[Cite as *State v. Fontanez*, 2024-Ohio-4579.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 113105
v.	:	
ALBERT FONTANEZ,	:	
Defendant-Appellant.	:	

EN BANC DECISION AND JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 19, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CR-21-664789-A, CR-22-669649-A, CR-22-670606-B,
CR-22-672399-A, and CR-22-674611-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Alexandria Serdaru and Frank Romeo Zeleznikar, Assistant Prosecuting Attorneys, *for appellee*.

Milton and Charlotte Kramer Law Clinic, Case Western Reserve University School of Law, Andrew S. Pollis, and Melissa A. Ghrist, Supervising Attorneys, and Spencer Luckwitz, and Kory C. Roth, Legal Interns, *for appellant*.

EILEEN T. GALLAGHER, J.:

{¶ 1} Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 2008-Ohio-4914, this court sua sponte determined that *State v.*

Fontanez, 2024-Ohio-1590 (8th Dist.), conflicts with *Cleveland v. Martin*, 2023-Ohio-448 (8th Dist.), and *Cleveland v. Jones-McFarlane*, 2020-Ohio-3662 (8th Dist.), on a dispositive point of controlling authority.

{¶ 2} Other cases from this court are consistent with *Fontanez* but are also in conflict with *Martin* and *Jones-McFarlane*. These cases include: *State v. Stewart*, 2021-Ohio-3600 (8th Dist.); *State v. Reyes*, 2021-Ohio-3599 (8th Dist.); *State v. Kauffman*, 2021-Ohio-1584 (8th Dist.), *Ohio v. Clifton*, 2022-Ohio-3814 (8th Dist.), ¶ 89; *State v. Acosta*, 2022-Ohio-3327, ¶ 46 (8th Dist.).

{¶ 3} En banc review is necessary to maintain harmony in the law of this district. *See, e.g.*, *Midland Funding L.L.C. v. Hottenroth*, 2014-Ohio-5680, ¶ 1 (8th Dist.) (resolving the conflict between two disparate lines of authority interpreting procedural rules through an en banc proceeding).

{¶ 4} In August 2023, defendant-appellant, Albert Fontanez ("Fontanez"), filed a notice of appeal challenging his convictions after entering guilty pleas to numerous counts in multiple cases. He claimed the following two errors:

> 1. The trial court erred by accepting Mr. Fontanez's guilty plea without first informing him of the effect of his plea, determining that he understood the effect, and informing that the court could proceed to judgment and sentence, all as required by Crim.R. 11(C)(2)(b).
>
> 2. The trial court erred in denying Mr. Fontanez's presentence motion to withdraw his guilty plea.

{¶ 5} This en banc opinion is concerned solely with the first assignment of error and is divided into two parts: (1) the en banc decision and (2) the merit panel

decision. The en banc decision is limited to two interrelated conflict questions to be resolved en banc:

> 1. Whether the trial court's failure to inform a defendant that a guilty plea is a complete admission of the defendant's guilt constitutes a complete failure to comply with Crim.R. 11 such that a showing of prejudice is not required to invalidate the plea.
>
> 2. Whether the Ohio Supreme Court's decision in *State v. Griggs*, 2004-Ohio-4415, remains good law following the Court's decision in *State v. Dangler*, 2020-Ohio-2765.

Decision of the En Banc Court

{¶ 6} Due process requires that a defendant's plea be made knowingly, intelligently, and voluntarily; otherwise, the plea is invalid. *State v. Bishop*, 2018-Ohio-5132, ¶ 10, citing *State v. Clark*, 2008-Ohio-3748, ¶ 25.

{¶ 7} Crim.R. 11(C) outlines the procedures a trial court must follow when accepting guilty or no contest pleas. The purpose of Crim.R. 11(C) is "'to convey to the defendant certain information so that he [or she] can make a voluntary and intelligent decision whether to plead guilty.'" *State v. Woodall*, 2016-Ohio-294, ¶ 12 (8th Dist.), quoting *State v. Ballard*, 66 Ohio St.2d 473, 479-480 (1981). It also "'ensures an adequate record on review by requiring the trial court to personally inform the defendant of his rights and the consequences of his plea and determine if the plea is understandingly and voluntarily made.'" *State v. Dangler*, 2020-Ohio-2765, ¶ 11, quoting *State v. Stone*, 43 Ohio St.2d 163, 168 (1975).

{¶ 8} When a defendant seeks to reverse his conviction, ordinarily the defendant must demonstrate (1) an error in the proceedings, and (2) that the error caused prejudice to the defendant. *Dangler* at ¶ 13. There are, however, two

exceptions applicable to convictions rendered following a guilty or no contest plea. The first occurs when "a trial court fails to explain the constitutional rights that the defendant waives by pleading guilty or no contest." *Id.* at ¶ 14. The second occurs if the trial court *completely* fails to comply with Crim.R. 11(C)'s requirement that it explain the nonconstitutional aspects of the plea proceedings. *Id.* at ¶ 15. "Aside from these two exceptions, the traditional rule continues to apply: a defendant is not entitled to have his plea vacated unless he demonstrates he was prejudiced by a failure of the trial court to comply with the provisions of Crim.R. 11(C)." *Id.* at ¶ 16, citing *State v. Nero*, 56 Ohio St.3d 106, 107 (1990). "The test for prejudice is 'whether the plea would have otherwise been made.'" *Id.* at ¶ 16, citing *Nero* at 108.

{¶ 9} In *Dangler*, the Ohio Supreme Court sought to simplify our review of the criminal-plea analysis by dispensing with the different tiers of compliance with Crim.R. 11(C), i.e., partial, substantial, or strict compliance. *Id.* at ¶ 17. Instead, the Court identified the following questions to be asked when reviewing a trial court's Crim.R. 11(C) colloquy:

> (1) has the trial court complied with the relevant provision of the rule?
>
> (2) if the court has not complied fully with the rule, is the purported failure of a type that excuses a defendant from the burden of demonstrating prejudice? and
>
> (3) if a showing of prejudice is required, has the defendant met that burden?

Id. at ¶ 17.

{¶ 10} In *Dangler*, the Ohio Supreme Court did not explicitly define what constitutes a "complete failure to comply" with Crim.R. 11. Nevertheless, the Court

held that the trial court in that case did not completely fail to comply with its duty to explain the maximum potential penalties to Dangler even though it did not explain the in-person-verification requirements, community-notification provisions, and residency restrictions applicable to his sex-offender classification. *Id.* at ¶ 22-23. Although the applicable sex-offender registration was punitive, the Court found that the trial court did not completely fail to explain the maximum potential penalty because the trial court generally advised Dangler that he would be subject to registration requirements. *Id.* at ¶ 22-23.

{¶ 11} In *State v. Miller*, 2020-Ohio-1420, decided less than one month before *Dangler*, the Court elaborated on its common-sense approach to the review of Crim.R. 11 colloquies. In that case, the trial court enumerated the constitutional rights that Miller would be entitled to if he exercised his right to trial, and Miller affirmatively stated that he understood the rights. However, the trial court failed to ask Miller whether he understood that he was waiving those rights by pleading guilty. Thus, the Court was asked to determine whether trial courts in felony cases must strictly comply with Crim.R. 11(C)(2)(c) when conducting its plea colloquy and, if so, whether strict compliance requires that the colloquy include particular words. *Id.* at ¶ 1. In answering that question, the Court acknowledged that it had "never mandated that a trial court use particular words in order to comply with Crim.R. 11(C)(2)(c)," the provision setting forth a defendant's constitutional rights. *Id.* at ¶ 17. Indeed, the Court explained that the

> "[f]ailure to use the exact language contained in Crim.R. 11(C), in informing a criminal defendant of his constitutional right to a trial and the constitutional rights related to such trial, including the right to trial by jury, is not grounds for vacating a plea as long as the record shows that the trial court explained these rights in a manner reasonably intelligible to that defendant."

Id., quoting *Ballard*, 66 Ohio St.2d at paragraph two of the syllabus. Thus, the Court held that strict compliance with Crim.R. 11(C)(2)(c) did not require rote recitation of the exact language of the rule. *Id.* Rather, the touchstone of the analysis was, and still is, whether the record shows that the trial court explained the rights outlined in Crim.R. 11(C)(2) in a manner reasonably intelligible to the defendant. *Miller* at ¶ 17-19. In *Dangler*, the Court explained:

> [O]ur focus in reviewing pleas has not been on whether the trial court has "[incanted] the precise verbiage" of the rule, *State v. Stewart*, 51 Ohio St.2d 86, 92, 364 N.E.2d 1163 (1997), but on whether the dialogue between the court and the defendant demonstrates that the defendant understood the consequences of his plea.

Dangler at ¶ 12, citing *Miller* at ¶ 19 and *State v. Veney*, 2008-Ohio-5200, ¶ 15-16.

{¶ 12} Although the trial court in *Miller* did not expressly ask whether Miller understood that he was waiving his constitutional rights by virtue of his guilty plea, the effect of the waiver was reasonably understood from the context of the colloquy. The Court observed: "Common sense tells us that the trial judge's use of easily understood words conveyed to Miller that he would be waiving certain constitutional rights if he were to plead guilty and that the exchange resulted in Miller's plea being voluntarily, knowingly, and intelligently made." The Court further stated that "[t]o reach any other result would raise form over substance" and that they "refuse to require trial courts to use particular words during the plea

colloquy." *Id.* at ¶ 21. Therefore, the Court concluded that a trial court strictly complies with Crim.R. 11(C)(2)(c) when it orally advises the defendant in a manner reasonably intelligible to the defendant that the plea waives the rights enumerated in the rule. *Id.* at ¶ 22.

{¶ 13} In this case, Fontanez sought to have his pleas vacated on grounds that the trial court failed to inform him that his guilty plea was a complete admission of guilt as required by Crim.R. 11(C)(2)(b). Crim.R. 11(B)(1) provides that "[t]he plea of guilty is a complete admission of the defendant's guilt." Unlike a plea of "no contest," a legal term that carries consequences that are not readily apparent to an ordinary person without further explanation, the meaning of a guilty plea is self-evident. The term "guilty" is a plain and commonly used word in the English language. Dictionary.com defines it as "having committed an offense, crime, violation, or wrong, especially against moral or penal law; justly subject to a certain accusation or penalty; culpable[.]" Dictionary.com, "guilty" available at https://perma.cc/PD74-HXC2 (accessed May 13, 2024).

{¶ 14} The plain and ordinary meaning of the word "guilty" is also apparent from the plea colloquy itself. During the colloquy, the trial court asked Fontanez if he committed the specific act charged in each count to which he was pleading guilty. For example, when pleading guilty to aggravated assault in Cuyahoga C.P. No. CR-22-664789-A, the court asked Fontanez:

> THE COURT: In Count 1, how do you plead * * * on July 22 of 2021, in Cuyahoga County, *you unlawfully did*, while under the influence of sudden passion or in a sudden fit of rage, either of which was brought

> on by serious provocation occasioned by [the victim], that was reasonably sufficient to incite you into using deadly force, *you did knowingly cause or attempt to cause* physical harm to [the victim] by means of deadly weapon?
>
> To this felony of the fourth degree * * * how do you plead?
>
> THE DEFENDANT: Guilty.

(Emphasis added.) (Tr. 54.) That Fontanez knowingly admitted that he committed the acts described by the judge is undeniable. Therefore, common sense dictates that Fontanez understood that his guilty plea was an admission of his guilt.

{¶ 15} Because a guilty plea is obviously an admission of guilt, the Ohio Supreme Court held in *Griggs,* 2004-Ohio-4415, at ¶ 19, that "a defendant who has entered a guilty plea without asserting actual innocence is presumed to understand that he has completely admitted his guilt." Although *Griggs* was decided prior to the Court's decision in *Dangler*, it remains good law on the issue of a defendant's subjective understanding of the effect of a guilty plea. *Dangler* did not explicitly overrule *Griggs*, and inferior courts are generally bound by the precedent of superior courts unless or until they overrule the prior decision. *See State ex rel. Anderson v. The Village of Obetz*, 2008-Ohio-4064, ¶ 12 (10th Dist.); *Johnson v. Microsoft Corp.*, 2004-Ohio-761, ¶ 8 (1st Dist.), citing *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989).

{¶ 16} In *Rodriguez de Quijas*, the United States Supreme Court stated that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow

the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 484.

{¶ 17} *Griggs* is still widely cited for this proposition of law post-*Dangler*. *See, e.g.*, *State v. Hawkins*, 2023-Ohio-2915, ¶ 12-13 (12th Dist.); *State v. Rogers*, 2022-Ohio-4126 ¶ 48 (6th Dist.); *State v. Anderson*, 2023-Ohio-2870 (5th Dist.); *State v. McClelland*, 2021-Ohio-3018 (7th Dist.), ¶ 37, citing *State v. Oliver*, 2021-Ohio-1247, ¶ 24 (7th Dist.); *State v. Hughes*, 2021-Ohio-4534, ¶ 10 (10th Dist.); *State v. Stewart*, 2021-Ohio-3600 (8th Dist.); *State v. Reyes*, 2021-Ohio-3599 (8th Dist.); *State v. Kauffman*, 2021-Ohio-1584, (8th Dist.); *Ohio v. Clifton*, 2022-Ohio-3814, 970, ¶ 89 (8th Dist.); and *State v. Acosta*, 2022-Ohio-3327, ¶ 46 (8th Dist.).

{¶ 18} Moreover, the Court's reasoning in *Griggs* is consistent with the common-sense approach to the review of guilty pleas articulated in *Dangler* and *Miller*. Although the trial court in *Griggs* did not inform Griggs that his guilty plea was a complete admission of guilt, the Court determined that he understood the effect of his guilty plea because he signed a document indicating that he committed the acts to which he was pleading guilty, Griggs's counsel stated on the record that he understood the document and the consequences of waiving his rights, and because the prosecutor set forth the factual basis for Griggs's guilty plea on the record. *Griggs* at ¶ 16.

{¶ 19} In *Dangler*, the Court determined that the trial court did not completely fail to comply with its duty to explain the maximum penalties to the defendant even though it did not inform the defendant of the residential restrictions

and community-notification requirements of the applicable sex-offender classification. And the trial court in *Miller* did not completely fail to comply with Crim.R. 11(C)(2) even though it did not specifically advise Miller that he would waive his constitutional trial rights by pleading guilty because the waiver was obvious from the context of the plea colloquy. Likewise, the trial court in this case did not completely fail to communicate the effect of Fontanez's guilty pleas where the court asked Fontanez if he committed the acts described in each count to which he replied that he was "guilty."

{¶ 20} We, therefore, find that where a trial court does not explicitly state that a guilty plea constitutes a complete admission of guilt during a Crim.R. 11 colloquy but the court otherwise complies with the rule and the defendant does not assert actual innocence, we may presume that the defendant understood that his guilty plea was a complete admission of guilt. And, despite *Dangler*'s new standards for evaluating guilty pleas, the Ohio Supreme Court's decision in *Griggs*, 2004-Ohio-4415, remains good law on this point.

{¶ 21} Based on the foregoing, we overrule *Martin*, 2023-Ohio-448 (8th Dist.), and *Jones-McFarlane*, 2020-Ohio-3662 (8th Dist.), to the extent that they conflict with the holding in this en banc decision.

EILEEN T. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, A.J.; MARY J. BOYLE; FRANK DANIEL CELEBREZZE, III; LISA B. FORBES; EILEEN A. GALLAGHER; and MICHELLE J. SHEEHAN, JJ., CONCUR

MICHAEL JOHN RYAN, J., DISSENTS (WITH SEPARATE OPINION)

SEAN C. GALLAGHER, EMANUELLA D. GROVES, and ANITA LASTER MAYS, JJ., CONCUR WITH JUDGE MICHAEL JOHN RYAN'S DISSENTING OPINION

MICHAEL JOHN RYAN, J., DISSENTING:

{¶ 22} Respectfully, I dissent from the majority's en banc opinion.

{¶ 23} As the majority states, under Crim.R. 11(C)(2), a trial court shall not accept a guilty or no contest plea in a felony case 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 . . . .
>
> (b) Informing the defendant of and determining that the defendant understands the effects of the plea . . . , 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.

{¶ 24} The purpose of Crim.R. 11(C) is to convey specific information to a defendant so that he or she can make a voluntary and intelligent decision regarding whether to enter a guilty or no contest plea. *State v. Schmick*, 2011-Ohio-2263, ¶ 5 (8th Dist.). This court reviews the issue of whether a trial court accepted a plea in

conformance with Crim.R. 11(C) under a de novo standard of review. *State v. Lunder*, 2014-Ohio-5341, ¶ 22 (8th Dist.).

{¶ 25} "When a criminal defendant seeks to have his [or her] conviction reversed on appeal, the traditional rule is that he [or she] must establish that an error occurred in the trial-court proceedings and that he [or she] was prejudiced by that error." *State v. Dangler*, 2020-Ohio-2765, ¶ 13. "'The test for prejudice is 'whether the plea would have otherwise been made.'" *Id.* at ¶ 16, quoting *State v. Nero*, 56 Ohio St.3d 106, 108 (1990). A defendant must establish prejudice "'on the face of the record'" and not solely by virtue of challenging the plea on appeal. *Dangler* at ¶ 24, quoting *Hayward v. Summa Health Sys.*, 2014-Ohio-1913, ¶ 26.

{¶ 26} However, the traditional rule is subject to two limited exceptions. *Dangler* at ¶ 14-16. Under these two exceptions, a defendant is not required to demonstrate prejudice when a trial court (1) fails to explain the constitutional rights set forth in Crim.R. 11(C)(2)(c) that a defendant waives by pleading guilty or no contest, or (2) has completely failed to comply with a portion of Crim.R. 11(C). *Id.* at ¶ 14-15, citing *State v. Clark*, 2008-Ohio-3748, ¶ 31; *State v. Sarkozy*, 2008-Ohio-509, ¶ 22 (finding that because the trial court completely failed "to inform the defendant of the mandatory term of postrelease control, which was a part of the maximum penalty, the court did not meet the requirements of Crim.R. 11(C)(2)(a). A complete failure to comply with the rule does not implicate an analysis of prejudice."). "Aside from these two exceptions, the traditional rule continues to apply: a defendant is not entitled to have his [or her] plea vacated unless he [or she]

demonstrates he [or she] was prejudiced by a failure of the trial court to comply with the provisions of Crim.R. 11(C)." *Dangler* at ¶ 16, citing *Nero* at 108.

{¶ 27} The first issue in this en banc proceeding is whether a trial court's failure to advise a defendant that his or her plea constitutes a complete admission of their guilt is a complete failure to comply with Crim.R. 11, such that a showing of prejudice is not required to invalidate the plea. I believe it does.

{¶ 28} The *Dangler* Court recognized that prior caselaw setting forth the strict-, substantial-, and partial-compliance standards had "muddled [the] analysis by suggesting different tiers of compliance with the rule" and "those formulations have served only to unduly complicate what should be a fairly straightforward inquiry." *Id.* at ¶ 17. Instead, the Court identified the following three questions to be answered: (1) did the trial court comply with the relevant provision of the rule? (2) if the court did not comply fully with the rule, was the failure of a type that excuses a defendant from the burden of demonstrating prejudice? and (3) if a showing of prejudice is required, has the defendant met that burden? *Id.*

{¶ 29} In *Dangler*, the defendant sought to have his no contest plea to sexual battery vacated, contending that the trial court failed to fully comply with Crim.R. 11 because it failed to explain the maximum penalty for the offense during the plea colloquy. The trial court informed the defendant that he would have to register as a Tier III sexual offender for the remainder of his life, but failed to more fully explain the obligations and restrictions attendant to his sexual offender status. The *Dangler* Court disagreed that the trial court's failure to more fully explain the sexual offender

status was a complete failure to comply with Crim.R. 11. The Court therefore determined that the defendant would only be entitled to have his plea vacated if he demonstrated prejudice, which it found he did not. *Id*. at ¶ 2.

{¶ 30} I believe the within case is in contrast to *Dangler*, where there was not a complete failure to advise the defendant of a requirement under Crim.R. 11. Here, the trial court completely failed to explain to Fontanez the effect of his guilty plea as required under Crim.R. 11.

{¶ 31} I decline to ascribe to the majority's view that a defendant who states he or she is "guilty" to an offense understands, based on common usage of the word "guilty," that he or she is entering a complete admission of guilt. I believe that if the implication of "guilty" was so obvious, there would be no need for it to be defined, as Crim.R. 11(B)(1) does: "The plea of guilty is a complete admission of the defendant's guilt." The inclusion in Crim.R. 11 of exactly what the effect of a guilty plea is — a complete admission of guilt — signals to me the level of importance assigned to it.

{¶ 32} I further note that Crim.R. 11 does not make a distinction between a felony no contest plea and a felony guilty plea. I would find the lack of distinction undercuts the argument that the effect of a guilty plea is "obvious." The rule mandates that whether the plea is a no contest plea or a guilty plea, the trial court is required to address the defendant personally, inform the defendant of the effect of the guilty plea or no contest plea, and determine that the defendant understands the effect of the plea of guilty or no contest

{¶ 33} At least two other Ohio Appellate Districts have found that a trial court's failure to advise a defendant that his or her plea constitutes a complete admission of their guilt is a complete failure to comply with Crim.R. 11, such that a showing of prejudice is not required to invalidate the plea. First, in *State v. Sauceman*, 2021-Ohio-172 (11th Dist.), the Eleventh District Court of Appeals considered the defendant's guilty plea to a misdemeanor OVI offense, a petty offense, which was governed, in part, by Traf.R. 10. Under Traf.R. 10, when taking a guilty plea for a misdemeanor involving either a serious or a petty offense, a trial court is required to inform the defendant "of the effect of the plea of guilty, no contest, and not guilty." Traf.R. 10(C) and (D). The rule, like Crim.R. 11, defines the effect of a guilty plea: "The plea of guilty is a complete admission of the defendant's guilt." Traf.R. 10(B)(1).

{¶ 34} The defendant in *Sauceman* "was not advised that her plea of guilty was a complete admission of her guilt." *Id.* at ¶ 15. The appellate court held that "[t]he failure to comply with the sole requirement mandated by the Traffic Rules for accepting a plea in petty offense cases, like its counterpart petty offense cases in the Criminal Rules, is grounds for reversing the conviction." *Id.* at ¶ 17, citing *State v. Clark*, 2012-Ohio-3889, ¶ 32 (11th Dist.); *State v. McGlinch*, 2019-Ohio-1380, ¶ 31 (2d Dist.); *Maple Hts. v. Mohammad*, 2019-Ohio-4577, ¶ 16 (8th Dist.);[1] and *State v. Smith*, 2016-Ohio-3496, ¶ 12 (9th Dist.).

---

[1] *Mohammad* involved an unusual circumstance of a former property manager entering a no contest plea for a petty offense surrounding violations at a property he no longer managed, even in light of the property owner himself acknowledging that the

{¶ 35} Second, *State v. Dumas*, 2024-Ohio-2731 (2d Dist.), involved a misdemeanor disorderly conduct guilty plea at which the trial court failed to advise the defendant that her plea was a complete admission of her guilt. Although there was a plea form containing that language, the Second District Court of Appeals still found that insufficient because the plea form was not mentioned at the plea hearing. The appellate court therefore found merit in the defendant's appeal and reversed the trial court's judgment.

{¶ 36} I would follow the Eleventh and Second Districts. Thus, I would answer the first conflict question in the affirmative: yes, a trial court's failure to inform a defendant that a plea of guilty is a complete admission of the defendant's guilt constitutes a complete failure to comply with Crim.R. 11, such that a showing of prejudice is not required to invalidate the plea.

{¶ 37} I believe the answer to the second certified conflict question — whether *State v. Griggs*, 2004-Ohio-4415 — remains good law in light of *Dangler*, 2020-Ohio-2765 — is complicated by another Supreme Court case, *State v. Jones*, 2007-Ohio-6093, which was issued three years after *Griggs*.

{¶ 38} In both *Griggs* and *Jones*, the Supreme Court of Ohio considered instances where a trial court failed to inform the defendants that their guilty pleas were a complete admission of guilt. In *Griggs*, reviewing under the previously used

---

violations existed and taking "full responsibility." *Id.* at ¶ 5. The odd circumstances aside, the trial court failed to explicitly advise the defendant that his no contest plea would "'constitute an admission of the truth of the facts alleged in the complaint,'" and thus, this court held that it failed to advise him of the effect of his no contest under Crim.R. 11(B)(2). *Id.* at ¶ 15, quoting Crim.R. 11(B)(2).

substantial-compliance standard, the Court held "that a defendant who has entered a guilty plea without asserting actual innocence is presumed to understand that he [or she] has completely admitted his [or her] guilt. In such circumstances, a court's failure to inform the defendant of the effect of his [or her] guilty plea as required by Crim.R. 11 is presumed not to be prejudicial." *Id.* at ¶ 19.

{¶ 39} In *Jones*, the Court held "that to satisfy the requirement of informing a defendant of the effect of a plea, a trial court must inform the defendant of the appropriate language under Crim.R. 11(B)." *Id.* at ¶ 25. In other words, the trial court "was required to inform Jones that a plea of guilty is a complete admission of guilt." *Id.*

{¶ 40} The *Jones* Court went on to consider whether Jones was prejudiced and found that he was not. *Id.* at ¶ 52-55. Relying on the lack of actual innocence argument as stated in *Griggs*, the *Jones* Court found that "any error by the trial court in failing to adequately inform [the defendant] of the effect of his plea was not prejudicial, because Jones did not assert his innocence at the colloquy." *Jones* at ¶ 54.

{¶ 41} *Griggs* and *Jones*, which were pre-*Dangler*, analyzed whether there was a prejudicial impact to the defendants due to the lack of advisement as to the effect of their pleas. *Dangle*r informs us that if one of the two limited exceptions applies, the traditional showing of prejudice is not required. *Id.* at ¶ 14-15. One of the exceptions is that the trial court has completely failed to comply with a portion

of Crim.R. 11(C). *Id.* *Jones* informs us that an advisement regarding the effect of a plea must inform a defendant that the plea is a complete admission of guilt.[2]

{¶ 42} I note that unlike in *Griggs*, the State in this case did not set forth the factual basis of the pleas at the plea hearing. It was not until sentencing that the underlying facts were discussed. And at that time, Fontanez expressed that he did not understand that his guilty plea was a complete admission of his guilt, stating that he did not "agree to all the circumstances" and did not agree that the crimes "happened exactly how the victims say they happened." Tr. 108.

{¶ 43} Thus, in consideration of the second certified question of whether *Griggs* remains good law, I would simply answer that *Griggs* cannot coexist with *Dangler*. I note that *Dangler*, a 2020 decision, is a more recent decision than the Supreme Court's pronouncement in *Griggs*, a 2004 decision, and for the reasons discussed herein, I find it more persuasive.

{¶ 44} In sum, because I believe the trial court completely failed to advise Fontanez under Crim.R. 11(B), under *Dangler*, I would find that Fontanez is excused from the burden of demonstrating prejudice. I believe that because *Jones* and

---

[2] I note that the post-*Dangler* decisions from this court that are in line with the original panel decision in *Fontanez — Cleveland v. Clifford*, 2020-Ohio-3803 (8th Dist.), *Parma v. Jakupca*, 2020-Ohio-4918 (8th Dist.), *Stewart*, 2021-Ohio-3600 (8th Dist.), *Reyes*, 2021-Ohio-3599 (8th Dist.), *Kauffman*, 2021-Ohio-1584 (8th Dist.), *Acosta*, 2022-Ohio-3327 (8th Dist.), and *Clifton*, 2022-Ohio-3814 (8th Dist.) — all cite *Griggs*, but only *Clifford* and *Jakupca* cite *Jones*. Neither *Clifford* nor *Jakupca* cite *Dangler*, however; rather, they both utilized the substantial-compliance standard of review.

Griggs are pre-*Dangler* cases their prejudice analysis is irrelevant to this case because of the holding in *Dangler*. I therefore respectfully dissent.

Merit Panel Decision

EILEEN T. GALLAGHER, J.:

{¶ 45} Defendant-appellant, Albert Fontanez ("Fontanez"), appeals his convictions and claims the following errors:

> 1. The trial court erred by accepting Mr. Fontanez's guilty plea without first informing him of the effect of his plea, determining that he understood the effect, and informing that the court could proceed to judgment and sentence, all as required by Crim.R. 11(C)(2)(b).
>
> 2. The trial court erred in denying Mr. Fontanez's presentence motion to withdraw his guilty plea.

{¶ 46} We find that Fontanez understood the effect of his guilty pleas and that he entered his pleas knowingly, intelligently, and voluntarily. We, therefore, affirm the trial court's judgment.

I. Facts and Procedural History

{¶ 47} Fontanez was charged with 18 crimes in five separate cases. In Cuyahoga C.P. No. CR-21-664789-A, Fontanez was charged with two counts of felonious assault. In Cuyahoga C.P. No. CR-22-669649-A, Fontanez was charged with two counts of felonious assault, two counts of aggravated robbery, and three counts of robbery. In Cuyahoga C.P. No. CR-22-670606-B, Fontanez was charged with one count of felonious assault, with one- and three-year firearm specifications, two counts of having weapons while under disability, one count of improper handling of firearms in a motor vehicle, and one count of criminal damaging or

endangering. In Cuyahoga C.P. No. CR-22-672399-A, Fontanez was charged with one count of theft and one count of assault. And in Cuyahoga C.P. No. CR-22-674611-A, Fontanez was charged with one count of failure to comply and one count of receiving stolen property.

{¶ 48} Following discovery, the parties reached a plea agreement that significantly reduced the charges and potential penalties in the five cases. After thoroughly reviewing the terms of the State's plea offer and the associated penalties, as well as the penalties Fontanez could receive if he were found guilty at trial, the court recessed to allow Fontanez to consult with his lawyer. Following the consultation, Fontanez indicated that he wanted to plead guilty. In CR-22-664789-A, Fontanez pleaded guilty to one count of aggravated assault. In CR-22-670606-B, Fontanez pleaded guilty to one count of discharging a firearm on or near a prohibited premises with a one-year firearm specification, and one count of criminal damaging. In CR-22-672399-A, Fontanez pleaded guilty to one count of attempted theft and one count of assault. In CR-22-669649-A, Fontanez pleaded guilty to one count of felonious assault and one count of theft. And in CR-22-674611-A, Fontanez pleaded guilty to one count of failure to comply and one count of receiving stolen property.

{¶ 49} The trial court conducted a sentencing hearing three weeks after taking Fontanez's guilty pleas. During the sentencing hearing but before sentence was imposed, Fontanez made an oral motion to withdraw his guilty plea. The trial

court conducted a hearing on the motion and asked Fontanez's counsel why he wished to withdrawal his pleas. Counsel explained:

> After he entered into a guilty plea for the five cases on which we are here today, we had come to learn and find out that there were two new pending cases in Cleveland Municipal Court that were since bound over.
>
> Your Honor, he may not have entered — or he would not have entered into this plea agreement had he had knowledge of these two pending criminal cases.

(Tr. 112.) Upon questioning, the court learned that Fontanez knew about the two new cases more than two weeks before the sentencing hearing because he had been arraigned in those cases. (Tr. 116-118.) When asked if there were any other reasons for the motion, counsel replied, "Other than a change of heart, your Honor, no." (Tr. 117.) The State indicated it would be prejudiced by the withdrawal of Fontanez's guilty pleas because "[he] went capias for a long, long time" and it would be difficult to coordinate the appearances of so many police officers and victims again. (Tr. 117.) After hearing from both sides, the court denied Fontanez's motion to withdraw his guilty pleas.

{¶ 50} In CR-21-664789-A, the court sentenced Fontanez to 18 months in prison on the amended aggravated-assault conviction. In CR-22-669649-A, the court sentenced him to six to nine years on the felonious assault conviction as charged in Count 1, and 180 days on the theft charge as amended in Count 3. In CR-22-670606-B, Fontanez was sentenced to three years on the discharging a firearm on or near a prohibited premises conviction plus three years on the

attendant firearm specification, as charged in Count 1, and 90 days in jail on the criminal damaging conviction as charged in Count 5. In CR-22-672399-A, the court sentenced Fontanez to 180 days in jail on the attempted theft and assault convictions as amended in Counts 1 and 2. Lastly, in CR-22-674611-A, Fontanez was sentenced to three years in prison on his failure to comply conviction as charged in Count 1, and 180 days in prison on his receiving stolen property conviction as amended in Count 2. The aggregate base sentence was ten years in prison. This appeal followed.

II. Law and Analysis

A. Effect of a Guilty Plea

{¶ 51} In the first assignment of error, Fontanez argues the trial court erred in accepting his guilty pleas without first informing him of the effect of his pleas and without informing him that the court could proceed immediately to judgment and sentence.

{¶ 52} As explained in the en banc decision, before accepting a guilty plea, the trial court must inform the defendant of both the constitutional and nonconstitutional rights he or she is waiving by pleading guilty. *See* Crim.R. 11(C)(2)(a). In *State v. Dangler*, 2020-Ohio-2765, the Ohio Supreme Court held that "[w]hen a criminal defendant seeks to have his [or her] conviction reversed on appeal, the traditional rule is that he [or she] must establish that an error occurred in the trial court proceedings and that he [or she] was prejudiced by that error." *Id.* at ¶ 13, citing *State v. Perry*, 2004-Ohio-297, 14-15; *State v. Stewart*, 51 Ohio St.2d 86 (1977).

{¶ 53} However, the *Dangler* Court set forth two limited exceptions to the traditional rule in the criminal-plea context. *Dangler* at ¶ 14-15. Under these two exceptions, no showing of prejudice is required when (1) a trial court fails to explain the constitutional rights set forth in Crim.R. 11(C)(2)(c) that a defendant waives by pleading guilty or no contest, or (2) a trial court has completely failed to comply with a portion of Crim.R. 11(C). *Id.* at ¶ 14-15, citing *State v. Clark*, 2008-Ohio-3748; *State v. Veney*, 2008-Ohio-5200.

{¶ 54} Fontanez argues the trial court completely failed to inform of the effect of his guilty pleas and that, therefore, his guilty pleas should be vacated. We resolved this issue in the en banc proceedings. In accordance with the en banc decision, we find that although the trial court did not explicitly state that a guilty plea constitutes a complete admission of guilt during a Crim.R. 11 colloquy, the court otherwise complied with the requirements of Crim.R. 11, and Fontanez did not assert actual innocence. We, therefore, presume that Fontanez understood that his guilty plea was a complete admission of guilt.

{¶ 55} Indeed, Fontanez does not even claim to have misunderstood the effect of his guilty pleas. He sought to withdraw his guilty pleas because he was indicted on additional charges. (Tr. 117.) Fontanez likely wanted to include the new charges within his global plea agreement in this case. However, a desire to renegotiate a plea agreement to incorporate new charges is not a valid basis to withdraw a guilty plea. And when asked if there were some other bases for the plea-withdrawal request, Fontanez's trial counsel replied, "Other than a change of heart,

your Honor, no." (Tr. 117.) A change of heart, without more, is not enough to justify the withdrawal of a guilty plea. *State v. Musleh*, 2017-Ohio-8166, ¶ 35 (8th Dist.).

{¶ 56} Fontanez nevertheless argues the trial court erred in failing to inform him that it could proceed to immediate sentencing. However, the trial court told Fontanez twice during the plea hearing that it would not proceed to sentencing that day. (Tr. 43, 49.) And, as indicated, the court scheduled a sentencing hearing for a later date. Therefore, Fontanez cannot demonstrate he was prejudiced by the court's failure to tell him that it could proceed directly to sentencing.

{¶ 57} The first assignment of error is overruled.

B. Motion to Withdraw Guilty Plea

{¶ 58} In the second assignment of error, Fontanez argues the trial court erred in denying his presentence motion to withdraw his guilty plea. He argues it should have been freely granted since he made the motion before sentence was imposed. He also argues the trial court abused its discretion by failing to consider the relevant factors governing presentence motions to withdraw guilty pleas.

{¶ 59} Crim.R. 32.1 governs withdrawals of guilty pleas and provides that "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." Ordinarily, a presentence motion to withdraw a guilty plea should be freely and liberally granted. *State v. Xie*, 62 Ohio St.3d 521, 527 (1992). However, a defendant does not have an absolute right to withdraw a guilty plea prior to

sentencing. *Id.* Therefore, a trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the plea-withdrawal request. *Id.*

{¶ 60} The decision to grant or deny a presentence motion to withdraw a guilty plea is within the trial court's discretion. *Id.* at paragraph two of the syllabus. Absent an abuse of discretion, the trial court's decision must be affirmed. *Id.* at 527. An abuse of discretion occurs when a court exercises its judgment in an unwarranted way regarding a matter over which it has discretionary authority. *Johnson v. Abdullah*, 2021-Ohio-3304, ¶ 35. This court has held that an abuse of discretion may be found where a trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 2008-Ohio-1720, ¶ 15 (8th Dist.). Courts do not have discretion to erroneously apply the law. *Johnson* at ¶ 39 ("We take this opportunity to make it clear that courts lack the discretion to make errors of law, particularly when the trial court's decision goes against the plain language of a statute or rule.").

{¶ 61} Courts have traditionally considered nine factors when reviewing a trial court's decision denying a defendant's presentence motion to withdraw a guilty plea. *State v. Hopkins*, 2023-Ohio-4311, ¶ 13. Those factors include whether a defendant was (1) represented by competent counsel, (2) given a full Crim.R. 11 hearing before he entered the plea, (3) given a complete hearing on the motion to withdraw, and (4) the record reflects that the court gave full and fair consideration

to the plea-withdrawal request. *State v. Peterseim*, 68 Ohio App.2d 211 (8th Dist. 1980), paragraph three of the syllabus.

{¶ 62} Consideration is also given to whether (5) the motion was made in a reasonable time, (6) the motion stated specific reasons for withdrawal, (7) the defendant understood the nature of the charges and the possible penalties, and (8) the defendant had evidence of a plausible defense. *State v. Fish*, 104 Ohio App.3d 236 (1st Dist. 1995), *see also State v. Heisa*, 2015-Ohio-2269 (8th Dist.). Finally, courts have considered (9) "'whether the state would be prejudiced if the defendant were permitted to withdraw his guilty plea.'" *State v. Barnes*, 2022-Ohio-4486, ¶ 32 (Brunner, J., concurring), quoting *State v. Richter*, 1983 Ohio App. LEXIS 15476 (8th Dist. Sept. 29, 1983).

{¶ 63} The trial court noted that Fontanez was represented by competent counsel that he, himself, retained. (Tr. 121.) The court also recounted how it conducted an exhaustive Crim.R. 11 plea colloquy. (Tr. 122.) The trial court found, and the record confirms, that Fontanez understood the nature of the charges and the possible penalties and that the court conducted a full hearing on Fontanez's plea-withdrawal request. Fontanez, through counsel, stated the reasons for his request, and the court considered those reasons. (Tr. 122.) Counsel explained that he wished to withdraw his guilty pleas because he discovered he had been charged with additional crimes in two new cases and because he had a change of heart. (Tr. 122.) Finally, the court noted that Fontanez knew about the two new cases for at least two weeks before the sentencing hearing, but he did not file a written motion to

withdraw his guilty plea at that time. And, the State asserted that it would be prejudiced by the withdrawal of the guilty pleas. Therefore, the trial court considered all the factors required for a motion to withdraw guilty pleas, and none of the nine factors weighed in favor of withdrawing Fontanez's guilty pleas.

{¶ 64} Moreover, the trial court recognized that Fontanez's motion was motivated by a change of heart. As previously stated, a change of heart regarding one's guilty plea is not a legitimate basis for the withdrawal of the plea. *State v. Hicks*, 2024-Ohio-974, ¶ 27 (8th Dist.), citing *State v. Westley*, 2012-Ohio-3571, ¶ 7 (8th Dist.).

{¶ 65} We find no abuse of discretion in the trial court's decision to deny Fontanez's motion to withdrawal his guilty pleas. The trial court considered all the factors necessary for evaluating a plea-withdrawal request, and Fontanez's motion was motivated by his change of heart, which is not a legitimate basis for a plea withdrawal.

{¶ 66} Accordingly, the second assignment of error is overruled.

{¶ 67} Judgment 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.

_____
EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
MICHAEL JOHN RYAN, J., CONCUR

N.B. Judge Ryan is constrained to concur given the court's en banc decision in this case, but see his dissenting opinion to the en banc opinion for his position on the matter.