

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

THOMAS W. HOLMES

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 09 CA 70

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. 09 CR 13

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

February 8, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Wise, J.

{¶1} Appellant Thomas Holmes appeals from a two-count felony conviction, following a no contest plea, in the Court of Common Pleas, Licking County. The relevant facts leading to this appeal are as follows.

{¶2} On January 1, 2009, appellant was stopped by an officer from the Newark Police Department for non-functioning taillights. Further investigation by the officer revealed the vehicle being operated by appellant had been reported stolen.

{¶3} Appellant was thereafter indicted by the Licking County Grand Jury on one count of breaking and entering (F-5) and one count of receiving stolen property (F-4).

{¶4} On April 20, 2009, appellant entered a plea of no contest to the charges in the indictment. Appellant was found guilty and was thereafter sentenced to nine months on Count I and one year on Count II, to run consecutively. He also received three years of post-release control.

{¶5} Appellant filed a notice of appeal on May 19, 2009, and herein raises the sole Assignment of Error:

{¶6} “I. THE TRIAL COURT ERRED WHEN IT DID NOT INFORM THE APPELLANT OF THE LENGTH OF TIME HE WOULD BE ON POST-RELEASE CONTROL UNTIL AFTER HIS PLEA.”

I.

{¶7} In his sole Assignment of error, appellant contends the trial court committed reversible error by failing to advise him, during the plea colloquy, of the length of potential time he would be on post-release control (“PRC”). We agree.

{¶8} As an initial matter, we note appellant filed his brief in this appeal on August 6, 2009; the State of Ohio sought leave from this Court on January 4, 2010 to file its appellee brief *instanter*. We denied the State's request for leave on or about January 12, 2010. Accordingly, we herein refer to App.R. 18(C), which states in pertinent part: "If an appellee fails to file the appellee's brief within the time provided by this rule, or within the time as extended, *** in determining the appeal, the court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action."

{¶9} Appellant herein maintains that the trial court's notification, following appellant's plea, that he would be placed on three years of PRC was insufficient in light of *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509. In *Sarkozy*, the Ohio Supreme Court held: "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." *Id.* at paragraph two of the syllabus.

{¶10} Crim.R. 11(C)(2) details the trial court's duty in a felony plea hearing to address the defendant personally and to convey certain information to such defendant, and makes clear that the trial court shall not accept a plea of guilty or no contest without performing these duties. As such, the PRC notification must be made prior to the court's acceptance of the plea. See *Sarkozy* at ¶ 11, ¶ 25. Moreover, "[e]ven if post-release control is discretionary, a defendant must be informed of the possibility of post-release control before a court may accept his plea." *State v. Souris*, Summit App.No. 24550, 2009-Ohio-3562, ¶ 7.

{¶11} The pertinent part of the plea transcript in this case reveals the following colloquy between the trial court and appellant:

{¶12} “Q. Do you understand, Mr. Holmes, that nobody can make you change your plea here?

{¶13} “A. Yes, sir.

{¶14} “Q. Are you changing your plea freely and voluntarily knowing what your rights are?

{¶15} “A. Yes.

{¶16} “Q. Have there been any threats or promises or anything offered to you or given to you to make you do this today?

{¶17} “A. No.

{¶18} “Q. Do you understand, Mr. Holmes, that if the Court allows you to change your plea here today, should the Court then enter a guilty finding, that all that’s going to remain to be done is to proceed with sentencing and the maximum sentence you could receive here would consist of a term of two and a half years in the state penitentiary, a fine of \$7,500, possibly some order for restitution? Do you understand that?

{¶19} “A. Yes.

{¶20} “Q. Do you understand that’s the maximum possible penalty you could receive in this case?

{¶21} “A. Yes.

{¶22} “Q. Do you understand that’s the maximum amount of time you could be required to serve in the state penitentiary without any type of credit for good behavior?

{¶23} “A. The only thing I was unaware of it could be run consecutive.

{¶24} “Q. Mr. Holmes, are you currently on probation, parole or community control?

{¶25} “A. No.

{¶26} ”***

{¶27} “Q. Are you under the influence of any alcohol or drugs or any medication here today?

{¶28} “A. No.

{¶29} “Q. Are you asking the Court to accept your no contest pleas there today, Mr. Holmes?

{¶30} “A. Yes.

{¶31} “THE COURT: Then, Mr. Holmes, the Court finds your no contest pleas to be freely, voluntarily and understandingly made. The Court finds the Defendant to be satisfied with the services of counsel. The court permits the Defendant to withdraw his earlier made pleas of not guilty and I’ll accept your no contest pleas.” Tr. at 14-17.

{¶32} Because this case represents a complete absence of PRC colloquy prior to the court’s acceptance of the plea,¹ we find a lack of substantial compliance with Crim.R. 11(C) and a demonstration of prejudicial error under *Sarkozy* and its progeny.

{¶33} Appellant’s sole Assignment of Error is sustained, and we hereby vacate appellant’s plea of no contest.

¹ The only direct mention on the record of PRC prior to the court’s plea acceptance was made by the prosecutor, not the judge. See Tr. at 13.

{¶34} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Licking County, Ohio, is hereby reversed and remanded for further proceedings consistent with this opinion.

By: Wise, J.

Gwin, P. J., and

Farmer, J., concur.

/S/ JOHN W. WISE

/S/ W. SCOTT GWIN

/S/ SHEILA G. FARMER

JUDGES

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STATE OF OHIO

-VS-

THOMAS W. HOLMES

Defendant-Appellant

JUDGMENT ENTRY

Case No. 09 CA 70

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, is reversed and remanded for further proceedings consistent with this opinion.

Costs assessed to appellee.

/S/ JOHN W. WISE

/S/ W. SCOTT GWIN

/S/ SHEILA G. FARMER

JUDGES