

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
VINTON COUNTY

STATE OF OHIO,	:	Case No. 17CA706
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
MARK BETTS,	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellant.	:	RELEASED: 10/19/2017

APPEARANCES:

Darren L. Meade, Parks and Meade, L.L.C., Columbus, Ohio, for appellant.

Mike DeWine, Ohio Attorney General, and Micah R. Ault, Ohio Assistant Attorney General, Cleveland, Ohio, for appellee.

Harsha, J.

{¶1} After Mark Betts pleaded guilty to a felony, the Vinton County Court of Common Pleas sentenced him to prison and a mandatory term of post-release control.

{¶2} Betts asserts that he did not knowingly, intelligently, and voluntarily enter his guilty plea because the trial court failed to advise him of the maximum potential sentence involved, i.e., the potential post-release control sanctions he faces for a new felony conviction under R.C. 2929.141(A). We disagree and expand our prior holding addressing R.C. 2929.141(A) in the original sentencing context to cover the entry of a no contest and/or guilty plea. Consistent with other appellate courts, we hold that a trial court need not advise a defendant entering a guilty plea of the potential consequences under R.C. 2929.141 for committing a new crime while on post-release control.

{¶3} However, the trial court provided inaccurate information to Betts by advising him during his plea hearing that if he violates his post-release control by committing a new felony, he could receive “the time remaining on post release control

plus a prison term for the new crime.” Under R.C. 2929.141(A)(1), “[t]he maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony.”

{¶4} Nonetheless Betts is entitled to have his guilty plea vacated only if he demonstrates a prejudicial effect, i.e., that he would not have made the plea if he had known otherwise. Despite his claim of a “significant reluctance in entering a guilty plea” and the “tangible defenses” he had to present, there is little or nothing in the record to indicate that a correction of the trial court’s slight misstatement about the length of a potential prison term for violating post-release control by committing a new felony would have resulted in a decision not to enter a guilty plea.

{¶5} Betts is correct the trial court’s mistaken advice could underestimate his potential prison sentence for a post-release control violation based on his commission of a new felony near the end of his post-release control. However, the trial court’s notification could also overestimate his potential prison sentence for the post-release control violation if he were to commit the new felony near the beginning of his post-release control.

{¶6} And the record does not disclose any realistic defenses to the attempted theft charge. Betts claims that the crime was committed by his brother and that he merely collected payments through his own timber company to help his brother avoid child-support arrearage payments. Based upon his own admission that he purposely chose to assist his brother in violating a court support order, his credibility is suspect. Likewise his claim that he never cut timber from the victim’s property was rebutted by at

least eight witnesses who observed him doing so. Lastly, money from the payments for the timber went into the accounts of Betts, his wife, and his son. His claims to a credible defense are, in fact, incredible.

{¶7} Under these circumstances, Betts cannot establish the requisite prejudice to invalidate his plea and reverse his conviction. We overrule his assignment of error and affirm his conviction.

I. FACTS

{¶8} The Vinton County Grand Jury returned an indictment charging Mark Betts with one count of theft from an elderly person; because the value of the property was more than \$150,000, it became a first-degree felony. After the trial court appointed counsel for Betts, he entered a plea of not guilty.

{¶9} Betts subsequently waived his right to a jury trial and pleaded guilty to the reduced second-degree felony charge of attempted theft. His written plea included the following language concerning post-release control:

If I am sentenced to prison for a Felony 2 * * *, I will have mandatory post release control of 3 years. * * * If I violate conditions of supervision while under post release control, the parole board could return me to prison for up to nine months for each violation, for a total of fifty percent (50%) of my originally stated prison term. *If the violation is for a new felony, I could receive the time remaining on post release control plus a prison term for the new crime.*

(Emphasis added.)

{¶10} The trial court conducted a hearing on Betts's change of plea and engaged in a colloquy that advised Betts of his constitutional and nonconstitutional rights prior to Betts guilty plea to the reduced charge. The trial court gave Betts this notice about the post-release control :

Judge: The last paragraph on the first page of the plea of guilty advised about post release control. And what it advises in this particular case since this is a felony of the second degree it says if I am sentenced to prison for a felony of the second degree and then it goes on to say the main point is that in this case if the court orders you to serve a prison term then after you serve all prison time * * * since it is a felony of the second degree you would be placed and you would be subject to mandatory post release control for a term of three years. Do you understand that?

Mr. Betts: Yes.

Judge: And * * * if you are on post release control then there would be various conditions of the post release control that you would be required to follow. If you failed to follow those conditions then as explained in this paragraph you would be subject to a more strict sanction, a longer sanction while under post release control or you could be returned to prison. As it says here, parole board could return you to prison for up to nine months for each violation for a total of 50% of my originally stated prison term. *If the violation is a new felony I could receive the remaining time on post release control plus a prison term for the new crime.* Do you understand how post release control applies to your case Mr. Betts?

Mr. Betts: Yes.

(Emphasis added.)

{¶11} The trial court accepted Betts's plea after concluding that he had made a knowing, intelligent, and voluntary waiver of his constitutional and nonconstitutional rights under Crim.R. 11, and found him guilty of attempted theft.

{¶12} The court's presentence investigation revealed the following facts. From early April 2007 through mid-September 2010, Betts timbered roughly 700 acres of property located in Vinton County. The owner, Roy Waldron, an elderly man who lived in Grove City, Ohio, had not authorized the harvest and had died by the time of sentencing. A friend told Waldron about the timbering of his property in 2013, and together they contacted the Vinton County Sheriff's Department. Initially Betts stated that he never harvested lumber from Waldron's property, but later told the investigating

deputy sheriff that his deceased brother was responsible for the timbering. But at least eight individuals controverted that claim by identifying him as the person who timbered Waldron's property. Waldron stated that Betts had asked him several times for permission to harvest the lumber, but Waldron had refused him every time. A forestry expert valued the stolen timber at \$2,025,088. The investigators traced \$575,685 of payments from sawmills for the timber into bank accounts of Betts, his son, and his wife; none of the proceeds ever went to Waldron.

{¶13} Betts told investigators that he did not think he committed the offense because his brother cut the timber, not him. Betts also claimed that his now-deceased brother had a contract with Waldron to cut the timber and that he let Betts do the "financial things" for the transaction through his logging business to prevent his brother's ex-wife from getting the proceeds through child-support arrearages.

{¶14} At the sentencing hearing the victim's nephew and heir to his estate, and a close friend of the victim both testified. Betts's attorney asked for a suspended sentence so that he could begin paying the victim's estate the restitution owed for the crime. The trial court read from the presentence investigation report and noted that Betts had a prior felony conviction for theft of timber in 2012. The trial court sentenced Betts to a four-year prison term and three years of mandatory post-release control. We granted Betts's motion for leave to file a delayed appeal.

II. ASSIGNMENT OF ERROR

{¶15} Betts assigns the following error for our review:

APPELLANT'S GUILTY PLEA WAS NOT ENTERED KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WHEN THE TRIAL COURT DID NOT FULLY AND PROPERLY ADVISE APPELLANT OF THE MAXIMUM POTENTIAL SENTENCE INVOLVED, SPECIFICALLY THE POTENTIAL

POST-RELEASE CONTROL SANCTIONS APPELLANT FACES FOR A
NEW FELONY CONVICTION.

III. STANDARD OF REVIEW

{¶16} “ ‘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. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 7, quoting *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). “ ‘An appellate court determining whether a guilty plea was entered knowingly, intelligently, and voluntarily conducts a de novo review of the record to ensure that the trial court complied with the constitutional and procedural safeguards.’ ” *State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014-Ohio-5601, ¶ 36, quoting *State v. Moore*, 4th Dist. Adams No. 13CA965, 2014-Ohio-3024, ¶ 13.

IV. LAW AND ANALYSIS

{¶17} Betts claims that his guilty plea is invalid because he did not knowingly, intelligently, and voluntarily enter it due to the trial court’s failure to advise him of his maximum potential sentence, i.e., the potential post-release control sanctions he faces for a new felony conviction.

{¶18} “Crim.R. 11(C) governs the process that a trial court must use before accepting a felony plea of guilty or no contest.” *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, at ¶ 8. Before accepting a guilty plea in a felony case a trial court must address the defendant personally and determine 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.” (Emphasis added.) Crim.R. 11(C)(2)(a). The court must also inform the defendant of other matters under Crim.R. 11(C)(2)(b) and (c).

{¶19} Betts acknowledges that this case involves the trial court's notification of nonconstitutional rights under Crim.R. 11(C)(2)(a), specifically the maximum penalty involved. Because this notification is not constitutionally based, substantial compliance is sufficient; this means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. *Veney* at ¶ 15, citing *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶20} A defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must generally prove prejudice, which in this context means that he would not have entered the plea had he known otherwise. *Veney* at ¶ 15. An exception to the prejudice requirement occurs if the trial court completely failed to comply with the rule:

When the trial judge does not *substantially* comply with Crim .R. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court *partially* complied or *failed* to comply with the rule. 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. See *Nero*, 56 Ohio St.3d at 108, 564 N.E.2d 474, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 93, 5 O.O.3d 52, 364 N.E.2d 1163, and Crim.R. 52(A); see also *Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 23. The test for prejudice is “whether the plea would have otherwise been made.” *Nero* at 108, 564 N.E.2d 474, citing *Stewart*, *id.* If the trial judge completely failed to comply with the rule, e.g., by not informing the defendant of a mandatory period of postrelease control, the plea must be vacated. See *Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d. 1224, paragraph two of the syllabus. “A complete failure to comply with the rule does not implicate an analysis of prejudice.” *Id.* at ¶ 22.

State v. Clark, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 32 (emphasis sic).

{¶21} Betts asserts that the trial court only partially complied with Crim.R. 11(C)(2)(a) because it did not properly advise him of the maximum potential sentence involved, which he contends includes the potential post-release control sanctions he faces for a new felony conviction under R.C. 2929.141(A).

{¶22} We reject the premise of Betts's assertion. "R.C. 2929.141(A) does not require the trial court in the original sentencing context to notify a defendant that a court sentencing the defendant for a subsequent crime can impose additional sanctions for the violation of post-[release control]." *State v. Mozingo*, 2016-Ohio-8292, 72 N.E.3d 661, ¶ 29 (4th Dist.). "Unlike R.C. 2929.19(B), which expressly requires notifications concerning the parole board's authority to impose sanctions for violations, R.C. 2929.141(A) addresses the trial court's authority to do so, and is silent about notification in the original sentencing context." *Id.* at ¶ 25; *State v. Robinson*, 4th Dist. Lawrence No. 16CA11, 2017-Ohio-1214, ¶ 8. Our holding is supported by the prevailing weight of authority in other Ohio appellate district courts. *Mozingo* at ¶ 26.

{¶23} Although *Mozingo* and its progeny involved the sentencing context and did not address the validity of accepting a guilty plea without any notification of the R.C. 2929.141(A) consequences of violating post-release control, one of many cases we cited in support of our holding involved the guilty-plea context. *Id.* at ¶ 26, citing *State v. Susany*, 7th Dist. Mahoning No. 07 MA 7, 2008-Ohio-1543, ¶ 95 ("Appellant fails to direct our attention to any holding which states that a defendant must be advised that upon the commission of a new offense, a defendant is subject to additional prison time

for any felony committed while under postrelease control. There is no such requirement and failure to so advise a defendant will still result in substantial compliance with Crim.R. 11(C)(2)(a)").

{¶24} Appellate courts have consistently held that Crim.R. 11(C)(2)(a), notice of the maximum penalty involved, does not require a trial court to inform a defendant entering a guilty plea of the R.C. 2929.141 consequences for violating post-release control. See, e.g., *State v. Turner*, 8th Dist. Cuyahoga No. 101578, 2015-Ohio-1148, ¶ 7, and cases cited there. We agree and similarly conclude that a guilty plea is not invalid because the trial court failed to notify the defendant of the consequences of violating post-release control under R.C. 2929.141.

{¶25} Nevertheless, once a trial court chooses to provide an expanded explanation of the law, the information it provides must be accurate. In *Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, at ¶ 38-39, the trial court was not required to discuss post-release control or parole in the defendant's guilty plea colloquy because of the charge involved, but the court expanded its advice to beyond that required, thereby providing incorrect information. "Such an incorrect recitation of the law fails to meet the substantial-compliance standard. *If a trial judge chooses to offer an expanded explanation of the law in a Crim.R. 11 plea colloquy, the information conveyed must be accurate.*" (Emphasis added.) *Id.* at 39.

{¶26} When taking Betts's plea, the trial court notified him of the R.C. 2929.141 consequences for violating his mandatory term of post-release control; but it did so in a way that was partly erroneous. The trial court provided inaccurate information to Betts by advising him that if he violates his post-release control by committing a new felony,

he could receive “the time remaining on post release control plus a prison term for the new crime.” Under R.C. 2929.141(A)(1), “[t]he maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony.”

{¶27} Given its misstatement about impact of a violation of post-release control by committing a new felony, the court only partially complied with the rule. Therefore, as Betts appears to concede, when a trial court partially complies, but does not substantially comply, with Crim.R. 11 for a nonconstitutional right—we will vacate the guilty plea only if the defendant demonstrates a prejudicial effect, i.e., he would not otherwise have entered the plea.

{¶28} Betts cites statements in the presentence investigation and record that he claims indicate his “significant reluctance in entering a guilty plea” and the “tangible defenses” he had to present. However, the record does not indicate that if the trial court had given a correct statement about the length of a potential prison term for violating post-release control by committing a new felony, Betts would not have entered a guilty plea. See, e.g., *State v. Fisher*, 6th Dist. Lucas No. L-15-1262, 2016-Ohio-4750, ¶ 24 (“There is nothing to be gleaned from the transcripts of both the plea hearing as well as the sentencing hearing that would indicate that appellant was induced to enter into the plea agreement as a result of the possibility that he would be entitled to earned time credit”).

{¶29} Although Betts is correct the trial court’s mistaken advice could underestimate his potential prison sentence for a post-release control violation based on

his commission of a new felony committed near the end of his post-release control, it is equally true the trial court's notification could also overestimate his potential prison sentence for the post-release control violation if he commits the new felony near the beginning of his post-release control. That is, if Betts commits a new felony within the first two years of his three-year term of post-release control, he would have more than 12 months remaining on his post-release control, which means that the trial court would have overestimated his potential prison sentence under R.C. 2929.141(A) with its mistaken advice. An overstatement of potential penalties does not establish prejudice. See *State v. Barner*, 4th Dist. Meigs No. 10CA9, 2012-Ohio-4584, ¶ 13 ("Furthermore, it is hard to see how Barner could have been prejudiced by an overstatement of penalties, i.e., that he would not have pled guilty if the penalty was explained correctly"); see also *State v. Calvin*, 8th Dist. Cuyahoga No. 100296, 2015-Ohio-2759, ¶ 24 ("[I]t is hard to demonstrate prejudice when an overstatement of the maximum penalty was given, and [the defendant] still entered his guilty pleas").

{¶30} And the record does not disclose any realistic significant defenses to the attempted theft charge. Betts claims that the crime was committed by his now-deceased brother and that Betts merely collected payments through his own timber company to help his brother avoid child-support arrearage payments. A factfinder faced with his admission that he assisted his brother in violating a court order of child support would view his credibility with great skepticism. And Betts's claim that he never cut the timber from the victim's property was rebutted by at least eight witnesses who observed him cutting timber there. Thus his credibility would be even more suspect. Not to mention the fact that the money from the payments for the timber went into the accounts

of Betts, his wife, and his son. Finally, Betts was convicted of a similar felony theft of timber about four years before his guilty plea in this case. His claim to a credible defense seems incredible.

{¶31} Under these circumstances Betts cannot establish the requisite prejudice to invalidate his plea and reverse his conviction. Betts has failed to prove that had he known he was subject to the greater of a potential 12-month prison sentence or the remainder of his term of post release control, in addition to his sentence for a new felony, he would not have pleaded guilty to the reduced charge of attempted theft. We overrule his assignment of error.

V. CONCLUSION

{¶32} The trial court partially complied with Crim.R 11 by informing Betts of his nonconstitutional rights before accepting his guilty plea. Although the trial court erred in its notification of the consequences under R.C. 2929.141(A) for violating post-release control, that mistaken information did not prejudice Betts. The trial court thus correctly determined that Betts knowingly, intelligently, and voluntarily entered his guilty plea.

{¶33} Having overruled Betts's assignment of error, we affirm his conviction and sentence.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Vinton County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.