

[Cite as *State v. Jackson*, 2010-Ohio-5008.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94038

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JIMMIE M. JACKSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521909

BEFORE: Cooney, J., Gallagher, A.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: October 14, 2010

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Jimmie M. Jackson (“Jackson”), appeals his convictions and sentences claiming the trial court failed to properly advise him that he would be subject to mandatory postrelease control. We find no merit to the appeal and affirm.

{¶ 2} This case arises out of the rape of an eleven-year-old girl, which occurred in November 2002. Jackson’s DNA was later found to match the DNA found on the victim, and in March 2008, Jackson was charged in a five-count indictment that included two counts of aggravated burglary, two counts of rape, and one count of kidnapping. In August 2009, Jackson pled

guilty to one count of aggravated burglary and one count of rape. The remaining counts were nolle. The trial court sentenced Jackson to two consecutive ten-year prison terms for a total of 20 years' imprisonment, to be served consecutively to another sentence he was serving on an unrelated case.

This appeal followed.

{¶ 3} In his sole assignment of error, Jackson contends his plea and sentence are void because the trial court failed to properly inform him of all aspects of postrelease control. R.C. 2943.032,¹ which requires that the trial court notify the defendant of postrelease control before accepting a guilty plea, provides:

“Prior to accepting a guilty plea or a plea of no contest to an indictment, information, or complaint that charges a felony, the court shall inform the defendant personally that, if the defendant pleads guilty or no contest to the felony so charged or any other felony, if the court imposes a prison term upon the defendant for the felony, and if the offender violates the conditions of a post-release control sanction imposed by the parole board upon the completion of the stated prison term, the parole

¹ R.C. 2943.032 was amended by H.B. 130, which became effective on April 7, 2009. This version of the statute no longer requires the court to provide the numerous notifications contained in subsections (A) through (E) of the former statute. These subsections required the court to notify a defendant prior to accepting a guilty plea or no contest plea that his or her prison term could be extended if the defendant committed any criminal offense while serving the prison term and that such extended prison terms may be for 30, 60, or 90 days of each violation, but not to exceed one-half the original prison term. Former R.C. 2943.032(A), (B) and (C). Former R.C. 2943.032(E) also required the trial court inform the offender that if he or she violates the conditions of a postrelease control sanction imposed by the parole board upon the completion of the stated prison term, the parole board could impose upon the offender a residential sanction that includes a new prison term up to nine months.

board may impose upon the offender a residential sanction that includes a new prison term of up to nine months.”

{¶ 4} Under Crim.R. 11(C)(2), before accepting a guilty plea in a felony case, 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) ensure 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 ensure that the defendant understands that he is waiving his constitutional rights to a jury trial, to confront 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.

{¶ 5} A trial court must strictly comply with the requirements of Crim.R. 11(C)(2) regarding the waiver of constitutional rights. In other words, the trial court must 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 nonconstitutional rights, Crim.R. 11(C)(2) simply requires reviewing courts to determine 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. “Under this standard, a slight deviation from the text of the rule is permissible; so long as the totality of the circumstances indicates that ‘the defendant subjectively understands the implications of his plea and the rights he is waiving.’” *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶31, quoting *State v. Nero*, 56 Ohio St.3d at 108.

{¶ 6} If the trial court does not “substantially comply” with Crim.R. 11(C)(2)(a), a reviewing court must “determine whether the court partially complied or failed to comply with this rule.” *Clark* at ¶32. If the trial court partially complied with the rule with respect to nonconstitutional rights, the plea may be vacated only if the defendant demonstrates a prejudicial effect. *Id.* See, also, *Veney* at ¶17. (“A defendant must show prejudice before a plea will be vacated for 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.

{¶ 7} Here, the trial court’s compliance with Crim.R. 11’s strict requirements for constitutional rights are not at issue. Rather, Jackson claims the trial court failed to properly inform him of the terms of his postrelease control. Specifically, Jackson claims the trial court’s explanation

of postrelease control was defective because: (1) it suggested that the Adult Parole Authority has discretion to determine the length of postrelease control; (2) the court's warning that committing a crime against the United States or the state of Ohio could result in additional prison time was confusing because it was unclear whether or not the court meant he would be subject to additional prison time "if he commits a crime while incarcerated or if he commits a crime while on postrelease control"; and (3) the trial court failed to advise him that he could be subject to additional prison time if he were to commit a new felony (not against the United States or Ohio), while on postrelease control. As such, Jackson argues, both his plea and sentence are void.

{¶ 8} At the plea hearing, the trial court informed Jackson as follows:

"THE COURT: * * * Post-release control would be mandatory. It would be for a period of five years. There can be no reduction. Do you understand that?"

"THE DEFENDANT: Yes."

{¶ 9} The trial court's statement that "the Ohio Parole Board can impose a period of postrelease control not to exceed five years," suggests that the Ohio Parole Board has discretion to determine the length of any postrelease control. However, the court had just advised Jackson moments before that the five-year term of postrelease control is mandatory and that

“[t]here can be no reduction.” In this context, we find that Jackson subjectively understood that his five-year term of postrelease control was mandatory because he affirmatively responded that he understood the court’s advisement.

{¶ 10} At the plea hearing, the trial court further explained:

“THE COURT: If you are released from prison and upon your release from prison, the Ohio Parole Board can impose a period of post-release control not to exceed five years. They may impose conditions and sanctions. Should you decide to commit an act that causes you to be found in violation of your post-release control, you can be remanded to an Ohio penal institution for an additional 50 percent of your original sentence. Do you understand that?”

“THE DEFENDANT: Yes.

“THE COURT: If you are incarcerated and you decided to commit criminal acts against the United States government or the state of Ohio, the Ohio Parole Board can administratively extend your stated prison term by periods of 30, 60 or 90 days not to exceed one half of your prison term. Do you understand that?”

“THE DEFENDANT: Yes.”

{¶ 11} The record clearly establishes that the trial court informed Jackson that he could be subject to additional prison time of up to one-half of his original sentence if he committed a crime against the United States, the state of Ohio, or committed an act that caused him to be found in violation of his postrelease control. As previously mentioned, the advisement of postrelease control at a plea hearing involves the defendant’s

nonconstitutional rights and therefore requires only substantial compliance with Crim.R. 11(C) and a showing of prejudice. *State v. Soltis*, Cuyahoga App. No. 92574, 2009-Ohio-6636, ¶18. In *Clark*, the Ohio Supreme Court explained that a trial judge's failure to sufficiently explain postrelease control does not require vacation of a guilty plea when the defendant fails to demonstrate prejudicial effect. *Clark*, 2008-Ohio-3748, ¶38.

{¶ 12} The court's warning that committing a crime against the United States or the state of Ohio could result in additional prison time might be confusing because it is not clear whether the court meant he would be subject to additional prison time "if he commits a crime while incarcerated or if he commits a crime while on postrelease control." Nevertheless, the record demonstrates that the trial court informed Jackson of the potential penalties for violating postrelease control and Jackson has not demonstrated that he was prejudiced by any confusion. Nor did Jackson inform the court that he did not understand the court's advisement. Therefore, we find no reason to vacate Jackson's plea.

{¶ 13} Jackson also argues that his sentence should be vacated because the trial court failed to properly inform him of the penalties for violating postrelease control. R.C. 2967.28(B) requires a sentencing court imposing a prison term on a first or second degree felony offender and certain other

offenders to notify the offender that the parole board will impose a period of mandatory postrelease control upon release from prison. In addition, R.C. 2929.19 mandates that a court, when imposing a sentence, notify the offender at the hearing that he will be supervised pursuant to R.C. 2967.28 and that upon violating supervision or a condition of postrelease control, the parole board may impose a prison term of up to one-half of the prison term originally imposed upon the offender. R.C. 2929.19(B)(3)(c) and (e).

{¶ 14} Jackson argues that the trial court improperly advised him of postrelease control because the court's statement concerning postrelease control failed to explain that he would be subject to additional prison time for committing a felony while on postrelease control. In support of this argument, he cites *State v. Hunter*, Cuyahoga App. No. 92032, 2009-Ohio-4194. In *Hunter*, the defendant was convicted of fifth degree felonies for violating postrelease control imposed in an earlier case. The trial court terminated that postrelease control and ordered appellant to serve the remaining time, which was to run consecutive to his current 12-month sentence. Hunter appealed, arguing that his sentence was unlawful and void because, among other things, the imposition of the original postrelease control term from the prior case was improper. This court vacated the sentence and remanded the case for resentencing because the remaining time

could not be calculated since the balance of the postrelease control term was not set forth in the record. However, Jackson was not on postrelease control when he committed the offenses giving rise to the instant case. Therefore, the facts of *Hunter* are easily distinguishable.

{¶ 15} Although R.C. 2967.28 requires that offenders subject to postrelease control be informed of the terms of postrelease control at the time of sentencing, the sentencing court need not fully describe every aspect of an offender's postrelease control in order to comply with the statutory mandates.

In *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d 78, the Ohio Supreme Court explained that the preeminent purpose of R.C. 2967.28 is to inform offenders subject to postrelease control at the time of sentencing "that their liberty could continue to be restrained after serving their initial sentences." *Id.* at ¶52. In *Watkins*, the defendants were erroneously advised that their postrelease control was discretionary and not mandatory. Nevertheless, the Supreme Court held that such defect did not warrant habeas corpus relief because the sentencing court had at least informed the defendants that they were subject to some kind of postrelease control. *Id.* at ¶46.

{¶ 16} At Jackson's sentencing hearing, the trial court advised as follows:

“THE COURT: * * * Sir, upon your release from prison, the Ohio Parole Board will impose a period of post-release control not to exceed 5 years. There can be no reduction. They may impose conditions and sanctions. Should you decide to commit an act that causes you to be found in violation of your post-release control, you can be remanded to an Ohio penal institution for an additional 50 percent of your original sentence, do you understand that?”

“THE DEFENDANT: Yes.”

{¶ 17} Thus, the record establishes that the trial court complied with the notification requirements of R.C. 2967.28 and 2929.19 by informing Jackson that: (1) he was subject to a mandatory term of postrelease control, (2) he would be supervised while on postrelease control, and (3) violating the terms of postrelease control could result in additional prison time up to one-half his original sentence. Thus, the trial court committed no error, and Jackson is not entitled to a new sentencing hearing.

{¶ 18} Accordingly, the sole assignment of error is overruled.

Judgment affirmed.

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.

COLLEEN CONWAY COONEY, JUDGE

SEAN C. GALLAGHER, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR