[Cite as *State v. Sweeney*, 2009-Ohio-5963.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92265

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ALFRED D. SWEENEY

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509865

BEFORE: Jones, J., Stewart, P.J., and Dyke, J.

RELEASED: November 12, 2009

JOURNALIZED:

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Alfred Sweeney ("Sweeney") appeals his conviction. Finding merit to the appeal, we reverse and remand.

{¶ 2} In 2008, Sweeney was charged with three counts of drug trafficking with firearm specifications, two counts of drug possession with firearm specifications, and one count of possessing criminal tools. Sweeney initially pled not guilty and filed a motion to suppress evidence. The trial court denied Sweeney's motion to suppress evidence after a full hearing and Sweeney decided to plead guilty to an amended indictment.

{¶ 3} Sweeney pled guilty to drug trafficking with a one-year firearm specification, drug possession with a one-year firearm specification, and possession of criminal tools. The trial court sentenced him to a total of three years in prison.

{¶ 4} It is from this judgment that Sweeney appeals, raising two assignments of error for our review. In his first assignment of error, Sweeney argues that the trial court's failure to advise him of postrelease control invalidates the plea. Second, Sweeney argues that the trial court erred in sentencing him to maximum and consecutive sentences and by failing to merge the counts.

{¶ 5} First, Sweeney argues that the trial court's failure to mention postrelease control during the plea hearing renders his plea invalid. The State concedes this assignment of error.

{¶ 6} Crim.R.11(C)(2)(a) provides that the court "shall not accept a plea of guilty or no contest without first addressing the defendant personally and * * * [d]etermining 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."

{¶ 7} R.C. 2943.032(E) requires that, prior to accepting a guilty plea for which a term of imprisonment will be imposed, the trial court must inform a defendant regarding postrelease control sanctions in a reasonably thorough manner. *State v. Crosswhite*, Cuyahoga App. Nos. 86345 and 86346, 2006-Ohio-1081. "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.

{¶ 8} Thus, to substantially comply with Crim.R. 11(C)(2)(a) and R.C. 2943.032(E), a trial court must advise a defendant of any mandatory postrelease control period at the time of the defendant's plea. See *State v. Lamb*, 156 Ohio App.3d 128, 133, 2004-Ohio-474, 804 N.E.2d 1027, at ¶16. The failure to do so renders the plea colloquy insufficient and substantial compliance with Crim.R.

11(C)(2)(a) and R.C. 2943.032 is not achieved. *State v. Brusiter*, Cuyahoga App. No. 87819, 2006-Ohio-6444; *State v. McCollins*, Cuyahoga App. No. 87182, 2006-Ohio-4886.

{¶ 9} R.C. 2967.28(C) provides that postrelease control is discretionary for certain third, fourth, or fifth degree felonies not subject to R.C. 2967.28(B), if the parole board determines that a period of postrelease control is necessary for that offender. In the case at bar, Sweeney pled guilty to three felonies of the fifth degree, which means he is subject to a discretionary period of up to three years of postrelease control. But the trial court failed to make any mention of postrelease control during the plea colloquy. Thus, because the trial court failed to inform Sweeney of postrelease control during the plea hearing, we find that Sweeney's plea was not knowingly and intelligently made. Therefore, we find that Sweeney's guilty plea must be vacated.

{¶ 10} Accordingly, Sweeney's first assignment of error is sustained and his plea is vacated. In light of our disposition of this assignment of error, the second assignment of error is moot.

{¶ 11} Judgment reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee 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.

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

LARRY A. JONES, JUDGE

MELODY J. STEWART, P.J., and
ANN DYKE, J., CONCUR