

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLINTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-02-003
- vs -	:	<u>OPINION</u>
	:	12/13/2010
TERESA J. MOORE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CRI2009-5134

Richard W. Moyer, Clinton County Prosecuting Attorney, Brian A. Shidaker, 103 East Main Street, Wilmington, Ohio 45177, for plaintiff-appellee

Rose & Dobyns Co., LPA, Scott B. Evans, 97 N. South Street, Wilmington, Ohio 45177, for defendant-appellant

BRESSLER, J.

{¶1} Defendant-appellant, Teresa J. Moore, appeals her sentence following her conviction in the Clinton County Court of Common Pleas for felonious assault.

{¶2} Appellant was arrested on May 15, 2009 after she used matches and a lighter to burn, as a form of punishment, the fingertips of a child she was babysitting. On June 9, 2009, appellant was indicted on one count each of felonious assault in violation of R.C. 2903.11(A)(1) and endangering children in violation of R.C. 2919.22(B)(2). After appellant entered a plea of not guilty by reason of insanity and a

request for evaluation, appellant was evaluated and the trial court found appellant competent to stand trial. Appellant also filed a motion to suppress, which the trial court denied after holding a hearing.

{¶13} Subsequently, appellant entered a guilty plea to one count of felonious assault in violation of R.C. 2903.11(A)(1), and the remaining charge against her was dismissed. The trial court conducted a sentencing hearing where it imposed a six-year term of imprisonment. At the hearing, the trial court advised appellant that she was subject to a mandatory five-year period of postrelease control following her release from prison. The trial court's Judgment Entry of Sentence also indicates appellant is subject to a mandatory five-year period of postrelease control.

{¶14} Appellant appeals her sentence and raises the following assignment of error.

{¶15} "THE TRIAL COURT ERRED IN FAILING TO PROPERLY ADVISE APPELLANT OF THE PROVISIONS OF POST-RELEASE CONTROL AT THE APPELLANT'S PLEA HEARING."

{¶16} In her assignment of error, appellant argues the trial court incorrectly advised appellant that she is subject to a mandatory five-year period of postrelease control following her release from prison. Appellant argues her guilty plea and sentence should be vacated based on this error.

{¶17} At appellant's sentencing hearing, the trial court advised appellant as follows, with respect to the term of postrelease control:

{¶18} "Now, when you get out of prison * * * it's not over because this does carry with it a mandatory period of supervision by the Ohio Adult Parole Authority. And I believe it is 5 years in this case * * *. So when you get out after that six-year term [of imprisonment] is completed, there will be a five-year period of supervision that will be

mandated by this Court to be conducted by the Ohio Adult Parole Authority. If violations of postrelease control occur, the Parole Board may return you to prison for up to 50 percent of this stated prison term, maximum three years, nine months for any single violation. And if you commit a new felony as a violation of postrelease control, a judge having jurisdiction over that felony may extend this prison term not less than one year or the time remaining on postrelease control, whichever is greater. Those sanctions, as imposed, shall be considered part of this Court's sentence."

{¶9} Also, the trial court's Judgment Entry of Sentence includes the following language:

{¶10} "Upon completion of the prison term, the offender *shall be subject* to a period of post release control as determined by the Parole Board pursuant to [R.C. 2967.28] of 5-years. If violations of post release control occur, the Parole Board may return the defendant to prison for up to fifty-percent of the stated prison term (9-months for any single violation); and for commission of a new felony may, pursuant to [R.C. 2967.28], extend the stated prison term for further periods, not less than one year, as provided by law. Such additional periods of time imposed by another court or by the Parole Board for violations in this case while on post release control are part of the sentence in this case." (Emphasis sic.)

{¶11} Appellant is correct that the trial court erred in imposing a mandatory five-year period of postrelease control. Appellant was convicted of felonious assault in violation of R.C. 2903.11(A)(1), which is a second-degree felony. R.C. 2967.28(B) provides in part, "[e]ach sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the

offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. * * * Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of post-release control required by this division for an offender shall be[,] * * * [f]or a felony of the second degree that is not a felony sex offense, three years * * *."

{¶12} However, appellant is incorrect in her assertion that the proper remedy for the trial court's error is vacating her guilty plea and sentence. R.C. 2929.191, which became effective on July 11, 2006, establishes the procedure to remedy a sentence that fails to properly impose a term of postrelease control. In *State v. Singleton*, 124 Ohio St.3d, 173, 2009-Ohio-6434, paragraph two of the syllabus, the Ohio Supreme Court held, "[f]or criminal sentences imposed on or after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191." Such procedures include a hearing limited to the imposition of postrelease control and a corrected judgment entry. *Id* at ¶24. R.C. 2929.191 applies to appellant, because she was sentenced after July 11, 2006.

{¶13} Also, we note that the state is misplaced in its assertion that the proper remedy to correct the trial court's error is a nunc pro tunc entry by the trial court. As the Ohio Supreme Court recently indicated in *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, ¶76, "R.C. 2929.191(C) requires that a hearing be conducted before a nunc pro tunc entry is journalized to correct a sentence that fails to properly impose a term of postrelease control." We recognize this holding supersedes our previous holding in *State v. Harrison*, Butler App. Nos. CA2009-10-272, CA2010-01-019, 2010-Ohio-2709, ¶25, that such a nunc pro tunc entry, without a hearing, is sufficient to correct a clerical error such as an incorrect postrelease control notification.

{¶14} Appellant also argues that she was not properly informed of the mandatory

nature of her postrelease control supervision. However, our review of the record indicates the trial court explained at the sentencing hearing that her sentence includes "a mandatory period of supervision by the Ohio Adult Parole Authority." Further, while the sentencing entry does not include the word "mandatory," the trial court stated in its entry, "[u]pon completion of the prison term, the offender *shall be subject* to a period of post release control by the Parole Board * * *." (Emphasis sic.) The trial court's use of the word "shall" clearly indicates the mandatory nature of postrelease control. See *State v. Irizarry*, Cuyahoga App. No. 93352, 2010-Ohio-3868, ¶12.

{¶15} Next, appellant implies, but does not expressly argue, that her guilty plea was not knowing and voluntary because she was not properly notified as to the term of postrelease control. To uphold a guilty plea, there must be substantial compliance with the Crim.R. 11(C)(2)(a) requirement to disclose the maximum penalties. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. "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." *Id.*, citing *State v. Stewart* (1977), 51 Ohio St.2d 86.

{¶16} When a trial court does not substantially comply with Crim.R. 11 in regard to a nonconstitutional right, the reviewing court must then determine whether the court partially complied or failed to comply with the rule. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶32. If the trial court completely failed to comply with the rule, the plea must be vacated. *Id.* However, if the trial court merely partially complied with the rule, the plea may be vacated only if the defendant demonstrates a prejudicial effect. *Id.* The test for prejudice is "whether the plea would have otherwise been made." *Nero*, 56 Ohio St.3d at 108, citing *Stewart*, 51 Ohio St.2d at 93.

{¶17} We find that the trial court partially complied, but did not substantially comply with Crim.R. 11 as it relates to appellant's nonconstitutional right to have her full

sentence properly explained to her. See *State v. Eberle*, Clermont App. No. CA2009-10-065, 2010-Ohio-3563, ¶49, citing *Clark*, 2008-Ohio-3748, ¶39-40. However, while appellant states that she was prejudiced by the trial court's error, she fails to explain how she was prejudiced by this error. There is absolutely nothing in the record to indicate that appellant would not have entered a guilty plea had the trial court properly informed her that she is subject to a mandatory period of postrelease control for three years instead of five years, nor does appellant even make such an allegation in her brief.

{¶18} Appellant's assignment of error is sustained in part and overruled in part.

{¶19} Accordingly, this matter is remanded for resentencing in accordance with the procedures set forth in R.C. 2929.191. See, also, *State v. Bloomer*, 122 Ohio St.3d 200, 2010-Ohio-2462, ¶69 ("the most basic requirement of R.C. 2929.191 and our existing precedent [is] that [the trial court] notify the offender of the mandatory nature of the term of postrelease control and the length of that mandatory term and incorporate that notification into its entry").

{¶20} Judgment reversed as to sentencing only and cause remanded for resentencing.

YOUNG, P.J., and POWELL, J., concur.