[Cite as *State v. Loyd*, 2011-Ohio-2964.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Appellee

v.

John (Jack) S. Loyd

Appellant

Court of Appeals Nos. E-10-055
E-10-056

Trial Court No. 2010-CR-164

DECISION AND JUDGMENT

Decided: June 17, 2011

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Timothy H. Dempsey, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} Defendant-appellant, John S. Loyd, appeals his conviction and sentence on seven counts of theft. He raises two assignments of error:

{¶ 2} "I. The trial court misinformed the defendant regarding judicial release at the plea hearing.

{¶ 3} "II. The sentence of 12 years is excessive and an abuse of discretion."

{¶ 4} Finding merit in appellant's first assignment of error, we reverse the judgment of the Erie County Court of Common Pleas.

{¶ 5} The salient facts in this case are undisputed. On June 10, 2010, appellant was indicted on eight counts of theft in violation of R.C. 2913.02(A)(3), one of which was charged as a felony of the second degree, one as a felony of the fifth degree, two as felonies of the third degree, and four as felonies of the fourth degree. On August 19, 2010, appellant pled guilty to seven of the eight counts as amended by a negotiated plea agreement. Essentially, the second-degree felony charge was reduced to a third-degree felony, three of the fourth-degree felony charges were reduced to fifth-degree felonies, and the originally charged fifth-degree felony was dismissed.

{¶ 6} Prior to accepting the pleas, the trial court addressed appellant personally and made all the required disclosures and determinations under Crim.R. 11(C)(2). In the course of its colloquy, however, the trial court added the following information:

{¶ 7} "THE COURT: Do you understand that if you went to prison in this matter you would be eligible for what's called judicial release, early release from prison, but in order to be considered for that you or your attorney would have to file a motion or make application with this Court.

{¶ 8} "MR. LOYD: Right.

{¶ 9} "THE COURT: And the Court has said it would consider judicial release and, obviously, the Court would have to—to consider the wishes of the victims in this case as well, you understand that?

{¶ 10} "MR. LOYD: Yes."

{¶ 11} After accepting appellant's pleas, the trial court held a sentencing hearing on September 23, 2010. The trial court imposed an aggregate prison term of 12 years, which rendered appellant ineligible for judicial release under R.C. 2929.20(A). The day after the trial court entered its judgment on September 29, 2010, appellant's attorney moved the court to reconsider its sentence on grounds that "[j]udicial release was discussed with the defendant at the time of the plea," that "the offenses he pled to enabled him to do this after 6 months in prison," and that "his current sentence does not allow him to apply for such relief at all."

{¶ 12} Appellant also sent his own handwritten letter to the trial judge, entitled "Request for Appeal." The letter is hand-dated "Sat. 9/25/2010," two days after the sentencing hearing, but filed-stamped October 18, 2010. In pertinent part, the letter reads:

{¶ 13} "You stated on my last pre-trial that I would serve six (6) months of sentencing and then apply for a 'Judicial Release' so I therefore pleaded guilty to all charges. [My attorney] on Thursday said any time beyond ten (10) years would not be eligible for Judicial Release. Now, I am confused."

{¶ 14} The trial court faxed appellant's letter to the court of appeals, where it was assigned case No. E-10-055. On October 29, 2010, appellant's counsel filed a notice of appeal from the trial court's judgment of September 29, 2010, and that appeal was designated case No. E-10-056. On November 12, 2010, this court consolidated those appeals.

{¶ 15} In his first assignment of error, appellant contends that his guilty pleas were not knowingly and intelligently made because the trial court misrepresented his eligibility for judicial release. Specifically, appellant argues that the trial court misled him by representing at the plea hearing that he would be eligible for judicial release and then imposing a sentence that rendered him ineligible for judicial release.

{¶ 16} A plea of guilty or no contest in a criminal case "must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle* (1996), 74 Ohio St.3d 525, 527.

{¶ 17} Pursuant to Crim.R. 11(C)(2), "felony defendants are entitled to be informed of various constitutional and nonconstitutional rights, prior to entering a plea." *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶ 6. While failure to adequately inform a defendant with respect to constitutional rights would invalidate a guilty plea "under a presumption that it was entered involuntarily and unknowingly," failure to accurately explain nonconstitutional rights is subject to review under a standard of substantial compliance. Id. at ¶ 12. "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." (Citations omitted.) *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

{¶ 18} Crim.R. 11(C)(2) does not require a trial court to advise a defendant in regard to eligibility for judicial release. See *State v. Smith*, 5th Dist. No. CT2007-0073, 2008-Ohio-3306, ¶ 17; *State v. Sherman*, 5th Dist. No. 2009-CA-132, 2010-Ohio-3959, ¶ 17. Nevertheless, when a defendant's guilty plea is induced by erroneous representations as to the applicable law, including eligibility for judicial release, the plea has not been entered knowingly and intelligently. *Sherman*, 2010-Ohio-3959, ¶ 38-41; *State v. Mitchell*, 11th Dist. No. 2004-T-0139, 2006-Ohio-618, ¶ 15. See, also, *Engle*, supra, 74 Ohio St.3d at 528 (allowing withdrawal of no-contest plea that was predicated on inaccurate representations as to defendant's right to appeal the trial court's ruling on a motion in limine).

{¶ 19} In order to establish the necessary inducement to vacate a guilty plea, the defendant must make a two-part showing. First, the defendant must show that he or she was misinformed as to the applicable law. In *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶ 39, the Supreme Court of Ohio explained that "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." See, also, *State v. Sherman*, supra, 2010-Ohio-3959, ¶ 41 (although

trial court is not obligated to discuss a defendant's eligibility for judicial release during a plea colloquy, such information, if conveyed, must be accurate).

{¶ 20} Second, the defendant must demonstrate that he or she was prejudiced by the misinformation. In *State v. Nero*, supra, 56 Ohio St.3d at 108, the Ohio Supreme Court specified that "a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. * * * The test is whether the plea would have otherwise been made." (Citations omitted.) Thus, in cases involving misstatements as to judicial release, "the defendant must demonstrate * * * that but for the misrepresentation regarding judicial release, he would not have entered the plea." *Mitchell*, supra, 2006-Ohio-618, ¶ 15. In other words, the record must reflect that "the defendant would have pled differently had he been told that he was ineligible for judicial release." *State v. Simpson*, 10th Dist. No. 07AP-929, 2008-Ohio-2460, ¶ 10.[1]

{¶ 21} In this case, the state argues that "the record does not suggest that appellant would not have entered his plea had the trial court advised him of his ineligibility [for judicial release]." In support, appellant places heavy reliance on this court's decision in

[1]We note that appellant's failure to file a motion to withdraw his plea in the trial court does not preclude him from challenging the knowing, intelligent, and voluntary nature of his plea in this court. A defendant may seek to vacate his guilty plea either by filing a motion to withdraw the plea in the trial court or upon direct appeal. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, paragraph one of the syllabus. See, also, *State v. Ealom*, 8th Dist. No. 91455, 2009-Ohio-1365, ¶ 5, fn. 1 (applying *Sarkozy* where the purported misinformation concerned defendant's eligibility for judicial release).

State v. Sheeks, 6th Dist. No.WD-09-031, 2010-Ohio-94. We disagree, finding *Sheeks* to be factually dissimilar.

{¶ 22} In *Sheeks*, the defendant sought to vacate his guilty plea on the basis that the state and the trial court had misrepresented that he would be eligible for judicial release after serving ten years of a stipulated 15-year sentence. The record in that case revealed that as part of the plea agreement, Sheeks was granted furlough to spend two days with his family over the 2008 Christmas holiday. He took advantage of the furlough but failed to return to custody when required, which resulted in an escape charge. It was only after Sheeks had received the benefit of the furlough that he sought to withdraw his guilty plea. Yet, at the hearing on his initial motion to withdraw his plea, Sheeks never referred to any misrepresentation concerning judicial release as a ground for withdrawing his plea; the issue was raised a month later by appellant's new appointed counsel upon a renewed motion to withdraw the plea.

{¶ 23} Based on those facts, we found "no evidence in the record before us to suggest, first, that appellant had a belief that he would be eligible for judicial release and, second, that such a belief induced his guilty plea." Id. at ¶ 16. We also considered it significant that "appellant did not ask any questions about judicial release [at the plea hearing] that would have indicated that the possibility of early release was a significant factor in his decision to plead guilty." Id. at 14.

{¶ 24} In contrast, the record in this case clearly reflects that appellant's guilty pleas were predicated on a belief that he would be eligible for judicial release. Appellant,

at 78 years of age, was pleading guilty to charges that carried a potential maximum penalty of 19 1/2 years incarceration. He was explicitly and unambiguously told by the trial court at his plea hearing that he "*would* be eligible for * * * judicial release" and that "the Court * * * *would* consider judicial release." Within two days after he was sentenced and informed by his trial counsel that the aggregate 12-year prison term rendered him ineligible for judicial release, appellant composed a letter to the trial judge explaining that he was confused because he had pled guilty in reliance on the court's statements in regard to judicial release. There is nothing in this record that indicates appellant was feigning reliance or insincere about his belief in regard to the possibility of early release from prison.

{¶ 25} Unlike in *Sheeks*, it was entirely unnecessary for appellant to have asked any questions about judicial release at the plea hearing in order to indicate that the possibility of early release was a significant factor in his decision to plead guilty. This is not a situation involving ambiguous or indirect statements made at the plea hearing by the court or the prosecutor, and appellant is not claiming that he relied on his own counsel's off-the-record representations about judicial release. In those situations, one would expect that a defendant who is concerned about the possibility of early release would ask the court for some clarification. In this case, however, the trial court expressly told appellant at the plea hearing that he would be eligible and considered for judicial release and, after each statement, elicited an affirmative response from appellant as to his understanding of that information. Under the present circumstances, appellant's failure to

ask any questions in regard to judicial release indicates only that he understood he would be eligible and considered for judicial release.

{¶ 26} The state also argues that "the record [does not] suggest that appellant's plea was based on his belief that he would *receive* judicial release." (Emphasis added.) Essentially, the state is proposing a test for prejudice under which a defendant must show that his or her plea was induced by erroneous representations that early release would actually be granted. Under such a standard, erroneous representations as to a defendant's *eligibility* for judicial release, or the *possibility* of judicial release, could never be found to have induced a plea. We cannot agree with such an insurmountable standard of demonstrating prejudicial reliance on misinformation concerning judicial release.

{¶ 27} It is true that at one point of our decision in *Sheeks*, we stated that the defendant failed to show that he "entered his plea based on a belief that he *would be given* early release." (Emphasis added.) Id. at ¶ 19. Viewed properly and in its entirety, however, our decision in *Sheeks* clearly reveals that a defendant does not have to show that his plea was predicated on a belief that early release would actually or probably be granted in order to establish prejudice. Thus, we carefully pointed out that "the trial court in the case before us made no representation to appellant regarding the *possibility or probability* of judicial release," that the record contained no evidence that "appellant had a belief that he would be *eligible* for judicial release," and that there was no evidence that appellant "would have pled differently if he had been told he was *ineligible* for judicial release." (Emphasis added.) Id. at ¶ 15, 16, 18.

{¶ 28} In *Engle*, the Ohio Supreme Court concluded that the defendant's plea was predicated on erroneous information that she could appeal a pretrial ruling without inquiring as to whether the appeal would have been successful or probably successful. *Engle*, supra, at 528. We cannot say that the possibility of early release from prison is so insignificant as to be incapable of inducing a guilty plea under any circumstances. Clearly, eligibility for judicial release is significant enough for the General Assembly to have established public policy on the matter under R.C. 2929.20.

{¶ 29} Considering the totality of the circumstances, we find that appellant was led by the trial court to believe he would be eligible for judicial release and that such a belief induced appellant's guilty pleas. Appellant's guilty pleas were not, therefore, made knowingly, intelligently, and voluntarily. However, we reject appellant's suggestion that the cause should be remanded solely for resentencing under this assignment of error. Appellant cannot vitiate his guilty pleas and have them too. The appropriate remedy where a plea is induced by erroneous representations as to the applicable law is to "remand this cause to the trial court with instructions that [appellant] be given the opportunity to withdraw [his] plea and proceed to trial." *Engle*, supra, 74 Ohio St.3d at 528. Indeed, this is essentially what the courts have done in all of the cases cited by appellant in which a defendant's plea was invalidated on the basis of erroneous representations in regard to eligibility for judicial release.

{¶ 30} Accordingly, appellant's first assignment of error is well-taken to the extent that his pleas were not made knowingly, intelligently, and voluntarily.

{¶ 31} In his second assignment of error, appellant maintains that the imposition of a 12-year sentence is excessive and constitutes an abuse of the trial court's discretion. While conceding that his sentence is within the permissible statutory range for the involved offenses, appellant argues that a 12-year term of incarceration is grossly disproportionate and out-of-line with sentences imposed in other cases upon "similarly situated defendants." In support, appellant refers to an eight-year sentence for theft that was purportedly handed down by a federal court in Youngstown in *U.S. v. Harris*, No.4:10-cr-00437-LW, and a judgment entry by the instant judge in *State v. Holeton* (Oct. 1, 2010), Erie C.P. No. 2010-CR-199, which imposed a sentence of three years upon a defendant who pled guilty to one count of theft in office and one count of tampering with evidence, both felonies of the third degree.

{¶ 32} R.C. 2929.11(B) provides that "[a] sentence imposed for a felony shall be * * * consistent with sentences imposed for similar crimes committed by similar offenders." In *State v. Elkins*, 6th Dist. No. S-08-014, 2009-Ohio-2602, ¶ 17, this court explained:

{¶ 33} "Consistent sentencing occurs when a trial court properly considers the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12 in every case. * * * Therefore, appellant cannot support an assignment of error of disproportionate sentencing solely based upon references to sentences imposed in other cases where defendants were sentenced for the same offense." (Citations omitted.)

{¶ 34} The only documentation that appellant has provided to this court upon which to compare sentences is a judgment entry by the court in *Holeton*. Indeed, the record does not include a transcript of the sentencing hearing in either *Holeton* or the present case. Appellant was sentenced on three counts of felony theft in the third degree, which involved thefts from elderly persons, three counts of felony theft of the fifth degree, and one count of felony theft of the fourth degree. The record further indicates that appellant had previously been found guilty of five counts of felony theft by deception in Ottawa County. It does not appear that the sentences imposed by the court in this case and *Holeton* were for similar crimes committed by similar offenders.

{¶ 35} Our review of the record makes manifest that the trial court expressly and properly considered the purposes and principles of sentencing under R.C. 2929.11, and gave careful and deliberate consideration to the relevant statutory factors of seriousness and recidivism under R.C. 2929.12. See *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912; *State v. Donald*, 6th Dist. No. S-09-027, 2010-Ohio-2790, ¶ 7; *State v. Turner*, 6th Dist. No. L-09-1195, 2010-Ohio-2630, ¶ 62; *State v. Jones*, 6th Dist. No. S-09-018, 2010-Ohio-2624, ¶ 13-15.

{¶ 36} Accordingly, appellant's second assignment of error is not well-taken.

{¶ 37} The judgment of the Erie County Court of Common Pleas is reversed. The cause is remanded to the trial court with instructions that appellant be allowed to

withdraw his guilty pleas and proceed to trial. The state may, of course, reinstate the original charges. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE