

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

CHARLES REESE

Appellant

C.A. Nos. 09CA0020
 09CA0023

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE Nos. 08-CR-0149
 08-CR-0202

DECISION AND JOURNAL ENTRY

Dated: December 14, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, Charles Reese, appeals from his convictions in the Wayne County Court of Common Pleas. This Court affirms.

I

{¶2} Charles Reese was indicted on two separate occasions for different felony offenses. On May 12, 2008, he was indicted for employing deception to obtain a dangerous drug in violation of R.C. 2925.22, and for illegally processing a drug document in violation of R.C. 2925.23, both of which are fourth-degree felonies. The illegal processing charge was later dismissed. On June 16, 2008, Reese was indicted for theft in violation of R.C. 2913.02 and two counts of forgery in violation of R.C. 2913.31(A)(3), all of which are fifth-degree felonies.

{¶3} On December 1, 2008, the trial court consolidated his cases and held a hearing at which Reese pleaded guilty to all remaining charges against him. In February 2009, Reese was sentenced to 18 months on the fourth-degree felony and 12 months on each of the fifth-degree

felonies. All of Reese's sentences were ordered to run concurrently. Reese has appealed from his convictions and his cases were again consolidated on appeal. He asserts two assignments of error for our review, which we have combined for ease of analysis.

II

Assignment of Error Number One

"THE SENTENCING COURT COMMITTED PLAIN ERROR BY ACCEPTING CHARLES REESE'S GUILTY PLEAS WITHOUT PERSONALLY INFORMING HIM OF THE POTENTIAL MAXIMUM PENALTIES HE COULD RECEIVE FROM VIOLATIONS OF POST RELEASE CONTROL, AS REQUIRED BY R.C. 2943.032 AND R.C. 2901.04; CONSEQUENTLY, MR. REESE'S PLEAS WERE NOT KNOWING AND VOLUNTARY."

Assignment of Error Number Two

"THE SENTENCING COURT COMMITTED PLAIN ERROR BY ACCEPTING CHARLES REESE'S GUILTY PLEAS WITHOUT PERSONALLY INFORMING HIM OF THE POTENTIAL MAXIMUM PENALTIES HE COULD RECEIVE FROM VIOLATIONS OF POST RELEASE CONTROL, AS REQUIRED BY CRIM.R. 11(C); CONSEQUENTLY, MR. REESE'S PLEAS WERE NOT KNOWING AND VOLUNTARY."

{¶4} In both of his assignments of error, Reese argues that it was plain error for the trial court to fail to inform him of the provisions outlined in R.C. 2943.032, setting forth the length of re-incarceration he would face if he violated the terms of his post-release control. Reese further asserts that the rules of construction, specifically R.C. 2901.04(A), require strict compliance with the sections of the Revised Code that define penalties, such as R.C. 2943.032, and that substantial compliance applies only to the rules of criminal procedure, such as Crim.R. 11(C). We disagree.

{¶5} Initially, we note that Reese relies on the codification of the rule of lenity as set forth in R.C. 2901.04(A) as the basis for his argument that, before accepting his plea, the trial

court was obligated to notify him of the specific penalty he would face under R.C. 2943.032 for any violation of his post-release control. R.C. 2901.04(A) is a rule of statutory construction which requires that “sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.” This rule of statutory construction, however, is implicated “only where there is an ambiguity in a statute or a conflict between statutes.” *State v. McClanahan*, 9th Dist. No. 23380, 2007-Ohio-1821, at ¶11. We consider the terms of R.C. 2943.032 unambiguous and Reese has not made any argument otherwise; therefore, the rule of lenity is inapplicable to his case. *Id.* Likewise, it bears mentioning that Reese does not argue that he was uninformed as to the nature or length of his term of post-release control. Rather, he argues only that the trial court committed plain error in failing to inform him of the length of any re-incarceration he may face should he violate the terms of his post-release control.

{¶6} Crim.R. 11(C) governs the acceptance of guilty pleas in felony cases. It reads, in pertinent part, as follows:

“(2) In felony cases the court may refuse to accept a plea of guilty *** and shall not accept a plea of guilty *** without first addressing the defendant personally and ***;

“(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved[.]”

“The Supreme Court of Ohio has established two separate standards of review with respect to constitutional and nonconstitutional rights in determining whether a trial court has satisfied its [Crim.R. 11 obligations].” *State v. Anderson* (1995), 108 Ohio App.3d 5, 8-9. “If nonconstitutional rights are involved, the trial court’s acceptance of a guilty plea will be affirmed so long as the court substantially complied with the requirements of Crim.R. 11(C)(2) and the

defendant subjectively understood the implications of his plea and the nature of the nonconstitutional rights he was waiving.” *Id.*, citing *State v. Nero* (1990), 56 Ohio St.3d 106,

108. The Supreme Court has since clarified that:

“[I]f the trial judge imperfectly explained nonconstitutional rights such as the right to be informed of the maximum possible penalty and the effect of the plea, a substantial-compliance rule applies. 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, the plea may be upheld. When the trial judge does not *substantially* comply with Crim.R. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court *partially* complied or *failed* to comply with the rule. 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. The test for prejudice is whether the plea would have otherwise been made.” (Emphasis in original.) (Internal citations and quotations omitted.) *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, at ¶¶31-32.

Reese does not argue that he was not properly informed of the maximum prison sentence or terms of post-release control to which he was subject for each of his offenses. Instead, he asserts that he was not properly informed of the nonconstitutional right set forth in R.C. 2943.032, which requires that:

“Prior to accepting a guilty plea *** to an indictment *** that charges a felony, the court shall inform the defendant personally that, if the defendant pleads guilty *** to the felony so charged *** and if the court imposes a prison term upon the defendant for the felony, all of the following apply:

“***

“(E) If the offender violates the conditions of a post-release control sanction imposed by the parole board upon the completion of the stated prison term, the parole board may impose upon the offender a residential sanction that includes a new prison term up to nine months.”

Terms of post-release control are part of a defendant’s actual sentence. See *Woods v. Telb* (2000), 89 Ohio St.3d 504, 511. Therefore, “a trial court must inform the offender at sentencing or at the time of a plea hearing that post-release control is part of the offender’s sentence.” *Id.* at

513. “As part of the sentence, post-release control is a fortiori intertwined with the requirements of Crim.R. 11(C)(2)(a)[.]” *State v. Gordon*, 9th Dist. No. 07CA0055, 2008-Ohio-341, at ¶5, quoting *State v. Madaris*, 156 Ohio App.3d 211, 2004-Ohio-653, at ¶17.

{¶7} A review of the transcript from Reese’s plea hearing reveals the following exchange relative to his argument on appeal:

“[Court:] If you receive a prison sentence, Mr. Reese, upon your release you’ll be under the supervision of the Adult Parole Authority for a period of up to three years. If you violate any condition the Parole Board imposes you could be sent back to prison even though you served your entire sentence. Any questions about that?

“[Reese:] No, sir.”

{¶8} Here, the trial court personally informed Reese that he was subject to a discretionary period of post-release control for a period of up to three years which was accurate, given that his offenses were fourth- and fifth-degree felonies. R.C. 2967.28(C). Moreover, the court properly instructed Reese that he would be reincarcerated if he violated the terms of his post-release control, although it did not specify that such re-incarceration could be for a period of up to nine months as stated in R.C. 2943.032(E). While not dispositive of our decision, we note that the record in each case contains a written plea agreement which was signed by Reese and his counsel and expressly states the consequences Reese would face under R.C. 2943.032(E) should he violate the terms of his post-release control.

{¶9} In light of the foregoing, we consider the trial court’s failure to verbally inform Reese as to the specific terms of re-incarceration he might face for post-release control violations to be a “slight” deviation from Crim.R. 11 and conclude that under the totality of the circumstances, Reese subjectively understood the implications of his plea agreement. *Clark*, at ¶31. See, also, *State v. Munyan*, 5th Dist. No. 08-CA-88, 2009-Ohio-2348 (concluding that

defendant's plea substantially complied with Crim.R. 11 despite defendant not being verbally informed at his plea hearing as to the length of re-incarceration he might face for violations of his post-release control under R.C. 2943.032(E)); and *State v. Bari*, 8th Dist. No. 90370, 2008-Ohio-3663, at ¶49-52 (concluding that a trial court substantially complies with Crim.R. 11 if it informs the defendant of the maximum period of re-incarceration he may face for violations of post-release control, though does not mention the specific nine month term of re-incarceration prescribed by R.C. 2943.032(E) and noting that "a court is not required to provide a rote recitation of the statute to comply with R.C. 2943.032(E)").

{¶10} Furthermore, Reese has failed to cite to any other authority for the proposition that before accepting his plea, the trial court was required to exercise strict compliance under Crim.R. 11 vis-à-vis the terms of R.C. 2943.032(E). Instead, the authority that Reese considers "precisely on all fours with the present one" is *State v. Owens*, 8th Dist. No. 84987, 2005-Ohio-3570, in which the trial court's notification relative to post-release control at the plea hearing was appropriately reviewed for substantial compliance under Crim.R. 11. *Owens* at ¶8 (vacating the defendant's plea because he was never informed at the plea hearing of any consequences for violating post-release control). Accordingly, Reese's first and second assignments of error are overruled.

III

{¶11} Reese's first and second assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas is affirmed.

Judgment affirmed.

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 Wayne, 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 Appellant.

BETH WHITMORE
FOR THE COURT

CARR, J.
MOORE, P. J.
CONCUR

APPEARANCES:

CLARKE W. OWENS, Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.