

[Cite as *State v. Gonzalez*, 2015-Ohio-673.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100848

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSE M. GONZALEZ

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-575397-A

BEFORE: Kilbane, P.J., Stewart, J., and Boyle, J.

RELEASED AND JOURNALIZED: February 26, 2015

ATTORNEY FOR APPELLANT

Edward M. Graham
Edward M. Graham Co., L.P.A.
13363 Madison Avenue
Lakewood, Ohio 44107

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
Margaret A. Troia
Brian R. Radigan
Assistant County Prosecutors
The Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Jose Gonzalez (“Gonzalez”), appeals from his guilty plea to gross sexual imposition and rape. For the reasons set forth below, we affirm.

{¶2} In July 2013, Gonzalez was charged in a three-count indictment. Count 1 charged him with the rape of his seven-year-old granddaughter, in violation of R.C. 2907.02(A)(1)(b), and carried a furthermore specification stating that his granddaughter was less than ten years of age. Count 2 charged him with the gross sexual imposition (“GSI”) of his granddaughter, in violation of R.C. 2907.05(A)(4). Count 3 charged him with the kidnapping of his granddaughter, in violation of R.C. 2905.01(A)(4), and carried a sexual motivation specification.

{¶3} Pursuant to a plea agreement, Gonzalez pled guilty to GSI and an amended count of rape. The rape count was amended by deleting the furthermore specification and changing the violation to R.C. 2907.02(A)(2). The kidnapping charge was dismissed. Gonzalez was then referred for a presentence investigation report and returned to the trial court for sentencing in December 2013. At that hearing, the trial court merged the rape and GSI counts for purposes of sentencing. The state of Ohio elected to proceed with sentencing on the rape count. The court sentenced Gonzalez to 11 years in prison, classified him as a Tier III sex offender, imposed a \$20,000 fine, and imposed five years of postrelease control.

{¶4} Gonzalez now appeals, raising the following single assignment of error for review.

Assignment of Error

The court committed plain error in violation of [Gonzalez’s] constitutional rights by accepting the plea of [Gonzalez] that was not made knowingly, intelligently, and voluntarily.

{¶5} In his sole assignment of error, Gonzalez challenges his plea, claiming that it was not knowingly, intelligently, and voluntarily made.

{¶6} Crim.R. 11(C)(2) requires that when a defendant pleads guilty, the trial court must personally address the defendant and (1) determine that the defendant is making the plea voluntarily with an understanding of the nature of the charges and the maximum penalty; (2) ensure the defendant understands the effect of the plea and that the court may proceed with judgment after accepting the plea; and (3) inform the defendant and ensure that the defendant understands that he is waiving his constitutional rights to a jury trial, to confront witnesses against him, to call witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial where the defendant cannot be forced to testify against himself.

{¶7} A trial court must strictly comply with the Crim.R. 11(C)(2)(c) requirements regarding the waiver of constitutional rights, which means that the court must actually inform the defendant of the constitutional rights he is waiving and make sure the defendant understands them. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 18, 27.

{¶8} With respect to nonconstitutional rights, which are set forth in Crim.R. 11(C)(2)(a) and (b), “substantial compliance” is sufficient. *Id.* at ¶ 14, citing *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977). “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*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990), citing *Stewart*. “Under this standard, a slight deviation from the text of the rule is permissible; so long as the totality of the circumstances indicates that ‘the defendant subjectively understands the implications of his plea and the rights he is waiving.’” *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 31, quoting *Nero* at 108.

{¶9} When the trial court does not “substantially comply” with Crim.R. 11(C)(2)(a), a reviewing court must then “determine whether the trial court *partially* complied *or failed* to comply with this rule.” (Emphasis sic.) *Clark* at ¶ 32. See also *State v. Soltis*, 8th Dist. Cuyahoga No. 92574, 2009-Ohio-6636, citing *Clark*. “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.” *Id.*, citing *Nero*. The test for prejudice is “whether the plea would have otherwise been made.” *Nero* at 108.

{¶10} Gonzalez argues the trial court failed to advise him: (1) that a violation of postrelease control may result in additional prison time; (2) of the Tier III reporting obligations; and (3) of the correct penalty for failing to comply with the Tier III reporting requirements.

{¶11} We note that the trial court must provide the defendant information pertaining to postrelease control during the plea hearing. *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d 78, ¶ 44, citing *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171, 733 N.E.2d 1103, paragraph two of the syllabus. In cases involving a mandatory period of postrelease control, postrelease control is part “of the maximum penalty involved in an offense for which a prison term will be imposed.” *State v. Perry*, 8th Dist. Cuyahoga No. 82085, 2003-Ohio-6344, ¶ 10, citing *State v. Jones*, 8th Dist. Cuyahoga No. 77657, 2001 Ohio App. LEXIS 2330 (May 24, 2001). We further note that the advisement regarding the sexual offender classification and requirements are also part of the “maximum penalty involved.” *State v. Allen*, 8th Dist. Cuyahoga No. 97820, 2013-Ohio-258, ¶ 12, citing *State v. Creed*, 8th Dist. Cuyahoga No. 97317, 2012-Ohio-2627. The advisement about the maximum penalty involved is a nonconstitutional right. *State v. Owens*, 8th Dist. Cuyahoga Nos. 100398 and 100399, 2014-Ohio-2275, ¶ 7, citing *State v. McKissic*, 8th Dist. Cuyahoga Nos. 92332 and 92333,

2010-Ohio-62, ¶ 13. Therefore, the substantial compliance rule applies. *Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, at ¶ 31.

{¶12} In the instant case, the trial court advised Gonzalez as follows:

THE COURT: [The prosecutor] ask[ed] the court to amend Count 1 to reflect a violation of 2907.02(A)(2) and, further, to take away the furthermore clause.

Do you understand?

THE DEFENDANT: I understand, your Honor.

THE COURT: And that charge is punishable by a possible term of incarceration of 3 to 11 years in yearly increments.

Do you understand?

THE DEFENDANT: I understand, your Honor.

THE COURT: It is a probational offense, but it does carry a presumption in favor of prison.

Do you understand?

THE DEFENDANT: I understand, your Honor.

THE COURT: In addition to which there's a mandatory period of 5 years of post-release control and reporting requirements and you'll be labeled as a Tier 3 sex offender with reporting requirements every 90 days of your residence, place of employment and education for the rest of your life.

Do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: And failure to adhere to or abide by those reporting requirements could result in additional consequences, up to and including re-indictment on another felony charge.

Do you understand?

THE DEFENDANT: I understand, your Honor.

THE COURT: And you're also precluded as a result of that label from residing within a thousand feet of a school or a daycare center having visible signage or any establishment having to do with the housing of children.

Do you understand?

THE DEFENDANT: I understand, your Honor.

{¶13} With respect to postrelease control, the trial court advised Gonzalez that there is a mandatory period of five years of postrelease control, which carried reporting requirements. The court also advised that the failure to abide by the postrelease control reporting requirements could result in additional consequences, up to and including reindictment on another felony charge. In response, Gonzalez stated that he understood. Because the trial court did not specifically inform Gonzalez that a postrelease control violation may result in a prison term of up to one-half of his original sentence, the trial court only partially complied in informing Gonzalez of the maximum possible penalty that could be imposed. *State v. White*, 8th Dist. Cuyahoga No. 95098, 2011-Ohio-1562, ¶ 21. Thus, we must determine if Gonzalez demonstrated whether his plea would have otherwise been made.

{¶14} In the instant case, we find no evidence that Gonzalez was prejudiced when the trial court did not explicitly state that a postrelease control violation may result in a prison term of up to one-half of his original sentence. Gonzalez received a large reduction in his sentence by virtue of his plea. He faced life in prison with his initial charges, but instead was sentenced to 11 years in prison. Furthermore, Gonzalez has presented no evidence or even an argument that he would not have entered his plea and would have insisted on going to trial if he knew of the ramifications associated with postrelease control. *Soltis*, 2009-Ohio-6636. *See also State v. Clark*, 11th Dist. Ashtabula No. 2006-A-0004, 2008-Ohio-6768 (where on remand from the Ohio Supreme Court, the Eleventh District Court of Appeals refused to vacate defendant's guilty plea

because the record contained no evidence that suggested defendant would not have entered his plea and would have insisted on going to trial if he knew of the ramifications associated with postrelease control).

{¶15} Based on the foregoing, we find that the trial court substantially complied with Crim.R. 11(C).

{¶16} With respect to the Tier III notification and requirements, the trial court advised Gonzalez that he will be labeled a Tier III sex offender, which carried reporting requirements of every 90 days of his residence, place of employment, and education for the rest of his life. The court also advised that he is precluded from residing within a 1000 feet of a school or a daycare center having visible signage or any establishment having to do with the housing of children. Gonzalez indicated that he understood these requirements.

{¶17} We note that the “[t]he trial court is not ‘required to review each of the numerous individual restrictions set forth in R.C. Chapter 2950’ in order to substantially comply with Crim.R. 11 in advising a defendant regarding his sexual offender classification.” *Allen*, 8th Dist. Cuyahoga No. 97820, 2013-Ohio-258, at ¶ 12, quoting *Creed*, 8th Dist. Cuyahoga No. 97317, 2012-Ohio-2627, at ¶ 16.

{¶18} In this case, we find that under the totality of the circumstances, Gonzalez subjectively understood that by pleading guilty to rape and GSI, he would be subject to certain restrictions as a Tier III sex offender. Additionally, the trial court asked Gonzalez if he had any questions about the plea and the possible consequences. Gonzalez responded, “no.” Therefore, the record demonstrates that the trial court substantially complied in advising Gonzalez that he would be classified a Tier III offender.

{¶19} Accordingly, the sole assignment of error is overruled

{¶20} Judgment is affirmed.

It is ordered that appellee recover from appellant 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.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., and
MARY J. BOYLE, J., CONCUR