

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

State of Ohio

Court of Appeals No. S-16-047

Appellee

Trial Court No. 16 CR 530

v.

Glen A. Gilbert

DECISION AND JUDGMENT

Appellant

Decided: September 11, 2020

* * * * *

Beth A. Tischler, Sandusky County Prosecuting Attorney,
for appellee.

Laurel A. Kendall, for appellant.

* * * * *

MAYLE, J.

{¶ 1} This case is before the court on remand following the Ohio Supreme Court's reversal of our decision in *State v. Gilbert*, 2018-Ohio-879, 96 N.E.3d 360 (6th Dist.), *rev'd and remanded*, Slip Opinion No. 2020-Ohio-3021. For the following reasons, we affirm the September 29, 2016 judgment of the Sandusky County Court of Common Pleas.

I. Background

{¶ 2} On July 29, 2016, defendant-appellant, Glen A. Gilbert, entered a plea of guilty to one count of pandering obscenity involving a minor, a violation of R.C. 2907.321(A)(2). The trial court ordered a presentence investigation and continued the matter for sentencing on September 29, 2016. At that time, the trial court sentenced Gilbert to 48 months in prison, imposed a five-year period of postrelease control, and classified Gilbert a Tier II sex offender. Gilbert appealed.

{¶ 3} On appeal, Gilbert argued that the trial court committed reversible error because at the plea hearing, it failed to fully explain the reporting requirements for a Tier II sex offender before accepting his guilty plea, in violation of Crim.R. 11(C). While Gilbert acknowledged that the trial court informed him of the registration obligations that would be required of him under R.C. 2950.03, he maintained that the court did not inform him of the community notification requirements under R.C. 2950.11 or residential restrictions under R.C. 2950.034. Gilbert insisted that these omissions rendered his plea invalid because he was not advised of all the punitive consequences he would face.

{¶ 4} With respect to the community notification requirements, we found that those requirements were inapplicable to Gilbert, therefore, the trial court was not required to inform him of community notification sanctions before accepting his guilty plea. *Gilbert*, 2018-Ohio-879, 96 N.E.3d 360, at ¶ 13. But concerning the applicable residential restrictions, we found that the trial court was required—but completely failed—to inform Gilbert of those restrictions. *Id.* at ¶ 14.

{¶ 5} We explained that “each of the penalty notifications of R.C. Chapter 2950 [i.e., the registration and verification requirements, community notification requirements, and residential restrictions] must be viewed independently.” *Id.* at ¶ 16, quoting *State v. Ragusa*, 6th Dist. Lucas No. L-15-1244, 2016-Ohio-3373, ¶ 10. We concluded that where any one of the requirements applicable to the offender has not been explained during the plea hearing, there has been a complete failure to comply with Crim.R. 11. *Id.* The complete failure to comply with Crim.R. 11 renders the plea involuntary and necessitates invalidation of the plea, even in the absence of a showing of prejudice. *Id.*

{¶ 6} We acknowledged in *Gilbert* that our decision conflicted with *State v. Creed*, 8th Dist. Cuyahoga No. 97317, 2012-Ohio-2627, ¶ 17. We, therefore, certified the record for review and final determination to the Supreme Court of Ohio on the following issue: “During a plea proceeding, does a trial court’s failure to inform a defendant about the residential restrictions imposed on sex offenders under R.C. Chapter 2950 render the plea invalid?” *Id.* at ¶ 21-22.

{¶ 7} In the meantime, the Ohio Supreme Court certified a conflict between our decision in *State v. Dangler*, 6th Dist. Williams No. WM-16-010, 2017-Ohio-7981, and the decisions of the Eighth and Second Districts in *Creed* and *State v. Young*, 2d Dist. Greene No. 2013-CA-22, 2014-Ohio-2213 on the following similar issue: “During a plea hearing, does the failure of the sentencing court to inform a defendant of all of the penalties associated with a sex offender classification imposed by R.C. Chapter 2950 constitute a complete failure to comply with Crim.R. 11 and render the plea void without

the need to show prejudice resulted?” *State v. Dangler*, 152 Ohio St.3d 1404, 2018-Ohio-723, 92 N.E.3d 876.

{¶ 8} The Ohio Supreme Court answered the certified question in the negative. It held that “[w]hen a trial court has told a defendant that he is subject to the sex-offender-registration scheme, that defendant is entitled to have his conviction vacated for lack of a more complete explanation only if he demonstrates prejudice—that is, that he would not have entered the plea but for the incomplete explanation.” *State v. Dangler*, Slip Opinion No. 2020-Ohio-2765, ¶ 2. In other words, a sentencing court’s incomplete notification of sex-offender registration requirements is sufficient to constitute partial compliance with Crim.R. 11(C)(2)(a), and will not result in vacation of the plea unless the offender can demonstrate that the lack of a complete explanation resulted in prejudice that can be found in the trial court record. The Ohio Supreme Court reversed and remanded *Gilbert* for application of its decision in *Dangler*.

{¶ 9} On remand, we ordered the parties to submit supplemental briefs on the issue of whether Gilbert can demonstrate that he was prejudiced by only partial compliance with the rule. Gilbert assigns the following errors in his supplemental brief:

I. Appellant was prejudiced by the failure of the trial court to explain the duration of the residential restriction for Tier II sex offenders pursuant to R.C. 2950.034 due to the silence of the statute concerning said duration, and the associated potential for arbitrary and discriminatory enforcement.

II. In the alternative, R.C. 2950.034 is void for vagueness due to the lack of specific duration a sex offender is subject to the residential restriction, rendering the statute unconstitutional, and therefore unenforceable.

II. Law and Analysis

{¶ 10} Gilbert argues in his first assignment of error that he was prejudiced by the trial court’s failure to notify him of the residential restrictions applicable to Tier II sex offenders. He claims that R.C. 2950.034—the statute prohibiting a sex offender from “establish[ing] a residence or occupy[ing] residential premises within one thousand feet of any school premises or preschool or child day-care center premises”—does not specify how long this restriction is applicable, so “it is unlikely that [he] would have entered a plea if he understood that the length of time that he was precluded from residing within one thousand feet of a school or child care facility was undefined * * *.” He maintains that without a duration, some law enforcement agencies may conclude that the residential restrictions “last for the same length of time as the notification requirements, here, 25 years,” while others may decide that the restrictions last for the offender’s lifetime. Gilbert claims that “[w]ithout knowing the duration of such a significant restriction, this court should find that [he] was prejudiced, because he would not have entered a plea if he had known the extent of the ambiguity about that provision.”

{¶ 11} The state emphasizes that under *Dangler*, Slip Opinion No. 2020-Ohio-2765, at ¶ 24, “[p]rejudice must be established on the face of the record,” and there is

nothing on the face of the record that shows that Gilbert was prejudiced by not being specifically advised that he was subject to residential restrictions. It notes that Gilbert had the opportunity to review the sex offender registration requirements with his attorney before being sentenced “and still did not question, object, or try to withdraw his plea.” And it maintains that Gilbert also signed and acknowledged the Tier II sex offender requirement form and did not question or object to the requirements.

{¶ 12} We have reviewed the form signed by Gilbert and we note that the residential requirements are not explained in that form. And while we presume that a licensed attorney is competent, *State v. Hoffman*, 129 Ohio App.3d 403, 407, 717 N.E.2d 1149 (6th Dist.1998)—and a competent attorney would be expected to explain such requirements to his or her client before allowing him or her to enter a plea—we cannot know for certain whether Gilbert was informed of the residential restrictions. Nevertheless, we are bound by the Ohio Supreme Court’s decision in *Dangler* and *Dangler* requires that prejudice be established *on the face of the record*. Here, there is nothing on the face of the record to establish that Gilbert “would not have entered his plea had he been more thoroughly informed of the details of the sex-offender-classification scheme.” *Id.* Accordingly, we must conclude that Gilbert has failed to demonstrate prejudice.

{¶ 13} In his second assignment of error, Gilbert argues that R.C. 2950.034 is void for vagueness and, therefore, unconstitutional because it does not specify a duration that a sex offender is prohibited from residing within one thousand feet of a school, preschool,

or child day-care center. This assignment of error is beyond the scope of the issues on remand. We, therefore, decline to address it.

{¶ 14} Accordingly, we find Gilbert’s first assignment of error not well-taken, and we decline to address his second assignment of error.

III. Conclusion

{¶ 15} Gilbert has failed to demonstrate on the face of the record that he was prejudiced by the trial court’s failure to inform him at the plea hearing of the residential restrictions applicable to him under R.C. 2950.034. We, therefore, find his first assignment of error not well-taken. Gilbert’s second assignment of error is beyond the scope of the issue on remand, therefore, we decline to consider it. We affirm the September 29, 2016 judgment of the Sandusky County Court of Common Pleas. Gilbert is ordered to pay the costs of this appeal under App.R. 24.

Judgment affirmed.

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

Arlene Singer, J.

JUDGE

Christine E. Mayle, J.

JUDGE

Gene A. Zmuda, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio’s Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court’s web site at: <http://www.supremecourt.ohio.gov/ROD/docs/>.