

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

WILLIAM WILLIAMS

Defendant-Appellant

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. Sheila G. Farmer, J.

Hon. Patricia A. Delaney, J.

Case No. 08CA113

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,  
Case Nos. 04CR413 and 05CR290

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

July 9, 2009

APPEARANCES:

For Plaintiff-Appellee

BRIAN T. WALTZ  
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Fourth Floor  
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For Defendant-Appellant

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604 East Rich Street  
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*Farmer, J.*

{¶1} On August 20, 2004, the Licking County Grand Jury indicted appellant, William Williams, on five counts of felony theft in violation of R.C. 2913.02, two counts of grand theft in violation of R.C. 2913.02, two counts of securing writings by deception in violation of R.C. 2913.43, two counts of receiving stolen property in violation of R.C. 2913.51, and one count of engaging in a pattern of corrupt activity (Case No. 04CR413).

{¶2} On June 17, 2005, appellant was further indicted on five counts of felony theft, three counts of grand theft, and one count of engaging in a pattern of corrupt activity (Case No. 05CR290).

{¶3} On August 14, 2006, appellant pled guilty as charged in both cases. By judgment entries filed October 31, 2006, the trial court sentenced appellant to an aggregate term of four years and eleven months in prison.

{¶4} On May 17, 2007, appellant filed motions for judicial release. By judgment entries filed June 15, 2007, the trial court denied the motions. On November 15, 2007, appellant again filed motions for judicial release. Again, the trial court denied the motions. See, Judgment Entries filed December 19, 2007.

{¶5} On May 30, 2008, appellant filed motions to withdraw his guilty pleas. By judgment entries filed July 28, 2008, the trial court denied the motions.

{¶6} Appellant filed an appeal and this matter is now before this court for consideration. As appellant failed to list any assignments of error pursuant to App.R. 16(A)(3), we glean the following assignment from appellant's arguments:

I

{¶7} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S CRIM.R. 32.1 MOTIONS TO WITHDRAW HIS GUILTY PLEAS."

I

{¶8} Appellant claims the trial court erred in denying his Crim.R. 32.1 motions to withdraw his guilty pleas. We disagree.

{¶9} Crim.R. 32.1 governs withdrawal of guilty plea and states "[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." The right to withdraw a plea is not absolute and a trial court's decision on the issue is governed by the abuse of discretion standard. *State v. Smith* (1977), 49 Ohio St.2d 261. In order to find an abuse of discretion, we must determine 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.

{¶10} Appellant argues the trial court should have granted his motion to withdraw his guilty pleas because the trial court failed to advise him of his mandatory term of postrelease control during the plea hearing as set forth in *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509. In *Sarkozy*, the Supreme Court of Ohio reviewed the denial of the defendant's motion to withdraw his guilty plea made prior to sentencing, and held the following at syllabus:

{¶11} "1. If a trial court fails during a plea colloquy to advise a defendant that the sentence will include a mandatory term of postrelease 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.

{¶12} "2. If the trial court fails during the plea colloquy to advise a defendant that the sentence will include a mandatory term of postrelease control, the court fails to comply with Crim.R. 11, and the reviewing court must vacate the plea and remand the cause."

{¶13} The *Sarkozy* court at ¶22 stated, "A complete failure to comply with the rule does not implicate an analysis of prejudice." Thereafter, the Supreme Court of Ohio decided the case of *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, wherein the court stated the following at ¶31-32:

{¶14} "When a trial judge fails to explain the constitutional rights set forth in Crim.R. 11(C)(2)(c), the guilty or no-contest plea is invalid 'under a presumption that it was entered involuntarily and unknowingly.' *Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12; see also *Nero*, 56 Ohio St.3d at 107, 564 N.E.2d 474, citing *Boykin*, 395 U.S. at 242-243, 89 S.Ct. 1709, 23 L.Ed.2d 274. However, if the trial judge imperfectly explained nonconstitutional rights such as the right to be informed of the maximum possible penalty and the effect of the plea, a substantial-compliance rule applies. *Id.* 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,' the plea may be upheld. *Nero*, 56 Ohio St.3d at 108, 564 N.E.2d 474.

{¶15} "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."

{¶16} In the case sub judice, the following language was included in the August 14, 2006 admission of guilt forms which appellant signed prior to the plea hearing: "After release from prison, I may have up to five (5) years of post-release control. If I violate post-release control conditions, I could be returned to prison for up to nine (9) months." Appellant read the plea forms, discussed them with his attorney, understood them, and did not have any questions for the trial court. August 14, 2006 T. at 5.

{¶17} During the sentencing hearing, the trial court stated the following:

{¶18} "The Court would notify the defendant that upon your release from prison, if you are not on judicial release, you will be on postrelease control for a period of three years unless that is reduced by the Adult Parole Authority. And if you violate that postrelease control, you could be returned to prison on these charges, and if you violate

that postrelease control, you could be returned to prison for nine months – up to nine months with a maximum for repeated violations equaling 50 percent of your stated prison term. If the violation is a new felony, you may be returned to prison for the remaining postrelease control period or twelve months, whichever is greater, plus a prison term for the new crime." October 31, 2006 T. at 16-17.

{¶19} The October 31, 2006 sentencing entries contained the following language:

{¶20} "The Court informed the defendant that upon release from prison he would be subject to postrelease control for three years unless sooner terminated by the Adult Parole Authority. The Court further notified the defendant that if he violates the conditions of postrelease control imposed by the Parole Board under Ohio Revised Code Section 2967.28, he could be returned to prison for up to nine months for those violations, and if the violation is a new felony, he could be returned to prison on the new felony as well."

{¶21} At no time did appellant indicate his disapproval or confusion of being informed by the trial court that he was subject to a three year period of postrelease control. The plea forms that appellant signed contained acknowledgements that he may be subject to up to five years of postrelease control. Further, appellant did not file a direct appeal, which he could have, upon being informed at the sentencing hearing that he was subject to a mandatory period of postrelease control.

{¶22} "Under the doctrine of *res judicata*, a final judgment bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of

due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Szefcyk*, 77 Ohio St.3d 93, 1996-Ohio-337, syllabus, reaffirming *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. "More specifically, a criminal defendant cannot raise any issue in a postsentence motion to withdraw a guilty plea that was or could have been raised at trial or on direct appeal." *State v. Brown*, 167 Ohio App.3d 242, 2006-Ohio-3266, at ¶7.

{¶23} Importantly, "Crim.R. 32.1 itself does not prescribe a time limitation. This is not to say that timeliness is not a consideration, however, as an 'undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.' " *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, at ¶14, quoting *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph three of the syllabus.

{¶24} In this case, appellant has given no explanation for the one year and seven month delay in filing his motion to withdraw his negotiated guilty pleas. Nor has he provided any explanation for not filing a direct appeal. Moreover, appellant suffered no prejudice by the trial court's failure to engage in a colloquy related to the potential imposition of postrelease control at the plea hearing because he was informed of this fact in the admission of guilt forms and then again during the sentencing hearing. If appellant did not understand that he faced a mandatory period of postrelease control before the plea, he certainly knew it afterward and could have objected to the plea during the sentencing hearing if he was surprised by the mandatory period of

postrelease control. See, *State v. Aleshire*, Licking App. No. 2007-CA-1, 2008-Ohio-5688.

{¶25} Given the record, we find appellant has failed to demonstrate that he was prejudiced by the trial court's failure to inform him of postrelease control during the plea hearing. In other words, we do not find that appellant is able to demonstrate that, but for the trial court's error, he would not have entered the guilty pleas and would have insisted on going to trial. In pleading guilty to the charges, appellant was sentenced to just under five years in prison as opposed to a possible thirty-eight plus year sentence. Appellant has failed to establish a manifest injustice warranting the withdrawal of his guilty plea under Crim.R. 32.1.

{¶26} Upon review, we find the trial court substantially complied with the requirements of Crim.R. 11(C)(2), and appellant was not prejudiced by the trial court's failure to mention during the plea hearing that he would be subject to postrelease control.

{¶27} The sole assignment of error is denied.

{¶28} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By Farmer, J.

Edwards, P.J. and

Delaney, J. concur.

s/Sheila G. Farmer

s/Julie A. Edwards

s/Patricia A. Delaney

JUDGES

SGF/db 0602

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

STATE OF OHIO

Plaintiff-Appellee

-vs-

WILLIAM WILLIAMS

Defendant-Appellant

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JUDGMENT ENTRY

CASE NO. 08CA113

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

s/Sheila G. Farmer

s/Julie A. Edwards

s/Patricia A. Delaney

JUDGES