[Cite as *State v. McKissic*, 2010-Ohio-62.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 92332 and 92333

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAWRENCE McKISSIC

DEFENDANT-APPELLANT

JUDGMENT:
FINDING OF GUILT AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-500167 and CR-508622

BEFORE: McMonagle, J., Kilbane, P.J., and Boyle, J.

RELEASED: January 14, 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), is filed within ten (10) 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).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} In these consolidated appeals, defendant-appellant, Lawrence McKissic, appeals his convictions, entered after guilty pleas, and his sentence. We affirm the finding of guilt, but vacate McKissic's sentence and remand for resentencing.

{¶ 2} In August 2007, McKissic was charged in Case No. CR-500167 with assault on a police officer with a furthermore clause, tampering with evidence, and possession of drugs. In February 2008, he pled guilty to assault on a police officer, a fourth degree felony, and tampering with evidence, a third degree felony. In exchange for his plea, the State deleted the furthermore clause and nolled the possession of drugs charge.

{¶ 3} In January 2008, McKissic was charged in Case No. CR-508622 with three counts of drug trafficking, two counts of drug possession, and one count of possession of criminal tools, each with a forfeiture specification. In July 2008, he pled guilty to one count of drug trafficking, a fifth degree felony, one count of drug possession, a fourth degree felony, and one count of possessing criminal tools, a felony of the fifth degree, and forfeited the cell phone identified in the forfeiture specifications. The remaining counts were dismissed.

{¶ 4} At the subsequent sentencing hearing, the trial court sentenced McKissic to one year incarceration on each count in Case No. CR-500167, to be served consecutively, and to one year incarceration on each count in Case No. CR-508622, also to run consecutively. The trial court ordered that the sentence in Case No. CR-500167 be served concurrent with that in Case No. CR-508622, for a total of three years incarceration.

{¶ 5} McKissic appeals his conviction and sentence in both cases, and we have consolidated the appeals for purposes of review and disposition.

1. McKissic's Pleas

{¶ 6} Under Crim.R. 11(C)(2), before accepting a guilty plea, a trial court must address the defendant personally and determine that he is making the plea voluntarily "with understanding of the nature of the charges and *the maximum penalty involved*." (Emphasis added.) Postrelease control constitutes a portion of the maximum penalty involved in an offense for which a prison term is imposed. *State v. Crosswhite*, Cuyahoga App. No. 86345, 2006-Ohio-1081. Thus, if a trial court fails to advise a defendant during a plea colloquy that the sentence will include a term of postrelease control, the defendant may dispute the knowing, intelligent, and voluntary nature of his plea through a motion to withdraw the plea or on direct appeal. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, ¶25.

{¶ 7} Postrelease control is mandatory for first degree, second degree, and certain third degree felonies. R.C. 2967.28(B). For other third degree felonies, and fourth and fifth degree felonies, postrelease control is discretionary with the parole board. R.C. 2967.28(C).[1]

{¶ 8} McKissic pled guilty to the third degree felony offense of tampering with evidence, with no evidence of any actual or threatened physical harm during the commission of the offense, as well as fourth and fifth degree felonies; hence, postrelease control is discretionary, rather than mandatory, for his offenses. The record reflects that before accepting McKissic's pleas in both cases, the trial court asked him if he understood that if the court were to impose a prison term, "the parole board could place you on postrelease control for up to three years?" McKissic responded affirmatively.

{¶ 9} Despite his admitted understanding that he could be subject to up to three years of postrelease control, McKissic contends that the trial court did not comply with Crim.R. 11(C) because it did not inform him of the consequences of violating any condition of postrelease control. He points to R.C. 2929.19(B)(3)(e), which provides that at sentencing, the trial court must advise the defendant that if the parole board imposes postrelease control and if the defendant violates any of the conditions of postrelease control, the parole board may impose a prison term of up to one-half of the stated prison term originally imposed as part of the sentence. McKissic contends that

[1]Postrelease control is discretionary for third degree felonies that are not felony sex offenses, unless during the commission of the offense, the defendant caused or threatened to cause physical harm to a person. R.C. 2967.28(B) and (C).

without being so advised, he could not understand the maximum penalty for the offenses to which he pled guilty and therefore his pleas were not knowingly, voluntarily, or intelligently made. McKissic's reference to R.C. 2929.19(B)(3)(e) is not helpful, however, as it applies to sentencing rather than a plea colloquy.

{¶ 10} Former R.C. 2943.032,[2] in effect when McKissic was sentenced, governed what information about any possible extension of the prison term the trial court was required to give a defendant prior to accepting his plea. It required, among other things, that the trial court tell a defendant prior to accepting his plea that any extension by the parole board could not exceed one-half of the term's duration. R.C. 2943.032(E). The trial court did not give McKissic this information, but we do not vacate his plea.

{¶ 11} A trial court must strictly comply with the Crim.R. 11(C)(2) requirements regarding the waiver of constitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶18. With respect to the other requirements of Crim.R. 11(C)(2) regarding nonconstitutional rights, reviewing courts consider whether there was substantial compliance with the rule. The statutory right to receive the plea notification of postrelease

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[2] R.C. 2954.032 was amended by 2008 H.B. 130, which became effective on April 7, 2009. The new version of the statute omits the half-term information and provides that prior to accepting a plea to a felony charge, the trial court must inform a defendant that if the defendant violates a period of postrelease control for the felony, the parole board may impose a new prison term of up to nine months.

control under R.C. 2943.032 (both former and amended) 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.

{¶ 12} "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *State v. Nero* (1990), 56 Ohio St.3d 106, 108; *State v. Stewart* (1977), 51 Ohio St.2d 86, 93. "[I]f it appears from the record that the defendant appreciated the effect of his plea and his waiver of rights in spite of the trial court's error, there is still substantial compliance." *State v. Caplinger* (1995), 105 Ohio App.3d 567, 572. Further, a defendant must show prejudice before a plea will be vacated for a trial court's error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the colloquy are at issue. *Veney* at ¶17. The test for prejudice is whether the plea would have otherwise been made. Id.

{¶ 13} 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*, 51 Ohio St.2d at 93. 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 cause. *Sarkozy* at ¶25. But "some compliance" with the rule with respect to postrelease control "prompts a substantial-compliance analysis and the corresponding 'prejudice' analysis." Id. at ¶23; see, also, *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶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.")

{¶ 14} We conclude that the trial court substantially complied with the requirements of Crim.R. 11(C) and R.C. 2943.032 in advising McKissic about postrelease control. Despite its failure to advise him that he could be subject to up to 18 months in prison if he violated postrelease control (one-half of the stated prison term), the court sufficiently apprised him of the possibility of postrelease control. McKissic has failed to show that he was prejudiced by the trial court's failure to advise him of the consequences of violating a postrelease control period that might never be imposed and, in fact, makes no argument whatsoever that he would not have pled guilty if the court had so advised him. Because he has failed to show any prejudice, we do not vacate his plea on this basis. *State v. Kupay-Zimerman*, Cuyahoga App. No. 92043, 2009-Ohio-3596.

{¶ 15} McKissic also argues that he did not understand the maximum penalty that could be imposed because the court did not tell him prior to accepting his pleas that it could run the sentence for each offense consecutively. The Ohio Supreme Court rejected this argument in *State v. Johnson* (1988), 40 Ohio St.3d 130, 134, wherein it held that when the court informs the defendant at the plea hearing of the maximum sentence for each of the crimes to which he will plead guilty, Crim.R. 11(C) does not require an explanation that any sentence given may run consecutively. The court reasoned that the rule refers to advising the defendant of the maximum penalty for each charge, not the cumulative total of all sentences for all charges to which the defendant may plead guilty in a single proceeding. Id. at 133.

{¶ 16} This court has consistently followed *Johnson* to find substantial compliance in cases where the trial court failed to advise a defendant prior to accepting a plea that sentences might be imposed consecutively. See, e.g., *State v. Norman*, Cuyahoga App. No. 91302, 2009-Ohio-1793; *State v. Lewis*, Cuyahoga App. Nos. 88627, 88628, and 88629, 2007-Ohio-3640, ¶14; *State v. Dudenas*, Cuyahoga App. Nos. 81461 and 81774, 2003-Ohio-1000, ¶19.

{¶ 17} McKissic notes that the prosecutor, rather than the trial judge, explained the maximum penalties at the plea colloquy. Although it would have been better for the trial judge himself to have explained the maximum penalties to McKissic,[3] substantial compliance with Crim.R. 11(C) suffices with respect to nonconstitutional rights. Thus, the court may properly determine that the defendant understands those matters from the totality of the circumstances, without informing him about them directly. *State v. Gibson* (1986), 34 Ohio App.3d 146, citing *State v. Rainey* (1982), 3 Ohio App.3d 441, 442. If this had been a constitutional right, however, the court's failure to personally address the defendant would merit reversal.

{¶ 18} The record adequately sets forth that the trial court substantially complied with the requirements of Crim.R. 11(C) and R.C. 2943.032 with respect to the maximum sentence to be imposed and that McKissic understood the potential maximum penalties before he pled guilty. His second assignment of error is therefore overruled.

2. Sentencing Errors

{¶ 19} McKissic argues that his sentence must be vacated because the trial court did not properly advise him at sentencing of postrelease control. We agree.

{¶ 20} At sentencing, after advising McKissic that he would be subject to postrelease control, the judge explained the consequences of violating postrelease control as follows:

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[3]Crim.R. 11(C)(2) provides that *the court* shall address the defendant personally and determine that he understands the nature of the charge and the maximum penalty.

{¶ 21} "If you commit a felony while on postrelease control, the court having jurisdiction of the new felony may, pursuant to Ohio Revised Code Section 2967.28, extend the stated prison term for further periods not less than three months as provided by law. Such additional periods of time imposed by another court for violation in this case while on postrelease control are part of the sentence in this case."

{¶ 22} This explanation of the penalties for violating postrelease control was not adequate. Under R.C. 2929.19(B)(3)(e), a trial court must notify a defendant at sentencing that if he violates a condition of postrelease control, the parole board may impose a prison term as part of the sentence of up to one-half of the stated prison term originally imposed upon the defendant. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶2. Failure to do so renders the sentence void and requires vacating the sentence and remanding for resentencing. Id. at ¶27. See, also, *State v. Edwards*, Cuyahoga App. No. 92128, 2009-Ohio-1890, ¶19; *State v. White*, Cuyahoga App. No. 92056, 2009-Ohio-4371, ¶4; *State v. Cook*, Cuyahoga App. No. 90487, 2008-Ohio-4246, ¶18.

{¶ 23} The State contends the trial court's failure to so advise McKissic was "not a fatal flaw" in light of R.C. 2929.19(3)(e), which provides in part:

{¶ 24} "*If a court imposes a sentence* including a prison term on or after July 11, 2006, the failure of a court to notify the offender * * * that the parole board may impose a prison term * * * for a violation of * * * a condition of postrelease control * * * or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the authority of the parole board to so impose a prison term for a violation of that nature if * * * the parole board notifies the offender prior to the offender's release of the board's authority to so impose a prison term." (Emphasis added.)

{¶ 25} We do not find this statute controlling because the trial court did not "impose a sentence." "'Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void.'" *Bloomer* at ¶3, quoting *State v. Beasley* (1984), 14 Ohio St.3d 74, 75. "A sentence is void if the court fails to follow the statutory mandates to impose postrelease control." *Bloomer* at ¶27. Because the trial court did not follow the statutory mandates for imposing postrelease control by failing to advise McKissic of the consequences of violating postrelease control, the sentence is void, and the parties are placed in the same position as if there had been no judgment at all. *Bloomer* at ¶27, citing *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, ¶12.

{¶ 26} As the trial court did not advise McKissic that he could be subject to up to 18 months in prison (one-half of the stated prison term) if he violated postrelease control, his first assignment of error is sustained and we vacate his sentence and remand for resentencing.

Finding of guilt affirmed; sentence vacated and remanded for resentencing.

It is ordered that the parties share equally 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.

CHRISTINE T. McMONAGLE, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR