

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-10-065
- vs -	:	<u>OPINION</u> 8/2/2010
JEFFREY E. EBERLE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2006CR023

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103, for plaintiff-appellee

Thomas W. Kidd, Jr., P.O. Box 231, Harveysburg, Ohio 45032, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Jeffrey E. Eberle, appeals from the decision of the Clermont County Court of Common Pleas denying his motion to withdraw his guilty plea. For the reasons outlined below, we affirm the trial court's sentencing entry as amended.

{¶2} On January 11, 2006, appellant was indicted for aggravated murder, kidnapping, and aggravated arson. On September 18, 2006, after entering into plea negotiations, appellant pled guilty to aggravated murder in violation of R.C. 2903.01(A), an unclassified felony and the state agreed to dismiss all remaining counts and all

specifications, including those accompanying the aggravated murder charge. That same day, the trial court sentenced appellant to serve a term of life in prison with the possibility of parole after 20 years and informed him that he faced a mandatory five-year term of postrelease control if he was ever released from prison.

{¶3} Appellant did not appeal from his conviction and sentence.

{¶4} Over three years later, on July 20, 2009, appellant moved to withdraw his guilty plea arguing that his trial counsel was ineffective and that he was the "victim" of prosecutorial misconduct. The trial court, without first conducting an evidentiary hearing, denied appellant's motion by finding no manifest injustice warranted the withdrawal of his plea.

{¶5} Appellant appealed from the trial court's decision, raising one assignment of error. However, at the conclusion of oral arguments, this court sua sponte raised the issue of whether appellant's guilty plea was rendered invalid pursuant to the Ohio Supreme Court's decision in *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, when the trial court erroneously informed him that he would be subject to a mandatory five-year term of postrelease control if he was ever released from prison.¹ Therefore, because the parties provided this court with supplemental briefs regarding that issue, we find an initial review of the validity of appellant's guilty plea is appropriate.

{¶6} A criminal defendant's choice to enter a guilty plea is a serious decision because, by agreeing to plead guilty, he is giving up several constitutional rights. *Clark*, 2008-Ohio-3748 at ¶25; *State v. Nero* (1990), 56 Ohio St.3d 106, 107; *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709. In turn, because the "exchange of certainty for some of the most fundamental protections in the criminal justice system will

1. It is undisputed that the trial court provided appellant with an incorrect recitation of the law as it relates to the application of postrelease control to an aggravated murder conviction, an unclassified felony, in its

not be permitted unless the defendant is fully informed of the consequences of his or her plea," when a defendant enters a guilty plea in a criminal case, the plea must be knowingly, intelligently, and voluntarily made. *Clark*, 2008-Ohio-3748 at ¶26; *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179. The failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution. *State v. Douglass*, Butler App. Nos. CA2008-07-168, CA2008-08-199, 2009-Ohio-3826, ¶9.

{¶7} To ensure that guilty pleas conform to these high standards, the trial court must engage the defendant in a Crim.R. 11 colloquy before accepting his plea. *Clark*, 2008-Ohio-3748 at ¶26, citing *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph one of the syllabus. In conducting this colloquy, the trial court must convey accurate information to the defendant relating to, among other things, the charges and maximum penalty involved, and, if applicable, that he is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing, so that the defendant can understand the consequences of his decision and enter a valid plea. Crim.R. 11(C)(2); *Douglass* at ¶9, citing *Clark*, 2008-Ohio-3748 at ¶26.

{¶8} Although "[l]iteral compliance with Crim.R. 11, in all respects, remains preferable to inexact plea hearing recitations," if the trial court fails to literally comply with such requirements, reviewing courts must engage in a multi-tiered analysis to determine the significance of the failure and, depending on the failure, the appropriate remedy. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶19, fn.2; *Clark*, 2008-Ohio-3748 at ¶30. For example, when the trial court fails to explain the *constitutional* rights to the defendant as set forth in Crim.R. 11(C)(2)(c), the guilty plea is rendered

"Plea of Guilty" form, as well as during the plea colloquy, sentencing hearing, and in its final sentencing entry. See, e.g., *Clark*, 2008-Ohio-3748 at ¶5-21, 36, 38.

invalid "under the presumption that it was entered involuntarily and unknowingly." *Clark*, 2008-Ohio-3748, ¶31, quoting *Griggs*, 2004-Ohio-4415, ¶12. However, when the trial court "imperfectly" explains the Crim.R. 11 *nonconstitutional* rights to the defendant, a substantial compliance standard applies. *Clark*, 2008-Ohio-3748 at ¶31; Crim.R. 11(C)(2)(a)-(b). Under this standard, a slight deviation from the text of the rule is permissible, so long as the totality of the circumstances indicates that the defendant subjectively understands the implications of his plea and the rights he is waiving. *State v. Phillips*, Butler App. No. CA2008-05-126, 2009-Ohio-1448, ¶13, citing *Clark*, 2008-Ohio-3748 at ¶31.

{¶9} When the 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. *Clark*, 2008-Ohio-3748 at ¶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 *State v. Stewart* (1977), 51 Ohio St.2d 86, 93.

{¶10} In this case, after a plea agreement was reached, appellant, his attorneys, and the prosecution signed a written "Plea of Guilty" form. This form, besides correctly listing the maximum penalty for aggravated murder as life in prison without parole, also read, in pertinent part, the following:

{¶11} "The defendant also acknowledges that he has been advised and understands that POST RELEASE CONTROL is mandatory in this case. If he is granted parole, he will be subject to five (5) years of post release control under terms and conditions determined by the Parole Board. A violation of any post release rule or

condition can result in a more restrictive sanction, increased duration of control and re-imprisonment. Each violation could result in re-imprisonment for up to nine months for each violation up to a maximum of one-half my original term. If the violation is a new felony offense, I could receive an additional prison term of the greater of one year or the time remaining on post release control." [sic]

{¶12} Thereafter, at the plea hearing, the trial court engaged appellant in a colloquy stating, in pertinent part, the following:

{¶13} "THE COURT: All right. [Prosecutor], on behalf of the State I would like for you to place on the record at this point in time your understanding of the negotiated resolution of this case, please?

{¶14} "[THE STATE]: Your Honor, my understanding is that [appellant] will enter a plea of guilty to Count 1 of the indictment, Aggravated Murder with Prior Calculation and Design. In exchange for that plea the State of Ohio would dismiss counts 2, 3, 4, and 5, and all specifications contained within the indictment. It is my understanding that both parties are going to jointly recommend to the – to the court that [appellant] receive life in prison with parole eligibility after 20 years in prison. * * *."

{¶15} "THE COURT: [Appellant's trial counsel], on behalf of [appellant, and co-counsel], is this your understanding about how the matter will be resolved?

{¶16} "[APPELLANT'S TRIAL COUNSEL]: Yes, it is, Your Honor.

{¶17} "THE COURT: All right. [Appellant,] before I can allow you to enter a plea of guilty to a charge of aggravated murder, * * * I need to go through what the charge is that you're pleading guilty to, what the possible consequences – that is the maximum possibility penalties could be in this case for your plea of guilty here today, as well as the rights you're giving up.

{¶18} "* * *

{¶19} "THE COURT: All right. Now, you're charged in Count No. 1 of this indictment. It alleges an aggravated murder charge. It alleges that on or about the 15th day of December of 2005 and in Clermont County, Ohio, that you did purposely with prior calculation and design cause the death of another person * * *. Do you understand what that charge is?

{¶20} "[APPELLANT]: Yes, Sir.

{¶21} "* * *

{¶22} "THE COURT: All right. Now, aggravated murder in Ohio is an unspecified felony. It does carry a maximum possible penalty of life in prison without parole, or life in prison with parole eligibility after you would serve 30 years, or life imprisonment with parole eligibility after serving 25 years, or life imprisonment with parole after serving 20 years imprisonment. Do you understand that?

{¶23} "[APPELLANT]: Yes, Sir.

{¶24} "* * *

{¶25} "THE COURT: All right. Now, you understand that part of the negotiated plea that you're entering here is that the State, you, and your attorneys are recommending to this panel of judges that the Court impose a sentence of life imprisonment with eligibility for parole after you have served 20 years of imprisonment. Do you understand that?

{¶26} "[APPELLANT]: Yes.

{¶27} "* * *

{¶28} "THE COURT: Now, you also understand that after – that you are – this is a mandatory sentence, you understand that? And mandatory means that the Court is not permitted to grant you any type of early release. There would be no opportunity for community control or judicial release in the future; you understand that?

{¶29} "[APPELLANT]: Yes.

{¶30} "THE COURT: All right. Now, you also understand that parole is not promised? You are eligible for parole after you have served 20 years of imprisonment. You could, however, serve your entire natural life in prison should you not be granted parole. Do you understand that?

{¶31} "[APPELLANT]: Yes, Sir."

{¶32} The court continued by stating the following:

{¶33} "THE COURT: Do you also understand that if you are granted parole at some point in the future, that post-release control – what we used to call parole in Ohio – is mandatory in this case? Do you understand that? [sic]

{¶34} "[APPELLANT]: Yes, Sir.

{¶35} "THE COURT: And that you would be supervised by the Adult Parole Authority upon release for a period of five years. Do you understand that?

{¶36} "[APPELLANT]: Yes, Sir.

{¶37} "THE COURT: And that they can place upon you certain restrictions as to your travel, certain other restrictions and rule of post-release control, and that could be for a period of five years – or would be for a period of five years. You understand that?

{¶38} "[APPELLANT]: Yes, Sir.

{¶39} "THE COURT: Now, if you were to violate a term or condition of your release on parole, you could be returned to prison. Do you understand that?

{¶40} "[APPELLANT]: Yes, Sir.

{¶41} "THE COURT: Each violation of parole rules could result in your being returned to prison for up to nine months. Do you understand that?

{¶42} "[APPELLANT]: Yes, Sir.

{¶43} "THE COURT: And if you violated your parole by committing a new felony

offense, the judge sentencing you in the new case could impose a sentence for violating post-release control of up to the number of months you have remaining on post-release control, or one year, whichever might be greater. Do you understand that? (sic)

{¶44} "[APPELLANT]: Yes, Sir."

{¶45} The trial court then advised appellant that by entering a guilty plea he would waive his right to a jury trial, the right to confront his accusers, the right to compulsory process to obtain witnesses, the right to require the state to prove his guilt beyond a reasonable doubt, and his privilege against compulsory self-incrimination.

{¶46} Following this colloquy, appellant entered a guilty plea to one count of aggravated murder. However, at the sentencing hearing, the trial court stated the following:

{¶47} "THE COURT: * * * I need to also advise [appellant] that there is post-release possible, and so as part of the sentence I need to also advise him that he is subject to mandatory post-release control if parole is granted in this case. That would be for a period of five years. And as I previously advised [appellant], a violation of post-release control terms or conditions can result in his being returned to prison for up to one-half of the sentence, or if he violates by the commission of a new felony offense, the sentencing Judge in the new case can also impose a sentence for violating post-release control of up to the number of months remaining on post-release control or one year whichever is greater. * * *."

{¶48} The trial court then reiterated in its sentencing entry that appellant would be "subject to mandatory period of post release control for a period of five years under the supervision of the Adult Parole Authority."

{¶49} After a thorough review of the record, we find the trial court strictly complied with the requirements of Crim.R.11(C)(2)(c) in explaining appellant's

constitutional rights to him. See *Douglass*, 2009-Ohio-3826 at ¶34, citing *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, syllabus. However, because the trial court incorrectly informed appellant that he was subject to a mandatory five-year term of postrelease control if he was ever released from prison, thereby obscuring the relatively straightforward maximum penalty involved, the trial court did not substantially comply with Crim.R. 11 as it relates to appellant's *nonconstitutional* rights, but instead, merely partially complied with the rule. See *Clark*, 2008-Ohio-3748 at ¶39-40.

{¶50} Yet, besides merely asserting in his supplemental brief that he "would not have followed through with his plea" after this court brought the issue to his attention, there is simply nothing in the record to suggest appellant would not have entered his guilty plea had the trial court not erroneously informed him that he was subject to a mandatory five-year term of postrelease control.² As the record indicates, appellant was informed on numerous occasions that his decision to enter a guilty plea to aggravated murder, an unclassified felony, carried with it the potential maximum penalty of life in prison without the possibility of parole. In turn, because there is simply nothing in the record to indicate appellant misunderstood the ramifications of his decision, and because he failed to prove the conditions he faced if he was ever released from prison were critical to his decision to enter his guilty plea, we find appellant has not demonstrated any resulting prejudice. See *Douglass* at ¶36; see, also, *State v. Clark*, Cuyahoga App. No. 2006-A-0004, 2008-Ohio-6768, ¶18 (finding no prejudice to defendant upon remand from Ohio Supreme Court following guilty plea to aggravated murder when trial court incorrectly informed him that he would be subject to a mandatory term of postrelease control). Accordingly, appellant's guilty plea is affirmed.

2. As noted previously, this court, and not appellant, raised this issue on appeal. The fact that appellant did not raise this issue on his own accord further weakens his argument that he was, in fact, prejudiced.

{¶51} However, while we find his guilty plea valid, the trial court improperly imposed a mandatory five-year term of postrelease control as part of its sentence. See *State v. McCree*, Cuyahoga App. No. 87951, 2007-Ohio-268, ¶104, motion for delayed appeal denied, 114 Ohio St.3d 1409, 2007-Ohio-2632. As noted above, an individual sentenced for aggravated murder, an unclassified felony, is not subject to postrelease control. *Clark*, 2008-3748 at ¶36. In turn, because the erroneous postrelease control language found in appellant's sentence was provided in addition to, and not in lieu of, the trial court's proper explanation of the possibility of parole following his 20 years of imprisonment, we vacate that portion of the trial court's sentencing entry sentencing appellant to postrelease control.³

{¶52} Having affirmed his guilty plea, we now turn our attention to appellant's single assignment of error.

{¶53} "THE COURT ERRED IN DENYING APPELLANT'S MOTION TO WITHDRAW GUILTY PLEA WITHOUT A HEARING SINCE HE WOULD NOT HAVE ENTERED THIS PLEA BUT FOR THE INEFFECTIVENESS OF COUNSEL AND THE MISCONDUCT OF THE GOVERNMENT."

{¶54} In his sole assignment of error, appellant argues that the trial court erred by denying his post-sentence motion to withdraw his guilty plea, or that, at the very least, the trial court erred by not first conducting an evidentiary hearing. We disagree.

{¶55} Pursuant to Crim.R. 32.1, "[a] defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice." *State v. Degaro*, Butler App. No. CA2008-09-227, 2009-Ohio-2966, ¶10, quoting *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. A

3. Nothing in this opinion should be construed as requiring the trial court to explain parole as part of the maximum possible penalty in a Crim.R. 11 colloquy. See *Clark*, 2008-Ohio-3748, ¶37.

manifest injustice "is a fundamental flaw in the proceedings that results in a miscarriage of justice or is inconsistent with the requirements of due process." *State v. McMahon*, Fayette App. No. CA2009-06-008, 2010-Ohio-2055, ¶6, citing *State v. Moncrief*, Franklin App. No. 08AP-153, 2008-Ohio-4594, ¶11. A post-sentence motion to withdraw a guilty plea is allowable only in extraordinary cases, and therefore, because the decision to grant or deny a post-sentence motion to withdraw a guilty plea is within the sound discretion of the trial court, an appellate court will not reverse a trial court's decision absent an abuse of that discretion. *State v. Williams*, Warren App. No. CA2009-03-032, 2009-Ohio-6240, ¶11, citing *Smith* at 264; *State v. Powell*, Clermont App. No. CA2009-05-028, 2009-Ohio-6552, ¶10.

{¶56} Ineffective assistance of counsel is a proper basis for seeking a post-sentence withdrawal of a guilty plea. *State v. Mays*, 174 Ohio App.3d 681, 2008-Ohio-128, ¶8. When an alleged error underlying a motion to withdraw a guilty plea is the ineffective assistance of counsel, the defendant must show (1) that his counsel's performance was deficient and (2) that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty. *State v. Finkbine*, Warren App. No. CA2005-06-068, 2006-Ohio-1788, ¶7; *State v. Xie* (1992), 62 Ohio St.3d 521, 524, citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.

{¶57} Initially, appellant argues that the trial court erred by denying his motion to withdraw his guilty plea because he was provided ineffective assistance of counsel. In support of this claim, appellant argues that his trial attorneys were deficient for "not revealing to him the nature" of a statement made by the state's "prized" witness, and that, had he been aware of the content of the statement, he would not have entered his

guilty plea.⁴ However, just as the trial court found, and to which we agree, appellant's trial attorneys' *opinion* regarding the potential impact this evidence could have on the jury is nothing more than an exercise of his counsels' reasonable professional judgment that does not rise to the level of deficient representation. In fact, the record clearly indicates that appellant's trial attorneys, just like any other effective criminal defense team, were there to provide appellant with informed advice, to relate worse case scenarios to him, and to make recommendations on how to proceed. See *State v. Shugart*, Mahoning App. No. 08 MA 238, 2009-Ohio-6807, ¶37. Therefore, because trial counsel is presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of its reasonable professional judgment, we find no error in the trial court's decision finding the evidence failed to create a manifest injustice permitting appellant to withdraw his guilty plea based on his trial attorneys' alleged ineffective assistance.

{¶58} Next, appellant argues that the trial court erred by denying his motion because he was the "victim" of prosecutorial misconduct resulting from the state "hiding evidence," thereby making his plea involuntary. However, even after accepting the allegations made in the submitted affidavits as true, the trial court found the evidence did not create a reasonable likelihood that a withdrawal of his guilty plea was necessary to correct a manifest injustice. After a thorough review of the record, we find no error in the trial court's decision. See *Williams*, 2009-Ohio-6240 at ¶17; *Powell*, 2009-Ohio-6552 at ¶10. The affidavits submitted by appellant in support of the withdrawal of his guilty plea based on prosecutorial misconduct were, at best, rife with ambiguity and

4. The statement, which his trial attorneys opined would deliver a guilty verdict, indicated appellant told the state's witness that the victim "tried to play us so we got him."

based on multiple layers of hearsay.⁵ Therefore, the trial court could reasonably conclude that appellant's allegations of prosecutorial misconduct did not justify vacating his guilty plea.

{¶59} Appellant also argues the trial court erred by not conducting a hearing before ruling on his motion to withdraw his guilty plea. A trial court, however, need not hold an evidentiary hearing on a post-sentence motion to withdraw where the record indicates the defendant is not entitled to relief. *State v. Taylor*, Madison App. No. CA2007-12-037, 2009-Ohio-924, ¶34, citing *Mays*, 2008-Ohio-128 at ¶6; *Degaro*, 2009-Ohio-2966 at ¶13. Therefore, as discussed above, because appellant failed to demonstrate a reasonable likelihood that the withdrawal of his guilty plea was necessary to correct a manifest injustice, the trial court did not err by denying his motion without first conducting an evidentiary hearing. *State v. Heath*, Warren App. No. CA2006-03-036, 2006-Ohio-7045, ¶8, citing *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶32.

{¶60} In light of the foregoing, we find the trial court did not abuse its discretion by overruling appellant's motion to withdraw his guilty plea without first conducting an evidentiary hearing. Accordingly, as the record is simply devoid of the type of extraordinary circumstances that would necessitate allowing him to withdraw his guilty plea, appellant's sole assignment of error is overruled.

{¶61} Judgment affirmed as modified.

BRESSLER, P.J., and POWELL, J., concur.

5. The evidence appellant places great significance on to form his prosecutorial misconduct claim is from an affidavit of a private investigator who allegedly discovered a statement from a woman in an interview indicating she told police her boyfriend told her he committed the murder and that the victim was "pushing up daisies."