

[Cite as *State v. Thomas*, 2015-Ohio-2152.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101630

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TIMOTHY THOMAS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; VACATED IN PART
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-581697-A

BEFORE: Jones, P.J., Kilbane, J., and McCormack, J.

RELEASED AND JOURNALIZED: June 4, 2015

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LARRY A. JONES, SR., P.J.:

{¶1} Defendant-appellant, Timothy Thomas, appeals his conviction and sentence for attempted murder with a one-year firearm specification and having weapons while under disability. We affirm his conviction, but remand for the limited purpose of advising Thomas on postrelease control.

{¶2} In March 2014, Thomas was charged in the shooting of his wife with two counts of felonious assault and one count each of kidnapping, attempted murder, improper handling of a firearm in a motor vehicle, and having weapons while under disability. The felonious assault, kidnapping, and attempted murder charges contained one- and three-year firearm specifications.

{¶3} In May 2015, Thomas pleaded guilty to attempted murder with a one-year firearm specification and having weapons while under disability. The trial court sentenced Thomas to a total of six years in prison.

{¶4} Thomas appeals and raises the following assignments of error for our review:

I. The trial court erred by accepting appellant's plea of guilty without first informing appellant of the maximum sentence he could receive.

II: Appellant's guilty plea was not knowingly, intelligently and voluntarily made.

III: The trial court erred by imposing postrelease control because it did not provide proper notice at the sentencing hearing.

{¶5} In the first and second assignments of error, Thomas claims that his plea was not knowingly, intelligently, and voluntarily made because he was not properly informed of the maximum sentence he could receive and he never admitted his guilt.

{¶6} Crim.R. 11(C) governs the process by which a trial court must inform a defendant of certain constitutional and nonconstitutional rights before accepting a felony plea of guilty or no contest. The underlying purpose of Crim.R. 11(C) is to convey certain information to a defendant so that he or she can make a voluntary and intelligent decision regarding whether to plead guilty. *State v. Schmick*, 8th Dist. Cuyahoga No. 95210, 2011-Ohio-2263, ¶ 5.

{¶7} To ensure that a defendant enters a plea knowingly, voluntarily, and intelligently, a trial court must engage in an oral dialogue with the defendant in accordance with Crim.R. 11(C)(2). *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). Crim.R. 11(C)(2) requires that a trial court determine from a colloquy with the defendant whether the defendant understands (1) the nature of the charge and maximum penalty, (2) the effect of the guilty plea, and (3) the constitutional rights waived by pleading guilty.

{¶8} A trial court must strictly comply with the requirements that relate to the waiver of constitutional rights under Crim.R. 11(C)(2)(c). *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 18. Thus, under the more stringent standard for constitutionally protected rights, a trial court's acceptance of a guilty plea will be affirmed only if the trial court engaged in meaningful dialogue with the defendant that, in substance, explained the pertinent constitutional rights "in a manner reasonably intelligible to that defendant." *Id.* at ¶ 27, citing *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981).

{¶9} With respect to the nonconstitutional requirements of Crim.R. 11, set forth in Crim.R. 11(C)(2)(a) and (b), a reviewing court will consider whether there was “substantial compliance” with the rule. *Veney* at ¶ 14-17. Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his or her plea and the rights he or she is waiving. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). “[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*, 105 Ohio App.3d 567, 572, 664 N.E.2d 959 (4th Dist.1995). Further, a defendant must show prejudice before a plea will be vacated for a trial court’s error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the plea colloquy are at issue. *Veney* at ¶ 17. Crim.R. 11(C)(2)(a) requires the court to determine that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved. Therefore, a trial court must substantially comply with this requirement.

{¶10} Thomas claims that the trial court did not properly advise him of the maximum penalties he faced because the court did not inform him he could be subject to additional prison time for being found a probation violator in a prior case by pleading guilty in his current case. We disagree.

{¶11} The right to be informed of maximum penalty involved is reviewed for substantial compliance. *See State v. Thomas*, 8th Dist. Cuyahoga No. 101263, 2014-Ohio-5153, ¶ 9. Thomas has provided no authority to support his claim that the

trial court was required to inform him that he was subject to additional prison time as a probation violator if he pleaded guilty in his current case. Even if the court did err, a trial court's failure to tell the defendant the effect of a plea to a felony does not invalidate the plea unless an appellant shows that he or she was prejudiced by the court's failure to substantially comply with the rule. *State v. Griggs*, 103 Ohio St.2d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12. Thomas has not shown that he was prejudiced by any alleged omission.

{¶12} The record reflects that the trial court held a violation hearing on May 13, 2014, found Thomas to be in violation, and terminated Thomas's community control sanctions in his prior case, Cuyahoga C.P. No. CR-12-564649. The trial court issued a journal entry indicating the same on May 15, 2014. The court did not impose additional prison time on Thomas as a result of him violating his community control sanctions in that case. Thus, Thomas has not shown he was prejudiced by his guilty plea in this case.

{¶13} Thomas further argues that he never admitted his guilt. But the record shows that the trial court adhered to the requirements of Crim.R. 11. The trial court advised Thomas of the rights he would be waiving, including the right to a jury trial, the right to counsel, the right to subpoena witnesses, and the requirement that at trial the state would have to prove his guilt beyond a reasonable doubt. The court permitted Thomas to inquire about the rights he was waiving as well as the court process. The court explained and clarified those points mentioned by Thomas and inquired whether he understood what was explained. Thomas responded "Yes. I think I understand, sir."

{¶14} The trial court explained each charge to Thomas, informed him of the maximum time he could receive on each count, and explained to him the sentencing range for each offense to which he was pleading guilty. The trial court informed Thomas that by pleading guilty, he was facing 3 to 11 years with an additional 1 year on the firearm specification for attempted murder and an additional 9 to 30 months for having weapons while under disability and advised him that he was subject to postrelease control. Thomas told the court he understood the possible penalties involved in his plea. The court asked him how he pled to each count, and Thomas replied, “Guilty, if I’m not mistaken.”

{¶15} Based on the above facts, the first and second assignments of error are overruled.

{¶16} In the third assignment of error, Thomas argues that the trial court erred by failing to properly advise him of postrelease control at the sentencing hearing. The state concedes the issue.

{¶17} “It is mandatory that every person ordered to serve a term of postrelease control be notified of the consequences for a violation of postrelease control.” *State v. Loyed*, 8th Dist. Cuyahoga No. 101504, 2014-Ohio-5141, ¶ 5, citing *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 8. When a trial court fails to properly impose statutorily mandated postrelease control as part of a defendant’s sentence, the postrelease control sanction is void. *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 5.

{¶18} Here, the trial court failed to inform Thomas of the consequences if he violated the conditions of his postrelease control. The new sentencing hearing to which he is entitled, however, is limited to proper imposition of postrelease control. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, paragraph two of the syllabus; *see also State v. White*, 8th Dist. Cuyahoga No. 99280, 2013-Ohio-3808, ¶ 9; *State v. Jones*, 8th Dist. Cuyahoga No. 95882, 2011-Ohio-2929, ¶ 8; *State v. Braddy*, 8th Dist. Cuyahoga No. 97816, 2012-Ohio-4720, ¶ 7.

{¶19} The third assignment of error is sustained.

{¶20} Judgment affirmed in part; vacated in part. Case remanded for a new sentencing hearing limited to the advisement of postrelease control.

It is ordered that appellant and appellee split the 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.

LARRY A. JONES, SR., PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
TIM McCORMACK, J., CONCUR