

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92099

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEMETRIUS LANG

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508110

BEFORE: Blackmon, P.J., Stewart, J., and Celebrezze, J.

RELEASED: February 11, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Demetrius Lang appeals his guilty plea and imposed sentence. He assigns the following errors for our review:

“I. Mr. Lang’s guilty plea was not entered knowingly and intelligently because when it took the plea, the trial court failed to accurately advise him of the terms and conditions of post-release control to which he would be subject as required under Crim.R. 11 and R.C. 2945.032, and thereby violated his right to due process under the state and federal constitutions.”

“II. The sentence imposed was contrary to law, violates Mr. Lang’s right to due process, and must be vacated.”

{¶ 2} Having reviewed the record and pertinent law, we affirm Lang’s convictions. The apposite facts follow.

Facts

{¶ 3} On March 18, 2008, the Cuyahoga County Grand Jury charged Lang and five others in an indictment for attempted murder, six counts of aggravated robbery, six counts of felonious assault, and one count of kidnapping. Each charge included one-and three-year firearm specifications.

The charges arose from the December 31, 2007 beating of a Shaker Heights resident by a group of Cleveland youths. Lang was 16 years old at the time; he was bound over from juvenile court to the court of common pleas.

{¶ 4} On July 9, 2008, Lang pled guilty to an aggravated robbery count and one count of felonious assault as a result of a plea agreement. The plea agreement required that the state dismiss the remaining counts and that Lang agree to a sentence between 10 and 15 years. Lang also agreed to

cooperate with the prosecution against his co-defendants. After testifying at one of the co-defendant's trials, Lang was sentenced to 15 years in prison. (Nine years for aggravated robbery and six years for felonious assault, served consecutively.)

Postrelease Control

{¶ 5} In his sole assigned error, Lang contends his plea should be vacated because it was not entered knowingly and intelligently due to the trial court's failure to advise him that he would be subject to a mandatory five-year term of postrelease control.

{¶ 6} Courts have divided Crim.R. 11 rights into constitutional and nonconstitutional rights. Concerning constitutional rights, courts must strictly comply with Crim.R. 11 mandates; for nonconstitutional rights, the standard is substantial compliance.¹ Informing the defendant of the potential maximum sentence is a nonconstitutional right; therefore, the court needed only to substantially comply in advising Lang as to the maximum sentence.²

{¶ 7} "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his

¹*State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163.

²*State v. Nero* (1990), 56 Ohio St.3d 106, 564 N.E.2d 474.

plea and the rights he is waiving. Furthermore, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show prejudicial effect.”³

{¶ 8} The Ohio Supreme Court has held that if a trial court completely fails at the plea hearing to mention a mandatory period of postrelease control, which falls under the category of “maximum penalty involved,” the plea must be vacated.⁴ However, if the trial court partially complied with the rule, for example by incorrectly explaining postrelease control, an appellate court may only vacate the plea if the defendant makes a showing of prejudicial effect.⁵ The cases relied upon by Lang to support the vacation of his plea are misplaced because they are cases where the trial court completely failed to mention postrelease control⁶ or where the case law precedes the Ohio Supreme Court decision in *State v. Holloway*.⁷ In *State v. Holloway*, the

³Id.

⁴*State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224.

⁵*State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462.

⁶*Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224 (court failed to mention postrelease control); *Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462 (court notified defendant he would get a parole and postrelease control hybrid that does not exist under Ohio law).

⁷111 Ohio St.3d 496, 2006-Ohio-6114, 857 N.E.2d 141. Lang cites to the following outdated case law in support of his argument: *State v. Crosswhite*, Cuyahoga App. No. 86345, 2006-Ohio-1081; *State v. Prieto*, Cuyahoga App. No. 87243, 2006-Ohio-4259; *State v. Brusiter*, Cuyahoga App. No. 87819, 2006-Ohio-6444, decided one day after *Holloway*, and cites

Court reversed our decision in which we held that the failure to advise the defendant at the plea hearing that postrelease control was mandatory was grounds to vacate the plea.

{¶ 9} In the instant case, during the plea colloquy, the trial court stated the following regarding postrelease control:

“Upon your release, you may be subject to what we call post release control, which is like parole for a period of up to three years. At that point that’s reducible at the discretion of the parole board. * * * And if you’re on parole and, or post release control, and you violate that, the prison authorities can take you back into prison for half the term that you were sentenced to.”⁸

{¶ 10} In fact, postrelease control was mandatory, not discretionary, and the term was five years, at least for aggravated robbery, and three years for the felonious assault. Therefore, there is no dispute the trial court was mistaken in advising Lang about postrelease control. The issue is whether the court’s advisement constitutes substantial compliance.

to outdated case law; *State v. Griffen*, Cuyahoga App. No. 83724, 2004-Ohio-4344; *State v. Lamb* (2004), 156 Ohio App.3d 128, 804 N.E.2d 1027; *State v. Conrad*, Cuyahoga App. No. 88934, 2007-Ohio-5717, relying on outdated case law.

⁸Tr. 17-18.

{¶ 11} As we discussed above, the Supreme Court has found the failure to advise a defendant at the plea hearing that postrelease control is mandatory does not constitute grounds for vacating the plea. Therefore, the issue is whether the trial court's failure to advise Lang that he would be subject to five years of mandatory postrelease control instead of three years constituted substantial compliance. We conclude that by failing to advise Lang of the maximum years of postrelease control he could serve, the trial court failed to substantially comply in advising Lang of the maximum term. This is different from cases where the court advised the defendant of the wrong length of time for postrelease control, but the defendant was at least advised of the maximum term.⁶

{¶ 12} Nonetheless, we still affirm the guilty plea because Lang has failed to show prejudice. At oral argument, defense counsel argued that Lang did not have to show prejudice because the court did not substantially comply when explaining postrelease control.⁷ This would be true if the trial judge completely failed to mention postrelease control; in such cases, the plea

⁶*State v. Moviel*, Cuyahoga App. No. 86244, 2006-Ohio-697, reversed on other grounds (court substantially complied by advising defendant he could receive between three or five years of postrelease control, when the correct period was a mandatory five years, because he was aware of the possibility he could serve five when he pled).

⁷*Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, at ¶ 31-32.

must be vacated.⁸ As we previously discussed, the trial court here, partially complied.

{¶ 13} In *State v. Clark*,⁹ the Ohio Supreme Court held that if the trial court failed to substantially comply in notifying the defendant of postrelease control, but partially complied in explaining to the defendant he would be subject to postrelease control, the plea may be vacated only if the defendant demonstrates a prejudicial effect. The test for prejudice is whether the plea would have otherwise been made.¹⁰

{¶ 14} A review of the record shows that there was no discussion, question, or comment indicating that postrelease control was of particular concern or import to Lang. Instead, Lang was apprised that if he went to trial and was found guilty on all counts, he could receive a potential sentence in excess of 30 years. The reduction in sentence that the plea offered may be viewed as the probable impetus for entering into the plea. Lang's request to withdraw his plea can only be reasonably explained as a change of heart, not the fact he would be serving an additional two years of postrelease control. Changing one's mind is not a sufficient basis for allowing the withdrawal of a

⁸*Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, paragraph two of the syllabus.

⁹*Clark*, 119 Ohio St.3d 239, 893 N.E.2d 462.

¹⁰*Id.*

plea;¹¹ therefore, the trial court did not err by refusing to vacate Lang’s guilty plea. Accordingly, Lang’s first assigned error is overruled.

Sentence

{¶ 15} In his second assigned error, Lang contends that his sentence is contrary to law because the court failed to advise him of the correct length of time for the postrelease control at the sentencing hearing and failed to consider the seriousness and recidivism factors before imposing the sentence.

{¶ 16} We review sentences pursuant to a two-prong standard set forth by the Supreme Court of Ohio in a split decision in *State v. Kalish*.¹² In *Kalish*, the court held that:

“[i]n applying *Foster* [109 Ohio St.3d 1, 2006-Ohio-856], to the existing statutes, appellate courts must apply a two-step approach. First, they must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied,

¹¹*State v. Salter*, Cuyahoga App. No. 82488, 2003-Ohio-5652; *State v. Drake* (1991), 73 Ohio App.3d 640, 645, 598 N.E.2d 115; *State v. Lambros* (1988), 44 Ohio App.3d 102, 103, 541 N.E.2d 632.

¹²120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124 (We recognize that *Kalish* is merely persuasive and not necessarily controlling because it has no majority. The Supreme Court of Ohio split over whether we review sentences under an abuse of discretion standard in some instances.)

the trial court's decision shall be reviewed under an abuse-of-discretion standard.”

1) Postrelease control

{¶ 17} At the sentencing hearing, the trial court stated as follows regarding Lang’s postrelease control:

“You will be subject to post release control upon your release. It may be up to five years. It’s reducible at the discretion of the parole board. And if you violate that, you can go back to half the time you were sent down which would be another seven-and-a-half years.”¹³

{¶ 18} Although the court failed to advise Lang that the postrelease control was mandatory, we conclude the advisement was sufficient notice to Lang that he would be subject to postrelease control upon the conclusion of his prison term. The advisement complied with the requirement pursuant to R.C. 2929.19(B)(3) that the court “shall” notify the offender at the sentencing hearing that he will be subject to postrelease control after he leaves prison. This is not a case where the court failed to provide notice of postrelease control. Moreover, the trial court properly stated the postrelease term was five years in the sentencing entry. Lang’s reliance on this court’s decision in *State v. Singleton*¹⁴ is misplaced. In *Singleton* we vacated the sentence based

¹³Tr. 25.

¹⁴Cuyahoga App. No. 90042, 2008-Ohio-2351, affirmed by Ohio Supreme Court in *State v. Singleton*, _ _ _ Ohio St.3d _ _ _, 2009-Ohio-6434, _ _ _ N.E. 2d _ _ _.

on the trial court's failure to indicate that postrelease control was mandatory in the sentencing entry. Therefore, we conclude the trial court's imposition of postrelease control was not contrary to law.

2) Considerations under R.C. 2929.11 and 2929.12

{¶ 19} Lang argues that in imposing the sentence, the trial court failed to consider the purposes of felony sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12. Although *Foster* no longer requires the trial court to make findings or give reasons for imposing its sentence, R.C. 2929.11 and 2929.12 remain operative.¹⁵ However, the court is not required to make findings pursuant to R.C. 2929.11 and 2929.12; it need only consider these provisions.¹⁶

{¶ 20} In the instant case, the record demonstrates that the trial court considered R.C. 2929.11 and 2929.12. Defense counsel informed the court that Lang was extremely inebriated during the incident and was 16 years old.

The sentencing journal entry reads in part: "The court considered all required factors of the law. The court finds that prison is consistent with the

¹⁵*State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio 855, 846 N.E.2d 1; *Kalish*, supra at ¶13.

¹⁶*State v. Nolan*, Cuyahoga App. No. 90646, 2008-Ohio-5595; *State v. Page*, Cuyahoga App. No. 90485, 2008-Ohio-4244; *State v. McSwain*, Cuyahoga App. No. 90358, 2008-Ohio-3661; *State v. Garrett*, Cuyahoga App. No. 90428, 2008-Ohio-3549.

purpose of R.C. 2929.11.” Therefore, the trial court complied with R.C. 2929.11 and 2929.12.¹⁷ Because the court imposed a sentence within the statutory range and considered R.C. 2929.11 and 2929.12 in imposing the sentence, the sentence is not contrary to law.

{¶ 21} Lang also contends the court failed to adhere to the requirement in R.C. 2929.11 that the sentence imposed is proportional to other sentences for similar offenses. This court has concluded that in order to support a contention that his or her sentence is disproportionate to sentences imposed upon other offenders, a defendant must raise this issue before the trial court and present some evidence, however minimal, in order to provide a starting point for analysis and to preserve the issue for appeal.¹⁸ Lang did not raise in the trial court that his sentence was disproportionate to sentences given to other offenders with similar records, who have committed the same offense.

¹⁷Cf. *State v. Harris*, Cuyahoga App. No. 90699, 2008-Ohio-5873 at ¶103; *State v. Snyder*, Cuyahoga App. No. 90869, 2008-Ohio-5586; *Nolan*, supra (Court complied with R.C. 2929.11 and 2929.12 because journal entry stated court considered all required sentencing factors and testimony was considered at sentencing hearing).

¹⁸*State v. Edwards*, Cuyahoga App. No. 89181, 2008-Ohio-2068; *State v. Nettles*, Cuyahoga App. No. 85637, 2005-Ohio-4990; *State v. Woods*, Cuyahoga App. No. 82789, 2004-Ohio-2700; *State v. Mercado*, Cuyahoga App. No. 84559, 2005-Ohio-3429; *State v. Breeden*, Cuyahoga App. No. 84663, 2005-Ohio-510; *State v. Austin*, Cuyahoga App. No. 84142, 2004-Ohio-5736.

Nor did he present evidence as to what a “proportionate sentence” might be. Therefore, he has not preserved the issue for appeal.

{¶ 22} We conclude Lang’s sentence is not contrary to law, and the court did not abuse its discretion by sentencing him to 15 years in prison. Accordingly, Lang’s second assigned error is overruled.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

MELODY J. STEWART, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR