

[Cite as *State v. Palmer*, 2011-Ohio-1244.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
No. 95140

---

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

GEORGE E. PALMER, III

DEFENDANT-APPELLANT

---

JUDGMENT:  
AFFIRMED AS MODIFIED  
AND REMANDED

---

Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-531884

**BEFORE:** Stewart, J., Blackmon, P.J., and Jones, J.

**RELEASED AND JOURNALIZED:** March 17, 2011

**ATTORNEY FOR APPELLANT**

James E. Valentine  
323 Lakeside Avenue, Suite 450  
Cleveland, OH 44113

**ATTORNEYS FOR APPELLEE**

William D. Mason  
Cuyahoga County Prosecutor

BY: William Leland  
Assistant County Prosecutor  
The Justice Center  
1200 Ontario Street, 8th Floor  
Cleveland, OH 44113

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, George E. Palmer, III, appeals from his conviction on one second degree felony count of felonious assault. He argues that he did not make his guilty plea to that charge voluntarily because the court failed to advise him properly of postrelease control and that the court erred when imposing postrelease control during sentencing because it failed to note that postrelease control was for a mandatory term.

{¶ 2} R.C. 2943.032 requires the court to inform a defendant who pleads guilty to a charge requiring a prison term that the defendant may be subject to postrelease control. Because postrelease control constitutes an aspect of a defendant's punishment, the court is further obligated by Crim.R. 11(C)(2)(a) to disclose the possibility of postrelease control during the plea colloquy. See *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶11.

{¶ 3} When a court's obligations during plea proceedings are set forth by statute, it need only substantially comply with them. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. "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." *Id.*, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163. If substantial compliance with the statute is shown, the defendant can only have the plea vacated upon a showing of prejudice. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶32. The test for prejudice is "whether the plea would have otherwise been made." *Nero*, 56 Ohio St.3d at 108.

{¶ 4} On the day trial was to commence, the court recounted the charges against Palmer (two counts of attempted murder and two counts of felonious assault), the degree of each offense, and the possible punishments.

The court then noted its understanding that Palmer's court file had been "marked" for a plea bargain by request of defense counsel and that the state was offering Palmer the chance to plead to a single count of felonious assault in exchange for dismissing the remaining three counts of the indictment. The court then told Palmer:

{¶ 5} "In the event that you resolve this by way of a plea, there is the possibility of what is referred to as post-release control for a period of up to three years. I don't know what would happen in this case; but if I would send you to jail, after you spend your term in jail, you could be put back in jail if you violated the terms of post-release control."

{¶ 6} When asked if he had any questions, Palmer asked the court to explain what was meant by having his file "marked." The court gave a brief explanation, but it appears that Palmer still did not understand. The court recessed so that Palmer could discuss the matter with his attorney. When the court went back on the record, it informed Palmer of his rights under Crim.R. 11(C), including the maximum sentence, but it did not mention postrelease control. The court accepted Palmer's plea, informed him that he could remain on bond, and that it would refer Palmer for a psychiatric evaluation. Counsel were asked if they were satisfied that the plea had been voluntarily and knowledgeably tendered and they both replied in the affirmative. The court then stated:

{¶ 7} “Is there any further inquiry? I think I explained this to you, but I think it best to explain it again. In the event that you are sent to prison, you may be subject to post-release control for three years. I think I explained that. Basically what that means is if — and I don’t know if this is going to be something that you go to jail on; but after you serve your time, if they want to, the parole authority can put you on post-release control for up to three years.

{¶ 8} “What that means is that they would set up the rules for you. If you violate the rules, you can go back to jail without the benefit of trial. Do you understand that?”

{¶ 9} Palmer answered in the affirmative. Defense counsel stated that he had nothing further to add.

{¶ 10} We cannot find that the court satisfied Crim.R. 11(C)(2)(a) when it advised Palmer of postrelease control after it accepted his plea. Crim.R. 11(C)(2)(a) states that the court “shall not accept a plea of guilty” without first addressing the defendant and determining that the defendant is making the plea voluntarily with the understanding of the maximum penalty involved. The transcript shows that the court stated that “I’ll accept the plea of guilty” before it went on to advise Palmer that he would be subject to postrelease control. It follows that the court had “accepted” the plea before

making statements about postrelease control, so the court did not comply with Crim.R. 11(C)(2)(a).

{¶ 11} This failure is immaterial, however, because the court advised Palmer of the maximum penalty, including postrelease control, at the start of the plea hearing. While Crim.R. 11(C)(2)(a) arguably sets the end point for plea hearings upon the court's acceptance of a plea, it defines no starting point for the plea hearing.<sup>1</sup> The rule only states that the court must "address the defendant personally" and determine that the defendant is making the plea voluntarily and with full understanding of the charges and maximum penalty involved. As written, the rule allows the court latitude in how it conducts a plea hearing. The appellate courts have recognized this latitude by noting that they review the validity of a plea by looking at the totality of the circumstances. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶12, citing *Nero*, 56 Ohio St.3d at 108.

{¶ 12} The transcript shows that the parties met for the purpose of resolving the charges against Palmer with a plea bargain. The court personally addressed Palmer by describing the charges against him, the degree of each count and the possible maximum penalty for each count. It described the plea deal offered by the state and then informed Palmer that if

---

<sup>1</sup>The transcript of the April 6, 2010 hearing is labeled in two parts: "plea offer" and "plea." These are descriptive labels attached by the court reporter and have no binding legal effect.

he chose to accept the plea bargain, there was the possibility that he would be placed on postrelease control for three years and that he could be “put back in jail” if he violated the terms of postrelease control. The court’s decision to take a short recess so that Palmer could confer with counsel on the issue of what it meant to have a file “marked” did not terminate the plea hearing. When the court reconvened following the recess, it specifically stated that “I’m going to incorporate by reference” the “conversation that you and I had earlier[.]” This shows that the court considered the post-recess proceedings to be a continuation of the plea hearing that commenced before the recess. We thus conclude that the court did advise Palmer of the possibility of postrelease control during the plea hearing.

{¶ 13} The next issue is whether the court substantially complied with Crim.R. 11(C)(2)(a). The supreme court has held that there is a difference between “partial” compliance with Crim.R. 11(C)(2)(a) and a complete failure to comply with the rule. See *Clark*, 119 Ohio St.3d at ¶32. The court partially complies with Crim.R. 11(C)(2)(a); for example, when it mentions postrelease control but does not explain it. *Id.* If the court partially complies with the rule, the defendant can have the plea vacated only upon a showing of prejudice; that is, that the defendant would not have entered the plea had the court fully complied with its requirements under Crim.R. 11(C)(2)(a). *Id.*

{¶ 14} The court’s statement that a guilty plea could subject Palmer to “post-release control for a period of up to three years” arguably failed to convey the sense that postrelease control was mandatory. This meant that the court only partially complied with Crim.R. 11(C)(2)(a). *State v. Soltis*, 8th Dist. No. 92574, 2009-Ohio-6636; *State v. King*, 184 Ohio App.3d 226, 2009-Ohio-4551, 920 N.E.2d 399. It was thus Palmer’s obligation to show prejudice from the court’s partial compliance with the rule. Palmer makes no argument that he was prejudiced by the court’s partial compliance with Crim.R. 11(C)(2)(a) or that he would not have entered his plea but for any noncompliance. We thus find that Palmer was not in any way prejudiced by the court’s failure to fully comply with Crim.R. 11(C)(2)(a) by correctly advising him of the maximum penalty.

## II

{¶ 15} Palmer next argues that his sentence is void because the court failed to mention postrelease control at the time of sentencing.

{¶ 16} The court must not only impose postrelease control in the sentencing entry, it must inform the defendant of postrelease control during the sentencing hearing. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, at ¶23. The court’s sentencing entry fully and completely stated the terms of postrelease control; the question is whether the court gave



Palmer notice at the sentencing hearing that he would be placed on postrelease control.

{¶ 17} The transcript of the sentencing shows that the court told Palmer at the start of the sentencing hearing that he faced a possible sentence of two to eight years and that “[i]n the event you are incarcerated, the parole authority may put you on what’s referred to as post-release control for a period of 3 years. If you violated the terms of post-release control, you could be sent back to jail without benefit of a trial for up to 50 percent of your original sentence, nine months at a time.” The court then heard from Palmer and two witnesses in mitigation of sentence. After noting that Palmer tested positive for the presence of drugs after he entered his guilty plea, the court imposed an eight-year sentence. Apart from what it said at the start of the sentencing hearing, the court made no further mention of postrelease control.

{¶ 18} We need not consider whether the court’s statement concerning the imposition of postrelease control was a part of the “sentencing” because it was, in any event, an incorrect statement of the sentence. We have held that it is insufficient for the court to inform the defendant at sentencing that he “may be” subject to postrelease control when postrelease control is mandatory. See *State v. Hairston*, 8th Dist. No. 94112, 2010-Ohio-4014, ¶5; *State v. Jones*, 8th Dist. No. 94216, 2010-Ohio-4136, ¶5. Palmer pleaded

guilty to a second degree felony, so he was subject to a mandatory, three-year period of postrelease control. See R.C. 2967.28(B)(2). We therefore find that the court did not properly impose a mandatory three-year period of postrelease control during sentencing.

{¶ 19} When the court fails to inform an offender that a sentence requires a mandatory term of postrelease control, R.C. 2953.08(G)(2) permits us to modify the sentence to include that which the court had no discretion to alter. See *State v. Fischer*, \_\_\_ Ohio St.3d \_\_\_, 2010-Ohio-6238, \_\_\_ N.E.2d \_\_\_, ¶29 (suggesting that the courts of appeals could, under authority of R.C. 2953.08(G)(2)(b), modify a sentencing defect without remanding for resentencing); *State v. Williams*, 8th Dist. Nos. 94321, 94322, and 94323, 2011-Ohio-316 (applying R.C. 2953.08(G)(2) to correct discretionary term of postrelease control that had been incorrectly stated as mandatory and to correct improperly stated length of mandatory postrelease control). We thus modify Palmer's sentence and remand with instructions for the court to correct the sentencing entries to reflect that Palmer's postrelease control is for a mandatory three-year period.

Judgment is affirmed as modified and remanded for correction of sentencing entry.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas 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.

---

MELODY J. STEWART, JUDGE

PATRICIA ANN BLACKMON, P.J., and  
LARRY A. JONES, J., CONCUR