[Cite as *State v. Bump*, 2011-Ohio-6687.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2010-A-0028**
DANNY R. BUMP,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2008 CR 427.

Judgment: Affirmed in part; reversed in part and remanded.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Ariana E. Tarighati, Law Offices of Ariana E. Tarighati, L.P.A., 34 South Chestnut Street, Suite 100, Jefferson, OH 44047-1092 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Danny R. Bump, appeals from the May 26, 2010 judgment entry of the Ashtabula County Court of Common Pleas, in which he was sentenced for complicity to murder and complicity to aggravated robbery.

{¶2} On October 31, 2008, the Ashtabula County Grand Jury indicted appellant and his brother/co-defendant, Bryan R. Ingramm, on 21 counts. The first 11 counts apply to Mr. Ingramm and the last 10 counts are applicable to appellant.

{¶3} Appellant filed a motion to suppress oral and written statements made to the Ashtabula County Sheriff's Department and the Cleveland Police Department, alleging they were improperly induced by promises of leniency. Appellee, the state of Ohio, opposed the motion. A suppression hearing was held and appellant's motion was overruled.

{¶4} Thereafter, appellant withdrew his not guilty plea and entered an oral and written plea of guilty to count 17, complicity to murder, an unclassified felony, and count 21, complicity to aggravated robbery, a first degree felony. The remaining eight counts were dismissed. Appellant's written guilty plea included language that appellant is subject to five years mandatory postrelease control for the first degree felony. The trial court accepted appellant's guilty plea, ordered a presentence investigation report, and deferred sentencing.

{¶5} Before sentencing, appellant personally wrote and filed a letter with the trial court asking to withdraw his guilty plea. As grounds, appellant's letter states he was misled and pushed into taking this deal. The trial court continued sentencing and rescheduled it to a later date. On the day of sentencing, appellant's counsel filed a written motion to vacate appellant's plea. The only grounds for vacation provided in the written motion was that a manifest injustice would occur if the motion were not granted. The written motion did not allege any facts in support. Following a full hearing, the trial court denied appellant's motions and proceeded to sentencing.

{¶6} The trial court sentenced appellant to 15 years to life in prison on count 17, complicity to murder, and three years in prison on count 21, complicity to aggravated robbery, concurrent. The trial court did not orally advise appellant that he was subject to five years mandatory postrelease control at the sentencing hearing and

did not sentence appellant to five years mandatory postrelease control in its judgment entry. It is from the foregoing judgment that appellant filed a timely appeal, asserting the following assignments of error for our review:

{¶7} "[1.] The trial court erred to the prejudice of [appellant] by denying his pre-sentence motion to withdraw his plea in violation of his due process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

{¶8} "[2.] The trial court erred when it denied [appellant's] motion to suppress in violation of his due process rights guaranteed under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Section 10, Article I of the Ohio Constitution.

{¶9} "[3.] The trial court erred when it failed to notify [appellant] that he would be subject to a mandatory [period] of postrelease control in violation of his due process rights guaranteed under the United States Constitution and the Constitution of the Ohio Constitution (sic)."

{¶10} In his first assignment of error, appellant argues that the trial court erred by denying his presentence motions to withdraw his guilty plea.

{¶11} Crim.R. 32.1 governs the withdrawal of a guilty plea and provides: "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

{¶12} Motions to withdraw a plea are governed by Crim.R. 32.1. "However, the rule itself gives no guidelines for a trial court to use when ruling on a presentence motion to withdraw a guilty plea." *State v. Xie* (1992), 62 Ohio St.3d 521, 526.

"Although a motion to withdraw a guilty plea, filed after sentence has been imposed, should be granted only to correct manifest injustice, a motion to withdraw filed before sentencing should be freely allowed." *State v. Peterseim* (1980), 68 Ohio App.2d 211, paragraph one of the syllabus. "Appellate review of a trial court's denial of a motion to withdraw is limited to a determination of abuse of discretion, regardless whether the motion to withdraw is filed before or after sentencing." Id. at paragraph two of the syllabus. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶13} "A trial court does not abuse its discretion in overruling a motion to withdraw: (1) where the accused is represented by highly competent counsel, (2) where the accused was afforded a full hearing, pursuant to Crim.R. 11, before he entered the plea, (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion, and (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request." *Peterseim*, supra, at paragraph three of the syllabus.

{¶14} Appellant moved to withdraw his plea before sentencing. Therefore, the freely allowed standard applies.

{¶15} With respect to the first *Peterseim* factor, appellant was represented by highly competent counsel. Generally, a properly licensed attorney practicing in this state is presumed to be competent. *State v. Lytle* (1976), 48 Ohio St.2d 391, 397. Appellant was provided three different attorneys to represent him during the course of the proceedings. At the plea hearing, appellant indicated that he did not have any problems with his defense counsel and that he was given enough time to discuss the

plea agreement with his representative. The record establishes that defense counsel provided highly competent representation.

{¶16} Regarding the second *Peterseim* factor, appellant was afforded a full hearing pursuant to Crim.R. 11 before entering his plea. The trial court conducted a thorough colloquy with appellant, determining that he understood each and every right he was waiving.

{¶17} The trial court first inquired about appellant's educational background, mental state, and whether he was under the influence of any drugs or alcohol to ensure that he understood the proceedings. Appellant replied that he had his GED, had no problem reading or writing the English language, had a clear mind, and was not under the influence of drugs or alcohol. Appellant informed the trial court that he understood the effect of his guilty plea and its consequences.

{¶18} Although not required under Crim.R. 11, the trial court then informed appellant of his appellate rights, stating:

{¶19} "THE COURT: Okay. All right. Next I want to explain the effect of the plea of guilty. If I accept your pleas of guilty, that constitutes a complete admission of guilt. What that really means is that you cannot later on file an appeal and attempt to raise the question of whether or not you were guilty or whether or not the State could have proven your guilt beyond a reasonable doubt at trial.

{¶20} "If you went to trial and were convicted by the Court and jury, you'd have a right to file an automatic appeal under those circumstances. And then on appeal you could raise the question of whether or not the evidence that was offered during the trial was strong enough to support the convictions.

{¶21} "The reason you can't do that on a guilty plea is because the highest form of evidence that the State can offer against you is your own admission that you did commit the act you're pleading guilty to. So if I accept your pleas of guilty, that pretty much closes the book on whether you're guilty or not, and you do waive some appellate rights then by pleading guilty.

{¶22} "Do you understand that?

{¶23} "MR. BUMP: Yes, Your Honor, I do.

{¶24} "THE COURT: Okay. Any questions you want to ask me about anything I've gone over here so far?

{¶25} "MR. BUMP: No, sir, Your Honor.

{¶26} "THE COURT: Okay. Anything you're not sure of or - -

{¶27} "MR. BUMP: No, sir.

{¶28} "THE COURT: You understand what I've said to you so far?

{¶29} "MR. BUMP: Yes, sir, I do."

{¶30} The foregoing colloquy establishes appellant understood and had no questions with regard to waiving some of his appellate rights by entering a guilty plea. Also, the written guilty plea, signed by appellant and his counsel, shows that he agreed to waive some of his appellate rights by pleading guilty.

{¶31} Next, the trial court, in a comprehensive manner, advised appellant of the constitutional rights he was waiving. Crim.R. 11(C)(2)(c) requires the trial court to inform the defendant and determine that he understands that by entering a plea he is waiving the right to a jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the state prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself.

At the plea hearing, appellant indicated he understood and waived his right to a jury trial, to confront and cross-examine witnesses, to subpoena witnesses for his defense, and to have the state prove its case beyond a reasonable doubt at a trial at which he could not be compelled to testify against himself. In addition, the written guilty plea shows that appellant was advised of his constitutional rights and that he agreed to waive them. The written plea states:

{¶32} "I understand by pleading guilty I give up my right to a jury trial or court trial, where I could see and have my attorney question witnesses against me, and where I could use the power of the court to call witnesses to testify for me. I know at trial I would not have to take the witness stand and could not be forced to testify against myself and that no one could comment if I chose not to testify. I understand I waive my right to have the prosecutor prove my guilt beyond a reasonable doubt."

{¶33} The record reveals the trial court covered all the constitutional rights. Thus, the trial court strictly complied with the requirements of Crim.R. 11(C)(2)(c).

{¶34} The record establishes that without any promises, coercion or threats, appellant freely entered a guilty plea. The trial court accepted appellant's guilty plea after determining that it was made knowingly, intelligently, and voluntarily. Thus, the plea hearing was fully compliant with the constitutional requirements of Crim.R. 11.

{¶35} With respect to the third and fourth *Peterseim* factors, we note that appellant was given a complete and impartial hearing on his motions to withdraw his plea. As discussed, the written motions to withdraw his plea alleged no facts in support. At the hearing, however, appellant's counsel asserted that appellant was misled into taking the negotiated plea and did not realize he was waiving certain rights, primarily his appellate rights. Appellant himself argued that he was entitled to withdraw his plea

because he did not fully understand the implications of pleading guilty at that time. Appellant also asserted that he did not realize he was waiving his appellate rights. However, although not required under Crim.R. 11, the record shows that the trial court advised him of his right to appeal and appellant said during his plea that he understood he was waiving some of his appellate rights.

{¶36} The transcript establishes that the trial court gave the motions full and fair consideration. Specifically, the trial court indicated appellant had three different attorneys represent him in this matter; voluntarily made statements that he was involved with his brother in the robbery and murder of Mr. Estes; never previously complained about the representations of his attorneys; was afforded an extensive plea hearing in which he never indicated that there were any issues or problems that he wanted to bring to the court's attention; assured the court on more than one occasion that his plea was voluntary; all of his rights were listed in his written plea of guilty; and he was found to be fully competent to stand trial after a competency hearing was conducted.

{¶37} The trial judge stated on the record: "So there's nobody pushed you into anything. You understood the deal. You've been negotiating for a year and a half, and you've drove a hard bargain here, but you've gotten the benefit of it, too, Mr. Bump."

{¶38} Again, the record establishes that appellant's guilty plea was knowingly, intelligently, and voluntarily entered, and he was given a complete and impartial hearing on the motions to withdraw.

{¶39} Pursuant to the *Peterseim* factors, the trial court did not abuse its discretion in denying appellant's presentence motions to withdraw his guilty plea. The record shows appellant knew when he entered his plea that he was waiving some of his appellate rights.

{¶40} Appellant's first assignment of error is without merit.

{¶41} In his second assignment of error, appellant contends that the trial court erred by denying his motion to suppress because his statements were coerced.

{¶42} A plea of guilty operates as a waiver of any alleged error regarding appellant's motion to suppress. *State v. Elliott* (1993), 86 Ohio App.3d 792, 795. "Unlike a plea of no contest, a plea of guilty operates as a waiver of claimed errors of the trial court in failing to suppress evidence." *Huber Heights v. Duty* (1985), 27 Ohio App.3d 244, syllabus. See, also, *State v. Kelley* (1991), 57 Ohio St.3d 127, paragraph two of the syllabus (plea of guilty waives all appealable errors unless such errors are shown to have precluded defendant from entering plea voluntarily).

{¶43} Appellant knowingly, intelligently, and voluntarily entered a guilty plea. By doing so, appellant waived any error on the part of the trial court with regard to the denial of his motion to suppress. *Elliott*, supra, at 795.

{¶44} Appellant's second assignment of error is without merit.

{¶45} In his third assignment of error, appellant alleges that the trial court erred by failing to orally notify him at his sentencing hearing that he would be subject to five years mandatory postrelease control and by not sentencing him to five years mandatory postrelease control in its sentencing entry. The state concedes these points but contends that his sentence is subject to correction pursuant to the procedures set forth in R.C. 2929.191. We agree.

{¶46} R.C. 2929.19(B), the statutory subsection that sets forth what a trial court must do at a sentencing hearing, provides, in relevant part:

{¶47} "(2) *** [I]f the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

{¶48} “***

{¶49} “(c) Notify the offender that the offender will be supervised under section 2967.28 of the Revised Code [regarding post-release control] after the offender leaves prison if the offender is being sentenced for a felony of the first degree ***.”

{¶50} In addition, R.C. 2967.28 provides:

{¶51} “(B) Each sentence to a prison term for a felony of the first degree *** shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender’s release from imprisonment. *** [A] period of post-release control required by this division for an offender shall be one of the following periods:

{¶52} “(1) For a felony of the first degree ***, five years ***.”

{¶53} Appellant pleaded guilty to and was sentenced for complicity to murder, an unclassified felony, to which the postrelease control statute does not apply, and complicity to aggravated robbery, a felony of the first degree, which is subject to mandatory postrelease control. “Where a defendant has been convicted of both an offense that carries mandatory postrelease control and an unclassified felony to which postrelease control is inapplicable, the trial court’s duty to notify of postrelease control is not negated.” *State v. Brown*, 8th Dist. No. 95086, 2011-Ohio-345, at ¶8.

{¶54} The trial court was required to but did not notify appellant that he is subject to five years mandatory postrelease control and include that in the sentencing entry. The General Assembly enacted R.C. 2929.191, effective July 11, 2006, establishing a simple procedure to correct a trial court’s judgment of conviction that omits proper notification regarding postrelease control. Appellant’s sentence of conviction must be

corrected to include mandatory postrelease control as he was not properly sentenced. *State v. McKinney*, 11th Dist. No. 2010-T-0011, 2010-Ohio-6445, at ¶31.

{¶55} "R.C. 2929.191 applies to sentenced offenders who have not yet been released from prison and who fall into at least one of three categories: (1) those who did not receive notice at the sentencing hearing that they would be subject to postrelease control, (2) those who did not receive notice that the parole board could impose a prison term for a violation of post-release control, or (3) those who did not have both of these statutorily-mandated notices incorporated into their sentencing entries. R.C. 2929.191(A) and (B).

{¶56} "For such offenders, R.C. 2929.191 provides that trial courts may, after holding a hearing with notice to the offender, the prosecuting attorney, and the department of rehabilitation and correction, prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction a statement that the offender will be supervised under post-release control after the offender leaves prison and that the parole board may impose a prison term of up to one-half of the stated prison term originally imposed if the offender violates post-release control. R.C. 2929.191(A)(1). If the court prepares such a correction, the court shall place upon its journal an entry nunc pro tunc to record the correction to the judgment of conviction. R.C. 2929.191(A)(2). The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the sentence and the judgment of conviction entered on the journal and had notified the offender that the offender would be subject to post-release control. Id. The offender has the right to be present at the hearing, but the court on its own motion

or on the motion of the state or the defense, may permit the offender to appear at the hearing by video conferencing equipment if available and compatible. R.C. 2929.191(C). At the hearing, the state and the offender may make a statement as to whether the court should issue a correction to the judgment of conviction." *McKinney*, supra, at ¶18-19.

{¶57} In the instant matter, appellant's sentence of conviction must be corrected to include mandatory postrelease control. Pursuant to R.C. 2929.191 and *McKinney*, we remand this matter to the trial court for the sole purpose of preparing and issuing a correction to the judgment of conviction that includes in the nunc pro tunc judgment of conviction postrelease control after conducting a limited hearing for this purpose. As noted above, upon motion of the court or either party, the court may order appellant to appear at this hearing "by video conferencing equipment if available and compatible." R.C. 2929.191(C).

{¶58} Appellant's third assignment of error is with merit.

{¶59} For the foregoing reasons, appellant's first and second assignments of error are without merit, and his third assignment of error is well-taken. The judgment of the Ashtabula County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.