[Cite as *State v. Achtziger*, 2011-Ohio-333.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT

COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94752

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT W. ACHTZIGER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-523049

BEFORE: Blackmon, P.J., Sweeney, J., and Gallagher, J.

RELEASED AND JOURNALIZED: January 27, 2011

ATTORNEY FOR APPELLANT

Thomas A. Rein
Leader Building, Suite 940
526 Superior Avenue
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Daniel T. Van
Asst. County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Robert W. Achtziger appeals his plea and sentence and assigns the following errors for our review:

> **"I. Appellant did not enter his guilty plea knowingly, intelligently, or voluntarily because the trial court did not properly inform him that a violation of postrelease control would result in a nine month prison sentence."**
>
> **"II. Appellant is entitled to a de novo sentencing hearing as the court did not properly impose a period of postrelease control at the sentencing hearing."**
>
> **"III. Appellant's consecutive sentences are contrary to law and violative of due process because the trial court**

failed to make and articulate findings and reasons necessary to justify it."

{¶ 2} Having reviewed the record and pertinent law, we affirm Achtziger's conviction. The apposite facts follow.

Facts

{¶ 3} On April 27, 2009, the Cuyahoga County Grand Jury indicted Achtziger on 67 counts. He was charged with one count of rape and one count of kidnapping. The remaining 65 counts were for gross sexual imposition. All of the counts had a sexually violent predator specification attached. The counts arose from Achtziger's sexual molestation of two boys under the age of 10 over a period of years.

{¶ 4} On September 29, 2009, Achtziger entered a plea of guilty. As a result, the indictment was amended to reflect that all counts and specifications were deleted except for 10 counts of gross sexual imposition.

{¶ 5} On February 3, 2010, a sentencing hearing was conducted. The trial court sentenced Achtziger to five years on nine of the counts, to run concurrently. On the remaining count he was sentenced to three years to be served consecutively to the other counts, for a total of eight years in prison.

Guilty Plea

{¶ 6} In his first assigned error, Achtziger argues his plea should be vacated because the trial court failed to advise him of the consequences of violating the conditions of his postrelease control.

{¶ 7} The record reflects that before accepting Achtziger's plea, the trial court asked him if he understood that if the court were to impose a prison term, "there is a mandatory five years postrelease control." Achtziger responded affirmatively.

{¶ 8} Despite his admitted understanding that he would be subject to five years of mandatory postrelease control, Achtziger 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 conditions of postrelease control. He points to R.C. 2943.032, effective April 7, 2009, which provides that prior to accepting a plea, the trial court must advise the defendant that if he violates a period of postrelease control, the parole board may impose a new prison term of up to nine months. Achtziger contends that without being so advised, he could not understand the maximum penalty for the offenses to which he pled guilty; therefore, his plea was not knowingly, voluntarily, or intelligently made. Although we agree the trial court did fail to advise Achtziger of the consequences for violating postrelease control, we do not vacate the plea.

{¶ 9} 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, 897 N.E.2d 621, ¶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. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462. 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, subject to the substantial-compliance standard. *State v. McKissic,* Cuyahoga App. Nos. 92332 and 92333, 2010-Ohio-62; *State v. Evans,* Cuyahoga App. Nos. 84966 and 86219, 2005-Ohio-5971, ¶11, citing *State v. Brown*, 11th Dist. Nos. C-020162 and C-020164, 2002-Ohio-5983, ¶30 and *State v. Gulley*, 11th Dist No. C-040675, 2005-Ohio-4592, ¶18.

{¶ 10} "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, 564 N.E.2d 474; *State v. Stewart* (1977), 51 Ohio St.2d 86, 93, 364 N.E.2d 1163. "[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, 664 N.E.2d 959. Further, a defendant must show prejudice before a plea will be vacated for a trial court's error involving nonconstitutional rights. *Veney* at ¶17. The test for prejudice is whether the plea would have otherwise been made. Id.

{¶ 11} 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, 881 N.E.2d 1224; see, also, *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶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.")

{¶ 12} We conclude that the trial court substantially complied with the requirements of Crim.R. 11(C) and R.C. 2943.032 in advising Achtziger about postrelease control. Despite its failure to advise him that he could be subject to prison if he violated postrelease control, the court sufficiently apprised him of the possibility of postrelease control. Achtziger has failed to show that he was prejudiced by the trial court's failure to advise him of the consequences of violating postrelease control, and, in fact, makes no argument whatsoever that he would not have pled guilty if the court had so advised him; therefore, his plea is valid. *McKissic*; *State v. Conner*, Cuyahoga App. No. 93953, 2010-Ohio-4353; *State v. Kupay-Zimerman*, Cuyahoga App. No. 92043, 2009-Ohio-3596. Accordingly, Achtziger's first assigned error is overruled.

De Novo Sentencing Hearing

{¶ 13} In his second assigned error, Achtziger claims the trial court is required to conduct a de novo sentencing hearing because it failed to inform him at the sentencing hearing that he faced five-years of mandatory postrelease control and also failed to advise him of the consequences for violating postrelease control. While the state concedes that error occurred, our review of the record indicates the trial court properly advised Achtziger.

{¶ 14} At the sentencing hearing, the trial court did advise Achtziger that if it imposed a prison term, the parole authority "will supervise the defendant for five years under what is called postrelease control." Later, when imposing the sentence, the trial court imposed eight years in prison and "five years of postrelease control." The court did not say "up to five years" or "possibly five years." The court stated "five years." The advisement complied with the requirement pursuant to R.C. 2929.19(B)(3) that the court "shall" notify the offender at the sentencing hearing that he will be subject to postrelease control after he leaves prison. This is not a case where the court failed to entirely provide notice of postrelease control. Moreover, the trial court properly stated that the postrelease term was for a mandatory five years in the sentencing entry. *State v. Lang*, Cuyahoga App. No. 92099, 2010-Ohio-433.

{¶ 15} Although Achtziger argues the trial court failed to inform him of the consequences of postrelease control, the trial court did explain that if it imposed prison and postrelease control and: "he fails to meet the terms and conditions of postrelease control supervision, then the Adult Parole Authority can modify and/or extend the supervision and make it more restrictive, incarcerate the defendant for up to one-half the original sentence imposed by the Court * * *." Tr. 16. Achtziger was also notified of the consequences in his sentencing journal entry. Accordingly, we conclude no error occurred and overrule Achtziger's second assigned error.

Consecutive Sentences

{¶ 16} In his third assigned error, Achtziger argues that the trial court erred by imposing consecutive sentences without making findings under R.C. 2929.14(E)(4) and asserts that the holding in *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, that the statute was unconstitutional is no longer valid in light of *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517.

{¶ 17} The Ohio Supreme Court in *State v. Hodge,* ___ Ohio St.3d ___, 2010-Ohio-6320, recently rejected this identical argument. The Court concluded that *Ice* did not require it to depart from its holding in *Foster,* because "there is no constitutional requirement that a judge make findings of fact before imposing consecutive sentences" and requiring resentencing to

include findings of fact would "disrupt reasonable and settled expectations of finality," and impose an "undue burden on the judicial system." ¶30-32. Accordingly, Achtziger's third assigned error is overruled.

Judgment affirmed.

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 be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

PATRICIA ANN BLACKMON, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
SEAN C. GALLAGHER, J., CONCUR