

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	CASE NOS. CA2008-07-168
	:	CA2008-08-199
	:	
- vs -	:	<u>OPINION</u>
	:	8/3/2009
	:	
MICHAEL DOUGLASS,	:	
	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2007-11-1999

Robin N. Piper, Butler County Prosecuting Attorney, Lina N. Alkamdawi, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Scott N. Blauvelt, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

BRESSLER, P.J.

{¶1} Defendant-appellant, Michael Douglass, appeals his conviction and sentence from the Butler County Court of Common Pleas following his guilty plea. We affirm the decision of the trial court.

{¶2} On November 12, 2007, appellant took part in an attack that ultimately led to the death of Sabyasachi Debnath at a Butler County motel. Appellant was 18 years old at the time of the attack.

{¶3} On December 12, 2007, the Butler County Grand Jury returned a seven count indictment against appellant charging him with aggravated murder, aggravated robbery, kidnapping, aggravated burglary, theft, tampering with evidence, and breaking and entering. After entering into plea negotiations, and against the advice of counsel, appellant pled guilty to all seven charges.

{¶4} On June 12, 2008, following a presentence investigation, the trial court sentenced appellant to life without the possibility of parole for aggravated murder, and imposed the maximum sentences, all to be served concurrently, for the remaining six counts.

{¶5} Appellant now appeals, raising four assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE AND VIOLATED HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION WHEN IT ERRED PURSUANT TO OHIO CRIMINAL RULE 11 AND ACCEPTED UNKNOWING, UNINTELLIGENT AND INVOLUNTARY GUILTY PLEAS."

{¶8} Appellant argues that his guilty plea to the seven count indictment was not entered knowingly, intelligently, and voluntarily because the trial court "misinformed" him that, if he was ever released from prison, he would be subject to a five-year mandatory term of postrelease control. This argument lacks merit.

{¶9} A criminal defendant's choice to enter a guilty plea is a serious decision because, by agreeing to plead guilty, the defendant is giving up several constitutional rights. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶25; *State v. Nero* (1990), 56 Ohio St.3d 106, 107; *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709. When a defendant enters a guilty plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily, and the failure on any of those points renders enforcement of the

plea unconstitutional under both the United States Constitution and the Ohio Constitution. *State v. Phillips*, Butler App. No. CA2008-05-126, 2009-Ohio-1448, ¶10; *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179. To ensure guilty pleas conform to these high standards, and prior to accepting such a plea, the trial court must engage the defendant in a colloquy that conveys, among other things, accurate information to him so that he can make the plea voluntarily, with an understanding of the charges and maximum penalty involved, and, if applicable, that he is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing. Crim.R. 11(C)(2); *Clark*, 2008-Ohio-3748 at ¶26, citing *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph one of the syllabus.

{¶10} If a trial court fails to literally comply with the requirements of Crim.R. 11, reviewing courts must engage in a multi-tiered analysis to determine the significance of the failure and, depending on the failure, the appropriate remedy. *Clark*, 2008-Ohio-3748 at ¶30. For example, when the trial court "imperfectly" explains the Crim.R. 11 nonconstitutional rights to the defendant, such as the right to be informed of the maximum possible penalty and the effect of the plea, a substantial compliance standard applies. *Id.* at ¶31; Crim.R. 11(C)(2)(a)-(b). 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. *Phillips*, 2009-Ohio-1448 at ¶13, citing *Clark*, 2008-Ohio-3748 at ¶31.

{¶11} When the trial court does not substantially comply with Crim.R. 11 in regard to a nonconstitutional right, the reviewing court must then determine whether the trial court partially complied, or failed to comply, with the rule. *Clark*, 2008-Ohio-3748 at ¶32. If the trial court partially complied with Crim.R. 11, for example, by mentioning mandatory postrelease control without explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect. *Id.*, citing *Nero*, 56 Ohio St.3d at 108. The test for prejudice is "whether

the plea would have otherwise been made." Id.

{¶12} After a plea agreement was reached, appellant, his attorney, and the prosecuting attorney signed a written "Plea of Guilty and Jury Waiver." This document, besides correctly listing the maximum penalty for aggravated murder as "life w/o parole," also read, in pertinent part:

{¶13} "Post Release Control: In addition, a period of supervision by the Adult Parole Authority after release from prison is mandatory in this case. If I am sentenced to prison for a felony 1 * * *, after my prison release I will have mandatory post release control for 5 years * * *."

{¶14} The "Plea of Guilty and Jury Waiver" indicated appellant intended to plead guilty to, among other things, aggravated robbery, aggravated burglary, and kidnapping, all first-degree felonies.

{¶15} In addition, the trial court engaged appellant in a colloquy at the plea hearing, and stated, in pertinent part, the following:

{¶16} "THE COURT: Now, this is a plea form in front of me which purports to bear your signature and that of your counsel. It indicates you are going to be pleading guilty as charged to the seven count indictment. And the maximum sentence I can give you on Count One [Aggravated Murder] is life without the possibility of parole. And you can also receive another – well, had you gone to trial, you could have received another 37 years with that. Is that your understanding?"

{¶17} "THE DEFENDANT: Yes, sir.

{¶18} " * * *

{¶19} "THE COURT: You understand, sir, that this [c]ourt has four options when it sentences you in five or six weeks. I can sentence you to life with parole eligibility after serving 20 full years, life in prison with the possibility of parole after serving 25 full years, life

in prison with the parole eligibility after serving 30 full years, and life without the possibility of parole, period. Do you understand that?

{¶20} "THE DEFENDANT: Yes, sir.

{¶21} "THE COURT: So as you stand here before this [c]ourt, you are exposing yourself to spending the rest of your natural life in prison without ever the hope of getting out. Do you understand that?

{¶22} "THE DEFENDANT: Yes, sir."

{¶23} The court then set the date for appellant's sentencing hearing, and continued by stating the following:

{¶24} "THE COURT: * * * And at that point in time, it will be my decision and my decision alone as to what punishment you will receive. At a minimum, you will be serving a life sentence with the parole possibility after serving 20 full years. You are aware of that?

{¶25} "THE DEFENDANT: Yes, sir."

{¶26} The trial court then stated, and the parties both agreed, that it was unnecessary and inappropriate "to go through the community control options at this point in time * * *." The trial court continued by stating the following:

{¶27} "TRIAL COURT: So if and when you would ever get out of prison, you will be subject to mandatory postrelease control. What that means is after you've served every bit of my sentence, if it is a sentence that you would get out on at some point in time, the Ohio Adult Parole Authority would have you serve a term of postrelease control, meaning they would give you a set of rules and regulations that you would have to live your life by.

{¶28} "You would have to live your life in accordance with these rules and regulations for a period of five years. If you fail to live your life in accordance with these rules and regulations, if you violated any of the terms of the postrelease control or the PRC as outlined by the Adult Parole Authority, they would then send you back to prison for up to one-half of

the originally stated prison term in increments of up to nine months for each violations. Do you understand that?

{¶29} "THE DEFENDANT: Yes, sir.

{¶30} "THE COURT: Now, you also understand, sir, that I could sentence you to a term in prison that you would never, ever get out of prison? You are aware of that?

{¶31} "THE DEFENDANT: Yes, sir."

{¶32} The trial court concluded by advising appellant by entering a guilty plea he would waive his right to a jury trial, the right to confront his accusers, the right to compulsory process to obtain witnesses, the right to require the state to prove his guilt beyond a reasonable doubt, and his privilege against compulsory self-incrimination.

{¶33} Following this colloquy, appellant pled guilty to all seven counts contained in the indictment.

{¶34} After reviewing the record, there is no evidence to suggest the trial court's colloquy did not strictly comply with the constitutional requirements of Crim.R. 11(C)(2)(c). See *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, syllabus. In addition, because appellant intended to plead guilty to a number of first-degree felonies, the trial court was statutorily required to inform him that he would be subject to a mandatory period of five years postrelease control if he was ever released from prison. See R.C. 2967.28(B)(1); *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, paragraph two of the syllabus; see *State v. Cochran*, Cuyahoga App. Nos. 91768, 91826, 92171, 2009-Ohio-1693, ¶26.

{¶35} However, although the trial court was required to inform appellant that he would be subject to postrelease control, something it did on the "Plea of Guilty and Jury Waiver" form, as well as during the plea hearing colloquy, it failed to expressly distinguish between the effect of his guilty plea to aggravated murder, an unclassified felony, and his guilty plea to the remaining charged offenses. As a result, based on the facts of this case, we find the trial

court's colloquy did not substantially comply with Crim.R. 11, but instead, merely partially complied with the rule because it inadvertently inferred that the mandatory term of postrelease control would apply to all seven charges appellant faced, and therefore, although unlikely, created the potential for confusion by obscuring the relatively straightforward penalties involved. See *Clark*, 2008-Ohio-3748 at ¶36, 38 (postrelease control statute does not apply to the unclassified felony aggravated murder).

{¶36} Yet, that being said, there is simply nothing to suggest appellant's guilty plea would have been different had the trial court explicitly informed him that aggravated murder was not subject to a mandatory term of postrelease control at the plea hearing. As noted above, the trial court correctly informed appellant in the "Plea of Guilty and Jury Waiver" form, as well as numerous occasions during the plea hearing, that entering a guilty plea to aggravated murder would carry the potential maximum penalty of life in prison without the possibility of parole. In addition, the record is devoid of any evidence indicating appellant misunderstood the ramifications of his decision. As a result, appellant has failed to show that the conditions he faced if he was ever released from prison were critical to his decision to enter a guilty plea. See *State v. Clark*, Cuyahoga App. No. 2006-A-0004, 2008-Ohio-6768, ¶18 (finding no prejudice to defendant upon remand from Ohio Supreme Court following guilty plea to aggravated murder when trial court incorrectly informed him that he would be subject to a mandatory term of postrelease control). Therefore, under these circumstances, appellant has not demonstrated any prejudice resulting from the potential confusion caused by the trial court's failure to distinguish the effect of his guilty plea to aggravated murder at the plea hearing. See *Cochran*, 2009-Ohio-1693 at ¶22-29. Accordingly, appellant's first assignment of error is overruled and his guilty plea is affirmed.

{¶37} Assignment of Error No. 2:

{¶38} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-

APPELLANT IN VIOLATION OF HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION WHEN IT CONSIDERED UNCHARGED, UNPROVEN AND DISPUTED CONDUCT IN IMPOSING SENTENCE."

{¶39} Assignment of Error No. 3:

{¶40} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT IN IMPOSING A SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE WHICH SENTENCE IS NOT SUPPORTED BY THE RECORD AND IS OTHERWISE CONTRARY TO LAW."

{¶41} In his second and third assignments of error, appellant essentially argues that the trial court erred in sentencing him to life in prison without the possibility for parole following his guilty plea to aggravated murder. This argument lacks merit.

{¶42} Trial courts "have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Wright*, Warren App. No. CA2008-03-039, 2008-Ohio-6765, ¶56; *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶100. In reviewing felony sentences, an appellate court must (1) examine the trial court's compliance with all applicable rules and statutes in imposing the sentence to determine whether it is clearly and convincingly contrary to law, and (2) review the term of imprisonment for an abuse of discretion. *State v. Taylor*, Madison App. No. CA2007-12-037, 2009-Ohio-924, ¶67; *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶26. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶43} After reviewing the record, the trial court's decision to sentence appellant to life in prison without the possibility of parole is not clearly and convincingly contrary to law, as

such a sentence is within the statutory range for aggravated murder. See R.C. 2929.03(A)(1)(a); *Kalish* at ¶18. In addition, we find no abuse of discretion in the trial court's sentencing decision as the record details appellant's involvement in the brutal crime, including evidence that he took part in restraining the victim with duct tape and bed sheets before stabbing him a total of 11 times, as well as appellant's "history of violence," and lengthy juvenile record. In turn, while it may be true that the trial court judge commented on his own past prosecutorial experience during the sentencing hearing, based on the facts of this case, there is no indication that this prejudiced appellant in any way. As a result, and in light of the foregoing, we cannot say that the court acted unreasonably, arbitrarily, or unconscionably by imposing the maximum sentence of life in prison without the possibility of parole following appellant's guilty plea to aggravated murder. *Kalish* at ¶19-20. Therefore, appellant's second and third assignments of error are overruled.

{¶44} Assignment of Error No. 4:

{¶45} "[APPELLANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶46} In his fourth assignment of error, appellant argues that his counsel was ineffective. We disagree.

{¶47} To establish ineffective assistance, appellant must show that his counsel's actions fell below an objective standard of reasonableness and he was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 687-88, 104 S.Ct. 2052. Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Id.* at 694. A reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *State v. White*, Butler App. No. CA2008-

02-046, 2009-Ohio-2965, ¶132; *State v. Bradley* (1989), 42 Ohio St.3d 136, 143.

{¶48} Appellant first claims that his counsel was ineffective because he failed to object when the trial court "misadvised" him regarding the consequences of his guilty plea and the maximum sentence that he faced. However, as we have already determined under his first assignment of error, the trial court correctly informed appellant by pleading guilty to aggravated murder he would subject himself to a potential maximum penalty of life in prison without the possibility of parole, that the trial court was required to inform him that he would be subject to a mandatory term of five years postrelease control prior to pleading guilty to a first-degree felony, and that, although the trial court only partially complied with Crim.R. 11, he was not prejudiced thereby.

{¶49} Appellant next asserts that his counsel's failure to object when the trial court judge alluded to his prior experience as a prosecutor indicating that he "could have received the death penalty but for prosecution's inability to establish certain facts" amounts to ineffective assistance of counsel because "his sentence would have been different but for trial counsel's error." However, we fail to see how appellant was prejudiced by his counsel's failure to object as we have already determined appellant's sentence was not clearly and convincingly contrary to law, and furthermore, his sentence did not amount to an abuse of discretion.

{¶50} Appellant has failed to show that his counsel's representation fell below the objective standard of reasonableness, or that he was prejudiced by his counsel's representation of him. Accordingly, appellant's fourth assignment of error is overruled.

{¶51} Judgment affirmed.

POWELL and RINGLAND, JJ., concur.

[Cite as *State v. Douglass*, 2009-Ohio-3826.]