

[Cite as *State v. Wilson*, 2009-Ohio-4879.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92149

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

ERIC R. WILSON

DEFENDANT-APPELLANT

**JUDGMENT:
VACATED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-457755

BEFORE: Kilbane, P.J., Sweeney, J., and Jones, J.

RELEASED: September 17, 2009

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Eric R. Wilson (“Wilson”), appeals his convictions for drug possession, a felony of the fifth degree, in violation of R.C. 2925.11, and having a weapon under disability, a felony of the third degree, in violation of R.C. 2923.13. Wilson argues that the trial court violated Crim.R. 11 by failing to ascertain whether he was voluntarily entering his plea and by failing to inform him of the possibility of “extensions to his prison term.” Wilson also argues that the trial court committed reversible error by denying his motion to withdraw his guilty pleas without holding a hearing. After reviewing the appropriate law and facts, we vacate Wilson’s pleas and convictions in this matter and remand for further proceedings.

{¶ 2} On October 19, 2004, the Cuyahoga County Grand Jury indicted Wilson in a five-count indictment, including drug trafficking, a fifth degree felony, in violation of R.C. 2925.03; two counts of drug possession, a fifth degree felony, in violation of R.C. 2925.11; having a weapon under disability, a third degree felony, in violation of R.C. 2923.13; and possession of criminal tools, a fifth degree felony, in violation of R.C. 2923.24.

{¶ 3} On November 14, 2005, the trial court nolleed Counts 1, 3, and 5 of the indictment in exchange for Wilson’s guilty plea to Count 2, possession of drugs, and Count 4, having a weapon while under disability.

{¶ 4} On December 14, 2005, appellant failed to appear for sentencing and a capias was issued for his arrest. He was ultimately captured near

Kalispell, Montana in 2007.

{¶ 5} On September 15, 2008, the trial court sentenced appellant to six months of incarceration on Count 2 and four years of incarceration on Count 4, to be served consecutively.

{¶ 6} This appeal followed, assigning three assignments of error for our review:

The trial court erred by failing to ascertain whether Mr. Wilson was voluntarily entering his plea.

The trial court erred by failing to inform Mr. Wilson as to the possibility of extensions to his prison term.

The trial court erred by summarily denying Mr. Wilson's motion to withdraw his guilty plea without holding a hearing.

{¶ 7} We address appellant's second assignment of error first because it is dispositive. In essence, appellant argues that the trial court failed to substantially comply with Crim.R. 11 and R.C. 2943.032 because it did not personally inform appellant of possible extensions, including postrelease control to his prison term.

{¶ 8} As pertinent to this appeal, R.C. 2943.032 states:

"Prior to accepting a guilty plea or a plea of no contest to an indictment, information, or complaint that charges a felony, the court shall inform the defendant personally that, if the defendant pleads guilty or no contest to the felony so charged or any other felony, if the court imposes a prison term upon the defendant for the felony, and if the offender violates the conditions of a post-release control sanction imposed by the parole board upon the completion of the stated prison term, the parole board may impose upon the offender a residential sanction that includes a new prison term of up to nine months."

{¶ 9} Prior to accepting a guilty plea, the trial court must “substantially comply” with Crim.R. 11. *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115. “Substantial compliance with Crim.R. 11(C) is determined upon a review of the totality of the circumstances to determine that no prejudice has resulted to the defendant.” *State v. Flint* (1986), 36 Ohio App.3d 4, 520 N.E.2d 580.

{¶ 10} With respect to postrelease control and entertaining pleas, Ohio law is clear that the trial court must inform the defendant at the time of the plea that postrelease control is a part of the sentence. See R.C. 2967.28; see, also, *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171, 733 N.E.2d 1102, reconsideration denied. We have held that “Crim.R. 11(C)(2) requires that the court personally address a defendant who enters a guilty plea and determine that the defendant is making the plea with an understanding of the maximum penalty involved.” *State v. Conrad*, Cuyahoga App. No. 89934, 2007-Ohio-5717. “Failure to do so renders the plea colloquy insufficient and substantial compliance with Crim.R.11(C)(2)(a) and R.C. 2943.032 is not achieved.” *Id.* at ¶8. Further, as stated above, R.C. 2943.032 requires that the trial court inform the defendant personally of postrelease control. R.C. 2943.032. This court spoke to this ver issue in *State v. Boswell*, Cuyahoga App. Nos. 88292, 88293, 2007-Ohio-5718, when it stated: “This court has repeatedly held that, where the trial court failed to personally address a defendant and inform him of the maximum length of postrelease control before accepting his guilty plea, the court fails to

substantially comply with Crim.R. 11(C)(2)(a).” *Boswell* at ¶9, reversed on other grounds, 121 Ohio St.3d 575, 2009-Ohio-1577.

{¶ 11} In this case, the record is clear that the court failed to comply with the above-mentioned statute prior to accepting appellant’s guilty plea. While the trial court engaged in a lengthy colloquy with appellant, informing him of his right to counsel, his right to confront witnesses, his right to a jury trial, the State’s burden of proof, appellant’s right to confrontation, and his right against self-incrimination, the trial court never mentioned postrelease control as a potential sanction. (Tr. 268-276.) In this case, a postrelease control sanction of three years was mandatory in light of appellant’s guilty plea, which included having a weapon under disability, a felony of the third degree, in violation of R.C. 2923.13. Under R.C. 2967.28, the crime of having a weapon under disability is subject to a mandatory period of three years of postrelease control. R.C. 2967.28(B)(3), 2967.28(C); see, also, *State v. Holloway*, Cuyahoga App. No. 91005, 2009-Ohio-35, at syllabus.

{¶ 12} The State argues that the assistant county prosecutor present at the plea mentioned postrelease control, and thus, substantially complied with Crim.R. 11, thereby requiring appellant to show that he was substantially prejudiced by the court’s failure to mention postrelease control. It cites *State v. Clark* in support of this contention. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462.

{¶ 13} In *Clark*, the Ohio Supreme Court stated: “[I]f the trial judge

imperfectly explained nonconstitutional rights such as the right to be informed of the maximum possible penalty and the effect of the plea, a substantial-compliance rule applies. 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, the plea may be upheld.’” *Id.* at 244-245 (Internal citations omitted.) We find *Clark* distinguishable from the present case.

{¶ 14} The case before us is not one where the trial court merely mentioned postrelease control and failed to adequately explain it to the appellant; the record before us is devoid of any mention of it whatsoever by the trial court. We agree with the general statement in *Clark* that “if a trial court fails to literally comply with Crim.R. 11, reviewing courts must engage in a multitiered analysis to determine whether the trial judge failed to explain the defendant’s constitutional or nonconstitutional rights and, if there was a failure, to determine the significance of the failure and the appropriate remedy.” *Id.* at 244. However, this situation does not encompass literal, substantial, or even partial compliance with the rule. It deals with the failure to comply at all by failing to mention postrelease control. See, e.g., *State v. Sarkozy*, 117 Ohio St.3d 86, 90, 2008-Ohio-509, 881 N.E.2d 1224, holding *inter alia* that a complete failure to comply with Crim.R. 11 does not implicate an analysis of prejudice, as would be applied to noncompliance with a defendant’s nonconstitutional rights. The situation in the present case is readily distinguishable from *Clark*, where the trial court did mention postrelease control,

and the question on appeal was whether the mere mention of it, without further explanation, rendered a defendant's plea invalid.¹

{¶ 15} Perhaps most pertinent to the current analysis, R.C. 2943.032 contemplates that the court, not the State, "shall inform the defendant personally" of this potential penalty and the further extensions upon his sentence if he violates postrelease control. *Id.* We are constrained by this statutory command to vacate appellant's plea in this matter and remand the case to the trial court. This is true even though the trial court informed Wilson at the sentencing hearing that he would be subject to three years of postrelease control upon his release from prison and included this information in its journal entry accompanying Wilson's sentence.

{¶ 16} As we have previously held, "a trial court's failure to offer any explanation of post-release control sanctions at the time of the plea is inadequate and does not constitute substantial compliance with the trial court's responsibility under Crim.R. 11 or R.C. 2943.032." *State v. Paris*, Cuyahoga App. No. 83519, 2004-Ohio-5965. (Internal citations omitted.) "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, appellant could not fully understand the consequences of his plea as

¹In *Clark*, the Supreme Court found that the trial court had only partially complied with Crim.R. 11, and remanded the case back to the trial court to determine whether "Clark was prejudiced by the trial court's misinformation to successfully vacate his plea." *Clark* at 471.

required by Crim.R. 11(C).” *State v. Griffin*, Cuyahoga App. No. 83724, 2004-Ohio-4344, at 7, citing *State v. Jones* (May 24, 2001), Cuyahoga App. No. 77657; see, also, *State v. Perry*, Cuyahoga App. No. 82085, 2003-Ohio-6344, ¶10.

{¶ 17} Since we are vacating Wilson’s pleas under Crim.R. 11, we decline to address the remaining assignments of error.

{¶ 18} Appellant’s pleas and convictions are vacated, and this matter is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from 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 EILEEN KILBANE, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
LARRY A. JONES, J., CONCUR