

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

RALPH E. CLARK,

Defendant-Appellant.

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Case No.

07-0983

On Appeal from the
Ashtabula County of Appeals,
Eleventh Appellate District, Case
No. 2006-CA-4

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT RALPH E. CLARK**

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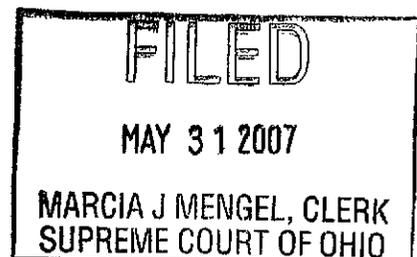


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**EXPLANATION OF WHY THIS CASE RAISES
SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS A CASE OF
GREAT GENERAL AND PUBLIC INTEREST**

This Court should accept this case to resolve a conflict about how courts of appeals should deal with a mistake that has been repeating itself case after case—trial courts that misinform defendants pleading guilty to offenses carrying a life sentence by stating that the defendants will be subject to limited postrelease control instead of unlimited parole upon release.

The Twelfth District Court of Appeals correctly determined that such misinformation about the termination of the sentence renders the plea involuntary. State v. Prom, 12th Dist. No. CA2002-01-07, 2003-Ohio-6543. The First, Fourth and Eleventh Districts have come to the opposite conclusion. State v. Clark, 11th Dist. No. 2006-CA-4, 2007-Ohio-1780; State v. Baker, 1st Dist. No. C-050791, 2006-Ohio-4902, discretionary appeal denied, 112 Ohio St.3d 1471; State v. Hamilton, 4th Dist. No. 05CA4, 2005-Ohio-5450, delayed appeal denied, State v. Hamilton, 112 Ohio St.3d 1417, 2006-Ohio-6712, 859 N.E.2d 557. Although the First District did not certify a conflict, the court expressly recognized that both it and the Fourth District reached a conclusion opposite of that of the Twelfth District:

The Twelfth Appellate District addressed this issue in State v. Prom and determined that a trial court's incorrect reference to post-release control misinformed the defendant of the maximum penalty faced. . . . The Fourth Appellate District reached the opposite conclusion in State v. Hamilton. . . . We agree with the reasoning of the Fourth Appellate District in Hamilton.

State v. Baker, at ¶9, 11, 13.

Courts should employ the same standard statewide. A plea that is voluntary in Marietta should also be voluntary in Hamilton. A plea that is involuntary in Middletown should also be involuntary in Ashtabula. This Court should accept this case to set one uniform statewide standard.

The issue in this case is important because both counsel and courts rely on stock forms to guide them in drafting plea agreements and in performing plea colloquies. When counsel and the court pay attention to detail, those forms help to efficiently ensure that a plea is voluntary. But when counsel and courts fail to notice that their stock form does not apply to a specific case, defendants base life-altering decisions on misinformation, and both the public and victims are misled as to what sentence the defendant faces.

Postrelease control and parole are two very different sanctions.

The sentence described in Mr. Clark's plea agreement was very different than the sentence the court ultimately imposed. Parole is an executive decision to relieve a defendant of part of his sentence, and in Mr. Clark's case, parole can extend for life. By contrast, postrelease control is a part of a defendant's sentence. R.C. 2967.28.

The theoretical differences between postrelease control and parole translate into very real practical differences. A sentence that includes five years of postrelease control after twenty-three years in prison is far different than a sentence that includes a lifetime of restrictions, even after release. Mr. Clark can be sent to prison for life for any violation of parole. By contrast, a defendant who violates postrelease control can only be imprisoned for half of

his original prison term, and only in nine-month intervals. R.C. 2929.14(F)(1) and 2967.28. In Mr. Clark's case, the plea agreement gave him objectively wrong information about how his sentence will end. A defendant does not understand his maximum sentence if he doesn't understand how the sentence ends.

This is not a case about a mere slip of the tongue.

This is not a case in which a trial judge accidentally used the expression "postrelease control" instead of "parole." The trial court substantively, repeatedly, and erroneously described postrelease control to Mr. Clark during the plea process. As in the Prom case, Mr. Clark's written plea form misinformed him that he would be subject to postrelease control and that the penalty for violation would be nine months incarceration. Plea Form at 1-2. As in Prom, Mr. Clark was misinformed at the plea colloquy as well. Plea Hrg. T.p. 14-15. Finally, Mr. Clark was misinformed at sentencing. Sentencing Hrg. T.p. 37-40. The trial court gave Mr. Clark the same wrong information on *three separate occasions* in the space of less than a week. As a consequence, Mr. Clark "necessarily was unaware of the maximum penalty to which [he] was exposed by [his] plea." Prom, 2003-Ohio-6543, at ¶29.

This Court should set this case for oral argument the same day as State v. Sarkozy, Case No. 2006-1973.

This case presents a similar, but not identical issue, as that presented in State v. Sarkozy, Case No. 2006-1973. In Sarkozy, this Court will decide whether the complete failure to inform a defendant about postrelease control at the plea hearing renders the plea involuntary. Mr. Clark's case asks the court

to address the consequences of misinforming a defendant about postrelease control.

Sarkozy will cast light on the question in Mr. Clark's case, but it may not entirely resolve the issue in Mr. Clark's case. Mr. Sarkozy was not told about any post-prison supervision in the plea process, so the parties in that case have no reason to address the issue of what to do when a defendants are told they will face postrelease control instead of parole, or when defendants are otherwise given incorrect information about postrelease control.

Mr. Clark's case is not an anomaly. Four court of appeals cases have specifically addressed the voluntariness of a plea to murder and aggravated murder when the trial court informed defendants that they would be subject to postrelease control instead of parole. State v. Prom, 12th Dist. No. CA2002-01-07, 2003-Ohio-6543. The First, Fourth and Eleventh Districts have come to the opposite conclusion. State v. Clark, 11th Dist. No. 2006-CA-4, 2007-Ohio-1780; State v. Baker, 1st Dist. No. C-050791, 2006-Ohio-4902, discretionary appeal denied, 112 Ohio St.3d 1471; State v. Hamilton, 4th Dist. No. 05CA4, 2005-Ohio-5450, delayed appeal denied, State v. Hamilton, 112 Ohio St.3d 1417, 2006 Ohio 6712, 859 N.E.2d 557. And given that most guilty plea cases are not appealed, it is likely that many other cases exist in which the defendant pleaded guilty based on incorrect information about the termination of his sentence. Further, Mr. Clark's case will allow this Court to set clear rules about how to deal with other misinformation about postrelease control, such as where the trial court tells a defendant that the defendant is subject to

discretionary instead of mandatory postrelease control, or three years of supervision instead of five.

This Court could rationally hold this case for the decision in Sarkozy, but it would make more sense to hear arguments for both cases on the same day. That way, this Court could ask counsel in both cases to address how their proposed rules would apply to the different factual situations in both cases.

STATEMENT OF THE CASE AND THE FACTS

Ralph Clark pleaded guilty to the aggravated murder of his wife of 22 years, Carolyn Clark, along with a firearm specification. He was sentenced to life in prison with parole eligibility after serving twenty-five full years of imprisonment for aggravated murder and three years for the firearm specification.

Mr. Clark, his trial counsel, and the prosecuting attorney all signed a written plea agreement labeled "Plea of Guilty," which contained the following language:

Post-Release Control. I understand that after I am released from prison, I may have a period of post-release control for five (5) years following my release from prison. If I violate a post-release control sanction imposed upon me, any one or more of the following may result.

- (1) The Parole Board may impose a more restrictive post-release control sanction upon me; and
- (2) The Parole Board may increase the duration of the post-release control subject to a specified maximum; and
- (3) The more restrictive sanction that the Parole Board may impose may consist of a prison term, provided that *the prison term cannot exceed nine months and the maximum cumulative prison term so imposed for all violations during the period of post-release control cannot exceed one-half of the stated prison term originally imposed upon me*; and
- (4) If the violation of the sanction is a felony, I may be prosecuted for the felony and, in addition to any sentence it imposes on me for the new felony, the Court may impose a prison term, subject to a specified maximum, for the violation.

I hereby certify the Court read to me, and gave to me in writing, the notice set forth herein.

Plea Form at 1-2 (emphasis added).

At the plea hearing, the trial court engaged Mr. Clark in the required colloquy. In so doing, the trial court informed Mr. Clark of the maximum penalties to which he would be subject if the trial court accepted his guilty plea. The trial court also described the contours and details of Mr. Clark's eventual release from incarceration and the ramifications of violating the terms of that release:

THE COURT: Okay. All right. Now, next I'm required to tell you the Court will be imposing a prison term and once that prison term is imposed, you're going to be required to serve the prison term that's imposed. Again, in this case, it's going to be at least 28 years.

After you serve your prison term, you'll be eligible for release under post-release control. And I believe in your case, if you do receive parole, your post-release control will be mandatory. And that means that there will be certain conditions that you're going to have to live up to after you're released, if you're released after 28 years.

The maximum period of time you could be on post-release control would be five years. And I would expect you'd probably get the full five years.

There would be certain conditions that you'd have to fulfill. One condition, obviously, would be that you have to remain law abiding. But there would be other conditions.

Now, if you're placed on post-release control and if you violate any of those conditions of post-release control, you'd be charged with a violation and you would have a hearing before the Parole Board, *and if it were determined at the hearing that you had violated one or more conditions of your post-release control, you could have a new prison term imposed of up to nine months in duration; however, the total of all such new prison terms could not exceed one-half of your original sentence.*

Now, do you have any questions about the mandatory post-release controls that would be imposed after you served your full sentence?

THE DEFENDANT: No, sir.

Plea Hrg. T.p. 14-15 (emphasis added).

The trial court ultimately accepted Mr. Clark's plea and set the case for sentencing five days later, noting that a pre-sentence investigation report was "not necessary for this sentencing." Plea Hrg. T.p. 34.

But at the sentencing hearing, the trial court imposed a different sentence than the plea agreement described—the trial court imposed a prison term under which Mr. Clark would be released on potentially unlimited "parole" instead of limited "post-release control." The trial court also detailed the terms of that release to Mr. Clark:

The trial court then told Mr. Clark that he would be subject to a mixture of both postrelease control and parole upon release:

THE COURT: Now, normally, we use a sentencing form at the Sentencing Hearing and it talks about post-release control. I'm going to use this form today and I'm going to read this form to you, but if the defendant were to be released, after 28 years, he would certainly be under certain conditions that they call parole, it's not called post-release control.

But I'm going to use this form and I'm going to read it to you, Mr. Clark, because what's in this form would apply to you.

If you're released from prison, and I'm going to change the word "after" to "if" because that's not a certainty.

If you're released from prison, you will – this will be mandatory – have a period of post-release control, or parole, for at least five years following your release from prison.

If you violate a post-release control[] sanction imposed upon you, any one or more of the following may result:

One, the Parole Board may impose a more restrictive post-release control sanction upon you.

And number two, the Parole Board may increase the duration of the post-release control, subject to the specified maximum.

And number three, the more restrictive sanction that the Parole Board may impose may consist of a prison term, *provided that the prison term cannot exceed nine months, and the maximum cumulative prison term so imposed for all violations during the period of post-release control cannot exceed one-half of the stated prison term originally imposed upon you.*

And number four, if the violation of the sanction is a felony, you may be prosecuted for the felony, and in addition to any sentence it imposes for the felony, for the new felony, the Court may impose a prison term, subject to the specified maximum for the violation.

Now, I'm going to hand this form out to you. I'm going to give you a chance to look at it with your attorney. I'm going to ask you to sign it and return it to the Court.

(The Bailiff handed the above-mentioned form to the defendant and counsel, which said form was then returned to the Court.)

THE COURT: All right, let the record show the Notice Form has been returned to the Court. It's been signed by the defendant and counsel. The Court will accept it and file it with the Clerk of this Court.

Sentencing Hrg. T.p. 37-40 (emphasis added).

The written sentencing entry imposed "a period of post-release control pursuant to R.C. 2929.14(F) and R.C. 2967.28 (B) & (C)." Sentencing Entry at 2.

In addition, the sentencing entry ordered Mr. Clark "to pay all prosecution costs, court-appointed counsel costs and any fees permitted pursuant to R.C. 2929.18(A)(4). Id. at 3. That order was *not* part of the sentence imposed at the sentencing hearing, and was reversed on appeal.

On appeal, Mr. Clark challenged his plea because the plea agreement included postrelease control, not parole. He also challenged his financial sanctions. The court of appeals unanimously reversed his financial sanctions, but, by a two-to-one vote, upheld the validity of his plea. Apx. at A-1.

Two days after the judgment was filed in the court of appeals, Mr. Clark filed a motion to certify a conflict with the decision of the Twelfth Appellate District in State v. Prom, 12th Dist. No. CA2002-01-007, 2003-Ohio-6543. He asked the court to certify the following question:

Is a guilty plea knowing, intelligent, and voluntary when the trial court misinforms the defendant that he or she will be subject to five years postrelease control if released and up to nine months in prison for any violation when, in fact, the defendant faces a lifetime of parole and re-incarceration for life for any violation?

The State did not oppose the motion to certify a conflict, and the motion is still pending before court of appeals.

ARGUMENT

Proposition of Law:

A guilty plea to a sentence carrying a life sentence is not knowing, voluntary, and intelligent when the trial court tells the defendant that he or she will be subject to time-limited postrelease control upon release, instead of indefinite parole.

A guilty plea is not knowing, voluntary, and intelligent, where the trial repeatedly misinforms the defendant that, after his release, the maximum penalty he would face for violating the terms of his supervision would be incarceration no more than nine months in prison per violation totaling no more than half of his original sentence. If Mr. Clark is released from prison, he will be subject to indefinite parole, not limited postrelease control. R.C. 2967.01(E), 2967.13, and 2967.28. Under parole, Mr. Clark faces the reinstatement of his life prison term if he violates his release conditions. R.C. 2967.15.

Murder and aggravated murder are not first-, second-, third-, fourth- or fifth-degree felonies.

The trial court may have been confused about the role of postrelease control. Postrelease control does not attach to Mr. Clark's sentence because murder is not a felony of the first, second, third, fourth or fifth degree. R.C. 2967.28. Murder and aggravated murder are offenses separate from first-, second-, third-, fourth- or fifth-degree felonies. R.C. 2901.02. The General Assembly directed that those convicted of murder and aggravated murder should be punished differently than those convicted of an enumerated felony. R.C. 2903.01(F), 2903.02(D), and 2929.02.

Misinforming a defendant about postrelease control is a substantial mistake.

A guilty plea is valid only if it is knowing, intelligent, and voluntary. State v. Raglin (1998), 83 Ohio St.3d 253, 262; Boykin v. Alabama (1969), 395 U.S. 238. “Failure on any of those points renders a resulting conviction unconstitutional.” State v. Prom, 12th Dist. No. CA2002-01-007, 2003-Ohio-6543, at ¶22, citing State v. Engle, 74 Ohio St.3d 525, 1996-Ohio-179. For a plea to be knowing, intelligent and voluntary, the trial court must ensure that a defendant “has a full understanding of what the plea connotes *and of its consequence.*” Boykin, 395 U.S. at 244 (emphasis added). Here, the trial court informed Mr. Clark that the worst penalty which he would face, should he violate the terms of his eventual release, is nine months in prison. In fact, the maximum penalty Mr. Clark would face is the balance of his life sentence. The trial court’s erroneous advice prevented Mr. Clark from entering a knowing, voluntary, and intelligent plea. Prom, 2003-Ohio-6543, at ¶28-29.

Substantial compliance with the requirements of Crim.R. 11 is generally sufficient. State v. Caplinger (1995), 105 Ohio App.3d 567, 572. But misinforming a defendant about the maximum penalty faced is not substantial compliance. State v. Carroll (1995), 104 Ohio App.3d 372, 379. “By erroneously advising [a defendant] that post-release control requirements are mandatory . . . and what terms of imprisonment might be imposed for their violation, the court inadvertently understated the maximum penalty that might apply to any re-incarceration after [the defendant’s] release.” Prom, 2003-Ohio-6543, at ¶27.

The trial court substantially misinformed Mr. Clark about the consequences of violating his parole, distinguishing this case from those cases in which the trial court simply did not *fully inform* the defendant about parole. See, e.g., State v. Belvin McGee, 8th Dist. No. 77463, 2001-Ohio-4238, at*5 (“the record does not indicate the appellant was misinformed by the trial court”); State v. Davis (Sept. 28, 2000), Cuyahoga App. No. 76315, at *7 (defendant was not “misled or misinformed [] concerning the sentencing procedures and the parole board’s discretionary role”). In this case, the trial court’s statement that Mr. Clark would be subject to a penalty of nine months instead of life imprisonment was more than an omission—it was misinformation:

Substantial compliance might arise out of an omission, but it’s far more difficult to find with respect to an affirmative misstatement, especially one that understates the penalty involved. That is underscored where the error occurred both in the written plea waiver and the court’s oral colloquy with the defendant, both of which happened here.

State v. Prom, 12th Dist. No. CA2002-01-07, 2003-Ohio-6543, at ¶28.

As in Prom, Mr. Clark’s written plea form misinformed him that he would be subject to postrelease control and that the penalty for violation would be nine months incarceration. Plea Form at 1-2. As in Prom, Mr. Clark was misinformed at the plea colloquy as well. Plea Hrg. T.p. 14-15. Finally, Mr. Clark was misinformed at sentencing. Sentencing Hrg. T.p. 37-40. The trial court gave Mr. Clark the same wrong information on *three separate occasions* in the space of less than a week. As a consequence, Mr. Clark “necessarily was unaware of the maximum penalty to which [he] was exposed by [his] plea.”

Prom, 2003-Ohio-6543, at ¶29. The trial court erred in accepting his plea, see id. This Court should vacate the plea and remand Mr. Clark's case for trial.

Release under parole is no longer mere "speculation" in Ohio.

In contrast with the federal system, Ohio prisoners have a right to be considered for parole based on objective criteria. The State and the Fourth District come to the opposite conclusion in part based on an outdated understanding of parole in Ohio. The First, Fourth and Eleventh Districts wrongly rely on federal case law and outdated state case law to determine state-law rights in Ohio's parole system. Clark at ¶18; State v. Baker, 1st Dist. No. C-050791, 2006-Ohio-4902, discretionary appeal denied, 112 Ohio St.3d 1471, 2007-Ohio-388; State v. Hamilton, 4th Dist. No. 05CA4, 2005-Ohio-5450. Ohio inmates, especially inmates who have pleaded guilty, have a reasonable expectation of release under statutorily mandated terms. The Ohio Parole Board's discretion to grant or deny release "must yield when it runs afoul of statutorily based parole eligibility standards and judicially sanctioned plea agreements." Layne v. Ohio Adult Parole Auth., 97 Ohio St. 3d 456, 2002-Ohio-6719, at ¶28. Under Layne, Mr. Clark has a right to "meaningful parole consideration" at the end of 23 years. Release is not guaranteed, but it is far from mere "speculation."

If a defendant does not understand what happens at the end of a sentence, he does not understand the maximum sentence.

The explanations of postrelease control given to Mr. Clark shifted throughout the trial court proceedings. The plea agreement stated that he

would be released from prison. "I understand that after I am released from prison, I may have a period of post-release control for five (5) years following my release from prison." Plea agreement at 1. At the plea colloquy and sentencing hearing, the trial court stated that postrelease control would be imposed "if" Mr. Clark was released. T.p. (plea hearing) 14-15, T.p. (sentencing) 38. The judgment entry of sentence omitted postrelease control entirely.

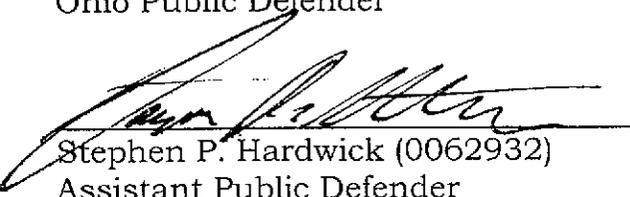
~~When neither the trial court and nor trial counsel can consistently explain how a sentence would end, a defendant cannot understand what exactly the maximum sentence is.~~

CONCLUSION

This Court should accept this discretionary appeal, hold oral arguments the same day as State v. Sarkozy, Case No. 2006-1973, and reverse the decision of the court of appeals. In the alternative, this Court should hold this case for the outcome of Sarkozy.

Respectfully submitted,

David H. Bodiker (0016590)
Ohio Public Defender



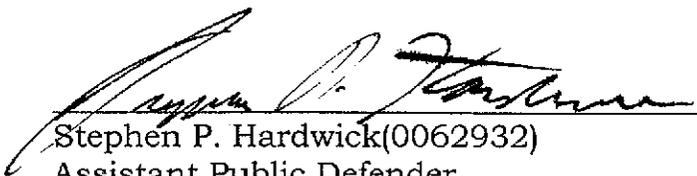
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Ralph E. Clark

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT RALPH E. CLARK** has been sent by U.S. Mail, postage prepaid to Shelley Pratt, Ashtabula County Assistant Prosecutor, Courthouse 25 West Jefferson Street, Jefferson, Ohio 44047 on this 31st day of May, 2007.



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Assistant Public Defender
Counsel of Record

Counsel For Defendant-Appellant,
Ralph E. Clark

#257703

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. _____
 :
 v. : On Appeal from the
 : Ashtabula County of Appeals,
 RALPH E. CLARK, : Eleventh Appellate District, Case
 : No. 2006-CA-4
 Defendant-Appellant. :

APPENDIX TO

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT RALPH E. CLARK**

COURT OF APPEALS

FILED

2007 APR 16 P 12 IN THE COURT OF APPEALS

STATE OF OHIO

COUNTY OF ASHTABULA

SS. CAROL A. HEAD
CLERK OF COURTS
COMMON PLEAS COURT
ASHTABULA CO, OH
ELEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

JUDGMENT ENTRY

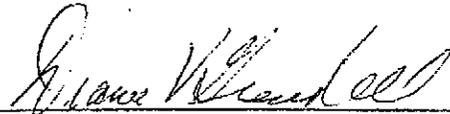
- vs -

CASE NO. 2006-A-0004

RALPH E. CLARK,

Defendant-Appellant.

For the reasons stated in the Opinion of this court, the first assignment of error is without merit, and the trial court's judgment with respect to appellant's guilty plea is affirmed. The remaining assignments of error are with merit. The trial court's judgment ordering appellant "to pay all prosecution costs, court-appointed counsel costs and any fees permitted pursuant to R.C. 2929.18(A)(4)" is reversed, and this cause is remanded to the trial court for further proceedings regarding economic penalties consistent with this Opinion.



JUDGE DIANE V. GRENDALL

MARY JANE TRAPP, J., concurs,

WILLIAM M. O'NEILL, J., dissents.

COURT OF APPEALS

FILED

2007 APR 16 P 12:11

CAROL A. HEAD
CLERK OF COURTS
COMMON PLEAS COURT
ASHTABULA CO, OH

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2006-A-0004
RALPH E. CLARK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 05 CR 118.

Judgment: Affirmed, in part, reversed, in part, and remanded.

Thomas L. Sartini, Ashtabula County Prosecutor and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

David H. Bodiker, Ohio Public Defender, and *Stephen P. Hardwick*, Assistant Public Defender, 8 East Long Street, 11th Floor, Columbus, OH 43215 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Ralph E. Clark, appeals his conviction and sentence in the Ashtabula County Court of Common Pleas following the entry of a negotiated guilty plea of Aggravated Murder with Gun Specification. For the following reasons, we affirm Clark's conviction and reverse his sentence, in part, and remand this cause for re-sentencing in respect to the financial sanctions imposed.

{¶2} Early on the morning of May 7, 2005, Ashtabula Police Officers received a dispatch of a burglary in progress at 4227 Park Avenue, in Ashtabula, the

residence of Clark's estranged wife, Carolyn Clark. The police found Carolyn unconscious, severely beaten at the back of her head with the butt of a rifle. Carolyn died shortly after being transported to the Ashtabula County Medical Center. Clark was arrested later that day at his home on 1031 East Morgan Road, in Jefferson, Ohio.

{¶3} On May 13, 2005, Clark was indicted on one count of Aggravated Murder with Gun Specification, an unclassified felony in violation of R.C. 2903.01 and R.C. 2941.145, two counts of Murder with Gun Specification, unclassified felonies in violation of R.C. 2903.02 and R.C. 2941.145.

{¶4} On January 13, 2006, Clark signed a negotiated Plea of Guilty to Aggravated Murder with a Three Year Gun Specification, in violation of R.C. 2903.01 and R.C. 2941.145. The trial court dismissed a second specification to the Aggravated Murder charge and the two counts of Murder. In the plea agreement, Clark acknowledged "that the maximum penalty for the crime of aggravated murder is life imprisonment without parole *** and that the sentence for the three year gun specification shall be served consecutively to the sentence imposed for aggravated murder." The agreement further provides: "I may have a period of post-release control for five (5) years following my release from prison. If I violate a post-release control sanction imposed upon me, *** the Parole Board may impose *** a prison term, provided that the prison term cannot exceed nine months and the maximum cumulative prison term so imposed for all violations during the period of post-release control cannot exceed one-half of the stated prison term originally imposed upon me."

{¶5} At Clark's change of plea hearing, the prosecution and defense counsel jointly recommended a sentence of life imprisonment, with parole eligibility after

twenty-five years plus an additional three years for the Gun Specification. The trial judge, addressing Clark directly, explained: "if you're placed on post-release control and if you violate any of those conditions of post-release control, you'd be charged with a violation and you would have a hearing before the Parole Board, and if it were determined at that hearing that you had violated one or more conditions of your post-release control, you could have a new prison term imposed of up to nine months in duration; however, the total of all such new prison terms could not exceed one-half of your original sentence."

{¶6} On January 18, 2006, Clark's sentencing hearing was held. The trial court sentenced Clark to life imprisonment with eligibility for parole after twenty-eight years.¹ As to the circumstances of Clark's parole, the trial judge addressed Clark as follows: "Normally, we use a sentencing form at the Sentencing Hearing and it talks about post-release control. I'm going to use this form today and I'm going to read this form to you, but if the defendant were to be released, after 28 years, he would certainly be under certain conditions that they call parole, it's not called post-release control. But I'm going to use this form and I'm going to read it to you, Mr. Clark, because what's in this form would apply to you. If you're released from prison, and I'm going to change the word "after" to "if" because that's not a certainty. If you're released from prison, you will *** have a period of post-release control, or parole, for at least five years following your release from prison. If you violate a post-release controlled sanction imposed upon you *** the Parole Board may impose *** a prison term, provided that the prison term cannot exceed nine months, and the maximum

1. Clark was forty-four years old at the time of sentencing with 257 days jail credit for time served. Accordingly, he would be about seventy-three years old when he becomes eligible for parole.

cumulative prison term so imposed for all violations during the period of post-release control cannot exceed one-half of the stated prison term originally imposed upon you.”

{¶7} The trial judge also addressed Clark regarding economic penalties as follows: “The Court is not going to impose any monetary fine. Under the law, the Court, if it imposes a fine, has to also make a finding that he’s got the ability to pay the fine. Obviously, [Clark]’s going to spend the rest of his life behind bars. He won’t have the ability to be employed. So, no fine will be imposed. There’s been no request for restitution made. Obviously, he would not have the ability to make restitution either.”

{¶8} In the trial court’s written Judgment Entry of Sentence, the court stated that Clark “will be subject to a period of post-release control pursuant to R.C. 2929.14(F) and R.C. 2967.28(B) & (C). *** No monetary fine is imposed and no restitution is ordered. [Clark] is ordered to pay all prosecution costs, court-appointed counsel costs and any fees permitted pursuant to R.C. 2929.18(A)(4).”

{¶9} Clark has appealed the entry of his guilty plea and the trial court’s imposition of economic penalties and raises the following assignments of error:

{¶10} “[1.] Ralph Clark’s guilty plea was not knowing, voluntary, and intelligent because the trial court repeatedly misinformed him that he would be subject to a limited period of post-release control upon his release from prison.

{¶11} “[2.] The trial court erred when it ordered Mr. Clark to pay court-appointed-counsel fees without making the necessary ability-to-pay finding required by R.C. 2941.51(D).

{¶12} “[3.] The trial court erred when it ordered Mr. Clark to pay ‘any fees permitted pursuant to R.C. 2929.18(A)(4)’ without considering Mr. Clark’s ‘present and future ability to pay’ such fees, as required by R.C. 2929.19(B)(6).

{¶13} “[4.] The trial court erred when it included a punishment in the written sentencing judgment, but not in the sentence it imposed from the bench at the sentencing hearing.”

{¶14} Under the first assignment of error, Clark argues that the trial court mistakenly informed him that the maximum penalties that could be imposed for violating the terms of his Adult Parole Authority supervision were additional prison terms of nine months not exceeding one half of his original sentence. According to Clark, this erroneous information regarding the “maximum penalty” that could be imposed rendered his plea invalid, i.e. it was not knowingly, voluntarily, and intelligently made. We disagree.

{¶15} Contrary to Clark’s plea agreement and the comments made by the trial judge at the plea hearing, Clark is not subject to post-release control as detailed in R.C. 2967.28. Strictly speaking, the trial judge’s erroneous statements regarding post release control made at the sentencing hearing have no bearing on the validity of Clark’s plea. Post-release controls apply to classified felonies based on the degree of the felony. R.C. 2967.28(B) and (C). Aggravated murder is an unclassified felony to which the provisions of R.C. 2967.28 do not apply. *State v. Wotring*, 11th Dist. No. 99-L-114, 2003-Ohio-326, ¶¶33-36; *State v. Baker*, 1st Dist. No. C-050791, 2006-Ohio-4902, at ¶6. Accordingly, Clark was mistakenly advised that he could be subject to a period of post-release control for five years and that if he violated the

conditions of post release control, the parole board could impose a prison term not exceeding nine months. See R.C. 2967.28(B)(1) and (F)(3).

{¶16} The basic penalties for Aggravated Murder are either death or imprisonment for life. R.C. 2929.02(A). If the court imposes the penalty of imprisonment for life, the court may specify whether the offender shall be imprisoned for life "without parole" or whether the offender will be eligible for parole after serving twenty, twenty-five, or thirty "full years of imprisonment." R.C. 2929.03(A)(1).

{¶17} According to the sentence imposed by the trial court, Clark becomes eligible for parole "after serving a term of twenty-five full years," plus three additional years for the Gun Specification. R.C. 2967.13(A)(3) and (B); R.C. 2929.03(A)(1)(c). "Parole" means, regarding a prisoner who is serving a prison term for aggravated murder ***, a release of the prisoner from confinement in any state correctional institution by the adult parole authority *** under the terms and conditions, and for a period of time, prescribed by the authority ***." R.C. 2967.01(E). A "parolee" remains under the supervision of the adult parole authority and under the legal custody of the department of rehabilitation and correction until granted "final release." R.C. 2967.02(C); *In re Ricks* (Dec. 31, 1997), 11th Dist. No. 97-T-0182, 1997 Ohio App. LEXIS 6026, at *3 ("the courts of this state have consistently held that a parolee remains in the legal custody of the Ohio parole authority until a final release certificate is issued"). There is no fixed period of time within which the parole authority must grant a parolee final release. R.C. 2967.16.

{¶18} "There is no constitutional or inherent right to be released before the expiration of a valid sentence." *State ex rel. Miller v. Leonard*, 88 Ohio St.3d 46, 47, 2000-Ohio-267, citing *Greenholtz v. Inmates of Nebraska Penal & Correctional*

Complex (1979), 442 U.S. 1, 7. “[W]hether to *** grant parole, or to grant a final release from parole once granted, rests within the discretion of the Adult Parole Authority.” *Poole v. Barkollo*, 10th Dist. No. 01AP-1249, 2002-Ohio-2300, at ¶6 (citations omitted); *State ex rel. Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 192, 1996-Ohio-326 (“[e]ven if all of these requirements [for final release] are met, the APA’s decision whether to grant final release is still discretionary”).

{¶19} In contrast to an offender subject to post-release control pursuant to R.C. 2967.28 (technically called a “releasee,” see R.C. 2967.01(J)), a parolee who violates the conditions of his parole “is returned to serve the remainder of his original sentence, not a new sentence.” *In re Long* (1985), 24 Ohio App.3d 32, 36.

{¶20} The Ohio Rules of Criminal Procedure provide that a trial court “shall not accept a plea of guilty *** without first addressing the defendant personally and *** determining that the defendant is making the plea voluntarily, with understanding *** of the maximum penalty involved ***.” Crim.R. 11(C)(2)(a). With respect to the non-constitutional requirements of Crim.R. 11(C)(2), such as whether the defendant understands the maximum penalty involved, a reviewing court must determine whether there was substantial compliance. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, at ¶45. “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. Nero* (1990), 56 Ohio St.3d 106, 108, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 92-93.

{¶21} In contrast to post release control, parole is not part of an offender’s sentence. The “maximum penalty” that could be imposed on Clark was imprisonment for life. Accordingly, the trial court was under no duty to explain to Clark the

circumstances of parole. *Hill v. Lockhart* (1985), 474 U.S. 52, 56 (“[w]e have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant’s plea of guilty to be voluntary”); *Xie v. Edwards* (C.A.6.1994), 6th Cir. No. 93-4385, 1994 U.S. App. LEXIS 23606, at *4 (“[p]arole eligibility is not a ‘direct consequence’ of a conviction, and a defendant need not be informed of it”) (citation omitted); *State v. Hamilton*, 4th Dist. No. 05CA4, 2005-Ohio-5450, at ¶13 (“[b]ecause parole is not part of an offender’s sentence, the maximum penalty [for aggravated murder] is imprisonment for life”); *State v. Prom*, 12th Dist. No. CA2002-01-007, 2003-Ohio-6543, ¶27 (“the court was [not] required to give Prom any advice at all concerning parole *** and courts rarely if ever do”).

{¶22} Clark relies on the Twelfth District case of *State v. Prom*, in which the offender pled guilty to murder and was mistakenly advised of post release control rather than parole. The Twelfth District, although acknowledging that the trial court was under no obligation to advise the offender regarding parole, found that “by delving into these inapplicable post-release control penalties in a mistaken effort to comply with Crim.R. 11(C), *** the court inadvertently created a Crim.R. 11(C) problem.” 2003-Ohio-6543, at ¶27. The court of appeals reasoned, “[s]ubstantial compliance might arise out of an omission, but it’s far more difficult to find with respect to an affirmative misstatement, especially one that understates the penalty involved.” *Id.* at ¶28. Thus, the court concluded “that the trial court erred when it accepted Prom’s guilty plea when, in consequence of the court’s erroneous advice to her concerning post-release control, Prom necessarily was unaware of the maximum penalty to which she was exposed by her plea.” *Id.* ¶29.

{¶23} We do not find *Prom* persuasive. The *Prom* court bases its conclusion on the offender being “unaware of the maximum penalty to which she was exposed by her plea,” however, eligibility for parole as well as the terms and conditions of parole were neither part of her sentence nor part of the maximum penalty to which she was exposed.

{¶24} The Fourth District in *State v. Hamilton* rejected the conclusion reached in *Prom*. As in the present case, the offender in *Hamilton* had pled guilty to Aggravated Murder and was erroneously advised of the penalties for violating post release control. 2005-Ohio-5450, at ¶1. The Fourth District reasoned, “nothing in the court’s misstatement about post-release control indicated that Hamilton would be or was entitled to early release. The maximum penalty remained life in prison. Hamilton is not subject to any greater penalty than the court described. The court’s inaccurate minimization of the sanction for violating a totally discretionary early release does not change the maximum penalty Hamilton faces. Hamilton may well have been misled about how much time he would serve for violating parole, but his contention that he did not know the maximum penalty he faced for aggravated murder rings hollow.” *Id.* at ¶18.

{¶25} The *Prom* decision has also been rejected by the First Appellate District in *State v. Baker*, 2006-Ohio-4902, for the similar. *Id.* at syllabus (“When the trial court mistakenly informed a defendant convicted of murder that the defendant could be placed on a period of post-release control, the defendant’s guilty plea was not rendered involuntary under Crim.R. 11(C)(2)(a): The trial court’s mistake in no way

detracted from the defendant's understanding that the maximum penalty he faced was life in prison.").²

{¶26} In the present case, as correctly stated by the trial judge at the plea hearing, the maximum penalty that could be imposed upon Clark was life without parole. Clark's actual sentence of life with eligibility for parole after twenty-five years was jointly recommended, but, as the trial judge made clear, the court was not bound to accept this recommendation. Accordingly, the trial court substantially complied with Crim.R. 11(C)(2)(a)'s requirement to explain the maximum penalty, notwithstanding the court's erroneous explanation of the lesser penalty of life with eligibility for parole.

{¶27} The inquiry, however, does not end with the determination as to whether the sentencing judge complied with Crim.R. 11(C)(2)(a). "[A] defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. *** The test is whether the plea would have otherwise been made." *Nero*, 56 Ohio St.3d at 108, citing *Stewart*, 51 Ohio St.2d at 93, and Crim.R. 52(A).

{¶28} In the present case, there is no evidence that would suggest Clark's belief that he would be subject to post release control, assuming he would be released after twenty-eight years, induced him to enter his plea of guilty. On the contrary, the prosecution possessed a video-taped statement, two recorded statements, and an oral statement in which Clark fully admitted his culpability for Carolyn's death. Clark's motion to have these confessions suppressed was denied.

2. The Ohio Supreme Court declined to accept *Baker* as a discretionary appeal. *State v. Baker*, 112 Ohio St.3d 1471, 2007-Ohio-388. As to *Hamilton*, the Supreme Court denied a motion to file a delayed appeal. *State v. Hamilton*, 112 Ohio St.3d 1417, 2006-Ohio-6712.

Moreover, Clark had been determined competent to stand trial and to have known the wrongfulness of his acts. As Clark's guilt was not reasonably in the question, the only issue for the court was whether Clark's sentence would be life imprisonment or life imprisonment with the possibility of parole. In exchange for the plea of guilty, the State agreed to recommend a sentence of life with eligibility for parole after twenty-five years. As discussed above, post release control is not applicable in murder cases. Clark cannot demonstrate prejudice by being misinformed about the possibility of post release control sanctions when such sanctions are not a possibility under any circumstances. Thus, parole remains the only possible alternative to life imprisonment without parole. Since parole is the only alternative of life imprisonment, the actual conditions of parole cannot have been a significant factor in Clark's decision to enter a plea. Cf. *State v. Mitchell*, 11th Dist. No. 2004-T-0139, 2006-Ohio-618, at ¶16 (defendant's mistaken belief about the "possibility" of early judicial release did not satisfy the prejudice requirement necessary to invalidate the guilty plea).

{¶29} The late Judge Kilbane, in a separate concurring opinion in *State v. Cvijetinovic*, 8th Dist. No. 81534, 2003-Ohio-563, provides a perceptive analysis of the difficulty of demonstrating prejudice in a direct appeal of a plea agreement: "I agree that the record on appeal is insufficient to set aside the plea because there is no indication that Cvijetinovic relied on the judge's statements to his prejudice. These circumstances, however, are not unusual because the substantial compliance rule tends to defeat most guilty plea challenges on appeal unless prejudice is shown in the transcript of the plea hearing or the violation does not require a showing of prejudice. Where the record on appeal shows substantial compliance, the defendant

still may challenge his plea through Crim.R. 32.1 if he can present evidence showing that he did not have the necessary subjective understanding of the plea's consequences." Id. at ¶23 (citations omitted).

{¶30} The first assignment of error is without merit.

{¶31} The next three assignments of error challenge the trial court's imposition of financial penalties and may be considered together.

{¶32} Under the Revised Code, "[t]he court shall not impose a fine or fines for aggravated murder which *** exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to the offender or to the dependents of the offender, or will prevent the offender from making reparation for the victim's wrongful death." R.C. 2929.02(C).

{¶33} At Clark's sentencing hearing, the trial court ordered Clark to "pay court costs, for which judgment is rendered and execution may issue." In its written Judgment Entry of Sentence, the trial court stated; "[n]o monetary fine is imposed and no restitution is ordered. [Clark] is ordered to pay all prosecution costs, court-appointed counsel costs, and any fees permitted pursuant to R.C. 2929.18(A)(4)."

{¶34} Clark argues that the order to pay court-appointed counsel fees and any fees permitted pursuant to R.C. 2929.18(A)(4) is improper because (1) the trial court failed to state that it was imposing these penalties at the sentencing hearing and (2) the trial court failed to inquire into Clark's ability to pay these fees.

{¶35} Ohio Criminal Rule 43(A) provides "[t]he defendant shall be present at the arraignment and every stage of the trial, including *** the imposition of sentence." Thus, the defendant must be present when sentence is imposed and a trial court errs when it imposes additional sanctions, including mandatory court costs, in its

sentencing entry outside the defendant's presence. *State v. Peacock*, 11th Dist. No. 2002-L-115, 2003-Ohio-6772, at ¶45 ("Crim.R. 43(A) requires the trial court to inform the defendant, at his sentencing hearing, *** that he is required to pay costs[;] [s]imply adding these sanctions in the sentencing entry violates Crim.R. 43(A)").

{¶36} The State concedes the trial court erred by including additional sanctions in its sentencing entry that were not imposed at the hearing. Accordingly, that part of the court's Judgment Entry of Sentence, ordering Clark "to pay all prosecution costs, court-appointed counsel costs and any fees permitted pursuant to R.C. 2929.18(A)(4)," must be vacated. The fourth assignment of error has merit.

{¶37} Under the second assignment of error, Clark challenges the trial court's ability to impose "court-appointed counsel costs" when the court has not inquired into the offender's ability to pay. There exists some ambiguity as to what the trial court meant by "court-appointed counsel costs."

{¶38} Clark interprets "court-appointed counsel costs" to mean the costs of appointed counsel. Pursuant to R.C. 2941.51, governing the payment of appointed counsel, "if the person represented has, or reasonably may be expected to have, the means to meet some part of the cost of the services rendered to the person, the person shall pay the county an amount that the person reasonably can be expected to pay." R.C. 2941.51(D). A trial court is required to make a finding on the record regarding an offender's ability to pay appointed counsel fees before assessing the costs of appointed counsel. *State v. Berry*, 6th Dist. No. L-05-1048, 2007-Ohio-94, at ¶56.

{¶39} The State interprets "court-appointed counsel costs" to mean the twenty-five dollar application fee for indigent defendants. Pursuant to R.C. 120.36, "if

a person who is a defendant in a criminal case *** requests or is provided a state public defender, *** or any other counsel appointed by the court, the court in which the criminal case is initially filed *** shall assess, unless the application fee is waived or reduced, a non-refundable application fee of twenty-five dollars. *** If the person does not pay the application fee within [a] seven-day period, the court shall assess the application fee at sentencing or at the final disposition of the case.” R.C. 120.36(A)(1).

{¶40} At sentencing, the trial court stated, “[t]he Court is not going to impose any monetary fine. Under the law, the Court, if it imposes a fine, has to also make a finding that he’s got the ability to pay the fine. Obviously, [Clark]’s going to spend the rest of his life behind bars. He won’t have the ability to be employed. So, no fine will be imposed.”

{¶41} These comments are consistent with the State’s, rather than Clark’s, interpretation of what the trial court meant by “court-appointed counsel costs.” Far from finding that Clark “has, or reasonably may be expected to have, the means to meet some of the costs of” appointed counsel, the trial court concluded that Clark does not and will not have the ability to pay additional fines. Accordingly, the trial court’s reference to “court-appointed counsel costs” can only be reasonably interpreted to mean the twenty-five dollar application fee for indigent defendants. However, since the trial court failed to assess this fee at the time of sentencing, this part of Clark’s sentence remains vacated. The second assignment of error has merit for the reasons set forth under the fourth assignment of error, i.e. “court-appointed counsel costs” were not pronounced at the sentencing hearing.

{¶42} Under the third assignment of error, Clark challenges the trial court's order that he pay "any fees permitted pursuant to R.C. 2929.18(A)(4)." Pursuant to R.C. 2929.18(A)(4), the trial court may order Clark to pay "[a] state fine or costs as defined in section 2949.111 of the Revised Code." "State fines or costs' means any costs imposed or forfeited bail collected by the court *** for deposit into the reparations fund or *** for deposit into the general revenue fund and all fines, penalties, and forfeited bail collected by the court and paid to a law library association ***." R.C. 2949.111(A)(2). "Before imposing a financial sanction under section 2929.18 of the Revised Code ***, the court shall consider the offender's present and future ability to pay the amount of the sanction or fine." R.C. 2929.19(B)(6).

{¶43} The State concedes the trial court did not comply with R.C. 2929.19(B)(6) by not considering Clark's future ability to pay fees pursuant to R.C. 2929.18(A)(4).

{¶44} As discussed under the second assignment of error, this part of Clark's sentence must be vacated as the trial court did not assess fees pursuant to R.C. 2929.18(A)(4) at the time of sentencing. We further note that it does not appear from the record that any "state fines or costs," as defined in 2949.111(A)(2), presently exist. Accordingly, the third assignment of error has merit.

{¶45} For the foregoing reasons, we affirm the Ashtabula County Court of Common Pleas' Judgment Entry of Guilty to Negotiated Plea, accepting Clark's guilty plea to one count of Aggravated Murder with Gun Specification. We reverse the court's Judgment Entry of Sentence as to the financial penalties contained in the

written entry and imposed outside of Clark's presence. This matter is remanded for the limited purpose of resentencing consistent with Crim.R. 43(A) and this opinion.

MARY JANE TRAPP, J., concurs,

WILLIAM M. O'NEILL, J., dissents.