[Cite as *State v. Evans*, 2023-Ohio-2373.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

COREY M.S. EVANS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 CO 0031

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 21 CR 499

BEFORE:
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Conviction Affirmed.
Sentence Reversed and Remanded.

Atty. Vito J. Abruzzino, Columbiana County Prosecutor and *Atty. Shelley M. Pratt*, Assistant Prosecutor, 135 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee

Atty. Christopher Bazeley, 9200 Montgomery Road, Suite 8A, Cincinnati, Ohio 45242, for Defendant-Appellant.

Dated: June 30, 2023

WAITE, J.

{¶1} Appellant Corey M.S. Evans was involved in a high-speed single-vehicle crash in which his passenger was killed. He was charged with aggravated vehicular homicide, and he pleaded guilty to the charge. On appeal, he first argues that he was not given the appropriate notice about his indefinite eight-to-twelve-year prison term. The state agrees. On this basis, the matter is remanded to the trial court for a resentencing hearing that must include notification to Appellant of his rights under R.C. 2929.19(B)(2)(c).

{¶2} In Appellant's second and third assignments of error he raises due process arguments related to the Reagan-Tokes Act. These arguments have already been rejected in *State v. Rose*, 7th Dist. Jefferson No. 21 JE 0014, 2022-Ohio-3529. His fourth assignment alleges error in the imposition of postrelease control, but Appellant has misread the record in this regard. In his fifth and final assignment of error he argues his guilty plea was not made knowingly because the court failed to notify him about community control. The record reveals, however, that Appellant was aware of the consequences of his plea and that the trial court substantially complied with the notice requirements.

{¶3} Accordingly, Appellant's first assignment of error has merit. Appellant's conviction is affirmed, but his sentence is reversed and remanded to the trial court for a full resentencing.

Case History and Facts

{¶4} On February 25, 2021, at approximately 6:30 p.m., Appellant, driving a Chevy Cavalier, was involved in a rollover crash on State Rt. 154 in Middletown Township

in Columbiana County. The passenger in the vehicle was a 15-year-old girl. At the time, Appellant was street racing at over 90 mph on a curvy road. He struck a guardrail, a ditch, an embankment, and a utility pole. The vehicle overturned a number of times. The passenger suffered catastrophic head injuries and died.

{¶5} Appellant admitted to consuming alcohol and marijuana on the day of the accident, and that he had started using methamphetamines ("meth") the week before. He was found to have meth in his system after the crash. Appellant did not have a valid driver's license at the time of the accident. Appellant had previously been involved in a similar accident in 2018 that involved a police chase of 70 mph in a 25 mph zone, in which a 15-year old passenger was badly injured. He had been drinking and smoking marijuana in that incident as well. Appellant also had a long history of criminal activity that involved other traffic violations, domestic violence, improper handling of a firearm, and possession of a drug abuse instrument. Appellant's counsel took no issue with the prosecutor's presentation of the facts of this case, which we have summarized here. (8/24/22 Tr., p. 14.)

{¶6} On September 15, 2021, Appellant was indicted on the following charges: aggravated vehicular homicide in violation of R.C. 2903.06(A)(1), a first degree felony; aggravated vehicular homicide pursuant to R.C. 2903.06(A)(2), a second degree felony; and two first degree misdemeanors, operating a vehicle while under the influence of methamphetamines in violation of R.C. 4511.19(A)(1)(j)(ix); and operating a vehicle while under the influence of alcohol under R.C. 4511.19(A)(1)(a).

{¶7} On April 20, 2022, the court held a change of plea hearing and accepted Appellant's guilty plea to counts two, three, and four. Count one, which was the first

degree felony count of aggravated vehicular homicide, was to be dismissed at sentencing. On April 20, 2022, the court filed a Judicial Advice to Defendant, reviewing many aspects and consequences of the plea, including the fact that a prison term was mandatory. Appellant filed an acknowledgement that he received this form and understood what was in it.

{¶8} Sentencing was held on July 18, 2022. Appellant was sentenced to 8 to 12 years in prison on count two (aggravated vehicular homicide, felony two); and 180 days in jail for count three (operating a vehicle while under the influence of methamphetamines, misdemeanor one). Count four was merged into count three, and count one was dismissed.

{¶9} The sentencing judgment entry was filed on July 19, 2022. This appeal followed on August 15, 2022. Appellant presents five assignments of error on appeal.

Effect of a Guilty Plea

{¶10} "A valid guilty plea by a counseled defendant * * * generally waives the right to appeal all prior nonjurisdictional defects * * *." *State v. Beasley*, 152 Ohio St.3d 470, 2018-Ohio-16, 97 N.E.3d 474, ¶ 15. "A guilty plea waives any right to appeal a ruling on a motion to suppress or any other trial court error, except for errors in the plea itself." *State v. Hackathorn*, 7th Dist. Belmont No. 21 BE 0013, 2022-Ohio-1612, ¶ 22. "A defendant who enters a plea of guilty waives the right to appeal all nonjurisdictional issues arising at prior stages of the proceedings, although the defendant may contest the constitutionality of the plea itself." *State v. Kuhner*, 3rd Dist. No. 13-03-12, 154 Ohio App.3d 457, 2003-Ohio-4631, 797 N.E.2d 992, ¶ 4.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED WHEN IT FAILED TO ADVISE EVANS OF THE R.C. 2929.19(B)(2)(c) FACTORS AT SENTENCING.

{¶11} This assignment of error concerns sentencing and is not waived by Appellant's guilty plea. Appellant argues that the trial court failed to advise him of the notifications contained in R.C. 2929.19(B)(2)(c), which states:

> (2) Subject to division (B)(3) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:
>
> * * *
>
> (c) If the prison term is a non-life felony indefinite prison term, notify the offender of all of the following:
>
> (i) That it is rebuttably presumed that the offender will be released from service of the sentence on the expiration of the minimum prison term imposed as part of the sentence or on the offender's presumptive earned early release date, as defined in section 2967.271 of the Revised Code, whichever is earlier;
>
> (ii) That the department of rehabilitation and correction may rebut the presumption described in division (B)(2)(c)(i) of this section if, at a hearing held under section 2967.271 of the Revised Code, the department makes

specified determinations regarding the offender's conduct while confined, the offender's rehabilitation, the offender's threat to society, the offender's restrictive housing, if any, while confined, and the offender's security classification;

(iii) That if, as described in division (B)(2)(c)(ii) of this section, the department at the hearing makes the specified determinations and rebuts the presumption, the department may maintain the offender's incarceration after the expiration of that minimum term or after that presumptive earned early release date for the length of time the department determines to be reasonable, subject to the limitation specified in section 2967.271 of the Revised Code;

(iv) That the department may make the specified determinations and maintain the offender's incarceration under the provisions described in divisions (B)(2)(c)(i) and (ii) of this section more than one time, subject to the limitation specified in section 2967.271 of the Revised Code;

(v) That if the offender has not been released prior to the expiration of the offender's maximum prison term imposed as part of the sentence, the offender must be released upon the expiration of that term.

{¶12} It is clear that a prison term in this case was mandatory and that Appellant would serve an indefinite, non-life term. Therefore, R.C. 2929.19(B)(2)(c) applies and the notifications listed in the statute were required to be given to Appellant at the sentencing

hearing. "[A] trial court's failure to do so requires reversal of the sentence and a remand to the trial court for the sole purpose of conducting a new sentencing hearing consistent with R.C. 2929.19(B)(2)(c)." *State v. Gatewood*, 2d Dist. Clark No. 2021-CA-20, 2022-Ohio-2513, ¶ 13; *State v. Greene*, 1st Dist. Hamilton No. C-220160, 2022-Ohio-4536, ¶ 9.

{¶13} R.C. 2929.19(B)(2)(c) was part of the Reagan-Tokes Act revisions to the criminal code and is relatively new legislation. The effective date of the revised statute was March 22, 2019. While this is the first time we have been asked to review whether the five notices in R.C. 2929.19(B)(2)(c) must be given orally at sentencing, every district that has looked at the question so far has come to that conclusion. *State v. Jackson*, 1st Dist. Hamilton No. C-200332, 2022-Ohio-3449; *Gatewood*, *supra*; *State v. Bobo*, 8th Dist. No. 111362, 2022-Ohio-3555, 198 N.E.3d 580. Appellee concedes error on this issue and agrees that the case should be remanded for a new sentencing hearing.

{¶14} It is apparent to us that the trial court failed to inform Appellant at sentencing of the requisite notifications pursuant to R.C. 2929.19(B)(2)(c). Hence, Appellant's first assignment of error has merit and the matter is remanded for a full resentencing hearing that must include oral notice to Appellant of the statutory notifications.

ASSIGNMENT OF ERROR NO. 2

THE HEARING PROVISION IN R.C. 2967.271 IS VAGUE AND VIOLATES EVANS' RIGHTS TO DUE PROCESS.

{¶15} This assignment of error also concerns sentencing and is not waived by Appellant's guilty plea. Appellant contends that the hearing provision in R.C. 2967.271, regarding the extension of an indefinite prison sentence, is unclear. He argues that the

law is unconstitutionally void for vagueness and violates his due process rights. Appellant contends that the effect of R.C. 2967.271 is to allow the Department of Rehabilitation and Correction ("the DRC") to extend an inmate's minimum indefinite prison term. Appellant argues there is a presumption in R.C. 2967.271(B) that an inmate will only serve the minimum sentence of an indefinite prison term. He contends the DRC must hold a hearing before it can extend such a prison term beyond the minimum: "The department may rebut the presumption only if the department determines, at a hearing, that one or more of the following applies * * *." R.C. 2967.271(C). Some of the things that may extend the term beyond the minimum are whether the inmate harmed others in prison, broke the law, remains a threat to public safety, was placed in extended restrictive housing, or is classified as a three or higher security level.

{¶16} Appellant acknowledges that R.C. 2967.271(E) includes a description of some of the parameters of such a hearing:

> The department shall provide notices of hearings to be conducted under division (C) or (D) of this section in the same manner, and to the same persons, as specified in section 2967.12 and Chapter 2930. of the Revised Code with respect to hearings to be conducted regarding the possible release on parole of an inmate.

{¶17} Nevertheless, Appellant argues that there is not enough information in R.C. 2967.271 for an ordinary person to understand how to prepare for the hearing. He claims the statute is unclear whether this hearing is more like a parole revocation hearing, a probation violation hearing, or a prison conduct violation hearing. Appellant also argues

that, if the hearing required by R.C. 2967.271 is akin to a probation violation hearing, he would actually be entitled to two hearings (a probable cause hearing and a revocation hearing). Since R.C. 2967.271 only provides for a single hearing, his due process rights are not properly preserved by the statute.

{¶18} In Appellant's argument he jumbles together a number of constitutional issues and alleged errors. None of them are preserved on appeal. As Appellee points out, Appellant did not raise any specific constitutional objections to the trial court. Failure to raise specific constitutional errors at trial forfeits all such errors on appeal except for plain error. *State v. Zuern*, 32 Ohio St.3d 56, 63, 512 N.E.2d 585 (1987); Crim.R. 52(B). An appellate court should correct such only to prevent a miscarriage of justice. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 14. Plain errors must be so obvious that they cannot be ignored. *State v. Rose*, 7th Dist. Jefferson No. 21 JE 0014, 2022-Ohio-3529, ¶ 61.

{¶19} Appellant did raise a general constitutional objection to the entirety of the Reagan-Tokes Act, 2018 S.B. 201. (7/18/22 Sentencing Hearing Tr., p. 14.). The Reagan-Tokes Act is a massive piece of legislation amending dozens of statutes. Simply objecting to the entire Act on the grounds that it is unconstitutional does not serve as a legal argument. This Court and others have upheld the general constitutionality of the Reagan-Tokes Act, particularly with respect to due process, jury trial, separation of powers, and equal protection. *Rose*, *supra*; *State v. Delvallie*, 8th Dist. Cuyahoga No. 109315, 2022-Ohio-470, 185 N.E.3d 536; *State v. Ratliff*, 5th Dist. Guernsey No. 21CA000016, 2022-Ohio-1372, 190 N.E.3d 684.

{¶20} Appellant's specific concern on appeal is that the hearing requirement in R.C. 2967.271 is too vague and fails to provide a minimum of due process. However "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). As stated by the Eighth District Court of Appeals, "the procedures employed under the Reagan Tokes Law provide at a minimum for notice of a hearing at which an inmate has an opportunity to be heard" and therefore "we hold that the law does not violate [the defendant's] right to procedural due process." *State v. Wilburn*, 8th Dist. No. 109507, 2021-Ohio-578, 168 N.E.3d 873, ¶ 37.

{¶21} We thoroughly reviewed a due process challenge to the Reagan-Tokes Act (specifically related to R.C. 2967.271) and held that "[t]he law under review does not give the DRC unfettered discretion to require an offender to serve more than the minimum term. And it affords an offender notice and an opportunity to be heard before more than the minimum may be required.' " *Rose, supra*, at ¶ 77, quoting *State v. Ferguson*, 2nd Dist. Montgomery No. 28644, 2020-Ohio-4153, ¶ 25. Based on our prior review of this issue, we reject Appellant's argument.

{¶22} As far as Appellant's void-for-vagueness argument, it is completely misplaced. " '[A] law will survive a void-for-vagueness challenge if it is written so that a person of common intelligence is able to ascertain what conduct is prohibited, and if the law provides sufficient standards to prevent arbitrary and discriminatory enforcement.' " *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633, ¶ 16, quoting *State v. Williams*, 88 Ohio St.3d 513, 533, 728 N.E.2d 342 (2000). Appellant contends that R.C.

2967.271 is vague because it does not provide coherent due process rights. This is not a void-for-vagueness argument. The void-for-vagueness doctrine arises when a statute is unclear regarding the types of behavior that is prohibited. Appellant has not alleged that R.C. 2967.271 is not clear about some behavior being prohibited. He argues that he was not afforded a proper opportunity to be heard.

{¶23} In *Rose*, we determined that R.C. 2967.271 does not violate due process. *Id.* at ¶ 77. The hearing provided for in R.C. 2967.271 is similar to other types of parole hearings. *Id.* at ¶ 74-75. Other than to suggest that these rights are preserved in a vague manner, Appellant does not add any arguments to those addressed in *Rose.*

{¶24} Appellant's second assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 3

THE REAGAN TOKES LAW IS UNCONSTITUTIONAL.

{¶25} This assignment of error has been resolved in our determination as to Appellant's previous assignment of error. Appellant does not advance any additional argument other than the vague, general challenge to the entire Reagan-Tokes Act. This Court and many others have upheld the overall constitutionality of Reagan-Tokes. *Rose*, *supra*; *Delvallie*, *supra*; *Ratliff*, *supra*. Appellant's third assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT FAILED TO PROPERLY IMPOSE POST RELEASE CONTROL (PRC).

{¶26} Again, this assignment of error concerns sentencing and is not waived by Appellant's guilty plea. Appellant argues that the trial court failed to properly notify him of postrelease control at sentencing. Appellant contends that R.C. 2967.28 requires notice of whether postrelease control is mandatory or discretionary, and that this notice must be made at both the sentencing hearing and in the sentencing judgment entry, citing *State v. Grimes*, 151 Ohio St.3d 19, 2017-Ohio-2927, 85 N.E.3d 700. Appellant claims that, since the trial court did not specifically state his postrelease control was mandatory, the notice was invalid and the case must be remanded for resentencing under R.C. 2929.191.

{¶27} Appellant is correct about the notice requirements when postrelease control is imposed. R.C. 2967.28(B) states in pertinent part: "Each sentence to a prison term * * * for a felony of the second degree * * * shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board[.]" A parallel set of requirements can be found in R.C. 2929.19(B)(2)(d-f).

{¶28} Appellant's argument is fixated on the word "mandatory" and the failure of the trial court to use that word. Appellant's argument is misplaced. R.C. 2967.28 does not require the use of the word "mandatory." Likewise, R.C. 2929.19(B)(2) only requires the court to "[n]otify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison * * *." Again, there is no requirement that the court use the word "mandatory" when giving this notice.

{¶29} Appellant relies on *Grimes*, *supra*, for his contention, here. However, *Grimes* does not support Appellant's argument. *Grimes* states that "[t]he court at a sentencing hearing must notify the offender that he or she 'will' or 'may' 'be supervised

under section 2967.28 of the Revised Code after the offender leaves prison * * *.' " *Grimes* at ¶ 9.

{¶30} The sentencing entry in this case states that Appellant "**will/shall** be subject to a period of three (3) years of post-release control under the authority of the Parole Board." (Emphasis in original). (7/19/22 J.E., p. 2.) The trial court could have used either word, will or shall, to convey the mandatory nature of his postrelease control. The fact that both words are used, in bold type, indicates the importance of the notice within the sentencing entry. The sentencing entry substantially complied with the requirements of R.C. 2967.28 and 2929.19(B)(2)(d). There is no error in the postrelease control notice and Appellant's fourth assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 5

THE TRIAL COURT ERRED WHEN IT FAILED TO ENSURE THAT EVANS' GUILTY PLEA TO THE CHARGE OF AGGRAVATED VEHICULAR HOMICIDE (COUNT 2) WAS NOT VOLUNTARILY, INTELLIGENTLY, AND KNOWINGLY GIVEN.

{¶31} Appellant claims the trial court failed to tell him that he was ineligible for community control when pleading guilty to aggravated vehicular homicide. Appellant argues that such a notice is required under Crim.R. 11(2)(a) as part of the process of accepting a guilty or no contest plea from a criminal defendant. Appellant concludes that as a result of the failure to give this notice, his guilty plea was not made knowingly, and his plea should be vacated.

{¶32} Unless a plea is knowingly, intelligently, and voluntarily made, it is invalid. *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). To ensure that a Crim.R. 11 plea is properly made, the trial judge must engage the defendant in a colloquy before accepting the plea. *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981), paragraph one of the syllabus; Crim.R. 11(C), (D), and (E). The colloquy must include an explanation of both the constitutional and nonconstitutional rights the defendant is waiving.

{¶33} The notice requirements regarding constitutional rights listed in Crim.R. 11(C)(2)(c) are reviewed for strict compliance. *State v. Howell*, 7th Dist. Monroe No. 17 MO 0018, 2019-Ohio-1806, ¶ 6; *State v. Daviduk*, 7th Dist. Mahoning No. 17 MA 0167, 2019-Ohio-1132, ¶ 14. "However, if the trial judge imperfectly explained nonconstitutional rights such as the right to be informed of the maximum possible penalty and the effect of the plea, a substantial-compliance rule applies." *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 31. "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." *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶34} A trial court's misinformation at sentencing about the possibility of community control can result in failure to enter a plea knowingly, and may render such a plea invalid. *State v. Hendrix*, 12th Dist. Butler No. CA2012-12-265, 2013-Ohio-4978, ¶ 19.

{¶35} "[T]he failure to adequately advise a defendant of a nonconstitutional right requires a prejudice analysis." *State v. Allen*, 7th Dist. Belmont No. 17 BE 0051, 2020-

Ohio-811, ¶ 15. If "the trial court wholly fails to inform a defendant of a nonconstitutional right, a defendant need not prove he was prejudiced." *Id.*

{¶36} The trial court must notify the defendant at sentencing if "the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing." Crim.R. 11(C)(2)(a). The right to receive this notice regarding community control is a nonconstitutional right, subject to substantial compliance. *State v. Duncan*, 8th Dist. Cuyahoga No. 105978, 2018-Ohio-1511, ¶ 3.

{¶37} The trial court did not specifically state at the plea hearing that Appellant could not be placed on community control. However, the trial court explained to him that it was required to impose a prison sentence, which the court described as "both a maximum and minimum as to Count Two." (4/19/22 Tr., p. 9.) The court also told him that "at sentencing the Court will elect a minimum term for the range of penalties for your crime, ranging anywhere from two years to eight years[.]" (4/19/22 Tr., p. 10.) It is clear from the court's explanation Appellant was going to prison for at least two years and not being sentenced to any alternative to prison. As such, there was no reason for Appellant to think that community control was an option or have any doubt that he was going to prison.

{¶38} Appellant was also advised about the mandatory prison term in the written Judicial Advice form from April 20, 2022, which he signed. "A written acknowledgment of a guilty plea and a waiver of trial rights executed by an accused can, in some circumstances, reconcile ambiguities in the oral colloquy that Crim.R. 11(C) prescribes." *State v. Dixon*, 2d Dist. Clark No. 01CA17, 2001 WL 1657836 (Dec. 28, 2001), *3; see

also, *State v. Rudai*, 7th Dist. Belmont No. 18 BE 0002, 2018-Ohio-4464, ¶ 7, citing *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826.

{¶39} It is clear from the totality of the circumstances that Appellant was made aware that he was to serve a mandatory prison term in this case and that community control was not an option. The trial court substantially complied with the notice requirements of Crim.R. 11(C)(2)(a). Appellant's fifth assignment of error is overruled.

Conclusion

{¶40} In Appellant's first assignment of error, he argues that he was not given proper notice about his indefinite eight-to-twelve-year prison term. The state concedes error on this issue. The case must therefore be remanded to the trial court for a resentencing hearing to include the mandatory notices found in R.C. 2929.19(B)(2)(c). The remaining assignments of error, dealing with constitutional challenges to the Reagan-Tokes Act and alleged notification errors at the change of plea hearing and at sentencing, are without merit. Appellant's assignments of error two, three, four, and five are overruled. Assignment of error one is sustained. We affirm Appellant's conviction, but remand the case to the trial court for a resentencing hearing that must include R.C. 2929.19(B)(2)(c) notification.

Robb, J., concurs.

D'Apolito, P.J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first assignment of error is sustained and his remaining assignments are overruled. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed in part and reversed. We hereby remand this matter to the trial court for a resentencing hearing that must include notification of Appellant of his rights under R.C. 2929.19(B)(2)(c) according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.