

[Cite as *State v. Moore*, 2015-Ohio-1026.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101658

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**CARLITO MOORE**

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-14-581594-A

**BEFORE:** Laster Mays, J., E.A. Gallagher, P.J., and E.T. Gallagher, J.

**RELEASED AND JOURNALIZED:** March 19, 2015

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ANITA LASTER MAYS, J.:

{¶1} After entering a guilty plea to a charge of attempted felonious assault with a three-year firearm specification, defendant-appellant Carlito Moore appealed from his convictions. Moore presents three assignments of error, claiming that his guilty plea was infirm because the trial court failed to: (1) require him to separately plead to the firearm specification, (2) inform him of the maximum fine involved, and (3) provide him with clear information about his ineligibility for “probation.”

{¶2} A review of the record, however, demonstrates that the trial court substantially complied with the non-constitutional duties placed upon it by Crim.R. 11(C)(2). Consequently, Moore’s assignments of error are overruled. His convictions are affirmed.

{¶3} Moore was indicted in this case on three counts, charged with one count of attempted murder and two counts of felonious assault. Each count contained both a one- and a three-year firearm specification.

{¶4} On the day that his jury trial was to commence, the parties informed the court that a plea agreement had been reached. As set forth by the prosecutor, in exchange for Moore’s guilty plea to Count 2, as amended to include the attempt statute and to delete only the one-year firearm specification, the state would dismiss the remaining charges. The trial court accepted Moore’s guilty pleas after conducting a colloquy. Subsequently, the trial court sentenced Moore to a prison term of three years for the firearm specification to be served prior to and consecutive with one year for the base charge.

{¶5} Moore appeals from his convictions with three assignments of error, as follows:

I. Appellant did not enter his plea knowingly, intelligently, or voluntarily because there was never a separate guilty plea to the firearm specification.

II. Appellant did not enter his plea knowingly, intelligently, or voluntarily because the trial court failed to properly inform him of the maximum fine as required by Crim.R. 11(c)(2)(a) [sic].

III. Appellant did not enter his plea knowingly, intelligently, or voluntarily because the trial court failed to properly inform Appellant that he is not eligible for probation or for the imposition of community control sanctions.

{¶6} In each of his assignments of error, Moore asserts that the trial court failed to comply with the dictates of Crim.R. 11(C)(2), consequently, his guilty pleas should be vacated. This court finds that the trial court committed no reversible error.

{¶7} Pursuant to Crim.R. 11(C), a trial court must make certain advisements prior to accepting a defendant's guilty plea in order to ensure that the plea is knowing, intelligent, and voluntary. *State v. Engle*, 74 Ohio St.3d 525, 660 N.E.2d 450 (1996). These advisements are divided into constitutional rights and nonconstitutional rights. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51.

{¶8} The nonconstitutional rights of which the defendant must be informed are: 1) the nature of the charges; 2) the maximum penalty involved, which includes, if applicable, an advisement on postrelease control; 3) if applicable, that the defendant is ineligible for the imposition of community control sanctions; and, 4) the court may proceed directly to judgment and sentencing. Crim.R. 11(C)(2)(a), (b); *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, at ¶ 10-13; *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 19-26.

{¶9} The trial court must substantially comply with Crim.R. 11's mandates with respect to nonconstitutional rights. *Griggs* at ¶ 12, citing *State v. Nero*, 56 Ohio St.3d 106, 564 N.E.2d 474 (1990). "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.” *Veney* at ¶ 15, quoting *Nero* at 108. A defendant who challenges his guilty plea on the basis that the trial court’s advisement of nonconstitutional rights was not in substantial compliance with Crim.R. 11(C)(2)(a), (b) must also show a prejudicial effect, i.e., that the plea would not have been entered. *Veney* at ¶ 15, citing *Nero* at 108.

{¶10} Moore first asserts that his guilty pleas were infirm for the trial court’s failure to require a separate plea to the firearm specification. This court addressed the same assertion in *State v. Davis*, 8th Dist. Cuyahoga No. 76085, 2000 Ohio App. LEXIS 4044 (Sept. 7, 2000), and stated in pertinent part as follows:

\* \* \* Davis contends in his fourth assignment of error that the judge failed to elicit and accept guilty pleas for each firearm specification separate and apart from the guilty pleas for the underlying charges. This assignment of error raises the \* \* \* “nature of the charge” issue \* \* \* ; the purpose behind requiring separate pleas is to ensure that Davis understood that each firearm specification contained elements separate from the underlying charges \* \* \* .

Davis correctly states that a separate charge, plea, and conviction for the firearm specification is required \* \* \* . *State v. Tyson* (1984), 19 Ohio App. 3d 90, 94, 482 N.E.2d 1327, 1330-31. The *Tyson* requirement of separate pleas, however, is subject to substantial compliance review. *State v. Richard* (Oct. 28, 1999), Cuyahoga App. No. 74815, unreported; *State v. Harris* (Dec. 6, 1990), Cuyahoga App. No. 59541, unreported.

The record shows that each count of the indictment separately stated the firearm specifications, and *the judge informed Davis that each count on which he was to enter a plea contained a firearm specification that would add three years to his sentence*. Although the judge then asked Davis to plead guilty to each count of the offense, rather than asking him to plead separately to each charge stated within the counts, Davis cannot rebut the circumstances indicating a lack of prejudice. \* \* \*

(Emphasis added.)

{¶11} Similarly, the transcript of Moore’s plea hearing in this case demonstrates the trial court stated that Moore would be pleading guilty to “the underlying crime of attempted felonious

assault” and, in addition, the “three-year firearm specification,” which meant that Moore “must serve that time in prison” and “before any sentence on the amended Count 2.” The court told Moore that, “after serving the 3 years, which must be done prior to and consecutive to the Felony 3,” Moore would then be required to serve the sentence for attempted felonious assault. Under these circumstances, Moore cannot support a claim on this basis that his guilty pleas were not knowingly, voluntarily, and intelligently made.

{¶12} Moore next asserts that the trial court neglected to inform him that the maximum penalty for these offenses involved a fine. However, because the record reflects the trial court did not impose any fine on Moore, he cannot demonstrate that his plea would not otherwise have been entered. *State v. Simmons*, 8th Dist. Cuyahoga Nos. 99513 and 100552, 2013-Ohio-5026, ¶ 7.

{¶13} Lastly, Moore asserts that the trial court provided “confusing and ambiguous” information concerning his ineligibility for “probation.” The record, however, belies his assertion.

{¶14} R.C. 2929.13 states in pertinent part as follows:

(A) Except as provided in division (E), (F), or (G) of this section and *unless a specific sanction is required to be imposed* or is precluded from being imposed pursuant to law, a court that imposes a sentence upon an offender for a felony *may impose any sanction or combination of sanctions on the offender that are provided* in sections 2929.14 to 2929.18 of the Revised Code.

\* \* \* (C) *Except as provided in division (D), (E), (F), or (G) of this section, in determining whether to impose a prison term as a sanction for a felony of the third degree \* \* \**, the sentencing court shall comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code and with section 2929.12 of the Revised Code.

\* \* \*

(F) Notwithstanding divisions (A) to (E) of this section, the court *shall impose a prison term* or terms \* \* \* and \* \* \* shall not reduce the term or terms \* \* \* *for any of the following offenses:*

\* \* \*

(8) Any offense \* \* \* that is a felony, *if the offender had a firearm on or about the offender's person or under the offender's control while committing the felony, with respect to a portion of the sentence imposed pursuant to division (B)(1)(a) of section 2929.14 of the Revised Code for having the firearm* \* \* \* .

(Emphasis added.)

{¶15} With respect to Moore's eligibility for community control sanctions, the trial court explained:

\* \* \* That leaves this, as amended, to be attempted felonious assault with a three-year firearm specification. The underlying crime of attempted felonious assault is a felony in [sic] the third degree \* \* \* . The three-year firearm specification means that you must serve that time in prison. And you must serve that time in prison before any sentence on the amended Count 2, attempted felonious assault \* \* \* . So after serving the 3 years, which must be done prior to and consecutive to the Felony 3, a Felony 3 exposes you to time in prison from 9 months to 36 months and a possibility of 12, 18, 24 or 30 months. One of those time periods have to be selected by me.

In addition, because this is a felony in the third degree, lower tier, I also have the option of putting you on what's called community-controlled sanctions or probation. But that can only occur after you serve the first 3 years of mandatory time for the three-year firearm specification \* \* \* . After the three-year gun specification I can either put you on community controlled sanctions or — called Probation — or assign you a prison term between 9 and 36 months as I've outlined. If I put you on community-controlled sanctions I can do so for 5 years and require you to participate in programs that would be beneficial to you and to the community. \* \* \*

{¶16} Thus, the trial court told Moore that he was ineligible for “probation” with respect to a portion of his sentence, but eligible with respect to the underlying offense. This information can be described only as reasonably intelligible because Moore expressed no confusion. *State v. Caraballo*, 8th Dist. Cuyahoga No. 97915, 2012-Ohio-5725; *State v. Holt*, 8th Dist. Cuyahoga No. 94039, 2010-Ohio-5591, citing *State v. Melton*, 8th Dist. Cuyahoga No. 89568, 2008-Ohio-925; *State v. Oldham*, 8th Dist. Cuyahoga No. 76611, 2000 Ohio App. LEXIS 3839 (Aug. 24, 2000); *State v. Collins*, 8th Dist. Cuyahoga No. 95503, 1999 Ohio App. LEXIS 4913 (Oct. 21, 1999).

{¶17} In light of the trial court’s substantial compliance with the duties placed upon it by Crim.R. 11(C)(2), Moore’s assignments of error are overruled. Moore’s convictions and sentences are 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.

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

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ANITA LASTER MAYS, JUDGE

EILEEN A. GALLAGHER, P.J., CONCURS;  
EILEEN T. GALLAGHER, J., CONCURS IN  
JUDGMENT ONLY WITH SEPARATE  
OPINION

EILEEN T. GALLAGHER, J., CONCURRING IN JUDGMENT ONLY:

{¶18} I concur with the majority opinion, but write separately to specifically reject appellant’s position at oral argument that the three-year mandatory prison term imposed on the firearm specification and the community control sanctions imposed on the underlying felony constituted an improper “split sentence.” I recognize “the sentencing statute does not allow a trial court to impose both a prison sentence and community control *for the same offense.*” (Emphasis added.) *State v. Jacobs*, 189 Ohio App.3d 283, 2010-Ohio-4010, 938 N.E.2d 79, ¶ 5 (8th Dist.). Such split sentences are prohibited; instead, the trial court must “decide which



sentence is most appropriate — prison or community control sanctions — and impose whichever option is deemed to be necessary.” *Id.*, quoting *State v. Vlad*, 153 Ohio App.3d 74, 2003-Ohio-2930, 790 N.E.2d 1246, ¶ 16 (7th Dist.). However, “[a] firearm specification is not a separate offense but, rather, a sentencing provision that enhances the penalty for the associated predicate offense.” *State v. Jennings*, 10th Dist. Franklin No. 09AP-70, 2009-Ohio-6840, ¶ 38. Thus, contrary to appellant’s contention, the “split sentence” scenario is not implicated in this matter. The sentence imposed by the trial court is not contrary to law.