

[Cite as *State v. Conner*, 2010-Ohio-4353.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93953

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDRE CONNER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521352-A

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

RELEASED AND JOURNALIZED: September 16, 2010

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MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Andre Conner (“Conner”), appeals his guilty plea to two counts of attempted murder, a first degree felony, in violation of R.C. 2903.02(A). He alleges that the trial court failed to adequately inform him of the consequences of postrelease control upon his sentence. After reviewing the facts and the pertinent law, we disagree and affirm.

Facts and Procedural History

{¶ 2} On October 11, 2008, Conner was driving a white SUV in a parking lot near East 135th Street and Miles Avenue in Cleveland, Ohio, when he apparently hit a Chevrolet Malibu and then fought with the driver of

the car. Upon leaving the scene, Conner hit some bystanders with his car. He then returned to the parking lot in his white SUV and began arguing with one of the victims, Jamell Perry. Conner opened fire on Perry, shooting him three times. Conner also shot another victim at the scene, Jackie Robinson, once. An additional victim was seen by onlookers limping around the parking lot, but could not be identified by the Cleveland police in their subsequent investigation.

{¶ 3} On February 25, 2009, a Cuyahoga County Grand Jury charged Conner in a seven-count indictment. Counts 1 and 2 charged attempted murder, first degree felonies, in violation of R.C. 2903.02(A). Each count contained one-, three-, and five-year firearm specifications, in violation of R.C. 2941.141, 2941.145 and 2941.146, respectively.

{¶ 4} Counts 3 and 4 charged felonious assault, a second degree felony, in violation of R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2), respectively. Counts 5 and 6 also charged felonious assault, a second degree felony, in violation of R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2). Finally, Count 7 charged possession of criminal tools, a fifth degree felony, in violation of R.C. 2923.24(A).

{¶ 5} On May 14, 2009, Conner pled guilty to attempted murder in Counts 1 and 2 with five-year firearm specifications. In exchange, the State deleted the one- and three-year firearm specifications from Counts 1 and 2

and dismissed counts 3 through 7. During the plea colloquy, the following exchange took place:

“Trial Court: Amended count 1 attempted murder with a five-year gun specification, that bears possible penalty of incarceration from three to ten years in one-year increments plus an additional five years to be served prior to and consecutive to the underlying sentence.

So as the prosecutor said the very minimum would be a mandatory eight years, plus a fine of up to \$20,000 and that would be a mandatory five years post-release control. Do you understand?

Conner: Yes, ma’am.

Trial Court: And also to amend Count 1, attempted murder, a felony of the first degree with the five-year gun spec, how do you plead?

Conner: Guilty.

Trial Court: Amended count 2 is also an attempted murder, a felony of the first degree, with the same five-year gun specification, again possibility of three to ten years in one-year increments, plus the additional five years prior to and consecutive with the underlying sentence, fine of up to \$20,000 plus there would be a mandatory five-years post-release control. Do you understand?

Conner: Yes, ma’am.

Trial Court: Knowing all these things, how do you plead to Count 2, attempted murder, amended count 2, attempted murder?

Conner: Guilty.” (Tr. 7-8.)

{¶ 6} On June 19, 2009, Conner was sentenced to 12 years of incarceration: seven years on Counts 1 and 2, to be served concurrently with one another, and five years on the underlying firearm specifications, to be served consecutively to the underlying charges.

{¶ 7} On September 21, 2009, Conner filed a notice of appeal and motion for delayed appeal, which was granted by this court. This appeal followed.

{¶ 8} Conner asserts one assignment of error for our review:

“The trial court failed to comply with the mandatory requirements of Ohio Revised Code §2943.032 and denied Appellant due process of law by accepting Appellant’s guilty plea without first fully informing him of the terms and conditions of post-release control. *Ohio Revised Code §2943.032; Crim.R. 11(C)(2)(a) and (b); Fourteenth Amendment, Constitution of the United States; Article I, Section 16, Ohio Constitution.*” (Emphasis sic.)

{¶ 9} Both the Ohio and the United States Constitutions require that a defendant entering a guilty plea must do so knowingly, intelligently, and voluntarily. *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179, 660 N.E.2d 450. Crim.R. 11(C)(2) requires that the trial court engage in oral dialogue with the defendant to determine that the plea is voluntary, that defendant understands the nature of the charges and the maximum penalty

involved, and to personally inform the defendant of the constitutional guarantees he waives by entering a guilty plea.¹

{¶ 10} In determining whether the trial court has satisfied its duties under Crim.R. 11 in taking a plea, reviewing courts have distinguished between constitutional and nonconstitutional rights. See *State v. Higgs* (1997), 123 Ohio App.3d 400, 704 N.E.2d 308; *State v. Gibson* (1986), 34 Ohio App.3d 146, 517 N.E.2d 990. The trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights. See *State v. Stewart* (1977), 51 Ohio St.2d 86, 88-89, 364 N.E.2d 1163; *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, paragraph one of the syllabus. “Strict compliance” does not require an exact recitation of the precise language of the rule, but instead focuses on whether the trial court

¹Crim.R. 11(C)(2) states: “In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining 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.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant’s favor, and to require the state to prove the defendant’s guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.”

explained or referred to the right in a manner reasonably intelligible to that defendant. *Id.*

{¶ 11} For nonconstitutional rights, scrupulous adherence to Crim.R. 11(C) is not required; the trial court must substantially comply. *Stewart*. “Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implication of his plea and the rights he is waiving.” *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. Moreover, there must be some showing of prejudicial effect before a guilty plea may be vacated. *Stewart*. The test for prejudice is whether the plea would have otherwise been made. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621.

{¶ 12} If the trial judge imperfectly explained nonconstitutional rights such as the right to be informed of the maximum possible penalty and the effect of the plea, a substantial compliance rule applies. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462.

{¶ 13} In the instant case, Conner argues that his plea was not knowingly, voluntarily, and intelligently made because the court did not inform Conner that he could be administratively subject to up to one-half of his stated prison term if he violated the terms and conditions of his postrelease control. In support of this contention, he cites *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, for the proposition that a

trial court does not comply with Crim.R. 11 when it fails to inform a defendant about a mandatory term of postrelease control as part of his sentence. It is clear from the record in this case that the trial court did inform Conner that postrelease control was mandatory. *Sarkozy* is therefore distinguishable from the instant case.

{¶ 14} Conner does not argue that he would not have pled guilty if the court had advised him of this statutory provision, which is the key test under *Veney*. While the record is clear that the trial court did not inform Conner of the possibility that his sentence could be administratively extended if he violated postrelease control, the record also shows that the trial court sufficiently apprised him of the mandatory nature of postrelease control. Any administrative extensions, including additional prison time, are by no means a certainty in Conner's sentence.

{¶ 15} In this case, Conner must show that he was prejudiced by the trial court's failure to inform him that his sentence could be administratively extended pursuant to R.C. 2943.032. *Stewart*. Nothing in the record shows that the trial court's failure to mention potential administrative extensions of his postrelease control prejudiced Conner's guilty plea. As the State points out, Conner cannot show he was prejudiced by a potential six-year administrative extension of his 12-year sentence when he pled to the instant offenses knowing he faced a potential 30-year term of incarceration.

{¶ 16} This court recently dealt with this identical issue in *State v. McKissic*, 8th Dist. Nos. 92332 and 92333, 2010-Ohio-62, in holding that a trial court substantially complies with Crim.R. 11 even when it does not advise a defendant of the potential provisions of R.C. 2943.032 where the defendant does not show he has been prejudiced by the trial court's failure. *Id.* at ¶18. In *McKissic*, as here, the appellant argued that he did not understand the nature of his plea. Also akin to *McKissic*, Conner did not argue that he was prejudiced by this failure, or that he would not have pled guilty had he been so informed.

{¶ 17} Since Conner cannot show he was prejudiced by the trial court's failure to inform him that he could be administratively subject to imprisonment for up to one-half of his stated prison term if he violated the terms and conditions of his postrelease control, we will not vacate his plea on this basis. *Id.* The trial court substantially complied with Crim.R. 11 in informing Conner about the mandatory nature of postrelease control as it relates to his sentence.

{¶ 18} Accordingly, Conner's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from 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.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

**PATRICIA A. BLACKMON, J., and
MARY J. BOYLE, J., CONCUR**