[Cite as *State v. Souris*, 2009-Ohio-3562.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. MANUEL STEVE SOURIS Appellant	C. A. No. 24550 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 07 10 3314

DECISION AND JOURNAL ENTRY

Dated: July 22, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, Manuel Souris, appeals from his conviction in the Summit County Court of Common Pleas. This Court reverses.

I

{¶2} On October 10, 2007, a grand jury indicted Souris on one count of nonsupport of dependents, a fifth-degree felony, in violation of R.C. 2919.21(A)(2)/(B). On July 3, 2008, a supplemental indictment was filed, adding a second count of nonsupport of dependents. The trial court held a plea hearing on October 7, 2008, and Souris pleaded guilty to one count of nonsupport of dependents in exchange for the dismissal of the other count. On November 6, 2008, the trial court sentenced Souris to one year in prison. The trial court's sentencing entry also provided that "[a]fter release from prison, [Souris] is ordered subject to post-release control of 3 years or less, as provided by law."

{¶3} Souris now appeals from his conviction and raises one assignment of error for our review.

II

Assignment of Error

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ACCEPTING DEFENDANT'S GUILTY PLEA ON THE GROUNDS THAT UNDER STATE V. SARKOZY, (2008) 117 OHIO ST.3D 86, THE TRIAL COURT FAILED TO COMPLY WITH CRIM. R. 11 DURING DEFENDANT'S PLEA COLLOQUY BY NOT ADVISING DEFENDANT THAT HIS SENTENCE WOULD INCLUDE A MANDATORY TERM OF POSTRELEASE CONTROL[.]"

{¶4} In his sole assignment of error, Souris argues that the trial court erred by accepting his guilty plea without notifying him that his sentence would include a mandatory term of post-release control. Specifically, Souris argues that the trial court's failure to advise him of post-release control at his plea hearing mandates a vacation of his plea on the basis that it was not knowingly, intelligently, and voluntarily made. We agree.

{¶5} This Court has held that:

> "The basic tenets of due process require that a guilty plea be made knowingly, intelligently, and voluntarily. Failure on any of these points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution. A determination of whether a plea is knowing, intelligent, and voluntary is based upon a review of the record. If a criminal defendant claims that his guilty plea was not knowingly, voluntarily, and intelligently made, then the reviewing court must review the totality of the circumstances in order to determine whether or not the defendant's claim has merit." (Internal quotations and citations omitted.) *State v. Liu*, 9th Dist. No. 24112, 2008-Ohio-6793, at ¶14.

A defendant does not have a constitutional right to be advised of post-release control or the maximum penalty for his offense during his plea colloquy. *State v. Garrett*, 9th Dist. No. 24377, 2009-Ohio-2559, at ¶13; *State v. Wagner*, 9th Dist. No. 08CA0063-M, 2009-Ohio-2790, at ¶8. Accordingly, a defendant's plea will stand so long as the trial court substantially complied with Crim.R. 11. *Garrett* at ¶10-13. If the trial court completely failed to comply with the rule,

however, the defendant's plea must be vacated. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, paragraph two of the syllabus (vacating a plea where the trial court utterly failed to advise the defendant of a mandatory term of post-release control during his plea colloquy).

{¶6} R.C. 2967.28(C) provides, in relevant part, that:

> "Any sentence to a prison term for a felony of the *** fifth degree *** shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender."

For fifth-degree felony offenders, the parole board must decide "whether a post-release control sanction is necessary and, if so, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances." R.C. 2967.28(D)(1). Accordingly, post-release control is not mandatory for fifth-degree felony offenders. Id.; *Woods v. Telb* (2000), 89 Ohio St.3d 504, 508. Even so, for a defendant to knowingly, intelligently, and voluntarily enter a plea, he must be informed that the offense to which he is pleading is an offense for which post-release control is a possibility. *State v. Douglas*, 8th Dist. Nos. 85525 & 85526, 2006-Ohio-536, at ¶9.

{¶7} The State concedes that the trial court failed to notify Souris of the possibility of post-release control before accepting his plea. The State argues, however, that "where the period of post-release control is discretionary a trial court can hardly inform the defendant that the maximum sentence might include post-release control or it might not[.]" We disagree. Even if post-release control is discretionary, a defendant must be informed of the possibility of post-release control before a court may accept his plea. Id. Otherwise, the defendant will have agreed to plead guilty without full knowledge of the maximum sentence that he may receive. See *State v. Gordon*, 9th Dist. No. 07CA0055, 2008-Ohio-341, at ¶5 ("Terms of post-release control are

part of a defendant's actual sentence."). Failing to inform a defendant of discretionary post-release control is no different than failing to inform a defendant of the full sentencing guideline range applicable to his offense. Even if a trial court sentences a defendant to less than the maximum, the imposition of the maximum sentence is always a possibility, and the law requires that the defendant be informed of that possibility before entering a plea of guilt. See Crim.R. 11(a). We fail to see how a different standard can apply to the possible imposition of discretionary post-release control.

{¶8} The trial court included a notification of post-release control in Souris' sentencing entry, but did not notify him of post-release control during the plea colloquy. Nor did Souris sign any type of written plea agreement that might have contained a notification regarding discretionary post-release control. The record reflects that Souris entered his plea without any indication that he might be subject to post-release control. As such, we must conclude that the trial court completely failed to comply with Crim.R. 11. *Garrett* at ¶10-13; *Sarkozy* at ¶22. Because Souris did not knowingly, intelligently, and voluntarily enter his plea, his plea must be vacated. Souris' sole assignment of error is sustained.

III

{¶9} Souris' sole assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed, and the cause is remanded for further proceedings consistent with the foregoing opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
CONCURS

SLABY, J.
DISSENTS, SAYING:

{¶10} In *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, the Supreme Court of Ohio held:

> "1. If a trial court fails during a plea colloquy to advise a defendant that the sentence will include a *mandatory* term of postrelease control, the defendant may dispute the knowing, intelligent, and voluntary nature of the plea either by filing a motion to withdraw the plea or upon direct appeal.
>
> "2. If the trial court fails during the plea colloquy to advise a defendant that the sentence will include a *mandatory* term of postrelease control, the court fails to

> comply with Crim.R. 11, and the reviewing court must vacate the plea and remand the cause." (Emphasis added.) Id. at syllabus.

I am reluctant to extend that holding to the facts of this case and, furthermore, I am compelled to dissent for the reasons set forth in Justice Lanzinger's dissents in *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, and the cases cited therein.

{¶11} I respectfully dissent.

(Slaby, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to, §6(C), Article IV, Constitution.)

APPEARANCES:

JILL R. FLAGG, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.