UNDERSTOOD THE IMPLICATIONS OF HIS PLEA AND THEREFORE, THE PLEA WAS NOT ENTERED INTO KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY.**

"Because grave consequences flow directly from entering a plea of guilty, a trial court must always ensure that a criminal defendant realizes what he is giving up by his course of action. The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford (1970), 400 U.S. 25, 31.

A guilty plea must be made "knowingly, intelligently, and voluntarily." State v. Engle (1996), 74 Ohio St. 3d 525, 527. "Failure on any of these points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *Id.*

Ohio protects a criminal defendant's constitutional right to have only knowing, intelligent, and voluntary pleas accepted with Crim. R. 11. State v. Boshko (2000), 139 Ohio App. 827, 833. "Crim. R. 11(C)(2) requires the trial judge to personally inform the defendant of the constitutional guarantees he waives by entering a guilty plea." State v. Nero (1990), 56 Ohio St. 3d 106, 108. In addition to the rights the defendant is accorded under the U.S. Constitution, Crim. R. 11(C) requires the judge to inform the

defendant on other matters before accepting a guilty plea, State v. Johnson (1988), 40 Ohio St. 3d 130, 132-133, such as the maximum penalties involved and whether or not the defendant is eligible for probation.

Crim. R. 11(C) provides that:

(C) *Pleas of guilty and no contest in felony cases.*

“

(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.**

The transcript for the sentencing proceeding in this matter indicates that the trial court judge did not inform the Mr. Melton of the fact that he would not be eligible for probation or the imposition of community control before the court accepted his plea of guilty. (T. 1-41.)

The Ohio Supreme Court has stated that strict compliance with Crim. R. 11(C) is preferred, but that substantial compliance with the tenants of the rule will suffice. Nero, 56 Ohio St. 3d 106, 108. The Court went on to state that “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.” Id. (emphasis added.)

In State v. Calvillo (Cuyahoga 1991), 76 Ohio App.3d 714, "held that there is no substantial compliance with Crim. R. 11 when the trial court fails to inform the defendant that he is not eligible for probation, and there are no circumstances indicating that the defendant was aware that he was not eligible for probation." State v. Myers (Cuyahoga 1994), 1994 WL 568316 (not reported in N.E.2d).

The record in this matter does not establish that Mr. Melton subjectively understood the implications of his guilty plea. Mr. Melton did not understand that he was ineligible for probation as nowhere in the record does the trial court explain to him that he was ineligible. The Defendant's words at the sentencing hearing bear witness to the fact that defendant did not fully understand the implications of his plea:

DEFENDANT: I didn't know that when I came down here and got the eight years that I was looking at all that time. I thought something was going to be worked out. I didn't know I was going to be looking at eight years... (T. 47-48).

DEFENDANT: ... Is my whole eight years mandatory? (T. 49.)

DEFENDANT: There is nothing I can work out with it, I mean, that's a whole eight years? (T. 49.)

In addition, expressing that a sentence is mandatory, without more, is insufficient to inform a defendant that he is ineligible for community control sanctions, including judicial release. State v. Davis (Clark 2004), WL 2538827 (Not reported in N.E.2d). In Davis, and State v. Gail Pape (unreported), which is extensively quoted in Davis, although the appellate court was satisfied that the defendant

was informed his sentence was mandatory, the court concluded that a defendant may still reasonably believe that he is eligible for judicial release after serving a portion of his sentence, which would then place him on community control. Id. ¶¶ 24-26.

As shown in the record of the plea hearing (T. 1-41), the trial court never explains to Mr. Melton that he is ineligible for judicial release or community control sanctions, and the colloquy between Mr. Melton and the judge (T. 47-49) demonstrates that Mr. Melton was unaware that he would have to serve the entire eight year sentence without judicial release or community control.

As required by State v. Stewart (1977), 51 Ohio St.2d. 86, a defendant must also show a prejudicial effect resulted from a plea that was not entered into knowingly, intelligently, and voluntarily. The test is whether the plea would have otherwise been made. Id.

Defendant would not have entered a guilty plea to in this case had he known that he was required to serve a full eight years mandatory prison sentence without the possibility of those eight years being suspended and probation implemented or being eligible for judicial release and community control.

CONCLUSION

For the reasons discussed above, this case involves matters of great and public concern and involves a substantial constitutional question. The Appellant requests that this Court accept jurisdiction in this case so that the important questions presented will be reviewed upon the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the following Memorandum in Support of Jurisdiction has been forwarded to the following on this 30<sup>th</sup> day of April, 2008:

William D. Mason  
Cuyahoga County Prosecutor  
Justice Center  
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HARVEY B. BRUNER & ASSOC.

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 89568

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STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MAURICE MELTON

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-477036

BEFORE: Rocco, P.J., McMonagle, J., and Celebrezze, J.

RELEASED: March 6, 2008

JOURNALIZED: MAR 17 2008

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KENNETH A. ROCCO, P.J.:

Defendant-appellant Maurice Melton appeals from his conviction after he entered a guilty plea to a first-degree felony charge of possession of crack cocaine.

Melton presents three assignments of error. First, he asserts the trial court erred in accepting his plea, because the court failed to explain during the plea hearing that he was ineligible for probation. In his second and third assignments of error, Melton claims his trial counsel provided ineffective assistance, because counsel failed to ensure Melton understood the terms of the plea agreement, and, further, failed to seek a withdrawal of Melton's plea during the sentencing hearing.

Since, however, Melton's assignments of error lack support in the record, they are overruled. Melton's conviction is affirmed.

Melton originally was indicted in this case in February 2006 along with three co-defendants; nine of the fifteen counts pertained to Melton.

Melton was charged in counts one through five with: possession of, trafficking in, and illegal manufacture of, crack cocaine, in an amount exceeding one hundred grams; tampering with evidence; and, possession of criminal tools. Counts one and two additionally contained major drug offender specifications and a juvenile specification.

Counts eleven through fourteen charged Melton with possession of, and trafficking in, crack cocaine in an amount between one hundred and five hundred grams, with firearm specifications, along with possession of criminal tools, and having a weapon while under disability. Melton entered pleas of not guilty to the charges and retained counsel to represent him.

The record reflects that approximately six months later, after several pretrial hearings took place, Melton chose a different attorney. Melton's new counsel, in effect, began the discovery process all over again. The case eventually was set for trial on December 13, 2006.

On that date, the prosecutor informed the court that, although the state was ready to proceed to trial, Melton and two of his co-defendants had reached plea agreements in the case. Melton would enter a guilty plea to only count two, trafficking, as amended, with "an agreed to sentence of eight years\*\*\*mandatory incarceration." In exchange, the state agreed to reduce the amount of drugs alleged to between twenty-five and one hundred grams, delete the specifications, and dismiss the remaining counts.

The prosecutor noted that the plea additionally disposed of a 1995 case against Melton, in which he was charged, inter alia, with "aggravated trafficking." Melton would plead guilty to that charge, and, in exchange, the

other count would be dismissed and the eighteen-month sentence for the offense would be served concurrently with the eight years imposed in the instant case.

The trial court asked Melton's attorney if the prosecutor correctly outlined the agreement, and received an affirmative response. The court then asked Melton if he "understood what the prosecutor ha[d] said and what [his] attorney [wa]s agreeing with and [wa]s that [his] understanding of the plea as well?" Melton answered, "Yes."

The trial court at that point proceeded to conduct a careful Crim.R. 11(C) colloquy with Melton. The court concluded it by informing him that a first-degree felony offense carried a potential term of incarceration of "3, 4, 5, 6, 7, 8, 9, or 10 years," but since there was "an agreed eight year sentence in this matter," the court "would follow that recommendation if [he] showed up for [his] sentencing."

After detailing postrelease control requirements and consequences, the court reminded Melton that if he did not return for his sentencing hearing, the promise of a particular sentence would be withdrawn. Melton stated he understood. At that, the trial court accepted Melton's plea, found him guilty of the amended charge, and dismissed the other counts.

The court called the case for sentencing a month later. Melton's attorney indicated to the court that, although his client did not "have a problem with the

fact he is going to jail," he wondered if sentencing could be postponed for a time. Counsel stated Melton needed additional time to secure care for his ailing mother.

Melton also addressed the court. He stated that he had come "on down here to get [his] eight years," but hoped the judge would allow him "two more weeks to get her situated." When the court remained disinclined to do so, Melton asked if his "whole eight years [wa]s mandatory?" The court reminded him that "[t]hat was pretty clear at [his] plea" hearing.

The court thereupon imposed the eight-year term.

This court has granted Melton's motion to file a delayed appeal of his conviction. He presents three assignments of error for review.

**"I. The trial court erred by not advising Appellant of his rights in a manner that complies with Crim.R. 11.**

**"II. Appellant's attorney failed to competently represent the Appellant by not ensuring that Appellant understood the plea agreement that was offered and accepted.**

**"III. Attorney failed to competently represent the Appellant by not making an attempt to withdraw the Appellant's guilty plea when it became apparent that the Appellant did not fully understand the terms of the plea."**

Melton initially asserts that the trial court acted improperly in accepting his plea, because it failed to comply completely with the dictates of Crim.R. 11(C).

In pertinent part, Crim.R. 11(C)(2) states that the trial court “shall not accept a plea of guilty\*\*\*without first addressing the defendant personally and doing all of the following:” including, in subsection (a), “[d]etermining that he is making the plea voluntarily, with understanding\*\*\* if applicable, that [he] is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.” Melton argues the trial court did not make the foregoing determination.

The supreme court has held that there must be “substantial compliance” with the non-constitutional requirements of Crim.R. 11(C)(2)(a). *State v. Nero* (1990), 56 Ohio St.3d 106. It defined the term “substantial compliance,” as meaning “that under the totality of the circumstances the defendant subjectively understands the implications of his plea\*\*\*.” *Id.* at 108.

The record of this case demonstrates the standard was met. During the plea hearing, the prosecutor explained the agreement, Melton’s attorney concurred in that recitation, and Melton acknowledged he understood that, in exchange for his guilty plea, and as long as he appeared for his sentencing

hearing, he would receive a mandatory eight-year term. Since no qualification of the word "mandatory" was mentioned, Melton understood none existed.

Indeed, when Melton addressed the court at the sentencing hearing, he reiterated his understanding. It was only when the trial court refused to consider Melton's request for a postponement of the imposition of sentence that Melton attempted to wheedle from the court some amelioration of the agreed-upon term.

Under the circumstances, the trial court properly accepted Melton's plea. *State v. Hall*, Cuyahoga App. No. 87059, 2007-Ohio-414; *State v. Jackson*, Cuyahoga App. No. 86506, 2006-Ohio-3165. Melton's first assignment of error, accordingly, is overruled.

Melton further claims in his second and third assignments of error that his retained trial counsel provided ineffective assistance, arguing that counsel should have ensured Melton understood the eight-year term was unqualified, and, since counsel did not do so, should have moved to withdraw Melton's plea at the sentencing hearing.

In order to prevail on a claim of ineffective assistance of counsel, Melton first must demonstrate his counsel's performance was deficient, and then must show his counsel's deficient performance prejudiced his defense. *State v. Bradley* (1989), 42 Ohio St.3d 136. Counsel is presumed to render adequate assistance

unless the appellant demonstrates otherwise. *State v. Smith* (1985), 17 Ohio St.3d 98.

The record in this case reflects counsel was diligent in pursuing discovery, and thus well-prepared to broker a plea agreement by which eight of the nine outstanding counts against his client were dismissed by the state, and the remaining count also was amended in Melton's favor. Although the remaining count was still a first-degree felony, counsel arranged to have his client exposed to only an eight-year sentence in the face of all the charges. This result hardly can be considered deficient performance. *State v. Corbin* (2001), 141 Ohio App.3d 381.

Similarly, as previously explained, counsel had no basis at the sentencing hearing upon which to seek to withdraw such an advantageous plea agreement. Counsel made a persuasive argument for postponement of Melton's sentence; the trial court simply remained unmoved. Counsel cannot be faulted for being unsuccessful in this particular matter.

Since Melton cannot demonstrate his claim of ineffective assistance of trial counsel, his second and third assignments of error also are overruled. *State v. Hall*, *supra*.

Melton's conviction is affirmed.

It is ordered that appellee recover from appellant 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. Case remanded to the trial court for execution of sentence

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



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KENNETH A. ROCCO, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., and  
FRANK D. CELEBREZZE, JR., J., CONCUR