[Cite as *State v. Dudas,* 2012-Ohio-2122.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**PER CURIAM OPINION**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-094**
- vs -	:	
RONALD DUDAS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 06 CR 000700.

Judgment: Affirmed.

William D. Mason, Cuyahoga County Prosecutor, and *Daniel Kasaris,* Assistant Prosecutor, The Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, OH 44113 (For Plaintiff-Appellee).

Ronald Dudas, pro se, PID: A520-261, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, OH 44430-0901 (Defendant-Appellant).

PER CURIAM.

{¶1} Appellant, Ronald Dudas, appeals his re-sentencing by the Lake County Court of Common Pleas. Appellant was convicted, following his guilty plea, of intimidation of and retaliation against a common pleas court judge, intimidation of a police officer, and engaging in a pattern of corrupt activity. The trial court re-sentenced appellant to correctly impose postrelease control. At issue is whether the trial court

violated appellant's constitutional rights in re-sentencing him. For the reasons that follow, we affirm.

{¶2} On October 19, 2006, appellant pled guilty in two cases that were consolidated in the trial court. In Case No. 06 CR 000560, "the murder conspiracy case," he pled guilty to four counts of intimidation of a police officer and a common pleas court judge and one count of retaliation against the judge. Each of these offenses was a felony of the third degree. In Case No. 06 CR 000700, "the corrupt activity case," appellant pled guilty to engaging in a pattern of corrupt activity, a felony of the first degree; tampering with records, theft, and securing writings by deception, each being a felony of the third degree; and forgery, uttering, and telecommunications fraud, each being a felony of the fourth degree.

{¶3} In the murder conspiracy case, appellant hired a hit man to murder the judge and to break the police officer's legs in retaliation for their roles in investigating and sentencing him in a prior felony theft case.

{¶4} In the corrupt activity case, appellant formed and carried on an enterprise for the ostensible purpose of providing loans to individuals in desperate financial straits, but with the true purpose of stealing their funds and real estate. He set up and operated mortgage companies to accomplish this purpose. Many of appellant's victims were near foreclosure, and he took advantage of their plight by stealing the last of their assets. Appellant created false loan applications and mortgages, using the names of his victims to obtain loans from lenders. He then stole the proceeds from these loans, leaving his victims with massive debt. He also stole money and real estate from his victims. He

stole in excess of one million dollars, driving many of his victims into financial ruin and/or bankruptcy.

{¶5} The trial court held a sentencing hearing on December 1, 2006. In the murder conspiracy case, the court sentenced appellant on each of four counts of intimidation to five years in prison, each term to run concurrently to the others. The court also sentenced him to five years on the retaliation count, to be served consecutively with the intimidation counts, for a total of ten years.

{¶6} In the corrupt activity case, the court sentenced appellant to ten years for engaging in a pattern of corrupt activity, five years for tampering with records, five years for securing writings by deception, 18 months for forgery, 18 months for uttering, 18 months for telecommunications fraud, and one year for theft. The prison terms imposed for forgery, theft, uttering, and telecommunications fraud were to be served concurrently to each other and concurrently to the terms imposed for engaging in a pattern of corrupt activity, tampering with records, and securing writings by deception. The terms for engaging in a pattern of corrupt activity, tampering with records, and securing writings by deception were to be served consecutively to each other, for a total of 20 years in prison, and consecutively to the prison term in the murder conspiracy case, for a total of 30 years in prison.

{¶7} Appellant filed a direct appeal in which he challenged his conviction and sentence. This court affirmed both in *State v. Dudas*, 11th Dist. Nos. 2006-L-267 and 2006-L-268, 2007-Ohio-6739, discretionary appeal not allowed at 118 Ohio St.3d 1409, 2008-Ohio-2340.

{¶8} In the years following appellant's conviction, he filed multiple pro se motions in which he challenged, inter alia, the trial court's denial of (1) his four motions to withdraw his guilty plea, (2) his motion to return contraband, (3) his petition for postconviction relief, (4) his Civ.R. 60(B) motion for relief from judgment, (5) his Civ.R. 34 request for production of documents, (6) his motion to quash the indictment, and (7) his motion to void his sentence on double jeopardy grounds. The trial court's denial of each of these motions was followed by an appeal. In some 13 separate decisions released between 2007 and 2011, this court affirmed the trial court's rulings. In addition, by our judgment entry, dated June 3, 2008, we denied appellant's motion for reconsideration of this court's affirmance of his conviction.

{¶9} With respect to the instant appeal, on November 23, 2010, appellant filed a "motion to take judicial notice of illegal sentence imposed by the Lake County Court of Common Pleas as void." Although the trial court had correctly advised appellant regarding postrelease control at his 2006 sentencing, the sentencing entry itself was incorrect. The entry stated that postrelease control was mandatory "up to a maximum of 5 years," when, in fact, postrelease control was mandatory for five years. Appellant thus argued his sentence was void. On December 29, 2010, appellant filed a nearly identical motion for sentencing in which he argued that because his original sentence was void, he was entitled to a "de novo" sentencing.

{¶10} On May 4, 2011, the trial court denied both motions, but set the matter for a hearing via video conference to correct the court's sentencing entry regarding postrelease control and appointed counsel to represent appellant at the hearing.

{¶11} On May 19, 2011, appellant filed a motion to allow him to be physically present in court and to represent himself. The trial court granted appellant's request to represent himself, but denied his request to be physically present.

{¶12} The re-sentencing hearing was held on June 30, 2011. Appellant was present via video conferencing equipment representing himself, but was assisted by the public defender. During the hearing, appellant argued he had a right to be physically present at the hearing. The trial court disagreed, stating that "video conferencing equipment has been specifically permitted by the law to correct the post release control advisements." Appellant orally moved to withdraw his guilty plea on the ground that his sentence was void. The court denied the motion; imposed the identical sentence it imposed in 2006; and correctly advised appellant that postrelease control was mandatory for five years.

{¶13} Appellant appeals the trial court's judgment asserting three assignments of error. Because the first two are related, we shall consider them together. They allege:

{¶14} "[1.] Trial court erred by not allowing appellant to be present at Resentencing.

{¶15} "[2.] The trial court erred by denying the appellant the right to a complete hearing on resentencing."

{¶16} Appellant argues that because the trial court did not correctly impose postrelease control in its original sentencing entry, his sentence was void and he was entitled to a de novo sentencing. We do not agree.

{¶17} Pursuant to R.C. 2929.19(B) and 2967.28(B)(1), an offender being sentenced for a felony of the first degree must be notified by the court at the sentencing hearing and in the sentencing entry that upon release from prison he is subject to a term of postrelease control of five years.

{¶18} In the event postrelease control is not correctly imposed, R.C. 2929.191 provides a procedure to correct the error in the trial court's sentence. The statute applies to sentenced offenders who are still in prison and were either not notified at their sentencing hearings of the applicable term of postrelease control or did not have such notice incorporated into their sentencing entries. R.C. 2929.191(A) and (B).

{¶19} For such offenders, R.C. 2929.191 provides that trial courts may, after holding a hearing, issue a nunc pro tunc entry that includes notification of the applicable term of postrelease control. The court's placement of the nunc pro tunc entry on the journal has the same effect as if the court had included the correct notification in the original sentencing entry and had notified the offender of the applicable term of postrelease control at the original sentencing hearing. *Id.* The offender has the right to be present at the hearing, but the court may permit the offender to appear at the hearing by video conferencing equipment. R.C. 2929.191(C).

{¶20} In *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the Supreme Court of Ohio held that sentences imposed without a proper postrelease-control notification on or after July 11, 2006, the effective date of R.C. 2929.191, remain in effect, but are subject to the correction procedure set forth in the statute. *Id*. at ¶24.

The court thus effectively held that such sentences are only partially void. The Supreme Court stated:

> **{¶21}** R.C. 2929.191(C) prescribes the type of hearing that must occur to make such a correction to a judgment entry "on and after the effective date of this section." The hearing contemplated by R.C. 2929.191(C) and the correction contemplated by R.C. 2929.191(A) and (B) pertain only to the flawed imposition of postrelease control. R.C. 2929.191 does not address the remainder of an offender's sentence. *Thus, the General Assembly appears to have intended to leave undisturbed the sanctions imposed upon the offender which are unaffected by the court's failure to properly impose postrelease control at the original sentencing*. (Emphasis added.) *Singleton, supra.*

{¶22} The *Singleton* Court further held: "[B]ecause R.C. 2929.191 applies prospectively to sentences entered on or after July 11, 2006 * * * that lack proper imposition of postrelease control, a trial court may correct such sentences in accordance with the procedures set forth in that statute." *Id*. at ¶35. In explaining its holding, the court noted that in enacting R.C. 2929.191, the General Assembly altered the Ohio Supreme Court's previous characterization of sentences imposed without the necessary postrelease-control notification as void. The court held: "Although our caselaw has previously characterized a sentence lacking postrelease control as a nullity, [R.C. 2929.191] demonstrates a legislative intent to apply the sentence-

correction mechanism of R.C. 2929.191 to sentences imposed after the act's effective date." *Id*. at ¶27. Since R.C. 2929.191 was made effective July 11, 2006, and appellant was sentenced on December 1, 2006, R.C. 2929.191 applies to his sentence.

{¶23} Thereafter, in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶26, the Supreme Court of Ohio expanded its holding in *Singleton*, *supra*, to sentences lacking postrelease-control notification that were imposed *prior to* the effective date of R.C. 2929.191. The court held that such sentences are likewise only partially void, and may be corrected to properly impose postrelease control. *Id*. at ¶28-29. Thus, regardless whether R.C. 2929.191 or *Fischer* applies, a sentence lacking postrelease-control notification does not entitle a criminal defendant to a de novo sentencing hearing.

{¶24} Applying the foregoing jurisprudence to the instant case, although the trial court did not correctly advise appellant regarding postrelease control in its original sentencing entry, the sentence was only partially void, and was subject to correction pursuant to R.C. 2929.191. Thus, contrary to appellant's argument, he was not entitled to a de novo sentencing. Instead, he was only entitled to a limited hearing for the sole purpose of correctly imposing postrelease control.

{¶25} Next, appellant argues the trial court erred when it held his re-sentencing by video conference without his waiver because, he claims, under Crim.R. 43, he had a right to physically appear at his re-sentence in the absence of a waiver. As noted above, R.C. 2929.191(C) permits trial courts to conduct re-sentencing hearings by video conference. However, Crim.R. 43(A) requires a waiver of a defendant's right to be

physically present in felony proceedings before a court can permit his participation by video conference. In the event of a conflict between a statute and a criminal rule involving a procedural matter, the rule prevails. *State ex rel. Silcott v. Spahr*, 50 Ohio St.3d 110 (1990). As a result, some Ohio Appellate Districts have held that, pursuant to Crim.R. 43(A), it is error to hold a re-sentencing via video conference without a waiver. *See, e.g*., *State v. Morton*, 10th Dist. No. 10AP-562, 2011-Ohio-1488, ¶13-14, 18; *State v. Steimle*, 8th Dist. No. 95076, 2011-Ohio-1071, ¶16-17. However, these courts have also held that such error is harmless without a showing of prejudice. *Morton*, *supra*; *Steimle*, *supra*.

{¶26} Here, although the trial court gave appellant an opportunity to present whatever information he wanted at the re-sentencing hearing, appellant presented no evidence in support of his position. Further, appellant has not made a credible argument that the outcome of the re-sentencing would have been different if he had been physically present. Moreover, as noted above, appellant pled guilty to a first degree felony. R.C. 2967.28(B)(1) mandates a five-year term of postrelease control for such a conviction. Thus, the trial court had no discretion to impose anything other than a five-year term of postrelease control. *Morton, supra*, at ¶14. Further, other than correctly imposing postrelease control, the trial court imposed the identical sentence it imposed in 2006. Consequently, appellant's physical presence would have contributed little to his defense. We therefore hold that any error by the trial court in holding the re-sentencing via video conference without a waiver was harmless.

{¶27} Next, appellant argues that because the trial court did not personally advise him regarding postrelease control during his plea hearing, his guilty plea was involuntary. He thus argues that the trial court should have granted the oral motion to withdraw his plea that he made during his re-sentencing. Again, we do not agree.

{¶28} Initially, we note that appellant did not make this argument in his direct appeal or in any of his four prior motions to withdraw his guilty plea. Moreover, this court has previously held that appellant's guilty plea was voluntarily entered. *State v. Dudas*, 11th Dist. Nos. 2008-L-081 and 2008-L-082, 2008-Ohio-7043, ¶58. The issue is therefore barred by res judicata. *State v. Szefcyk,* 77 Ohio St.3d 93, 96 (1996). Further, the issue is waived because appellant did not argue at his re-sentencing that his guilty plea was involuntary. *State v. Awan*, 22 Ohio St.3d 120, 122 (1986).

{¶29} In any event, even if the issue was not barred by res judicata or waiver, it would lack merit. Appellant's current motion to withdraw his guilty plea was a post-sentence motion pursuant to Crim.R. 32.1. Although the trial court at the re-sentencing referred to its original sentence as "void" and purported to vacate it, the court lacked authority to do either. The only lawful purpose of the re-sentencing hearing was to correctly impose postrelease control. Thus, the trial court's authority was limited to accomplishing that objective. *See State v. Masterson*, 11th Dist. No. 2009-P-0064, 2010-Ohio-4939, ¶30 (the sole purpose of a remand pursuant to R.C. 2929.191 is to correct the court's original sentence on conviction regarding postrelease control); *State v. Turner,* 11th Dist. Nos. 2010-A-0034, 2010-A-0039, and 2010-A-0040, 2011-Ohio-2993, ¶16 (when a court conducts a hearing to properly impose postrelease control,

"the court's jurisdiction is limited to addressing only post-release control"). Since the only purpose of the re-sentencing hearing was to correctly impose postrelease control, the trial court lacked authority to find that the original sentence was void. Thus, the court's finding was mere surplusage and of no legal consequence, and the original sentence remained valid but for the provision regarding postrelease control.

{¶30} Because appellant's motion to withdraw his guilty plea was a post-sentence motion, it could only have been granted if he established manifest injustice. *State v. Smith*, 49 Ohio St.2d 261, 264 (1977). Under such standard, a post-sentence withdrawal motion is allowable only in extraordinary cases. *Id*. A manifest injustice exists when a guilty plea is not voluntarily entered. *State v. Williams*, 10th Dist. No. 10AP-1135, 2011-Ohio-6231, ¶32.

{¶31} Failure to inform a defendant of his constitutional rights invalidates a guilty plea as involuntary. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶12. However, knowledge of the maximum penalty is not constitutionally required for a guilty plea to be voluntary. *State v. Johnson*, 40 Ohio St.3d 130, 133 (1988). The non-constitutional rights of which a defendant must be informed include the maximum penalty. Crim.R. 11(C)(2)(a). Substantial compliance with Crim.R. 11(C) is sufficient when a defendant is waiving non-constitutional rights. *State v. Nero*, 56 Ohio St.3d 106, 108 (1990). Substantial compliance means that under the totality of the circumstances, the defendant understands the implications of his guilty plea and the rights he is waiving. *Id.* at 108. Failure to literally comply with non-constitutional rights does not

invalidate a plea unless the defendant suffers prejudice. *Id*. The test for prejudice is "whether the plea would have otherwise been made." *Id*.

{¶32} Here, appellant's guilty plea was voluntary because, at his guilty plea hearing, the trial court substantially complied with its duty to advise him regarding postrelease control. In response to the court's questions, appellant said he had read and discussed with his attorneys his written guilty plea, which outlined the charges and potential penalties. He said his attorneys had answered all his questions about the written plea to his satisfaction; that he agreed with the written plea; and that he wanted to sign it. The judge handed the written plea to appellant, and told him to make sure he read and understood it and to only sign it if that was what he wanted to do. Appellant then signed the written plea and his attorneys signed it as witnesses. The written plea stated: "After prison release, *I will have 5 years of post-release control*." (Emphasis added.) Further, appellant's counsel in the written plea stated that he had witnessed appellant sign the written plea; that he had reviewed the document with him; and that he had reviewed with appellant the consequences of his change of plea to guilty.

{¶33} Based on the guilty plea form, which expressly advised appellant regarding postrelease control, and the trial court's colloquy with appellant, we hold the trial court substantially complied with the requirement that it advise appellant regarding the maximum penalties, including the imposition of postrelease control. The totality of the circumstances here indicates that appellant knew about postrelease control.

{¶34} Further, appellant presented no evidence of prejudice. Specifically, there is no evidence that, if the court had specifically advised appellant regarding postrelease control, he would not have pled guilty.

{¶35} The Tenth Appellate District recently reached the same conclusion on facts virtually identical to those presented here in *Williams*, *supra*. In that case, although the trial court did not address postrelease control during the defendant's guilty plea hearing, the Tenth District held that because the written guilty plea form advised the defendant regarding postrelease control and the defendant advised the court that he had reviewed the form with his attorney, the trial court substantially complied with the requirement that it advise the defendant regarding the maximum penalties, including the imposition of postrelease control. *Id*. at ¶39.

{¶36} Thus, even if appellant's argument was not barred by res judicata and waiver, he failed to demonstrate manifest injustice. We therefore hold that the trial court did not abuse its discretion in denying appellant's current motion to withdraw his guilty plea.

{¶37} For his third and final assignment of error, appellant asks:

{¶38} "Were the prior attorneys who have represented appellant during trial, on appeal and on federal habeas corpus, ineffective for their failure to notice the illegal sentence given to the defendant?"

{¶39} Appellant argues he should have been permitted to withdraw his guilty plea because his counsel was ineffective in not asserting his original sentence was void due to the improper imposition of postrelease control. Initially, we note that appellant

could have but failed to make this argument on direct appeal or in any of his prior motions to withdraw his guilty plea. Moreover, this court has held that appellant's counsel was not ineffective. *State v. Dudas*, 11th Dist. Nos. 2009-L-072 and 2009-L-073, 2010-Ohio-3253, ¶42. The argument is therefore barred by res judicata. In any event, even if the argument was not barred, it would lack merit. Applying the test in *Strickland v. Washington*, 466 U.S. 668 (1984), there is no evidence that appellant's counsel was deficient because his original sentence was only partially void and subject to being corrected pursuant to R.C. 2929.191.

{¶40} For the reasons stated in this Per Curiam Opinion, the assignments of error are not well taken. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J., CYNTHIA WESTCOTT RICE, J., MARY JANE TRAPP, J., concur.