

[Cite as *State v. Soltis*, 2009-Ohio-6636.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92574

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KEVIN SOLTIS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512923

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

RELEASED: December 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 J. BOYLE, J.:

{¶ 1} Defendant-appellant, Kevin Soltis, appeals his conviction on the grounds that his guilty plea was not knowingly, intelligently, and voluntarily made because the trial court failed to properly advise him as to the ramifications of violating postrelease control. Finding no merit to the appeal, we affirm.

{¶ 2} Soltis was indicted for one count of domestic violence and two counts of felonious assault arising from stabbing his girlfriend. On the day of trial, the state and Soltis reached a plea agreement. As part of the plea agreement, the trial court nolleed the two counts of felonious assault, and Soltis pled guilty to a single count of domestic violence, in violation of R.C. 2919.25(A), and two furthermore clauses that elevated the offense to a third degree felony.

{¶ 3} Prior to accepting Soltis's guilty plea, the trial court advised him of his constitutional rights and then informed Soltis of the penalties involved as follows:

{¶ 4} "[The Court:] Count three is domestic violence, a felony of the third degree, possible penalty of incarceration one to five years in one year increments and/or a fine up to \$10,000. If incarcerated there is a possibility of three years postrelease control. Do you understand?"

{¶ 5} After Soltis acknowledged understanding both the rights that he was waiving and the penalties involved, the trial court accepted his guilty plea and then referred the matter for a presentence investigation report. The court later

imposed a three-year prison sentence and three years of postrelease control. As to the imposition of postrelease control, the court stated:

{¶ 6} “If you violate [it] at any time, the length of your postrelease control could be extended, additional conditions could be added, or you could be returned to the institution for a period of up to one half of the original sentence.”

{¶ 7} Three days following sentencing, Soltis moved to vacate his plea on the grounds that he should not have been convicted of a third degree felony for domestic violence because the presentence report revealed that he had only one prior domestic violence conviction — not two. He argued that he was “misinformed” as to his prior convictions, thereby rendering his plea involuntary, and that he should be subject only to a fourth degree felony. The state responded with a motion for summary judgment, identifying two former cases of Soltis: one involving domestic violence and the other involving an assault against a household or family member. Based on these two cases, the state argued that Soltis was properly convicted of a third degree felony. Soltis raised no issue related to postrelease control in the motion to withdraw his guilty plea. The trial court denied the motion.

{¶ 8} Soltis filed the instant appeal, raising the following assignment of error:

{¶ 9} “Appellant’s plea was not knowingly, intelligently and voluntarily made depriving him of his constitutional right to a trial.”

{¶ 10} In his single assignment of error, Soltis argues that the trial court failed to properly advise him of the ramifications of postrelease control as set forth in former R.C. 2943.032,¹ which provides the following:

“Advice as to possible extension of prison term

“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 and if the court imposes a prison term upon the defendant for the felony, all of the following apply:

“(A) The parole board may extend the stated prison term if the defendant commits any criminal offense under the law of this state or the United States while serving the prison term.

“(B) Any such extension will be done administratively as part of the defendant's sentence in accordance with section 2967.11 of the Revised Code and may be for thirty, sixty, or ninety days for each violation.

“(C) All such extensions of the stated prison term for all violations during the course of the term may not exceed one-half of the term's duration.

“(D) The sentence imposed for the felony automatically includes any such extension of the stated prison term by the parole board.

“(E) 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 up to nine months.”

¹R.C. 2943.032 was amended by H.B. 130, which became effective on April 7, 2009. The new version of the statute no longer requires the court to provide the numerous notifications contained in subsections (A) through (E) of the former statute. Instead, the statute merely provides that the court must inform the defendant prior to accepting a guilty plea that “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.” See R.C. 2943.032.

{¶ 11} Soltis argues that the trial court's failure to strictly comply with this statute rendered his guilty plea defective and mandates a vacation of his plea under Crim.R. 11. In support of his argument, Soltis relies on this court's decisions in *State v. Delventhal*, 8th Dist. No. 81034, 2003-Ohio-1503, and *State v. Pendleton*, 8th Dist. No. 84514, 2005-Ohio-3126. Based on this authority, he contends that he need not demonstrate prejudice and that the trial court's failure to advise him of the ramifications of postrelease control mandates an automatic vacation of his guilty plea. We disagree.

{¶ 12} 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."

{¶ 13} The requirements of Crim.R. 11(C)(2)(a) are nonconstitutional and thus, this court reviews "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. Likewise, the statutory right to receive the plea

notification of postrelease control under former R.C. 2943.032 is similar to the nonconstitutional notifications of Crim.R. 11(C)(2)(a) and therefore subject to the substantial-compliance standard. *State v. Evans*, 8th Dist. Nos. 84966 and 86219, 2005-Ohio-5971, ¶11; *State v. Brown*, 1st Dist. Nos. C-020162 and C-020164, 2002-Ohio-5983.

{¶ 14} 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.*” (Emphasis added.) *Id.*, citing *Nero* at 108. As repeatedly recognized by the Ohio Supreme Court, “a defendant must show prejudice before a plea will be vacated for a trial court’s error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the colloquy are at issue.” *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶17; see, also, *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶12; *Nero* at 108.

{¶ 15} “The test for prejudicial effect is ‘whether the plea would have otherwise been made.’” *Clark*, 2008-Ohio-3748, ¶32, 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. A complete failure to comply with the rule, however, does not implicate an analysis of prejudice. *Sarkozy* at ¶22.

{¶ 16} Here, the record is clear that the trial court strictly complied with Crim.R. 11 regarding Soltis’s constitutional rights during the plea colloquy. The trial court, however, failed to inform Soltis of the ramifications of violating postrelease control and therefore only partially complied in informing Soltis of the maximum possible penalty that could be imposed upon conviction. Because we are dealing with a nonconstitutional right and the record evidences some compliance by the court in informing Soltis of the maximum possible penalty involved, we find that a prejudice analysis is required.

{¶ 17} Soltis’s reliance on *Delventhal* and *Pendelton* for the proposition that a prejudice analysis is not required and that his guilty plea should automatically be vacated is misplaced. In these cases, the trial court utterly failed to mention postrelease control, let alone the ramifications of violating the conditions of postrelease control.² Had the trial court failed to inform

² Although not specifically raised in his brief, Soltis referenced during oral argument this court’s decision in *State v. Wilson*, 8th Dist. No. 92149, 2009-Ohio-4879, which he claims is right on point and requires us to vacate his guilty plea. *Wilson*, however, is distinguishable because the trial court utterly failed to mention postrelease control and therefore a prejudice analysis was not implicated. *Id.* As we specifically noted, “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.” *Id.* at ¶14.

Soltis that he was subject to postrelease control as part of his sentence, we would agree then that his guilty plea would have to be vacated. As the Ohio Supreme Court recognized in *Sarkozy*, “if the trial court fails during the 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.” *Id.*, 2008-Ohio-509, ¶25.

{¶ 18} But the instant case does not involve a situation where the trial court utterly failed to mention postrelease control. Here, the trial court did advise Soltis that he could “face up to three years of postrelease control.” This is a critical distinction with respect to whether a prejudice analysis is necessary. Indeed, the *Sarkozy* court specifically emphasized this distinction and noted that “some compliance prompts a substantial compliance analysis and the corresponding ‘prejudice’ analysis.” *Id.* at ¶25. See, also, *Clark*, 2008-Ohio-3748, ¶38 (trial judge’s failure to adequately explain postrelease control does not require vacation of guilty plea when defendant fails to demonstrate a prejudicial effect).

{¶ 19} Ohio courts recently addressing challenges of guilty pleas on the basis of a trial court’s failure to adequately explain the ramifications of postrelease control have all concluded that a defendant must demonstrate a prejudicial effect to warrant the vacation of the guilty plea. See, e.g., *State v.*

Kupay-Zimmerman, 8th Dist. No. 92043, 2009-Ohio-3596; *State v. Garrett*, 9th Dist. No. 24377, 2009-Ohio-2559; *State v. Clark*, 11th Dist. No. 2006-A-0004, 2008-Ohio-6768. As this court recognized in *Kupay-Zimmerman*, as long as a defendant is apprised that he or she is subject to postrelease control, a reviewing court should not vacate a guilty plea in the absence of a showing of prejudice. *Id.* at ¶22.

{¶ 20} Furthermore, this court has recently held that a trial court's failure to strictly adhere to former R.C. 2943.032 will not automatically require a trial court to vacate a guilty plea. See *State v. Burks*, 8th Dist. No. 91719, 2009-Ohio-2375. Indeed, "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*, 56 Ohio St.3d at 108, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 93 and Crim.R. 52(A); *Clark*, 2008-Ohio-3748, ¶32.

{¶ 21} Turning to the issue of prejudice, we find no evidence that Soltis was prejudiced by the trial court's failure to inform him of the penalties if he violated the terms of his postrelease control. He has presented no evidence or even an argument that he would not have entered his plea and would have insisted on going to trial if he knew of the ramifications associated with postrelease control. See, generally, *Clark*, 2008-Ohio-6768 (the Eleventh District, on remand from the Ohio Supreme Court, refused to vacate defendant's guilty plea because the record contained no evidence that

defendant would have insisted on trial but for the erroneous belief that he would be subject to early release under the terms and conditions of postrelease control). Indeed, Soltis never raised any argument related to postrelease control in his motion to withdraw his guilty plea despite having been adequately advised of the ramifications during sentencing.

{¶ 22} Accordingly, because the record is devoid of any evidence of prejudice, we cannot say that Soltis's plea should be vacated. His sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
MELODY J. STEWART, J., CONCUR