

[Cite as *State v. Griffin*, 2010-Ohio-437.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92728

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KENNETH GRIFFIN, II

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTIONS AFFIRMED;
SENTENCE VACATED AND CAUSE
REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-504293 and CR-505636

BEFORE: Sweeney, J., Gallagher, A.J., and Jones, 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).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Kenneth Griffin, II (“defendant”), appeals his robbery and theft convictions. After reviewing the facts of the case and pertinent law, we affirm defendant’s convictions; vacate his sentence and remand for resentencing.

{¶ 2} On February 7, 2008, defendant pled guilty to one count of robbery in violation of R.C. 2911.02(A)(2), a second degree felony, and one count of theft in violation of R.C. 2913.02(A)(1), a fifth degree felony. Defendant also pled no contest to one count of aggravated robbery in violation of R.C. 2911.01(A)(3), a first degree felony, and two counts of robbery in violation of R.C. 2911.02(A)(3), which are third degree felonies.¹

{¶ 3} On March 14, 2008, the court sentenced defendant as follows: five years in prison for the second degree felony and 11 months for the fifth degree felony, to be served concurrently; six years for the first degree felony, to be served consecutive to the five years; and five years for each third degree felony, to be served consecutive to each other and consecutive to all other counts. Defendant was sentenced to an aggregate of 21 years in prison.

{¶ 4} Defendant appeals and raises four assignments of error for our review, which we address in the order asserted and together where it is appropriate for discussion.

¹ See our analysis of assignments of error three and four, *infra*.

{¶ 5} “1. The trial court erred by convicting appellant of aggravated robbery and multiple counts of robbery because his indictments on these counts violated his constitutional rights where the Grand Jury failed to charge him with the culpable mental state necessary to constitute these crimes rendering those counts of the indictments defective and his convictions void.”

{¶ 6} In *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 (*Colon I*), the Ohio Supreme Court held that an indictment for robbery in violation of R.C. 2911.02(A)(2) was defective because it failed to charge an essential element of the crime, namely, the mens rea of recklessness. The court further held that Colon’s defective indictment resulted in structural errors permeating his entire trial. *Id.* at ¶19. The Ohio Supreme Court clarified this holding by issuing *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 (*Colon II*), which limited the structural error analysis to “rare cases * * * in which multiple errors at the trial follow the defective indictment.” *Id.* at ¶8. The standard of review for the remaining defective-indictment cases is plain error. *Id.* at ¶7.

{¶ 7} Although the indictments for aggravated robbery and robbery in the instant case fail to allege the mental state of recklessness, *Colon I* and *Colon II* do not apply because defendant’s case did not go to trial. Rather, defendant entered pleas of guilty and no contest to the indictments.

{¶ 8} In *State v. Hayden*, Cuyahoga App. No. 90474, 2008-Ohio-6279, this Court declined to extend the *Colon* line of cases to a defendant who pled guilty to

the indictment. “Furthermore, ‘[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.’ *State v. Spates* (1992), 64 Ohio St.3d 269, 272, 595 N.E.2d 351 (quoting *Tollett v. Henderson* (1973), 411 U.S. 258, 267). See, also, *State v. Gant*, Allen App. No. 1-08-22, 2008-Ohio-5406 (holding that ‘[t]his Court is not persuaded that the Court in *Colon* was also overruling the longstanding waiver rules with regard to guilty pleas. Accordingly, the court finds that Gant admitted guilt of the substantive crime of burglary and has, therefore, waived any alleged indictment defects for purposes of appeal’).” *Hayden*, supra, at ¶6.

{¶ 9} Additionally, we hold that defendant has waived defective-indictment challenges regarding offenses to which he pled no contest. See *State v. Moss*, Lucas App. No. L-07-1401, 2008-Ohio-4737. As *Colon I* and *Colon II* are inapplicable to the instant case, defendant’s first assignment of error is overruled.

{¶ 10} “II. Appellant’s pleas were not knowing, voluntary, or intelligent where the trial court did not fully and substantially comply with R.C. 2943.032 and Crim.R. 11 before accepting his pleas.”

{¶ 11} Specifically, defendant argues that the court erred when it failed to inform him at his plea hearing of the consequences of violating postrelease control.

{¶ 12} The underlying purpose of Crim.R. 11(C) is for the court to give a defendant enough information to allow him or her to make an intelligent, voluntary, and knowing decision of whether to plead guilty. See *State v. Ballard* (1981), 66 Ohio St.2d 473, 613 N.E.2d 591. Pursuant to Crim.R. 11(C)(2)(a), the court must personally inform a defendant of, among other things, “the nature of the charges and of the maximum penalty involved * * *.” Included in a maximum penalty is postrelease control, when applicable. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224. Additionally, R.C. 2943.032 states that “[p]rior to accepting a guilty plea or a plea of no contest * * * the court shall inform the defendant personally that * * * if the offender violates the conditions of a post-release control sanction * * * a new prison term of up to nine months” may be imposed.²

{¶ 13} In the instant case, defendant was subject to mandatory postrelease control of five years because he was a first-degree-felony offender. R.C. 2967.28(B)(1). At the February 7, 2008 plea hearing, the court told defendant that by pleading guilty and no contest, his sentence would include a prison term and five years of postrelease control. However, the court did not inform defendant of the consequences of violating postrelease control.

{¶ 14} Failing outright to inform a defendant about mandatory postrelease control during the plea colloquy is reversible error and the reviewing court must

²A prior version of R.C. 2943.032 was in effect when defendant entered his plea in the instant case; however, the pertinent parts of the prior version and the current version, which is quoted in this opinion, are the same.

vacate the plea. *Sarkozy*, supra. However, when a court does not substantially comply with the requirement of notifying a defendant about mandatory postrelease control during the plea colloquy, the plea may be vacated only if the defendant shows a prejudicial effect. *Id.* See, also, *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (holding that the test for prejudice is “whether the plea would have otherwise been made”).

{¶ 15} In *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462 at ¶31, the Ohio Supreme Court held that “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 understands the implications of his plea and the rights he is waiving,’ the plea may be upheld.” (Citing *Nero*, supra.)

{¶ 16} A review of the record in the instant case shows that defendant did not make a showing of prejudice regarding the court’s failure to thoroughly explain the penalties for violating postrelease control. In other words, defendant did not allege that but for the court’s omission, he would have entered a different plea. See *State v. Kupay-Zimmerman*, Cuyahoga App. No. 92043, 2009-Ohio-3596 and *State v. Soltis*, Cuyahoga App. No. 92574, 2009-Ohio-6636 (both holding that a trial court’s failure to strictly adhere to former R.C. 2943.032

was not reversible error because there was no evidence that the defendants were prejudiced). Accordingly, defendant's second assignment of error is overruled.

{¶ 17} "III. The sentence(s) imposed in case numbers CR-504293 and CR-505636 must be vacated because the trial court failed to properly advise appellant about post release control.

{¶ 18} "IV. The trial court's imposition of a twenty-one year consecutive prison sentence is contrary to law and an abuse of discretion."

{¶ 19} Throughout the plea and sentencing hearings in the instant case, the court, as well as both parties, acted under the mistaken belief that the two counts of robbery in violation of R.C. 2911.02(A)(3) were second degree felonies, rather than third degree felonies. The court notified defendant that he was subject to prison time from two to eight years for these offenses, when, in fact, he was subject to one to five years in prison. The court then sentenced defendant to five years on each count, to run consecutive to each other for ten years in prison, and then consecutive to the remaining 11 years, for an aggregate sentence of 21 years. Five years is the maximum prison sentence for a third degree felony; however, it is more than the minimum but less than the maximum for a second degree felony.

{¶ 20} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court, in a plurality decision, addressed the standard for reviewing felony sentencing. See, also, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Appellate courts must apply the following

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, the trial court’s decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard.” *Kalish*, supra, at ¶26, 896 N.E.2d 124.

{¶ 21} Before we can meaningfully review defendant’s sentence under *Kalish*, we must remand this matter to the trial court for resentencing of the two robbery counts in violation of R.C. 2911.02(A)(3), under the proper third degree felony range of one to five years in prison. The Fifth District Court of Appeals of Ohio reviewed a similar case and came to the same conclusion: *State v. Wolfe*, Delaware App. No. 05 CAA 12 0087, 2007-Ohio-1218. In *Wolfe*, the trial court believed the defendant’s conviction was for a first degree felony and sentenced him to eight years in prison; however, the offense in question was a second degree felony. “While eight years is not the maximum sentence permitted for a felony of the first degree, it is the maximum sentence permitted for a second degree felony. Because the trial court was under the impression that such charge was a first degree felony when it imposed the eight-year sentence, we cannot presume that it would have entered the same sentence for a second-degree felony conviction.” *Id.* at ¶21-22. See, also, *State v. Chandler*, Cuyahoga App. No. 81922, 2003-Ohio-3529 (resentencing required when it was unclear whether court sentenced the defendant as if he committed a

fourth-degree felony or a fifth-degree felony and court failed to make required findings for maximum sentences under former R.C. 2929.14); *State v. Williams*, Cuyahoga App. No. 82206, 2003-Ohio-3962 (vacating sentence and remanding for resentencing when the court “was without authority to sentence [the defendant] to a prison term for felonies of the second degree when he had accepted his plea for third degree felonies * * *”).

{¶ 22} We note that the court’s sentencing error in the instant case is not harmless because the two five-year prison terms in question are to run consecutive to each other, and consecutive to defendant’s sentences for other offenses, adding ten years in prison to defendant’s sentence. Compare with *State v. Tomlinson*, Cuyahoga App. No. 83411, 2004-Ohio-3295 (holding a sentencing error harmless when it ran concurrent to a mandatory ten-year sentence for a major drug offender specification).

{¶ 23} Accordingly, defendants third and fourth assignments of error are moot. App.R. 12(A)(1)(c). Sua sponte, defendant’s sentences of two five-year prison terms for robbery in Case No. CR-505636 are vacated and this matter is remanded for resentencing on those counts.

{¶ 24} Convictions affirmed; sentence vacated and cause remanded for resentencing.

It is ordered that appellant and appellee share equally the 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 Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for resentencing. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

SEAN C. GALLAGHER, A.J., and
LARRY A. JONES, J., CONCUR