IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

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STATE OF OHIO,	)	Case Nos. 2007-0983 and 2007-1047
	)	
Plaintiff-Appellee,	)	On Appeal from the Ashtabula
-vs-	)	County Court of Appeals,
	)	Eleventh Appellate District
RALPH E. CLARK,	)	
	)	Ashtabula County Court of Appeals
Defendant-Appellant.	)	Case No. 2006-A-4

MERIT BRIEF OF APPELLEE, STATE OF OHIO

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STATEMENT OF THE CASE AND FACTS

On May 13, 2005, an indictment was filed charging Ralph E. Clark, appellant herein, with one Count of Aggravated Murder with a gun specification, in violation of R.C. 2903.01(A); one Count of Murder with a gun specification, in violation of R.C. 2903.02(A); and one Count of Murder with a gun specification, in violation of R.C. 2903.02(B). On May 18, 2005, appellant was arraigned and entered a plea of not guilty to the charges in the indictment. On January 13, 2006, appellant entered a plea of guilty to Aggravated Murder with a three year gun specification under R.C. 2903.01 and R.C. 2941.145. Pursuant to a negotiated plea agreement, the State of Ohio dismissed Counts Two and Three of the indictment. No pre-sentence investigation was ordered and sentencing was scheduled for January 18, 2006.

Appellant was sentenced to life imprisonment with the possibility of parole after twenty-five years, in addition to three years imprisonment for the gun specification. The sentences were ordered to be served consecutively. The Eleventh District Court of Appeals affirmed appellant's negotiated plea of guilty and reversed the trial court's sentence as to financial penalties imposed outside of appellant's presence. *State* v.Clark, 11th Dist. App. No.2006-A-0004,¶45, 2007-Ohio-1780.

Appellant filed a motion to certify conflict with the decision in *State v. Prom,* 12th Dist. App. No. CA2002-01-007, 2003-Ohio-6543 with the Eleventh District Court of Appeals. The court certified the following question to this Honorable Court:

> 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?

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On August 29, 2007, this Honorable Court accepted jurisdiction to hear appellant's certified conflict case and discretionary appeal.

ARGUMENT

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PROPOSITION OF LAW

> A GUILTY PLEA TO A SENTENCE CARRYING A LIFE SENTENCE IS 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.

Appellant argues that his guilty plea was not knowing, voluntary, and intelligent because the trial court informed him that, after his release, he would be subject to postrelease control and the maximum penalty he would face as a postrelease control sanction would be incarceration of not more than nine months and totaling no more than half of his original sentence. This argument lacks merit, as the record reveals that the trial court fully complied with Crim.R. 11(C)(2) when it accepted appellant's guilty plea.

Pursuant to Crim.R.11(C)(2), a trial court may not accept a plea of guilty without first addressing the defendant personally and doing all of the following:

> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
>
> (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
>
> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving his rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable

doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

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"While literal compliance with the requirements of Crim.R. 11(C)(2) is the preferred practice, and is in some instances required, 'the fact that the trial judge did not do so does not require vacation of the defendant's guilty plea if the reviewing court determines that there was substantial compliance.'" *State v. Brown*, 11th Dist. No. 2003-G-2504, 2004-Ohio-1843, at ¶11, quoting, *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. "'Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.'" *Id.*, quoting, *State v. Stewart* (1977), 51 Ohio St.2d 86, 92, 364 N.E.2d 1163. "Furthermore, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect." *Id.*, citing, *Stewart*, at 93. "The test is whether the plea would have otherwise been made." *Id.*

Appellant argues that he was not aware of the maximum penalty he could receive as a result of his plea. However, as required by Crim.R. 11(C)(2)(a), the trial court explained to appellant the maximum penalty he could receive for pleading guilty to Aggravated Murder. The trial court advised appellant that the court will impose a sentence of life imprisonment, but that there are four modifying conditions. (T.p. plea hearing 11.) Appellant indicated that he understood this penalty. (T.p. plea hearing 12.) The court further indicated to appellant that he would be required to serve at least twenty-eight years and that he would be eligible for release at that time. (T.p. plea hearing 14.)

Appellant contends that his plea is invalid due to misinformation from the trial court

relating to postrelease control supervision. While the State concedes that appellant was misinformed with respect to postrelease control supervision, this does not render appellant's plea invalid. "[T]he trial court was under no duty to explain to [appellant] the circumstances of parole." *Clark* at ¶21 citing *Hill v. Lockhart* (1985), 474 U.S. 52, 56; *Xie v. Edwards* (C.A. 6 1994), 6th Cir. No. 93-4385, 1994 U.S. App. LEXIS 23606 at *4; *State v. Hamilton*, 4th Dist. App. No. 05CA4, 2005-Ohio-5450 at ¶13; *State v. Prom*, 12th Dist. App. No. CA2002-01-007, 2003-Ohio-6543 at ¶27.

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While a defendant must be made aware of the maximum penalty he can receive before a trial court accepts his guilty plea, Crim.R.11 does not require a court to inform a defendant of possible sanctions for violating conditions of an early release from a maximum penalty. *State v. Hamilton*, 4th Dist. App. No. 05CA4 *4, 2005-Ohio-5450. Misinforming a defendant about the possibility of postrelease control does not misstate the maximum penalty for Aggravated Murder. *Id.* "Because parole is not part of an offender's sentence, the maximum penalty is imprisonment for life." *Id.*

A defendant facing life imprisonment is aware that the maximum penalty is life in prison. *Id.* at *5. A defendant does not have a constitutional right to be released before the expiration of a valid sentence. *Clark* at ¶18 citing *State ex rel. Miller v. Leonard*, 88 Ohio St.3d 46, 47, 2000-Ohio-267. The decision to grant parole rests within the discretion of the Adult Parole Authority. *Id.* citing *Poole v. Barkollo*, 10th Dist. App. No. 01AP-1249, 2002-Ohio-2300 at ¶6; *State ex rel. Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 192, 1996-Ohio-326. While the possibility of parole exists, there is no guarantee that a defendant will be granted a parole. *Hamilton* at *4. Early release from prison and subsequent return are both speculative, and the

fact that they may occur does not change a defendant's maximum sentence. *Id.*

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Appellant's argument has no merit, as it is based on speculation that appellant will get paroled. At no time did the trial court indicate to appellant that he would be guaranteed an early release from prison. In fact, when explaining to appellant about the possibility of postrelease control or parole, the trial court makes frequent use of the word "if" as an indication that there is no guarantee of early release. (T.p. plea hearing 14.) Appellant is not subject to any greater penalty due to the court's postrelease control information. He has at all times been subject to a maximum term of life imprisonment.

Moreover, appellant fails to show prejudicial effect. Appellant offers no evidence that suggests that his belief that he would be subject to postrelease control induced him to plea guilty. The State possessed a video taped statement, two recorded statements, and an oral statement where appellant admits guilt for his wife's death. *Clark* at ¶28. Appellant's attempt to have these confessions suppressed failed. *Id.* Appellant was determined competent to stand trial and to have been aware of the wrongfulness of his acts. *Id.* "As [appellant's] guilt was not reasonably in question, the only issue for the court was whether [appellant's] sentence would be life imprisonment or life imprisonment with the possibility of parole." *Id.* The State agreed to recommend life with the possibility of parole after twenty-five years in exchange for a guilty plea. *Id.*

Postrelease control was not a possibility for appellant under any circumstances. Parole was the only possible alternative to life in prison. "Since parole is the only alternative to life imprisonment, the actual conditions of parole cannot have been a significant factor in [appellant's] decision to enter a plea." *Id.* Accordingly, appellant's guilty plea was knowing,

intelligent, and voluntary when the trial court misinformed him that he would be subject to five years postrelease control if released and up to nine months in prison for any violation when, in fact, he was facing a lifetime of parole and re-incarceration for life for any violation.

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CONCLUSION

For the foregoing reasons, the State of Ohio respectfully requests this Honorable Court to affirm the decision of the Eleventh District Court of Appeals.

Respectfully submitted,

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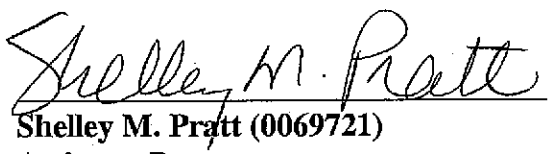
PROSECUTING ATTORNEY



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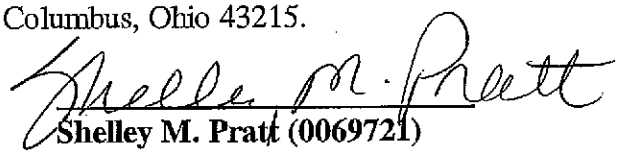
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Merit Brief of Appellant, State of Ohio has been served via ordinary U.S. Mail, postage prepaid, this 3rd day of December, 2007 upon Stephen P. Hardwick, Counsel for Appellant, at Office of the Ohio Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio 43215.



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STATE OF OHIO,	)	OHIO SUPREME COURT
	)	CASE NOS. 2007-0983 and 2007-1047
Plaintiff-Appellee,	)	
	)	On Appeal from the Ashtabula County
-vs-	)	Court of Appeals, Eleventh Appellate
	)	District
RALPH E. CLARK,	)	
	)	Ashtabula County Court of Appeals
Defendant-Appellant.	)	Case No. 2006-A-4

APPENDIX

Crim. R. Rule 11

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Baldwin's Ohio Revised Code Annotated ⁱ. Currentness

Rules of Criminal Procedure (Refs & Annos)

" src="https://statcont.westlaw.com/images/arrow.gif" border=0**Crim R 11 Pleas, rights upon plea**

(A) Pleas

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas

With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim. R. 32.

(C) Pleas of guilty and no contest in felony cases

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

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(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is

determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

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(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses

In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty.

The counsel provisions of Crim. R. 44(B) and (C) apply to division (E) of this rule.

(F) Negotiated plea in felony cases

When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea

If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor

be the subject of comment by the prosecuting attorney or court.

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(H) Defense of insanity

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

(Adopted eff. 7-1-73; amended eff. 7-1-76, 7-1-80, 7-1-98)