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

STATE OF OHIO,	:	APPEAL NO. C-170389 TRIAL NO. B-1602246
Plaintiff-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
JEFFREY HAWKINS,	:	
Defendants-Appellant.	:	
	:	
	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist.Loc.R. 11.1.1.

Defendant-appellant Jeffrey Hawkins pleaded guilty to one count of involuntary manslaughter under R.C. 2903.04(A) and one count of felonious assault under R.C. 2903.11, both with accompanying firearm specifications. As part of a plea agreement, Hawkins stipulated that the two offenses were committed with a separate animus. The parties also agreed that he would be sentenced to between 15 and 20 years in prison.

The trial court sentenced Hawkins to a total of 20 years in prison. It imposed a sentence of 11 years on the involuntary-manslaughter count and three years on the felonious-assault count, to be served consecutively. It also imposed consecutive three-year terms on the two firearm specifications. This appeal followed.

In his first assignment of error, Hawkins contends that the trial court erred by convicting him of multiple firearm specifications, and in ordering the sentences on those specifications to run consecutively to each other, because they were allied offenses of similar import. This assignment of error is not well taken.

This case involves an agreed sentence, which is not subject to appellate review as long as it is authorized by law. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 16; *State v. Williams*, 1st Dist. Hamilton No. C-150320, 2016-Ohio-376, ¶ 4. But when a sentence is imposed for multiple convictions on offenses that are allied offenses of similar import, R.C. 2953.08(D)(1) does not bar appellate review of the sentence even though it was jointly recommended by the parties and imposed by the court. *Underwood* at paragraph one of the syllabus; *Williams* at ¶ 5. An exception to this rule is when the state and a defendant stipulate in the plea agreement that the offenses were committed with a separate animus, thus subjecting the defendant to more than one conviction and sentence. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 20; *Underwood* at ¶ 29; *Williams* at ¶ 5-7.

The record shows that the parties had stipulated that the two underlying offenses, involuntary manslaughter and felonious assault, were committed with a separate animus. A firearm specification is a sentencing enhancement, not a separate criminal offense. *State v. Ford*, 128 Ohio St.3d 398, 2011-Ohio-765, 945 N.E.2d 498, ¶ 16; *State v. Welninski*, 6th Dist. Wood Nos. WD-16-039 and WD-16-040, 2018-Ohio-778, ¶ 101. The firearm specification is contingent upon the underlying felony conviction and does not contain a positive prohibition of conduct. *Ford* at ¶ 16. Therefore, if the underlying offenses were committed with a separate animus, then the firearm specifications were also committed with a separate animus.

The trial court's statement at the sentencing hearing that the firearm specifications would merge does not change the fact that the firearm specifications were committed with a separate animus. Further, former R.C. 2929.14(B)(1)(g) permitted the imposition of consecutive sentences for the firearm specifications. *See Welninski* at ¶ 101-102.

Hawkins also claims that his plea was not made knowingly, intelligently, and voluntarily because he believed that the specifications would be merged. A trial court must strictly comply with the provisions of Crim.R. 11(C) related to the constitutional rights a defendant waives by entering a guilty plea. *State v. Ballard*, 66 Ohio St.2d 473, 476-478, 423 N.E.2d 115 (1981); *State v. Fields*, 1st Dist. Hamilton No. C-090648, 2010-Ohio-4114, ¶ 8. It must substantially comply with the provisions of the rule relating to other notifications. *State v. Nero*, 56 Ohio St.3d 106, 107, 564 N.E.2d 474 (1990); *Ballard* at 475-476; *Fields* at ¶ 8.

Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of the plea and the rights he is waiving. *Nero* at 108. A defendant who challenges his plea on the basis that it was not knowingly, intelligently and voluntarily made must show that he was prejudiced. "The test is whether the plea would otherwise have been made." *Nero* at 108; *Fields* at ¶ 9.

The record shows that the trial court strictly complied with the provisions of Crim.11(C) relating to Hawkins's constitutional rights and substantially complied with the rule in all other respects. The court conducted a meaningful dialogue to ensure that his plea was made knowingly, intelligently, and voluntarily. *See Fields* at ¶ 10.

Hawkins agreed to a sentencing range of 15 to 20 years, and the sentence imposed by the trial court was within that range. The trial court's erroneous statement that the firearm specifications would merge did not cause him prejudice. Hawkins has not demonstrated that but for the erroneous statement, he would not have entered his pleas. We, therefore, overrule his first assignment of error.

In his second assignment of error, Hawkins contends that the trial court abused its discretion by not ruling on his affidavit of indigency when it imposed $35,000 in nonmandatory fees. This assignment of error is not well taken.

Before imposing a financial sanction or a fine, the trial court must consider the offender's present and future ability to pay it. While the court need not evaluate any express factors or make any findings, there must be some evidence in the record that the court considered the offender's present and future ability to pay. *State v. Cauthen*, 1st Dist. Hamilton No. C-130475, 2015-Ohio-272, ¶ 6. That evidence may include financial information gleaned from the presentence investigation report or from the offender's own statements. *Id.*

An affidavit of indigency must be filed with the court prior to sentencing, which means that the affidavit must be delivered to the clerk of court for purposes of filing and must be indorsed by the clerk of court prior to the filing of the journal entry reflecting the trial court's sentencing decision. *State v. Gipson*, 80 Ohio St.3d 626, 687 N.E.2d 750 (1998), syllabus; *State v. Owens*, 1st Dist. Hamilton No. C-170413, 2018-Ohio-1853, ¶ 6.

In this case, the fines were not mandatory. Before the court imposed the fines, it considered Hawkins's present and future ability to pay, and evidence in the record supported the trial court's determination that he did have the ability to pay. Though Hawkins stated that the sentencing hearing that he intended to file an affidavit of

indigency, it was not delivered to or indorsed by the clerk of court prior to the journalization of the sentencing entry. The affidavit was not timely filed, and therefore, the trial court did not err in failing to consider the affidavit filed after the journalization of the sentencing entry.

Hawkins argues that because counsel was appointed, he was obviously found indigent. But there is a difference between a finding of indigency for purpose of receiving appointed legal counsel and the finding of indigency to avoid the payment of fines. *State v. Ison*, 5th Dist. Richland No. 15CA17, 2016-Ohio-1528, ¶ 38; *State v. Powell*, 78 Ohio App.3d 784, 789, 605 N.E.2d 1337 (3d Dist.1992). Consequently, we overrule Hawkins's second assignment of error.

In his third assignment of error, Hawkins contends that his counsel was ineffective for failing to file an affidavit of indigency. Even if an affidavit of indigency is filed, the court must still render a determination that the defendant is in fact indigent and unable to pay the fines. *Powell* at 789. Hawkins was not prejudiced by counsel's failure to timely file an affidavit of indigency, because the record demonstrates that he had the ability to pay the fines.

Hawkins has not demonstrated that, but for counsel's allegedly deficient performance, the results of the proceeding would have been different. Therefore, he has failed to meet his burden to show ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hamblin*, 37 Ohio St.3d 153, 155-156, 524 N.E.2d 476 (1988); *State v. Hackney*, 1st Dist. Hamilton No. C-150375, 2016-Ohio-4609, ¶ 36-38. We overrule Hawkins's third assignment of error.

In his fourth assignment of error, Hawkins contends that the trial court erred in imposing excessive consecutive prison terms. But under R.C. 2953.08(D), we are

precluded from reviewing whether the sentences were excessive. *See State v. Spurling*, 1st Dist. Hamilton No. C-060087, 2007-Ohio-858, ¶ 15.

We can review whether the proper findings were made justifying the imposition of consecutive sentences. *State v. Davis*, 1st Dist. Hamilton No. C-140351, 2015-Ohio-775, ¶ 4-9. The record shows that the trial court made the proper findings to impose consecutive sentences and incorporated them in the judgment entry. *See State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus; *State v. Thomas*, 1st Dist. Hamilton No. C-140070, 2014-Ohio-3833, ¶ 5-9. Therefore, we overrule Hawkins's fourth assignment of error.

In his fifth assignment of error, Hawkins's counsel raises several issues Hawkins himself wanted to raise. He argues that the trial court erred by failing to replace his trial counsel, failing to include all transcripts in the record, and failing to correct possible errors in the presentence investigation. The record fails to demonstrate these alleged errors. Further, they involve matters outside the appellate record, which this court cannot consider. *See State v. Ishmail*, 54 Ohio St.3d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus; *Fields*, 1st Dist. Hamilton No. C-090648, 2010-Ohio-4114, at ¶ 15. We, therefore, overrule Hawkins's fifth assignment of error and affirm his convictions.

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

MOCK, P.J., MILLER and **DETERS, JJ.**

To the clerk:

Enter upon the journal of the court on August 15, 2018
per order of the court _____.
Presiding Judge