

[Cite as *State v. Stokes*, 2010-Ohio-3181.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93154

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARIO STOKES

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511950

BEFORE: Boyle, J., Kilbane, P.J., and McMonagle, J.

RELEASED: July 8, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Mario Stokes, appeals his conviction for murder following his guilty plea. He contends that the trial court failed to adequately advise him of the consequences of violating postrelease control and that such failure violated Crim.R. 11, thereby rendering his plea involuntary. But Stokes pled guilty to murder, an unclassified felony that is not subject to postrelease control. We find no merit to his appeal and affirm his conviction.

Procedural History and Facts

{¶ 2} In June 2008, the grand jury indicted Stokes in connection with the death of Charles Gooden for one count of aggravated murder, one count of murder, and one count of felonious assault. On August 26, 2008, Stokes entered into a plea agreement with the state whereby the charges of aggravated murder and felonious assault were dismissed in exchange for Stokes's testimony in his codefendants' trials and his guilty plea to the charge of murder. At the plea hearing, the trial court advised Stokes of his constitutional rights prior to accepting his plea. The court also informed Stokes of the sentence that would be imposed for the murder conviction, namely, 15 years to life. The court further explained that "you would serve 15 years and then be eligible for parole beginning at that point." Immediately following this, however, the court incorrectly advised Stokes that he also "would be subject to postrelease control for five years in this kind of matter." Following Stokes's representing that he was

satisfied with his counsel and that he was entering the plea knowingly and voluntarily, the court accepted his guilty plea. One month later, the court sentenced Stokes to prison for 15 years to life. The court further stated that “postrelease control of five years is part of the sentence.”

{¶ 3} In April 2009, Stokes moved to file a delayed appeal, which this court granted. He now appeals his conviction, raising a single assignment of error:

{¶ 4} “The trial court committed error when it accepted appellant’s guilty plea without first fully advising appellant of the consequences associated with the plea.”

Standard of Review

{¶ 5} Because Stokes failed to challenge his guilty plea in the trial court, we review only for plain error or defects affecting substantial rights. See *State v. Robinson*, 8th Dist. Nos. 89222 and 89223, 2008-Ohio-224. Under the plain error doctrine, a trial court’s decision will be reversed only in exceptional circumstances to prevent a miscarriage of justice. *Id.* at ¶6, citing *Crim.R. 52(B)*; *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 227, 448 N.E.2d 452.

Crim.R. 11

{¶ 6} *Crim.R. 11(C)(2)(a)* provides in pertinent part that the court “shall not accept a plea of guilty or no contest without first addressing the defendant personally and * * * [d]etermining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum

penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.”

{¶ 7} The requirements of Crim.R. 11(C)(2)(a) are nonconstitutional and thus, this court reviews plea proceedings “to ensure substantial compliance” with this rule. *State v. Esner*, 8th Dist. No. 90740, 2008-Ohio-6654, ¶4. Where “substantial compliance” is required, if, under the totality of the circumstances, it is apparent the defendant subjectively understood the implications of his plea and the rights he was waiving, the plea should not be disturbed on appeal. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶31, citing *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. We note further that a defendant who challenges his plea on the basis that it was not knowingly, intelligently, and voluntarily made must show that he was prejudiced by the court’s failure to substantially comply with the rule. *Clark* at ¶32, citing *Nero* at 108; *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶12. In order to show such prejudice, the defendant must show that he would not have otherwise entered into the plea. *Id.*

{¶ 8} Here, Stokes does not dispute that the trial court strictly complied in informing him of his constitutional rights. He solely challenges that portion of the plea colloquy addressing his maximum penalty, i.e., a nonconstitutional right. Specifically, he argues that the trial court failed to adequately advise him of the ramifications of violating postrelease control. But Stokes pled guilty to murder,

an unclassified felony; it is not subject to postrelease control. R.C. 2967.28. We therefore find no merit to Stokes’s argument.

{¶ 9} We must nonetheless consider the effect of the trial court erroneously stating that postrelease control would be a part of Stokes’s sentence when it is not applicable. Under such circumstances, we cannot say that the trial court’s colloquy substantially complied with Crim.R. 11; instead, the court merely partially complied with the rule. See, e.g., *Clark* at ¶40; *State v. Anderson*, 8th Dist. No. 92576, 2010-Ohio-2085, ¶29; *State v. Douglass*, 12th Dist. Nos. CA2008-07-168 and CA2008-08-199, 2009-Ohio-3826, ¶35. Consequently, whether Stokes’s plea should be vacated depends on whether he was prejudiced by the court’s inaccurate statement.

{¶ 10} Based on the record before us, we find no basis to conclude that Stokes was prejudiced. Indeed, Stokes has presented no evidence or even argument that he would not have entered his plea and would have insisted on going to trial if he knew that he would not be subject to postrelease control upon release. As this court recently stated, “[w]ithout some evidence that defendant was motivated by the expectation of being subject to postrelease control upon release, we must affirm the plea.” *Anderson* at ¶30; see, also, *State v. Clark*, 11th Dist. No. 2006-A-004, 2008-Ohio-6768 (court refused to vacate defendant’s guilty plea to aggravated murder because defendant failed to demonstrate that he would not have entered the plea absent the trial court’s erroneous mention of

postrelease control). Stokes's challenge of his plea can only be reasonably explained as a change of heart, which is simply not a valid basis to vacate a plea.

{¶ 11} Stokes's sole assignment of error is overruled. But because the trial court erroneously included a postrelease provision in the sentencing entry, the matter is remanded to correct the sentencing entry and to delete the reference to postrelease control. See *State v. Jordan*, 8th Dist. No. 91413, 2009-Ohio-4037, ¶38.

{¶ 12} Judgment affirmed and case remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellee recover of 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
CHRISTINE T. McMONAGLE, J., CONCUR