[Cite as *State v. Irizarry*, 2010-Ohio-3868.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93352

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ISMAEL IRIZARRY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-519881

BEFORE: Cooney, J., Boyle, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: August 19, 2010

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Ismael Irizarry ("Irizarry"), appeals the denial of his presentence motion to withdraw his guilty plea. Irizarry contends the trial court failed to inform him of the mandatory nature of postrelease control and abused its discretion in failing to hold a hearing on his motion. We find no merit to the appeal and affirm.

{¶ 2} In September 2008, Irizarry was charged with murder for purposely causing the death of Daniel Higgins. In December 2008, the case was transferred from juvenile court to the common pleas court where the Cuyahoga

County Grand Jury indicted Irizarry on charges of aggravated murder, aggravated robbery, and aggravated burglary. All the charges included firearm specifications. The aggravated burglary charge also included a weapons under disability specification.

{¶ 3} In April 2009, pursuant to a plea agreement, Irizarry pled guilty to one count of involuntary manslaughter, and all other counts and specifications were nolled.

{¶ 4} At the plea hearing, Irizarry informed the court that he was seventeen years old and that, although he had dropped out of school after ninth grade, he has no difficulty reading and writing. Irizarry also informed the court that he was satisfied with his legal representation and that he understood the constitutional rights he was waiving by pleading guilty. The court advised Irizarry of his potential sentence including postrelease control and the possibility of his sentence being imposed consecutively to his other two cases. The court then accepted his plea.

{¶ 5} Later that day, the court held a sentencing hearing at which Irizarry orally moved to withdraw his guilty plea. The court denied the motion and sentenced Irizarry to a 10-year prison term to be served consecutive to his sentences in the other two cases. Irizarry now appeals raising two assignments of error.

{¶ 6} In his first assignment of error, Irizarry argues his plea was not knowingly, intelligently, and voluntarily made because the trial court failed to advise him, before accepting his plea, that postrelease control was mandatory.

{¶ 7} In order for a plea to be made knowingly and voluntarily, the trial court must follow the mandates of Crim.R. 11(C). If a defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and is void. *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274. A defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. *State v. Stewart* (1977), 51 Ohio St.2d 86, 93, 364 N.E.2d 1163; Crim.R. 52(A). The test of prejudicial effect is whether the plea would have been otherwise made. Id. at 108.

{¶ 8} In *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715, the Ohio Supreme Court held that a presentence motion to withdraw a guilty plea should be freely and liberally granted. Id. at 527. However, "[a] defendant does not have an absolute right to withdraw a guilty plea prior to sentencing." Id. at paragraph one of the syllabus. Crim.R. 32.1 provides no guidelines for a trial court to use when ruling on a presentence motion to withdraw a guilty plea. Nevertheless, the Ohio Supreme Court has ruled that the decision to grant or deny a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court. *Xie*, at paragraph two of the syllabus. Therefore, absent an

abuse of discretion, a trial court's decision whether to grant a presentence motion to withdraw a guilty plea must be affirmed. Id. at 527.

{¶ 9} Before accepting a guilty plea, a trial court must strictly comply with Crim.R. 11 as it pertains to the waiver of federal constitutional rights. However, substantial compliance with Crim.R. 11(C) is sufficient when waiving nonconstitutional rights. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. The right to be informed at the plea hearing of the maximum possible penalty that could be imposed upon conviction is a nonconstitutional right. *Stewart* at 93. Likewise, the statutory right to receive the plea notification of postrelease control under R.C. 2943.032 is similar to the nonconstitutional notifications of Crim.R. 11(C)(2) and therefore subject to the substantial-compliance standard. *State v. Evans*, Cuyahoga App. Nos. 84966 and 86219, 2005-Ohio-5971, ¶11, citing *State v. Brown*, Hamilton App. Nos. C-020162 and C-020164, 2002-Ohio-5983, ¶30 and *State v. Gulley*, Hamilton App. No. C-040675, 2005-Ohio-4592, ¶18. When a trial court fails to mention postrelease control "at all" during a plea colloquy, the court fails to comply with Crim.R. 11, and the reviewing court must vacate the plea and remand the case for resentencing. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶25.

{¶ 10} However, "some compliance" with the rule with respect to postrelease control "prompts a substantial-compliance analysis and the

corresponding 'prejudice' analysis." Id. at ¶23, 881 N.E.2d 1224; see, also, *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶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.")

{¶ 11} At the plea hearing in this case, the court advised Irizarry:

> "THE COURT: Do you also know with respect to this charge only after serving the time you shall be subject to five years post-release control? That's a parole period after incarceration. If you violate the terms of post-release control you would look at additional time of up to half of your original sentence or a charge of felony escape if violated by the department of corrections or the parole authority. Do you understand that?
>
> "THE DEFENDANT: Yes, Your Honor."

{¶ 12} Thus, the court informed Irizarry that he was subject to five years of postrelease control after serving his prison sentence. Although the court did not expressly state that the five year term of postrelease control was "mandatory," the court stated "you shall be subject to five years postrelease control." The use of the word "shall" clearly suggests the mandatory nature of the penalty. Therefore, we conclude that the trial court substantially complied with the requirements of Crim.R. 11(C) and R.C. 2943.032 in advising Irizarry about postrelease control.

{¶ 13} In his second assignment or error, Irizarry argues the trial court erred in not allowing him to withdraw his guilty plea during the sentencing hearing.

{¶ 14} In *State v. Benson*, Cuyahoga App. No. 83718, 2004-Ohio-1677, addressing a presentence motion to withdraw a plea, this court stated:

> "'A trial court does not abuse its discretion in overruling a motion to withdraw the plea: (1) where the accused is represented by highly competent counsel, (2) where the accused was offered a full hearing, pursuant to Crim.R. 11, before he entered the plea, (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion, and (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request.'
>
> **{¶ 15}** "These factors have been expanded to include:
>
> "'(5) whether the court gave full and fair consideration to the motion; (6) whether the motion was made in a reasonable time; (7) whether the motion states specific reasons for withdrawal; (8) whether the accused understood the nature of the charges and the possible penalties; and (9) whether the accused was perhaps not guilty or had a complete defense.'"

Benson at ¶8-9, quoting *State v. Peterseim* (1980), 68 Ohio App.2d 211, 428 N.E.2d 863, paragraph three of the syllabus (for the first four), and *State v. Pinkerton* (Sept. 23, 1999), Cuyahoga App. Nos. 75906 and 75907 (for the remaining five).

{¶ 16} Further, in *State v. Smith* (Dec. 10, 1992), Cuyahoga App. No. 61464, this court held that the scope of a hearing on an appellant's motion to withdraw his guilty plea should reflect the substantive merits of the motion. Id. Specifically, this court explained that:

> "[A] court's adherence to Crim.R. 11 raises a presumption that the plea was voluntarily entered. See *State v. Spence* (Jan. 19, 1989), 8th Dist. No. 54880, at 2. The proponent of the motion to withdraw the plea has the burden of rebutting that presumption by demonstrating that the plea was infirm. The motion to withdraw a plea must, at a minimum, make a prima

> facie showing of merit before the trial court need devote considerable time to it. * * * Stated differently, the scope of the hearing to be held on the Crim.R. 32.1 motion should be reflective of the substantive merit of the motion itself. Hence, bold assertions without evidentiary support simply should not merit the type of scrutiny that substantiated allegations would merit. The scope of the hearing is within the sound discretion of the trial judge, subject to our review for an abuse of that discretion. * * * This approach strikes a fair balance between fairness for an accused and preservation of judicial resources." (Internal citations omitted.)

Id.

{¶ 17} During the sentencing hearing, when the court gave Irizarry the opportunity to make a statement on his own behalf, Irizarry told the court he did not understand that by pleading guilty he was admitting that he killed the victim and that he wanted to withdraw his plea. However, the record indicates that Irizarry was represented by competent counsel and that the court carefully explained the ramifications of his plea as required by Crim.R. 11. When the court accepted Irizarry's plea, the following exchange took place:

> "THE COURT: All right. How do you plead then to the charge as amended, involuntary manslaughter, in violation of 2903.04, section A, which states that on or about August 17th, 2007, you did cause the death — you did cause the death of another, that is Daniel L. Higgins, as a proximate cause result of you committing or attempting to commit a felony, how do you plead?
>
> "THE DEFENDANT: Plead guilty."

{¶ 18} Thus, the record demonstrates that when the court accepted the plea, Irizarry was aware that he was admitting to killing the victim. His bald assertion that he did not understand that he was admitting guilt by pleading guilty

does not merit further scrutiny when the court, earlier that same day, carefully explained the ramifications of his guilty plea and read the language of the indictment to him that clearly states that "you did cause the death of [Daniel L. Higgins]." Therefore, the trial court did not abuse its discretion in refusing to hold a hearing on Irizarry's motion.

{¶ 19} Accordingly, the second 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.

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COLLEEN CONWAY COONEY, JUDGE

MARY J. BOYLE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR