[Cite as *State v. Mullins*, 2011-Ohio-1256.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 09AP-1185 (C.P.C. No. 03CR-11-8030)
v.	:	
Christopher R. Mullins,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 17, 2011

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

R. William Meeks Co. L.P.A., and *David Thomas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Defendant-appellant, Christopher R. Mullins, appeals from a judgment of the Franklin County Court of Common Pleas pursuant to a re-sentencing hearing held to correct a prior erroneous sentence.

{¶2} In 2004 appellant entered a plea of guilty to one count of rape as defined in R.C. 2907.02, a felony of the first degree. In exchange for the plea, the prosecution dismissed two additional rape counts found in the indictment. On May 14, 2004, the trial

court sentenced appellant to a term of six years imprisonment. At the time the trial court did not provide the statutorily required notice to appellant that he was subject to a mandatory five-year period of post-release control as part of his sentence.

{¶3} On November 24, 2009, one day before appellant was to be released from his original term of imprisonment, the record indicates the trial court held a de novo re-sentencing hearing to correct the earlier omission of notice regarding the imposition of post-release control. Appellant was not physically present at the hearing, participating via teleconference from the penal institution where he was held. Counsel for appellant was present at the hearing and did not object to the use of teleconferencing for appellant's participation. Neither defense counsel nor appellant himself expressed at the hearing any objection to the use of teleconferencing or any deficiency in notice either for the hearing itself or the medium by which appellant would be permitted to participate.

{¶4} Contemporaneously with the re-sentencing, the trial court reclassified appellant as a Tier III sex offender; that determination, however, is not at issue here because it is the object of a separate appeal before this court.

{¶5} Appellant brings the following two assignments of error on appeal:

> [I.] The Trial Court violated Appellant's rights as Guaranteed by the Sixth Amendment to the United States Constitution, Article I, Section 10 of the Ohio Constitution and by Ohio Crim.R. 43 by resentencing Defendant in absentia to include a five-year period of post-release control. The Court erred by failing to comply with the waiver requirements or the video-conferencing requirements of Ohio Crim.R. 43 over Appellant's objection.
>
> [II.] Appellant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution was violated when counsel failed to object to the hearing

> conducted in Appellant's absence to resentence him on the day prior to his release from prison. This hearing was conducted without Appellant physically present, without appropriate notice or a valid waiver of his presence, and failed to conform to the requirements of Crim.R. 43.

{¶6} Appellant's first assignment of error asserts that the trial court erred when appellant was only present via teleconference and when appellant had not explicitly waived his right to be physically present. The record reflects that neither appellant nor his counsel raised this issue at any point during the hearing before the trial court. While appellant argues his indication of an intention to appeal constitutes an objection, the record shows he was only answering the trial court's general question of whether he wanted to appeal. Under most circumstances, failure to object to purported error results in a waiver of such error relating to a defendant's absence from a hearing. *State v. Carr* (1995), 104 Ohio App.3d 699, 703. In the absence of objected error, we review the question under a plain error analysis. "It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Glaros* (1960), 170 Ohio St. 471, paragraph one of the syllabus. "Constitutional rights may be lost as finally as any others by a failure to assert them at the proper time." *State v. Childs* (1968), 14 Ohio St.2d 56, 62.

{¶7} Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." However, an alleged error is plain error only if the error is "obvious," *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, and where, but for the error, the outcome of the proceeding would

clearly have been otherwise. *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus.

{¶8} Appellant contends that the trial court's imposition of post-release control when appellant was present only by video conference violates both Crim.R. 43(A) and his constitutionally guaranteed due process right to be physically present at every stage of his criminal proceeding.

{¶9} For the time in question, Crim.R. 43(A)(2) provides for participation of a defendant via video appearance only when the defendant waived the right to be physically present and did so in writing or on the record under Crim.R. 43(A)(3).

{¶10} It remains axiomatic that a criminal defendant has a fundamental right to be present at all critical stages of his criminal trial. Section 10, Article I of the Ohio Constitution; Crim.R. 43(A) ("defendant must be physically present at every stage of the criminal proceeding and trial"); *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶100. However, on these facts, we agree with the state that appellant has failed to demonstrate plain error because the outcome of the proceeding would not clearly have been otherwise but for the purported error. The presence of a defendant is a condition of due process " 'to the extent that a fair and just hearing would be thwarted by his absence, *and to that extent only*.' " (Emphasis added.) Id., quoting *Snyder v. Massachusetts* (1934), 291 U.S. 97, 108, 54 S.Ct. 330, 333, overruled on other grounds *Mallory v. Hogan* (1964), 378 U.S. 1, 84 S.Ct. 1489. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶90. "An accused's absence * * * does not necessarily result in prejudicial or constitutional error." Id. A defendant's absence, therefore, even where the notice and waiver rules of Crim.R. 43(A)(2) and (3) are not found in the record, may be improper and yet not rise to the level

of plain error where the defendant suffers no prejudice. *State v. Warren*, 10th Dist. No. 10AP-376, 2010-Ohio-5718, ¶7, citing *State v. Williams* (1983), 6 Ohio St.3d 281, 285-87.

{¶11} Appellant cannot demonstrate that the outcome would have been different had he been physically present. Appellant was represented by counsel and had all other due process guarantees fulfilled. Appellant was notified of his right to appeal and responded that he intended to do so, both on the re-sentencing and his Tier III sex offender reclassification. Appellant has not demonstrated plain error because he has not articulated sufficient prejudice arising from either a purported lack of notice or from his participation via a video teleconference from his institution. Appellant's first assignment of error is accordingly overruled.

{¶12} Appellant's second assignment of error asserts that, based upon the failure to object to appellant's physical absence, counsel representing appellant at the re-sentencing hearing was ineffective and appellant was thus denied his right to representation by counsel under the United States and Ohio Constitutions.

{¶13} The United States Supreme Court established a two-pronged test for ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. First, the defendant must show that counsel's performance was outside the range of professionally competent assistance and, therefore, deficient. Id. at 687, 104 S.Ct. at 2064. Second, the defendant must show that counsel's deficient performance prejudiced the defense and deprived the defendant of a fair trial. Id. A defendant establishes prejudice if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068.

{¶14} Because the standard for finding ineffective assistance of counsel hinges, as does plain error analysis, upon a finding that the outcome of the proceedings ultimately would have been different, we cannot find that counsel was ineffective for failure to object to the purported lack of notice or the use of video conferencing to provide appellant's appearance at the re-sentencing hearing. Again, appellant cannot articulate any reason on appeal for finding that his physical presence at the hearing would have altered the outcome.

{¶15} In addition, given the nature of the proceedings, it is hard to conceive of any other outcome since the intent of the court and the prosecution was to correct an error in prior proceedings in which appellant had not been specifically advised of the imposition of post-release control. The trial court re-sentenced appellant to the same sentence as originally ordered, and the statutorily required period of post-release control was mandatory; the only additional characteristic was the explicit notice to appellant at the re-sentencing of the existence of a post-release control term as a component of his sentence. Appellant cannot argue that his physical presence would have changed the outcome of the proceeding.

{¶16} In accordance with the foregoing, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT, P.J., and TYACK, J., concur.

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