[Cite as *State v. Wolford*, 2010-Ohio-434.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92607

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT WOLFORD

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-500529

BEFORE: Celebrezze, J., McMonagle, P.J., and Jones, J.

RELEASED: February 11, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

John P. Parker
988 East 185th Street
Cleveland, Ohio 44119

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Timothy R. Fadel
Katherine Mullin
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ALSO LISTED:

Robert Wolford
Inmate No. 552-305
Lebanon Correctional Institution
P.O. Box 56
Lebanon, Ohio 45036

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Robert Wolford ("appellant"), appeals his conviction for aggravated murder, murder, and two counts of felonious assault. Based on our review of the record and pertinent case law, we reverse and remand.

{¶ 2} On August 30, 2007, appellant was indicted in a four-count indictment for aggravated murder, murder, and two counts of felonious assault. On July 15, 2008, appellant indicated that he was willing to change his plea to guilty. The trial court, during a very thorough plea colloquy, informed appellant that his conviction for felonious assault carried a mandatory five-year period of postrelease control.[1] After indicating some confusion with the concept of postrelease control, appellant asked whether a violation of postrelease control could include a "tail." Appellant's counsel advised him that the period of reincarceration if he violated postrelease control could be as much as ten years. The trial court then stated:

{¶ 3} "I would imagine the amount of time he would face is up to 50 percent of whatever time he actually served. For instance, if he served, hypothetically speaking, 22 years, he would be facing up to 11 years.

---

[1] We recognize that appellant was convicted of felonious assault pursuant to R.C. 2903.11(A)(1) and (A)(2). Since both of these counts are second-degree felonies, they only carry a mandatory period of three years postrelease control. R.C. 2903.11(D)(1)(a); R.C. 2967.28(B)(2). Our disposition of appellant's first assignment of error renders this error moot.

{¶ 4} "Mr. Wolford, the way it works is that if you violate PRC, they, the adult parole authority has the discretion to send you back to prison without coming back in front of a judge. With the bad time provisions of the Ohio Revised Code, it's not that you come back and get a 50 percent of whatever sentence you served; you can get up to that. It's done in portions, okay * * *."

{¶ 5} Appellant indicated some confusion with regard to consecutive and concurrent sentences. After the trial judge explained the difference between the two concepts, appellant informed the court that he was no longer comfortable entering a guilty plea, and a trial date was set for July 29, 2008.

{¶ 6} On July 29, 2008, appellant appeared before the trial court and indicated that he was prepared to change his plea to no contest. The court engaged appellant in a new plea colloquy. During this colloquy, however, the court again referenced the "bad time provision" of the Ohio Revised Code and informed appellant that he would be subject to a mandatory term of five years postrelease control due to his felonious assault conviction. Appellant pled no contest, and the court immediately proceeded to sentencing. Appellant was sentenced to life imprisonment with the possibility of parole after 20 years for aggravated murder, life imprisonment with the possibility of parole after 15 years for murder, and five years for each of the two counts of felonious

assault. The terms imposed were to run concurrently.[2] The trial court also informed appellant that, should he be released from prison, he would be subject to a mandatory five-year term of postrelease control. This appeal followed.

{¶ 7} Appellant presents three assignments of error for our review. In his first assignment of error, appellant argues that his plea was unknowing, unintelligent, and involuntary due to the trial court's reference to the "bad time provision" of the Ohio Revised Code.[3] In his second assignment of error, appellant argues murder and felonious assault are allied offenses of aggravated murder, and thus those charges should have merged for sentencing.[4] In his third and final assignment of error, appellant argues

---

[2] We recognize that the subsections of Ohio's felonious assault statute, R.C. 2903.11(A)(1) and (A)(2), are allied offenses. *State v. Minifee*, Cuyahoga App. No. 91017, 2009-Ohio-3089, ¶103. Although the trial court's failure to merge these counts at sentencing constitutes reversible error, our disposition of appellant's first assignment of error renders this error moot.

[3] Appellant's first assignment of error reads: "The court's incorrect information regarding the appellant's legal status after release from prison rendered the no contest plea to be unknowingly, unintelligently and involuntarily given under Crim.R. 11 and *State v. Clark*, [119 Ohio St.3d 239, 2008-Ohio-3748] and the court's incorrect advisement about 'bad time' rendered the pleas to be a violation of the Fourteenth Amendment of the federal Constitution."

[4] Appellant's second assignment of error reads: "The crimes of Murder and Felonious Assault are allied offenses of Aggravated Murder in this case and should have merged with the Aggravated Murder conviction and the appellant should have only been convicted and sentenced on Aggravated Murder under R.C. 2941.25 and *State v. Winn*, 2009 Ohio 1059."

that the multiple violations committed by the trial court resulted in a due process violation.[5]

Law and Analysis

Appellant's No Contest Plea

{¶ 8} In his first assignment of error, appellant argues that the trial court erred when informing him of the "bad time provision" of the Ohio Revised Code because that specific provision was declared unconstitutional in *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 2000-Ohio-116, 729 N.E.2d 359. Appellant also argues that the trial court misinformed him that he would be subject to postrelease control upon his release from prison. Based on these alleged errors, appellant argues that his no contest plea should be vacated.

{¶ 9} We note that appellant's trial attorneys failed to object during the plea colloquy, thus we must apply a plain error standard of review to this issue. To constitute plain error, the error must be obvious on the record, palpable, and fundamental, so that it should have been apparent to the trial court without objection. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16. Moreover, plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but

[5] Appellant's third assignment of error reads: "The cumulative errors rendered the pleas in violation of Rule 11 and Due Process under the Fourteenth Amendment of the federal Constitution."

for the trial court's allegedly improper actions. *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100, 661 N.E.2d 1043. Notice of plain error is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Phillips*,74 Ohio St.3d 72, 83, 1995-Ohio-171, 656 N.E.2d 643.

{¶ 10} Because a criminal defendant gives up certain constitutional rights when pleading guilty to a crime, a guilty plea cannot be accepted "unless the defendant is fully informed of the consequences of his or her plea." *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶25. A plea is invalid unless it was knowingly, intelligently, and voluntarily made. Id., citing *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179, 660 N.E.2d 450.

{¶ 11} To ensure compliance with these fundamental protections, a trial judge must engage the defendant in a plea colloquy before accepting the plea. *Clark* at ¶26, citing *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, paragraph one of the syllabus; Crim.R. 11(C), (D), and (E). "It follows that, in conducting this colloquy, the trial judge must convey accurate information to the defendant so that the defendant can understand the consequences of his or her decision and enter a valid plea." Id.

{¶ 12} Before accepting a defendant's plea, a trial judge must comply with the mandates of Crim.R. 11(C)(2). Pursuant to this rule, the trial judge

could not have accepted appellant's no contest plea unless he (1) determined that appellant was voluntarily entering the plea and understood the nature of the charges and the maximum penalty he faced, (2) informed appellant of the effect of accepting the plea and that the court could proceed with judgment and sentencing once it was accepted, and (3) informed appellant that he was waiving his constitutional right to a jury trial, confrontation of witnesses, compulsory process, and the state's burden of proof beyond a reasonable doubt. Id. at ¶27.

{¶ 13} "If a trial court fail[ed] 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 ¶30. If the trial judge did not explain the constitutional rights pursuant to Crim.R. 11(C)(2)(c), we presume that the plea was not voluntary and knowing, and thus the plea was invalid. Id. at ¶31, quoting *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶12, and citing *State v. Nero* (1990), 56 Ohio St.3d 106, 107, 564 N.E.2d 474; *Boykin v. Alabama* (1969), 395 U.S. 238, 242-243, 89 S.Ct. 1709, 23 L.Ed.2d 274.

{¶ 14} "However, if 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 underst[ood] the implications of his plea and the rights he [wa]s waiving,' the plea may be upheld." (Internal citations omitted.) Id., citing *Nero*, supra, at 108.

{¶ 15} When the trial judge fails to substantially comply with Crim.R. 11, an appellate court must then determine if the trial court partially complied or simply failed to comply. Id. 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,* supra, at 108. Prejudicial effect is established if the defendant can demonstrate that he would not have entered the plea had Crim.R. 11 been complied with. Id. "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, 881 N.E.2d 1224, paragraph two of the syllabus.

"Bad Time Provision" of the Ohio Revised Code

{¶ 16} Appellant argues that his guilty plea should be vacated because the trial court erroneously referred to the "bad time provision" of the Ohio Revised Code, which was declared unconstitutional by *Bray*, supra. This argument is misguided.

{¶ 17} The trial court referenced the "bad time provision" when informing appellant of a mandatory period of postrelease control that follows incarceration for felonious assault. The trial court specifically stated: "If you are not compliant on post-release control supervision, that pursuant to the bad time provisions of the Ohio Revised Code, you could be returned to prison in incremental periods of time for up to half of your original prison sentence without coming back to Court, do you understand?" Appellant answered in the affirmative.

{¶ 18} Although Ohio's "bad time provision" (see R.C. 2967.11) was declared unconstitutional by *Bray*, supra, the trial judge in this case was referencing Ohio's postrelease control statute (see R.C. 2967.28). In *Bray*, the Ohio Supreme Court held that the "bad time provision" of the Ohio Revised Code violated separation of powers in that it allowed the executive branch, namely the Adult Parole Authority ("APA"), to find a defendant guilty of a separate crime and extend his prison term for offenses committed during his term of incarceration. *Bray*, supra, at 135-136. The Court recognized

that convicting a defendant of a crime is an action within the sole province of the judiciary, and allowing the APA to take such action is unconstitutional. Id.

{¶ 19} Although the trial judge in this case referred to the "bad time provision," she was informing appellant of the consequences of violating the terms of postrelease control. As such, the trial judge was referring to R.C. 2967.28, which has been repeatedly upheld as constitutional. In *Woods v. Telb*, 89 Ohio St.3d 504, 512, 2000-Ohio-171, 733 N.E.2d 1103, the Ohio Supreme Court held that "[t]he post-release control sanctions are sanctions aimed at behavior modification in an attempt to reintegrate the offender safely into the community, not mere punishment for an additional crime, as in bad time.

{¶ 20} "Accordingly, because the APA's discretion in managing post-release control does not impede the function of the judicial branch, we find no violation of the separation of powers doctrine."

{¶ 21} Since the right to be informed of the maximum penalty one faces upon entering a plea of guilty or no contest is not a constitutional right, the test for this particular issue is substantial compliance. *Clark*, supra. This is not a case where the trial court simply failed to explain the maximum penalty appellant faced. The trial judge explained the maximum penalties, but made a misstatement with regard to the "bad time provision." Because

the trial judge partially complied with the mandates of Crim.R. 11, appellant must show that he was prejudiced in order to warrant a vacation of his no contest plea.

{¶ 22} In order to effectively show that he was prejudiced by the trial judge's misstatement, appellant would have to prove that he would not have entered his no contest plea had the error been corrected. Appellant relies on the fact that he aborted the original plea colloquy to argue that he was prejudiced by the trial judge's misstatements. When appellant indicated to the court on July 15, 2008 that he no longer wished to plead guilty, he had shown confusion with regard to postrelease control and consecutive and concurrent sentences. This in no way shows that the judge's mistaken reference to Ohio's "bad time provision" would have swayed his decision to plead no contest. Since appellant has failed to prove that he was prejudiced by the trial judge's misstatements, we must find that the reference to the "bad time provision" was harmless error.

Postrelease Control

{¶ 23} Appellant also contends that his plea was not knowingly, intelligently, and voluntarily entered because the trial court indicated that he would be subject to a mandatory five-year period of postrelease control if he was released from prison. Appellant specifically argues that he pled no contest to aggravated murder, an unclassified felony, and thus postrelease

control is inapplicable. R.C. 2967.28. The state argues that although the trial court's reference to postrelease control was superfluous, it does not render appellant's plea unknowing, unintelligent, or involuntary.

{¶ 24} We again acknowledge that appellant's trial attorneys failed to object during his plea colloquy, and thus we must utilize a plain error standard as defined above. Appellant's argument involves the nonconstitutional right to be informed of the maximum penalty one faces when pleading guilty or no contest to a crime. *Clark*, supra, at ¶31. As such, the test for this is substantial compliance. Id. Here, the trial court's attempt to inform appellant of the penalties he faced constitutes partial compliance, and thus appellant must show not only that the trial court committed error, but that this error prejudiced him.

{¶ 25} This case is similar to *State v. Cochran*, Cuyahoga App. Nos. 91768, 91826, 92171, 2009-Ohio-1693. In *Cochran*, the defendant pleaded guilty to aggravated robbery and murder. Id. at ¶26. The trial court informed the defendant that he would be subject to a mandatory five-year term of postrelease control if he were ever released from incarceration. Id. at ¶22-25. This court held that the trial court properly informed the defendant that he would be subject to five years of postrelease control for the first-degree felony of aggravated robbery. Id. at ¶26. When addressing the fact that the defendant also pleaded guilty to murder, an unclassified felony,

the trial court stated: "If a paroled person violates the various conditions associated with the parole, he or she may be required to serve the remainder of the original sentence; that period could be more than nine months. Ohio Adm.Code 5120:1-1-19(C)." Id. at ¶27.

{¶ 26} "'Even after a prisoner has met the minimum eligibility requirements, parole is not guaranteed; the Adult Parole Authority "has wide-ranging discretion in parole matters" and may refuse to grant release to an eligible offender. *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St.3d 456, 2002-Ohio-6719, 780 N.E.2d 548, ¶28; *State ex rel. Hattie v. Goldhardt*, 69 Ohio St.3d 123, 125, 1994-Ohio-81, 630 N.E.2d 696. Because parole is not certain to occur, trial courts are not required to explain it as part of the maximum possible penalty in a Crim.R. 11 colloquy. See *Hill v. Lockhart* (1985), 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203.'" Id. at ¶28, quoting *Clark*, supra.

{¶ 27} The *Cochran* court went on to hold that "the trial court properly omitted discussion of parole at defendant's plea hearing. As the court properly conducted defendant's plea hearing concerning postrelease control and parole, defendant is unable to show a manifest injustice." Id. at ¶29.

{¶ 28} It is undisputed that appellant was ineligible for postrelease control because he was pleading guilty to aggravated murder, which is an unclassified felony. While we recognize this error, appellant must still show

that he was prejudiced by the trial court's mistake. Appellant again relies on the July 15, 2008 plea colloquy that was aborted to argue that he would not have entered his no contest plea had this error been corrected. Based on our review of the transcript from the first plea colloquy, we agree.

{¶ 29} During the first plea colloquy, appellant indicated concern when being informed of what repercussions he could face should he violate postrelease control. This confusion was likely elevated by the fact that appellant has an IQ that is significantly below that of an average individual.[6] When attempting to clear up this confusion, one of appellant's trial attorneys stated: "Your Honor, for the record, the postrelease control our client had a question, and I think you advised that if he is on postrelease control and he would violate, he could be subject to a sentence of half of what he already received. He was wondering if that would include a tail * * *."

{¶ 30} In answering this question, the trial court explained the basic concept of what happens when an individual violates the terms of postrelease control. The trial court specifically stated: "Mr. Wolford, the way that it works is that if you violate PRC, they, the adult parole authority has the discretion to send you back to prison without coming back in front of a judge.

---

[6] Although the transcript is unclear and appellant's competency evaluation is not a part of the record before us on appeal, the transcript does reflect that appellant's IQ was either 54 or 58, both of which are well below the average IQ for an individual of appellant's age.

With the bad time provisions of the Ohio Revised Code, it's not that you come back and get a 50 percent of whatever sentence you served; you can get up to that. It's done in portions, okay * * *."

{¶ 31} While this explanation would have been sufficient for a criminal defendant who was not charged with an unclassified felony, appellant would face a much harsher penalty if he were granted parole and then committed a parole violation. "When a person is paroled, he or she is released from confinement before the end of his or her sentence and remains in the custody of the state until the sentence expires or the Adult Parole Authority grants final release. If a paroled person violates the various conditions associated with the parole, he or she may be required to serve the remainder of the original sentence[.]" (Internal citations omitted.) *Clark*, supra, at ¶36. This means that, if appellant was paroled and committed a violation, he could be sent back to prison for the remainder of his life (i.e., the "tail" he referred to at the aborted plea hearing).

{¶ 32} This consequence differs significantly from the explanation the trial judge provided appellant during the original plea colloquy. The record also shows that, after being very concerned with the repercussions of violating postrelease control and the possibility of receiving consecutive sentences, appellant indicated to the court on July 15, 2008 that he no longer wished to plead guilty. Appellant relies on these facts to argue that he would

not have entered the no contest plea if the trial court had not mistakenly informed him that he would be placed on postrelease control.

{¶ 33} Since release on parole is only a possibility, trial courts are not required to explain the consequences of violating the terms and conditions associated with parole during a plea colloquy. *Cochran*, supra, at ¶28. Here, however, appellant specifically questioned the court regarding the possibility of reimprisonment if he committed a violation once released. The trial court explained the implications of postrelease control, but failed to inform appellant that because he was pleading no contest to an unclassified felony, he could possibly be sent back to prison for the remainder of his life. Because appellant aborted the original plea colloquy due to these concerns, we believe he would have chosen not to enter his plea if the trial court had correctly informed him of the consequences for violating parole. As such, appellant's first assignment of error is well taken, and his no contest plea is vacated.

{¶ 34} Our disposition of appellant's first assignment of error renders his second and third assignments of error moot. See App.R. 12(A)(1)(c).

Conclusion

{¶ 35} The trial court misinformed appellant that he could be sent back to prison for one-half of his original prison sentence for a violation of postrelease control when he was charged with an unclassified felony, to which

postrelease control is inapplicable. Since appellant was able to demonstrate that he would not have voluntarily pled no contest to the crimes charged if this error had not been committed, his guilty plea must be vacated.

{¶ 36} Accordingly, this case is reversed and remanded to the trial court for proceedings consistent with this opinion.

It is ordered that appellant recover of said 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.

FRANK D. CELEBREZZE, JR., JUDGE

CHRISTINE T. McMONAGLE, P.J., and
LARRY A. JONES, J., CONCUR