

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

STATE OF OHIO,	:	APPEAL NO. C-160593
	:	TRIAL NO. B-1207297
Plaintiff-Appellee,	:	
vs.	:	
	:	<i>JUDGMENT ENTRY.</i>
JESTEN WALLER,	:	
	:	
Defendant-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.

In four assignments of error, Jesten Waller appeals his convictions and sentences for aggravated burglary with a three-year gun specification and aggravated robbery with a three-year gun specification. We affirm the convictions, but vacate the sentences and remand the cause for a new sentencing hearing.

In his first assignment of error, Waller argues that the trial court failed to correctly advise him that he was waving his constitutional right against self-incrimination before accepting his guilty pleas. Specifically, the court informed Waller that that the guilty pleas waived his right to a trial where he “cannot be compelled to testify on [his] own behalf,” instead of stating he could not be compelled to testify “against himself.”

Although the court did not use the exact language of Crim.R. 11(C)(2)(c), we resolve any ambiguity in the colloquy by considering the totality of the circumstances, including the written plea form. *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826, ¶ 24-25.

Waller’s attorney signed the plea form and represented to the court that he had

explained all of the constitutional rights that Waller would be waiving to Waller before Waller and he signed the form, and that Waller entered the pleas knowingly, intelligently, and voluntarily. Moreover, Waller confirmed to the court that he had read, understood, and signed the plea form. Because the court addressed all of the constitutional rights at the plea hearing, and Waller was informed of his rights in the plea form, Waller was fully informed of the privilege against self-incrimination. *See Barker* at ¶ 24-25.

Therefore, considering the totality of the circumstances, we find it clear that Waller knowingly, intelligently, and voluntarily waived his rights. Accordingly, we overrule his first assignment of error.

In his second assignment of error, Waller claims the trial court abused its discretion by refusing to allow him to withdraw his guilty pleas because the court did not comply with Crim.R. 11(C)(2)(c). Because we have found that the court complied with Crim.R. 11(C)(2)(c), we overrule the second assignment of error.

In his third assignment of error, Waller alleges his counsel was ineffective for failing to inform the court that the plea colloquy did not comply with Crim.R. 11(C)(2)(c). Under *Strickland*, Waller is required to prove that his counsel's performance was so deficient that but for counsel's error, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Waller's counsel was not ineffective because the court complied with Crim.R. 11(C)(2)(c), and we overrule the third assignment of error.

In his final assignment of error, Waller argues that the 12-year aggregate sentence imposed by the trial court was contrary to law because the trial court merged the two gun specifications at the sentencing hearing, but the sentencing entry did not reflect the merger. Instead, the sentencing entry reflects a 15-year prison term. Waller seeks a remand so the trial court can order that the gun specs run concurrently. The state requests that we order the trial court to journalize a nunc pro tunc entry to correct

the sentencing entry.

However, both of those remedies would require the court to impose a sentence that is contrary to law. R.C. 2929.14(B)(1)(g) prohibits the merging of gun specifications if an offender is convicted of two or more felonies, and one of the convictions is for aggravated robbery, as it is here. Therefore, the court was required to impose a three-year term on each specification.

Waller and the state acknowledge that the intent of the trial court was to impose a 12-year aggregate sentence and agree that the cause should be remanded for the court to impose the intended sentence. Therefore, we sustain this assignment of error, vacate the sentence, and remand the cause to the trial court for a new sentencing hearing. The trial court's judgment is affirmed in all other respects.

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.

**CUNNINGHAM, P.J., ZAYAS and DETERS, JJ.**

Enter upon the journal of the court on June 30, 2017  
per order of the court \_\_\_\_\_.

Presiding Judge