

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio

Court of Appeals No. S-09-023

Appellee

Trial Court No. 08 CR 1294

v.

Tianna L. Wright

DECISION AND JUDGMENT

Appellant

Decided: June 11, 2010

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney, and
Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Andrew R. Bucher for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals her conviction for complicity to robbery following a guilty plea in the Sandusky County Court of Common Pleas. For the reasons that follow, we affirm.

{¶ 2} On September 17, 2007, a gunman wearing a ski mask entered a Fremont tavern. After striking one of the patrons with the butt of his pistol, the man fled with a large amount of cash in a car owned and occupied by appellant, Tianna L. Wright.

{¶ 3} On November 19, 2008, appellant was named in a three count indictment, charging two counts of complicity to aggravated robbery, first degree felonies, and one count of complicity to robbery, a second degree felony. All counts were accompanied with a firearm specification. On arraignment, appellant pled not guilty to all charges.

{¶ 4} Appellant was scheduled to appear before the court for a plea change on March 31, 2009. When she did not appear, ostensibly because of a medical emergency, the court revoked her bond. The court did not expressly rule on her motion to reinstate bond.

{¶ 5} On April 22, 2009, appellant executed a waiver of further indictment and agreed to be tried on a bill of information. The original indictment was dismissed. Appellant entered a plea of guilty to an information charging complicity to robbery, a third degree felony, in violation of "[R.C.]2911.01(A)(3) and 2923.03."

{¶ 6} Following a plea colloquy, the trial court accepted appellant's plea. After a presentence investigation, the court sentenced appellant to a four year term of incarceration. Appellant now appeals this conviction, setting forth the following four assignments of error:

{¶ 7} "I. The trial court erred and was not in compliance with Crim R. 11 when it failed to notify defendant-appellant of a mandatory term of post release control at plea

change [sic] thus the plea fails to be knowing, voluntary, and intelligent and accordingly must be vacated and remanded.

{¶ 8} "II[.] The court abused its discretion when it sua sponte revoked defendant-appellant's bond and subsequently declined a hearing on the same. The result of this abuse was an involuntary plea[.]

{¶ 9} "III[.] Defendant suffered from ineffective assistance of counsel both generally and to render her plea involuntary.

{¶ 10} "IV[.] Defendants [sic] waiver of indictment and agreement to proceed via information was invalid as the information failed to charge a crime under the R.C."

I. Plea Colloquy

{¶ 11} During appellant's plea colloquy, both orally and in the written plea agreement, the court advised appellant that she could be sentenced to imprisonment and, if a prison term is imposed, "* * * you may be subjected to a period of post-release control for up to three years upon your release from prison * * *." It is undisputed that complicity to robbery is a third degree felony which, coupled with caused or threatened physical harm to a person, carries a mandatory three year term of postrelease control. See R.C. 2967.28(B)(3).

{¶ 12} Appellant argues that, pursuant to the syllabus of *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, at paragraphs one and two of the syllabus, a trial court's failure to inform a defendant that her sentence will include a mandatory period of postrelease control constitutes a violation of Crim.R. 11, negating the knowing,

intelligent and voluntary nature of the plea. In such circumstances, the reviewing court must vacate the plea, appellant insists.

{¶ 13} The state maintains that strict compliance with Crim.R. 11 is only necessary when informing a defendant of the constitutional rights he or she waives when entering the guilty plea. Matters contained in Crim.R. 11 which are not constitutional are governed by a different standard. Substantial compliance with the rule when informing a defendant of non-constitutional matters is sufficient, the state insists.

{¶ 14} A guilty plea is a complete confession of the matter charged. Crim.R. 11(B)(1). For a trial court to accept such a confession of guilt, the court must first ascertain that the plea is voluntary. *Boykin v. Alabama* (1969), 395 U.S. 238, 241. To be voluntary, a guilty plea requires the knowing and intelligent waiver of certain constitutionally guaranteed rights. The waiver of these rights must be express. *Id.*

{¶ 15} Crim.R. 11(C) was adopted to facilitate an accurate determination of the voluntariness of the plea and to insure a record of the waiver. *State v. Stone* (1975), 43 Ohio St.2d 163, 167-168. The trial court is required to personally address the defendant and inform him or her of these rights and determine that the defendant understands that he or she 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." Crim.R. 11(C)(2)(c).

{¶ 16} The rule also requires the court to determine, inter alia, that the defendant understands the nature of the charges against him or her, the maximum penalty involved and, if applicable, that the defendant is ineligible for probation or community control. Crim.R. 11(C)(2)(a). For constitutionally guaranteed rights, strict compliance to the rule is demanded. *State v. Ballard* (1981), 66 Ohio St.2d 473, 480; *State v. Reed*, 7th Dist. No. 03 MA 77, 2004-Ohio-1544, ¶ 20. Concerning directives that do not implicate constitutional rights, while literal compliance with Crim.R. 11 is preferred, a defendant's guilty plea need not be vacated if there is substantial compliance with the rule. *State v. Stewart* (1977), 51 Ohio St.2d 86, 92-93.

{¶ 17} "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. Furthermore, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. The test is whether the plea would have otherwise been made." (Citations omitted.) *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

{¶ 18} Appellant relies on *State v. Sarkozy*, supra, for the proposition that, when a court fails to advise a defendant of mandatory postrelease control during the plea colloquy, this constitutes a failure to comply with Crim.R. 11 and requires a reviewing court to vacate the plea.

{¶ 19} Michael Sarkozy was named in a ten count indictment charging him with attempted murder and assorted burglaries, robberies and assaults. He initially pled not

guilty, but, following negotiations, agreed to plead guilty to one count of attempted murder, one count of aggravated robbery and a single count of kidnapping. The state agreed to nolle the remaining counts.

{¶ 20} At Sarkozy's plea hearing, the court informed him of the prison terms for the offenses to which he was pleading guilty. The court did not inform Sarkozy of mandatory postrelease control, its length or the consequences for violating postrelease control. The court accepted Sarkozy's plea, denied a subsequent motion to withdraw the plea and sentenced him to a 27 year term of imprisonment with a mandatory five year term of postrelease control.

{¶ 21} Sarkozy appealed, arguing that his plea was invalid because he had not been advised that postrelease control would be part of his sentence. The appeals court affirmed. On further review, the Supreme Court of Ohio reversed. In syllabus, the court held:

{¶ 22} "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.

{¶ 23} "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." *State v. Sarkozy*, supra, paragraphs one and two of the syllabus.

{¶ 24} Appellant insists that misinforming a defendant that a mandatory period of postrelease control is discretionary constitutes a failure to advise a defendant that the "sentence will include a mandatory term of postrelease control." It follows then, appellant argues, that, pursuant to the second paragraph of the *Sarkozy* syllabus, her plea must be vacated and the matter remanded to the trial court.

{¶ 25} The *Sarkozy* syllabus must be construed in the light of the court's full opinion. *State v. Garrett*, 9th Dist. No. 24377, 2009-Ohio-2559, ¶ 18, citing S.Ct. R. Rep. Op. 1(B)(1). The *Sarkozy* court, at ¶ 22, states that it did not apply the substantial compliance analysis because "there was no compliance with Crim.R. 11. * * * The trial court did not merely misinform Sarkozy about the length of his term of postrelease control. Nor did the court merely misinform him as to whether postrelease control was mandatory or discretionary. Rather, the court failed to mention postrelease control at all during the plea colloquy. * * * A complete failure to comply with the rule does not implicate an analysis of prejudice."

{¶ 26} The *Sarkozy* court expressly distinguished the complete omission of any mention of postrelease control from colloquies such as those examined in *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082. There defendants were advised that mandatory postrelease control was "optional," id. at ¶ 3, that "the defendant will/may serve a period of post-release control," id. at ¶ 5, "that the defendant is subject to post-release control which is (mandatory/optional)," id. at ¶ 11, "is optional," id. at ¶ 13, and,

in language virtually identical to that employed here, "[t]he defendant may be subject to a period of three (3) years of post-release control," *id.* at ¶ 21.

{¶ 27} According to the *Sarkozy* court, "In *Watkins*, however, the trial judge did mention postrelease control, whereas here the trial judge made no mention of postrelease control during the plea colloquy. In cases such as *Watkins*, some compliance prompts a 'substantial compliance' analysis and the corresponding 'prejudice' analysis." *Sarkozy* at ¶ 23.

{¶ 28} With this distinction, the court leaves intact its prior holding that, when a court misinforms a defendant that a period of postrelease control is discretionary rather than mandatory, this is "* * * sufficient to afford notice to a reasonable person that the courts were authorizing postrelease control as part of each petitioner's sentence." *Watkins* at ¶ 51. Although *Watkins* was a petition for habeas corpus, the court also applied this reasoning to find substantial compliance with Crim.R. 11 in the same context as presented here. *State v. Holloway*, 111 Ohio St.3d 496, 2006-Ohio-6114, ¶ 2. ("And do you understand that after any sentence is imposed is served you may be released into a five-year post-release control program * * *?" *State v. Holloway*, 8th Dist. Nos. 86426 and 86427, 2006-Ohio- 2591, ¶ 15.) See, also, *State v. Garrett*, *supra*, at ¶ 15.

{¶ 29} The trial court's imperfect advisement to appellant that she was subject to a discretionary period of postrelease control afforded her sufficient notice that such control might be imposed. Since appellant had notice that her sentence might include postrelease control, she cannot show prejudice as her plea was made with knowledge of that

possibility. *Watkins*, supra; *Garrett*, supra, at ¶ 16; *State v. Holloway*, 8th Dist. Nos. 86426 and 86427, 2007-Ohio-2221, at ¶ 11; *State v. Fuller*, 1st Dist. No. C-040318, 2007-Ohio-1020, at ¶ 9. Compare *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748. (Defendant informed she was subject to five years postrelease control, when, in fact she was subject to lifetime parole and re-incarceration for life for a violation.)

{¶ 30} Accordingly, even though the court mistakenly told appellant that her postrelease control period was discretionary rather than mandatory, the plea colloquy substantially complied with Crim.R. 11 and appellant's first assignment of error is not well-taken.

II. Bond Revocation

{¶ 31} In her second assignment of error, appellant maintains that the trial court abused its discretion when it revoked her bond after she failed to appear at a scheduled hearing and that being incarcerated coerced her to enter a plea. Appellant insists that she notified the court while receiving treatment for pregnancy complications at a hospital and provided documentation to the court of her medical issues. In such circumstances, appellant insists, revocation of her bond was erroneous.

{¶ 32} When a " * * * court determines that the accused has violated conditions of bail, whether the conditions be express or implied, the accused is subject to the court's sanctioning authority for violation of the conditions, including revocation of bail." *In re Mason* (1996), 116 Ohio App.3d 451, 453. The decision of the court in this regard is reviewed on an abuse of discretion standard. *State v. Clinkscale*, 177 Ohio App.3d 294,

2008-Ohio-1677, ¶ 18, reversed on other grounds 122 Ohio St.3d 351, 2009-Ohio-2746.

An abuse of discretion is more than a mistake of law or a lapse of judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 33} In this matter, the court stated on the record that it believed appellant's absence at what was supposed to be a plea change hearing was a stalling tactic, intended to delay her trial. The court, therefore, refused to believe appellant's submissions of excuse. This is a factual determination to which we must grant great deference. *State v. Antill* (1964), 176 Ohio St. 61, 67. Given this determination of fact, we cannot say that the court's decision to revoke bond was arbitrary, unreasonable or unconscionable. Moreover, there is nothing in the record to suggest that the revocation of appellant's bond influenced her decision to enter a plea. Accordingly, appellant's second assignment of error is not well-taken.

III. Ineffective Assistance of Counsel

{¶ 34} In her third assignment of error, appellant asserts that she was denied effective assistance of counsel because her trial counsel failed to petition for a habeas corpus or seek other remedy when her bond was revoked.

{¶ 35} "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction * * * has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the

defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. * * * Unless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. Accord, *State v. Smith* (1985), 17 Ohio St.3d 98, 100.

{¶ 36} In this matter, given our decision with respect to appellant's second assignment of error, we cannot say that the inaction appellant asserts constituted deficient representation would have produced any result. As a result, appellant has failed to meet the first prong of the *Strickland* test. Accordingly, appellant's third assignment of error is not well-taken.

IV. Failure to State an Offense

{¶ 37} In her remaining assignment of error, appellant insists that the bill of information to which she pled contained patent defects to the extent that she could not have possibly have been properly advised of the nature of the charge against her as required. Specifically, the bill of information states that appellant committed "Complicity to Commit Robbery" in violation of R.C. 2911.01(A)(3) and 2923.03, a third degree felony. R.C. 2911.01(A)(3) defines the offense of aggravated robbery, a first degree felony for which no third degree variation exists. Thus, appellant argues, the bill of information was defective and her plea should be vacated.

{¶ 38} The state concedes that the statutory reference in the bill of information was in error, but suggests that, in all other respects, the information was correct as was the

court's charge to appellant. The state suggests that this was a clerical mistake which should be remanded to the trial court for correction, pursuant to Crim.R. 36.

{¶ 39} In all respects, the bill of information charges and refers to the offense of complicity to commit robbery, a third degree felony. It would appear that, in drafting the information, the state substituted R.C. 2911.01(A)(3), the section defining aggravated robbery, for R.C. 2911.02(A)(3), the section defining simple robbery. This mistake, unfortunately, carried over to the court's judgment of conviction.

{¶ 40} Crim.R. 36 provides that, "Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time." Such a correction may be used to correct erroneous statute numbers in the indictment and judgment entries. *State v. Jamison* (Jan. 9, 1991), 3d Dist. Nos. 3-89-24 and 3-89-25.

{¶ 41} As a result, appellant's fourth assignment of error, to the extent that she seeks a declaration that the bill of information under which she was tried is invalid, is not well-taken. Nevertheless, this matter must be remanded to the trial court for a nunc pro tunc entry correcting the erroneous statute reference.

{¶ 42} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is affirmed. This matter is remanded to said court to correct the erroneous statute references in the bill of information and final judgment. It is ordered that appellant pay court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
