[Cite as *State v. Holcomb*, 2010-Ohio-4656.]

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

STATE OF OHIO	C. A. No. 25165
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DANIEL LEE HOLCOMB	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 1999 10 2235

DECISION AND JOURNAL ENTRY

Dated: September 30, 2010

MOORE, Judge.

{¶1} Appellant, Daniel Holcomb, appeals from the decision of the Summit County Court of Common Pleas. This Court reverses and remands for proceedings consistent with this opinion.

I.

{¶2} In January of 2000, as part of a plea agreement, Holcomb pled guilty to two counts of aggravated robbery and one count of aggravated burglary, all first-degree felonies. The remaining charges were dismissed. After a plea hearing, the trial court accepted Holcomb's plea. Immediately following the hearing, the trial court proceeded to sentencing. The trial court imposed the agreed sentence of seven years on each count of aggravated robbery, to be served concurrently, and a sentence of six years on the count of aggravated burglary, to be served consecutively with the sentences for aggravated robbery. This totaled 13 years of incarceration.

{¶3} Holcomb subsequently filed numerous motions with the trial court and with this Court, resulting in several opinions. See *State v. Holcomb*, 9th Dist. No. 23447, 2007-Ohio-2607; *State v. Holcomb*, 9th Dist. No. 21682, 2003-Ohio-7167; *State v. Holcomb*, 9th Dist. No. 21637, 2003-Ohio-632,. In our most recent decision, *State v. Holcomb*, 184 Ohio App.3d 577, 2009-Ohio-3187, we determined that Holcomb's sentence imposed in January of 2000 was void. Therefore, we vacated his sentence and remanded for a de novo resentencing hearing.

{¶4} Prior to his resentencing hearing, Holcomb filed two pro se motions to withdraw his guilty plea. On October 15, 2009, Holcomb through counsel filed a motion to withdraw his guilty plea. On October 20, 2009, the trial court held a hearing on Holcomb's motion to withdraw his plea. On November 17, 2009, the trial court denied Holcomb's motion, and on December 8, 2009, resentenced Holcomb to 13 years of incarceration and imposed a mandatory five-year term of post-release control.

{¶5} Holcomb timely appealed the trial court's decision, raising six assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ACCEPTING [HOLCOMB'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 [HOLCOMB'S] PLEA COLLOQUY BY NOT ADVISING [HIM] THAT HIS SENTENCE WOULD INCLUDE A MANDATORY TERM OF POSTRELEASE CONTROL[.]"

ASSIGNMENT OF ERROR III

"THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR BY DENYING [HOLCOMB'S] MOTION TO WITHDRAW HIS GUILTY PLEA."

{¶6} In his first and third assignments of error, Holcomb contends that the trial court committed reversible error in accepting his guilty plea on the grounds that the trial court failed to comply with Crim.R. 11 during Holcomb's plea colloquy by not advising him that his sentence would include a mandatory term of post-release control and that the trial court erred by denying his motion to withdraw his plea. We agree.

{¶7} Rule 32.1 of the Ohio Rules of Criminal Procedure provides that "[a] motion to withdraw a plea of guilty *** may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." Where the motion to withdraw comes before sentencing, the trial court should freely and liberally grant the motion. *State v. Xie* (1992), 62 Ohio St.3d 521, 526.

{¶8} Holcomb was originally sentenced on January 21, 2000. On July 30, 2009, this Court determined that Holcomb's sentence was void because the trial court failed to properly notify him of post-release control, and therefore we vacated his sentence. *State v. Holcomb*, 9th Dist. No. 24287, 2009-Ohio-3187, at ¶21; see, also, *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, at ¶36. Prior to his November 24, 2009 resentencing, Holcomb filed a motion to withdraw his guilty plea. "A motion to withdraw a plea of guilty *** made by a defendant who has been given a void sentence must be considered as a presentence motion under Crim.R. 32.1." *State v. Boswell*, 121 Ohio St.3d 575, at the syllabus. Accordingly, we review Holcomb's motion to withdraw his guilty plea as a presentence motion.

{¶9} A criminal plea must be entered knowingly, voluntarily, and intelligently. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, at ¶7. If it is not, enforcement of the plea is unconstitutional. Id., quoting *State v. Engle* (1996), 74 Ohio St.3d 525, 527. In evaluating

whether a right was violated, strict compliance with Crim.R. 11 is preferred, but not required, provided that the court substantially complied with the rule. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. "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." Id. Furthermore, an error involving a nonconstitutional right "will not invalidate a plea unless the defendant thereby suffered prejudice." *Sarkozy*, supra, at ¶20, quoting *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, at ¶12. This requires a showing that, but for the error, the plea would not have been made. Id. This Court, ordinarily, must review the totality of the circumstances surrounding the guilty pleas to determine whether the defendant subjectively understood the effect of his pleas. Id.

{¶10} Crim.R. 11(C)(2)(a) requires that, in a felony case, before accepting a guilty plea, a trial court must address the defendant and determine "that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved[.]" This Court has held that "[t]erms of post-release control are part of a defendant's actual sentence." *State v. Gordon*, 9th Dist. No. 07CA0055, 2008-Ohio-341, at ¶5, citing *Woods v. Telb* (2000), 89 Ohio St.3d 504. A plea is not voluntary if it is entered "[w]ithout an adequate explanation of post-release control from the trial court" because in that case, the defendant will be unable to "fully understand the consequences of his plea as required by Crim.R. 11(C)." *State v. Griffin*, 8th Dist. No. 83724, 2004-Ohio-4344, at ¶13, quoting *State v. Jones* (May 24, 2001), 8th Dist. No. 77657, at *2.

{¶11} Holcomb entered a plea of guilty to two counts of aggravated robbery and one count of aggravated burglary, each a first-degree felony. Pursuant to R.C. 2967.28(B)(1), Holcomb was subject to a mandatory five-year term of post-release control. A review of the plea

colloquy reveals that the trial court did not mention post-release control prior to accepting Holcomb's guilty plea. The State points out that the trial court mentioned post-release control at the conclusion of Holcomb's sentencing hearing, *after* imposing sentence, which was held in conjunction with the plea hearing. Although the record does support this contention, this does not comply with the mandate in *Sarkozy*, supra. It is clear from *Sarkozy* that "[i]f 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.) *Sarkozy*, supra, at paragraph two of the syllabus. Notably, the trial court in *Sarkozy* imposed post-release control in the subsequent sentencing entry. The Ohio Supreme Court did not conclude that this notification negated any failure on the part of the trial court to mention post-release control prior to accepting a guilty plea. "As the Court did not mention post-release control at all during the plea hearing, [Holcomb] was also not informed by the court of the consequences of violating that sanction, including a return to prison. See R.C. 2943.032(E)." *State v. Gillespie*, 9th Dist. No. 24248, 2009-Ohio-2785, at ¶8. When the trial court fails to mention post-release control at all, it fails to comply with Crim.R. 11, and therefore a reviewing court does not consider whether the defendant suffered prejudice from the failure. Id., citing *Sarkozy*, at paragraph two of the syllabus. Therefore, the trial court erred when it denied Holcomb's motion to withdraw his plea. It should have permitted him to withdraw his plea.

{¶12} Accordingly, Holcomb's first and third assignments of error are sustained.

ASSIGNMENT OF ERROR II

{¶13} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ACCEPTING [HOLCOMB'S] GUILTY PLEA ON THE GROUNDS THAT THE TRIAL COURT FAILED TO COMPLY WITH CRIM. R. 11 DURING [HOLCOMB'S]

PLEA COLLOQUY BY NOT ADVISING [HIM] OF THE MAXIMUM PENALTIES INVOLVED[.]"

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO CONDUCT A DE NOVO SENTENCING."

ASSIGNMENT OF ERROR V

"TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR BY RESENTENCING [HOLCOMB] AS IT LACKED JURISDICTION TO SENTENCE OR RESENTENCE DUE TO AN UNREASONABLE DELAY IN SENTENCING."

ASSIGNMENT OF ERROR VI

"TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR BY RESENTENCING [HOLCOMB] AS HE HAD ALREADY SERVED THE TERM PREVIOUSLY IMPOSED ON SOME OF THE OFFENSES."

{¶14} Due to our disposition of Holcomb's first and second assignments of error, his remaining assignments of error are moot. App.R. 12(A)(1)(c); *Gillespie*, supra, at ¶9.

III.

{¶15} Holcomb's first and third assignments of error are sustained. His remaining assignments of error are moot. The judgment of the Summit County Court of Common Pleas is reversed and remanded for proceedings consistent with this 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.

CARLA MOORE
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

SHUBHRA N. AGARWAL, Attorney at Law, for Appellant.

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