

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	CASE NO. 2010-T-0005
- vs -	:	
ERIC LEE PORTERFIELD,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 00 CR 402.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Eric Lee Porterfield, pro se, PID: 420-502, Mansfield Correctional Institution, P.O. Box 788, Mansfield, OH 44901 (Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Eric Lee Porterfield appeals from the judgment of the Trumbull County Court of Common Pleas, denying his motion to withdraw his plea of guilty to numerous crimes. We affirm.

{¶2} This is the latest in a long line of appeals by Mr. Porterfield, all stemming from incidents occurring June 23, 2000, when he and two cohorts stormed the residence of Dave Harper, intending to rob him of money and drugs. *State v.*

Porterfield, 11th Dist. No. 2008-T-0002, 2008-Ohio-5948, at ¶2. Mr. Harper was seriously injured; two others were killed. *Id.* Mr. Porterfield was charged with two counts of aggravated murder, with aggravating circumstances and firearm specifications; one count of attempted aggravated murder with a firearm specification; two counts of kidnapping with firearm specifications, one count of aggravated burglary with a firearm specification; and, one count of aggravated robbery with a firearm specification. *Id.* Eventually, Mr. Porterfield entered a plea agreement with the state. The aggravating circumstances attendant to the aggravated murder counts were eliminated, thus sparing Mr. Porterfield a death sentence. The trial court thereafter sentenced Mr. Porterfield to serve three years on the firearm specification to the attempted aggravated murder count, and merged the firearm specifications for the other counts into it, to be served prior to concurrent ten year terms for the counts of attempted aggravated murder, kidnapping, aggravated burglary, and aggravated robbery. He was further sentenced to consecutive terms of twenty years to life for each of the aggravated murder counts, to be served consecutive to the previously mentioned sentences, for a total minimum term of imprisonment of fifty-three years.

{¶3} August 3, 2009, Mr. Porterfield moved the trial court to withdraw his guilty plea. He supplemented his motion August 21, 2009. The state filed a brief in opposition November 13, 2009. Mr. Porterfield moved to dismiss the state's response December 10, 2009. By a judgment entry filed January 12, 2010, the trial court denied Mr. Porterfield's motion. January 25, 2010, Mr. Porterfield noticed this appeal, assigning two errors:

{¶4} “[1.] The Trial Court Erred when denying Appellant’s Motion to Vacate a Void Sentence in accordance with Ohio Revised Code Section 2967.28.

{¶5} “[2.] The Trial Court Abused its Discretion when denying Appellant’s Motion to Withdraw his Guilty Plea pursuant to Ohio Criminal Rule 32.1.”

{¶6} By his first assignment of error, Mr. Porterfield contends his sentence is void, due to a failure to include appropriate language regarding mandatory postrelease control. By his second assignment of error, Mr. Porterfield asserts that, since his sentence is void, his motion to withdraw his guilty plea should have been liberally granted, since it was made prior to imposition of a valid sentence.

{¶7} When a trial court imposes sentence for any of the classified felonies set forth at R.C. 2967.28(B), it must appropriately advise the defendant of mandatory postrelease control, or the sentence is void ab initio. Cf. *State v. Dean*, 11th Dist. No. 2009-P-0023, 2009-Ohio-5900, at ¶14. However, in this case, Mr. Porterfield pleaded guilty to, and was sentenced for, two counts of aggravated murder. Aggravated murder is an unclassified felony, not subject to the dictates of R.C. 2967.28. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, at ¶36. As the *Clark* court stated:

{¶8} “However, an individual sentenced for aggravated murder such as Clark is not subject to postrelease control because that crime is an unclassified felony to which the postrelease-control statute does not apply. R.C. 2967.28. Instead, such a person is either ineligible for parole or becomes eligible for parole after serving a period of 20, 25, or 30 years in prison. See R.C. 2929.03(A)(1); 2967.13(A). Parole is also a form of supervised release, but it is not merely an addition to an individual’s sentence. When a person is paroled, he or she is released from confinement before the end of his or her

sentence and remains in the custody of the state until the sentence expires or the Adult Parole Authority grants final release. R.C. 2967.02(C); 2967.13(E); 2967.15(A); 2967.16(C)(1). If a paroled person violates the various conditions associated with the parole, he or she may be required to serve the remainder of the original sentence; that period could be more than nine months. Ohio Adm.Code 5120:1-1-19(C).

{¶9} “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, ***, ¶28; *State ex rel. Hattie v. Goldhardt* (1994), 69 Ohio St.3d 123, 125, ***. 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. See *Hill v. Lockhart* (1985), 474 U.S. 52, 56, ***.” *Clark*, 119 Ohio St.3d 239, at ¶36-37. (Parallel citations omitted.)

{¶10} The *Clark* matter originated in the Ashtabula County Court of Common Pleas. See, e.g., *State v. Clark*, 11th Dist. No. 2006-A-0004, 2007-Ohio-1780, at ¶1. Appellant pleaded guilty to one count of aggravated murder, with a firearm specification. *Id.* Following sentencing, appellant appealed to this court. *Id.* at ¶9. One of the issues was whether his guilty plea had been knowing, voluntary, and intelligent, as required by Crim.R. 11(C). *Id.* at ¶10. At issue was the fact the trial court had advised appellant in the Crim.R. 11(C) colloquy that he would be subject to mandatory postrelease control, as set forth at R.C. 2967.28, which was also made part of the judgment entry, rather than the fact that he would be subject to parole. Cf. *id.* at ¶4-8. This court determined

that the trial court had substantially complied with the requirements of Crim.R. 11(C), since the trial court had correctly advised appellant that the maximum penalty for aggravated murder was life imprisonment without parole. *Id.* at ¶26. This court further determined that any error was not prejudicial, in that appellant could not show that his plea would have been different absent the claimed error. *Id.* at ¶27-28.

{¶11} On further appeal, the Supreme Court of Ohio determined that the trial court's Crim.R. 11 colloquy failed to meet the substantial compliance standard. The court held, in pertinent part:

{¶12} "The trial judge was not required to discuss postrelease control or parole in Clark's plea colloquy under Crim.R. 11(C)(2), as Clark was not eligible for postrelease control given his plea to an unclassified felony. See R.C. 2967.28(B) and (C). When he expanded on the information set forth in the rule, the trial judge obscured the relatively straightforward maximum penalties for Clark's crimes. The judge described a decidedly different form of release than the one Clark actually faced under the law, 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.

{¶13} "Such an incorrect recitation of the law fails to meet the substantial-compliance standard. If a trial judge chooses to offer an expanded explanation of the law in a Crim.R. 11 plea colloquy, the information conveyed must be accurate. The rule is in place to ensure that defendants wishing to plead guilty or no contest do so knowingly, intelligently, and voluntarily. Because of the substantial misinformation that

the trial judge provided to the defendant in this case, the defendant could not have entered his plea knowingly, intelligently, and voluntarily. The fact that the trial court provided some correct information as well does not alter this conclusion, because the correction (sic) information was not provided in such a manner as to remedy the erroneous information.

{¶14} “Despite the failure to substantially comply with Crim.R. 11, the trial judge did not simply ignore his duties under Crim.R. 11(C)(2)(a). Because the trial judge partially complied with the rule, Clark must show that he was prejudiced by the trial court’s misinformation to successfully vacate his plea. See [*State v. Nero* [(1990)], 56 Ohio St.3d [106,] *** 108, ***. Although it discussed prejudice in its opinion, the court of appeals did not reach a conclusion on the issue. We therefore remand the case for a full determination of prejudice.” *Clark*, 119 Ohio St.3d 239, at ¶38-40. (Parallel citation omitted.)

{¶15} On remand, this court held appellant had suffered no prejudice due to the trial court’s failure to explain parole properly. *State v. Clark*, 11th Dist. No. 2006-A-0004, 2008-Ohio-6768.

{¶16} In this case, the pertinent portion of the Crim.R. 11 colloquy reads as follows:

{¶17} [The Court]; “It will, therefore, be the sentence of this Court that you be taken from here to the Trumbull County jail (sic) and therein (sic) Lorain Correctional Institute to serve the following sentences: No. 1, you will have 10 years served on Count 3 and 10 years on each of Counts 4, 5, 6 and 7, and those sentences will be served

concurrently to the sentence imposed in Count 3 with parole eligibility after serving 20 years of life imprisonment on Count 1 to be served consecutive to the sentence imposed on Count 3, and life with parole eligibility after serving 20 years of imprisonment on Count 2, which will also be served consecutively to the sentence imposed on Counts 1 (sic) and Counts 3 (sic). In addition you will be sentenced to three years on the firearm specification in Count 3, which will be served prior to and consecutive to the principal sentence. The firearm specifications on Counts 1, 2, 4, 5, 6 and 7 will merge and the firearm specification in Count 3 – with the firearm specification in Count 3, and what this means is a total aggregate sentence of 53 years to life.

{¶18} “After you are released from prison you will have, if you are released, you will have post-release control sanctions imposed upon you for up to five years – for five years I should say. If you violate a post-release control sanction imposed upon you you could get up to nine months for each violation, but the total amount they give you cannot exceed one-half of my original prison term. It’s necessary that you sign that I’ve given you this notice.

{¶19} [Assistant Prosecutor]: “Judge, may we approach?”

{¶20} [The Court]: “Yes.

{¶21} ***

{¶22} [The Court]: “Well, sir, apparently I stand corrected. If you are released from prison you will have a specified time for post-release control sanctions that will be up to the prison board. And how long could it be, just indefinitely?”

{¶23} [Assistant Prosecutor]: “It depends on when they let him out, judge. It would be the balance of the life sentence.

{¶24} [The Court]: “The balance of your life sentence. So you understand that?”

{¶25} [Defense Counsel]: “You would be on parole.

{¶26} [Mr. Porterfield]: “Yeah.”

{¶27} This colloquy appears to suffer from many of the same defects found by the Supreme Court of Ohio in *Clark*, 119 Ohio St.3d 239. The trial court initially informed Mr. Porterfield that his sentences for aggravated murder would be for life, with parole eligibility after twenty years – but then, it informed him that he would be serving five years mandatory postrelease control, if he was freed in the future. It was only through the intervention of the assistant prosecutor that he was informed that he would be supervised for life, if he was ever released from prison. Only defense counsel mentioned that this would constitute parole. Further, the document signed by Mr. Porterfield – called “Finding on Guilty Plea to Amended Indictment” – does not inform Mr. Porterfield that he would be subject to parole if freed – but does give him an extensive explanation of postrelease control.

{¶28} Following the Supreme Court of Ohio’s decision in *Clark*, 119 Ohio St.3d 239, we cannot find that the colloquy substantially complied with the mandates of Crim.R. 11. Nevertheless, Mr. Porterfield must show prejudice resulting from the misinformation given him by the trial court in order to withdraw his plea. *Clark*, 119 Ohio St.3d 239 at ¶40. “The test [for prejudice] is whether the plea would have otherwise been made.” *Nero* at 108. We do not find that Mr. Porterfield suffered any prejudice.

He does not point to anything in the record indicating that his plea would have been different had the trial court not erred. He does not even argue that it would have been different.

{¶29} The first assignment of error lacks merit.

{¶30} As a consequence of our disposition of his first assignment of error, Mr. Porterfield's sentence is not void. Thus we consider his second assignment of error – that the trial court should have granted his motion to withdraw his guilty plea – as relating to a postsentence motion to withdraw. We review the grant or denial of such for abuse of discretion. *State v. Gray*, 11th Dist. No. 2008-T-0114, 2009-Ohio-1925, at ¶14. Regarding this standard, we recall the term “abuse of discretion” is one of art, essentially connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. Further, an abuse of discretion may be found when the trial court “applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.” *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, at ¶15.

{¶31} As we noted in relation to his first assignment of error, Mr. Porterfield raises no valid argument regarding how he may have been prejudiced by any failure in the trial court's Crim.R. 11 colloquy with him, almost nine years ago. He simply argues that his sentence is void, which is untrue.

{¶32} The second assignment of error lacks merit.

{¶33} The judgment of the Trumbull County Court of Common Pleas is affirmed.

{¶34} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J., concurs,

DIANE V. GRENDALL, J., concurs in judgment only.