[Cite as *State v. Munyan*, 2009-Ohio-2348.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08-CA-88
JAMES M. MUNYAN	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas Case No. 08-CR-049
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	May 19, 2009

APPEARANCES:

For Plaintiff-Appellee:

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Licking County Prosecutor
20 S. Second Street, 4th Fl.
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For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-Appellant, James Munyan, appeals from his plea and conviction of twelve counts of rape, one count of complicity to rape, and nineteen counts of gross sexual imposition. The State of Ohio is Plaintiff-Appellee.

{¶2} Between February 3, 2007, and January 20, 2008, Appellant engaged in multiple instances of sexual conduct with A.B., his nine-year-old stepdaughter, who resided with him at the time. Additionally, Appellant engaged in sexual activity with his stepson, D.B., between October 24, 2007, and January 20, 2008. At the time, D.B. was 12 years old. Moreover, Appellant forced D.B. and his brother, L.B., to engage in sexual activity with each other. Finally, Appellant also had sexual contact with a ten-year old friend of his stepchildren, H.S.

{¶3} Appellant was indicted on twelve counts of rape, all felonies of the first degree, in violation of R.C. 2907.02(A)(1)(b). He was also indicted on one count of complicity to rape, a felony of the first degree, in violation of R.C. 2923.03 as it relates to R.C. 2907.02(A)(1)(b). Additionally, he was indicted on 19 counts of gross sexual imposition, all felonies of the third degree, in violation of R.C. 2907.05(A)(4).

{¶4} Appellant pled guilty to the indictment and signed several different plea forms, wherein he acknowledged:

{¶5} "After release from prison, I will have (5) years of post-release control. If I violate post-release control, I could be returned to prison for up to nine (9) months."

{¶6} Additionally, at his plea hearing, the prosecutor stated, "All offenses within this indictment carry a mandatory term of five years of post-release control when the Defendant is released from prison." Moreover, the trial court informed Appellant, "Do

you also understand, Mr. Munyan, that if you were sent to the penitentiary, served out your sentence and then were released, that you'd be placed by the state on post-release control, and if you violated the terms of post-release control, you would be returned to the penitentiary for incarceration even though you've completed your sentence? Do you understand that, Mr. Munyan?" Appellant replied, "Yes, sir."

{¶7} The trial court then sentenced Appellant to thirty-six years in prison. In the trial court's judgment entry, with respect to postrelease control, the court stated the following:

{¶8} "The court sentences the defendant to a period of five (5) years of post-release control following any prison sentence imposed, and further the consequences for violating conditions of post-release control imposed by the Parole Board under Ohio Revised Code Section 2967.28, being the defendant is subject to being reincarcerated for a period of up to nine months, with a maximum for repeated violations of 50% of the stated prison term. If the violation is a new felony, the defendant may be returned to prison for the remaining period of control or 12 months, whichever is greater, plus receive a prison term for the new crime."

{¶9} Appellant raises one Assignment of Error:

{¶10} "I. DID THE TRIAL COURT ERR WHEN IT FAILED TO INFORM MR. MUNYAN NOT ONLY OF THE EXACT LENGTH OF TIME HE WOULD BE PLACED ON POSTRELEASE CONTROL IF RELEASED FROM THE PENITENTIARY, BUT THE MAXIMUM PENALTIES FOR VIOLATING POSTRELEASE CONTROL?"

I.

{¶11} In his sole assignment of error, Appellant argues that the trial court violated Criminal Rule 11 by failing to inform Appellant of how long he would be subject to postrelease control and that if he violated postrelease control, he would be subject to an additional term of incarceration. We disagree.

{¶12} Criminal Rule 11 governs the process of entering a plea. Criminal Rule 11(C), which is pertinent to our analysis, provides:

{¶13} "(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:

{¶14} "(a) 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."

{¶15} Appellant relies on the Ohio Supreme Court's decision in *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, wherein the Court held that a trial court must inform a defendant of mandatory postrelease control as part of the requirements of Crim. R. 11(C). Based on *Sarkozy*, Appellant asserts that the trial court erred because it did not inform him that he would be subject to a five-year term of postrelease control or that he could be reincarcerated for up to half of his original sentence if he violated post-release control. We find Appellant's reliance on *Sarkozy* to be misplaced. In *Sarkozy*, there was a complete failure by the trial court to notify the defendant that he would be subject to postrelease control. The Supreme Court,

therefore, rejected a substantial compliance test with respect to Crim. R. 11 based on the fact that there was no mention *at all* by the trial court of postrelease control.

{¶16} Some compliance with respect to postrelease control notification triggers a substantial compliance analysis and a resultant prejudice analysis. See *State v. Alfarano*, 1st Dist. No. C-061030, 2008-Ohio-3476. The Supreme Court itself has addressed this issue with respect to substantial compliance with Crim. R. 11 as it relates to nonconstitutional rights:

{¶17} "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."

{¶18} In the present case, the trial court did mention postrelease control and in fact, Appellant was informed of the term of postrelease control and the possibility of reincarceration due to postrelease control violations after release from prison.

{¶19} Specifically, the trial court advised Appellant that he would be subject to postrelease control once he was released from any prison term that it might impose. Likewise, the court advised him of the potential of reincarceration for violating postrelease control. While the trial court did not verbally inform Appellant of the actual term of postrelease control nor of the term of reincareration, the written plea agreement accurately stated that Appellant would serve a mandatory five-year term of postrelease control, the prosecutor stated that Appellant would serve a mandatory five-year term of postrelease control, and the judgment entry accurately stated that Appellant would serve a mandatory five-year term of post-release control and delineated the different penalties for violations of post-release control.

{¶20} Moreover, prior to accepting Appellant's plea, the trial court asked Appellant if he had reviewed the plea form with counsel, and if he had any questions regarding the written plea agreement. Appellant replied that he had reviewed the form and did not have any questions. Thus, Appellant had notice that he would receive a maximum of five years' post-release control, and that if he violated the terms of his postrelease control, he could serve up to 50 percent of his original prison sentence. Under these circumstances, we hold that the trial court substantially complied with Crim. R. 11(C)(2)(a). See *State v. Alfarano*, supra, citing *State v. Moviel*, 8th Dist. No. 86244, 2006-Ohio-697, at ¶ 17-23; see also *State v. Fleming*, 6th Dist. No. OT-07-024, 2008-Ohio-3844.

{¶21} Moreover, Appellant has not alleged that he would not have entered a guilty plea to the charge, had he known that that his mandatory term of postrelease control was five years. Also, in pleading guilty to the charges, the trial court only sentenced Appellant to 36 out of a possible 225 year sentence. As such, Appellant has failed to demonstrate prejudice.

{¶22} As a result of the foregoing, we overrule Appellant's sole assignment of error and affirm the judgment of Licking County Court of Common Pleas.

By: Delaney, J.

Hoffman, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

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IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JAMES M. MUNYAN	:	
	:	
Defendant-Appellant	:	Case No. 08-CA-88
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

_____
HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE