

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 87819**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

VS.

**DARIN BRUSITER**

DEFENDANT-APPELLANT

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**JUDGMENT:  
REVERSED AND REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-456618

**BEFORE:** Cooney, P.J., Calabrese, J., and Corrigan, J.

**RELEASED:** December 7, 2006

**JOURNALIZED:**

[Cite as *State v. Brusiter*, 2006-Ohio-6444.]

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COLLEEN CONWAY COONEY, P.J.:

{¶ 1} Defendant-appellant, Darin Brusiter (“Brusiter”), appeals the trial court’s acceptance of his guilty plea. Finding merit to the appeal, we reverse the judgment, vacate the plea, and remand for further proceedings.

{¶ 2} In 2004, Brusiter was charged with eight counts of felonious assault, one count of improperly discharging a firearm at or into a habitation or school, and two counts of aggravated burglary. Each count contained one- and three-year firearm specifications. Brusiter pled guilty to an amended count of felonious assault, containing a three-year firearm specification and an amended count of improperly discharging a firearm at or into a habitation or school. All remaining counts and specifications were nolle. The court sentenced Brusiter to two years on each count, which were ordered to run concurrently to each other, but consecutive to the three-year firearm specification, for a total of five years in prison.

{¶ 3} Brusiter filed this delayed appeal in which he argues in his sole assignment of error that the trial court erred and he was prejudiced when the court accepted his guilty plea without advising him of the correct term of post-release control in contravention of R.C. 2943.032 and Crim.R. 11.

{¶ 4} R.C. 2943.032(E) requires that, prior to accepting a guilty plea for which a term of imprisonment will be imposed, the trial court must inform the defendant regarding post-release control sanctions in a reasonably thorough manner. *State v. Crosswhite*, Cuyahoga App. Nos. 86345-86346, 2006-Ohio-1081, ¶7, citing *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171, 733 N.E.2d 1103. “Post-release control constitutes a portion of the maximum penalty involved in an offense for which a prison term will be imposed. Without an adequate explanation of post-release control from the trial court, the defendant could not fully understand the consequences of his plea as required by Crim.R. 11(C).” *State v. Griffin*, Cuyahoga App. No. 83724, 2004-Ohio-4344, at ¶13, quoting *State v. Jones* (May 24, 2001), Cuyahoga App. No. 77657, discretionary appeal not allowed, 93 Ohio St.3d 1434, No. 01-1295.

{¶ 5} Brusiter argues that the court failed to advise him of the actual term of post-release control that he faced. At the plea hearing, the trial court stated:

**“You should assume that they’re going to place a post-release control for these two felonies, which would include whatever they want to include. It might be, if they think you have got an alcohol problem, it would be alcohol counseling, drug problem, drug counseling, mental**

**health, seeking mental health counseling, whatever. Do you understand all that?**

**The Defendant: Yes.**

**The Court: If you violate parole, post-release control order, you would have to go back to prison, and again do half the time again. So, I would assume they're going to place you on parole, and you would have to face two and a half years if you violated. Do you understand that?**

**The Defendant: Yes, sir.”**

{¶ 6} The trial court informed Brusiter that he should “assume” that he would be placed on post-release control. By operation of law, Brusiter was subject to a mandatory three years of post-release control. R.C. 2929.19(B)(3)(c) and 2967.28(B).

{¶ 7} Crim.R. 11(C)(2) requires that the court personally address the defendant who enters a guilty plea and determine that the defendant is making the plea with an understanding of the maximum penalty involved. Ohio courts have determined that, although literal compliance with Crim.R. 11(C)(2)(a) is preferred, substantial compliance is sufficient. *State v. Caplinger* (1995), 105 Ohio App.3d 567, 572, 664 N.E.2d 959, citing *State v. Johnson* (1988), 40 Ohio St.3d 130, 532 N.E.2d 1295; *State v. Nero* (1990), 56 Ohio St.3d 106, 564 N.E.2d 474. “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.” *Nero*, supra at 108, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d

1163. “In other words, if it appears from the record that the defendant appreciated the effect of his plea and his waiver of rights in spite of the trial court’s error, there is still substantial compliance.” *Caplinger*, supra at 572, citing *Nero*, supra at 108-109. “[I]n order to substantially comply with Crim.R. 11(C)(2)(a), a trial court must advise a defendant of any mandatory post-release control period at the time of the defendant’s plea.” *State v. Lamb*, 156 Ohio App.3d 128, 133, 2004-Ohio-474, at \_16.

{¶ 8} “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.” *Nero*, supra at 108, citing *Stewart*, supra at 93; Crim.R. 52(A). “The test is whether the plea would have otherwise been made.” *Id.*

{¶ 9} In the instant case, the record is clear that the trial court failed to advise Brusiter that he was subject to a mandatory three-year term of post-release control following his prison sentence. This court has repeatedly held that, where the trial court failed to personally address a defendant and inform him of the maximum length of post-release control before accepting his guilty plea, the court fails to substantially comply with Crim.R. 11(C)(2)(a) and R.C. 2943.032. *State v. McCollins*, Cuyahoga App. No. 87182, 2006-Ohio-4886; *Crosswhite*, supra; *State v. Pendleton*, Cuyahoga App. No. 84514, 2005-Ohio-3126.

{¶ 10} The State concedes this error but contends that Brusiter was not prejudiced, and, thus, the error was harmless. We disagree. In *State v. Delventhal*, Cuyahoga App. No. 81034, 2003-Ohio-1503, this court deduced that the prejudice requirement is applied as part of the substantial compliance rule. *Id.* at ¶8, citing *Stewart*, *supra* at 93; *Nero*, *supra* at 108. “Where the judge is required to inform the defendant personally and entirely fails to do so there is no further need to determine whether prejudice occurred, and this rule is not limited only to warnings that are constitutionally required.” *Id.*, citing *State v. Higgs* (1997), 123 Ohio App.3d 400, 407-408, 704 N.E.2d 308.

{¶ 11} Because Brusiter was not advised of the maximum length of post-release control before entering his guilty plea, the trial court did not substantially comply with the requirements of Crim.R. 11(C)(2)(a) and R.C. 2943.032. Therefore, the trial court erred in accepting Brusiter’s guilty plea, and the plea is vacated.

{¶ 12} Accordingly, the assignment of error is sustained.

Judgment reversed, plea vacated, and case remanded for further proceedings consistent with this opinion.

It is, therefore, ordered that appellant recover of appellee the costs herein.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, PRESIDING JUDGE

ANTHONY O. CALABRESE, JR., J. and  
MICHAEL J. CORRIGAN, J.\* CONCUR

\*Sitting by assignment, Judge Michael J. Corrigan, Retired, of the Eighth District Court of Appeals.

[Cite as *State v. Brusiter*, 2006-Ohio-6444.]