

[Cite as *State v. Rolling*, 2011-Ohio-121.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95473

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL ROLLING

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-421317

BEFORE: Kilbane, A.J., Gallagher, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: January 13, 2011

APPELLANT

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MARY EILEEN KILBANE, A.J.:

{¶ 1} In this pro se appeal, defendant-appellant, Michael Rolling, appeals from the order of the trial court that denied his motion to withdraw his guilty plea and deleted an erroneously included term of postrelease control in a nunc pro tunc order. Defendant has not provided us with a transcript of the proceedings, and therefore, finding no reversible error, we affirm.

{¶ 2} On March 27, 2002, defendant was indicted for aggravated murder with one-year and three-year firearm specifications, and having a weapon while under disability, in connection with the shooting death of Ricardo Bonner. On

January 27, 2003, defendant entered into a plea agreement with the State and entered a guilty plea to a reduced charge of murder. The firearm specifications and weapons under disability charge were dismissed. The trial court sentenced defendant to a term of imprisonment of 15 years to life. The trial court's journal entry also stated, "[f]ive years postrelease control is part of this sentence for the maximum period allowed for the above felony under R.C. 2967.28."

{¶ 3} On February 6, 2003, defendant filed a motion to withdraw his guilty plea and asserted that his plea was based upon his understanding that he could be sentenced to a term of probation. On February 25, 2003, while the motion to withdraw was pending, defendant filed a notice of appeal. The appeal was dismissed on April 17, 2003.

{¶ 4} On June 13, 2003, defendant filed a motion for delayed appeal to this court. On June 20, 2003, while the motion for a delayed appeal was pending, defendant filed a motion to vacate or set aside sentence, then later dismissed this motion. On July 15, 2003, this court denied defendant's motion for a delayed appeal. Rolling filed an application for reopening, pursuant to App.R. 26(B), on March 19, 2006, which was denied as untimely. *State v. Rolling*, Cuyahoga App. No. 83051, 2007-Ohio-2635.

{¶ 5} The defendant was not able to obtain a transcript of the plea proceeding until March 2008. Thereafter, on March 27, 2008, defendant filed a new motion to withdraw his guilty plea in which he asserted that the trial court failed to comply with Crim.R. 11, and that his guilty plea was based upon his

“misunderstanding that he could be released after serving two years of his sentence of fifteen years to life.” The State refuted defendant’s claims and maintained that they were unsupported by the record. Thereafter, on May 21, 2008, the trial court denied the motion to withdraw the guilty plea and concluded:

“Based upon the motions, arguments of counsel, and transcript of the plea, the court finds that defendant’s plea was knowingly, voluntarily, and intelligently made. The court specifically informed defendant of his constitutional rights and the maximum penalty involved. He was asked if promises were made to him and he answered ‘no.’ He was asked if he understood the penalty. He stated ‘yes.’

“The court does not find the defendant meets the standard of manifest injustice that would allow the withdrawal of his guilty plea.”

{¶ 6} On June 1, 2010, defendant filed a motion for resentencing pursuant to R.C. 2929.191. Defendant maintained that his sentence was void because it included a term of postrelease control and, pursuant to R.C. 2967.13, postrelease control is not applicable to convictions for the offense of murder.

{¶ 7} On June 28, 2010, the trial court issued a nunc pro tunc order that denied the motion for resentencing pursuant to R.C. 2929.191 and stated: “Delete five years postrelease control and replace with parole.”

{¶ 8} Defendant now appeals and assigns two errors for our review.

Assignment of Error One

“The trial court erred by failing to grant defendant a de novo hearing on re-sentencing pursuant to R.C. 2929.191, and *State v. Singleton* [124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958].”

{¶ 9} In *Singleton*, the Ohio Supreme Court addressed R.C. 2929.191, the

statutory remedy to correct the trial court's failure to properly impose postrelease control, and held that "[f]or criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191." *Id.* at paragraph two of the syllabus. The *Singleton* court stated:

"Effective July 11, 2006, R.C. 2929.191 establishes a procedure to remedy a sentence that fails to properly impose a term of postrelease control. It applies to offenders who have not yet been released from prison and who fall into at least one of three categories: [1] those who did not receive notice at the sentencing hearing that they would be subject to postrelease control, [2] those who did not receive notice that the parole board could impose a prison term for a violation of postrelease control, or [3] those who did not have both of these statutorily mandated notices incorporated into their sentencing entries. R.C. 2929.191(A) and (B). For those offenders, R.C. 2929.191 provides that trial courts may, after conducting a hearing with notice to the offender, the prosecuting attorney, and the Department of Rehabilitation and Correction, correct an original judgment of conviction by placing on the journal of the court a nunc pro tunc entry that includes a statement that the offender will be supervised under R.C. 2967.28 after the offender leaves prison and that the parole board may impose a prison term of up to one-half of the stated prison term originally imposed if the offender violates postrelease control." *Id.* at ¶23.

{¶ 10} However, the instant matter presents none of the three scenarios outlined in R.C. 2929.191(A) or (B), set forth above. The trial court did not fail to notify defendant that he would be subject to postrelease control, did not fail to notify him that the parole board could impose a prison term for a violation of postrelease control, and did not fail to have statutorily mandated notices incorporated into his sentencing entries. R.C. 2929.191(A) and (B). We

therefore conclude that R.C. 2929.191 and *Singleton* are inapplicable herein.

{¶ 11} Further, with regard to whether the trial court employed a correct procedure in entering a nunc pro tunc deletion of the postrelease control provision, we note that a trial court may use a nunc pro tunc entry to correct mistakes in judgments, orders, and other parts of the record so the record speaks the truth. *State v. Greulich* (1988), 61 Ohio App.3d 22, 24, 572 N.E.2d 132. We have not been provided with a transcript, so there is no basis upon which we may conclude that the court improperly employed the nunc pro tunc procedure or that the corrected entry does not reflect the truth. *State v. L.M.*, Cuyahoga App. Nos. 94896 and 94897, 2010-Ohio-5614.

{¶ 12} Similarly, with regard to the substantive correctness of the trial court's ruling, there has been no showing that defendant would not have entered the plea absent the erroneous reference to postrelease control. In *State v. Stokes*, App. No. 93154, 2010-Ohio-3181, this court concluded that where the defendant failed to establish that he would not have entered the plea absent the erroneous reference to postrelease control, the correct remedy is to remand the matter to the trial court "to correct the sentencing entry and to delete the reference to postrelease control." *Id.*, citing *State v. Jordan*, Cuyahoga App. No. 91413, 2009-Ohio-4037.

{¶ 13} In accordance with the foregoing, the defendant has failed to demonstrate that the trial court erred in failing to grant defendant a de novo hearing on resentencing. See *Stokes* at ¶9.

{¶ 14} The first assignment of error is without merit.

Assignment of Error Two

“[The trial court’s] plea colloquy did not substantially comply with the applicable criminal procedure rule, and * * * remand is required to permit determination of whether the defendant was prejudiced by trial court’s failure to substantially comply with Crim.R. 11(C)(2)(c).”

{¶ 15} As an initial matter, we note that we have not been provided with a transcript of the plea proceedings, or an App.R. 9(C) statement of the evidence. We are therefore unable to properly review the plea colloquy, and under such circumstances, courts presume regularity. *L.M.* at ¶8.

{¶ 16} In any event, in *Stokes*, this court considered the effect of the trial court erroneously stating that postrelease control would be a part of the defendant’s sentence when it is actually not applicable. In that case, the defendant pled guilty to one count of murder, and the trial court erroneously informed him that “postrelease control of five years is part of the sentence.” This court held that the misstatement constituted partial compliance with Crim.R. 11, but found no basis to conclude that Stokes was prejudiced. The court stated:

“Indeed, Stokes has presented no evidence or even argument that he would not have entered his plea and would have insisted on going to trial if he knew that he would not be subject to postrelease control upon release. As this court recently stated, ‘[w]ithout some evidence that defendant was motivated by the expectation of being subject to postrelease control upon release, we must affirm the plea.’” *Id.*, quoting *State v. Anderson*, Cuyahoga App. No. 92576, 2010-Ohio-2085.

{¶ 17} Similarly, in *State v. Baker*, Hamilton App. No. C-050791,

2006-Ohio-4902, the defendant pled guilty to murder and was therefore not subject to postrelease control pursuant to R.C. 2967.13. During the plea proceedings, the trial court informed him that he could be subject to postrelease control. In considering whether this information misinformed the defendant of the maximum penalty and rendered his plea involuntary, the court stated:

“[T]he trial court informed Baker that he faced 18 years to life imprisonment. Life imprisonment was the maximum sentence that Baker could have received. The trial court’s incorrect reference to post-release control did not detract from this. Even if Baker mistakenly believed that he ‘could be’ released on post-release control, he was still aware that he potentially faced life imprisonment.

“The trial court’s statements concerning post-release control in no way added to the penalty Baker faced, nor did they convey to Baker that he had a right to early release. Further, the record contains no indication that Baker would not have pled guilty but for the trial court’s references to post-release control. Under these circumstances, the trial court’s statements concerning post-release control were not prejudicial.

“Moreover, the trial court need not have informed Baker of the possibility of parole. Parole was not a part of Baker’s sentence.

And as with post-release control, there is no guarantee that Baker will be released from prison and receive parole. The record demonstrates that Baker was aware of the maximum sentence he faced, life imprisonment.”

{¶ 18} The *Baker* court relied upon the Fourth Appellate District’s decision in *State v. Hamilton*, Hocking App. No. 05CA4, 2005-Ohio-5450. In that case, the

defendant argued that he did not knowingly, intelligently, and voluntarily enter his guilty plea to aggravated murder because the court incorrectly informed him that he would be subject to postrelease control, rather than parole. In rejecting this claim, the court stated:

“Here, the trial court advised Hamilton four times during the combined plea and sentencing hearing that his aggravated murder conviction carried a life sentence with parole eligibility after twenty years. After two of the admonishments where the court told him that life with parole eligibility after 20 years was the only sentence available, Hamilton stated that he understood. Thus, the court complied with Crim.R. 11(C)’s requirement to inform the defendant of the maximum penalty. The court’s extraneous pronouncement regarding post-release control did not misstate the maximum penalty for the crime of aggravated murder. Because parole is not part of an offender’s sentence, the maximum penalty is imprisonment for life.

“R.C. 2967.28(B) identifies the felonies to which post-release control requirements apply. * * * Aggravated murder, an unclassified felony, is not among them.”

{¶ 19} Both the *Baker* Court and the *Hamilton* Court acknowledged that the court in *State v. Prom*, Butler App. No. CA2002-01-007, 2003-Ohio-6543, reached a contrary result. In *Prom*, the court concluded that the defendant did not knowingly, intelligently, and voluntarily plead guilty after being incorrectly informed that her murder conviction carried a period of postrelease control. The appellate court reasoned that because the trial court informed her that she could be sent back to prison for up to half of the original sentence if she violated postrelease control, it understated the maximum penalty that might apply in the event that she violated the conditions of parole. The *Baker* court rejected this reasoning and

noted that the defendant was still aware that he potentially faced life imprisonment and the erroneous information concerning postrelease control in no way added to the penalty he faced. Similarly, the *Hamilton* court rejected this reasoning as unduly speculative.

{¶ 20} Applying all of the foregoing, we conclude that defendant has presented no evidence or even argument that he would not have entered his plea and would have insisted on going to trial if he knew that he would not be subject to postrelease control upon release. Absent some evidence that defendant was motivated by the expectation of being subject to postrelease control upon release, we must affirm the plea. *Stokes*. Although the trial court's sentencing journal entry erroneously included a reference to postrelease control, this provision in no way added to the penalty defendant faced, did not suggest that he could be released early, and did not misstate the maximum penalty, so it is not prejudicial.

{¶ 21} Finally, we note that in *State v. Fountain*, Cuyahoga App. Nos. 92772 and 92874, 2010-Ohio-1202, this court held that the doctrine of res judicata bars all claims raised in a Crim.R. 32.1 motion that were raised or could have been raised in a prior proceeding, including a direct appeal, and could be invoked to bar a challenge to a void sentence. In that case, the defendant pled guilty to several drug charges and was informed that he "may" be subject to postrelease control, which was in fact mandatory. Six years later, the defendant attempted to withdraw his plea and asserted that the trial court's misinformation about postrelease control rendered his sentence void. In rejecting the defendant's

challenge to his sentence, this court determined that these claims were known at the time appellant had to instigate an appeal and should have been raised therein.

{¶ 22} Likewise, in this matter, defendant waited seven years to raise this issue, but the matter was known to him immediately upon sentencing and should have been raised in a direct appeal. *Fountain*.

{¶ 23} The second assignment of error is overruled.

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. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

SEAN C. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR