[Cite as *State v. Hlinovsky*, 2024-Ohio-1317.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

FREDRICK J. HLINOVSKY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 23 BE 0015

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 20 CR 286

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:
Reversed and Remanded.
Plea and Conviction Vacated.

Atty. J. Kevin Flanagan, Belmont County Prosecutor and *Atty. Jacob A. Manning*, Assistant Prosecutor, for Plaintiff-Appellee

Atty. Mary Adeline R. Lewis, for Defendant-Appellant

Dated: March 21, 2024

WAITE, J.

{¶1} Appellant Fredrick J. Hlinovsky appeals his conviction, based on a plea agreement, on one count of unlawful sexual contact with a minor. In Appellant's second assignment of error he argues that various aspects of the plea process were defective. Appellant contends that his guilty plea was not made knowingly, intelligently, and voluntarily because the trial judge did not explain the maximum possible sentence at the plea hearing, and failed to notify him regarding mandatory postrelease control. The record reflects there was substantial compliance with the court's discussion of the maximum penalty in general, but shows a complete failure to mention mandatory postrelease control. Without the information about mandatory postrelease control, Appellant's plea could not have been made knowingly, intelligently, and voluntarily. Therefore, we sustain the second assignment of error. Appellant's first assignment of error, that his counsel was constitutionally ineffective, is moot based on our ruling on the second assignment.

{¶2} The judgment of the trial court is reversed, his conviction is vacated, his plea vacated, and the case is remanded for further proceedings.

Facts and Procedural History

{¶3} On November 5, 2020, Appellant was indicted by the Belmont County Grand Jury with one count of rape in violation of R.C. 2907.02(A)(2), a first degree felony, and one count of unlawful sexual contact with a minor in violation of R.C. 2907.04(A), (B)(3), a third degree felony. The criminal activity giving rise to these charges occurred in 2005. The delay between the crime and the indictment was due in part to a lack of

DNA evidence until 2020 connecting Appellant with crimes. The case proceeded to a jury trial, but due to a failure to disclose certain evidence, a mistrial occurred. The case was assigned to a new judge and reset for trial on November 30, 2022, but was further delayed due to Appellant's request for a continuance. Appellant's counsel moved to withdraw on January 19, 2023. The parties appeared for a hearing on January 24, 2023, to review the motion to withdraw. Appellant indicated he was prepared to enter a guilty plea at that hearing. The court granted counsel's motion to withdraw, but did not then approve the change of plea. The court appointed the Belmont County public defender as counsel.

{¶4} On January 31, 2023, Appellant signed a Crim.R. 11 plea agreement. A change of plea hearing was held that day. Appellant agreed to plead guilty to one count of unlawful sexual contact with a minor. He was advised of the constitutional and non-constitutional rights he waived by pleading guilty. He was not advised as to mandatory postrelease control.

{¶5} The sentencing hearing was held on February 21, 2023. Appellant was sentenced to five years in prison and was designated a Tier II sex offender. He was also sentenced to five years of mandatory postrelease control. The court's final judgment was entered on February 24, 2023. Appellant filed a late appeal on March 31, 2023. This Court granted a motion for delayed appeal on April 18, 2023. Appellant raises two assignments of error on appeal, which will be treated in reverse order.

ASSIGNMENT OF ERROR NO. 2

> THE COURT SHOULD REVERSE AND REMAND THIS CASE TO THE TRIAL COURT BECAUSE THE APPELLANT'S PLEA WAS NOT KNOWING, INTELLIGENT, AND VOLUNTARY AS HE WAS NOT

ADVISED OF THE MAXIMUM PENALTIES AS REQUIRED BY RULE 11 AND OHIO LAW.

{¶6} Appellant argues that his plea was not made knowingly, voluntarily, or intelligently because the trial court failed to fully inform him of the maximum penalties he faced by pleading guilty. The record does not reflect that Appellant requested to withdraw his plea during the trial court proceedings. Nevertheless, a criminal defendant may challenge for the first time on appeal whether the plea was made knowingly, intelligently, and voluntarily. *State v. Milite*, 11th Dist. Lake No. 2020-L-061, 2020-Ohio-5384, ¶ 8.

{¶7} Unless a plea is entered knowingly, intelligently, and voluntarily, it is invalid. *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). To ensure that a Crim.R. 11 plea is properly made, the trial judge must engage the defendant in a colloquy before accepting the plea. *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981), paragraph one of the syllabus; Crim.R. 11(C), (D), and (E). The colloquy must include an explanation of both the constitutional and nonconstitutional rights the defendant is waiving. *State v. Eckles*, 173 Ohio App.3d 606, 2007-Ohio-6220, 879 N.E.2d 829, ¶ 7 (7th Dist.); Crim.R. 11(C).

{¶8} The non-constitutional rights on which the defendant must be addressed are: (1) the nature of the charges; (2) the maximum penalty involved, which includes, if applicable, an advisement on postrelease control; (3) if applicable, that the defendant is not eligible for probation or the imposition of community control sanctions; and (4) that after entering a guilty plea or a no contest plea, the court may proceed directly to judgment and sentencing. Crim.R. 11(C)(2)(a)(b); *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-

5200, 897 N.E.2d 621, ¶ 31; *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 423 N.E.2d 1224, ¶ 19-26.

{¶9} Information regarding the maximum penalty in a felony case relates to a nonconstitutional right, and the court must substantially comply with the notice requirements regarding nonconstitutional rights in order for a guilty plea to be valid. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 31. "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." *State v. Bell*, 7th Dist. Mahoning No. 14 MA 0017, 2016-Ohio-1440, ¶ 10. A defendant who challenges his guilty plea on the basis that the advisement on the non-constitutional rights did not substantially comply with Crim.R. 11(C)(2)(a)(b) must also show a prejudicial effect, meaning the plea would not have been otherwise entered. *Veney* at ¶ 15.

{¶10} "In determining whether a guilty plea was entered knowingly, intelligently, and voluntarily, this Court conducts a de novo review to make sure that the trial court complied with constitutional and procedural safeguards." *State v. Lyda*, 2021-Ohio-2345, 175 N.E.3d 30, ¶ 28 (7th Dist.).

{¶11} Appellant contends that the trial court errored in two ways. First, he asserts the court failed to explain what the maximum sentence could be if he pleaded guilty. The court's entire colloquy regarding this issue consisted of one sentence: "Do you understand what the maximum penalty could be?" (1/31/23 Tr., p. 9.) Appellant argues that this was an insufficient review of the maximum penalty and rendered his plea invalid.

{¶12} Appellee argues that since the trial court did mention maximum penalties at the hearing, the question regarding the adequacy of the notice should be reviewed for

substantial compliance. Appellee is correct. Appellee also notes that substantial compliance may be shown through a review of the entire record and all the facts and circumstances of the change of plea process. "[U]nder some circumstances, the trial court may be justified in concluding that a defendant has drawn an understanding from sources other than the lips of the trial court." *State v. Rainey*, 3 Ohio App.3d 441, 442, 446 N.E.2d 188, 190 (10th Dist.1982).

{¶13} At the change of plea hearing the trial judge asked Appellant several questions, including whether he understood the charged offense, understood the rights he was waiving, understood the facts of the case, and whether he was satisfied that his counsel had explained everything about the case. The judge specifically asked him if he understood what the maximum penalty was, and Appellant answered: "Yes, Your Honor." (1/31/23 Tr., p. 9.) As the court did not further explain the details of the maximum penalty, we may look to other aspects of the record to gauge Appellant's understanding. The record reveals that Appellant signed a Crim.R. 11 plea agreement in which the maximum penalty for unlawful sexual contact with a minor was explained. The maximum penalty stated in the plea agreement was 60 months in prison and a $10,000 fine. Based on the record, here, we conclude that Appellant understood what the maximum prison term and fine could be if he pleaded guilty.

{¶14} Another aspect of the maximum penalty is postrelease control. Appellant's second argument is that the trial judge completely failed to mention that he would be subject to mandatory postrelease control, and for how long. Appellant was sentenced to five years of mandatory postrelease control. A different standard of review is applied

when the trial court completely fails to mention mandatory postrelease control at the change of plea colloquy.

> [W]e hold that 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. Further, we hold that 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.

State v. Sarkozy, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 25. In this situation, prejudice is presumed and need not be proven by the defendant. *Id.* at ¶ 22.

{¶15} Because the court did not advise Appellant at the change of plea hearing about mandatory postrelease control, the plea must be vacated. Appellee does not address this aspect of Appellant's argument and offers no rebuttal, other than to say that postrelease control was mentioned in the written plea agreement. The plea agreement cannot be used to bolster a required notice that was not mentioned at all during the change of plea colloquy. *State v. Cruz-Ramos*, 2019-Ohio-779, 132 N.E.3d 170, ¶ 9 (7th Dist.). Therefore, Appellant's second assignment of error has merit and is sustained. Appellant's plea and conviction are hereby vacated.

ASSIGNMENT OF ERROR NO. 1

THE COURT SHOULD REVERSE AND REMAND THIS CASE TO THE TRIAL COURT BECAUSE THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL REPRESENTED THE APPELLANT IN A PLEA HEARING WITHOUT ANY KNOWLEDGE OF THE FACTS OF THE CASE.

{¶16} Appellant contends that his counsel was ineffective based on alleged errors during the discovery phase of the case. Due to our ruling on Appellant's second assignment of error, Appellant's first assignment of error is moot.

Conclusion

{¶17} Appellant argues on appeal that his guilty plea was not made knowingly, intelligently, and voluntarily, because the trial court failed to inform him of the maximum penalty for unlawful sexual contact with a minor. The record shows that Appellant did acknowledge he was aware of the maximum prison term, and the maximum prison term was stated in the written plea agreement. The trial judge, though, completely failed to provide any information about mandatory postrelease control, and the complete absence of this notice requires that the plea and conviction be vacated. Appellant's second assignment of error is sustained. Appellant's first assignment of error, alleging ineffective assistance of counsel, is moot. The judgment of the trial court is reversed, the plea and conviction are vacated, and the case is remanded for further proceedings.

Robb, P.J. concurs.

Hanni, J. concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first assignment of error is moot and his second assignment is sustained. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is reversed and Appellant's plea and conviction are hereby vacated. This matter is remanded to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.