[Cite as *State v. Smiley*, 2009-Ohio-3269.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- MARCUS SMILEY Defendant-Appellant	JUDGES: Hon. John W. Wise, P. J. Hon. Julie A. Edwards, J. Hon. Patricia A. Delaney, J. Case No. 2008 CA 00192 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 00103
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 29, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO PROSECUTING ATTORNEY RONALD MARK CALDWELL ASSISTANT PROSECUTOR 110 Central Plaza South, Suite 510 Canton, Ohio 44702	KELLY S. MURRAY 116 Cleveland Avenue, NW 303 Courtyard Centre Canton, Ohio 44702

Wise, P. J.

{¶1} Appellant Marcus Smiley appeals the July 31, 2008, judgment of the Stark County Common Pleas Court denying his Motion to Withdraw his Guilty Plea and Motion for a New Trial.

{¶2} Appellee is State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} On February 20, 2008, Appellant was indicted on three counts of Aggravated Robbery, felonies of the first degree; one count of Escape, a felony of the third degree; one count of Assault, a felony of the fourth degree; and one count of Vandalism, a felony of the fifth degree.

{¶4} On April 2, 2008, Appellant entered a plea of guilty to all counts in the indictment. By Judgment Entry docketed on April 9, 2008, Appellant was sentenced to a five year prison term.

{¶5} On July 8, 2008, Appellant filed a Motion for a New Trial and a Motion to Withdraw his Guilty Plea, arguing in his Motion that he is not guilty of the offense, that he was motivated to enter his plea when his trial counsel advised him that he could not plead to some of the counts in the indictment and ask for a trial on the remaining counts, and also that his trial counsel refused to use exculpatory evidence regarding the identity of the actual perpetrators of most of the crimes charged in the indictment. In addition, Appellant argued that the indictment against him was defective under the *State v. Colon*, 188 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, decision of the Ohio Supreme Court.

{¶6} By Judgment Entries filed July 31, 2008, the trial court denied Appellant's Motions.

{¶7} Appellant now appeals to this Court, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶8} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO VACATE HIS PLEA WITHOUT A HEARING.

{¶9} "II. THE TRIAL COURT ERRED BY ACCEPTING THE APPELLANT'S GUILTY PLEA WITHOUT ADVISING HIM OF THE CORRECT TERM OF POST-RELEASE CONTROL."

I.

{¶10} In his first assignment of error, Appellant argues that the trial court erred in denying his motion to vacate his plea without a hearing. We disagree.

{¶11} A reviewing court will not disturb a trial court's decision whether to grant a motion to withdraw a plea absent an abuse of discretion. *State v. Caraballo* (1985), 17 Ohio St.3d 66, 477 N.E.2d 627. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶12} Crim.R. 32.1 addresses the withdrawal of a plea and provides as follows: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

{¶13} In this case, Appellant's request came after pronouncement of sentence so the appropriate standard is withdrawal only to correct a manifest injustice. See *State v. Patterson,* Muskingum App. No. CT2008-0054, 2009-Ohio-273. The burden of establishing the existence of such injustice is upon the defendant. *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of the syllabus.

{¶14} "An evidentiary hearing on a post-sentence motion to withdraw a guilty plea 'is not required if the facts as alleged by the defendant, and accepted as true by the court, would not require that the guilty plea be withdrawn.' " *State v. Patterson,* Stark App.No. 2003CA00135, 2004-Ohio-1569, at paragraph 18, citing *State v. Blatnik* (1984), 17 Ohio App.3d 201, 204, 478 N.E.2d 1016. However, generally a self-serving affidavit or statement is insufficient to demonstrate manifest injustice. *Patterson,* supra, citing *State v. Laster,* Montgomery App. No. 19387, 2003-Ohio-1564.

{¶15} We find that the trial court did not abuse its discretion in failing to hold a hearing on Appellant's motion and in denying the same. The only documentation before the trial court was Appellant's own statements as set forth in his motion to withdraw in which he argued that he is innocent of the majority of the charges to which he pled guilty. He also argued that he had exculpatory evidence identifying the actual perpetrator of the aggravated robbery charges.

{¶16} Said statements are self-serving and unsupported by any type of documentary evidence. We find that Appellant's self-serving statement was insufficient in this case to demonstrate a manifest injustice. "When a petitioner submits a claim that his guilty plea was involuntary, a 'record reflecting compliance with Crim.R. 11 has greater probative value' than a petitioner's self-serving affidavit." *State v. Brehm* (July

18, 1997), Seneca App. No. 13-97-05, unreported, 1997 WL 401824, following *State v. Moore* (1994), 99 Ohio App.3d 748, 753, 651 N.E.2d 1319, 1322-1323. In the case sub judice, the transcript of the plea hearing shows that the trial court complied with Crim.R. 11 in accepting Appellant's plea.

{¶17} Based on the foregoing, we find that the trial court did not err in not conducting an evidentiary hearing, and in overruling Appellant's motion to withdraw his guilty plea.

{¶18} Appellant's first assignment of error is overruled.

II.

{¶19} In his second assignment of error, Appellant argues that his plea should be vacated because the trial court did not advise him of the mandatory period of post-release control. We disagree.

{¶20} 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 post-release 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 post-release.

{¶21} Initially we note that in *Sarkozy,* the Supreme Court stated:

{¶22} Accordingly, we hold that if a trial court fails during a plea colloquy to advise a defendant that the sentence will include a mandatory term of post-release control, the defendant may dispute the knowing, intelligent, and voluntary nature of the plea *either by filing a motion to withdraw the plea or upon direct appeal*. Further, we

hold that if the trial court fails during the plea colloquy to advise a defendant that the sentence will include a mandatory term of post-release control, the court fails to comply with Crim.R. 11, and the reviewing court must vacate the plea and remand the cause." (emphasis added).

{¶23} Appellant in this case failed to raise this issue on direct appeal and further failed to raise it before the trial court in his motion to withdraw his guilty plea.

{¶24} Furthermore, 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 post-release 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 post-release control.

{¶25} Some compliance with respect to post-release 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 non-constitutional rights:

{¶26} "When the trial judge does not substantially comply with Crim.R. 11 in regard to a non-constitutional 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 post-release 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.

{¶27} 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 post-release 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.

{¶28} In the present case, the trial court advised Appellant at the sentencing hearing that he would be subject to a period of post-release control following any period of incarceration. (T. at 5, 7). Likewise, the trial court advised him of the potential of re-incarceration for violating post-release control. (T. at 8). While the trial court did not verbally inform Appellant of the actual term of post-release control, the trial court did advise him that the term of re-incarceration would be up to one-half the original sentence. Furthermore, the written plea agreement accurately stated that Appellant would serve a mandatory five-year term of post-release 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.

{¶29} Moreover, prior to accepting Appellant's plea, the trial court asked Appellant if he had reviewed the plea form with counsel and if he understood the possible penalties. (T. at 4-5). Appellant replied that he did. (T. at 5). 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 post-release control, he could serve up to one-half 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.

{¶30} Moreover, Appellant has not alleged that he would not have entered a guilty plea to the charge had he known that his mandatory term of post-release control was five years.

{¶31} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

By: Wise, P. J.

Edwards, J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ JULIE A. EDWARDS_____

/S/ PATRICIA A. DELANEY_____

JUDGES

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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MARCUS SMILEY	:	
Defendant-Appellant	:	Case No. 2008 CA 00192

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to Appellant.

/S/ JOHN W. WISE

/S/ JULIE A. EDWARDS

/S/ PATRICIA A. DELANEY

JUDGES