

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-VS-	:	
	:	Case No. 2010-CA-00008
NICHOLAS B. WALLACE	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING:	Criminal appeal from the Licking County Court of Common Pleas, Case No. 09-CR-491
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	September 13, 2010
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APPEARANCES:

For Plaintiff-Appellee

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Licking County Prosecutor
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For Defendant-Appellant

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Gwin, P.J.

{¶1} Defendant-Appellant, Nicholas B. Wallace, appeals his convictions on one count of aggravated murder, one count of murder, one count of aggravated burglary and one count of tampering with evidence. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant was indicted for aggravated murder (R.C. 2903.01(A) & (B)), murder (R.C. 2903.02(B)), aggravated burglary (R.C. 2911.11(A) (1)), and tampering with evidence (R.C. 2921.12(A) (1)). Concerning aggravated murder, murder, and aggravated burglary, the indictment also specified that appellant was liable either as a principal offender or as an accomplice under R.C. 2923.03.

{¶3} The Assistant Prosecuting Attorney set forth the underlying facts at the Change of Plea and Sentencing hearing conducted on December 18, 2009:

{¶4} “Specifically on August 24, 2009, at approximately 2212 hours, the Newark Police Department officers responded to 59 West Harrison Street, Newark, Licking County, Ohio, on a report of screams coming from a room, the structure being a rooming house. Upon further investigation, officers found 25-year old John Stouffer lying dead on the floor of his room. It was apparent that Mr. Stouffer had suffered multiple stab wounds from a sharp-edged incident (instrument).

{¶5} “Homicide detectives were called in to investigate. The investigation revealed that the co-defendant, Beth Doty, was previously romantically involved with the victim and believed that she was pregnant with his child at the time of the homicide. Prior to his killing, co-defendant Doty had solicited her co-defendants and members of the “Death Demons” to take care of the victim Stouffer in order to prevent him from

having access to the child because she did not want her child's father to be a sex offender.

{¶6} "To that end, on August 24, 2009, James Slocum, the president of the "Death Demons," directed the Defendant and the co-defendants to "go do him", referring to Stouffer. Thereafter, the Defendant and his co-defendants arrived at Stouffer's neighbor's apartment under the pretense of removing some of co-defendant Beth Doty's personal items from the apartment. Marvin Wielms whom the co-defendant Beth Doty was dating at the time occupied this apartment.

{¶7} "Once there, co-defendant William Snyder convinced the victim, John Stouffer, to answer his door under the pretense of wanting to discuss Stouffer's truck. After the victim opened his door, co-defendant Snyder stepped aside and co-defendant Jason Stone rushed through the doorway and proceeded to physically attack the victim with a knife. The Defendant handed the knife and ultimately the murder weapon to Stone moments before Stone attacked and killed Stouffer.

{¶8} "A total of 29 stab wounds were inflicted by co-defendant Stone, including stab wounds of - - 20 stab wounds to the torso, seven stab wounds to the head and neck, and two stab wounds to the extremities. Because of the stab wounds, John Stouffer died at the scene.

{¶9} "After Stone killed Stouffer, the Defendant and his co-defendants returned to James Slocum's residence located at 33 South Sixth Street, Newark, Licking County, Ohio. There the Defendant burned Stone's blood soaked clothes to destroy the evidence, and additionally disposed of a second knife that was identical to the murder weapon. Thank you." (T. at 9-14).

{¶10} Appellant pled no contest and the trial court found that he was guilty on all counts. The court immediately proceeded to sentencing, where the court found that the aggravated murder, murder, and aggravated burglary all merged for sentencing. The court then sentenced appellant to 15 years to life for the merged counts and a consecutive three years for tampering with evidence, for an aggregate sentence of 18 years to life. This sentence was consistent with the prosecution's recommendation under the plea agreement.

{¶11} On appeal, appellant challenges only the validity of his plea, raising two assignments of error,

{¶12} "I. APPELLANT'S PLEAS OF NO CONTEST MUST BE VACATED BECAUSE THE TRIAL COURT COMPLETELY FAILED TO INFORM APPELLANT OF THE EFFECT OF THE PLEAS.

{¶13} "II. APPELLANT'S PLEAS OF NO CONTEST MUST BE VACATED BECAUSE THE TRIAL COURT'S EXPLANATION OF POST RELEASE CONTROL WAS INACCURATE AND CONFUSING INsofar AS APPELLANT WAS PLEADING TO AN UNCLASSIFIED OFFENSE AND WAS THEREFORE SUBJECT TO A SIGNIFICANTLY MORE RESTRICTIVE PAROLE REGIME."

II.

{¶14} For ease of discussion, we shall start with appellant's second assignment of error.

{¶15} Appellant argues in his second assignment of error, that his plea was not knowingly, intelligently, and voluntarily made because the trial judge informed him that he would be subject to a limited period of post release control and that a violation of

post release control would result in a resentencing of no more than nine months, when actually he could face lifetime monitoring and the re-imposition of his original sentence for a parole violation.

{¶16} Before accepting appellant's plea at the plea hearing, the trial judge was bound by the requirements of Crim.R. 11(C) (2). Crim.R. 11(C) (2) states:

{¶17} "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:

{¶18} "(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.

{¶19} "(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶20} "(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

{¶21} In determining whether the trial court has satisfied its duties under Crim.R. 11 in taking a plea, reviewing courts have distinguished between constitutional and

non-constitutional rights. *State v. Clark*, 119 Ohio St.3d 239, 893 N.E.2d 462, 2008-Ohio-3748 at ¶ 32; *State v. Aleshire*, Licking App. No. 2007-CA-1, 2008-Ohio-5688 at ¶ 10. The trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights. *State v. Clark*, 119 Ohio St.3d at 244, 893 N.E.2d at 499, 2008-Ohio-3748 at ¶ 31.

{¶22} In *State v. Clark*, supra, the Ohio Supreme Court set forth the following procedure for a reviewing court, “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. 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. In *Clark*, the Ohio Supreme Court concluded that the right to be informed of the maximum possible penalty and the effect of the plea are subject to the substantial compliance test. 119 Ohio St.3d at 244, 893 N.E.2d at 469, 2008-Ohio-3748 at ¶ 31. (Citations omitted).

{¶23} In the case at bar, the appellant was sentenced for aggravated murder and murder, both of which are unclassified felonies to which the post-release control statute does not apply. Appellant may, however, be subject to parole. If a paroled person violates the various conditions associated with the parole, he or she may be required to serve the remainder of the original sentence; that period could be more than nine months. Ohio Adm.Code 5120:1-1-19(C). *Clark* 119 Ohio St.3d at 246, 893 N.E.2d at 470, 2008-Ohio-3748 at ¶ 36. “Because parole is not certain to occur, trial courts are not required to explain it as part of the maximum possible penalty in a Crim.R. 11 colloquy. See *Hill v. Lockhart* (1985), 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203.” *Clark* 119 Ohio St.3d at 246, 893 N.E.2d at 470, 2008-Ohio-3748 at ¶ 37.

{¶24} However, appellant was also sentenced for tampering with evidence, a felony of the third degree. R.C. 2921.12(A) (1). Accordingly, appellant is subject to a mandatory period of post-release control of three years. See R.C. 2967.28(B) (3). When an offender, such as the appellant, is sentenced to an indefinite prison term or a life sentence in addition to a stated prison term, the offender shall serve the period of post-release control in the following manner:

{¶25} “(a) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under a life sentence or an indefinite sentence, and if the period of post-release control ends prior to the period of parole, the offender shall be supervised on parole. The offender shall receive credit for post-release control supervision during the period of parole. The offender is not eligible for final release under section 2967.16 of the Revised Code until the post-release control period otherwise would have ended.” R.C. 2967.28(F) (4).

{¶26} In the case at bar, the trial court informed appellant that if he was ever released from prison, he would be subject to mandatory post-release control for five years. Furthermore, during the sentencing phase, the trial court inform appellant, that upon his release he would be placed on post-release control “for five years” and could be returned to prison upon a violation of those controls “for nine months, or for repeated violations, two and a half years.” These statements are not correct. First, the trial court merged the counts of aggravated murder, murder and aggravated burglary for sentencing purposes. The trial court therefore sentenced appellant on only the aggravated murder and tampering with evidence, which was the third count in the indictment. Therefore the five-year period of post release control that can be imposed for a felony of the first-degree, i.e. aggravated burglary, was incorrect because appellant cannot be separately sentenced for the aggravated burglary charge. Second, if released from prison appellant would be subject to parole and could be sent back to prison to serve the remainder of the original sentence.

{¶27} Despite the failure to substantially comply with Crim.R. 11, the trial judge did not simply ignore his duties under Crim.R. 11(C) (2) (a). Because the trial judge partially complied with the rule, appellant must show that he was prejudiced by the trial court's misinformation to successfully vacate his plea. See *Nero*, 56 Ohio St.3d at 108, 564 N.E.2d 474.

{¶28} In *Clark*, the court of appeals determined that the trial court erred in discussing post release control and that it provided a deficient explanation of the parole process. *State v. Clark*, Ashtabula App. No. 2006-A-0004, 2007-Ohio-1780, 2007 WL 1113968, ¶ 15-19. However, it held that the trial court substantially complied with the

mandates of Crim.R. 11(C) (2) (a) because Clark was informed of the maximum prison sentence he faced. *Id.* at ¶ 26. It also discussed whether Clark had demonstrated that he was prejudiced by the trial court's errors and suggested that he had not. *Id.* at ¶ 28. The court of appeals affirmed the judgment of the trial court on this issue. It subsequently determined that its decision conflicted with a decision of the Twelfth District Court of Appeals, *State v. Prom*, 12th Dist. No. CA2002-01-007, 2003-Ohio-6543, 2003 WL 22887906, and certified the case as a conflict to the Ohio Supreme court.

{¶29} The Supreme Court held, despite “the failure to substantially comply with Crim.R. 11, the trial judge did not simply ignore his duties under Crim.R. 11(C)(2)(a). Because the trial judge partially complied with the rule, Clark must show that he was prejudiced by the trial court's misinformation to successfully vacate his plea. See *Nero*, 56 Ohio St.3d at 108, 564 N.E.2d 474. Although it discussed prejudice in its opinion, the court of appeals did not reach a conclusion on the issue. We therefore remand the case for a full determination of prejudice.” 119 Ohio St.3d at 247, 893 N.E.2d at 471 2008-Ohio-3740 at ¶ 40.

{¶30} “The test for prejudice is ‘whether the plea would have otherwise been made.’ *Id.* Under the substantial-compliance standard, we review the totality of circumstances surrounding [the defendant's] plea and determine whether he subjectively understood [the effect of his plea].” See, *State v. Sarkozy*, 117 Ohio St.3d 86, 881 N.E.2d 1224, 2008-Ohio-509 at ¶ 19-20.

{¶31} In the case at bar, there is no evidence that would suggest appellant's belief that he would be subject to post-release control, assuming he would be released,

induced him to enter his plea of guilty. Indeed appellant does not point to any evidence in the trial court record to support such a claim. Where the record on appeal shows substantial compliance, the defendant still may challenge his plea through Crim.R. 32.1 if he can present evidence showing that he did not have the necessary subjective understanding of the plea's consequences.” *State v. Cvijetinovic*, 8th Dist. No. 81534, 2003-Ohio-563. at ¶ 23. See also, *State v. Simpson*, 10th App. No. 07AP-929, 2008-Ohio-2460 at ¶ 6; *State v. Mitchell*, 11th App. No.2004-T-0139, 2006-Ohio-618, certiorari denied, --- Ohio St.3d ----, 2006-Ohio-2998 (the trial court's and trial counsel's erroneous misrepresentations regarding judicial release eligibility did not invalidate a guilty plea where the trial court complied with Crim. R. 11); *State v. Cvijetinovic*, 8th App. No. 81534, 2003-Ohio-563 (guilty plea upheld where the record failed to demonstrate that defendant relied upon the trial court's misstatements about judicial release); *State v. Taylor*, 12th App. No.2003-07-025, 2004-Ohio-3171, certiorari denied, 103 Ohio St.3d 1526, 817 N.E.2d 409 (guilty plea upheld where record did not reflect that the decision to plead guilty was influenced by the trial court's erroneous information regarding his eligibility for judicial release); *State v. Blackshear* (Sept. 19, 2001), 7th App. No. 00 C.A. 240 (under the circumstances, trial counsel's misrepresentations regarding eligibility for judicial release did not invalidate guilty plea). Unless incorporated into a plea agreement, the trial court is not under an obligation to inform a defendant regarding his eligibility for judicial release. See, *Hill v. Lockhart* (1985), 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (“[w]e have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary”).

{¶32} Accordingly, appellant's second assignment of error is overruled.

I.

{¶33} Finally, in his first assignment of error, appellant argues that his plea was not knowingly, intelligently, and voluntarily made because the trial judge failed to inform him of the effect of his plea of no contest. Specifically, a court must advise a defendant that a no contest plea is not an admission of guilt, but is an admission of the truth of the facts alleged in the complaint and that the plea cannot be used in subsequent civil or criminal proceedings. Crim.R. 11(B) (2).

{¶34} We concede, however, that the "Admission of No Contest" form signed by appellant and filed on December 18, 2009 form did not precisely explain the difference between a guilty plea and a no contest plea, nor did the transcript of the change of plea and sentencing hearing indicate that the trial court informed appellant that such plea could not be used against him in a subsequent civil or criminal proceedings. Thus, to this extent, we agree that the trial court failed to fully comply with Crim.R. 11. However, in *State v. Clark*, supra, the Ohio Supreme Court concluded that the right to be informed of the effect of the plea is subject to the substantial compliance test. 119 Ohio St.3d at 244, 893 N.E.2d at 469, 2008-Ohio-3748 at ¶ 31. (Citations omitted).

{¶35} We find nothing in the record to suggest that the trial court's failure to fully inform appellant about the effect of his no contest plea prejudiced him, because this advice, had it been given, would have made the no-contest plea more attractive to appellant, not less. *State v. Singleton*, 169 Ohio App.3d 585, 590, 863 N.E.2d 1114, 1118, 2006-Ohio-6314 at ¶ 65.

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

{¶37} Accordingly, the judgment of the Licking County Court of Common Pleas is affirmed.

By Gwin, P.J., and

Delaney, J., concur

Hoffman, concurs and

dissents

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY

WSG:clw 0802

Hoffman, J., concurring in part and dissenting in part

{¶38} I concur, albeit reluctantly, with the majority's analysis and disposition of Appellant's second assignment of error.

{¶39} I say reluctantly only to note my disagreement with the Ohio Supreme Court's holding in *Clark* that substantially misinforming a defendant as to his or her sentence regarding post-release control is to be analyzed as if the trial court partially complied with Crim.R. 11. I believe providing incorrect sentencing information regarding post release control/parole is arguably worse than providing no information at all. To remand to the Court of Appeals for a prejudice determination would, in most cases, be a *fait accompli*.¹ It is unlikely a defendant would have notice of the necessity or incentive to establish prejudice in the trial court at the plea hearing because it would be reasonable for a defendant to presume and rely upon the trial court's statements as being correct.

{¶40} I further question the availability of a Crim.R. 32.1 motion to withdraw plea given this Court's disposition of this assignment of error. Such may run afoul of *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94. I note such post-appeal procedure impacts our standard of review by adding a hurdle of demonstration of abuse of discretion should the trial court overrule a subsequent motion to withdraw the guilty plea.

¹ Upon remand to the Court of Appeals in *Clark*, the appellate court relied heavily upon the defendant's out-of-court admissions to the charges in finding no prejudice. I suspect many change of plea hearings do not reference or contain out-of-court admissions of the defendant.

{¶41} Despite the foregoing, I must adhere to the Ohio Supreme Court's holding in *Clark*; and, therefore, concur in the majority's decision to overrule Appellant's second assignment of error.

{¶42} I respectfully dissent from the majority's disposition of Appellant's first assignment of error. The majority concedes the transcript of the change of plea and sentencing hearing indicates the trial court did not inform Appellant of the effect of his no contest plea. (Majority Opinion at ¶34). Such colloquy is required by Crim. R.11(C)(2)(b). Yet, the majority apparently finds the trial court partially complied with the rule. I disagree. Because I find no compliance, any analysis of prejudice is unnecessary pursuant to *Clark*.

{¶43} Accordingly, I would sustain Appellant's second assignment of error. In so doing, I echo the words of admonition set forth by the Ohio Supreme Court in *Clark*:

{¶44} "Over the past few years, we have decided several cases on the application of Crim.R. 11. See, e.g., *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224; *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51. In each instance, the trial court error was easily avoidable.

{¶45} "We urge trial courts to avoid committing error and to literally comply with Crim.R. 11. 'Literal compliance with Crim.R. 11, in all respects, remains preferable to inexact plea hearing recitations.' *Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶19, fn. 2, citing *State v. Nero*, 56 Ohio St.3d at 108, 564 N.E.2d 474. The best way to ensure that pleas are entered knowingly and voluntarily is to simply follow the requirements of Crim.R. 11 when deciding whether to accept a plea agreement." *Id.*

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

NICHOLAS B. WALLACE

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2010-CA-00008

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

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY