[Cite as *State v. Smoot*, 2016-Ohio-5750.]

COURT OF APPEALS
MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon., John W. Wise, P.J.
Plaintiff-Appellee	:	Hon., Patricia A. Delaney, J.
	:	Hon., Craig R. Baldwin, J.
-vs-	:	
	:	
JASON R. SMOOT	:	Case No. 15AP0009
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Morgan County Court of Common Pleas PRC at Plea - Trial Court Case No. 13CR0024
JUDGMENT:	PLEA VACATED REVERSED AND REMANDED
DATE OF JUDGMENT:	August 17, 2016

APPEARANCES:

For Appellant:

William E. Creighton
Attorney at Law
970 E. Goshen Run Rd.
Chesterhill, Ohio 43728
Attorney for Defendant-Appellant

Pro Se:

Jason R. Smoot #A715-376
15708 McConnelsville Road
Caldwell, Ohio 43724

For Appellee:

Mark J. Howdyshell
Prosecuting Attorney
Morgan County, Ohio
19 E. Main Street
McConnelsville, Ohio 43756
Attorney for Plaintiff-Appellee

Delaney, J.

{¶1} Appellant, Jason Rafael Smoot, entered into a plea agreement wherein he plead guilty to one count of burglary, a felony of the second degree, in violation of R.C. 2911.112(A)(1). The agreement resulted in the indictment being amended from one count of burglary which was a felony of the first degree to one count of burglary which was a felony of the second degree. Further, the State agreed to dismiss a firearm specification and recommend a prison sentence of four years. Following a presentence investigation, Appellant was sentenced to a prison term of four years. Appellant was granted leave to file a delayed appeal in this case.

{¶2} Counsel for Appellant has filed a Motion to Withdraw and a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, rehearing den. (1967), 388 U.S. 924, indicating that the within appeal was wholly frivolous. Counsel for Appellant has raised one potential assignment of error asking this Court to determine whether Appellant received effective assistance of counsel. Appellant has also filed a brief raising one additional assignment of error.

I.

{¶3} "WHETHER OR NOT DEFENDANT HAD INEFFECTIVE ASSISTANCE OF COUNSEL."

II.

{¶4} "THE TRIAL COURT VIOLATED CRIM.R. 11 AND R.C. § 2929.19(B)(3)(c) WHEN IT FAILED TO ADVISE DEFENDANT THAT HE WAS SUBJECT TO A MANDATORY THREE-YEAR TERM OF POST-RELEASE CONTROL. AS A RESULT, DEFENDANT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTER A GUILTY PLEA."

{¶5} In *Anders,* the United States Supreme Court held if, after a conscientious examination of the record, a defendant's counsel concludes the case is wholly frivolous,

then he should so advise the court and request permission to withdraw. *Id.* at 744. Counsel must accompany his request with a brief identifying anything in the record that could arguably support his client's appeal. *Id.* Counsel also must: (1) furnish his client with a copy of the brief and request to withdraw; and, (2) allow his client sufficient time to raise any matters that the client chooses. *Id.* Once the defendant's counsel satisfies these requirements, the appellate court must fully examine the proceedings below to determine if any arguably meritorious issues exist. If the appellate court also determines that the appeal is wholly frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements, or may proceed to a decision on the merits if state law so requires. *Id.*

{¶6} Counsel in this matter has followed the procedure in *Anders v. California* (1967), 386 U.S. 738.

{¶7} We now will address the merits of Appellant's potential Assignments of Error.

II.

{¶8} Because Appellant's second Assignment of Error is dispositive of this case, we will address it first. In his second Assignment of Error, Appellant contends his plea and sentence must be vacated because the trial court failed to advise Appellant of the possibility of post release control.

{¶9} We have reviewed the transcript of the plea hearing and find the trial court failed to advise Appellant of the post release control portion of his sentence. The trial court made no mention of post release control during the plea hearing. Further, the plea form signed by Appellant contains no reference to post release control.

{¶10} The Supreme Court has held the following where a trial court fails to advise a defendant of mandatory post release control in the plea colloquy, "[I]f 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." *State v. Sarkozy*, 117 Ohio St.3d 86, 91, 2008-Ohio-509, 881 N.E.2d 1224, 1229, ¶ 25 (2008).

{¶11} We are mindful of our holding in *State v. Aleshire* wherein we did not vacate a plea despite the trial court's failure to advise the defendant of post release control. See *State v. Aleshire*, 5th Dist. Licking No. 2007-CA-1, 2008-Ohio-5688.

{¶12} We find this case distinguishable from *Aleshire* because the plea form in this case contained no reference to post release control and Appellant did file a direct appeal of his conviction in this case unlike the appellant in *Aleshire*.

{¶13} Based upon the Supreme Court's holding in *Sarkozy*, we must vacate Appellant's plea and remand this matter to the trial court for further proceedings.

{¶14} Appellant's second assignment of error is sustained.

I.

{¶15} In light of our disposition of appellant's second assignment of error, we find Appellant's first assignment of error to be moot.

{¶16} For these reasons, after independently reviewing the record, we reverse the judgment of the Morgan County Court of Common Pleas. We vacate Appellant's plea and remand this matter to the trial court for further proceedings.

By Delaney, J.

Wise, P.J. and

Baldwin, J. concur.