

[Cite as *State v. Shaffer*, 2011-Ohio-844.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 95273 and 95274

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JIMMY SHAFFER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART, REVERSED AND
REMANDED IN PART**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-529102

BEFORE: Jones, J., Sweeney, P.J., and Rocco, J.

RELEASED AND JOURNALIZED: February 24, 2011

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LARRY A. JONES, J.:

{¶ 1} In Appeal No. 95273, defendant-appellant, Jimmy Shaffer, appeals from the trial court’s January 21, 2010 sentencing entry. In Appeal No. 95274, Shaffer appeals from the trial court’s May 12, 2010 judgment denying his motion “to merge multiple convictions and correct void sentence.” Both appeals result from trial court Case No. CR-529102-A and have been consolidated. We affirm in part and reverse and remand in part.

I. Procedural History

{¶ 2} Shaffer was indicted on the following seven counts: Count 1, trafficking in

drugs, with a one-year firearm specification; Count 2, drug possession, with a one-year firearm specification; Count 3, drug trafficking, with a one-year firearm specification; Count 4, drug possession, with a one-year firearm specification; Count 5, possession of criminal tools; Count 6, endangering children; and Count 7, having a weapon while under disability, with a one-year firearm specification. The counts also contained several forfeiture specifications.

{¶ 3} After negotiations with the state, Shaffer pleaded guilty to Count 1, drug trafficking, with a one-year firearm specification, and agreed to forfeit several items. The remaining counts were nolle. Shaffer was sentenced to one year for the trafficking charge, to be served consecutive to one year for the firearm specification.

{¶ 4} Postsentencing, Shaffer filed a motion “to merge multiple convictions and to correct void sentence.” In that motion, he contended that the trial court erred by not merging the sentences for allied offenses. The court denied the motion.

{¶ 5} On appeal, Shaffer was appointed counsel. After his review of the case, appellate counsel filed a motion to withdraw and a brief under *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, in support of his motion.¹ This court granted

¹*Anders* sets forth the procedure appointed appellate counsel must follow when he or she wishes to withdraw for lack of any meritorious appealable issues. There, the United States Supreme Court held that if counsel does a conscientious examination of the case and determines an appeal to be frivolous, counsel should advise the court and then should request permission to withdraw. *Id.* at 744. Counsel must also give his or her client a copy of the brief along with the request to withdraw. *Id.* The appellant then must be given sufficient time to raise any matters he so chooses. *Id.* After those requirements are satisfied, the appellate court must conduct a thorough examination of the proceedings to determine if the

the motion and gave leave to Shaffer to file a brief pro se,² which he has done.

{¶ 6} Shaffer assigns the following three assignments of error for our review:

“Assignment of error one: The trial court committed plain error in imposing a sentence contrary to [R.C.] 2941.25(A) violating the Defendant’s Double Jeopardy rights of the U.S.C.A. and the Ohio Constitution that are codified in [R.C.] 2941.25(A).

“Assignment of error two: The trial court erred in imposing post release [sic] control without informing the Defendant that he can face up to 36 months additional imprisonment due to [R.C.] 2929.141.

“Assignment of error three: The trial court erred in imposing the collection costs without allowing the Defendant to move for a waiver of the collection of those costs as he was found indigent by the court.”

II. Analysis

A. Merger

{¶ 7} In his first assignment of error, Shaffer contends that the trial court erroneously sentenced him and erred by denying his motion “to merge multiple convictions and to correct void sentence.” We disagree.

{¶ 8} Shaffer pleaded guilty to one count of the indictment, Count 1, drug trafficking, with a one-year firearm specification. He did not plead guilty to multiple counts. A firearm specification is not a charge in and of itself. Rather, it is a penalty enhancement, for which a

appeal is actually frivolous. *Id.* If the appellate court does determine the appeal is frivolous, it may then grant counsel’s request to withdraw and then dismiss the appeal without violating any constitutional requirements, or the court can proceed to a decision on the merits if state law requires it. *Id.*

²See motion no. 436444.

mandatory term of incarceration as an enhancement to the actual sentence imposed for the commission of the crime as set forth in indictment must be imposed. *State v. Ervin* (1994), 93 Ohio App.3d 178, 180-181, 638 N.E.2d 104; R.C. 2941.141. Accordingly, the first assignment of error is overruled.

B. Postrelease Control

{¶ 9} For his second assigned error, Shaffer contends that the trial court failed to properly advise him of postrelease control. Specifically, he contends that the trial court failed to advise him that if he committed a new felony he could be sentenced to an additional three years under R.C. 2929.141.

{¶ 10} R.C. 2929.141, governing commission of an offense while under postrelease control, provides that “[t]he maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the releasee has spent under post-release control for the earlier felony.”

{¶ 11} At the plea hearing, the court advised Shaffer that, “for three years after you’re released the Adult Parole Authority will supervise you. If you violate the rules or conditions they set, then the Adult Parole Authority can send you back to prison to do additional time up to one half the time I imposed at sentencing. * * * Also, during that three-year period * * * if you fail to report to your parole officer, they’re going to charge you with a new charge of escape.” The court did not advise Shaffer that if he committed a new felony while on

postrelease control, he could receive a prison term “the greater of twelve months or the period of post-release control.”

{¶ 12} It has been held, however, that trial courts are not required to inform a defendant at the change of plea hearing of the possibility that it could impose a prison term for committing a new felony while on postrelease control. See *State v. Lane*, Allen App. No. 1-10-10, 2010-Ohio-4819, ¶15; *State v. Lamb*, 156 Ohio App.3d 128, 2004-Ohio-474, 804 N.E.2d 1027, ¶17; see, also, *State v. Susany*, Mahoning App. No. 07 MA 7, 2008-Ohio-1543, ¶95 (finding that there is no authority that states a defendant must be advised that upon the commission of a new offense, a defendant is subject to additional prison time for any felony committed while on postrelease control; failing to so advise a defendant will still result in substantial compliance with Crim.R. 11(C)(2)(a)); *State v. Mullins*, Butler App. No. CA2007-01-028, 2008-Ohio-1995, ¶12-13 (finding no error in the trial court’s failure, at the defendant’s original sentencing hearing, to inform him of the potential sentence for committing a new felony while on postrelease control); *State v. Witherspoon*, Cuyahoga App. No. 90498, 2008-Ohio-4092, ¶¶17-19 fn. 11 (stating that “although defendants were not apprised of all the ramifications of their postrelease control, as long as they were advised that their liberty could continue to be restrained after sentencing, this provided adequate notice.”).

{¶ 13} Further, in *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, the Ohio Supreme Court discussed omissions from postrelease control notifications.

The Court did not mention the failure to advise the defendant about the sanctions for the commission of a new felony while on postrelease control. Instead, the court took issue with the trial court's failure to advise the defendant at his plea that he would be subject to a mandatory five-year period of postrelease control and that a violation of the conditions of postrelease control could result in a prison term of up to one-half of the original prison term. Id. at ¶15, 23-24.

{¶ 14} In addressing a situation similar to this case, the Seventh Appellate District stated that the discussion in *Sarkozy* “supports the conclusion that the notification regarding the commission of a new felony is not part of the requirements for a knowing, intelligent, and voluntary plea.” *State v. Black*, Columbiana App. No. 09 CO 15, 2010-Ohio-2701, ¶30. The Seventh District further stated that “even if this were a partial, as opposed to a full, post-release control notification, vacation of the plea is not required. Pursuant to Crim.R. 11(C)(2)(a), the court must determine that the defendant is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved. This is the provision said to be implicated in the case of a faulty post-release control notification. See *Sarkozy*, 117 Ohio St.3d 86 at ¶8-11.

{¶ 15} “Partial post-release control notifications at a plea hearing are evaluated under the substantial compliance test for non-constitutional rights. Id. at ¶20, 23. Under this test, the appellate court reviews the totality of the circumstances concerning the plea to determine

whether appellant subjectively understood the effect of the plea. *Id.* The defendant must also show prejudice from the lack of full compliance in order to warrant plea withdrawal, i.e. he must show the plea would not have otherwise been made. *Id.*” (One citation omitted.) *Black* at ¶131-32.

{¶ 16} Here, the trial court informed Shaffer that he would be under postrelease control for three years and that if he violated the terms of his postrelease control, he could serve up to one-half of his original prison sentence. On this record, we find that the trial court substantially complied with Crim.R. 11(C)(2)(a). See *Lane*, *supra* at ¶116. Further, Shaffer has not alleged that he would not have entered a guilty plea had he been advised of the possibility that the trial court could impose a prison term for committing a new felony while on postrelease control.

{¶ 17} In light of the above, the second assignment of error is overruled.

C. Court Costs

{¶ 18} For his final assignment of error, Shaffer challenges the imposition of court costs. At the sentencing hearing, the trial court told Shaffer, “I’m not imposing court costs because you just lost your job recently.” The sentencing entry states, however, “defendant is to pay court costs.” In *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, the Ohio Supreme Court held that “a court errs in imposing court costs without so informing a defendant in open court but that [] error does not void the defendant’s entire sentence.” *Id.*

at ¶1.

{¶ 19} Accordingly, the third assignment of error is sustained. Upon remand, the court is to issue a new sentencing entry deleting the imposition of court costs to Shaffer.

Affirmed in part; reversed and remanded in part.

It is ordered that appellant recover of 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. 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.

LARRY A. JONES, JUDGE

JAMES J. SWEENEY, P.J., and
KENNETH A. ROCCO, J., CONCUR