[Cite as *State v. Tokar*, 2009-Ohio-4369.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91941

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JEFFREY TOKAR

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506651

BEFORE: Boyle, J., Stewart, P.J., and Sweeney J.

RELEASED: August 27, 2009

JOURNALIZED:

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Jeffrey Tokar, appeals from a judgment convicting him of burglary, theft of drugs, and attempted burglary. Finding merit to the appeal, we reverse the judgment of the trial court, vacate Tokar's plea, and remand for further proceedings.

{¶ 2} The Cuyahoga County Grand Jury indicted Tokar on ten counts: one count of burglary, a violation of R.C. 2911.12(A)(1); three counts of theft, violations of R.C. 2913.02(A)(1); one count of theft of drugs, a violation of R.C. 2913.02(A)(1); one count of receiving stolen property, a violation of R.C. 2913.51(A); and four counts of attempted burglary, violations of R.C. 2911.12(A)(2) and 2923.02. He pled not guilty to all charges.

{¶ 3} Tokar later withdrew his plea of not guilty and entered into a plea agreement with the state where he pled guilty to an amended indictment. Tokar pled guilty to burglary, theft of drugs, and two counts of attempted burglary. The trial court nolled the remaining counts. The plea also included the understanding that Tokar's sentence would include prison.

{¶ 4} The trial court sentenced Tokar to four years for burglary, one year for theft of drugs, and two years for each count of attempted burglary. The trial

court ordered that all counts be served consecutive to one another, for an aggregate term of nine years in prison.[1]

{¶ 5} It is from this judgment that Tokar appeals, raising three assignments of error for our review:

{¶ 6} "[1.] The trial court failed to establish, pursuant to Criminal Rule 11(C)(2)(a), that Jeffrey Tokar was knowingly and voluntarily entering his plea of guilty.

{¶ 7} "[2.] The trial court committed an abuse of discretion by imposing a cumulative and consecutive sentence upon Mr. Tokar.

{¶ 8} "[3.] Mr. Tokar was denied the effective assistance of counsel by the acts and omissions of his attorney, which are evident in the record, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution."

{¶ 9} In his first assignment of error, Tokar argues that he did not enter into his plea knowingly and voluntarily and thus, the trial court erred in accepting it. Specifically, Tokar maintains that the trial court did not ensure that he adequately understood the effect of his guilty plea because the trial court failed to inform him of the maximum penalty he could face for each count. We agree.

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[1]At the same plea hearing, Tokar also pled guilty in a separate indictment (Case No. CR-509148) to one count of receiving stolen property, a violation of R.C. 2913.51(A). The trial court sentenced him to one year in prison on this conviction, and ordered that it be served consecutive to the sentences received in the case sub judice (Case No. CR-506651).

{¶ 10} Crim.R.11(C)(2)(a) provides in pertinent part that the court "shall not accept a plea of guilty or no contest without first addressing the defendant personally and *** [d]etermining 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."

{¶ 11} The requirements of Crim.R.11(C)(2)(a) are nonconstitutional and thus, this court reviews plea proceedings "to ensure substantial compliance" with this rule. *State v. Esner*, 8th Dist. No. 90740, 2008-Ohio-6654, ¶4. "Under this standard, a slight deviation from the text of the rule is permissible; so long as the totality of the circumstances indicates that 'the defendant subjectively understands the implications of his plea and the rights he is waiving.'" *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶31, quoting *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

{¶ 12} When the trial court does not "substantially comply" with Crim.R. 11(C)(2)(a), a reviewing court must then "determine whether the trial court *partially* complied or *failed* to comply with this rule." (Emphasis sic.) *Clark* at ¶32. "If the trial judge partially complied, e.g., by mentioning mandatory postrelease control without explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect." Id., citing *Nero* at 108. "The test for prejudicial effect is 'whether the plea would have otherwise been

made.'" Id., quoting *Nero* at 108. "If the trial judge completely failed to comply with the rule, e.g., by not informing the defendant of a mandatory period of postrelease control, the plea must be vacated." Id., citing *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509. Moreover, a "complete failure to comply with the rule does not implicate an analysis of prejudice." Id.

{¶ 13} The record reveals, and the state concedes, that the trial court failed to advise Tokar of the maximum penalty that he could receive for each offense. The state maintains, however, that the trial court "partially complied with Crim.R. 11" because it at least advised Tokar as to "his mandatory postrelease control." The state therefore contends that Tokar must show how he was prejudiced, which it claims he did not do.

{¶ 14} First, assuming as the state asserts that the trial court properly informed Tokar about postrelease control, that still would not amount to "partial compliance." The trial court completely failed to mention the sentence range for each offense and thus, failed to advise Tokar of the maximum penalty he could receive. The trial court's omissions amounted to "a complete failure to comply" with the rule and thus, a prejudice analysis is not necessary. See *Clark* at ¶32; see, also, *Sarkozy* at ¶22-23 (facts were similar to what occurred here except that trial court informed defendant of the sentence range he could receive for each offense, but completely failed to

mention postrelease control; Ohio Supreme Court held this omission was "a complete failure to comply" with the rule).

{¶ 15} Second, the state's assertion that the trial court properly advised Tokar as to "his mandatory postrelease control" is incorrect. Although Tokar does not raise the issue of postrelease control, we will address it since the state raises it. The trial court informed Tokar at his plea hearing that if it imposed a prison term, then "the parole board *could* place [him] on post-release control *for up to three years*." (Emphasis added.) Thus, the trial court informed Tokar that he may receive postrelease control. Under R.C. 2967.28, however, an offender convicted of a second degree felony, that is not a felony sex offense, must receive three years of mandatory postrelease control; it is not discretionary.[2]

{¶ 16} In *Sarkozy* at paragraph two of the syllabus, the Ohio Supreme Court made clear that when a "trial court fails during a 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." As we stated,

[2] In addition, the trial court incorrectly stated the proper term of postrelease control at Tokar's sentencing hearing as "up to three years." In the judgment entry, however, the trial court correctly indicated that three years of mandatory postrelease control was part of the sentence. It is well established that putting the correct amount of postrelease control in the judgment entry does not correct the error. See *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, _11-12.

the trial court in *Sarkozy* "made no mention of postrelease control during the plea colloquy." Id. at ¶23. The Supreme Court noted, however, that when there is "some compliance," such as when the trial court at least mentions postrelease control, it "prompts a substantial-compliance analysis and the corresponding 'prejudice' analysis." Id.

{¶ 17} Here, the trial court did at least mention postrelease control, albeit incorrectly. If the trial court would have informed Tokar of the sentence range for each offense, as well as the possibility of making those sentences consecutive, then this court would have had to determine whether the trial court's statements about postrelease control amounted to "partial compliance" and if so, whether Tokar was prejudiced by the partial compliance. Since it did not do so, however, we do not need to reach the prejudice analysis. *Clark* at ¶32; *Sarkozy* at ¶23.

{¶ 18} Accordingly, Tokar's first assignment of error is sustained and his plea is vacated. In light of our disposition of this assignment of error, the remaining assignments of error are moot.

Judgment reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing 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.

MARY J. BOYLE, JUDGE

MELODY J. STEWART, P.J., and
JAMES J. SWEENEY, J., CONCUR