

[Cite as *State v. Allen*, 2010-Ohio-3718.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 93488**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**ANTHONY ALLEN**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED IN PART;  
REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-513773

**BEFORE:** McMonagle, P.J., Blackmon, J., and Sweeney, J.

**RELEASED AND JOURNALIZED:** August 12, 2010

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CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, Anthony Allen, appeals from the trial court's judgment, entered after his guilty plea, finding him guilty of felonious assault and sentencing him to eight years in prison. Allen contends that his plea was not knowingly, voluntarily, and intelligently made and his sentence is void because at both the plea and sentencing hearings, the trial court did not properly advise him of the consequences of violating postrelease control. We find no issue with the plea, but remand for the trial court to correct the sentence pursuant to R.C. 2929.191.

{¶ 2} Allen and his girlfriend, Christa Stinson, were charged in a four-count indictment with one count of felonious assault and three counts of endangering children. The charges stemmed from Allen and Stinson's abuse of Stinson's two-year-old son. The child was hospitalized for a month as a result of his injuries. The doctors and nurses who cared for him called him a "medical miracle child" because he was not expected to recover from, much less survive, his injuries.

{¶ 3} Allen subsequently pled guilty to one count of felonious assault and the other three counts were nolle. Before accepting Allen's plea, the trial court advised him that he would be subject to a mandatory term of three years of postrelease control and that if he violated the conditions of postrelease control,

{¶ 4} "you face the greater of one year incarceration, or the remaining time period left on your postrelease control to be served in prison."

{¶ 5} At the sentencing hearing, the trial court sentenced Allen to eight years incarceration and then again advised him that he was subject to three years of postrelease control "which, if you violate, will subject you to additional prison sanctions, the worst of which would be the greater of one year, or the remaining time period left on your postrelease control term."

{¶ 6} In his first assignment of error, Allen contends that his plea was not knowingly, voluntarily, and intelligently made because the trial court erroneously advised him of the consequences of violating postrelease control.

{¶ 7} Under Crim.R. 11(C)(2), before accepting a guilty plea in a felony matter, a trial court must personally address the defendant and (1) determine that the defendant is making the plea voluntarily, with an understanding of the nature of the charges and the maximum penalty; (2) inform the defendant of and determine that the defendant understands the effect of the plea, and that the court may proceed with judgment after accepting the plea; and (3) inform the defendant and determine that the defendant understands that he is waiving his constitutional rights to a jury trial, to confront the witnesses against him, to call witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial where the defendant cannot be forced to testify against himself.

{¶ 8} A trial court must strictly comply with the dictates of Crim.R. 11(C)(2) regarding the waiver of constitutional rights, meaning the court must actually inform the defendant of the constitutional rights he is waiving and make sure the defendant understands them. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶27. With respect to the other requirements of Crim.R. 11(C)(2) regarding nonconstitutional rights, reviewing courts consider whether the trial court substantially complied with

Crim.R. 11(C)(2) and whether the defendant subjectively understood the implications of his plea and the rights he was waiving. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. If the judge substantially complied with the rule, the plea will be upheld. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶31.

{¶ 9} If the trial judge partially complied with the rule with respect to nonconstitutional rights, the plea may be vacated only if the defendant demonstrates a prejudicial effect. *Id.* at ¶32. See, also, *Veney* at ¶17 (“A defendant must show prejudice before a plea will be vacated for a trial court’s error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the colloquy are at issue.”) The test for prejudice is “whether the plea would have otherwise been made.” *Clark* at ¶32, quoting *Nero* at 108.

{¶ 10} Here, the trial judge partially complied with Crim.R. 11(C)’s requirement that he advise Allen of the maximum possible penalty that could be imposed upon conviction before accepting his guilty plea, a nonconstitutional right. The trial judge correctly informed Allen that he would be subject to three years of postrelease control, but then incorrectly advised him that upon violating postrelease control, he could be returned to prison for “the remaining time period left on your postrelease control,” which would be a period of less than three years. In fact, given Allen’s eight-year sentence, he can be returned to prison for up to four years for violating a

condition of postrelease control. See R.C. 2929.19(B)(3)(e) (If the offender violates a condition of postrelease control, the parole board may impose a prison term of up to one-half the stated prison term originally imposed upon the offender).

{¶ 11} But Allen has failed to demonstrate that he was prejudiced by the trial court's explanation of the consequences of violating postrelease control. He has presented no evidence nor made any argument that he would not have entered his plea had the trial court informed him that he could be subject to four years incarceration for violating postrelease control. Simply put, he has failed to provide any evidence that his understanding of the consequences of violating postrelease control affected his decision to plead guilty in any way. Without any evidence that "the plea would not otherwise have been made," Allen has not met his burden of showing prejudice that would necessitate vacating his plea. See, e.g., *State v. Soltis*, 8th Dist. No. 92574, 2009-Ohio-6636, ¶22 (plea not vacated where appellant presented no evidence nor argued that he would not have entered his plea if he had known of the consequences of violating postrelease control); *State v. Alfarano*, 1st Dist. No. C-061030, 2008-Ohio-3476 (no prejudice found and plea not vacated where appellant made no allegation he would not have pled guilty but for the trial court's erroneous advisement that he would be subject to three years of postrelease control, rather than the mandatory five years).

{¶ 12} Accordingly, appellant's first assignment of error is overruled.

### III

{¶ 13} In his second assignment of error, Allen contends that his sentence is void, requiring de novo resentencing, because of the trial court's erroneous advisement at sentencing about the consequences of violating postrelease control.

{¶ 14} R.C. 2929.191, effective July 11, 2006, promulgated a statutory remedy for trial courts to use to correct an error in imposing postrelease control. In *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, the Ohio Supreme Court addressed the effect of R.C. 2929.191 on a trial court's failure to properly impose postrelease control. The court held that for criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall conduct a de novo sentencing hearing. *Id.* at paragraph one of the syllabus.

{¶ 15} The court further held that for criminal sentences imposed on or after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the remedial procedures set forth in R.C. 2929.191. The Court specifically recognized that for sentences imposed after July 11, 2006, R.C. 2929.191 does not afford the defendant a de novo sentencing hearing. It stated:

{¶ 16} “The hearing contemplated by R.C. 2929.191(C) and the correction contemplated by R.C. 2929.191(A) and (B) pertain only to the flawed imposition of postrelease control. R.C. 2929.191 does not address the remainder of an offender’s sentence. Thus, the General Assembly appears to have intended to leave undisturbed the sanctions imposed upon the offender that are unaffected by the court’s failure to properly impose postrelease control at the original sentencing.” Id. at ¶24.

{¶ 17} Allen was sentenced in 2009. Accordingly, we remand for the remedial correction afforded by R.C. 2929.191.

Affirmed in part; remanded for proceedings consistent with this opinion.

It is ordered that the parties split 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.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and  
JAMES J. SWEENEY, J., CONCUR