[Cite as *State v. Eckler*, 2009-Ohio-7064.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

State of Ohio,	:	
Plaintiff-Appellee,	:	Case No. 09CA878
v.	:	DECISION AND
Jeffery Eckler, aka Jeffrey Eckler,	:	JUDGMENT ENTRY
Defendant-Appellant.	:	File-stamped date: 12-28-09

APPEARANCES:

Lisa Rothwell, West Union, Ohio, for Appellant.

Aaron E. Haslam, Adams County Prosecuting Attorney, and David Kelley, Adams County Assistant Prosecuting Attorney, West Union, Ohio, for Appellee.

Kline, P.J.:

{¶1} Jeffery Eckler (hereinafter "Eckler") appeals his conviction for Aggravated Assault, in violation of R.C. 2903.12(A). The Adams County Court of Common Pleas accepted Eckler's guilty plea. On appeal, Eckler contends that he did not enter his guilty plea knowingly, intelligently, and voluntarily. Eckler was on post-release control when he pled guilty in the present case, and an entry from Eckler's prior case contains some ambiguous language. Because of that language, Eckler claims that he was confused about the consequences of a post-release control violation. However, Eckler has failed to demonstrate that his guilty plea was less than knowing, intelligent, and voluntary. First, Eckler's sentence is in accordance with the law, and the supposed confusion about his

resulting sentence does not invalidate Eckler's guilty plea. Second, the trial court's colloquy substantially complied with Crim.R. 11(C)(2)(a) and (b) and strictly complied with Crim.R. 11(C)(2)(c). Third, there is no evidence that Eckler actually relied upon the entry from his prior case while pleading guilty. And finally, without the record from Eckler's prior case, we can only speculate as to what may have happened in that case. Accordingly, we affirm the judgment of the trial court.

I.

{¶2} An Adams County Grand Jury indicted Eckler for Felonious Assault, a second-degree felony, in violation of R.C. 2903.11(A)(2). At the time of his indictment, Eckler was on post-release control after serving a prison term in Adams County Case No. 20040120. (The underlying offense in Case No. 20040120 is not entirely clear. At the sentencing hearing below, the trial court judge called the crime "pandering obscenity, having nude materials of a minor." Thus, in Case No. 20040120, Eckler may have been convicted of violating R.C. 2907.321.)

{¶3} Eckler initially pled not guilty to the Felonious Assault charge. But later, Eckler agreed to plead guilty to Aggravated Assault, a fourth-degree felony, in violation of R.C. 2903.12(A). On November 14, 2008, the trial court held a change of plea hearing. At that hearing, the trial court and Eckler had the following exchange:

{¶4} "COURT: Mr. Eckler, are you presently on felony probation, parole, under community control sanctions or under post release control?"

{¶5} MR. ECKLER: I'm on felony probation, I mean parole, I just talked to my parole officer out here in the hallway.

{¶6} COURT: Okay. Do you understand that a plea of guilty in this, in this case, to this amended charge, could result in your parole officer filing revocation proceedings against you? Do you understand that?

{¶7} MR. ECKLER: Yes sir.

{¶8} COURT: Do you understand that if they file revocation proceedings against you and they do, in fact, revoke your parole, that any suspended sentenced could be required to be served by the parole board, and that sentence would be in addition to any term of incarceration or could be imposed in addition to any term of incarceration imposed by this court for the offense of aggravated assault. Do you understand that?

{¶9} MR. ECKLER: Yes sir.

{¶10} COURT: Now if this court does, in fact, require you to serve an actual term of incarceration in an appropriate state penal institution, in prison, that a period of supervision by the adult parole authority upon your release from prison would be optional in this case, and it would be optional whether they placed you on post release control. Do you understand that?

{¶11} MR. ECKLER: Yes sir.

{¶12} COURT: When I use the term optional Mr. Eckler, do you know what I mean by that?

{¶13} MR. ECKLER: Yes, it's up to them.

{¶14} COURT: It's up to them, thank you.

{¶15} MR. ECKLER: Yeah.

{¶16} COURT: Now, because this is a felony of the fourth degree, you should understand that if they do, in fact, exercise that option and place you on post release control, that you could be placed on post release control for a period of up to three years. Do you understand that?

{¶17} MR. ECKLER: Yes sir.

{¶18} COURT: Now Mr. Eckler, if you were to be placed on post release control, if you violate any post release control rule or condition, that could result in more restrictive sanctions being placed upon you by the adult parole authority, it could also result in increased duration of the period of supervision up to the maximum of three years, or it could even result in being reimprisoned, even though you had served the entire stated prison term that I would impose upon you at the time of sentencing for this offense. Do you understand that?

{¶19} MR. ECKLER: Yes sir.

{¶20} COURT: If you were to violate any of the conditions while under post release control, the parole board could return you to prison for up to nine months for each violation of your post release control for a total of up to one-half of the originally stated prison term imposed by this court. If the violation of your post release control is a new felony offense, you can receive a prison term of the greater of one year or it could be the time remaining on your post release control, and that would be in addition to any other prison term that any court would, courts would impose upon you for the new felony offense. Do you understand?

{¶21} MR. ECKLER: Yes sir.

{¶22} COURT: Do you have any questions about post release control or the consequences of violation of post release control?

{¶23} MR. ECKLER: No sir." Change of Plea Hearing at 6-9.

{¶24} After the trial court concluded its colloquy, Eckler pled guilty to Aggravated Assault.

{¶25} On December 18, 2008, the trial court held a sentencing hearing. The trial court sentenced Eckler to seventeen months in prison for the Aggravated Assault conviction. Then, the trial court addressed Eckler's post-release control violation.

{¶26} "COURT: * * * Now counselors, the other issue that this court is confronted with is that, at the time of the change of plea, prior to accepting the plea of guilty, this court advised Mr. Eckler that if he was on community control, post release control from prison, or any other supervised release, but specifically post release control, that if he was convicted of a new felony offense, that he could receive the greater of twelve months or the time remaining on post release control. There are one thousand forty-three days remaining on post release control. Pursuant to Ohio Revised Code 2929.141, and I'll provide for your availability if you wish to review… Could I ask the, the bailiff to provide that to both counsel… Mr. Michael Stumph, the parole officer, has asked that those days be imposed in addition to any sentence by this court.

{¶27} [Discussions between defense counsel and the defendant]

{¶28} [ECKLER'S TRIAL COUNSEL]: Your Honor, do you know what he's on parole for right now?

{¶29} COURT: I would have to think that it's the pandering obscenity, having nudity material of a minor, where he served two years and seventeen months.

{¶30} MR. ECKLER: No I served two years, that's all they gave me was two years.

{¶31} COURT: Okay, two years.

{¶32} MR. ECKLER: Yeah.

{¶33} [ECKLER'S TRIAL COUNSEL]: He thought the maximum on, on this type of sentence would be half the original sentence, am I wrong on that?

{¶34} COURT: Well, at the time of, at the time of the change of plea, the court advised * * * the defendant that, that, and he acknowledged by signing, it says I understand that if I am now on felony probation, parole, under community control sanctions or under post release control from prison, this plea may result in revocation proceedings and any new sentence could be imposed consecutively. I know any prison term stated will be served without good time credit. The court in this case, had also advised, and I'm I guess somewhat assuming the same, but I can pull [Case No. 20040120.] * * * But he has been advised, at least in this court, and I will look at the 2005 entry, that if he violates any of the conditions of supervision while under post release control, the parole board could return him to prison up to nine months for each violation, for a total of one-half of the originally stated prison term. Relevant to this question, if the violation of post release control is a new felony, I can receive a prison term of the greater of one year or the time receiving [sic] on post release control in addition

to any other prison term imposed for the new felony offense. So we'll look at the 2005 case, we'll make that available to you. * * *." Sentencing Hearing at 17-20.

{¶35} The trial court then proceeded to read from the judgment entry of sentencing in Case No. 20040120 (hereinafter the "20040120 Entry"). The trial court then went off the record, which allowed Eckler and his trial counsel the opportunity to review the 20040120 Entry. After going back on the record, the trial court sentenced Eckler to 1,043 days in prison for the post-release control violation. Eckler's trial counsel objected to length of the sentence.

{¶36} "[ECKLER'S TRIAL COUNSEL]: Your Honor, for the record, I would object to the court sentencing Mr. Eckler to anything over a year in addition to the current sentence for violation of the post release control based on the language of the change of plea hearing there that I pointed out to the court in chambers where it appears that the defendant was advised that, or least arguably, that the maximum he would end up doing would be a year. That may have been a typographical error or it may not have, but I think that's due, I think the sentence has more than one interpretation, so I would ask that the court provide the least restrictive interpretation, which would be, I believe, I don't remember if it says three hundred and sixty-five days or one year, I believe it said one year. * * * I'll just quote this, if that's alright [sic]. It says if I violate conditions of supervision while under post release control, the parole board could return me to prison for up to nine months for each violation for a total of one-half of my originally stated prison term. If the violation is a new felony, I could receive a prison term of the greater of one year of the time remaining on post release

control, in addition to any other prison term imposed for the offense. And that is where my specific objection lies your Honor.

{¶37} COURT: It states one year, and instead of saying or it says of?

{¶38} [ECKLER'S TRIAL COUNSEL]: One year of the time remaining, that's correct your Honor.

{¶39} COURT: Instead of one year or the time remaining, correct?

{¶40} [ECKLER'S TRIAL COUNSEL]: Correct your Honor.

{¶41} COURT: Alright [sic]. That objection shall be duly noted. State?

{¶42} MR. KELLEY: Just, just for clarification that that is contained in the change of plea paperwork dated December 29th, 2004 in case number 20040120, not in today's instant case involving the change of plea paperwork.[1]

{¶43} COURT: Certainly. And I believe the objection, at least this initial objection, is noted as relates to the court's imposition of the additional post release control days of one hundred, one thousand and forty-three, correct?

{¶44} [ECKLER'S TRIAL COUNSEL]: That's correct your Honor." Id. at 27-29.

{¶45} Despite the objection, the trial court still sentenced Eckler to 1,043 days in prison for the post-release control violation.

{¶46} Eckler appeals his conviction, asserting the following assignment of error: I. "THE TRIAL COURT DENIED THE APPELLANT DUE

[1] Actually, the same language *does* appear in the present case in the November 17, 2008 PLEA OF GUILTY. Under the heading Post Release Control, it states: "If the violation is a new felony, I could receive a prison term of the greater of one year of the time remaining on post release control, in addition to any other prison term imposed for the offense." Eckler, Eckler's trial counsel, the assistant prosecuting attorney, and the trial court judge all signed the PLEA OF GUILTY.

PROCESS IN VIOLATION OF THE UNITED STATE'S [sic] CONSTITUTION AND THE OHIO CONSTITUTION WHEN THE TRIAL COURT ACCEPTED THE DEFENDANT'S GUILTY PLEA AS IT WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY MADE."

II.

{¶47} In his only assignment of error, Eckler contends that he did not knowingly, intelligently, and voluntarily plead guilty to Aggravated Assault.

{¶48} In determining whether to accept a guilty plea, the trial court must determine whether the defendant knowingly, intelligently, and voluntarily entered the plea. See *State v. Johnson* (1988), 40 Ohio St.3d 130, at syllabus; Crim.R. 11(C). "In considering whether a guilty plea was entered knowingly, intelligently and voluntarily, an appellate court examines the totality of the circumstances through a *de novo* review of the record to ensure that the trial court complied with constitutional and procedural safeguards." *State v. Jodziewicz* (Apr. 16, 1999), Adams App. No. 98CA667, citing *State v. Kelley* (1991), 57 Ohio St.3d 127, 129; *State v. Carter* (1979), 60 Ohio St.2d 34, 38. Before accepting a guilty plea, the trial court should engage in a dialogue with the defendant as described in Crim.R. 11(C). See *State v. Morrison*, Adams App. No. 07CA854, 2008-Ohio-4913, at ¶9.

{¶49} Crim.R. 11(C)(2) provides: "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:

{¶50} (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.

{¶51} (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.

{¶52} (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."

{¶53} "Substantial compliance with the provisions of Crim.R. 11(C)(2)(a) and (b) is sufficient to establish a valid plea." *State v. Vinson*, Franklin App. No. 08AP-903, 2009-Ohio-3240, at ¶6, citing *State v. Mulhollen* (1997), 119 Ohio App.3d 560, 563; see, also, *State v. Nutt*, Ross App. No. 06CA2927, 2007-Ohio-3032, at ¶12. "Substantial compliance means that, under the totality of the circumstances, appellant subjectively understood the implications of his plea and the rights he waived." *Vinson* at ¶6, citing *State v. Carter* (1979), 60 Ohio St.2d 34, 38; see, also, *Morrison* at ¶9. However, "[a] trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2)

the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid." *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, syllabus. See, also, *State v. Ballard* (1981), 66 Ohio St.2d 473, at paragraph one of the syllabus. "Appellant need not be advised of those rights in the exact language of Crim.R. 11(C), but he must be informed of them in a reasonably intelligible manner." *Vinson* at ¶6, citing *Ballard*, at paragraph two of the syllabus.

{¶54} A defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. See *State v. Stewart* (1977), 51Ohio St.2d 86, 93; Crim.R. 52(A). "The test is whether the plea would have otherwise been made." *State v. Nero* (1990), 56 Ohio St.3d 106, 108; *State v. Corbin* (2001), 141 Ohio App.3d 381, 386.

{¶55} At the trial court level, Eckler did not move to withdraw his guilty plea. Instead, at the sentencing hearing, Eckler objected to the length of his sentence. Eckler based his objection on the following language in the 20040120 Entry: "If the violation is a new felony, I could receive a prison term of the greater of one year *of* the time remaining on post release control, in addition to any other prison term imposed for the offense." (Emphasis added.) But on appeal, Eckler has made no arguments as to the length of his sentence; e.g., that the sentence was too long and, thus, contrary to law. Rather, for the first time, Eckler now

argues that he did not enter his guilty plea knowingly, intelligently, and voluntarily.

{¶56} "Generally, a party cannot assert new legal theories for the first time on appeal." *State v. Landrum* (2000), 137 Ohio App.3d 718, 722, citing *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43; see, also, *State v. Smith*, Trumbull App. No. 2007-T-0076, 2008-Ohio-1501, at ¶16; *State v. Pigg*, Scioto App. No. 04CA2947, 2005-Ohio-2227, at ¶34; *State v. Kemper*, 158 Ohio App.3d 185, 2004-Ohio-4050, at ¶19; *State v. Perkins* (2001), 145 Ohio App.3d 583, 586. Therefore, except for plain error, Eckler has forfeited his right to raise this issue for the first time here. See, e.g., *Pigg* at ¶34. See, also, *State v. Conrad*, Cuyahoga App. No. 88934, 2007-Ohio-5717, at ¶3-5 (reviewing for plain error because defendant "failed to challenge his guilty plea at the trial court"); *State v. Edwards*, Cuyahoga App. No. 85908, 2006-Ohio-2315, at ¶23; *State v. Kovacek* (May 30, 2001), Lorain App. No. 00CA007713.

{¶57} Pursuant to Crim.R. 52(B), we may notice plain errors or defects affecting substantial rights. "Inherent in the rule are three limits placed on reviewing courts for correcting plain error." *State v. Payne* (2007), 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶15. "'First, there must be an error, *i.e.*, a deviation from the legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.'" Id. at ¶16, quoting *State v. Barnes*

(2002), 94 Ohio St.3d 21, 27 (omissions in original). We will notice plain error "only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, at paragraph three of syllabus. And "[r]eversal is warranted only if the outcome of the trial clearly would have been different absent the error." *State v. Hill* (2001), 92 Ohio St.3d 191, 203, citing *Long*.

{¶58} Essentially, on appeal, Eckler contends that the language in the 20040120 Entry confused him. Because of the 20040120 Entry, Eckler argues that he did not understand the consequences of his guilty plea. Namely, Eckler claims that he thought one year, not 1,043 days, was the maximum prison term for the community control violation.

{¶59} Here, we cannot find plain error. First, we note that Eckler's sentence is in accordance with the law. See former R.C. 2929.141(B)(1); 29C Ohio Jurisprudence 3d, Criminal Law Section 3916 ("The maximum prison term for [a post-release control violation] will be either the maximum period of post-release control for the earlier felony minus any time the releasee has spent under post-release control for the earlier felony or 12 months, whichever is greater."). And even though Eckler claims to have been confused about the consequences of the post-release control violation, "'it is well established that a defendant's mistaken belief or impression regarding the consequences of his plea is not sufficient to establish that such plea was not knowingly and voluntarily made.'" *State v. Bragenzer*, Pickaway App. No. 03CA1, 2003-Ohio-5597, at ¶22, quoting *State v. Sabatino* (1995), 102 Ohio App.3d 483, 486.

{¶60} Second, after reviewing the transcript from the change of plea hearing, we believe that the trial court engaged in a sufficient colloquy before accepting Eckler's guilty plea. Eckler has based his entire appeal on the confusion supposedly caused by the 20040120 Entry. As a result, Eckler has not attempted to explain how the trial court may have failed to comply with Crim.R. 11(C). Nevertheless, we believe that the trial court substantially complied with Crim.R. 11(C)(2)(a) and (b) and strictly complied with Crim.R. 11(C)(2)(c). Specifically, the trial court substantially complied with Crim R. 11(C)(2)(a) when it discussed the consequences of a post-release control violation. At the very least, nothing in the trial court's colloquy rises to the level of plain error.

{¶61} In his brief, Eckler cites *State v. Bragwell*, Mahoning App. No. 06-MA-140, 2008-Ohio-3406. However, we believe that *Bragwell* is distinguishable from the present case. In *Bragwell*, the defendant agreed to plead guilty to driving while under the influence of alcohol and a repeat offender specification. Id. at ¶3. On appeal, the *Bragwell* court found that the defendant's plea was not knowingly, intelligently, and voluntarily made. In part, the *Bragwell* court noted the following: "In [the defendant's] signed plea form, the information regarding which prison term is mandatory was only partially correct. One page of the form properly identifies the one-to-five-year sentence on the specification as the mandatory sentence and further states that another term of up to five years is possible on the underlying DUI. But on the very next page where only the charged offense, and not the specification, is listed it states that a prison term for the DUI is mandatory." Id. at ¶51. As such, the *Bragwell* court found that "the

trial court failed to properly inform [the defendant] of a mandatory consequence of his guilty plea. It neglected to inform him that the sentence on the specification, not on the underlying DUI, was mandatory." Id. at ¶53.

{¶62} Eckler equates the incorrect information in *Bragwell*'s plea form to the language of the 20040120 Entry, but this argument does not persuade us. In *Bragwell*, the Seventh District Court of Appeals held that the trial court erred in "not informing the defendant of a mandatory consequence of his guilty or no contest plea." Id. at ¶52. However, under the former R.C. 2929.141(B)(1), the trial court below had the discretion (1) whether to terminate Eckler's term of post-release control and (2) whether to impose a prison term for Eckler's post-release control violation. Thus, the holding in *Bragwell* does not apply to the present case because the 1,043-day prison term was not a mandatory consequence of Eckler's guilty plea. Further, the trial court in *Bragwell* erred not only in the language of the plea form, but also during the Crim.R. 11(C) colloquy. *Bragwell* at ¶44-50. But in the present case, we believe that the trial court's colloquy substantially complied with Crim.R. 11(C)(2)(a). Therefore, we find that Eckler had enough information to make a knowing, intelligent, and voluntary plea.

{¶63} Next, there is no evidence that Eckler actually relied upon the 20040120 Entry while he entered his guilty plea. If Eckler did not rely upon the 20040120 Entry, then he cannot claim that the language in that entry caused his plea to be less than knowing, intelligent, and voluntary. Neither Eckler nor his attorney mentioned the 20040120 Entry during the change of plea hearing. As Eckler's trial attorney later noted, the 20040120 Entry "ha[d] more than one

interpretation[.]" Thus, if Eckler was genuinely confused by that document, he should have raised his concerns when the trial court judge used the "or" language, not the "of" language, when discussing the consequences of a post-release control violation. But instead, the trial court judge asked Eckler if he had "any questions about post release control or the consequences of violation of post release control[,]" and Eckler replied that he did not.

{¶64} Finally, we cannot find either an error or an obvious defect in the present case because we do not have the complete record from Case No. 20040120. In fact, we have none of the documents or transcripts from that case. All we have is the transcript from the sentencing hearing below, wherein Eckler's attorney read part of the 20040120 Entry into the record. Therefore, without the complete record, we do not know (1) the full context of the 20040120 Entry, (2) whether the trial court in Case No. 20040120 addressed this issue at the sentencing hearing, or (3) whether the trial court in Case No. 20040120 issued a subsequent entry pursuant to Crim.R. 36. Without a full record, all we can do is speculate as to what may have happened in Case No. 20040120. And we do not believe that speculation can rise to the level of plain error because, under a plain error review, we may reverse the trial court only if the outcome would have clearly been different.

{¶65} Accordingly, for the foregoing reasons, we overrule Eckler's only assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellant pay the 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 Adams County 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. Exceptions.

Harsha, J. and McFarland, J.: Concur in Judgment Only.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.