

[Cite as *State v. Huff*, 2014-Ohio-5513.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

|                      |   |                   |
|----------------------|---|-------------------|
| STATE OF OHIO,       | ) |                   |
|                      | ) | CASE NO. 13 BE 37 |
| PLAINTIFF-APPELLEE,  | ) |                   |
|                      | ) |                   |
| - VS -               | ) | OPINION           |
|                      | ) |                   |
| DRU EDWARD HUFF,     | ) |                   |
|                      | ) |                   |
| DEFENDANT-APPELLANT. | ) |                   |

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 13 CR 129.

JUDGMENT: Reversed, Plea Vacated; and Remanded.

APPEARANCES:  
For Plaintiff-Appellee: Attorney Daniel Fry  
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No Brief Filed

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JUDGES:  
Hon. Mary DeGenaro  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite

Dated: December 11, 2014

[Cite as *State v. Huff*, 2014-Ohio-5513.]  
DeGenaro, P.J.

{¶1} Defendant-Appellant, Dru Edward Huff, appeals the October 16, 2013 judgment of the Belmont County Court of Common Pleas convicting him of one count of gross sexual imposition and sentencing him accordingly, following a no contest plea. Huff asserts that his plea was not knowing, voluntary and intelligent because the trial court failed to advise him about post-release control during the plea hearing. He also asserts the trial court erred by imposing the maximum prison sentence and by failing to properly advise him about post-release control during the sentencing hearing and in the judgment entry of sentence.

{¶2} Huff's appeal is meritorious. First, the trial court completely failed to notify him about post-release control during the plea colloquy. Second, while not specifically raised by Huff, the trial court's complete failure to notify Huff about sex offender registration requirements during the plea colloquy is also an error requiring that the plea be vacated. Accordingly, the judgment of the trial court is reversed, Huff's plea is vacated, and the matter is remanded for further proceedings.

### **Facts and Procedural History**

{¶3} On March 19, 2013, Huff was charged by complaint with one count of kidnapping, R.C. 2905.01(A)(4), a second-degree felony; and one count of gross sexual imposition, R.C. 2907.05(A)(4), a fourth-degree felony. Huff, a professor at Belmont College, was accused of sexually molesting a female student. He was arraigned, waived a preliminary hearing and agreed to be bound over to the grand jury.

{¶4} On September 3, 2013, Huff appeared in court, waived prosecution by indictment, and agreed to plead no contest to a bill of information charging him with one count of gross sexual imposition, R.C. 2907.05(A)(4), which had been filed that same day. In exchange for the no contest plea, the State agreed to recommend no prison time and that Huff be placed on community control.

{¶5} During the plea colloquy, the trial court failed to advise Huff that he would be subject to a mandatory five-year term of post-release control upon his release if he pled guilty. The written no contest plea agreement did mention post-release control, however, this information was erroneous, stating he would be subject to a 5 year optional term.

Despite this, in its judgment entry memorializing the plea hearing, the trial court stated that "the Defendant understood the court's advising him regarding post-release control."

{¶6} The trial court also failed to inform Huff about the sex offender registration requirements he would be subjected to as a result of pleading no contest to a sex offense. The trial court did advise Huff about the remaining constitutional and nonconstitutional rights he would be giving up by pleading guilty. At the close of the hearing, the trial court accepted Huff's plea as knowing, voluntary and intelligent. The trial court ordered a presentence investigation, victim impact statement and EOCC evaluation.

{¶7} On October 15, 2013, a sentencing hearing was held. Defense counsel noted that the State was amenable to community control and argued that community control was the appropriate sentence. Defense counsel contended that Huff would be sufficiently punished by having to register as a sex offender; he noted that this would have devastating consequences for Huff's career. After being addressed by the trial court, Huff declined to make a statement in mitigation of punishment, in light of the fact that he had a pending civil suit against him. The victim made a statement stressing how the offense had caused her great fear and the inability to trust others, especially teachers.

{¶8} After considering all of the information presented to it, along with the principles and purposes of sentencing in R.C. 2929.11 and the sentencing factors contained in R.C. 2929.12, the trial court sentenced Huff to 18 months in prison. The trial court said it would be open to considering EOCC at a later date. With regard to post-release control, during the hearing the trial court first told Huff he would be subject to a term of up to three years. Later during the hearing the prosecutor noted to the court that "[u]nder statute, because this is a sex offender crime, they're required to do the maximum five years of post-release control after they are released \* \* \* from jail. It's five years for sex crimes." To this, the trial court responded: "Okay, thank you. That is in the guidelines, you're correct. And my recitation of the sentence is amended by that comment by [the prosecutor.]" However, the sentencing entry stated that Huff would be subject to a term of "up to five (5) years."

{¶19} The trial court also classified Huff as a Tier I sex offender during sentencing and notified him about the resulting duties and responsibilities, including registration for 15 years, with annual in-person verification.

### Plea

{¶10} In his first of three assignments of error, Huff asserts:

{¶11} "The Trial Court erred by failing to substantially comply with Criminal Rule (11)(C)(2)(a) by erroneously advising the Defendant of post release control regarding the mandatory requirement and the length of post release control at the time of the Defendant's plea resulting in a plea that was not knowing, intelligent and voluntary."

{¶12} A plea must be made knowingly, voluntarily and intelligently. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶7; *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). If it is not, it has been obtained in violation of due process and is void. *State v. Martinez*, 7th Dist. No. 03 MA 196, 2004-Ohio-6806, ¶11, citing *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). When determining the voluntariness of a plea, an appellate court must consider all of the surrounding relevant circumstances. *State v. Johnson*, 7th Dist. No. 07 MA 8, 2008-Ohio-1065, ¶8, citing *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

{¶13} In order for a trial court to ensure that a felony defendant's plea is knowing, voluntary and intelligent, it must engage the defendant in a colloquy pursuant to Crim.R. 11(C). *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶25-26. "Although a plea of no contest does not admit a defendant's guilt, Crim.R. 11(C) requires that the same procedure be followed by the trial court in accepting pleas of guilty and no contest in felony cases." *State ex rel. Stern v. Mascio*, 75 Ohio St.3d 422, 424, 662 N.E.2d 370 (1996). During the colloquy, the trial court is to provide specific information to the defendant, including constitutional and nonconstitutional rights being waived. Crim.R. 11(C)(2); *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355.

{¶14} When the trial court does not substantially comply with Crim.R. 11 with regard to a nonconstitutional right, reviewing courts must determine whether the trial court

partially complied or failed to comply with the rule. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶32. "If the trial court partially complied—e.g., by mentioning mandatory post-release control without explaining it—the plea may be vacated only if appellant demonstrates a prejudicial effect." *State v. White*, 8th Dist. No. 95098, 2011-Ohio-1562, ¶23, citing *Sarkozy* at ¶23 and *Nero* at 108, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977). The test for prejudice is "whether the plea would have otherwise been made." *Nero* at 108.

{¶15} However, in *Sarkozy*, the Ohio Supreme Court held that when a trial court fails to mention post-release control at all during the plea colloquy, the court fails to comply with Crim.R. 11, and the reviewing court must vacate the plea. *Sarkozy* at ¶22. Because the trial court's "complete failure to comply with the rule does not implicate an analysis of prejudice[.]" *id.* at ¶22, the Court held that the error required that the plea be vacated. *Id.* at ¶26.

{¶16} Huff was convicted of one count of gross sexual imposition, a violation of R.C. 2907.05(A)(1), which is a fourth-degree felony, and is considered a felony sex offense pursuant to R.C. 2967.28(A)(3), which carries a five-year mandatory term of post-release control. R.C. 2967.28(B)(1). See also *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110, ¶14.

{¶17} During the plea colloquy, the trial court completely failed to make any mention of post-release control to Huff. This is the same situation presented by *Sarkozy*. Further, it is distinguishable from *State v. Berch*, 7th Dist. No. 08-MA-52, 2009-Ohio-2895, where the trial court at least attempted to explain post-release control during the plea hearing, but misstated the requirements; thus, there was partial compliance, which triggered an analysis of prejudice; but *Berch* ultimately found no prejudice. *Id.* at ¶10, 34-35.

{¶18} In *Sarkozy*, like here, there was no compliance during the plea hearing and there was no need for an analysis of prejudice. *Sarkozy* at ¶22. Concededly, there was some mention of post-release control in Huff's written plea agreement, however, even this information was erroneous, stating that Huff would be subject to an optional 5 year term.

{¶19} While the *Sarkozy* opinion provides no information as to what was in the written plea agreement in that case, the clear syllabus language mandates that the trial court tell the defendant about post-release control "*during the plea colloquy.*" *Sarkozy* at paragraph 2 of the syllabus. (Emphasis added.) ("If the trial court fails *during the plea colloquy* to advise a defendant that the sentence will include a mandatory term of postrelease control, the court fails to comply with Crim.R. 11, and the reviewing court must vacate the plea and (plea vacated where trial court failed to "*personally*" inform the defendant about the maximum penalties, including post-release control.) remand the case.") *Accord State v. Keith*, 8th Dist. No. 89765, 2008-Ohio-3029, ¶16-22. (Emphasis sic.)

{¶20} In addition, although not raised specifically by Huff, the trial court made no mention of Huff's sex offender classification requirements during the plea hearing. In the past, this was not a required part of the plea colloquy, because "prior to the Adam Walsh Act version of R.C. Chapter 2950, a trial court had no obligation to inform a sex offender of the applicable registration, verification, and notification requirements before accepting a guilty plea." *State v. Hawkins*, 2d Dist. No. 2012-CA-49, 2013-Ohio-2572, ¶8, citing *State v. Stape*, 2d Dist. No. 22586, 2009-Ohio-420, ¶19. *See also State v. Peterson*, 7th Dist. No. 07 MA 59, 2008-Ohio-6636, ¶17.

{¶21} However, in *State v. Williams*, 129 Ohio St.3d 324, 2011-Ohio-3374, 952 N.E.2d 1108, ¶16, the Supreme Court of Ohio held that the Adam Walsh Act is punitive, not remedial and accordingly, many appellate districts now hold that "Crim.R. 11 obligates a trial court to advise a defendant who is being sentenced under the Adam Walsh Act at least of the basic registration requirement before accepting his plea." *Hawkins* at ¶9. *See also State v. Jackson*, 1st Dist. Hamilton No. C-110645, 2012-Ohio-3348, ¶5-6; *State v. Allen*, 8th Dist. Cuyahoga No. 97820, 2013-Ohio-258, ¶11; *State v. Hines*, 6th Dist. No. E-13-054, 2014-Ohio-1996, ¶12. Courts have concluded that this is a nonconstitutional Crim.R. 11 requirement that is thus subject to a substantial compliance standard. *Hawkins* at ¶12; *Allen* at ¶12.

{¶22} Here, the trial court completely failed to mention during the plea colloquy that Huff would be required to register as a sex offender as a consequence of his no contest plea. There is likewise no mention of sex offender classification or registration in the written plea agreement. For this reason also, the plea was not knowing, voluntary and intelligent. Accordingly, Huff's first assignment of error is meritorious.

### **Sentencing**

{¶23} Huff's second and third assignments of error concern his sentencing and they assert, respectively:

{¶24} "The Trial Court erred by failing to properly advise the Defendant of post release control regarding the mandatory requirement and the length of post release control during sentencing and in its Judgment entry in contravention of R.C. §2929.19 (B)."

{¶25} "The Trial Court erred by imposing the maximum prison sentence where there lacked clear and convincing evidence that the sentence was supported by the record."

{¶26} Because we have vacated Huff's no contest plea, these assignments of error are moot. App.R. 12(A)(1)(c).

{¶27} In sum, because the trial court completely failed to notify Huff about post-release control and about sex offender registration requirements during the plea colloquy, Huff's appeal is meritorious. Accordingly, the judgment of the trial court is reversed, Huff's plea vacated, and the matter is remanded for further proceedings.

Donofrio, J., concurs.

Waite, J., concurs.