

[Cite as *State v. Gardner*, 2009-Ohio-6505.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF LORAIN    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No.    08CA009520

Appellee

v.

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF LORAIN, OHIO  
CASE No.    04CR064818

JABARI GARDNER

Appellant

DECISION AND JOURNAL ENTRY

Dated: December 14, 2009

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BELFANCE, Judge.

{¶1} Defendant-Appellant Jabari Gardner appeals the decision of the Lorain County Common Pleas Court denying his motion to withdraw his guilty plea. For reasons set forth below, we reverse.

I.

{¶2} In 2004 Gardner was charged with felonious assault in violation of R.C. 2903.11 along with two attendant firearm specifications and attempted murder in violation of R.C. 2923.02(A)/2903.02(A) along with two accompanying firearm specifications. Gardner pled guilty to the indictment in 2005 and was sentenced to a total of nine years. The sentencing entry did not specify the duration or nature of the post-release control sanction that Gardner would be subject to upon his release. In October 2008, Gardner filed a pro se motion to vacate his guilty plea and requested an oral hearing. The State did not respond. In an entry dated December 9, 2008, the trial court denied Gardner’s motion without a hearing and ordered that Gardner be

resentenced.<sup>1</sup> It is from this entry that Gardner has appealed raising four assignments of error all related to his guilty plea.

## II.

{¶3} Initially we must determine if Gardner’s motion to withdraw his plea should be considered a presentence or post-sentence motion. “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.” Crim.R. 32.1. Despite the fact that Gardner was originally sentenced in 2005, the Supreme Court of Ohio recently held that “[a] motion to withdraw a plea of guilty or no contest made by a defendant who has been given a void sentence must be considered as a presentence motion under Crim.R. 32.1.” *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at syllabus. Thus, if Gardner’s 2005 sentencing entry is void, Gardner’s motion to vacate his guilty plea must be considered a presentence motion. *Id.* Gardner pled guilty to attempted murder in violation of R.C. 2923.02(A)/2903.02(A), a first-degree felony. R.C. 2923.02(E)(1). Pursuant to R.C. 2967.28(B)(1), Gardner was subject to a mandatory five-year term of post-release control. Gardner’s 2005 sentencing entry specifies neither the term nor the nature of the post-release control Gardner was subject to upon his release from prison. “In cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant

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<sup>1</sup> The record indicates that Gardner was resentenced on January 9, 2009. The 2009 sentencing entry correctly provides that Gardner is subject to a mandatory five years of post-release control upon his release from prison. See R.C. 2967.28(B)(1).

has completed his sentence.” *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at syllabus. Thus, Gardner’s 2005 sentencing entry is void and his motion should have been considered as a pre-sentence motion.<sup>2</sup>

### III.

#### ASSIGNMENT OF ERROR I

“THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED MR. GARDNER’S CRIM.R. 32.1 MOTION TO VACATE GUILTY PLEA, THEREBY DENYING HIM DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 2, 10, AND 16 OF THE OHIO CONSTITUTION.”

#### ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. GARDNER DURING THE PLEA HEARING WHEN IT DID NOT INFORM HIM OF HIS CONSTITUTIONAL RIGHT TO ‘COMPULSORY PROCESS,’ THEREBY FAILING TO ‘STRICTLY COMPLY’ WITH OHIO CRIM.R. 11(C)(2)(c) IN VIOLATION OF SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I SECTION 10 OF THE OHIO CONSTITUTION.”

{¶4} Initially we note that the trial court does not specify in its entry whether it considered the motion as a pre- or post-sentence motion. As detailed above, under these circumstances, it was appropriate to consider Gardner’s motion as a pre-sentence motion. Gardner argues in his first and second assignments of error that the trial court abused its discretion in denying his motion to withdraw his guilty plea as the trial court failed to inform Gardner at his plea hearing of his right to compulsory process. The right to compulsory process is a constitutional right; thus, mandating “strict, or literal, compliance” by the trial court with the

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<sup>2</sup> However, we do not vacate the sentence and remand for resentencing, as the Supreme Court did in *Boswell*, as Gardner was resentenced in 2009.

Crim.R. 11(C)(2)(c) notification. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, at ¶18. As the trial court's failure to strictly comply with the constitutional requirements of Crim.R. 11(C)(2)(c) notification would entitle Gardner to withdraw his plea under either the pre- or post-sentence standard, we see no need to remand the matter to the trial court in order for it articulate and apply the appropriate standard. We thus proceed to analyze Gardner's motion as a presentence motion and conclude that his assignments of error have merit.

¶5 “[A] presentence motion to withdraw a guilty plea should be freely and liberally granted.” *Boswell* at ¶1, quoting *State v. Xie* (1992), 62 Ohio St.3d 521, 527. “Even so, it is the defendant's burden to demonstrate ‘a reasonable and legitimate basis for withdrawing a plea[.]’” *State v. Razo*, 9th Dist. No. 08CA009509, 2009-Ohio-3405, at ¶12, quoting *State v. DeWille* (Nov. 4, 1992), 9th Dist. No. 2101, at \*1. Generally, this Court reviews a motion to withdraw a guilty plea for an abuse of discretion. *State v. Bigelow*, 9th Dist. No. 08CA0072-M, 2009-Ohio-4093, at ¶6. However, in so doing, “we consider the trial court's action with reference to the nature of the underlying matter.” See, e.g., *In re L.W.*, 9th Dist. No. 24632, 2009-Ohio-5543, at ¶17. An abuse of discretion “connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. We have stated that:

“A trial court does not abuse its discretion in denying a motion to withdraw a plea when the following three elements were present: 1) the defendant was represented by competent counsel; 2) the trial court provided the defendant with a full hearing before entering the guilty plea; and 3) the trial court provided the defendant with a full hearing on the motion to withdraw his guilty plea and considered the defendant's arguments in support of his motion to withdraw his guilty plea.” *Bigelow* at ¶6, quoting *State v. Brown*, 9th Dist. No. 23759, 2007-Ohio-7028, at ¶15, quoting *State v. Daugherty*, 9th Dist. No. 05CA0058, 2006-Ohio-2684, at ¶16.

{¶6} During his plea, Gardner was represented by counsel, thus satisfying the first element listed above. Thus, we next examine whether Gardner received a full hearing before entering the guilty plea. “The requirement that a trial court provide the defendant with a hearing before the defendant enters a guilty plea necessitates a determination as to whether such a plea is entered knowingly, voluntarily, and intelligently.” *State v. Robinson*, 9th Dist. No. 21583, 2004-Ohio-963, at ¶31. “[I]n order to make certain that a plea is made knowingly and intelligently, a trial court is required to engage in an oral dialogue with the defendant in accordance with Crim.R. 11(C)(2).” *Id.* at ¶32. The analysis of whether the trial court complied with the notification requirements under Crim.R. 11(C)(2)(c) presents us with a question of law, which we thus review de novo. See, e.g. *State v. Hochstetler*, 9th Dist. No. 03CA0025, 2004-Ohio-595, at ¶10.

{¶7} “Crim.R. 11(C) governs the process that a trial court must use before accepting a felony plea of guilty or no contest.” *Veney* at ¶8. Crim.R. 11(C)(2) provides in pertinent part:

“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:

“\* \* \*

“(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.” (Emphasis added.)

The right to compulsory process is a constitutional right; thus, mandating “strict, or literal, compliance” by the trial court with the Crim.R. 11(C)(2)(c) notification. *Veney* at ¶18. Further, “the trial court must orally inform the defendant of the rights set forth in Crim.R. 11(C)(2)(c) during the plea colloquy for the plea to be valid. Although the trial court may vary slightly from

the literal wording of the rule in the colloquy, the court cannot simply rely on other sources to convey these rights to the defendant.” Id. at ¶29. “When the record confirms that the trial court failed to perform this duty, the defendant's plea is constitutionally infirm, making it presumptively invalid.” Id.

{¶8} At the plea hearing the following discussion took place between the trial court and Gardner concerning Gardner’s constitutional rights:

“[The Court]: Do you understand that when you enter this plea today you give up your right to a trial by jury?

“[Gardner]: Yes.

“[The Court]: You give up the right to face and confront witnesses who would testify against you?

“[Gardner]: Yes.

“[The Court]: You give up the right to call witnesses who would testify for you; do you understand?

“[Gardner]: Yes.

“[The Court]: When you enter this plea today, you give up your right to remain silent, because you’ve made an admission in open court; do you understand?

“[Gardner]: Yes.

“[The Court]: You’ve given up the right to have the State prove your guilt beyond a reasonable doubt; do you understand?

“[Gardner]: Yes.”

{¶9} While the trial court does inform Gardner that he has a right to call witnesses to testify for him, the court does not inform him that Gardner can use the court’s subpoena power to compel the witnesses’ attendance. As noted by the Eighth District Court of Appeals: “[A] trial court need not specifically tell a defendant that he has the right to compulsory process, it must nonetheless inform a defendant that he has the power to force, compel, subpoena or otherwise

cause a witness to appear and testify on the defendant's behalf.” (Internal quotations and citations omitted.) *State v. Smith*, 8th Dist. No. 92320, 2009-Ohio-5692, at ¶35. “Otherwise, the logical import of the court's notice is that the *defendant could present such witnesses as he could only secure through his own efforts.*” (Emphasis in original.) *State v. Wilson*, 8th Dist. No. 82770, 2004-Ohio-499, at ¶16. Thus in the instant case, the trial court did not effectively inform Gardner of his right to compulsory process. See, e.g., *Smith* at ¶35 (“[A]lthough the trial court did tell Smith that he had the right to bring in witnesses who could testify on his behalf, the trial court failed to explain to Smith that he could use the subpoena power of the court to compel those individuals to appear and that he did not have to secure witnesses on his own.”); *State v. Robinson*, 6th Dist. No. E-07-020, 2009-Ohio-2921, at ¶22 (“The trial court did not discuss the constitutional right to compulsory process to compel attendance witnesses at trial, either to explain the nature of the right or to determine that appellant understood that he waived the right by pleading guilty[,]” rendering appellant’s plea invalid.); *State v. Robinson*, 9th Dist. No. 21583, 2004-Ohio-963, at ¶37, quoting *State v. Ballard* (1981), 66 Ohio St.3d 473, paragraph two of the syllabus; (“The transcript from the sentencing hearing on the felonious assault charge reveals that the trial court in fact did not inform Mr. Robinson of the fact, that, in entering a guilty plea, he was waiving his constitutional right to compulsory process as enumerated in Crim.R. 11(C)(2)(c). The trial court neither cited this right during the hearing, nor explained the right in a manner ‘reasonably intelligible’ to Mr. Robinson.”). The failure to inform a defendant of his or her constitutional rights at the time of the plea renders the plea invalid. *Veney* at ¶30.

{¶10} Further, we note that the trial court did not hold a hearing on Gardner’s motion to vacate his guilty plea, despite his request that the court do so. In light of the trial court’s failure to strictly comply with the Crim.R. 11(C)(2)(c) notification requirements, and the trial court’s

failure to hold a hearing on Gardner's motion to withdraw his plea, we conclude that the trial court committed reversible error in denying Gardner's motion to withdraw his guilty plea. Thus, we sustain Gardner's first and second assignments of error.

## IV.

## ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. GARDNER DURING THE PLEA HEARING PRIOR TO ACCEPTING HIS GUILTY PLEA WHEN IT FAILED TO PROPERLY INFORM HIM OF THE LENGTH OF THE 'MANDATORY TERMS' OF POST-RELEASE CONTROL-THE MAXIMUM PENALTY INVOLVED PURSUANT TO CRIM.R. 11(C)(2)(a) IN VIOLATION OF THE FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION."

## ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. GARDNER WHEN THE JUDGE'S PARTICIPATION IN PLEA BARGAINING PROCESS INTIMIDATED HIM INTO ACCEPTING PLEA BARGAIN, THEREBY AFFECTING VOLUNTARINESS OF HIS GUILTY PLEA IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶11} The Court need not address Gardner's third and fourth assignments of error as our disposition of his first and second assignments of error renders them moot.

## V.

{¶12} In light of the foregoing, we sustain Gardner's first and second assignments of error, do not reach his third and fourth assignments of error, and remand this matter for proceedings consistent with this opinion.

Judgment reversed  
and cause remanded.



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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 Lorain, 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.

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EVE V. BELFANCE  
FOR THE COURT

MOORE, P. J.  
CONCURS

DICKINSON, J.  
CONCURS IN JUDGMENT ONLY, SAYING:

{¶13} The trial court made a mistake of law by failing to permit Mr. Gardner to withdraw his guilty plea. Accordingly, I join in the majority's judgment.

APPEARANCES:

JABARI GARDNER, pro se, Appellant.

DENNIS WILL, Prosecuting Attorney, and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for Appellee.