

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-150226
	:	TRIAL NO. B-1401983(B)
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
DERRICK IRBY-PATTERSON,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Derrick Irby-Patterson was indicted for one count of aggravated robbery with specifications, two counts of felonious assault with specifications, and one count of having a weapon while under a disability. He later pleaded guilty to felonious assault, a felony of the second degree, with a three-year specification, and to having a weapon while under disability, a felony of the third degree. During the plea colloquy, the trial court informed Irby-Patterson that “[w]ith regard to the gun specifications, it’s a mandatory prison term to be served consecutively to anything else that you were sentenced to.” The trial judge asked Irby-Patterson if he understood that, and he said that he did. Also, during the plea discussions, it was revealed that the state had offered a plea deal with a ten-year sentence. Irby-Patterson had rejected the sentence aspect of the plea deal, but had not given a reason.

At the sentencing hearing, the state indicated that it still wished to see “that the court impose a double digit penitentiary number, the actual number that the Court feels is appropriate.” At no time during the sentencing hearing did counsel for Irby-Patterson indicate what sentence he felt would be appropriate, and counsel did not respond to the contention of the state that the sentence should be at least ten

years. The trial court sentenced Irby-Patterson to eight years in prison for the felonious assault, three years for the specification, and 36 months for having a weapon while under a disability. All sentences were ordered to run consecutively, for a total of 14 years in prison. Irby-Patterson now appeals, raising three assignments of error.

In Irby-Patterson's first assignment of error, he claims that his pleas were unknowing, arguing that it is "clear from the record that he rejected the state's ten-year agreed sentence with the understanding that he would receive a sentence below the state's offer." But there is nothing in the record to support this assertion. While the state indicated, during the plea hearing, that "if it's open, that myself and the victim were going to ask for a 14-year sentence * * *," counsel for Irby-Patterson did not suggest an alternate number. The record does not support the claim that Irby-Patterson believed he would receive less than ten years in prison.

Within the same assignment of error, Irby-Patterson also claims that his trial counsel was ineffective for negotiating the "open" plea. But Irby-Patterson indicated on the record that he did not want the ten-year deal, and the fact that he received a greater sentence was not counsel's fault. And we will not hold that "allowing" a client enter into an "open" plea is ineffective per se. We overrule Irby-Patterson's first assignment of error.

In his second assignment of error, Irby-Patterson argues that his pleas were unknowing, because the form he signed did not indicate that the three-year-gun specification was "mandatory time." Before accepting a plea, a trial court must ascertain that the plea is voluntary and that the defendant understands the effect of his plea, the nature of the charges against him and the maximum sentence he faces. Crim.R. 11(C)(2). The court must also inform the defendant—and ensure that he understands—that as a result of pleading guilty, he is waiving constitutional rights. Crim.R. 11(C)(2)(c). The court must strictly comply with the constitutional provisions; absent strict compliance, the plea is invalid. *State v. Veney*, 120 Ohio

St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, syllabus. For the nonconstitutional provisions, only substantial compliance is required. *Id.* at ¶ 14.

Informing a defendant that a sentence involves mandatory time is a nonconstitutional aspect of the plea colloquy. *See State v. Maggard*, 1st Dist. Hamilton No. C-100788, 2011-Ohio-4233, citing *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). In this case, the plea form did not indicate that the prison term associated with the specification was mandatory. But Irby-Patterson was informed at the hearing that it was, and he told the trial court he understood this. This amounts to substantial compliance with Crim.R. 11(C), and we overrule Irby-Patterson’s second assignment of error.

In his final assignment of error, Irby-Patterson claims that his convictions for felonious assault and having a weapon while under a disability were allied offenses of similar import and should have been merged. This court has previously held that having weapons while under disability is of a dissimilar import from other offenses “because the statute manifests a legislative purpose to punish the act of possessing a firearm while under a disability separately from any offense committed with the firearm.” *See State v. Dalmida*, 1st Dist. Hamilton No. C-140517, 2015-Ohio-4995, ¶ 33; *State v. Bates*, 1st Dist. Hamilton No. C-140033, 2015-Ohio-116, ¶ 30. We overrule Irby-Patterson’s third assignment of error and affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

DEWINE, P.J., MOCK and STAUTBERG, JJ.

To the clerk:

Enter upon the journal of the court on March 4, 2016
per order of the court _____.

Presiding Judge