

[Cite as *State v. White*, 2011-Ohio-1562.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 95098**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**DEREK WHITE**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**REVERSED AND REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-526053

**BEFORE:** Celebrezze, J., Boyle, P.J., and Cooney, J.

**RELEASED AND JOURNALIZED:** March 31, 2011

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Derek White, appeals from his sentence arguing that the trial court failed to advise him of the terms of his postrelease control and failed to honor his original plea agreement. After a thorough review of the record and case law, we reverse and remand.

{¶ 2} On July 7, 2009, a Cuyahoga County grand jury indicted appellant for kidnapping in violation of R.C. 2905.01(A)(4), a felony of the first degree, with a sexual motivation specification; two charges of rape in violation of R.C.

2907.02(A)(2), felonies of the first degree; and one charge of attempted rape, a felony of the second degree. The charges were the result of incidents that occurred in September 1999.

{¶ 3} On March 10, 2010, appellant entered a plea of guilty to an amended charge of gross sexual imposition in violation of R.C. 2907.05(A)(2), a felony of the third degree. All other counts were nolle.

{¶ 4} At the plea hearing, appellant was advised of the potential penalties, registration requirements, and constitutional rights associated with entering a guilty plea. The state informed the trial court that the victim was aware that appellant's possible prison term ranged from one to five years, and she was amenable to a two-year sentence.

{¶ 5} Addressing appellant's co-defendant, Neil Hull, who was convicted of the same crime against the same victim,<sup>1</sup> the court advised Hull that he would be subject to postrelease control:

{¶ 6} "COURT: Following prison, your — when you'd be released from prison, you'd be released on three years post-release control. If you violate that post-release control, you could be sent back to prison for half the time again. Do you understand that, parole?

{¶ 7} "DEFENDANT HULL: Yes sir."

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<sup>1</sup> The facts indicate that appellant and co-defendant Hull both raped the victim in September 1999. A rape kit was collected, and sperm from both men was identified in the specimen.

{¶ 8} During the plea colloquy, the trial court never specifically addressed appellant about postrelease control and failed to ask appellant whether he understood the terms of his postrelease control. Nevertheless, appellant pled guilty to one count of gross sexual imposition.

{¶ 9} When the trial court proceeded to sentencing, the state recommended a two-year sentence. The trial court then sentenced appellant to two years: “We’re gonna go with the sentence agreed, discussed, the two-year sentence \* \* \* I see Mr. White is not a threat to the state, to the community, so I will give him two weeks to turn himself in to get his medical affairs in order.” Finally, the court advised appellant of postrelease control and the possible one-year sentence for violating postrelease control.

{¶ 10} On March 24, 2010, appellant failed to turn himself in, and a capias was issued. Attorney Melania Giamaria, who is a social worker and sexual assault survivor’s advocate, represented the victim at the first sentencing hearing. Giamaria stated that on April 7, 2010, she observed appellant on the victim’s street when he was supposed to be in prison. Concerned for the victim’s safety, Giamaria immediately contacted the police, who then arrested appellant.

{¶ 11} Subsequently, a second sentencing hearing was held, and the trial court was asked to reconsider appellant’s sentence in light of his failure to appear on the specified date. The court gave appellant the option of either

having his plea vacated or being subject to a new sentence. The court explained:

{¶ 12} “I’m going to resentence him. I’m going to give you a sentence between one and five years. The chance of it going down are not good. The chance of it going up based on what I heard are good. \* \* \* Now, the court is giving you the option to withdraw your plea and go to trial if you like, on rape; giving you that chance, or you can take the felony three as they have offered you and we’re going to resentence you right now. I’m not accepting the sentence. You didn’t fulfill your end.”

{¶ 13} After being given time to consult with his attorney, appellant did not withdraw his plea, but proceeded to sentencing. Subsequently, the trial court revoked appellant’s two-year sentence and resentenced him to a three-year prison term based solely on his failure to surrender himself.

{¶ 14} Appellant now appeals, raising two assignments of error.<sup>2</sup>

## **Law and Analysis**

### **Postrelease Control**

{¶ 15} In his first assignment of error, appellant argues that the trial court failed to substantially comply with Crim.R. 11 when it took his plea

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<sup>2</sup> Appellant’s assignments of error are included in the appendix to this Opinion.

because it failed to properly advise him of the consequences of violating the terms of his postrelease control. We agree.

{¶ 16} The standard of review we must apply for compliance with the requirements set forth in Crim.R. 11(C) is de novo. *State v. Roberts*, Cuyahoga App. No. 89453, 2010-Ohio-3302, ¶19. Crim.R. 11(C)(2)(a) and (b), which deal with a trial court's acceptance of a plea of guilty to a felony offense, provide, "the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and \* \* \* [d]etermining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation[.]" and "[i]nforming the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment sentence."

{¶ 17} 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, 881 N.E.2d 1224, ¶25. Postrelease control is mandatory for first-degree, second-degree, and certain

third-degree felonies, including sexual offenses like gross sexual imposition. R.C. 2967.28(B).

**R.C. 2967.28(F)(3)**

{¶ 18} Appellant specifically contends that his plea cannot stand because the trial court did not inform him that he was subject to nine months of imprisonment for postrelease control violations under R.C. 2967.28(F)(3). Appellant argues that this information was essential to his making a knowing, intelligent, and voluntary plea.

{¶ 19} R.C. 2967.28(F)(3) lists several options a court may pursue in the event a person violates the terms of postrelease control, among them are the following: the court or Adult Parole Authority may impose a more restrictive sanction; increase the duration of postrelease control; impose a prison term for a single violation that may not exceed nine months or impose a cumulative prison term for multiple violations of up to one-half of the stated prison term originally imposed upon the offender. The nine-month option applies to single violations of postrelease control; if the offender commits more than one violation (multiple offenses), the court may order a cumulative sentence that does not exceed one-half of the originally imposed prison term.

{¶ 20} Given these multiple options, the General Assembly apparently decided it would be cumbersome to require the courts to advise an offender of every possible option that might occur in the event of a violation of postrelease

control. In *State v. Zganjer*, Cuyahoga App. No. 94724, 2011-Ohio-606, this court stated: “Instead of forcing the sentencing court to delve into the myriad of possibilities that could arise in the event of a future violation of postrelease control, the statute only requires the court to advise an offender of the maximum sanction that can be imposed in the event of a violation of postrelease control.”

{¶ 21} Accordingly, the trial court was not required to inform appellant that he would be subject to periods of imprisonment of nine months for subsequent violations of postrelease control. However, the court was required to advise appellant that a violation of his postrelease control could result in a prison term of up to one-half his original sentence. In contrast to *Zganjer*, the record in the instant case reflects that the trial court failed to directly advise appellant that he would be subject to a prison term of up to one-half his original sentence during his plea colloquy. As such, the trial court did not comply with the requirements of Crim.R. 11.

### **Crim.R. 11**

{¶ 22} Literal compliance with Crim.R. 11 is the preferred practice. However, the fact that the trial court did not strictly comply with Crim.R. 11 does not necessarily compel vacation of appellant’s guilty plea if the reviewing court determines that there was substantial compliance in regard to a



non-constitutional right.<sup>3</sup> *State v. Nero* (1990), 56 Ohio St.3d 106, 564 N.E.2d 474. “Unlike \* \* \* constitutional rights, which necessitate strict compliance, non-constitutional rights require that the trial court demonstrate substantial compliance. \* \* \* 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. Fink*, Ashtabula App. No. 2006-A-0035, 2007-Ohio-5220, ¶18, quoting *White*, *supra*, at ¶25.<sup>4</sup>

{¶ 23} When the trial court does not substantially comply with Crim.R. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court partially complied or failed to comply with the rule. If the trial court partially complied — e.g., by mentioning mandatory postrelease control without explaining it — the plea may be vacated only if appellant demonstrates a prejudicial effect. See *Nero* at 108, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163, and *Sarkozy* at ¶23. The test for prejudice is “whether the plea would have otherwise been made.” *Nero* at 108.

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<sup>3</sup> For a discussion of the constitutional and nonconstitutional rights involved, see *State v. White*, Lake App. No. 2002-L-146, 2004-Ohio-6474, ¶24-25.

<sup>4</sup> The statutory right to receive the plea notification of postrelease control under R.C. 2943.032 is similar to the nonconstitutional notifications of Crim.R. 11(C)(2) and, therefore, is 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.

{¶ 24} However, in *Sarkozy*, the Ohio Supreme Court held that when a trial court fails to mention postrelease control “at all” during the plea colloquy, the court fails to comply with Crim.R. 11, and the reviewing court must vacate the plea. *Sarkozy* at ¶22, 25. “A complete failure to comply with the rule does not implicate an analysis of prejudice.” *Id.* at ¶22.

{¶ 25} Here, the record indicates that the trial court failed to mention postrelease control “at all” during appellant’s plea colloquy. The only discussion of postrelease control was with appellant’s co-defendant Hull. Specifically, the court stated to Mr. Hull:

{¶ 26} “COURT : Following prison, your — when you’d be released from prison, you’d be released on three years post-release control. If you violate that post-release control, you could be sent back to prison for half the time again. Do you understand that, parole?

{¶ 27} “DEFENDANT HULL: Yes, sir.”

{¶ 28} This statement was directed towards Mr. Hull alone. A similar statement was not made to appellant. At no time prior to accepting appellant’s plea did the trial court indicate to appellant that he would be subject to postrelease control, nor did the court ask him if he understood the terms of his postrelease control. The trial court did not merely misinform appellant about the length of his term of postrelease control. It did not merely misinform him as to whether postrelease control was mandatory or

discretionary. Rather, the trial court failed to mention postrelease control “at all” during appellant’s plea colloquy. See *State v. DeV Vaughn*, Cuyahoga App. No. 82843, 2004-Ohio-154, at ¶4 (“We are unaware of any authority that would prohibit group guilty pleas, and note that such pleas have been the practice in the court of common pleas. Nevertheless, a plea colloquy requires the court to address the accused individually.”). Because the trial court failed, before accepting appellant’s guilty plea, to inform him of the mandatory term of postrelease control, which was a part of the maximum penalty, the court did not meet the requirements of Crim.R. 11(C)(2)(a). Accordingly, appellant’s March 10, 2010 plea must be vacated.

{¶ 29} Appellant’s remaining assignment of error is rendered moot by our analysis above. App.R. 12(A)(1)(c).

{¶ 30} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee 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

MARY J. BOYLE, P.J., and  
COLLEEN CONWAY COONEY, J., CONCUR

## APPENDIX

Appellant's assignments of error:

I. "The trial court erred to the prejudice of Mr. White when it failed to properly advise Mr. White about the terms of post-release control in violation of Crim.R. 11, R.C. 2929.19, and 2967.28, United States Constitution Amendments V and XIV, and Ohio Constitution Article [sic] I, Sections 10 & 16."

II. "The trial court erred when it failed to honor the plea agreement thereby rendering Mr. White's plea unknowing, and involuntary in violation of United States Constitution Amendments V and XIV and Ohio Constitution Article I, Section 10."