[Cite as *State v. Cargill*, 2015-Ohio-661.]

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

STATE OF OHIO Appellee v. NATHANIEL E. CARGILL Appellant	C.A. Nos. 27011 27590 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 12 08 2326(A)

DECISION AND JOURNAL ENTRY

Dated: February 25, 2015

HENSAL, Judge.

{¶1} Nathaniel Cargill appeals his convictions in the Summit County Court of Common Pleas as well as the court's denial of his motion to withdraw guilty plea. For the following reasons, this Court affirms.

I.

{¶2} The Grand Jury indicted Mr. Cargill for trafficking in heroin, possession of heroin, and having weapons under disability. The parties negotiated a plea deal under which Mr. Cargill agreed to plead guilty to the trafficking and weapons charges in exchange for the State recommending a four-year sentence. The trial court accepted Mr. Cargill's plea and sentenced him to four years in prison. Six months later, Mr. Cargill moved to withdraw his plea, but the trial court denied his motion. Mr. Cargill appealed its order. He also moved this Court for a delayed direct appeal, which this Court granted. We subsequently consolidated the appeals. Mr.

Cargill has assigned four errors for this Court's review, which we have rearranged for ease of consideration.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT COMMITTED PLAIN ERROR AND DENIED DUE PROCESS AND EQUAL PROTECTION TO MR. CARGILL'S PREJUDICE WHEN IT FAILED TO INFORM HIM OF ANY APPELLATE RIGHTS.

{¶3} Mr. Cargill's first assignment of error is that the trial court erred when it failed to advise him of his appellate rights at sentencing. If a trial court does not notify a criminal defendant about his right to appeal the court's judgment, however, the remedy is a delayed appeal, which is what Mr. Cargill has received. *State ex rel. Sneed v. Anderson*, 114 Ohio St.3d 11, 2007-Ohio-2454, ¶ 8. His argument, therefore, is moot. *See State v. Inman*, 4th Dist. Ross No. 10CA3176, 2011-Ohio-3438, ¶ 4. Mr. Cargill's first assignment of error is overruled.

ASSIGNMENT OF ERROR III

> THE TRIAL COURT COMMITTED PLAIN ERROR AND DENIED DUE PROCESS TO MR. CARGILL'S PREJUDICE WHEN IT IMPROPERLY IMPOSED POSTRELEASE CONTROL.

{¶4} In his third assignment of error, Mr. Cargill argues that the trial court failed to comply with Revised Code Section 2943.032 because it did not tell him during the plea colloquy that, if he violated post-release control, he could be returned to prison in nine-month increments. He argues that his sentence, therefore, was not authorized by law. According to Mr. Cargill, because of the error, his plea must be vacated or, at the very least, his case should be remanded for resentencing.

{¶5} Mr. Cargill's argument overlooks the difference between what a trial court is required to do before accepting a guilty plea and what it is required to do at sentencing. Section 2943.032 only addresses the plea stage, providing:

> Prior to accepting a guilty plea * * * the court shall inform the defendant personally that, if the defendant pleads guilty * * *, if the court imposes a prison term upon the defendant for the felony, and 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 of up to nine months.

See State v. McCallister, 9th Dist. Summit No. 26722, 2013-Ohio-5559, ¶ 5 (explaining that Section 2943.032 "applies only to plea colloquies, not sentencing which is governed by R.C. 2929.19.").

{¶6} During the plea colloquy, the trial court advised Mr. Cargill that, "when you are placed on Post[-]Release Control, if you violate any of the conditions of the parole authority, their procedures, etc., they can impose additional conditions, including additional incarceration equal to one-half of this Court's prison sentence * * *." Because the negotiated recommended sentence was four years, the court actually overstated the potential additional prison time that Mr. Cargill could receive if he violated post-release control. This Court has held that, if a "trial court erroneously overstates the length of additional prison time that can be imposed for a violation of post-release-control conditions, the defendant is not prejudiced." *Id*. at ¶ 9, quoting *State v. Jones*, 2d Dist. Montgomery No. 24772, 2013-Ohio-119, ¶ 10. In addition, Mr. Cargill has not alleged that he would not have entered a guilty plea if he had known that he was subject to only nine months imprisonment for a post-release-control violation instead of half of his stated prison term. *See id*. at ¶ 10. Upon review of the record, we conclude that Mr. Cargill has not established that he did not understand the "effect of the plea" or that his plea was not made

"voluntarily, with understanding of the nature of the charges and of the maximum penalty involved," under Criminal Rule 11(C)(2)(a), (b). *See State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶ 32 (explaining that, if a trial court partially complies with Criminal Rule 11(C) in regard to a nonconstitutional right, "the plea may be vacated only if the defendant demonstrates a prejudicial effect[,]" which is whether the plea would have otherwise been made.). We also conclude that, to the extent he has challenged his sentence, Mr. Cargill has not established that the trial court failed to comply with Section 2929.19 or any other sentencing requirements. Mr. Cargill's third assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT COMMITTED PLAIN ERROR AND DENIED DUE PROCESS TO MR. CARGILL'S PREJUDICE WHEN IT SUMMARILY DENIED HIS MOTION TO WITHDRAW HIS GUILTY PLEAS.

{¶7} In his second assignment of error, Mr. Cargill argues that the trial court abused its discretion when it summarily denied his motion to withdraw his guilty plea. He also argues that the trial court should have held a hearing on his motion before ruling on it.

{¶8} Criminal Rule 32.1 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." "A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court." *State v. Smith*, 49 Ohio St.2d 261 (1977), paragraph two of the syllabus. "At the same time, the extent of the trial court's exercise of discretion * * * is determined by the particular provisions that govern the motion under which the defendant is proceeding * * *." *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶ 33.

"[A] presentence motion to withdraw a guilty plea should be freely and liberally granted." *State v. Xie*, 62 Ohio St.3d 521, 527 (1992). A defendant who moves to withdraw his plea after the imposition of sentence, on the other hand, "has the burden of establishing the existence of manifest injustice." *Smith* at paragraph one of the syllabus.

{¶9} In his motion to withdraw guilty plea, Mr. Cargill argued that it was a presentence motion because the trial court had not correctly advised him about post-release control. This Court has held, however, that, even if the part of the sentence that imposes post-release control is void, a motion to withdraw plea filed after sentencing must be treated as a post-sentence motion. *McCallister*, 2013-Ohio-5559, at ¶ 7. Accordingly, Mr. Cargill's motion to withdraw guilty plea was a post-sentence motion.

{¶10} Mr. Cargill argued in his motion that the trial court failed to comply with Section 2943.032, meaning that his plea was not knowing, intelligent, and voluntary. As this Court explained earlier, however, the trial court actually overstated the sentence he would face if he violated post-release control. Mr. Cargill did not allege in his motion, and has not alleged on appeal, that he would not have pleaded guilty if the trial court had told him the correct term. We, therefore, conclude that the trial court did not abuse its discretion when it determined that Mr. Cargill failed to establish the existence of manifest injustice. *See id*. at ¶ 10.

{¶11} Regarding whether the trial court should have held a hearing on his motion before ruling on it, this Court has held that "[a]n evidentiary hearing on a post-sentence motion to withdraw a guilty plea is not required if the 'record indicates that the movant is not entitled to relief and the movant has failed to submit evidentiary documents sufficient to demonstrate a manifest injustice.'" *State v. Razo*, 9th Dist. Lorain No. 05CA008639, 2005-Ohio-3793, ¶ 20, quoting *State v. Russ*, 8th Dist. Cuyahoga No. 81580, 2003-Ohio-1001, ¶ 12. Because it was

clear from the record that Mr. Cargill could not have established manifest injustice, we conclude that the trial court was not required to hold an evidentiary hearing. *Id*. at ¶ 21. Mr. Cargill's second assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> THE TRIAL COURT COMMITTED PLAIN ERROR AND DENIED DUE PROCESS AND DOUBLE JEOPARDY PROTECTIONS TO MR. CARGILL'S PREJUDICE WHEN IT FAILED TO CONSIDER WHETHER COUNTS OF TRAFFICKING IN HEROIN AND HAVING A WEAPON UNDER DISABILITY MERGED AS ALLIED OFFENSES.

{¶12} Mr. Cargill's final argument is that the trial court erred when it failed to merge his trafficking and having-a-weapon-under-disability offenses at sentencing. Revised Code Section 2941.25 "is the primary indication of the General Assembly's intent to prohibit or allow multiple punishments for two or more offenses resulting from the same conduct" and is "an attempt to codify the judicial doctrine of merger." *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, ¶ 11. It provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

R.C. 2941.25. The Ohio Supreme Court has explained that, through Section 2941.25,

> [t]he General Assembly * * * has authorized trial courts, in a single criminal proceeding, to convict and to sentence a defendant for two or more offenses, having as their genesis the same criminal conduct or transaction, provided that the offenses (1) were not allied and of similar import, (2) were committed separately or (3) were committed with a separate animus as to each offense.

State v. Moss, 69 Ohio St.2d 515, 519 (1982); *Washington* at ¶ 12.

{¶13} Although Mr. Cargill pleaded guilty to his offenses, "[a] defendant's plea to multiple counts does not affect the court's duty to merge those allied counts at sentencing. This duty is mandatory, not discretionary." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 26. Even if "the plea agreement is silent on the issue of allied offenses of similar import, * * * the trial court is [still] obligated under R.C. 2941.25 to determine whether the offenses are allied, and if they are, to convict the defendant of only one offense." *Underwood* at ¶ 29. The Ohio Supreme Court has also held that the "imposition of multiple sentences for allied offenses of similar import is plain error." *Id*. at ¶ 31.

{¶14} Even though a trial court is required to determine whether offenses are allied, the "defendant bears the burden of establishing his entitlement to the protection, provided by R.C. 2941.25, against multiple punishments for a single criminal act." *Washington* at ¶ 18, quoting *State v. Mughni*, 33 Ohio St.3d 65, 67 (1987); *see also Logan*, 60 Ohio St.2d 126, 128 (1979). "In other words, the trial court is not relieved of its obligation to avoid sentencing on allied offenses of similar import. However, it need only make its determination on the basis of the information before it." *State v. Asefi*, 9th Dist. Summit No. 26931, 2014-Ohio-2510, ¶ 18 (Carr., J., concurring in judgment only).

> Where there are no facts on the record to allow the trial court to consider whether the offenses are allied, a plain error analysis by this Court cannot constitute a viable mechanism to determine whether the trial court erred by imposing multiple sentences. * * * [T]he absence of facts in the record precludes a showing that the results of the proceedings would have been different because there is nothing to demonstrate that the defendant was actually sentenced to allied offenses.

Id. at ¶ 22 (Carr, J., concurring in judgment only).

{¶15} A document from the time of Mr. Cargill's arrest indicates that he was found with 86 grams of heroin and two firearms. There are no other details in the record about his offenses. Upon review of the entire record, we conclude that Mr. Cargill has not established that his

offenses should merge and, thus, that it was plain error for the trial court not to merge them under Section 2941.25. Mr. Cargill's fourth assignment of error is overruled.

III.

{¶16} Mr. Cargill has not demonstrated reversible error. The judgment of the Summit 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 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(C). 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.

JENNIFER HENSAL
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR.

APPEARANCES:

MARK H. LUDWIG, Attorney at Law, for Appellant.

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