

[Cite as *State v. Anderson*, 2010-Ohio-2085.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92576

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LATANGIA ANDERSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510427

BEFORE: Dyke, J., Gallagher, A.J., and Sweeney, J.
RELEASED: May 13, 2010

JOURNALIZED:

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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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

ANN DYKE, J.:

{¶ 1} Defendant LaTangia Anderson appeals from the trial court's denial of her motion to vacate her guilty plea to one count of murder. For the reasons set forth below, we affirm defendant's conviction but remand for correction of her sentence to delete the imposition of postrelease control.

{¶ 2} On May 8, 2008, defendant was indicted in connection with the death of Charles Gooden for one count of aggravated murder, one count of murder, and one count of felonious assault. On October 14, 2008, defendant entered into a plea agreement with the state of Ohio whereby the charges of aggravated murder and felonious assault were dismissed in exchange for defendant's guilty plea to the charge of murder. During these proceedings, her counsel stated:

{¶ 3} "I believe that, if she's released at some point in the future, she would be subject to postrelease control of up to five years." In addition, after outlining the pertinent constitutional rights, the trial court stated:

{¶ 4} "You're pleading guilty to count two, which is a — it's a felony of the first degree, and its subject to a sentence of 15 years to life. Do you understand that?"

{¶ 5} "DEFENDANT: Yes."

{¶ 6} "* * *

{¶ 7} "THE COURT: And you would be subject, upon any release from prison, to postrelease control of five years. Do you understand that?"

{¶ 8} “DEFENDANT: Yes.”

{¶ 9} Thereafter, on October 30, 2008, prior to sentencing, defendant moved to vacate the guilty plea, contending that she did not understand the consequences of the plea, that exculpatory evidence was produced that she could not review, that her attorney forced her to plead guilty, and that she was innocent.

{¶ 10} The trial court held a hearing on the matter on November 21, 2008. At this time, defendant’s counsel stated that the reference to postrelease control during the plea proceedings “may have been confusing to my client in that she felt that there may be an opportunity for her to receive postrelease control from the institution when that is incorrect. This is a parole situation. She would be facing 15 years to life and it would be determined by the Parole Board.”

{¶ 11} Defendant’s trial counsel also stated that the trial court did not inquire further after defendant indicated in the plea proceedings that she takes prescription medication. Counsel additionally noted that during the plea hearing, defendant stated that she was not satisfied with the representation that her trial counsel had provided, then later said that she was satisfied with the representation. Finally, defendant’s trial counsel noted that defendant stated on the record that she said “Some things I don’t understand but they don’t need to go - [-.]”

{¶ 12} The trial court denied the motion to vacate the guilty plea and

sentenced defendant to a term of imprisonment of fifteen years to life, plus five years of postrelease control. Defendant now appeals and assigns three errors for our review.

{¶ 13} For her first assignment of error, defendant contends that the trial court failed to comply with Crim.R. 11, and that her guilty plea was not knowingly, voluntarily, and intelligently given because the trial court erroneously identified that offense of murder as a first degree felony, rather than an unclassified offense, and erroneously informed her that she would be subject to a term of postrelease control.

{¶ 14} Both the Ohio and the United States Constitutions require that a defendant entering a guilty plea must do so knowingly, intelligently, and voluntarily. *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450, 1996-Ohio-179. Crim.R. 11(C)(2) requires that the trial court engage in oral dialogue with the defendant to determine that the plea is voluntary, that defendant understands the nature of the charges and the maximum penalty involved, and to personally inform the defendant of the constitutional guarantees he waives by entering a guilty plea.

{¶ 15} Crim.R. 11(C)(2) states:

{¶ 16} “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:

{¶ 17} “(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.

{¶ 18} “(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.

{¶ 19} “(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.”

{¶ 20} In determining whether the trial court has satisfied its duties under Crim.R. 11 in taking a plea, reviewing courts have distinguished between constitutional and non-constitutional rights. See *State v. Higgs* (1997), 123 Ohio App.3d 400, 704 N.E.2d 308; *State v. Gibson* (1986), 34 Ohio App.3d 146, 517 N.E.2d 990. The trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights. See *State v. Stewart* (1977), 51 Ohio St.2d 86, 88-89, 364 N.E.2d 1163; *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E. 2d 115, paragraph one of the syllabus. “Strict

compliance” does not require an exact recitation of the precise language of the rule but instead focuses on whether the trial court explained or referred to the right in a manner reasonably intelligible to that defendant. *Id.*

{¶ 21} For non-constitutional rights, scrupulous adherence to Crim.R. 11(C) is not required; the trial court must substantially comply. *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163. “Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implication of his plea and the rights he is waiving.” *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. Moreover, there must be some showing of prejudicial effect before a guilty plea may be vacated. *State v. Stewart, supra.*

{¶ 22} If the trial judge imperfectly explained non-constitutional 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. In *Clark*, the Ohio Supreme Court noted that defendants who are sentenced for unclassified felonies are not subject to postrelease control, pursuant to R.C. 2967.28. Such defendants are either ineligible for parole or become eligible for parole after serving a period of 20, 25, or 30 years in prison. *Id.*, citing R.C. 2929.03(A)(1) and R.C. 2967.13(A).

{¶ 23} The *Clark* Court additionally explained that because parole is not certain to occur, trial courts are not required to explain it as part of the maximum possible penalty in a Crim.R. 11 colloquy. The Court stated:

{¶ 24} “Even after a prisoner has met the minimum eligibility requirements, parole is not guaranteed; the Adult Parole Authority ‘has wide-ranging discretion in parole matters’ and may refuse to grant release to an eligible offender. *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St.3d 456, 2002-Ohio-6719, 780 N.E.2d 548, ¶ 28; *State ex rel. Hattie v. Goldhardt* (1994), 69 Ohio St.3d 123, 125, 630 N.E.2d 696.”

{¶ 25} The *Clark* Court further held that, because the defendant who is sentenced to an unclassified felony is not eligible for postrelease control, the trial court is not required to discuss postrelease control or parole in the defendant's plea colloquy under Crim.R. 11(C)(2). *State v. Clark*, 119 Ohio St.3d at 246, 893 N.E.2d at 471. The *Clark* Court then noted that, during the plea colloquy, the trial court provided Clark with an incorrect recitation of the law because it informed him of a “hybrid system that combined the mandatory term of years and the maximum possible sentences associated with postrelease control with the uncertainty of release associated with parole.” The *Clark* Court then reversed and remanded for a determination of whether the defendant was prejudiced by the trial court's misinformation.

{¶ 26} In this matter, the trial court erroneously indicated that defendant would be subject to five years of postrelease control but postrelease control is not applicable since murder is an unclassified felony. In *State v. Douglass*, Butler App. Nos. CA2008-08-199 and CA2008-07-168, 2009-Ohio-3826, the court

considered whether the trial court substantially complied with its duties under Crim.R. 11(C) where it erroneously advised a defendant who plead guilty to an unclassified felony that he would be subject to five years of postrelease control. The *Douglass* Court stated:

{¶ 27} “[B]ased on the facts of this case, we find the trial court’s colloquy did not substantially comply with Crim.R. 11, but instead, merely partially complied with the rule because it inadvertently inferred that the mandatory term of postrelease control would apply to all seven charges appellant faced, and therefore, although unlikely, created the potential for confusion by obscuring the relatively straightforward penalties involved. See *Clark*, 2008-Ohio-3748 at ¶¶36, 38, 119 Ohio St.3d 239, 893 N.E.2d 462 (postrelease control statute does not apply to the unclassified felony aggravated murder).

{¶ 28} “Yet, that being said, there is simply nothing to suggest appellant’s guilty plea would have been different had the trial court explicitly informed him that aggravated murder was not subject to a mandatory term of postrelease control at the plea hearing. As noted above, the trial court correctly informed appellant in the ‘Plea of Guilty and Jury Waiver’ form, as well as numerous occasions during the plea hearing, that entering a guilty plea to aggravated murder would carry the potential maximum penalty of life in prison without the possibility of parole. In addition, the record is devoid of any evidence indicating appellant misunderstood the ramifications of his decision. As a result, appellant

has failed to show that the conditions he faced if he was ever released from prison were critical to his decision to enter a guilty plea. See *State v. Clark*, Cuyahoga App. No. 2006-A-0004, 2008-Ohio-6768, ¶18 (finding no prejudice to defendant upon remand from Ohio Supreme Court following guilty plea to aggravated murder when trial court incorrectly informed him that he would be subject to a mandatory term of postrelease control). Therefore, under these circumstances, appellant has not demonstrated any prejudice resulting from the potential confusion caused by the trial court's failure to distinguish the effect of his guilty plea to aggravated murder at the plea hearing. See [*State v.*] *Cochran*, [Cuyahoga App. Nos. 91768, 91826, 92171,] 2009-Ohio-1693 at ¶22-29. Accordingly, appellant's first assignment of error is overruled and his guilty plea is affirmed.”

{¶ 29} Applying the foregoing to this matter, we note that the trial court’s failure to advise defendant of parole does render the plea proceedings defective because parole is not certain to occur. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462. Nonetheless, insofar as the trial court informed defendant that she would be subject to five years of postrelease control, the trial court's colloquy did not substantially comply with Crim.R. 11, but instead, merely partially complied with the rule. *State v. Douglass*, supra. However, on the record presented, we cannot find prejudice. That is, defense counsel maintained only that the proceedings “may have been confusing to my client in

that she felt that there may be an opportunity for her to receive postrelease control from the institution when that is incorrect.” Further, the misinformation does not in any way suggest an early release from imprisonment as defendant’s trial counsel stated, “if she’s released at some point in the future, she would be subject to postrelease control of up to five years.” In addition, the trial court stated, “And you would be subject, upon any release from prison, to postrelease control of five years. Do you understand that?”

{¶ 30} Moreover, there is no evidence in the record suggesting that defendant’s plea would have been otherwise had she known the actual conditions of parole. Without some evidence that defendant was motivated by the expectation of being subject to postrelease control upon release, we must affirm the plea. *State v. Clark*, Cuyahoga App. No. 2006-A-0004, 2008-Ohio-6768. However, because the trial court erroneously included a postrelease control provision in the sentencing entry, the matter must be remanded to correct the sentencing entry. *State v. Jordan*, Cuyahoga App. No. 91413, 2009-Ohio-4037.

{¶ 31} The assignment of error is without merit, but the matter is remanded for correction of the sentencing journal entry.

{¶ 32} For her second assignment of error, defendant asserts that the trial court erred in denying her motion to vacate her guilty plea.

{¶ 33} A motion to withdraw a guilty plea is governed by the standards set forth in Crim.R. 32.1, which states:

{¶ 34} “A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.”

{¶ 35} The general rule is that motions to withdraw guilty pleas before sentencing are to be freely allowed and treated with liberality. *State v. Peterseim* (1979), 68 Ohio App.2d 211, 214, 428 N.E.2d 863, citing *Barker v. United States* (C.A.10, 1978), 579 F.2d 1219, 1223. Nonetheless, a defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715. In ruling on a presentence withdrawal motion, the court must conduct a hearing and decide whether there is a reasonable and legitimate basis for the withdrawal of the plea. *Id.* The decision to grant or deny such a motion is within the sound discretion of the trial court. *Id.*

{¶ 36} It is not an abuse of discretion to deny a presentence motion to withdraw a guilty plea when a defendant: (1) is represented by competent counsel; (2) is given a full Crim.R. 11 hearing before entering a plea; and (3) is given a hearing on the motion to withdraw that plea during which the court considers the defendant's arguments in support of the motion. *State v. Peterseim*, at 214, 428 N.E.2d 863.

{¶ 37} In this matter, we find no abuse of discretion in connection with the

denial of defendant's presentence motion to withdraw her guilty plea. Defendant was represented by highly competent counsel, was given a full Crim.R. 11 hearing before entering his plea and was given a hearing on his motion to withdraw the plea during which the court considered her arguments.

{¶ 38} The second assignment of error is without merit.

{¶ 39} For her third assignment of error, defendant contends that the trial court's use of electronic signatures in this matter violated her rights as set forth in *State ex rel. Drucker v. Reichle* (1948), 81 N.E.2d 735, and her rights pursuant to Crim.R. 32(C).

{¶ 40} Loc. R. 19 provides that "[t]he Court shall approve a journal entry deemed by it to be proper, sign it MANUALLY OR APPLY AN ELECTRONIC SIGNATURE TO THE JOURNAL ENTRY PURSUANT TO LOCAL RULE 19.1, and cause it to be filed with the Clerk, and notice of the filing of each journal entry for journalization shall on the day following such filing be published in the Daily Legal News." (Emphasis in original.)

{¶ 41} In pertinent part, Crim.R. 32(C) instructs the judge to sign the judgment of conviction.

{¶ 42} In *State v. Pinkney*, Cuyahoga App. No. 91861, 2010-Ohio-237, this court held that the use of electronic signatures does not violate Crim.R. 32(C) and does not contravene the principle announced in *State ex rel. Drucker v. Reichle*, *supra*. This court stated:

{¶ 43} “We find no prohibition to the use of an electronic signature on the type of journal entries at issue. The use of electronic signatures is authorized by the local rules and does not conflict with the criminal rules or any existing law providing it is the judge who authorizes and is in control of its use.

{¶ 44} “Defendant acknowledges that the journal entries he is challenging all contain electronic signatures. There is no evidence in this record, nor any contention by the defendant, that would lead us to suspect that the electronic signatures were authorized by anyone other than the judge in this case. Accordingly, the use of the electronic signature by the judge constituted the attestation of a judicial act. Accordingly, the journal entries at issue comply with the Local Rules, are not inconsistent with the criminal or civil rules of procedure, and were valid under the law of this jurisdiction. See *State v. Nicholson*, Cuyahoga App. No. 91652, 2009-Ohio-3592, ¶ 9-11.”

{¶ 45} In accordance with the foregoing, the third assignment of error is without merit.

{¶ 46} Defendant’s guilty plea to murder is affirmed but the matter is remanded for correction of the sentencing journal entry to delete the reference to postrelease control.

It is ordered that appellee recover from 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.

ANN DYKE, JUDGE

JAMES J. SWEENEY, J., CONCURS;
SEAN C. GALLAGHER, A.J., CONCURS WITH ATTACHED CONCURRING
OPINION

SEAN C. GALLAGHER, A.J., CONCURRING:

{¶ 47} I concur fully with the judgment and analysis of the majority. I write separately because I believe it is important to address the application of new technology when issues regarding its implementation, or use, are raised.

{¶ 48} Anderson asserts that the trial court's use of an "electronic signature" on many journal entries in her case is tantamount to the use of a "rubber stamp," a practice that was disavowed by this court in *State ex rel. Drucker v. Reichle* (1948), 81 N.E.2d 735.

{¶ 49} The proponents of the use of "electronic signatures" in Cuyahoga

County Common Pleas Court reference Cuyahoga County Common Pleas Court Local Rule 19.1, adopted on December 16, 2008, as the authorization for the new technology. The rule states:

“19.1 ELECTRONICALLY SIGNED DOCUMENTS

“(A) The following definitions shall apply to this rule:

“‘Electronic’ and ‘Electronic Signature’ have the same meaning as used in section 1306.01 of the Ohio Revised Code.

“The term ‘Document’ includes journal entries, notices, orders, opinions, and any other filing by a Judge or Magistrate of this Court.

“(B) Electronic transmission of a document with an electronic signature by a Judge or Magistrate that is sent in compliance with procedures adopted by the Court shall, upon the complete receipt of the same by the Clerk of Court, constitute filing of the document for all purposes of the Ohio Civil Rules, Ohio Criminal Rules, Rules of Superintendence, and the Local Rules of this Court.

“(C) Electronic transmission of an indictment with an electronic signature by a Grand Jury Foreperson that is sent in compliance with procedures adopted by the Court shall, upon the complete receipt of the same by the Clerk of Court, constitute filing of the document for all purposes of the Ohio Civil Rules, Ohio Criminal Rules, Rules of Superintendence, and the Local Rules of this Court.”

{¶ 50} The rule borrows language from law covering electronic financial transactions under R.C. 1306.01 to define an electronic signature as: “(H) ‘Electronic signature’ means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with

the intent to sign the record.”

{¶ 51} Loc.R. 19.1(B) references the Ohio Criminal Rules, thus implying the use of such a process is in compliance with the requirements of Crim.R. 32(C).

{¶ 52} In *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, syllabus, the Supreme Court of Ohio held that Crim.R. 32(C) requires that a judgment of conviction set forth the following to be a final appealable order: “(1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court.” See, also, *State v. Pinkney*, Cuyahoga App. No. 91861, 2010-Ohio-237; *State v. Anderson*, Cuyahoga App. No. 87136, 2006-Ohio-3905; and *In re Mitchell* (1994), 93 Ohio App.3d 153, 637 N.E.2d 989, for cases related to the use of electronic signatures and judicial signatures on journal entries.

{¶ 53} At issue here is what constitutes a “judge’s signature” under the third tier of the *Baker* test on determining a valid journal entry and thus what constitutes a final appealable order. Other cases have similarly listed the judge’s signature as a necessary component of a journal entry. *State v. Brock*, Hamilton App. No. C-020819, 2003-Ohio-3199. Appellant’s claim that the use of an electronic signature today is no different than the use of rubber stamps in the 1940s is worthy of review. Indeed, if there is a distinction, we ought to identify it, and if not, we should state there is no difference. The use of this new

technology is in need of validation or rejection.

{¶ 54} I would note that while some may argue a rubber stamp is distinguishable from an electronic signature, no case interpreting Criminal Rule 32 has expressly defined the distinction.

{¶ 55} The definition referenced in R.C. 1306.01(H) contains the phrase “executed or adopted by a person with the intent to sign the record.” While one can argue the use of a rubber stamp can include the “intent” and “adoption” to sign a record, there is one significant distinction with regard to electronic signatures and rubber stamps. Electronic signatures require the use of a personal password or code or unique identifier entrusted to the person whose signature in an electronic form ultimately appears on the document. For this reason, a rubber stamp, which can admittedly be used by anyone, is distinguishable from an electronic signature. Thus, I would likewise reject the appellant’s claim that the use of Loc.R. 19.1 and electronic signatures in any way violates the rights of Anderson.