

[Cite as *State v. Garrett*, 2009-Ohio-2559.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24377

Appellee

v.

CODY D. GARRETT

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 2003-01-0250

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 3, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} After five years of incarceration, Mr. Garrett decided that he made a mistake when he pleaded guilty to involuntary manslaughter with a firearm specification. He moved to withdraw his plea, but the trial court denied his motion. Mr. Garrett has appealed, arguing that the trial court should have allowed him to withdraw his plea because it did not properly advise him about post-release control at his plea colloquy. This Court affirms because the trial court substantially complied with Rule 11(C)(2)(a) of the Ohio Rules of Criminal Procedure when it told Mr. Garrett about post-release control.

FACTS

{¶2} In July 2003, Mr. Garrett pleaded guilty to involuntary manslaughter in exchange for a 13 year prison sentence. During the plea colloquy, his lawyer said that he had discussed post-release control with Mr. Garrett and that Mr. Garrett understood the process.

{¶3} The trial court examined Mr. Garrett to ensure that he understood the ramifications of his plea. It told him that, “[n]ow, you’re also subject to a period of post-release control of up to five years after you leave a state institution. Post-release control is a period of supervision with certain rules and regulations. If you violate those, you can be sent back to prison for periods of 30, 60, or 90 days, but the total amount of time that you could be re-incarcerated cannot exceed more than one-half the original total sentence.” Mr. Garrett said that he understood.

{¶4} On July 3, 2008, Mr. Garrett moved to withdraw his guilty plea, arguing that he was not told that post-release control was mandatory. The trial court denied his motion. He has appealed, assigning one error: that the trial court incorrectly denied his motion to withdraw his guilty plea.

CRIMINAL RULE 32.1

{¶5} Mr. Garrett has argued that his plea was not knowing, intelligent, or voluntary because the trial court did not tell him at the plea colloquy that post-release control was mandatory or that its duration would definitely be five years. He has argued that, if he had known that post-release control was mandatory for five years, he would not have pleaded guilty.

{¶6} Rule 32.1 of the Ohio Rules of Criminal Procedure provides that “[a] motion to withdraw a plea of guilty . . . 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.” Interpreting that rule, the Ohio Supreme Court has held that “a presentence motion to withdraw a guilty plea should be freely and liberally granted.” *State v. Boswell*, ___ Ohio St. 3d ___, 2009-Ohio-1577, at ¶1 (slip opinion) (quoting *State v. Xie*, 62 Ohio St. 3d 521, 527 (1992)). On the other hand, “[a] defendant who seeks to withdraw a

plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice.” *State v. Smith*, 49 Ohio St. 2d 261, paragraph one of the syllabus (1977).

{¶7} Although a trial court has discretion when it decides a motion to withdraw a plea, “the extent of the trial court’s exercise of discretion . . . is determined by the particular provisions that govern the motion under which the defendant is proceeding.” *State v. Francis*, 104 Ohio St. 3d 490, 2004-Ohio-6894, at ¶33. Accordingly, before reviewing the trial court’s decision, this Court must determine whether Mr. Garrett’s motion to withdraw his guilty plea was a presentence motion or a postsentence motion. While Mr. Garrett filed his motion five years after his sentence, the Ohio Supreme Court has recently held that “[a] motion to withdraw a plea of guilty . . . made by a defendant who has been given a void sentence must be considered as a presentence motion under Crim.R. 32.1.” *Boswell*, 2009-Ohio-1577, at paragraph one of the syllabus. This Court, therefore, must determine whether Mr. Garrett’s sentence is void under *Boswell*.

{¶8} In *Boswell*, the trial court failed to include post-release control in its sentencing entry. *Id.* at ¶2. Following its “recent line of cases dealing with postrelease control,” the Ohio Supreme Court concluded that Mr. Boswell’s sentence was void because the entry “fail[ed] to impose a mandatory term of postrelease control.” *Id.* at ¶8. Unlike in *Boswell*, the trial court in this case wrote that, “[a]fter release from prison, [Mr. Garrett] is ordered to a period of post-release control for 5 years.” The trial court, therefore, correctly sentenced Mr. Garrett to a mandatory five-year term of post-release control. Accordingly, Mr. Garrett’s sentence is not void and his motion to withdraw his guilty plea was a postsentence motion.

PLEA COLLOQUY REQUIREMENTS

{¶9} “[U]nless a plea is knowingly, intelligently, and voluntarily made, it is invalid.” *State v. Clark*, 119 Ohio St. 3d 239, 2008-Ohio-3748, at ¶25. “To ensure that pleas conform to these high standards, the trial judge must engage the defendant in a colloquy before accepting his or her plea.” *Id.* at ¶26. “[I]n conducting this colloquy, the trial judge must convey accurate information to the defendant so that the defendant can understand the consequences of his or her decision and enter a valid plea.” *Id.* The court “may not accept a plea of guilty . . . without addressing the defendant personally and (1) ‘[d]etermining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, . . . ’ (2) informing the defendant of the effect of the specific plea and that the court may proceed with judgment and sentencing after accepting it, and ensuring that the defendant understands these facts, and (3) informing the defendant that entering a plea of guilty . . . waives the constitutional rights to a jury trial, to confrontation, to compulsory process, and to the requirement of proof of guilt beyond a reasonable doubt and determining that the defendant understands that fact.” *Id.* at ¶27 (quoting Crim. R. 11(C)(2)).

{¶10} “If a trial court fails to literally comply with Crim.R. 11, reviewing courts must engage in a multitiered analysis to determine whether the trial judge failed to explain the defendant’s constitutional or nonconstitutional rights and, if there was a failure, to determine the significance of the failure and the appropriate remedy.” *Id.* at ¶30. If the court has failed to explain “the constitutional rights set forth in Crim.R. 11(C)(2)(c), the . . . plea is invalid.” *Id.* at ¶31. If the court, however, has “imperfectly explained nonconstitutional rights such as the right to be informed of the maximum possible penalty and the effect of the plea, a substantial-compliance rule applies.” *Id.* “Under this standard, a slight deviation from the text of the rule is

permissible; so long as the totality of the circumstances indicates that ‘the defendant subjectively understands the implications of his plea and the rights he is waiving,’ the plea may be upheld.” *Id.* (quoting *State v. Nero*, 56 Ohio St. 3d 106, 108 (1990)).

{¶11} If the trial court has not substantially complied with Criminal Rule 11, the “reviewing court[] must determine whether the trial court *partially* complied or *failed* to comply with the rule.” *Id.* at ¶32. If the court “partially complied, e.g., by mentioning mandatory postrelease control without explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect.” *Id.* “The test for prejudice is ‘whether the plea would have otherwise been made.’” *Id.* (quoting *Nero*, 56 Ohio St. 3d at 108). If the court “completely failed to comply with the rule, e.g., by not informing the defendant of a mandatory period of postrelease control, the plea must be vacated.” *Id.* (citing *State v. Sarkozy*, 117 Ohio St. 3d 86, 2008-Ohio-509, at paragraph two of the syllabus). “A complete failure to comply with the rule does not implicate an analysis of prejudice.” *Sarkozy*, 2008-Ohio-509, at ¶22.

SUBSTANTIAL COMPLIANCE

{¶12} Mr. Garrett has argued that the trial court failed to tell him during the plea colloquy that, because he was convicted of a first-degree felony, post-release control was mandatory. He has also argued that the court was not clear that the duration of the post-release control was five years.

{¶13} Mr. Garrett did not have a constitutional right to be advised of post-release control. See *Francis*, 2004-Ohio-6894, at ¶29 (identifying the requirement that the trial court inform a defendant of “the maximum penalty involved” as a “nonconstitutionally based matter[.]”). Accordingly, even though the trial court should have told Mr. Garrett that post-release control was mandatory for five years, this Court must analyze whether it substantially-

complied with Criminal Rule 11(C)(2). *Clark*, 2008-Ohio-3748, at ¶31. “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.” *State v. Nero*, 56 Ohio St. 3d 106, 108 (1990).

{¶14} In *Watkins v. Collins*, 111 Ohio St. 3d 425, 2006-Ohio-5082, the Ohio Supreme Court considered a writ of habeas corpus from twelve inmates who were incarcerated for violating post-release control. *Id.* at ¶27. Although “each of the petitioners was subject to a mandatory term of postrelease control based upon their convictions[,] . . . the language of their trial court sentencing entries mistakenly included some discretionary language concerning their terms of postrelease control.” *Id.* at ¶42. The Supreme Court acknowledged that the journal entries “erroneously refer to discretionary instead of mandatory postrelease control,” but determined that they were “sufficient to afford notice to a reasonable person that the courts were authorizing postrelease control as part of each petitioner’s sentence.” *Id.* at ¶51. It, therefore, concluded that the defendants had notice of post-release control and could have challenged the propriety of their sentences on direct appeal. *Id.* Accordingly, it denied their writ.

{¶15} While *Watkins* is procedurally different from this case, the Ohio Supreme Court has applied it to other situations. In *State v. Holloway*, 8th Dist. Nos. 86426 and 86427, 2006-Ohio-2591, the Eighth District concluded that “the trial court’s failure to advise Holloway [at the plea hearing] that his post-release control was mandatory rendered his plea invalid.” *State v. Holloway*, 8th Dist. Nos. 86426 and 86427, 2007-Ohio-2221, at ¶1. The Ohio Supreme Court reversed its decision, however, “on the authority of *Watkins*” *State v. Holloway*, 111 Ohio St. 3d 496, 2006-Ohio-6114, at ¶2. On remand, the Eighth District concluded that *Watkins* stood for the principle that “the failure to inform a defendant of the mandatory nature of post-release

control d[oes] not render the plea . . . invalid.” *Holloway*, 2007-Ohio-2221, at ¶2. The First District has also reached that conclusion based on the Supreme Court’s reversal in *Holloway*. *State v. Fuller*, 1st Dist. No. C-040318, 2007-Ohio-1020, at ¶9. In *Fuller*, the court wrote that “the supreme court’s decision [in *Holloway*] can only be read to renounce the rule, applied by the Eighth Appellate District in its decision, that a trial court violates its duty under Crim.R. 11(C)(2)(a) when it misinforms a defendant that a mandatory period of post-release control is discretionary.” *Id.* The court concluded that, even though the trial court in that case told Mr. Fuller at his plea hearing that post-release control was discretionary, it substantially complied with Criminal Rule 11(C)(2)(a). *Id.* at ¶10.

{¶16} This Court agrees with the conclusions reached by the First and Eighth Districts. Although the trial court misinformed Mr. Garrett at the plea colloquy that post-release control would be “up to five years,” it substantially complied with Criminal Rule 11(C)(2)(a). See *Watkins*, 2006-Ohio-5082, at ¶51.

{¶17} Mr. Garrett has argued that this case is controlled by *State v. Sarkozy*, 117 Ohio St. 3d 86, 2008-Ohio-509. In *Sarkozy*, the Supreme Court held that, “[i]f the trial court fails during the plea colloquy to advise a defendant that the sentence will include a mandatory term of postrelease control, the court fails to comply with Crim.R. 11, and the reviewing court must vacate the plea and remand the cause.” *Id.* at paragraph two of the syllabus.

{¶18} While the syllabus cited by Mr. Garrett contains broad language, it must be construed in light of the Supreme Court’s full opinion. See S. Ct. R. Rep. Op. 1(B)(1). In *Sarkozy*, the trial court completely failed to tell Mr. Sarkozy about post-release control during his plea hearing. *Sarkozy*, 2008-Ohio-509, at ¶4. Although the State argued substantial compliance, the Supreme Court determined that the test did not apply because there was no compliance. *Id.*

at ¶22. The Supreme Court wrote that “[t]he trial court did not merely misinform Sarkozy about the length of his term of postrelease control. Nor did the court merely misinform him as to whether postrelease control was mandatory or discretionary. Rather, the court failed to mention postrelease control at all during the plea colloquy.” *Id.* The Supreme Court distinguished *Watkins*, concluding that there must be “some compliance” to prompt “a substantial-compliance analysis.” *Id.* at ¶23.

{¶19} Accordingly, while the syllabus in *Sarkozy* appears to apply to this case, it only actually applies to cases in which the trial court has completely failed to tell the defendant about post-release control. This case is one of those distinguished by the Supreme Court in *Sarkozy*, in which the trial court “merely misinform[ed the defendant] about the length of his term [or] . . . as to whether postrelease control was mandatory or discretionary.” *Id.* at ¶22.

MANIFEST INJUSTICE

{¶20} Because the trial court substantially complied with Rule 11(C)(2) of the Ohio Rules of Criminal Procedure, this Court concludes that Mr. Garrett has failed to demonstrate manifest injustice. The trial court, therefore exercised proper discretion when it denied his motion to withdraw his guilty plea. Mr. Garrett’s assignment of error is overruled.

CONCLUSION

{¶21} The trial court correctly concluded that it substantially complied with Criminal Rule 11(C)(2) when it told Mr. Garrett about post-release control during his plea colloquy. Accordingly, it properly denied his motion to withdraw his guilty plea. The judgment of Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
CONCURS

BELFANCE, J.
CONCURS, SAYING:

{¶22} While I agree with the result reached by the majority, and most of its analysis, I write separately as I cannot conclude that the trial court substantially complied with Crim.R. 11(C)(2) during Garrett’s plea colloquy, in light of the Supreme Court of Ohio’s recent decision in *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748.

{¶23} The *Clark* Court stated that:

“if the trial judge imperfectly explained nonconstitutional rights such as the right to be informed of the maximum possible penalty and the effect of the plea, a substantial-compliance rule applies. Under this standard, a slight deviation from

the text of the rule is permissible; so long as the totality of the circumstances indicates that the defendant subjectively understands the implications of his plea and the rights he is waiving, the plea may be upheld. When the trial judge does not *substantially* comply with Crim.R. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court *partially* complied or *failed* to comply with the rule. If the trial judge partially complied, e.g., by mentioning mandatory postrelease control without explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect. The test for prejudice is whether the plea would have otherwise been made.” (Emphasis *sic*; internal citations and quotations omitted.) *Id.* at ¶¶ 31-32.

While the line between substantial compliance and partial compliance is not clearly drawn, I cannot determine that the misinformation the trial court provided to Garrett constituted a “slight” deviation from the rule. The trial court informed Garrett that he was “subject to a period of post-release control of *up to* five years * * *.” (Emphasis added.) However, Garrett was actually subject to five years of mandatory post-release control. Thus, the information the trial court provided to Garrett at the plea hearing was inaccurate and misleading, and did not inform him that by pleading guilty Garrett would inevitably be subject to five years of post-release control upon his release from prison.

{¶24} I read *Clark* to provide that if the trial court’s deviation from the rule is more than slight, as is the case here, then the appellate court must determine if the trial court partially complied, or failed to comply. *Id.* Here the trial court did not completely ignore the requirements of Crim.R. 11(C)(2), and did inform Garrett that he would be subject to some term of post-release control, with a potential maximum of five years. Thus, the trial court partially complied with the rule.

{¶25} As I determine the trial court partially complied with Crim.R. 11(C)(2), Garrett’s plea can only be vacated if Garrett demonstrates prejudice, which requires him to show that absent the error he would not have entered the plea. *Id.* As Garrett did not develop a prejudice argument in his brief, I would uphold his plea.

APPEARANCES:

JANA DELOACH, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellee.