

[Cite as *State v. Manning*, 2010-Ohio-5133.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94208

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DONNELL MANNING

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-371504 and CR-371528

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

RELEASED AND JOURNALIZED: October 21, 2010

ATTORNEYS FOR APPELLANT

Paul Mancino, Jr.
75 Public Square
Suite 1016
Cleveland, Ohio 44113-2098

Thomas J. Kelly
Kelly and Kelly, LLC
11221 Pearl Road
Strongsville, Ohio 44136

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Thorin Freeman
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Donnell Manning, appeals the denial of his motion to withdraw his guilty plea. Based on our review of the record and apposite case law, we affirm.

{¶ 2} In 1999, appellant was indicted in CR-371528 on one count of aggravated murder with a three-year firearm specification. As part of a plea deal in this case, appellant entered a guilty plea to an amended indictment of

voluntary manslaughter with a three-year firearm specification. Appellant was also indicted in CR-371504 on one count of felonious assault with one- and three-year firearm specifications. As part of the same plea deal, the indictment in CR-371504 was amended to delete the firearm specifications, and appellant entered a guilty plea to felonious assault.

{¶ 3} Appellant was sentenced to three years for the firearm specification, to be served prior and consecutively to ten years for voluntary manslaughter. He was also sentenced to seven years for felonious assault, to be served consecutively to the sentence imposed in CR-371528, for an aggregate sentence of 20 years in prison.

{¶ 4} Appellant did not file a timely direct appeal with this court. On June 9, 2000, he filed a motion for leave to file a delayed appeal, which was denied. He filed another motion for leave to file a delayed appeal in 2005, which was also denied.

{¶ 5} On July 1, 2009, appellant filed a motion to withdraw his guilty plea and vacate his sentence. In this motion, appellant argued that the trial court failed to accurately advise him of postrelease control. He specifically argued that the trial court mistakenly informed him that he would be subject to a discretionary five-year period of postrelease control, and thus his plea was not knowingly, intelligently, and voluntarily entered. He also argued that the trial court failed to properly impose postrelease control at sentencing

resulting in a void sentence, and thus the motion to withdraw his guilty plea should be treated as a presentence motion.

{¶ 6} The trial court denied appellant's motion to withdraw his guilty plea, but granted the motion to vacate his sentence. The trial court then resentenced him pursuant to *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, but imposed a sentence identical to that which was imposed in 1999. This appeal followed wherein appellant argues that the trial court abused its discretion in denying his motion to withdraw his guilty plea.

Law and Analysis

{¶ 7} In his sole assignment of error, appellant argues that he "was denied due process of law when the court refused to vacate his plea as he was not advised concerning the mandatory nature of his post-release control when the plea was entered." We first recognize that appellant's argument is barred by the doctrine of res judicata because it could have been raised in a direct appeal. *State v. Fountain*, Cuyahoga App. Nos. 92772 and 92874, 2010-Ohio-1202 ("we find that the application of res judicata to a motion to withdraw is not impacted by a void sentence.").

{¶ 8} In the interest of justice, we will analyze appellant's argument. Because appellant's original sentence was void, his motion to withdraw his guilty plea must be treated as a presentence motion. *State v. Boswell*, 121

Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, ¶1. The decision of a trial court to grant or deny a motion to withdraw a guilty plea is reviewed using an abuse of discretion standard. *State v. Van Dyke*, Lorain App. No. 02CA008204, 2003-Ohio-4788, at ¶7, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211, 428 N.E.2d 863, paragraph two of the syllabus. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 9} Although “presentence motions to withdraw guilty pleas should be freely granted, a defendant ‘does not have an absolute right to withdraw a plea prior to sentencing.’” *State v. McGregor*, Cuyahoga App. No. 86165, 2005-Ohio-5561, at ¶3, quoting *State v. Xie* (1992), 62 Ohio St.3d 521, 527, 584 N.E.2d 715. “Instead, the trial court ‘must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea.’” *Id.*

{¶ 10} Since 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. To ensure compliance with fundamental protections, a trial judge must engage the defendant in a plea colloquy before accepting the plea. *Id.* at ¶26, citing

State v. Ballard (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, paragraph one of 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.*

{¶ 11} Before accepting appellant’s plea, the trial judge was obligated to comply with the mandates of Crim.R. 11(C)(2). Pursuant to this rule, the trial judge may not accept a defendant’s guilty plea unless he (1) determines that the defendant is voluntarily entering the plea and understands the nature of the charges and the maximum penalty he faces, (2) informs the defendant of the effect of accepting the plea and that the court may proceed with judgment and sentencing once it is accepted, and (3) informs the defendant that he is 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.

{¶ 12} “If a trial court fails 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 does 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 is 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. “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 understands the implications of his plea and the rights he is waiving,’ the plea may be upheld.” (Internal citations omitted.) *Id.*, citing *Nero*, *supra*, at 108.

{¶ 13} This case is comparable to *State v. Lang*, Cuyahoga App. No. 92099, 2010-Ohio-433, in which the defendant was misinformed with regard to postrelease control. In *Lang*, however, the defendant was told he faced a discretionary three years of postrelease control when in actuality postrelease control was mandatory for five years. *Id.* at ¶9-10. This court held that such a misstatement did not constitute substantial compliance, but went on to consider whether the defendant was able to show that he was prejudiced by this error. *Id.* at ¶11-12.

{¶ 14} In this case, appellant was informed that he faced a discretionary five-year period of postrelease control when it was actually a mandatory term.

Despite this misstatement, appellant has failed to show that he was prejudiced. At the hearing on the motion to withdraw his guilty plea, appellant's counsel made a blanket argument that appellant may not have entered the guilty plea had he been correctly informed about postrelease control; however, this claim was unsubstantiated. As such, appellant has failed to show that he was prejudiced by the trial court's misstatement, and the trial judge did not abuse his discretion in denying appellant's motion to withdraw his guilty plea. See, also, *State v. Torres*, Lucas App. No. L-07-1036, 2008-Ohio-815, ¶43-45; *State v. Berch*, Mahoning App. No. 08-MA-52, 2009-Ohio-2895, ¶32-35.

Conclusion

{¶ 15} Appellant's argument with regard to the trial court's denial of his motion to withdraw his guilty plea is barred by res judicata. Nonetheless, we cannot find that the trial judge abused his discretion in denying such a motion made ten years after the plea was entered when the appellant is also unable to show that he was prejudiced by any alleged errors. Appellant's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from 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.

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

KENNETH A. ROCCO, P.J., and
LARRY A. JONES, J., CONCUR