

[Cite as *State v. Gillespie*, 2009-Ohio-2785.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24248

Appellee

v.

DERRICK D. GILLESPIE

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 07 11 3883

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 15, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Derrick Gillespie, appeals from the judgment of the Summit County Court of Common Pleas. This Court reverses.

I.

{¶2} On November 27, 2007, Appellant, Derrick Gillespie, was indicted on one count of aggravated robbery, in violation of R.C. 2911.01(A)(1), a felony of the first degree with a firearm specification, two counts of robbery, in violation of R.C. 2911.02(A)(1)(2), a felony of the second degree with a firearm specification, and three counts of having a weapon while under disability, in violation of R.C. 2923.13(A). On March 28, 2008, Gillespie pled guilty to one count of robbery, which was amended to a third degree felony. Pursuant to the plea agreement, the remaining counts were dismissed. On May 5, 2008, Gillespie was sentenced to four years of incarceration. Gillespie timely appealed the trial court’s decision. He has raised two

assignments of error for our review. We have rearranged Gillespie's assignments of error to facilitate our review.

II

ASSIGNMENT OF ERROR II

“THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ACCEPTING [GILLESPIE’S] GUILTY PLEA ON THE GROUNDS THAT UNDER STATE V. SARKOZY [] THE TRIAL COURT FAILED TO COMPLY WITH CRIM. R. 11 DURING [GILLESPIE’S] PLEA COLLOQUY BY NOT ADVISING [GILLESPIE] THAT HIS SENTENCE WOULD INCLUDE A MANDATORY TERM OF POSTRELEASE CONTROL[.]”

{¶3} In Gillespie's second assignment of error, he contends that the trial court committed reversible error when it failed to comply with Crim.R. 11 during the plea colloquy by failing to advise him that his sentence would include a mandatory term of post-release control. We agree.

{¶4} A criminal plea must be entered knowingly, voluntarily, and intelligently. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, at ¶7. If it is not, enforcement of the plea is unconstitutional. *Id.*, quoting *State v. Engle* (1996), 74 Ohio St.3d 525, 527. In evaluating whether a right was violated, strict compliance with Crim.R. 11 is preferred, but not required, provided that the court substantially complied with the rule. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. “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.” *Id.* Furthermore, an error involving a nonconstitutional right “will not invalidate a plea unless the defendant thereby suffered prejudice.” *Sarkozy*, *supra*, at ¶20, quoting *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, at ¶12. This requires a showing that, but for the error, the plea would not have been made. *Id.* This Court, ordinarily, must review the totality of the circumstances

surrounding the guilty pleas to determine whether the defendant subjectively understood the effect of his pleas. *Id.*

{¶5} Crim.R. 11(C)(2)(a) requires that, in a felony case, before accepting a guilty plea, a trial court must address the defendant and determine “that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved[.]” This Court has held that “[t]erms of post-release control are part of a defendant’s actual sentence.” *State v. Gordon*, 9th Dist. No. 07CA0055, 2008-Ohio-341, at ¶5, citing *Woods v. Telb* (2000), 89 Ohio St.3d 504. A plea is not voluntary if it is entered “[w]ithout an adequate explanation of post-release control from the trial court” because in that case, the defendant will be unable to “fully understand the consequences of his plea as required by Crim.R. 11(C).” *State v. Griffin*, 8th Dist. No. 83724, 2004-Ohio-4344, at ¶13, quoting *State v. Jones* (May 24, 2001), 8th Dist. No. 77657, at *2.

{¶6} Gillespie entered a guilty plea to one count of robbery, a felony of the third degree. Before accepting the plea, the trial court confirmed that he understood the nature of the charges against him and the potential penalty. Gillespie has correctly pointed out that the robbery charge to which he pleaded guilty, carries a mandatory term of post-release control pursuant to R.C. 2929.14(F)(1) and R.C. 2967.28(B)(3).

{¶7} During the plea colloquy, the trial court did not mention post-release control. This Court has previously held that a trial court failed to substantially comply with Crim.R. 11 because it did not mention applicable post-release control during a plea hearing and there was no written plea agreement referencing post-release control. *Gordon*, *supra*, at ¶7. The Ohio Supreme Court has also held that, if a trial court accepts a plea without mentioning post-release control to the defendant during the colloquy, it has failed to comply with Crim.R. 11. *Sarkozy*,

supra, at ¶22. The State has conceded that the trial court failed to mention post-release control during the colloquy and that this failure to mention post-release control renders the plea involuntary and warrants reversal.

{¶8} As the Court did not mention post-release control at all during the plea hearing, Gillespie was also not informed by the court of the consequences of violating that sanction, including a return to prison. See R.C. 2943.032(E). When the trial court has not even mentioned post-release control at the plea hearing, this Court is obligated to vacate the plea without analyzing whether the defendant suffered prejudice from that failure. *Sarkozy*, at paragraph two of the syllabus. Gillespie’s second assignment of error is sustained.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FOUND [GILLESPIE] GUILTY [OF] ROBBERY ON THE GROUNDS THAT THE INDICTMENT WAS FATALY DEFECTIVE UNDER STATE V. COLON [] BECAUSE THE INDICTMENT DID NOT CHARGE THE MENS REA ELEMENT FOR THAT OFFENSE[.]”

{¶9} Our disposition of Gillespie’s second assignment of error, renders his first assignment of error moot.

III.

{¶10} Gillespie’s second assignment of error is reversed. His first assignment of error is moot. The judgment of the Summit County Court of Common Pleas is reversed.

Judgment reversed
and cause remanded.

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 Appellee.

CARLA MOORE
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

APPEARANCES:

JILL R. FLAGG, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.