

IN THE SUPREME COURT OF OHIO

No. 2007-2373

**APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
No. 88292, 88293**

STATE OF OHIO

PLAINTIFF/APPELLANT

-VS-

PARRIS BOSWELL

DEFENDANT/APPELLEE

MEMORANDUM OPPOSING JURISDICTION

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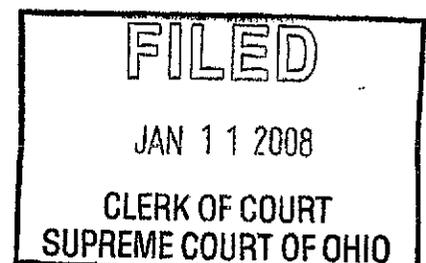


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The State has asked this Court to again consider the issue of Crim. R. 32.1; allowing a defendant to vacate a plea following sentencing. This is simply not necessary since this Court has developed an unvarying body of case law, beginning in 1977 with *State v. Stewart (1997), 51 Ohio St. 2d 86*, and culminating with *State v. Jones _N.E. 2d _ , 2000-Ohio-6093*. Nothing can be added to this Court's standard, involving a Crim. R. 11 plea, as follows:

- Strict compliance is required when advising a defendant of Constitutional rights, pursuant to Crim. R. 11(C)(2)(b).
- Substantial compliance is required when advising a defendant of non-Constitutional rights pursuant to Crim. R. (C)(2)(a). But, if a defendant can establish prejudice, it is a factor which will weigh in favor of vacating a plea. *Stewart, supra, State v. Nero (1990) 56 Ohio St. 3d 106*.
- Non-compliance with either of the above allows a plea to be vacated

One of the issues in this case, is the failure of the trial court to advise the defendant of mandatory post-release control; the length of post-release control; and, the potential additional incarceration of up to one-half of the original sentence.

An additional issue is that this Court has upheld the mandatory language in R.C. 2943.032, which requires the trial court to advise a defendant of post-release control, and the penalties for a violation, *State v. Jordan (2004), 104 Ohio St. 3d 21*. Also, in *State v. Bezak (2007), 114 Ohio St. 3d 94*, this Court held that failure to comply with R.C. 2929.19 renders the sentence void.

Finally, the central issue argued in the Eighth District was that the trial court had not abused its discretion in finding "manifest injustice," because the defendant had been lead to believe that he would receive a ten year sentence during the plea hearing but, instead, received a 16 year sentence. One of Mr. Boswell's attorneys failed to appear for the sentencing hearing, and the other attorney failed to remind the sentencing judge of the State's position that they would accept a concurrent sentence (ten years).

In conclusion, Crim. R. 11(C) is not the central issue, but only a component of the overriding issue of whether the trial court abused its discretion in granting Mr. Boswell's motion to vacate plea. It is clear from this Court's decision in *Blakemore v. Blakemore (1983), 5 Ohio St. 3d 217*, that an abuse of discretion is more than an error of law or judgment.

Accordingly, it is requested that this Court deny jurisdiction, since the issues decided by the Eighth District follow well settled law established by this Court.

STATEMENT OF THE CASE

On May 15, 2000, the defendant entered into a plea bargain by entering a guilty plea to a charge of Aggravated Burglary and Assault in Case No. 387210, and to a charge of Aggravated Robbery, and Felonious Assault in Case No. 388072. The defendant was sentenced to consecutive prison sentences for a total of 16 years.

On September 9, 2004, defendant filed a Motion for Delayed Appeal with the Eighth District Court of Appeals. The court denied the motion. Thereafter, defendant filed a Motion for Reconsideration with the appellate court which was also denied.

On June 6, 2005, defendant filed a Motion to Vacate Plea in the trial court. The State filed a Brief in Opposition. On May 11, 2006, the trial court granted the Motion to Withdraw the Plea. Thereafter, the State filed a Motion for Leave to Appeal which was granted by the Eighth District . The appellate court affirmed the trial court, holding that there was: a failure to comply with Crim. R. 11(C); that a manifest injustice had occurred; and that the trial court had not abused its discretion in granting the motion. ***State v. Boswell, Cuyahoga App. Nos. 88292, 88294, 2007-Ohio-5718.***

LAW AND ARGUMENT

RESPONSE TO PROPOSITION OF LAW NO. 1: THE EIGHTH DISTRICT COURT DID NOT CHANGE THE LAW REGARDING POST-SENTENCE MOTIONS BY ELIMINATING THE PREJUDICE REQUIREMENT.

1. THE TRIAL COURT DID NOT ERR IN GRANTING MR. BOSWELL'S MOTION TO VACATE PLEA.
 - A. THE EIGHTH DISTRICT WAS NOT REQUIRED TO USE A PREJUDICE STANDARD SINCE THERE WAS NON-COMPLIANCE WITH CRIM. 11(C).

In ***State v. Delventhal (2003) Ohio-1503***, the Eighth District considered a similar issue, and incorporated this Court's rulings in ***State v. Stewart, supra***, and ***State v. Nero, supra***, and held [p8]:

The State next counters that Delventhal has not shown that he would not have entered the plea if had been properly informed and, therefore, has not shown prejudice. The prejudice requirement, however, is applied as part of the substantial compliance rule. Where Crim. R. 11(C) does not require the giving of specific information or requires only that the judge "determine" that the defendant understands particular aspects of his plea, the substantial compliance rule allows a showing that the defendant had the requisite understanding even when the judge failed to inform him personally . Where the judge is required to

inform the defendant personally and fails to do so, the judge has no valid basis for determining that the defendant had necessary understanding and there can be no finding of substantial compliance. Where the judge is required to inform the defendant personally and entirely fails to do so there is no further need to determine whether prejudice occurred, and this rule is not limited only to warnings that are constitutionally required.

In this case, the court of appeals determined that it was a non-compliance situation, and that prejudice was not the proper standard.

In *State v. Conrad Cuyahoga App. No. 88934, 2007-Ohio-5717*, the Eighth District again looked to this Court for guidance, and held, footnote4:

The Ohio Supreme Court recently held that when a defendant is not informed about the imposition of post-release control at his sentencing hearing, the **sentence** is void and the trial court must conduct a new sentencing hearing. *State v. Bezak, 114 Ohio St. 3d 94, 2007 Ohio 3250, 868 N.E.2d 961*. We find the same rationale requires that we vacate a plea when the trial court fails to inform the defendant of mandatory post-release control at the plea hearing.

B. THE APPELLEE'S GUILTY PLEAS WERE INVALID SINCE THE TRIAL COURT FAILED TO ADVISE HIM OF MANDATORY POST-RELEASE CONTROL.

On May 15, 2000, and prior to taking the defendant's guilty pleas to a first degree felony and a second degree felony, the court failed to inform Mr. Boswell that he would be subject to mandatory post-release control of five-years. Consequently, the trial court did not comply with the mandatory requirements of Crim. 11(C)(2)(a), and the mandate of R.C. 2943.032(E). This failure makes the guilty pleas invalid.

Crim R. 11(C)(2)(a), reads as follows, and requires the sentencing court to advise the defendant of the maximum penalty involved:

- (C) (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.

It has been held, as set forth below, that post-release control is part of the maximum penalty which will be imposed, following a plea.

In the case of first and second degree felonies, **R.C. 2967.28(B)** dictates a mandatory term of post-release control for a first degree felony, and a mandatory three years post-release control for a second degree felony:

(B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. Unless reduced by the parole board pursuant to division, a period of post-release control required by this division for an offender shall be of one of the following periods:

(1) For a felony of the first degree or for a felony sex offense, five years;

(2) For a felony of the second degree that is not a felony sex offense, three years.

Finally, **R.C. 2943.032**, requires the court to do all of the following:

Prior to accepting a guilty plea or a plea of no contest to an indictment, information, or complaint that charges a felony, the court shall inform the defendant personally that, if the defendant pleads guilty or no contest to the felony so charged or any other felony and if the court imposes a prison term upon the defendant for the felony, all of the

following apply:

(A) The parole board may extend the stated prison term if the defendant commits any criminal offense under the law of this state or the United States while serving the prison term.

(B) any such extension will be done administratively as part of the defendant's sentence in accordance with section 2967.11 of the Revised Code and may be for thirty, sixty, or ninety days for each violation.

(C) All such extensions of the stated prison term for all violations during the course of the term may not exceed one-half of the term's duration.

(D) The sentence imposed for the felony automatically includes any such extension of the stated prison term by the parole board.

(E) If the offender violates the conditions of a post-release control sanction imposed by the parole board upon the completion of the state prison term, the parole board may impose upon the offender a residential sanction that includes a new prison term up to nine months.

In this case, the only advice that the trial court gave the appellee, as it relates to **R.C. 2943.032**, and post-release control, was the following, Tr. 18, 19:

The Court: And also that the – if you misbehave in prison, you could have additional time?

The Defendant: Yes sir.

The Court; There's also a matter of post-release control. After you do your time, you may be subject to post-release control.

The Defendant: Yes sir.

The Court; All right.

In **State v. Griffin**, Cuyahoga App. 83724, 2004, Ohio App. LEXIS 3961, after the appellant had pleaded guilty to a sex offense which required a mandatory five-years of post-release control, and even though the trial court told him that he was

subject to a mandatory three years of post-release control, the court held that the plea was invalid:

“Post-release control constitutes a portion of the maximum penalty involved in an offense for which a prison term will be imposed. Without an adequate explanation of post-release control from the trial court, appellant could not fully understand the consequences of his plea as required by Crim. R. 11(C).” *State v. Jones* (May 24, 2001), Cuyahoga App. No. 77657, 2001 Ohio App. LEXIS 2330; also see *State v. Perry*, Cuyahoga App. No. 82085, 2003, Ohio 6344, P10.”

In this case, the court failed to inform the appellant that he was subject to a five-year mandatory term of post-release control. The court reviewed the plea agreement with appellant, but the plea agreement incorrectly stated that appellant was subject to post-release control of up to three years as to each offense. Therefore, we conclude that the court’s explanation of post-release control sanctions was inadequate and did not substantially comply with the court’s responsibilities under **Crim. R. 11(C)(2)(a)** and **R.C. 2943.032(E)**. Accordingly, we vacate appellant’s guilty pleas and the sentence imposed upon him.

In *State v. Douglas* (February 9, 2006), Cuyahoga App. 85525, 85526, 2006 Ohio App. LEXIS 506, the court held that it was error, and vacated the defendant’s conviction because the court:

“never mentioned that the crimes were subject to post-release control. It never informed defendant what the terms of post-release control would be; that the felonious assault included a mandatory three year term of post-release control. The court never informed defendant of the ramification of a violation of post-release control. A review of the record shows, and the state does not deny, that the trial court failed at his plea hearing to inform defendant of mandatory post-release control for the felonious assault charge and the possibility of such control for the theft charge. Accordingly, this assignment of error is sustained. The defendant’s conviction is vacated and the case remanded for proceedings consistent with this option.”

Again, this Court needs to keep in mind that the conviction of Aggravated Robbery, dictated a **mandatory** five years of post-release control.

In a recent case to consider this issue, *State v. Crosswhite*, (March 9, 2006), Cuyahoga App. 86345, 86346, Ohio App. LEXIS 989, the court held, in vacating a plea, where the defendant not been informed of mandatory five years of post-release control, that:

"Failure to provide post-release notification before accepting a guilty or no-contest plea may form the basis to vacate the plea. Further, this court and the courts of eight other appellate districts agree that where the trial court failed to personally address a defendant and inform him of the maximum length of the post-release control period before accepting his guilty plea, the court fails to substantially comply with Ohio R. Crim. P. 11(C)(2)(a) and RC 2943.032(E).

C. THE DEFENDANT'S GUILTY PLEAS WERE INVALID SINCE THE TRIAL COURT FAILED TO ADVISE OF THE CONSEQUENCES OF VIOLATING POST-RELEASE CONTROL

In *State v. Woods*, (April 7, 2005), Cuyahoga App. 84426, 2005 the court made the following observation:

After reviewing the record, we find that the trial court informed the appellant that he would be subject to post-release control at the plea hearing; however, the court failed to inform the appellant of the consequence of violating post-release control, as required by RC 2929.19(B)(3)(e) and RC 2943.032(E). Therefore, we conclude that the court's explanation of post-release control sanctions was inadequate and did not substantially comply with the court's responsibilities under Crim R. 11(C)(2)(a). Accordingly, we sustain the appellant's first assignment of error and vacate appellant's guilty plea, remanding this cause for further proceedings.

Accordingly, even if the trial court **did** advise the defendant that he would be subject to post-release control, if it failed to advise of the consequences of a violation, the guilty plea is still invalid.

This issue was addressed by the Eighth District in *State v. Owens*, (July 14, 2005), Cuyahoga App. 84987, 2005 Ohio App. LEXIS 3301, wherein the court held:

“after reviewing the record, we find that the trial court correctly informed the appellant at the plea hearing that he would be subject to post-release control; however, the court failed to inform him of the consequences of violating post-release control, as required by Ohio Rev. Code Ann. Section 2943.032(E). Therefore, we conclude that the court’s explanation of post-release control sanctions was inadequate and did not substantially comply with the trial court’s responsibilities under Ohio R. Crim. P. 11(C)(2)(a), which require a trial court to determine that the defendant was making the plea voluntarily and with the understanding of the **maximum penalty** involved.”

In this case, the trial court failed to advise the Mr. *Bowell*’s that there would be mandatory post-release control; and, failed to advise him of the consequences of violating post-release control. Under either scenario, the plea is invalid, and the original plea must be vacated.

D. ABUSE OF DISCRETION

Crim R. 32.1 provides that a defendant may move the trial court to withdraw a plea.

In *State v. Xie* (1992) 62 Ohio St. 3d 521, 526-527, the Ohio Supreme Court stated in relevant part as follows:

“Even though the general rule is that motions to withdraw guilty pleas before sentencing are to be freely allowed and treated with liberty, *** still the decision thereon is within the sound discretion of the trial court. ***” For us to find an abuse of discretion in this case, we must find more than an error of judgement. We must find that the trial court’s ruling was “unreasonable, arbitrary or unconscionable.” [Citations omitted].

Abuse of discretion is more than an error of law or judgement.

In *State v. McGuire* (March 23, 2006), Cuyahoga App. 86608, this court reviewed the decision of the trial court, in a post-conviction motion ruling, and refused to reverse the

decision:

In reviewing whether the trial court erred in denying a petition for post-conviction relief without an evidentiary hearing, we apply an abuse of discretion standard. *State v. Dowell, Cuyahoga App. No. 86232, 2006 Ohio 110*. "The term abuse of discretion connotes more than an error of law or judgement; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore (1983, 5 Ohio St. 3d 217, 219, 5 Ohio B. 450 N.E. 2d 1140*.

In short, the trial court's decision is entitled to due deference in the absence of an unreasonable, arbitrary, unconscionable ruling. An error of judgement or interpretation of the law is not sufficient.

E. A MANIFEST INJUSTICE OCCURRED BECAUSE THE DEFENDANT WAS DENIED HIS RIGHT TO COUNSEL WHEN HIS ATTORNEY IN THE CASE INVOLVING THE CHARGE OF AGGRAVATED BURGLARY, CR387210, FAILED TO APPEAR FOR HIS SENTENCING.

As set forth above, the defendant was charged in two different cases, and had two different attorneys representing him in connection with charges of Aggravated Burglary in Case No. CR387210, and Felonious Assault in Case No. CR388702. At the time of the sentencing, only one attorney appeared on Mr. Boswell's behalf in CR388072, the aggravated robbery case. At the time of sentencing, the following colloquy took place between the trial court, and the attorney who represented Mr. Boswell in the Aggravated Robbery case, CR388702:

The Court: This is the State of Ohio versus Paris Boswell for sentencing, and this is a parrot (sic) case, 387210 and 388017A. Are you counsel in both of these matters?

Mr. Kersey: No, Judge, I believe I'm the counsel on the aggravated robbery case with the firearm spec. case 388072. I can stand in. Michael Westerhaus is the other one. I will stand in.

The Court: Is that acceptable to you?

Mr. Kersey: Yes, sir.

The Court: All right. I'll be happy to hear from you, Mr. Kersey.

The defendant *never* waived his right to have counsel present in connection with his sentencing in Case No. CR388017. The sentencing hearing is extremely important since it allows defense counsel, who is presumed to be familiar with the facts of the case, to present a cogent argument on behalf of his client, as it relates to sentencing. In fact, in **Ohio Felony Sentencing Law 2002 Ed.** the authors, Griffin and Katz, make the following comments about the importance of defense counsel at the sentencing hearing; T 2.16:

A major function of defense counsel during the sentencing hearing, is to make certain that the judge remains within the bounds of statutory guidelines while conducting the sentencing hearing and imposing sentence. The following actions by defense counsel, therefore, take on increased importance.

(1) Possible presentation of a sentencing memorandum which relates the provisions of RC Chapter 2929 to the facts which are relevant to sentencing.

(2) Assuring that all reports, letters, and other papers relevant to the sentencing decision are properly made a part of the record.

(3) Assuring that information provided for sentencing is accurate and credible.

(4) Providing information concerning the relative cost of available sanctions.

(5) Providing information on sentences of similar offenders in comparable cases.

(6) Monitoring the sentencing judge with respect to findings of fact or reasons when such facts or reasons are required by RC Chapter 2929.

(7) Monitoring the sentencing judge with respect to disputed statements in the presentence report and, when

appropriate, asserting rights under RC 2951.03(B)(5).

In this case, Mr. Boswell never waived the presence of his attorney in Case No. CR388017, at the sentencing hearing.

Finally, in one of the most recent Ohio Supreme Court decisions, on the issue of effective assistance of counsel, the Court adopted a more expansive view of the standard to be used, in determining whether assistance has been effective. **State v. Kole** (2001), 92 Ohio St.3d 303. In **Kole**, the court reversed a conviction, because trial counsel had failed to request a proper jury instruction, which lead to a conviction. In so holding, the court held, at 306:

The United States Supreme Court has held that “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” **Strickland v. Washington** (1984), 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L.E.d.2d 674, 692-693. In making such a determination, there are two components. “First, the defendant must show that counsel’s performance was deficient.” *Id.* At 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. “Second, the defendant must show that the deficient performance prejudices the defense.” *Id.*

We bear in mind that our scrutiny of counsel’s performance must be highly deferential. *Id.* at 689, 104 S. Ct. At 2065, 80 L.Ed.2d at 694. But important to our decision today is the admonition that counsel ‘has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.’ *Id.*, at 688, 104 S.Ct. At 2065, 80 L.Ed.2d at 694.

In this case, it is clear that since the defendant’s attorney was absent from the sentencing a manifest injustice occurred.

The issue of absence of counsel, or effectiveness of counsel, becomes more pronounced when it is noted that the Cuyahoga County Prosecutor recommended a

concurrent sentence at the plea hearing. TR. 5:

Ms. Mahaney:

The State is fine with the Court, your Honor, if it sees fit running all the counts concurrently, if that's what the Court would like to do.

This critical issue was not raised by counsel at the sentencing hearing. The only statements made on behalf of the defendant were harmful TR. 3, 4:

Mr. Kersey:

Judge, I had an opportunity to review the presentence report. This a horrible offense and the accused knows it.

Do you know what's usual about this? I have got to tell you. Usually, and I'm not making light of this, usually in cases like this these guys put the blame on me. Here he, in there, says I did it. Which the Court, I know you don't get too many of them like this and this kind of thing, usually, where there is a co-defendant, oh he did it, my co-defendant made me do it. So his statement is, give him – I would give him some credit for that, Judge.

Other than that, the presentence report certainly delineates his involvement and his past criminal history, Judge.

I have nothing further to say other than that. Thank you.

And, when the court inquired about the charges in CR-387210, where Mr. Boswell was represented by an attorney who was absent, counsel who was present had this to say, Tr. 6:

Mr. Kersey:

Judge, I didn't represent him on that case, to tell you the truth. **I can't remember what Mr. Westerhaus did on that case.**

The failure to raise the issue of concurrent sentences, and the limited sentencing hearing comments, are a manifest injustice.

In a similar case where the State had indicated to the trial court that certain counts of an indictment would be dismissed on a plea, and that they would not seek a prison sentence, the Eighth District vacated the plea because the judge failed to inform the defendant that the court was not bound by the recommendations. The court characterized

the failure as a notice/due process situation, and held[p14]:

The State argues that it did not promise appellant that there would be no prison term imposed. Indeed, the state did not, and could not make such a promise to induce appellant's plea. However, the prosecutor told the court that if a plea were forthcoming to count one of the indictment then: 1.) The state would move to nolle count two and 2.) He and the parole officer were not seeking jail time for the offense. Count two of the indictment was nolle. Appellant could reasonably expect the second aspect of the prosecutor's and parole officer's position, no prison time, to be fulfilled. Again, this is particularly so in light of the court's statement's before accepting plea. At best, the plea colloquy was ambiguous. Any ambiguity must be resolved in appellant's favor. *United States v. Holman (C.A. 6 1983), 728 F.2d 809.*

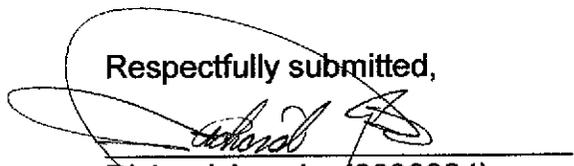
State v. Asberry, Cuyahoga App. No. 88580, 2007-Ohio-5436.

Accordingly, Mr. Boswell could reasonably argue that, since the trial court failed to inform him that it would not accept the proposed sentence, it is a due process violation, and that strict compliance is the standard.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that this Court not accept jurisdiction.

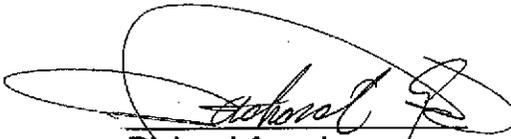
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **MEMORANDUM OPPOSING JURISDICTION** has been hand delivered to Jon W. Oebker, Assistant Cuyahoga County Prosecutor, The Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, OH 44113, this 9th day of January, 2008.



Richard Agopian
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