[Cite as *State v. Redavide*, 2015-Ohio-3056.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26070
	:	
v.	:	Trial Court Case No. 2012-CR-3731
	:	
JOSHUA REDAVIDE	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 31st day of July, 2015.

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FAIN, J.

{¶ 1} Defendant-appellant Joshua M. Redavide appeals from his conviction and

sentence, following a no-contest plea, for Involuntary Manslaughter, in violation of R.C. 2903.04 (A), a felony of the first degree. Redavide contends that his plea was not made in a knowing, intelligent or voluntary manner. Redavide also contends that the trial court's termination entry inaccurately states that he pled guilty, when in fact he entered a no- contest plea.

{¶ 2} We conclude that the trial court's error in the termination entry may be corrected with a nunc pro tunc entry. We also conclude that Redavide's plea was knowingly, voluntarily and intelligently made. Therefore, the judgment of the trial court is Affirmed.

I. The Course of Proceedings

{¶ 3} Redavide was indicted on one count of Involuntary Manslaughter, in violation of R.C. 2903.04 (A), a felony of the first degree. On the third day of trial, Redavide decided to enter a no-contest plea. The trial court then stopped the trial and took a recess to allow Redavide to discuss the matter with his counsel, and to review the plea form. The record reveals the following colloquy:

> THE COURT: Mr. Nowicki [representing Redavide], understand we have something that's going to take us a different direction.
>
> MR. NOWICKI: Yes, Your Honor. After discussions with my client, throughout the trial as well as this morning, I also had an opportunity to speak with your staff attorney; get a copy of the jury instructions to make sure that my client is properly informed as to what the law is that the jury's going to be hearing, and in consideration of some of the evidence that's

already been presented, it's my understanding that my client would like to enter a plea to –plea of – change his plea from not guilty to a plea of no contest at this time.

THE COURT: Is there any plea negotiation with the State to set forth for the record.

MR. NOWICKI: No, Your Honor. It's my understanding that we will defer to the Court and I think we're both probably making our arguments at the appropriate time. So.

THE COURT: Okay. Well by we, I'm thinking the State's not going to defer. Is that right? Each side is going to - -

MR. NOWICKI: Oh, yes.

THE COURT: -- make its argument. Is that right?

MR. NOWICKI: Exactly.

THE COURT: All right. You and your client approach the podium, please?

THE COURT: Mr. Redavide, you've heard what your lawyer said. Is that what you want to do today?

THE DEFENDANT: Yes, sir.

THE COURT: All right. How old are you and how far did you get in school?

THE DEFENDANT: I graduated, Sir. I'm 23 - - 24.

THE COURT: From high school or college?

THE DEFENDANT: High school, sir.

THE COURT: All right. Have you had an opportunity to go over that plea form with your lawyer?

MR. NOWICKI: Actually, Your Honor, we were just handed it to us when we were in the hallway on our way down here.

THE COURT: Uh-huh.

MR. NOWICKI: And I didn't have a chance to go over every –

THE COURT: Well, I tell you what we're going to do. I'm going to go over it with you now and before we take your plea, I'll give you all the time you need to chat about it over – about it, look it over, with your lawyer. Okay?

THE DEFENDANT: Yes, sir.

THE COURT: All right. As we talk here this morning, are you under the influence of any drug, alcohol or medication?

THE DEFENDANT: No, sir.

THE COURT: Do you have any physical or mental problem which would prevent you from understanding what we're doing here today?

THE DEFENDANT: No, sir.[1]

THE COURT: Are you entering your plea today voluntarily and of your own free will?

THE DEFENDANT: Yes.

UNIDENTIFIED SPEAKER: I need you to speak up.

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[1] The original transcript indicated "No verbal response."

THE DEFENDANT: Yes. I'm sorry.

THE COURT: Anyone threaten or force you to plead?

THE DEFENDANT: No, sir.

THE COURT: Any promises made to get you to plead?

THE DEFENDANT: No, sir.

THE COURT: All right. You're a United States Citizen?

THE DEFENDANT: Yes, sir.

THE COURT: And are you on parole or probation in any other court?

THE DEFENDANT: No, sir.

THE COURT: All right. We're going to, at this time, ask the State to read the charge. I'd like you to listen carefully because in a moment I'll ask you if you understand the charge. Okay?

THE DEFENDANT: (No verbal response).

Transcript at pgs. 416-418.

{¶ 4} After the prosecutor read the words of the indictment, and reserved its right to file a sentencing memorandum, the colloquy continued as follows:

THE COURT: Very well. Do you understand that charge, Mr. Redavide?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now that is a felony of the 1st Degree, carries maximum potential penalties of a $20,000 fine; three, four, five, six, seven, eight, nine, ten or 11 years in prison. Do you understand that?

THE DEFENDANT: Yes, sir.[2]

THE COURT: Now, is there eligibility for community control in this case?

MS. KOROSTYSHEVSKY: Yes, Your Honor. There is.

THE COURT: All right. You're eligible for community control sanctions or probation. If you were to get that, that could last for as long as five years and could involve six months in the jail. Do you understand that?

THE DEFENDANT: Yes, sir.[3]

THE COURT: Now, if you were to get community control sanctions and then be revoked from it, you would then face the maximum time of prison for your felony, which is 11 years. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, do you understand that - -

THE DEFENDANT: Sir, can I ask you a question?

THE COURT: Sure.

THE DEFENDANT: What was the – what was that called that you just said? Sanctioned --

MR. NOWICKI: Community Control sanctions?

THE DEFENDANT: Uh-huh.

MR. NOWICKI: Is that what you're confused about?

THE DEFENDANT: Yeah. What –

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[2] The original transcript indicated "No verbal response."
[3] The original transcript indicated "No verbal response."

THE COURT: That's probation. But probation can involve six months in the jail.

THE DEFENDANT: Right.

Transcript at pgs. 419-420

{¶ 5} The trial court continued, and Redavide gave affirmative responses that he understood that he was subject to random drug testing, issues regarding post-release control, and the consequences of pleading no contest. At the end, Redavide verbally agreed that he understood he was giving up his constitutional rights, as follows:

THE COURT: All right. Do you understand by pleading, you give up the following constitutional rights? You give up your right to a jury trial, or the balance of it in this case.

You give up your right to - - at that trial the Prosecutor has been required to prove your guilt beyond a reasonable doubt to the satisfaction of all 12 jurors.

You give up your right to confront witnesses who are against you, as has happened and have Mr. Nowicki cross-examine the[m] while they're under oath.

You give up your right to have the Court order favorable witnesses to come to your trial under subpoena to testify for you and finally, you give up your right to remain silent; your right not to say anything here today; your right not to be made to testify at your trial, or have anybody comment about the fact that you chose not to testify at trial.

Do you understand by pleading, you give up all these constitutional

rights?

THE DEFENDANT: Yes, sir.

Transcript at pgs. 422-423.

{¶ 6} Before the court asked him to sign the plea form, or verbally state his plea, Redavide was given time to ask questions or to consult with his attorney. After he signed the plea form, and verbally pled no contest, the trial court concluded as follows:

> THE COURT: Well, the record ought to reflect Defendant, counsel each signed the plea form. The court approves it, finding the Defendant has entered his plea voluntarily; that he knowingly, intelligently and voluntarily waived his constitutional rights; that he understands the nature of the charge; the maximum penalties for it; that he is eligible for community control sanctions. He understands the effect of his plea and that the Court will proceed to judgment and sentencing.

Transcript at pg. 424.

{¶ 7} The original transcript revealed "no verbal response" from the Defendant to four of the trial court's questions directed to him during the plea. Specifically, the original transcript reveals "no verbal response" to the question asked before the State's recitation of the charges in the indictment, after the two questions from the trial court asking the Defendant if he understood the potential penalties, and to the question concerning the Defendant's physical or mental ability to understand the proceedings. However, an amended transcript was later filed, which corrected three of the "no verbal response" with specific responses, leaving only one question to which Redavide does not appear to provide a response, as identified above.

II. Redavide's Plea was Voluntary, Intelligent and Knowingly Made

{¶ 8} In his second assignment of error, Redavide alleges as follows:

APPELLANT'S PLEA WAS NOT MADE IN A KNOWING, INTELLIGENT AND VOLUNTARY MANNER

{¶ 9} Redavide argues that his plea was not made knowingly, intelligently or voluntarily based on several alleged defects in the plea process. First, Redavide claims that because the record failed to record all of Redavide's responses to the trial court's questions, it must be concluded that Redavide did not understand the proceedings. Second, it is argued that Redavide could not have understood the nature of the charge against him, because the State failed to fully recite or explain the elements of the charged offense, and the court did not inquire whether defense counsel had reviewed the elements with Redavide. Thirdly, Redavide argues that the trial court did not explain that R.C. 2929.13(D)(1) provides a presumption of imprisonment for the offense charged, and failed to fully explain the sanctions that could be imposed for a post-release violation. Fourthly, Redavide argues that the plea was defective because the trial court explained the constitutional rights as a group, instead of addressing each one individually and confirming that Redavide fully understood each and every constitutional right that Redavide was relinquishing by his plea. Finally, Redavide argues that based on the unusual circumstance of entering a plea after two full days of trial, the trial court should have made a more searching inquiry for the reason for the plea, including an inquiry as to his satisfaction with his legal representation.

{¶ 10} " '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. Barner*, 4th Dist. Meigs No.10CA9, 2012-Ohio-4584, ¶ 7 (Internal citations omitted).

{¶ 11} In *Boykin v. Alabama,* 395 U.S. 238, 242–43, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the United States Supreme Court held that in order for a reviewing court to determine whether a guilty plea is voluntary, the record must show that the defendant knowingly, intelligently, and voluntarily waived his constitutional rights. *State v. Jones*, 2d Dist. Montgomery No. 23926, 2011-Ohio-1984, ¶ 27, citing *State v. Nero,* 56 Ohio St.3d 106, 107, 564 N.E.2d 474 (1990). " 'Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution.' " *State v. Minnich*, 2d Dist. Miami No. 2013-CA-40, 2014-Ohio-2999, ¶ 9, quoting *State v. Engle,* 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). Compliance with the procedures mandated by Crim.R. 11(C) when a defendant enters a plea of guilty or no contest to a felony charge, absent any indicia of coercion, creates a presumption that the plea was knowing, intelligent, and voluntary. *State v. Ogletree*, 2d Dist. Montgomery No. 21995, 2008-Ohio-772, ¶ 7; S*tate v. Ratliff*, 2d Dist. Champaign No. 2013-CA-24, 2014-Ohio-2677, ¶¶ 25-26.

{¶ 12} We construe Redavide's second assignment of error as asserting that the trial court failed to comply with Crim.R. 11(C)(2), which governs the process a trial court must follow to ensure a guilty plea to a felony charge is knowing, intelligent, and voluntary. According to Crim.R. 11(C)(2):

> 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.

{¶ 13} While literal compliance with Crim.R.11 is the preferred practice, if the reviewing court determines that there was "substantial compliance," the defendant's plea need not be vacated. *State v. Nero*, 56 Ohio St. 3d 106, 564 N.E.2d 474 (1990). "Substantial compliance means that under the totality of the circumstances the

defendant subjectively understands the implications of his plea and the rights he is waiving. (Internal citation omitted). Furthermore, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. (Internal citation omitted). The test is whether the plea would have otherwise been made." *State v. Reynolds*, 2d Dist. Montgomery No. 21903, 2007-Ohio-6903, ¶ 27.

{¶ 14} As the Supreme Court of Ohio explained in *State v. Clark,* 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 32:

> When the trial judge does not *substantially* comply with Crim .R. 11 in regard to a non-constitutional right, reviewing courts must determine whether the trial court *partially* complied or *failed* to comply with the rule. If the trial judge partially complied, e.g., by mentioning mandatory post release control without explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect. The test for prejudice is "whether the plea would have otherwise been made." If the trial judge completely failed to comply with the rule, e.g., by not informing the defendant of a mandatory period of post release control, the plea must be vacated. "A complete failure to comply with the rule does not implicate an analysis of prejudice."

(Internal citations omitted).

{¶ 15} We have reviewed the entirety of the plea transcript and watched the video of the plea hearing, and we conclude that the trial court satisfied the requirements set forth in Crim.R. 11(C)(2). The trial court asked a series of questions, and Redavide

responded in a manner that confirmed that he understood the nature of the charges against him, the potential penalties that could be imposed if he was found guilty, the effect of a plea, and the rights that he was giving up by pleading no contest. The trial court also asked a series of questions, and confirmed that Redavide was entering into his plea voluntarily. There is nothing in the record to suggest that he was coerced or pressured in any way.

{¶ 16} Although Redavide did not provide a verbal response to the trial court's question asking if he understood that after the State read the charges he would be asked if he understood them, his lack of a response was harmless because after the charges were read he did verbally respond that he understood the charges. The record also supports that the trial court gave Redavide ample opportunity and time to discuss the charges with his attorney. The fact that Redavide listened and asked questions to clarify possible penalties also supports the trial court's conclusion that the plea was made knowingly and intelligently.

{¶ 17} With respect to Redavide's second argument, we conclude that the record sufficiently identifies that Redavide had been informed of the elements of the offense from the statement of Redavide's counsel that he had obtained a copy of the jury instructions and reviewed them with his client. Transcript at pg. 416. The jury charge would have specifically included each element of the offense of manslaughter, as identified in OJI CR 503.04, and no allegation has been made that the drafted instructions were deficient. Therefore, the failure to read the elements of the offense during the plea colloquy does not render the plea invalid.

{¶ 18} With respect to the third argument, we conclude that the plea was not

rendered invalid by the court's failure to advise Redavide that Ohio law provides a presumption of imprisonment for the offense of Involuntary Manslaughter. Although R.C. 2929.13 does provide a presumption of incarceration for first-degree felonies, it also provides the court with authority to impose community control sanctions under specific circumstances. These two possible outcomes were presented to Redavide during the plea colloquy. The trial court advised him of the range of prison terms, including the maximum sentence, and further advised him that he was also eligible for community control. The court repeatedly asked Redavide if he had any questions, and he in fact asked questions, but he confirmed that he understood the range of penalties. Under different circumstances, where the record affirmatively suggests that a defendant's comprehension of the process is deficient, the trial court may need to more fully explain the statutory presumption for imprisonment and the criteria for overcoming that presumption. Based on the totality of the circumstances, we conclude that the plea in the case before us was not rendered invalid by the trial court's failure to inform Redavide that a first-degree felony carries a presumption of incarceration.

{¶ 19} We also conclude that the plea is not rendered invalid based on the trial court's failure to fully explain the sanctions that could be imposed for a post-release violation. The State concedes that the trial court did not discuss the nine-month sanction limitation set forth in R.C. 2943.032. As we have previously held, when the trial court substantially complies with the notice requirement of informing a defendant about post-release control sanctions, no error occurs without demonstrating that a fuller disclosure would have changed his decision to plead. *State v. Jones*, 2d Dist. Montgomery No. 24772, 2013-Ohio-119; *State v. Jennings*, 2d Dist. Clark No. 2013 CA 60, 2014-Ohio-

2307. Redavide has not demonstrated that he would not have entered his no-contest plea if he knew that he faced up to nine-months in prison for each post-release control violation. Therefore, we conclude that Redavide was not prejudiced by the omission of a reference to the nine-month sanction provision of the sentencing law.

{¶ 20} With respect to the fourth issue, we conclude that the plea was not invalidated by the trial court's recitation of the constitutional rights being waived as a group, instead of addressing each right individually. The record supports a conclusion that Redavide fully understood each and every constitutional right that he was waiving by entering a plea.

{¶ 21} With respect to the fifth issue, we conclude that Redavide has not shown any prejudicial effect by the trial court's failure to make a more searching inquiry for the reason for the plea after completing two days of trial. The trial court fully complied with Crim. R. 11, which does not require the Court to inquire why the defendant has chosen to change his plea. Under different circumstances, a trial court may be compelled to make a more searching inquiry for the purpose of determining whether a plea is voluntary or not made with full knowledge and comprehension of its effect, but under the totality of the circumstances in the case before us, we conclude that Redavide's plea was made knowingly, voluntarily and intelligently.

{¶ 22} Redavide's Second Assignment of Error is overruled.

III. The Sentencing Entry's Incorrect Statement that Redavide's Conviction Is the Result of a Guilty Plea May Be Corrected by a Nunc Pro Tunc Entry

{¶ 23} As his First Assignment of Error, Redavide alleges as follows:

THE TRIAL COURT'S TERMINATION ENTRY MISSTATES THE NATURE OF APPELLANT'S PLEA

{¶ 24} Although the trial court did not correctly state in the termination entry that Redavide had pled no contest, Redavide has not alleged or demonstrated any prejudice in his sentencing as a result of this clerical error. It is clear from the transcript of the proceeding that everyone understood he was pleading no contest. As we recently held in *State v. Mayberry*, 2014-Ohio-4706, 22 N.E.3d 222, ¶ 34 (2d Dist.), when it is necessary for the trial court to correct its sentencing entry, we will remand the case for correction of the error. Therefore, upon remand, the trial court may issue a nunc pro tunc order and entry with imposition of sentence that properly identifies the no-contest plea.

IV. Conclusion

{¶ 25} All of Redavide's assignments of error having been overruled, the judgment of the trial court is Affirmed. However, this cause is Remanded for the sole purpose of correcting the termination entry to reflect the correct nature of the plea.

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FROELICH, P.J., and HALL, J., concur.

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