

[Cite as *State v. Szakacs*, 2009-Ohio-5480.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92230

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KELLY SZAKACS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-505704

BEFORE: Cooney, A.J., Gallagher, J., and Stewart, J.

RELEASED: October 15, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Michael J. Gordillo
1370 Ontario Street
2000 Standard Building
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Katherine Mullin
Assistant County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Defendant-appellant, Kelly Szakacs (“Szakacs”), appeals her conviction stemming from her guilty plea. Finding no merit to the appeal, we affirm.

{¶ 2} In January 2008, Szakacs was charged with four counts of child endangering.¹ Pursuant to a plea agreement, Szakacs pled guilty to one count of child endangering in violation of R.C. 2912.22(B)(1). The remaining charges were nolle. In May 2008, the trial court sentenced Szakacs to seven years in prison and advised her that she would be subject to postrelease control.

{¶ 3} Szakacs now appeals, raising two assignments of error for our review. In the first assignment of error, she argues that the trial court erred in instructing her on postrelease control during her plea hearing. In the second assignment of error, she argues that trial counsel was ineffective for failing to request a psychological exam and that she be placed on the mental health docket.

{¶ 4} Initially, we note that Szakacs pled guilty to child endangering. A defendant who pleads guilty is generally limited on appeal—the defendant may only attack the voluntary, knowing, and intelligent nature of the plea,

¹Szakacs was indicted with codefendant, Jarrett Turney. He appealed his sentence, which was affirmed by this court in *State v. Turney*, Cuyahoga App. No. 91555, 2009-Ohio-964.

and may not raise independent claims relating to the deprivation of constitutional rights that occurred prior to pleading guilty. See *State v. Clay*, Cuyahoga App. Nos. 89339-89341, 2008-Ohio-314; *State v. Sadowsky*, Cuyahoga App. Nos. 90696 and 91796, 2009-Ohio-341. “[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann [v. Richardson]* (1970), 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763].” *State v. Spates* (1992), 64 Ohio St.3d 269, 272, 595 N.E.2d 351, quoting *Brady v. United States* (1970), 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747.

{¶ 5} Crim.R. 11(C)(2) requires that the court personally address a defendant who enters a guilty plea and determine that the defendant is making the plea with an understanding of the maximum penalty involved. Ohio courts have determined that although literal compliance with Crim.R. 11(C)(2)(a) is preferred, substantial compliance is sufficient in regard to nonconstitutional rights. *State v. Caplinger* (1995), 105 Ohio App.3d 567,

572, 664 N.E.2d 959, citing *State v. Johnson* (1988), 40 Ohio St.3d 130, 532 N.E.2d 1295; *State v. Nero* (1990), 56 Ohio St.3d 106, 564 N.E.2d 474.

{¶ 6} “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.” *Nero* at 108, 564 N.E.2d 474, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163. “[I]f it appears from the record that the defendant appreciated the effect of his plea and his waiver of rights in spite of the trial court’s error, there is still substantial compliance.” *Caplinger* at 572, citing *Nero*. “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.” *Nero* at 108, citing *Stewart*; Crim.R. 52(A). In determining prejudice, “[t]he test is whether the plea would have otherwise been made.” *Nero* at 108.

Postrelease Control

{¶ 7} Szakacs does not attack the voluntary, knowing, and intelligent nature of her plea; rather she argues that the trial court erred when it stated that the parole authority could punish her if she committed a felony while on parole. She asks that her sentence be vacated because the parole authority cannot impose statutory sanctions in addition to the penalties imposed by the trial court.

{¶ 8} To substantially comply with Crim.R. 11(C)(2), this court has found that the trial court must advise a defendant of any mandatory postrelease control period at the time of the defendant's plea. *State v. Conrad*, Cuyahoga App. No. 88934, 2007-Ohio-5717. "Postrelease control constitutes a portion of the maximum penalty involved in an offense for which a prison term will be imposed. Without an adequate explanation by the trial court of postrelease control, a defendant cannot fully understand the consequences of his plea as required by Criminal Rule 11(C)." *State v. Griffin*, Cuyahoga App. No. 83724, 2004-Ohio-4344, citing *State v. Jones* (May 24, 2001), Cuyahoga App. No. 77657, discretionary appeal not allowed, 93 Ohio St.3d 1434, 755 N.E.2d 356, No. 01-1295.

{¶ 9} In the instant case, the trial court advised Szakacs at her guilty plea hearing that she would be subject to three years of postrelease control. If she failed to follow the parole authority's rules, she could be sent back to prison for up to half of her sentence term. The trial court also advised that the rules of postrelease control require her to report to a parole officer. If she failed to report, the court advised that the "parole authority can punish you for that and send you back to prison and you're subject to being indicted on a separate felony called escape. The judge who gets that new felony indictment can also punish you with more time on top of or consecutive to the time the parole authority gave you for the very same thing, not reporting."

The court further stated, “[t]hat’s also true of any other felony you might commit while on post-release control. Parole authority can punish you for that felony. The Court who gets the new indictment can also punish you.”

{¶ 10} R.C. 2967.28(F)(2) provides that once a defendant is on postrelease control, “[i]f the adult parole authority or * * * the court determines that a releasee has violated a post-release control sanction * * * imposed upon the releasee and that a more restrictive sanction is appropriate, the authority or court may impose a more restrictive sanction upon the releasee * * *.” Furthermore, “[t]he parole board or * * * the court may hold a hearing on any alleged violation by a releasee of a post-release control sanction * * * that [is] imposed upon the releasee. If after the hearing the board or court finds that the releasee violated the sanction or condition, the board or court may increase the duration of the releasee’s post-release control * * * or impose a more restrictive post-release control sanction. When appropriate, the board or court may impose as a post-release control sanction a residential sanction that includes a prison term.” R.C. 2967.28(F)(3).

{¶ 11} Here, the trial court advised Szakacs she is subject to three years of postrelease control. The court also advised that should she commit a felony while on postrelease control, she could be subject to punishment by the parole authority and the court “who gets the new indictment.” Based on the

foregoing, we find that Szakacs was not prejudiced by the court's statements and that the trial court substantially complied with Crim.R. 11(C)(2)(a).

{¶ 12} Therefore, the first assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 13} Szakacs also argues that trial counsel was ineffective for failing to request a psychological exam and that she be placed on the mental health docket.

{¶ 14} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164. To determine whether counsel was ineffective, the burden is on the defendant to establish that counsel's performance fell below an objective standard of reasonable representation and prejudiced the defense. *State v. Bradley* (1989), 42 Ohio St.2d 136, 538 N.E.3d 373, paragraph two of the syllabus; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 15} It is well-established that a guilty plea waives the right to claim the defendant was prejudiced by the ineffective assistance of counsel, except to the extent that the defects complained of caused the plea to be less than knowing and voluntary. *State v. King*, Cuyahoga App. No. 91909, 2009-Ohio-4551, citing *State v. Caldwell* (Aug. 13, 2001), Butler App. No. CA99-08-144. Thus, to prove a claim of ineffective assistance of counsel with a guilty plea, Szakacs must demonstrate that there is a reasonable

probability that, but for counsel's errors, she would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart* (1985), 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203; *Caldwell*.

{¶ 16} In the instant case, Szakacs does not argue that her plea was less than knowing and voluntary because of counsel's errors; rather she claims that ample evidence in the record demonstrates that she suffers from a mental illness.² She claims that there is a strong probability that her mental condition would have been considered a mitigating factor in sentencing.

{¶ 17} Szakacs's argument is speculative at best. The record before us fails to support her contention that the trial court would have imposed a lesser sentence had it obtained and reviewed a psychological evaluation. See *State v. Pempton*, Cuyahoga App. No. 80255, 2002-Ohio-5831 (holding that defense counsel's failure to request a psychiatric evaluation of defendant prior to sentencing did not constitute ineffective assistance).

{¶ 18} Moreover, there is not enough evidence in the record to demonstrate that a psychological evaluation was needed. Loc.R. 30.1 of the Court of Common Pleas of Cuyahoga County, General Division, provides that only those defendants who have a confirmed serious mental illness or are mentally retarded are eligible for the mental health docket. "A defendant is

²She refers to comments by the trial court that she is a "mixed-up individual" and by the State that her "jealousy issues" caused her to inflict physical harm upon her child.

deemed to have a confirmed serious mental illness if within the previous six months prior to arraignment, there is a clinical diagnosis of a severe mental illness with a psychotic feature.” Loc.R. 30.1(A)(1). “[A] defendant is deemed to be mentally retarded if there is a clinical diagnosis that the defendant meets current Mentally Retarded Offender eligibility of an IQ of 75 or less and/or an adaptive skills deficit.” Loc.R. 30.1(A)(2). Here, there is no evidence in the record that Szakacs had a confirmed mental illness or an IQ of 75 or less.

{¶ 19} Because Szakacs failed to demonstrate that “counsel’s errors” caused her plea to be less than knowing and voluntary, we find counsel was not ineffective for failing to request that her case be placed on the mental health docket. Therefore, the second assignment of error is overruled.

Judgment is affirmed.

It is ordered that appellee recover of appellant 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 common pleas court to carry this judgment into execution. The defendant’s conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to
Rule 27 of the Rules of Appellate Procedure.

COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

SEAN C. GALLAGHER, J., and
MELODY J. STEWART, J., CONCUR