

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 09-CA-49
Plaintiff-Appellee	:	
	:	Trial Court Case Nos. 99-CR-628
v.	:	00-CR-072
	:	
DARYL COCHRAN	:	
	:	(Criminal Appeal from
Defendant-Appellant	:	Common Pleas Court)
	:	

.....
OPINION

Rendered on the 25th day of June, 2010.

.....

AMY M. SMITH, Atty. Reg. #0081712, Clark County Prosecutor's Office, 50 East
Columbia Street, 4th Floor, Post Office Box 1608, Springfield, Ohio 45501
Attorney for Plaintiff-Appellee

WILLIAM O. CASS, JR., Atty. Reg. #0035417, 3946 Kettering Boulevard, Suite 202,
Kettering, Ohio 45439
Attorney for Defendant-Appellant

.....

FAIN, J.

{¶ 1} Defendant-appellant Daryl Cochran appeals from the denial of his pre-sentence motion to withdraw his guilty plea to Murder, Aggravated Robbery, and Tampering with Evidence, without a hearing. Cochran contends that the inclusion, in his sentence, of a provision for five years of post-release control following his release from prison, confounded the expectation he had, as a result of having

entered into a plea agreement with the State providing for a sentence that did not include any reference to post-release control. We conclude that the record does not support Cochran's contention, since it appears that the trial court advised him, when taking his plea, that five years of post-release control would be a statutorily mandated part of his sentence. Accordingly, the order of the trial court denying Cochran's motion to withdraw his guilty plea is Affirmed.

I

{¶ 2} In 1999, Cochran was charged by indictment with one count of Aggravated Murder, one count of Complicity to Commit Murder, one count of Complicity to Commit Aggravated Robbery, and one count of Tampering with Evidence. In early 2000, Cochran was charged in a second indictment with one count of Aggravated Robbery. The trial court consolidated the two indictments, replacing the count of Complicity to Commit Aggravated Robbery, in the first indictment, with the count of Aggravated Robbery in the second indictment.

{¶ 3} Also in early 2000, Cochran pled guilty to one count of Murder, one count of Aggravated Robbery, and one count of Tampering with Evidence. The Aggravated Murder count was dismissed. The plea agreement included a joint recommendation of a sentence of fifteen years to life imprisonment for Murder, ten years for Aggravated Robbery, and five years for Tampering with Evidence, to be served consecutively, for an aggregate sentence of thirty years to life imprisonment.

{¶ 4} The joint recommendation of sentence included no reference to a period of post-release control to follow Cochran's eventual release from prison. In

the plea colloquy, however, the trial court informed Cochran that he would be subject to a mandatory period of five years of post-release control, and obtained his affirmative response when asked if he understood that. And the sentence imposed in the trial court's termination entry included provision for post-release control. But it appears that in the pronouncement of sentence, orally, at the sentencing hearing, the trial court omitted reference to post-release control.

{¶ 5} In 2005, Cochran filed two motions in the trial court that are not relevant to this appeal. Both were overruled.

{¶ 6} In late 2008, Cochran filed a "Post Conviction Motion to Correct a Void Sentence and Request for Resentencing," noting that his original sentence lacked the provision for post-release control mandated by statute, with the result that his original sentence was void under the authority of *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250. The State did not oppose Cochran's motion, and the trial court set a hearing date for May 7, 2009.

{¶ 7} Shortly before the commencement of the re-sentencing hearing, Cochran filed a motion to withdraw his plea. In his motion, Cochran contended that "his guilty pleas was [sic] not made knowingly, voluntarily, and intelligently with substantial compliance of Crim. R. 11(C)(2)(a) requirements because trial court, prior to accepting the pleas, failed to determine if he understood the maximum stipulated sentencing penalty negotiated in his Plea Agreement and Waiver with the Plaintiff, State of Ohio, would include a mandatory term of post-release control as part of the stipulated sentence in the case."

{¶ 8} At the re-sentencing hearing, the trial court orally overruled Cochran's

motion to withdraw his plea, without a hearing on that issue. The trial court imposed the same sentence originally imposed, but this time included, in its oral pronouncement, a provision for post-release control. From the overruling of his motion to withdraw his plea, Cochran appeals.

II

{¶ 9} Cochran asserts two assignments of error:

{¶ 10} “THE COURT ERRED IN DENYING THE APPELLANT’S MOTION TO WITHDRAW HIS GUILTY PLEA.

{¶ 11} “THE IMPOSITION OF MANDATORY POST RELEASE CONTROL VIOLATED THE TERMS OF THE PLEA AGREEMENT AND REQUIRES THAT THE APPELLANT BE PERMITTED TO VACATE HIS PLEA.”

{¶ 12} As a preliminary matter, the State contends that the overruling of Cochran’s motion to withdraw his plea is not a final appealable order, because it has not been entered upon the trial court’s journal. The State cites *State v. Tripodo* (1977), 50 Ohio St.2d 124, for the proposition that: “An announcement of a decision in a criminal case is not a final appealable order until the entry of judgment thereon is filed with the trial court.”

{¶ 13} At the re-sentencing hearing, the trial court twice orally overruled Cochran’s motion to withdraw his plea. Thereafter, the trial court entered a judgment of conviction and sentence, by entry filed June 1, 2009. This was the trial court’s entry of judgment in the case, and all of its previous interlocutory rulings, including the overruling of Cochran’s motion to withdraw his plea, became final and

appealable as a result of the final judgment rendered in the case.

{¶ 14} We also agree with Cochran that his motion to withdraw his plea, made just shortly before the imposition of the first non-void sentence in his case, must be treated as a pre-sentence motion to withdraw, to be governed by the more lenient standard applicable to pre-sentence motions, under Crim. R. 32.1. Nevertheless, even pre-sentence motions to withdraw a plea are subject to the trial court's exercise of discretion. *State v. Xie* (1992), 62 Ohio St.3d 521.

{¶ 15} The plea agreement, signed by both Cochran and the State, agreed to a sentence of thirty years to life sentence, but without any reference to the subject of post-release control. The plea agreement concluded with the following paragraph:

{¶ 16} "(16) This is to certify that the terms and conditions as specified herein and the defendant's Plea Agreement and Waiver are a full and complete description of the negotiated plea agreement in this cause. It is further understood that if any other sentence is imposed other than that contemplated by the Plea Agreement and Waiver, then the plaintiff, State of Ohio and the defendant, Daryl Cochran will join in a motion to vacate the guilty plea entered pursuant to this agreement."

{¶ 17} By statute, Cochran's definite sentence of ten years for Aggravated Robbery requires a five-year period of post-release control. R.C. 2967.28. Also by statute, the Adult Parole Authority, upon the release from prison of one convicted of Murder, must wait at least five years before giving the convict a final release from parole supervision. R.C. 2967.16. The statute contemplates that one convicted of both an offense requiring a life sentence and an offense requiring a period of post-release control will be subject to both post-release requirements. R.C.

2967.28(F)(4).

{¶ 18} We understand the State’s argument that the conundrum Cochran raises with respect to the five-year period of post-release control required by R.C. 2967.28 is not likely to have any practical effect upon him, in view of the post-release parole supervision independently required as a result of his Murder conviction. Nevertheless, we cannot treat the issue as totally moot, since there is always the possibility that Cochran’s Murder conviction may be vacated some time in the future as a result of federal or state court action, or as a result of a gubernatorial pardon.

{¶ 19} Although the written plea agreement between Cochran and the State omitted any reference to post-release control, that subject was discussed in the plea colloquy:

{¶ 20} “THE COURT: And this is your signature following this statement [at the end of the written plea tender]?”

{¶ 21} “DEFENDANT: Yes, Your Honor.

{¶ 22} “THE COURT: Mr. Schumaker [the Clark County Prosecutor]?”

{¶ 23} “MR. SCHUMAKER: Yes, Your Honor.

{¶ 24} “The document [the plea agreement that had just been read into the record] did not contain the statutory provisions as to bad time, and the State would request – and post release control and the State would request the Court to review those with the Defendant.

{¶ 25} “THE COURT: All right.

{¶ 26} “Mr. Cochran, did your counsel talk to you about the concepts of bad time and post release control?”

{¶ 27} “DEFENDANT: Yes, Your Honor.

{¶ 28} “THE COURT: Then you understand that even though the Court would sentence you today to a term of 30 years to life, that the actual time imposed could be increased by what’s known as bad time. That means any time you violate a rule of the prison, they could give you another 15, 30, 60, or 90 days for each violation and add that to the time given you by the Court. They can continue to do that until you have accumulated up to one half the time given you by the Court.

{¶ 29} “Do you understand that?

{¶ 30} “DEFENDANT: Yes, Your Honor.

{¶ 31} “THE COURT: *Upon being released from prison, the parole authority would be required to place you on post release control for a period of five years.*

{¶ 32} “Do you understand that?

{¶ 33} “DEFENDANT: Yes, Your Honor.

{¶ 34} “THE COURT: *If you do not comply with their rules, they could put you back in prison for up to nine months for each violation on this case and they can continue to do that until you have accumulated again up to one half the time given you by the Court.*

{¶ 35} “Do you understand that?

{¶ 36} “DEFENDANT: Yes, Your Honor.

{¶ 37} “THE COURT: *If you commit another felony while on post release control, the sentencing judge or the parole authority could put you back in prison on this case for at least one year and up to the amount of time which remains on the post Lee [sic] release control, if it’s greater than one year. You would have to serve*

that time prior to and consecutive to any sentence on the new felony.

{¶ 38} “Do you understand that?”

{¶ 39} “DEFENDANT: Yes, Your Honor.” (Emphasis added.)

{¶ 40} From the above colloquy, it is clear that Cochran understood that a five-year period of post-release control would necessarily be part of his sentence, even though reference to it had been omitted from the plea agreement. Therefore, we conclude that Cochran’s plea was knowing and voluntary, and the trial court did not abuse its discretion in overruling his motion to withdraw his plea.

{¶ 41} It is true that the State did not join in Cochran’s motion to withdraw his plea, as Cochran argues that the State was required to do by virtue of the last paragraph in the plea agreement, quoted above. But even if the State had joined in the motion, explaining, as it would have been free to explain, that it was joining in the motion solely because of the requirement that it do so, in the final paragraph of the plea agreement, rather than out of any belief that Cochran’s plea was other than knowing and voluntary, we find it unlikely, in the extreme, that the trial court would have granted Cochran’s motion and permitted him to withdraw his plea.

{¶ 42} Cochran’s assignments of error are overruled.

III

{¶ 43} Both of Cochran’s assignments of error having been overruled, the order of the trial court overruling his motion to withdraw his guilty plea, from which this appeal is taken, is Affirmed.

.....

FROELICH and DONOFRIO, JJ., concur.

(Hon. Gene Donofrio, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Amy M. Smith
Clark County Prosecutor's Office
50 E. Columbia Street, 4th Floor
P.O. Box 1608
Springfield, OH 45501

William O. Cass, Jr.
3946 Kettering Blvd.
Suite 202
Kettering, OH 45439

Hon. Richard J. O'Neill
Clark County Common Pleas Court
Courthouse, 101 N. Limestone
Springfield, OH 45502-1120