

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

State of Ohio

Court of Appeals No. F-08-008

Appellee

Trial Court No. 07CR165

v.

Orlando Williams

DECISION AND JUDGMENT

Appellant

Decided: February 5, 2010

* * * * *

Scott A. Haselman, Fulton County Prosecuting Attorney, and
Gary Smith, Assistant Prosecuting Attorney, for appellee.

Chad D. Huber, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Orlando Williams, appeals from his conviction in the Fulton County Court of Common Pleas for trafficking in cocaine in violation of R.C. 2925.03(A)(1), a felony of the second degree. For the reasons that follow, we vacate the

plea and remand the cause for further proceedings consistent with this decision and judgment.

{¶ 2} Appellant entered a guilty plea to trafficking in cocaine. In exchange for appellant's guilty plea, the state agreed to dismiss two additional charges pending against him. Appellant was convicted and sentenced to four years in prison. Pursuant to R.C. 2929.14(F)(1) and R.C. 2967.28(B)(2), the second degree felony of trafficking in cocaine carries a mandatory period of three years postrelease control.

{¶ 3} Appellant's original counsel then filed a merit brief pursuant to *Anders v. California* (1967), 386 U.S. 738, requesting leave to withdraw. Counsel's request was granted. However, new counsel was assigned upon this court's finding that a meritorious appealable issue existed. *State v. Williams*, 6th Dist. No. F-08-008, 2009-Ohio-3199. Appellant now appeals setting forth the following assignment of error:

{¶ 4} "Appellant's plea of guilty can not [sic] be considered made knowingly, intelligently, and voluntarily as required under Criminal Rule 11 because the trial court failed to notify the appellant that he would be subject to Postrelease Control before accepting the plea."

{¶ 5} In his sole assignment of error, appellant contends that the trial court failed to mention appellant's mandatory postrelease control during the plea colloquy. Appellant asserts that this failure precludes appellant from making a knowing, intelligent, and voluntary guilty plea. We agree.

{¶ 6} The trial judge must comply with Crim.R. 11(C)(2)(a) before accepting a defendant's guilty plea. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶ 27.

Crim.R. 11(C)(2)(a) provides:

{¶ 7} "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: * * * 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."

{¶ 8} The standard for review of a trial court's adherence to this rule is a three-pronged test for compliance. *Clark* at ¶ 30. If literal compliance with Crim.R. 11 has not been met by the trial court and the error results in a breach of the defendant's nonconstitutional rights, then the reviewing court must determine whether substantial or partial compliance has been satisfied, or whether the court has failed to comply. *Id.* at ¶ 32.

{¶ 9} In the case at bar, appellant contends that the trial court failed to explain that his sentence carried a mandatory period of postrelease control. Disclosure of postrelease control is required prior to accepting a guilty plea to satisfy the maximum penalty involved element of the statute. Failure to satisfy the maximum penalty involved

element is a violation of a nonconstitutional right. *Id.* at ¶ 31. This court must look to the plea colloquy to determine what level of compliance was reached.

{¶ 10} Before accepting appellant's guilty plea, the trial court attempted to ensure that appellant was making a knowing, voluntary, and intelligent plea through a series of questions and explanations which addressed the rights he was waiving and the consequences of the plea. Included in this plea colloquy was the trial judge's explanation to appellant that the offense of trafficking in cocaine carried a prison term of two to eight years; a possible fine of \$15,000 with a mandatory minimum fine of \$7,500; and a driver's license suspension from six months to five years. The trial judge then accepted the guilty plea, sentenced appellant to four years in prison and stated:

{¶ 11} "I'm further going to advise [sic] you and remind you that you would be subject to [postrelease control] of up to five years to be monitored by the Adult Parole Authority under the terms and conditions set by them. If you violate any of those terms and conditions you could be returned to prison under this case for up to nine months for each violation, up to one-half of the stated term. If any violation is a new felony, it would be one year or the time remaining on your [postrelease control], whichever was greater to be served consecutively."

{¶ 12} Prior to this statement, the trial judge had not discussed postrelease control with appellant.

{¶ 13} Although the trial judge did explain to appellant the terms and conditions of his postrelease control, he failed to do so before accepting appellant's guilty plea. The

Ohio Supreme Court has already addressed this issue. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509. A court's failure to mention postrelease control during the plea colloquy is a complete failure to comply with Crim.R. 11. *Sarkozy* at ¶ 22.

{¶ 14} At Sarkozy's plea hearing, a guilty plea was entered and the trial judge explained to Sarkozy the possible prison terms for his offenses. *Id.* at ¶ 4. The trial judge did not notify Sarkozy that his sentence included postrelease control prior to accepting Sarkozy's plea. *Id.* at ¶ 4. On appeal, Sarkozy argued that he could not have made his guilty plea knowingly and voluntarily because he had not been informed of his mandatory postrelease control. *Id.* at ¶ 12. In response, the state argued that disclosure of the postrelease control merely puts a defendant on notice that "his or her liberty can be restrained after incarceration." *Id.* at ¶ 24. The state added that failure to notify a defendant of postrelease control cannot invalidate a sentence "and thus cannot invalidate a plea." *Id.* at ¶ 23-24. This argument is rejected by the court because postrelease control carries a much heavier burden than any type of community control. *Id.* at ¶ 24.

{¶ 15} A violation of postrelease control may result in additional imprisonment of up to half of the defendant's original sentence. The court explained, "[N]o reasonable person in [defendant's] position would have been put on notice of this restraint on his or her liberty, because the trial court failed to inform of the consequences of the plea." *Id.* at ¶ 24.

{¶ 16} In the present case, the facts are not in dispute. The trial judge failed to notify appellant that his sentence included mandatory postrelease control prior to

accepting appellant's plea. Without this information it cannot be said that appellant understood the maximum penalty to which he might be sentenced. Thus, appellant's plea was not made knowingly, intelligently, and voluntarily. The trial court's acceptance of this plea is a failure to comply with Crim.R. 11. Appellant's assignment of error is well-taken.

{¶ 17} On consideration whereof, the judgment of the Fulton County Court of Common Pleas is reversed. Appellant's sentence for trafficking in cocaine is vacated, and this cause is remanded for the trial court to resentence him according to law. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

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

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:
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