

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

State of Ohio

Court of Appeals No. S-10-040

Appellee

Trial Court No. 09 CR 1475

v.

Clarence L. Oliver

DECISION AND JUDGMENT

Appellant

Decided: October 14, 2011

* * * * *

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

Thomas P. Kurt, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This is an appeal from a judgment issued by the Sandusky County Court of Common Pleas, following appellant's guilty plea pursuant to a plea agreement. Because we conclude that appellant's guilty plea was not entered knowingly or intelligently, we reverse and remand.

{¶ 2} Appellant, Clarence Oliver, was originally indicted on three offenses:

Count One—felonious assault, in violation of R.C. 2903.11(A)(1), Count Two—felonious assault, in violation of R.C. 2903.11(A)(2), and Count Three—possession of a firearm in a liquor permit premises, in violation of R.C. 2923.121(A). The charges stemmed from a bar fight incident which involved a group of 13 people. Allegedly, during the altercation, appellant threw a broken glass, striking an employee, who was injured. Appellant also was carrying an unloaded firearm.

{¶ 3} Pursuant to a plea agreement, appellant pled guilty to a lesser included offense of attempted felonious assault, in violation of R.C. 2903.11(A)(2) and 2923.02 and the firearm charge. According to the plea hearing, the remaining count was to be dismissed.¹ The court sentenced appellant to the maximum allowed term of five years for the attempted felonious assault conviction, and to one year incarceration for the firearm charge, to be served concurrently.

{¶ 4} Appellant now appeals arguing the following three assignments of error:

{¶ 5} "FIRST ASSIGNMENT OF ERROR: Appellant's guilty plea was not made knowingly and voluntarily because the trial court misinformed appellant about his eligibility for judicial release. The trial court therefore erred in accepting appellant's plea of guilty.

¹Although the plea hearing clearly indicates that the remaining count was to be dismissed, the court's judgment entry contains no such finding.

{¶ 6} "SECOND ASSIGNMENT OF ERROR: The mandatory sentencing considerations of Ohio Revised Code § 2929.11(A) were frustrated in this case, in that the trial court at the time of sentencing expressed its intent to consider a motion for judicial release but imposed a sentence under which judicial release was a legal impossibility.

{¶ 7} "THIRD ASSIGNMENT OF ERROR: For the reasons set forth in the First Assignment of Error, appellant's guilty plea was not made knowingly and voluntarily, and therefore his conviction was entered in violation of his rights under the Fifth and Fourteenth Amendments of the United States Constitution."

{¶ 8} We will address all three assignments of error together. In his first and third assignments of error, appellant contends that his guilty pleas were not knowingly and intelligently made because the trial court misrepresented his eligibility for judicial release. Specifically, appellant argues in his second assignment of error, that the statute which purportedly permits judicial release, creates a legal impossibility for such release for an offender sentenced to exactly five years. Appellant argues that the trial court misled him by representing at the plea hearing that he would be eligible for judicial release and then imposing a sentence of five years that renders him ineligible for judicial release.

{¶ 9} We initially note that, contrary to appellee's suggestion, appellant's failure to file a motion to withdraw his plea in the trial court does not preclude him from challenging the knowing, intelligent, and voluntary nature of his plea in this court. A

defendant may seek to vacate his guilty plea either by filing a motion to withdraw the plea in the trial court or upon direct appeal. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, paragraph one of the syllabus. See, also, *State v. Ealom*, 8th Dist. No. 91455, 2009-Ohio-1365, ¶ 5, fn. 1 (applying *Sarkozy* where the purported misinformation concerned defendant's eligibility for judicial release). Therefore, we will now address appellant's assignments of error.

{¶ 10} A plea of guilty or no contest in a criminal case "must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle* (1996), 74 Ohio St.3d 525, 527. Crim.R. 11(C)(2) provides that "felony defendants are entitled to be informed of various constitutional and nonconstitutional rights, prior to entering a plea." *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶ 6. The failure to adequately inform a defendant of his constitutional rights invalidates a guilty plea "under a presumption that it was entered involuntarily and unknowingly." *Id.* at ¶ 12.

{¶ 11} However, the failure to accurately explain nonconstitutional rights is reviewed under the substantial compliance standard. *Id.* "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." *State v. Nero* (1990), 56 Ohio St.3d 106, 108. Under Crim.R. 11(C)(2), a trial court is not required to advise a defendant regarding eligibility for judicial release. See *State v. Sherman*, 5th Dist. No. 2009-CA-132,

2010-Ohio-3959, ¶ 17; *State v. Smith*, 5th Dist. No. CT2007-0073, 2008-Ohio-3306, ¶ 17. Therefore, the failure to include such information in the court's colloquy does not violate a defendant's Crim.R. 11 rights.

{¶ 12} Nevertheless, an "incorrect recitation of the law fails to meet the substantial-compliance standard. If a trial judge chooses to offer an expanded explanation of the law in a Crim.R. 11 plea colloquy, the information conveyed must be accurate." *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶ 39. See, also, *State v. Sherman*, supra, 2010-Ohio-3959, ¶ 41 (although trial court is not obligated to discuss a defendant's eligibility for judicial release during a plea colloquy, such information, if conveyed, must be accurate). When a defendant's guilty plea is induced by erroneous representations as to the applicable law, including eligibility for judicial release, the plea is not knowingly, intelligently, and voluntarily made. *Sherman*, supra, at ¶ 38-41; *State v. Mitchell*, 11th Dist. No. 2004-T-0139, 2006-Ohio-618, ¶ 15. See, also, *Engle*, supra, at 528 (allowing withdrawal of no-contest plea that was predicated on inaccurate representations as to defendant's right to appeal the trial court's ruling on a motion in limine).

{¶ 13} However, in addition to the demonstration that the court has not substantially complied with the requirements of Crim.R. (11)(C)(2), "there must be some showing of prejudicial effect before a guilty plea may be vacated." *State v. Stewart* (1977), 51 Ohio St.2d 86, 93. The test for determining prejudice is whether the plea would otherwise have been made. *Nero*, supra, at 108, citing *Stewart*, supra, at 93, and

Crim.R. 52(A). Thus, in cases involving misstatements as to judicial release, an appellant "must demonstrate * * * that but for the misrepresentation regarding judicial release, he would not have entered the plea." *Mitchell*, supra, at ¶ 15.

{¶ 14} In this case, as to the court's substantial compliance with Crim.R. 11, appellant asserts that the trial court's statements misrepresented the law regarding his eligibility for judicial release, under R.C. 2129.20(C). The immediately previous version of this section provided that for a first, second, or third degree felony and a sentence less than five years, a defendant was permitted to apply for judicial release 180 days after delivery to the institution. R.C. 2929.20(B)(2), effective date November 23, 2005. An offender with a sentence of five years was allowed to apply for judicial release after serving four years of the sentence. R.C. 2929.20(B)(3), effective date November 23, 2005.

{¶ 15} The current version of R.C. 2929.20, effective after April 7, 2009, however, reinstated a prior version of the statute, which also provided that, for a prison term of "at least two years but less than five years, the eligible offender may file the motion not earlier than one hundred eighty days after the offender is delivered to a state correctional institution * * *." R.C. 2929.20(C)(2). For a sentence of *five to ten years* incarceration, however, the offender is eligible for judicial release only *after serving five years*. R.C. 2929.20(C)(3).

{¶ 16} We note that the version of R.C. 2929.20 which was effective prior to November 23, 2005, which included substantially the same language as the current

statute regarding the judicial release eligibility of an offender sentenced to exactly five years, was found to be unconstitutional in 2004. See *State v. Peoples*, 102 Ohio St.3d 460, 2004-Ohio-3923 (R.C. 2929.20, which provided that offenders sentenced to 5 years in prison were not eligible for judicial release until after serving 5 years, violated the Equal Protection Clause of the Ohio Constitution). Thus, the most recent version of R.C. 2929.20(C)(3), which inexplicably reinstated the prior violative language, is likely to be found unconstitutional as well. See *State v. Byrd*, 2d Dist. No. 23950, 2011-Ohio-2060. As noted by the Second District Court of Appeals in *Byrd*,

{¶ 17} "As [the current version of R.C. 2929.20] now stands, with a five year sentence, [appellant] is not eligible for judicial release at all unless he files an application for judicial release and the court determines that the five year limitation is unconstitutional. If the limitation is found unconstitutional * * * [appellant] would be eligible after 180 days." Since appellant has not yet applied for judicial release, any specific ruling on the constitutionality of R.C. 2929.20 in the present appeal would be premature. The ultimate effect of the statutory language, however, does have a bearing on whether the trial court misstated or misrepresented the law as it pertained to appellant.

{¶ 18} In this case, the trial court stated at both the plea hearing and the sentencing hearing that appellant "would be eligible to apply for judicial release in the event that you are sentenced to prison." Even the judgment entry stated that appellant "can apply for judicial release after he is delivered to the prison pursuant to the guidelines set forth in ORC 2929.20." Technically, the trial court's statement that appellant would be eligible

for judicial release was correct under a strict reading of the current statutory language. Such eligibility, however, is illusory, since appellant would have to serve his full five year sentence before being "eligible" to apply for judicial release. Therefore, we agree with appellant that the trial court misstated the law regarding judicial release as applicable to appellant, establishing that the court did not substantially comply with Crim.R. 11.

{¶ 19} Appellant must also show that prejudice occurred, i.e., that the court's error induced him to enter the guilty plea. The record shows that, in exchange for his guilty plea, one of the felonious assault charges was reduced to attempted felonious assault. The second felonious assault charge was to be dismissed. The remaining charge of illegal possession of a firearm in a liquor permit premises at sentencing was not reduced or dismissed. At his sentencing hearing, appellant himself spoke several times, urging the court to impose only community control, rather than a prison sentence. Appellant's statements indicated that he was not expecting a lengthy prison sentence, or at the least was expecting that he would be permitted to apply for judicial release. After the court imposed the five year sentence, the maximum for appellant's offense, appellant again requested that the court give him "five years probation with a prison stay or something, anything like that, please?"

{¶ 20} Although no guarantee was made that such release would be granted, after reviewing the record, we conclude that it demonstrates that the possibility of judicial release likely was an important factor which induced appellant to enter his guilty plea.

Therefore, we conclude that appellant's guilty plea was not entered knowingly, intelligently, or voluntarily.

{¶ 21} Accordingly, appellant's three assignments of error are well-taken.

{¶ 22} The judgment of the Sandusky County Court of Common Pleas is reversed, appellant's plea is vacated, and the case is remanded for proceedings consistent with this decision. 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.

Peter M. Handwork, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, 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>
