[Cite as *State v. McKenna*, 2009-Ohio-6154.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0034**
- vs -	:	
EVAN A. McKENNA,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 08 CR 196.

Judgment: Modify and affirm as modified.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Mark I. Verkhlin, 839 Southwestern Run, Youngstown, OH 44514 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Evan A. McKenna, appeals his conviction and sentence for Sexual Battery. McKenna was sentenced to serve a one-year term of imprisonment followed by a period of postrelease control and ordered to register as a Tier III sex offender. For the following reasons, we affirm McKenna's conviction and sentence as modified.

{¶2} On March 19, 2008, McKenna was indicted on one count of Sexual Battery, a felony of the third degree in violation of R.C. 2907.03(A)(5) and (B), and one count of Unlawful Sexual Conduct with a Minor, a felony of the third degree in violation of R.C. 2907.04(A) and (B)(3).

{¶3} On November 3, 2008, a change of plea hearing was held. McKenna pled guilty to Sexual Battery and the State moved the court for leave to enter a Nolle Prosequi on the count of Unlawful Sexual Conduct with a Minor.

{¶4} At the change of plea hearing, the following colloquy occurred:

{¶5} The Court: Mr. McKenna, before I can accept any plea, I have to make sure that you understand all of your rights. *** The charge as amended is Count 1, Sexual Battery, a felony of the third degree, in violation of Ohio Revised Code Section 2907.03(A)(5) and Section B. Do you understand that?

{¶6} McKenna: Yes, sir.

{¶7} The Court: The State of Ohio would have to prove the following elements by proof beyond a reasonable doubt to the unanimous satisfaction of a jury; that is, that you did engage in sexual conduct with another, not the spouse of the offender, when the offender is the other person's natural or adoptive parent, step-parent, guardian, custodian or person loco parentis of the other, in Trumbull County, Ohio. Do you understand what the State of Ohio would have to prove in this matter?

{¶8} McKenna: Yes, sir.

{¶9} The Court: The possible penalty in this case can be from 1, 2, 3, 4, 5 years and up to $10,000.00 fine. Do you understand that?

{¶10} McKenna: Yes, sir.

{¶11} The Court: There is a mandatory post-release control period of up to three (3) years in a case like this. Do you understand that?

{¶12} McKenna: Yes, sir.

{¶13} The Court: The State would oppose any judicial release in this matter. Do you understand that?

{¶14} McKenna: Yes, sir.

{¶15} The Court: Nobody has to plead to any charge. You have the right to go forward with a trial and have the State of Ohio prove its case by proof beyond a reasonable doubt. Do you understand that?

{¶16} McKenna: Yes, sir.

{¶17} The Court: At that trial, you have the right to have an attorney represent you. If you couldn't afford one, one would be appointed at State's expense. Do you understand that?

{¶18} McKenna: Yes, sir.

{¶19} The Court: Also, at that trial, you would have the right to confront and cross-examine any witnesses that testified against you. Do you understand that?

{¶20} McKenna: Yes, sir.

{¶21} The Court: You would also have the right to subpoena witnesses on your own behalf. Do you understand that?

{¶22} McKenna: Yes, sir.

{¶23} The Court: You have a Fifth Amendment Right under the Constitution. For trial purposes, that means you don't have to testify, nobody could force you to take the stand. If you chose not to testify, nobody could comment about it. Do you understand that?

{¶24} McKenna: Yes, sir.

{¶25} The Court: If you did go forward with a trial and were convicted, you would have an automatic right to appeal that conviction to the Court of Appeals. If you couldn't afford an attorney to do that appeal, one would be appointed for you at State's expense. Do you understand that?

{¶26} McKenna: Yes, sir.

{¶27} The Court: I am holding in front of me a document that is captioned as a Finding of Guilty Plea to Amended Indictment. I am going to ask you if you have gone over this form with your attorney?

{¶28} McKenna: Yes, sir.

{¶29} The Court: Do you understand it?

{¶30} McKenna: Yes, sir.

{¶31} The Court: Do you have any questions about it?

{¶32} McKenna: No, sir.

{¶33} The Court: There is a place here for your signature. Is that your signature?

{¶34} McKenna: Yes, sir, it is.

{¶35} The Court: Did you sign that freely and voluntarily?

{¶36} McKenna: Yes.

{¶37} The Court: Any threats or promises made to you to cause you to sign this document?

{¶38} McKenna: No, sir.

{¶39} The Court: Are you satisfied that your attorney has done what he can for you in this matter?

{¶40} McKenna: Absolutely.

{¶41} The Court: Mr. Schubert, are you satisfied that your client understands what's contained in this document and the consequences of waiving his Constitutional Rights?

{¶42} Atty. Schubert: I am, Your Honor.

{¶43} The Court: How do you plead?

{¶44} McKenna: Guilty, sir.

{¶45} The trial court accepted McKenna's plea and granted the State's motion for a Nolle Prosequi.

{¶46} On December 1, 2008, a sentencing hearing was held. At the conclusion of the hearing, the trial court sentenced McKenna to imprisonment for one year, ordered him to register as a Tier III sex offender and submit to DNA testing, and notified him that he would be subject to post release control for a period of three years following his

release from prison. On December 2, 2008, the court's Entry on Sentence was journalized.

{¶47} On April 16, 2009, McKenna filed a Notice and Motion for Leave to File a Delayed Appeal, which leave was granted by this court. On appeal, McKenna raises the following assignments of error:

{¶48} "[1.] The Trial Court committed reversible error when [it] accepted the guilty plea of Defendant-Appellant Evan McKenna which was less than knowing, intelligent and voluntary due to the Trial Court's failure to address Defendant-Appellant Evan McKenna in regards to his rights in direct violation of Crim.R. 11(C)(2), thereby rendering the guilty plea of Defendant-Appellant Evan McKenna invalid.

{¶49} "[2.] The trial court committed reversible error when it incorrectly advised Appellant of the nature of his post release control, when the correct period of post release control is a mandatory period of five years for a felony that is a sex offense pursuant to R.C. 2967.28(B)(1), making Appellant's sentence void."

{¶50} In the first assignment of error, McKenna argues his guilty plea was invalid on the grounds that the trial court failed to comply with Criminal Rule 11(C)(2)(c).

{¶51} "When a defendant enters a plea in a criminal case, the plea 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*, 74 Ohio St.3d 525, 527, 1996-Ohio-179. In order for a plea to be knowingly, intelligently, and voluntarily entered, a defendant must be "informed in a reasonable manner at the time of entering his guilty plea of his rights to a trial by jury and to confront his accusers, and his privilege against self-incrimination,

and his right of compulsory process for obtaining witnesses in his behalf." *State v. Ballard* (1981), 66 Ohio St.2d 473, 478, interpreting *Boykin v. Alabama* (1969), 395 U.S. 238, 243.

{¶52} In 1973, Criminal Rule 11 was adopted to ensure that certain information necessary for entering a knowing, intelligent, and voluntary plea would be conveyed to a defendant. Id. at 479-480; *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, at ¶7 (Crim.R. 11 provides "detailed instructions to trial courts on the procedure to follow when accepting pleas"); *State v. Stone* (1975), 43 Ohio St.2d 163, 167-168.

{¶53} Criminal Rule 11(C) provides, in relevant part, as follows:

{¶54} (2) 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:

{¶55} Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶56} Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶57} 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.

{¶58} "Before accepting a guilty or no-contest plea, the court must make the determinations and give the warnings required by Crim.R. 11(C)(2)(a) and (b) and notify the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c)." *Veney*, 2008-Ohio-5200, at ¶13.

{¶59} A trial court's compliance with Criminal Rule 11(C) is reviewed under two different standards, one applied to the "nonconstitutional" portions of the Rule, subsections (a) and (b), and another applied to the "constitutional" portion, subsection (c). Id.

{¶60} The standard applied to the nonconstitutional portions of Rule 11 is substantial compliance. Id. at ¶14, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 93. "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. *** Furthermore, 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." *State v. Nero* (1990), 56 Ohio St.3d 106, 108 (citations omitted).

{¶61} For the constitutional rights outlined in subsection (c), "strict, or literal, compliance" with the Rule is required. *Veney*, 2008-Ohio-5200, at ¶18 (citations omitted), and at syllabus ("[w]hen a trial court fails to strictly comply with this duty, the defendant's plea is invalid").

{¶62} The failure to comply literally with the provisions of subsection (c) does not automatically invalidate a guilty plea. *Ballard*, 66 Ohio St.2d at 479. "Failure to use the exact language contained in Crim. R. 11(C), in informing a criminal defendant of his constitutional right to a trial and the constitutional rights related to such trial, including the right to trial by jury, is not grounds for vacating a plea as long as the record shows that the trial court explained these rights in a manner reasonably intelligible to that defendant." Id. at syllabus. The Ohio Supreme Court has reaffirmed that "a trial court

can still convey the requisite information on constitutional rights to the defendant even when the court does not provide a word-for-word recitation of the criminal rule, so long as the trial court actually explains the rights to the defendant." *Veney*, 2008-Ohio-5200, at ¶27.

{¶63} The first argument raised is that the trial court failed to expressly address McKenna to determine whether he understood that he is waiving the constitutional rights contained in Rule 11(C)(2)(c). McKenna does not claim that the court failed to identify and explain his constitutional rights to him. Rather, he claims the court did not specifically inquire whether he understood that these rights were being waived by his decision to enter a guilty plea. The only specific mention that the court made of waiver was in a query directed toward McKenna's counsel. The written guilty plea, signed by McKenna, states that he was advised that by pleading guilty, he is "waiving (giving up)" certain constitutional rights. McKenna maintains the question posed to trial counsel and the written plea does not satisfy Rule 11. Cf. *State v. Caudill* (1976), 48 Ohio St.2d 342, at paragraph three of the syllabus ("[t]he requirements of Crim. R. 11(C)(2) are not satisfied by a written statement by the defendant or by representations of his counsel").

{¶64} McKenna relies upon the Seventh District Case of *State v. Strebler*, 7th Dist. No. 08 MA 108, 2009-Ohio-1200. In *Strebler*, as in the present case, the trial court adequately advised the appellant of his constitutional rights under Rule 11. However, "the trial court did not specifically indicate in any way that by pleading guilty, Strebler was waiving his constitutional rights." Id. at ¶29. Relying on the Ohio Supreme Court's decisions in *Ballard* and *Veney*, the Seventh District concluded that, "in order to strictly comply with Crim.R. 11(C)(2)(c), the trial court must not only explain the applicable

constitutional rights but it must also advise that by entering a guilty plea the criminal defendant is waiving those rights." Id. at ¶36. We disagree.

{¶65} The Ohio Supreme Court has stated and reaffirmed that the "'[f]ailure to use the exact language contained in Crim.R. 11(C), in informing a criminal defendant of [*Boykin* rights], is not grounds for vacating a plea *as long as the record shows that the trial court explained these rights in a manner reasonably intelligible to that defendant*.' (Emphasis added.)" *Veney*, 2008-Ohio-5200, at ¶27, quoting *Ballard*, 66 Ohio St.2d 473, at paragraph two of the syllabus.

{¶66} It is undisputed in the present case that the trial court did explain to McKenna his rights in a reasonably intelligible manner. Although the court did not expressly state that these rights were being waived, it repeatedly emphasized that the rights at issue would be exercised "at that trial" to which McKenna would be entitled if he decided not to plea. Obviously, these rights would not be exercised if McKenna decided to forego a trial by pleading guilty. Cf. *Strebler*, 2009-Ohio-1200, at ¶36 ("common sense dictates that if you plead guilty you are not going to receive a trial, require the state to prove the charges, have the right to cross-examination and subpoena witnesses"). In *Strebler*, the Seventh District conceded that "an instruction on the constitutional rights carries an implicit understanding that by entering the guilty plea the criminal defendant is waiving those rights." Id.

{¶67} "[I]n determining whether a trial court has informed a criminal defendant of his *Boykin* rights," the Ohio Supreme Court has acknowledged that "[m]atters of reality, and not mere ritual, should be controlling." *Ballard*, 66 Ohio St.2d at 480, quoting *McCarthy v. United States* (1969), 394 U.S. 459, 468 fn. 20 (citation omitted).

Accordingly, the Court recognized that, "[a]lthough the trial court may not relieve itself of the requirement of Crim.R. 11(C) by exacting comments or answers by defense counsel as to the defendant's knowledge of his rights, such a colloquy ***may be looked to in the totality of the matter***." Id. at 481 (emphasis added). In *Ballard*, the plea was upheld "even though the trial court failed to specifically mention the right to a jury trial by name, because the trial court did inform Ballard that 'neither the Judge nor the jury' could draw any inference if Ballard refused to testify and that he 'was entitled to a completely fair and impartial trial under the law.'" *Veney*, 2008-Ohio-5200, at ¶28, quoting *Ballard*, 66 Ohio St.2d at 479, fn. 7, and 481.

{¶68} In a similar case, *State v. Compton*, 11th Dist. No. 97-L-010, 1998 Ohio App. LEXIS 6361, this court rejected the argument proposed by McKenna. In *Compton*, the trial court explained each of the appellant's constitutional rights during the plea colloquy, without specifically asking a question about waiver. We affirmed the plea, holding that "the trial court is not required to stop after each right and ask the defendant whether he understands the right and knows that by pleading guilty, he is effecting a waiver of it." Id. at *10-*11. As in the present case, "the record [in *Compton*] demonstrates that the trial court orally communicated with appellant about each of his Crim.R. 11(C) constitutional rights," and, "after explaining each of appellant's constitutional rights, the trial court orally indicated that each of those rights would be waived by pleading guilty, since there would not be a trial." Id. at *11.

{¶69} In conclusion, the record before us demonstrates that McKenna was fully informed of his constitutional rights as required by Rule 11 and that any doubts as to

whether he realized he was waiving these rights by pleading guilty are precluded by the written Finding of Guilty Plea and testimony of defense counsel.

{¶70} In his second argument under the first assignment of error, McKenna argues the trial court erred by failing to advise him that it could proceed immediately to judgment and sentencing. Furthermore, McKenna contends that, because the trial court "completely failed" to inform him that it may proceed immediately to judgment and sentence, this court is precluded from considering whether the error is prejudicial. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, at ¶22 ("[a] complete failure to comply with the rule [Crim.R. 11(C)(2)(a)] does not implicate an analysis of prejudice").

{¶71} Criminal Rule 11(C)(2)(b) provides that it must inform the defendant that, "upon acceptance of the plea, [it] may proceed with judgment and sentence." In the present case, the trial court duly advised McKenna of the possible sentences that could be imposed if he pled guilty, although it did not advise him that it could immediately proceed to sentencing. The written Finding of Guilty Plea advised McKenna that the court could impose sentence immediately upon entry of the plea. Based on this record, there was not a "complete failure" on the part of the trial court to advise McKenna that it could impose sentence. In *Sarkozy*, in contrast, the trial court failed to make any mention about the possibility of postrelease control. 2008-Ohio-509, at ¶22.

{¶72} Turning to the issue of prejudice, we note that the trial court ordered a presentence investigation rather than proceed immediately to sentencing. McKenna's sentencing hearing was held about a month after the change of plea hearing. This court has repeatedly held that "[w]hen the trial court does not proceed immediately with sentencing, *** a defendant is not prejudiced by the court's failure to advise that it could

have proceeded immediately with sentencing." *State v. Brown*, 11th Dist. No. 2003-G-2504, 2004-Ohio-1843, at ¶23, and the cases cited therein; *State v. Docgrand*, 7th Dist. Nos. 08 MA 249, 08 MA 250, and 08 MA 251, 2009-Ohio-5077, at ¶23 ("[a]ppellant has not alleged any prejudice as a result of the court's actions, and since the court did not immediately proceed to sentencing, the error could not have had any effect on the outcome of the plea"); *State v. Byrd*, 4th Dist. No. 07CA29, 2008-Ohio-3909, at ¶11 ("[b]ecause, in fact, sentencing took place at a later date, we fail to see how Appellant suffered prejudice").

{¶73} Thus, McKenna was not prejudiced by the trial court's failure to orally advise him that it could proceed to judgment and sentencing upon acceptance of the plea.

{¶74} McKenna's third argument under the first assignment of error is that the trial court erred by failing to advise him that he would be subject to a five-year period of postrelease control.

{¶75} In the plea colloquy, as well as in the written Finding of Guilty Plea, McKenna was advised that a mandatory period of postrelease control of up to three years would be part of his sentence. In fact, every prison sentence for a felony sex offense includes a mandatory five-year period of postrelease control. R.C. 2967.28(B)(1). McKenna contends that the trial court's failure to correctly advise him of the term of postrelease control renders his plea less than knowing, intelligent, and voluntary.

{¶76} The Ohio Supreme Court has held that, "in conducting [the change of plea] colloquy, the trial judge must convey accurate information to the defendant so that

the defendant can understand the consequences of his or her decision and enter a valid plea." *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, at ¶26. "[I]f the trial judge imperfectly explained nonconstitutional rights such as the right to be informed of the maximum possible penalty and the effect of the plea, a substantial-compliance rule applies." Id. at ¶31. "If the trial judge partially complied, e.g., by mentioning mandatory postrelease control without explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect." Id. at ¶32.

{¶77} In the present case, the trial court partially complied by mentioning mandatory postrelease control, but understating the period of postrelease control by two years. However, McKenna fails to raise any claim or argument that he suffered prejudice as a result and the record before us fails to demonstrate such an effect. Cf. *State v. Clark*, 11th Dist. No. 2006-A-0004, 2008-Ohio-6768, at ¶31 (Cannon, J., concurring) ("there was no discussion, question, or comment indicating that [the possibility of postrelease control rather than parole] was of particular concern or import to Clark"). On the contrary, McKenna benefited from the entry of a guilty plea by having a felony charge of Unlawful Sexual Conduct with a Minor dismissed. Considering the court's misstatement about the length of postrelease control against the dismissal of the felony charge, it is not reasonable to conclude that, but for the court's misstatement regarding the period of postrelease control, McKenna would not have entered his plea. Cf. *State v. Berch*, 7th Dist. No. 08-MA-52, 2009-Ohio-2895, at ¶35 (appellant's plea was valid despite the trial court's erroneous advice that postrelease control was discretionary rather than mandatory where the appellant obtained a favorable plea agreement and the record failed to disclose any concern by the appellant or his counsel

on this issue); *State v. Garrett*, 9th Dist. No. 24377, 2009-Ohio-2559, at ¶19 (*Sarkozy*'s holding that a demonstration of prejudice is not necessary does not apply where the "trial court merely misinform[ed the defendant] about the length of his term [or] *** as to whether postrelease control was mandatory or discretionary").

{¶78} Thus, the failure to correctly advise McKenna regarding the duration of postrelease control does not render his plea invalid.

{¶79} The first assignment of error is without merit.

{¶80} In his second assignment of error, McKenna argues that the trial court's failure to include the correct term of postrelease control in its Entry on Sentence renders his sentence void. McKenna relies upon the Ohio Supreme Court decisions in *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, and *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250. In *Bezak*, the Supreme Court held: "When a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense." 2007-Ohio-3250, at syllabus. Similarly in *Simpkins*, the Court held: "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 in order to have postrelease control imposed on the defendant unless the defendant has completed his sentence." 2008-Ohio-1197, at syllabus.

{¶81} In *Simpkins* and *Bezak*, postrelease controls were not properly included in the appellants' sentences: in *Simpkins* because "the journal entry on sentencing did not

indicate that Simpkins was subject to postrelease control," 2008-Ohio-1197, at ¶1; and in *Bezak* because the trial court failed "to inform [Bezak] at the sentencing hearing that he may be subject to postrelease control." 2007-Ohio-3250, at ¶6. *Simpkins* and *Bezak* stand "[i]n a narrow vein of cases running back to 1984," in which the Supreme Court "has held consistently that a sentence that does not contain a statutorily mandated term is a void sentence." *Simpkins*, 2008-Ohio-1197, at ¶14.

{¶82} In the present case, McKenna was duly advised that postrelease control was mandatory both at the sentencing hearing and in the Entry on Sentence. By properly advising McKenna that he would be subject to postrelease control as required by R.C. 2967.28, postrelease control was made part of his sentence. In this respect, *Simpkins* and *Bezak* are distinguishable. This conclusion is supported by the Ohio Supreme Court's decision in *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082. In *Watkins*, a group of twelve inmates filed a habeas corpus petition. The petitioners had been imprisoned for violating postrelease control. The petitioners claimed that the trial courts that imposed the postrelease control failed to advise that postrelease control was a mandatory part of their sentences, rather the courts had indicated that such control would be discretionary. Id. at ¶42. "The petitioners claim that by misrepresenting the mandatory nature of their postrelease control, the trial courts never properly imposed such control, and that they therefore could not be imprisoned *** for violating that control." Id. at ¶43. The petitioners relied on the "narrow vein" of cases considered in *Simpkins*.

{¶83} The Supreme Court rejected the argument. "While [the petitioners'] entries erroneously refer to discretionary instead of mandatory postrelease control, they

contain significantly more information than any of the sentencing entries held insufficient by the court in *Hernandez* (no reference to postrelease control), *Adkins* (no reference to postrelease control), and *Gensley* (vague reference about petitioner's understanding of possible penalties). Consequently, the sentencing entries are sufficient to afford notice to a reasonable person that the courts were authorizing postrelease control as part of each petitioner's sentence." Id. at ¶51 (citations omitted). "The petitioners' sentencing entries, although they mistakenly included wording that suggested that imposition of postrelease control was discretionary, contained sufficient language to authorize the Adult Parole Authority to exercise postrelease control over the petitioners." Id. at ¶53. Certainly, the sentences at issue in *Watkins* were not void.

{¶84} Rather than void, McKenna's sentence with respect to postrelease control is voidable, i.e. it is a judgment "rendered by a court that has both jurisdiction and authority to act, but in which the court's judgment is invalid, irregular, or erroneous." *Simpkins*, 2008-Ohio-1197, at ¶12, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶27. As such, it is within this court's power to correct pursuant to R.C. 2953.08(G)(2) ("[t]he appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section"); *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, at ¶4 ("R.C. 2953.08(G)(2) permits an appellate court to 'increase, reduce, or otherwise modify a [felony] sentence that is appealed under this section' *** if the sentence is contrary to law").

{¶85} Accordingly, the sentence is modified with respect to postrelease control so that McKenna is now subject to a five-year period of postrelease control as provided for in R.C. 2967.28(B)(1). See, also, App.R. 12(A)(1) ("[o]n an undismissed appeal from

a trial court, a court of appeals shall *** [r]eview and affirm, modify, or reverse the judgment or final order appealed") and (B) ("where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly").

{¶86} Otherwise, the second assignment of error is without merit.

{¶87} For the foregoing reasons, the Trumbull County Court of Common Pleas' acceptance of McKenna's plea to one count of Sexual Battery is affirmed. McKenna's sentence is modified to reflect the fact that he will be subject to postrelease control for a period of five years following his release from prison. In all other respects, judgment and sentence are affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

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{¶88} I respectfully dissent.

{¶89} Although I agree with the majority that appellant's second and third issues under his first assignment of error are without merit, I disagree with the majority with regard to appellant's first issue under his first assignment of error as well as his second assignment of error.

{¶90} In his first assignment of error, appellant argues that the trial court erred by accepting his guilty plea which was less than knowing, intelligent and voluntary due to its failure to address him in regards to his rights in direct violation of Crim.R. 11(C)(2), thereby rendering his guilty plea invalid.

{¶91} In his first issue, appellant alleges that the trial court failed to strictly comply with Crim.R. 11(C)(2)(c). I agree.

{¶92} "The matters subject of Crim.R. 11(C)(2)(c) are constitutional, and strict compliance by the trial court with the rule is required in presenting them to a defendant. *State v. Woodliff,* 11th Dist. No. 2004-P-0006, 2005-Ohio-2257, at ¶51." *State v. Gibson*, 11th Dist. No. 2007-G-2755, 2007-Ohio-6254, at ¶11. "Strict compliance" does not require a rote recitation of the exact language of the rule. Rather, the focus is on whether "the record shows that the trial court explained these rights in a manner reasonably intelligible to that defendant." *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph two of the syllabus.

{¶93} "To comply with the constitutional requirements, the court must explain to the defendant that he is waiving: (1) the Fifth Amendment privilege against self-incrimination, (2) the right to a trial by jury, (3) the right to confront one's accusers, (4) the right to compulsory process of witnesses, and (5) the right to be proven guilty beyond a reasonable doubt. *State v. Nero* [supra,] *** citing *Boykin v. Alabama* (1969), 395 U.S. 238 ***; *State v. Ballard* [supra,] 478 ***; *State v. Higgs* (1997), 123 Ohio App.3d 400, 407 ***." *State v. Lavender* (Dec. 21, 2001), 11th Dist. No. 2000-L-049, 2001 Ohio App. LEXIS 5858, at 10-11. (Parallel citations omitted.) See, also, *State v.*

Veney, 120 Ohio St.3d 176, 2008-Ohio-5200, at ¶31 (holding that when a trial court fails to strictly comply with Crim.R. 11(C)(2)(c), the defendant's plea is invalid.)

{¶94} In the case at bar, the following exchange occurred between the trial judge and appellant at the change of plea hearing:

{¶95} "THE COURT: The charge as amended is Count 1, Sexual Battery, a felony of the third degree, in violation of Ohio Revised Code Section 2907.03(A)(5) and Section B. Do you understand that?

{¶96} "THE DEFENDANT: Yes, sir.

{¶97} "THE COURT: The State of Ohio would have to prove the following elements by proof beyond a reasonable doubt to the unanimous satisfaction of a jury; that is, that you did engage in sexual conduct with another, not the spouse of the offender, when the offender is the other person's natural or adoptive parent, step-parent, guardian, custodian or person loco parentis of the other, in Trumbull County, Ohio. Do you understand what the State of Ohio would have to prove in this matter?

{¶98} "THE DEFENDANT: Yes, sir.

{¶99} "THE COURT: The possible penalty in this case can be from 1, 2, 3, 4, 5 years and up to $10,000.00 fine. Do you understand that?

{¶100} "THE DEFENDANT: Yes, sir.

{¶101} "THE COURT: There is a mandatory post-release control period of up to three (3) years in a case like this. Do you understand that?

{¶102} "THE DEFENDANT: Yes, sir.

{¶103} "THE COURT: The State would oppose any judicial release in this matter. Do you understand that?

{¶104} "THE DEFENDANT: Yes, sir.

{¶105} "THE COURT: Nobody has to plead to any charge. You have the right to go forward with a trial and have the State of Ohio prove its case by proof beyond a reasonable doubt. Do you understand that?

{¶106} "THE DEFENDANT: Yes, sir.

{¶107} "THE COURT: At that trial, you have the right to have an attorney represent you. If you couldn't afford one, one would be appointed at State's expense. Do you understand that?

{¶108} "THE DEFENDANT: Yes, sir.

{¶109} "THE COURT: Also, at that trial, you would have the right to confront and cross examine any witnesses that testified against you. Do you understand that?

{¶110} "THE DEFENDANT: Yes, sir.

{¶111} "THE COURT: You would also have the right to subpoena witnesses on your own behalf. Do you understand that?

{¶112} "THE DEFENDANT: Yes, sir.

{¶113} "THE COURT: You have a Fifth Amendment Right under the Constitution. For trial purposes, that means you don't have to testify, nobody could force you to take the stand. If you chose not to testify, nobody could comment about it. Do you understand that?

{¶114} "THE DEFENDANT: Yes, sir.

{¶115} "THE COURT: If you did go forward with a trial and were convicted, you would have an automatic right to appeal that conviction to the Court of Appeals. If you

couldn't afford an attorney to do that appeal, one would be appointed for you at State's expense. Do you understand that?

{¶116} "THE DEFENDANT: Yes, sir.

{¶117} "THE COURT: I am holding in front of me a document that is captioned as a Finding of Guilty Plea to Amended Indictment. I am going to ask you if you have gone over this form with your attorney?

{¶118} "THE DEFENDANT: Yes, sir.

{¶119} "THE COURT: Do you understand it?

{¶120} "THE DEFENDANT: Yes, sir.

{¶121} "THE COURT: Do you have any questions about it?

{¶122} "THE DEFENDANT: No, sir.

{¶123} "THE COURT: There is a place here for your signature. Is that your signature?

{¶124} "THE DEFENDANT: Yes, sir, it is.

{¶125} "THE COURT: Did you sign that freely and voluntarily?

{¶126} "THE DEFENDANT: Yes.

{¶127} "THE COURT: Any threats or promises made to you to cause you to sign this document?

{¶128} "THE DEFENDANT: No, sir.

{¶129} "THE COURT: Are you satisfied that your attorney has done what he can for you in this matter?

{¶130} "THE DEFENDANT: Absolutely.

{¶131} "THE COURT: Mr. Schubert, are you satisfied that your client understands what's contained in this document and the consequences of waiving his Constitutional Rights?

{¶132} "ATTY. SCHUBERT: I am, Your Honor.

{¶133} "THE COURT: How do you plead?

{¶134} "THE DEFENDANT: Guilty, sir."

{¶135} The foregoing colloquy does not support strict compliance with Crim.R. 11(C)(2)(c). The trial court did not address appellant personally toward the end of the colloquy but rather addressed appellant's counsel, asking him if he was satisfied that his client understood what was contained in the document and the consequences of waiving his constitutional rights. "It is well established that a trial court must personally address a criminal defendant thereby enabling the court to fully determine the defendant's understanding of the consequences of his plea." *Westlake v. Kilbane* (2001), 146 Ohio App.3d 308, 313, citing *State v. Engle* (1996), 74 Ohio St.3d 525, 527, citing *State v. Caudill* (1976), 48 Ohio St.2d 342, paragraph two of the syllabus; see, also, *Cleveland v. Chebib* (Jan. 18, 2001), 8th Dist. No. 76924, 2001 Ohio App. LEXIS 148. "A trial court cannot discharge its duty to personally address a criminal defendant under Crim.R. 11 by eliciting answers from defense counsel." *Kilbane*, supra, at 313, citing *State v. Ballard* (1981), 66 Ohio St.2d 473, 481.

{¶136} I believe appellant's first issue is with merit, thereby rendering his first assignment of error well-taken.

{¶137} In his second assignment of error, appellant contends that the trial court erred when it incorrectly advised him of the nature of his post release control, when the

correct period of post release control is a mandatory period of five years for a felony that is a sex offense pursuant to R.C. 2967.28(B)(1), making his sentence void. I agree.

{¶138} When reviewing an alleged sentencing error, Ohio's appellate courts must apply the two-pronged test set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. First, the appellate court determines if the sentencing court "has adhered to all applicable rules and statutes in imposing the sentence." Id. at ¶14. The standard for this determination is whether the trial court's application of the appropriate rules and statutes is "clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." Id. If the sentence passes this prong of the test, the appellate court then reviews for abuse of discretion. Id. at ¶17.

{¶139} R.C. 2967.28(B)(1) provides that the period of post release control "*** for a felony sex offense [is] five years[.]"

{¶140} In the case sub judice, the plea agreement, the colloquy from the change of plea hearing, and the trial court's December 2, 2008 judgment entry, indicate that post release control is mandatory up to a maximum of three years. However, pursuant to R.C. 2967.28(B)(1), post release control is mandatory up to a maximum of five years. This writer determines, and the state concedes, that the trial court rendered an invalid judgment with respect to post release control. Thus, I believe the trial court's judgment does not pass the first prong of the *Kalish* test, making appellant's sentence void. *State v. Bloomer*, 122 Ohio St.3d 200**,** 2009-Ohio-2462, at ¶27; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at the syllabus. As such, the "trial court must resentence the offender as if there had been no original sentence." *Bezak* at ¶16.

{¶141} I believe appellant's second assignment of error is with merit.

{¶142} For the foregoing reasons, this writer believes that appellant's assignments of error are well-taken. I would reverse the judgment of the trial court, vacate appellant's sentence, and remand the matter for further proceedings.

{¶143} Thus, I respectfully dissent.