

NO. 2007-2373

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NOS. 88292, 88293

STATE OF OHIO
Plaintiff-Appellant

-vs-

PARRIS BOSWELL
Defendant-Appellee

MERIT BRIEF OF APPELLANT

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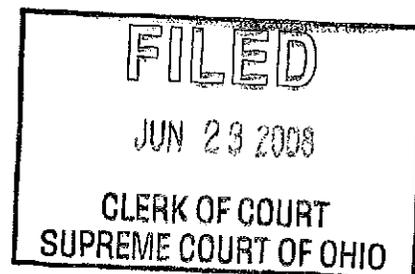


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I. Introduction and Summary of Argument

This Court must examine the law of substantial compliance and prejudice analysis under Crim.R. 11 and R.C. 2943.032, as it relates to inaccurate postrelease control advisements. As pointed out by the Ohio State Public Defender, *State v. Sarkozy*¹ did not provide this Court the opportunity to establish the proper analysis “when defendants are otherwise given incorrect information about postrelease control.”²

In *State v. Sarkozy*, this Court held that an individual *not* advised of postrelease control need not establish prejudice to prevail in a presentence motion to withdraw a guilty plea.³ In this case, the Eighth District eviscerates substantial compliance and improperly eliminates substantial compliance review for individuals who are inaccurately advised of post release control, but are placed on notice of a liberty restraint after incarceration.

This new standard developed by the Eighth District:

- reverses 30 years of substantial compliance, prejudice analysis, and manifest injustice jurisprudence when evaluating postsentence motions to withdraw guilty pleas;

¹ 117 Ohio St. 3d 86, 2008-Ohio-509.

² *State v. Clark*, 2007-0983, Memo in Support of Jurisdiction pg. 4.

³ 117 Ohio St. 3d 86, 2008-Ohio-509 paragraph two of the syllabus.

- confuses issues of finality by refusing to apply *res judicata* to claims that can be raised on direct appeal and;
- allows defendants to automatically withdraw a plea for any error related to postrelease control advisement.

The Eighth District's decision also conflicts with *Sarkozy*. In *Sarkozy*, this Court wrote, "some compliance prompts a substantial-compliance analysis and the corresponding 'prejudice' analysis."⁴ In this case, Boswell was informed that after he completed his sentence he "may be subject to postrelease control."⁵ This places the burden on Boswell to show that but for the period of mandatory postrelease control he would not have pleaded guilty.

The State requests this Court establish the proposition that where a trial court substantially complies with a postrelease control advisement, during the plea colloquy, the ensuing guilty plea is subject to vacation only if the defendant demonstrates prejudice. Further, this Court should apply *res judicata* to issues raised in Crim.R. 32.1 motions that could have been raised on direct appeal.

⁴ *Id.* at ¶ 23.

⁵ Tr. 18-19.

II. Statement of the Case and Facts

Parris Boswell was indicted in two separate criminal cases. In CR-00-387210, Boswell was indicted for aggravated burglary and misdemeanor assault. These charges were brought after Boswell trespassed in Patrice Johnson's home with the intent to assault her.

In CR-00-388072, Boswell was indicted for aggravated robbery and felonious assault with firearm specifications and having a weapon while under a disability. Boswell and a codefendant used a firearm while committing a robbery. Boswell's codefendant was convicted during a jury trial.

Boswell took responsibility for his actions and pleaded guilty to all counts. Because Boswell took responsibility for his actions, the State agreed not to seek consecutive sentences in Boswell's cases.⁶ This potentially reduced Boswell's prison exposure by 23 years.

During the plea colloquy, the trial court advised Boswell that "[a]fter you do your time, you may be subject to postrelease control."⁷ There was no objection to this advisement. Boswell informed the trial court that he

⁶ Tr. 5.

⁷ Tr. 18-19.

understood his rights and pleaded guilty to each count. Boswell did not appeal.

Approximately five years after pleading guilty, Boswell filed a motion to withdraw his plea. In support of his motion, Boswell provided a purely legal argument. His sole claim was that because he was not informed postrelease control was mandatory he had the absolute right to withdraw his plea. Boswell provided no evidence that he was prejudiced by the trial court's misadvisement. The trial court, without requiring Boswell to show prejudice, vacated the pleas.

In a split decision, the Eighth District affirmed.

III. Law and Analysis

A. Proposition of Law

By eliminating the prejudice requirement, the Eighth District changed the law regarding post-sentence motions to withdraw guilty pleas.

Misadvising a defendant about postrelease control, during a plea colloquy, should be reviewed under a two-step approach. The trial court must determine whether Crim.R. 11(C)(2)(a) and R.C. 2943.032 were

substantially complied with. If the trial court substantially complied with Crim.R. 11 and R.C. 2943.032, a defendant must prove prejudice from the misadvisement. In a postsentence motion to withdraw a guilty plea, a defendant has the additional burden to establish a manifest injustice.⁸

B. Crim.R. 11(C)(2)(a) and the postrelease control term.

A trial court is required to ensure that a defendant has an understanding of the maximum penalty.⁹ Ensuring a defendant has an understanding of the maximum penalty is a nonconstitutional right.¹⁰ “Some compliance [with advisements of nonconstitutional rights] prompts a substantial-compliance analysis and the corresponding ‘prejudice’ analysis.”¹¹ Substantial compliance means that under a totality of the circumstances a defendant subjectively understands the implications of the plea.¹² “Furthermore, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must

⁸ Crim.R. 32.1.

⁹ Crim.R. 11(C)(2)(a).

¹⁰ *State v. Francis*, 104 Ohio St. 3d 490, 499, 2004-Ohio-6894 ¶ 45.

¹¹ *Sarkozy*, 2008-Ohio-509 at ¶ 23.

¹² *State v. Nero* (1990), 56 Ohio St. 3d 106, 108.

show a prejudicial effect. The test is whether the plea would have otherwise been made.”¹³

In this matter, Boswell’s understanding of the maximum penalty must be viewed under the caselaw as of the date of the plea:

- June 23, 1999, the Sixth District finds postrelease control unconstitutional.¹⁴
- September 2, 1999, the Eighth District declares postrelease control unconstitutional.¹⁵
- March 23, 2000, the Third District finds postrelease control unconstitutional.¹⁶
- May 15, 2000, Boswell pleads guilty.¹⁷
- August 2000, this Court finds postrelease control constitutional.¹⁸

At the time Boswell pleaded guilty, postrelease was unconstitutional. Viewed in this context, the trial court acts reasonably when advising Boswell that he “may” be subject to postrelease control because postrelease

¹³ *Id.* (citations omitted).

¹⁴ *Woods v. Telb* (June 23, 1999), Lucas App. No. L-99-1083 (reversed by *Woods v. Telb*, 89 Ohio St. 3d 504, 2000-Ohio-171).

¹⁵ *State v. Jones* (Sept. 2, 1999), Cuyahoga App. No. 74247 (stayed on Nov. 10, 1999, 87 Ohio St. 3d 1442 (Table)).

¹⁶ *Price v. Henry* (March 23, 2000), Logan App. No. 8-99-12.

¹⁷ Transcripts.

¹⁸ *Woods v. Telb*, 89 Ohio St. 3d 504, 2000-Ohio-171.

control had been declared unconstitutional by controlling precedent. Boswell understood that at the time of the plea he might be subject to postrelease control because the statute was unconstitutional in Cuyahoga County.

In addition to the general law concerning advisements of nonconstitutional rights during a plea colloquy and law at the time Boswell pleaded guilty, this issue must be examined in the rubric of the Eighth District's decision in *State v. Holloway* and this Court's subsequent reversal of that decision.¹⁹

In *Holloway*, the Eighth District was confronted with the issue currently before this Court. The defendant pleaded guilty to a first-degree felony. During the plea colloquy, the trial court advised the defendant he may be subject to postrelease control for five years. On direct appeal, the defendant disputed his plea because he was not informed that postrelease control was mandatory. The Eighth District agreed and vacated the plea. This Court summarily reversed that decision on the authority of *Watkins v. Collins*.²⁰

¹⁹ Cuyahoga App. Nos. 86426 & 86427, 2006-Ohio-2591 (reversed in *State v. Holloway*, 111 Ohio St. 3d 96, 2006-Ohio-6114).

²⁰ *Holloway*, 111 Ohio St. 3d 96, 2006-Ohio-6114.

In this case, Boswell pleaded guilty to first-degree felonies. Under R.C. 2967.28, Boswell is subject to mandatory postrelease control for 5 years. If Crim.R. 11 had been scrupulously followed, Boswell would have been informed that he was subject to mandatory postrelease control for 5 years. But since 1977, scrupulous adherence to Crim.R. 11(C)(2)(a) is not required.²¹

Boswell knew that after his release he might be subject to postrelease control—some compliance.²² Because there was some compliance, the first issue is whether Boswell subjectively understood the implications of his plea.

The record shows that Boswell was informed that upon release his liberty might be restrained.²³ Thus, the record indicates Boswell substantively understood the implications of his plea because he was on notice that his liberty could be restrained after incarceration.²⁴ Because Boswell had notice of the implications of his guilty plea, he is required to prove prejudice.

²¹ *State v. Ballard* (1981), 66 Ohio St. 2d 473, 475 (citing *State v. Stewart* (1977), 51 Ohio St. 2d 86).

²² Tr. 18-19.

²³ Tr. 18-19.

²⁴ See, *Holloway*, 111 Ohio St. 3d 96, 2006-Ohio-6114; *Watkins v. Collins*, 111 Ohio St. 3d 425, 434, 2006-Ohio-5082 at ¶ 51.

The record is void of any evidence of prejudice. In fact, Boswell raised a purely legal argument that his plea had to be vacated because Crim.R. 11 was not scrupulously followed. There is no claim that if he had known postrelease control was mandatory he would have gone to trial.

Boswell cannot show that he would not have pleaded guilty if advised postrelease control was mandatory for 5 years. As evidenced by the codefendant's guilty verdict, the cases against Boswell were strong. By pleading guilty, he reduced his prison exposure by 23 years. Boswell would not have gone to trial and subjected himself to 31 years in prison because of 5 years of postrelease control. Because Boswell was not prejudiced, his motion to withdraw should not have been granted. The trial court substantially complied with Crim.R. 11(C)(2)(a) and Boswell failed to show he was prejudiced.

Assuming the trial court failed to substantially comply with Crim.R. 11(C)(2)(a), this Court must determine whether res judicata bars Boswell's claims.

C. Res judicata applies to issues raised in a Crim.R. 32.1 motion that could have been raised on appeal.

In *Sarkozy*, this Court held that Sarkozy's claim was not barred by res judicata because the claim was raised at the first available opportunity—direct appeal. Boswell waited approximately 5 years before he raised the

issue of postrelease control. The different procedural histories between *Sarkozy* and this case result in a different outcome.

For more than 40 years this Court has held that “[u]nder the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.”²⁵ Res judicata is not a technicality. It is an end to litigation that must be enforced by the courts.²⁶

At the plea, 2 attorneys represented Boswell. Boswell did not appeal his guilty plea or the sentences imposed. He waited 5 years to raise postrelease control issues.

In the Eighth District, the dissenting opinion found that the postrelease control misadvisement could be raised on direct appeal and was barred by res judicata in a Crim.R. 32.1 motion.²⁷ By failing to raise this

²⁵ *State v. Perry* (1967), 10 Ohio St. 2d 175, paragraph 9 of the syllabus (approved and followed in *State v. Szefcyk*, 77 Ohio St. 3d 93, 1996-Ohio-337, syllabus).

²⁶ *State v. Szefcyk*, 77 Ohio St. 3d 93, 95, 1996-Ohio-337.

²⁷ *State v. Boswell*, Cuyahoga App. Nos. 88292 & 88293, 2008-Ohio-5718 at ¶ 26.

purely legal issue in a direct appeal, Boswell has forfeited his right to collaterally attack the plea colloquy.

Because the trial court substantially complied with Crim.R. 11(C)(2)(a), Boswell cannot show prejudice, and his claim is barred by res judicata, this Court must proceed to the next step in the analysis—compliance with R.C. 2943.032(E).

D. Consequences for violating postrelease control.

During a plea colloquy, a trial court must advise a defendant that violating postrelease control can result in additional prison time.²⁸ This is a nonconstitutional advisement subject to substantial compliance and prejudice analysis.²⁹

In *State v. Francis*, this Court determined whether the statutory deportation advisement must be scrupulously followed or the advisement is subject to substantial compliance and the corresponding prejudice analysis. This Court held that verbatim narration is required but substantial compliance is the test used to evaluate the plea.³⁰

²⁸ R.C. 2943.032(E).

²⁹ *State v. Francis*, 104 Ohio St. 3d 490, 2004-Ohio-6894 at ¶ 45.

³⁰ *Id.* at paragraph 2 of the syllabus.

The postrelease control advisement statute is similar to the deportation statute. Both statutes require a trial court to advise defendants of certain consequences that may occur before accepting a guilty plea. Both statutes also affect nonconstitutional rights. Therefore, similar to the deportation statute, a trial court is required to substantially comply with R.C. 2943.032 during a plea colloquy.

Based on the record, Boswell may not have understood the ramifications of violating postrelease control beyond his understanding that his liberty could be restrained after incarceration. But under these facts, this Court must evaluate whether res judicata bars this claim.

E. Res judicata applies to Crim.R. 32.1 motions based on noncompliance with R.C. 2943.032.

In *State v. Pless*, this Court held that a violation of the statute governing waiver of a jury trial, R.C. 2945.05, can only be raised on direct appeal.³¹ In *Pless*, the defendant waived his constitutional right to a jury. This waiver was made in open court. The actual waiver was not made a part of the record. Under R.C. 2945.05, the actual waiver is required to be included in the record. This Court reversed because the statute required the waiver be in the record.

³¹ (1996), 74 Ohio St. 3d 333, 1996-Ohio-102 at paragraph 2 of the syllabus.

In reversing, this Court addressed several cases where R.C. 2945.05 violations were raised in proceedings other than a direct appeal. This Court decided that a violation of R.C. 2945.05 can only be raised in a direct appeal. Thus, *res judicata* bars litigation of a constitutional right.

Like *Pless*, Boswell's claim is based on a statutory violation. And the violation in this case is arguably less severe than *Pless*, because the violation in this case concerns a nonconstitutional right. Thus, if *res judicata* bars constitutional rights from litigation in any forum other than a direct appeal, any claim that Boswell was not properly notified of a nonconstitutional right can only be raised in a direct appeal. Boswell's motion to withdraw his guilty plea, based entirely on advisements of nonconstitutional rights is barred.

F. Boswell must be advised of postrelease control under R.C. 2929.191.

Assuming this Court agrees with the State and reinstates Boswell's conviction and sentence, the issue of postrelease control in Boswell's *sentence* must be addressed. Boswell was not advised of postrelease control when he was sentenced. Thus, his sentence is void.³²

³² *State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-6085 at paragraph 2 of the syllabus.

This Court must remand the matter to the trial court to hold a R.C. 2929.191 hearing. R.C. 2929.191 became effective July 11, 2006. It allows the trial court, “at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison.”³³

Boswell was not informed of postrelease control at his sentencing. The trial court must inform Boswell that he is subject to postrelease control and the consequences for a violation. R.C. 2929.191 provides a mechanism by which this can be accomplished. This case should be remanded for a R.C. 2929.191 hearing.

IV. Conclusion

This appeal should establish the following propositions of law:

- where a trial court substantially complies with a postrelease control advisement, during the plea colloquy, the ensuing guilty plea is subject to vacation only if the defendant demonstrates prejudice and;
- res judicata applies to postsentence motions to withdraw guilty pleas based on arguments that could have been raised on direct appeal.

³³ R.C. 2929.191 (A)(1).

The Eighth District's decision should be reversed, Boswell's conviction and sentence reinstated, and the matter remanded for a R.C. 2929.191 hearing.

Respectfully submitted,

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SERVICE

A copy of the foregoing Merit Brief of Appellant has been mailed this 20th day of June, 2008, to Kelly K. Curtis, 8 East Long St. 11th Floor Columbus Ohio 43215 and Richard Agopian, 1415 West 9th Street 2nd Floor, Cleveland Ohio 44113.

Thorin Freeman
Assistant Prosecuting Attorney

NO.

07-2373

IN THE SUPREME COURT OF OHIO

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

STATE OF OHIO,

Plaintiff-Appellant

-vs-

PARRIS BOSWELL,

Defendant-Appellee

NOTICE OF APPEAL IN THE SUPREME COURT OF OHIO

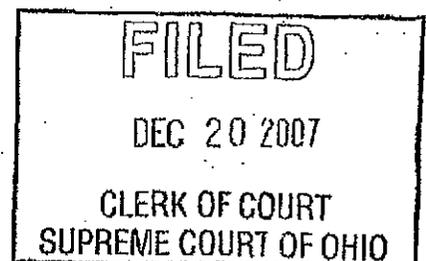
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NO.

IN THE SUPREME COURT OF OHIO

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

STATE OF OHIO,
Plaintiff-Appellant

-vs-

PARRIS BOSWELL,
Defendant-Appellee

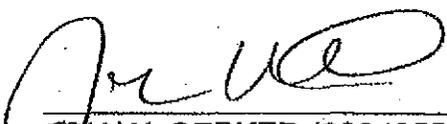
NOTICE OF APPEAL IN THE SUPREME COURT OF OHIO

Now comes the State of Ohio and hereby gives Notice of Appeal to the Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District, journalized on November 5, 2007 which affirmed the decision of the trial court.

Said cause did not originate in the Court of Appeals and involves a felony.

Respectfully submitted,

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SERVICE

A copy of the foregoing Notice of Appeal has been mailed this 19th day of December 2007, to Richard Agopian, 1415 West 9th Street, Cleveland, Ohio 44113



Assistant Prosecuting Attorney

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 88292, 88293

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

PARRIS BOSWELL

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-388072 and CR-387210

BEFORE: Kilbane, J., Rocco, P.J., and Boyle, J.

RELEASED: October 25, 2007

JOURNALIZED: NOV 5 - 2007

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**FILED AND JOURNALIZED
PER APP. R. 22(E)**

NOV 5 - 2007

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.**

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

OCT 25 2007

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

**NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED**

MARY EILEEN KILBANE, J.:

The State of Ohio ("State") appeals from the trial court's decision to vacate Parris Boswell's ("Boswell") plea. The State argues that the trial court did inform Boswell that he might be subjected to postrelease control, and therefore it substantially complied with Ohio law. For the following reasons, we affirm the decision of the trial court.

On February 15, 2000, a Cuyahoga County Grand Jury returned an indictment charging Boswell with aggravated burglary, a first degree felony, and assault, a first degree misdemeanor. On March 6, 2000, a Cuyahoga County Grand Jury returned an indictment charging Boswell with aggravated robbery with firearm specifications, a first degree felony; felonious assault with firearm specifications, a second degree felony; and having a weapon while under disability, a fourth degree felony.

On May 15, 2000, the trial court conducted a plea hearing with Boswell. During the hearing, the trial court told Boswell that he "may be subject to post-release control."¹ Boswell told the court that he understood, and then pleaded guilty to all five crimes as charged in the two separate indictments. On June 5, 2000, the trial court sentenced Boswell to a total prison term of sixteen years.

¹Transcript of hearing dated May 15, 2000, attached to Parris Boswell's addendum to motion to vacate plea.

On September 9, 2004 and on April 4, 2005, Boswell filed motions for a delayed appeal with this court. This court dismissed both appeals. On June 8, 2005, Boswell filed a motion with the trial court, seeking to vacate his May 15, 2000 plea agreement. In his motion, Boswell argued that the trial court failed to accurately and adequately inform him of the mandatory term of postrelease control that applied to his charges. Boswell further argued that the trial court did not advise him of any penalties for violating postrelease control. Accordingly, Boswell claimed that his guilty pleas must be vacated. The State opposed this motion; more than a year later, on May 9, 2006, the trial court vacated the guilty pleas entered on May 15, 2000. The State appeals, raising a single assignment of error.²

“The trial court erred in granting Boswell’s motion to withdraw guilty plea six years after the plea. Journal entry dated 5/11/2006.”

Pursuant to Crim.R. 32.1, a postsentence motion to withdraw a guilty plea should only be granted to correct manifest injustice. *State v. Woods*, Cuyahoga App. No. 84993, 2005-Ohio-3425. In reviewing the trial court’s decision to deny or grant a defendant’s motion to withdraw his guilty plea, this court’s standard of review is limited to a determination of whether the trial

²The State’s two separate appeals have been consolidated.

court abused its discretion. *Id.* An abuse of discretion constitutes more than just an error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

Here, the State argues that manifest injustice did not occur because the trial court substantially complied with the requirements of Crim.R. 11(C) when informing Boswell of the postrelease control requirements. We disagree with this argument.

Crim.R. 11 requires that, before the court may accept a plea of guilty in a felony case, the court must address the defendant personally and determine that he is making the plea voluntarily and "with understanding of *** the maximum penalty involved." *State v. Morgan*, Cuyahoga App. No. 87578, 2007-Ohio-71; *State v. Brusiter*, Cuyahoga App. No. 87819, 2006-Ohio-6444. "Post-release control constitutes a portion of the maximum penalty involved in an offense for which a prison term is imposed." *Morgan*, at paragraph 12. The Ohio Supreme Court has previously held that the trial court's failure to notify the defendant of postrelease control sanctions before accepting a guilty plea may form the basis to vacate the plea. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085; *Morgan*, *supra*.

Additionally, "R.C. 2943.032(E) requires that, prior to accepting a guilty plea for which a term of imprisonment will be imposed, the trial court must inform the defendant regarding postrelease control sanctions in a reasonably thorough manner." *Brusiter*, supra; See, also, *Morgan*, supra. "Without an adequate explanation of post-release control from the trial court, the defendant could not fully understand the consequences of his plea as required by Crim.R. 11(C). *Id.*

The State argues that the trial court substantially complied with the requirements of Crim.R. 11(C) when informing Boswell of the postrelease control requirements. However, prior to taking Boswell's guilty pleas to first and second degree felonies, the trial court failed to inform him that he would be subjected to mandatory postrelease control for five years and the consequences that would result if he violated the terms and conditions of his postrelease control. Instead, the trial court told Boswell that he "may be subject to post-release control."

In the present case, the record is clear that the trial court failed to advise Boswell that he was subject to a mandatory five-year term of postrelease control following his prison sentence. This court has repeatedly held that, where the trial court failed to personally address a defendant and inform him of the

maximum length of postrelease control before accepting his guilty plea, the court fails to substantially comply with Crim.R. 11(C)(2)(a) and R.C. 2943.032. *Brusiter*, supra; *Morgan*, supra; *State v. Cortez*, Cuyahoga App. No. 87871, 2007-Ohio-261. *State v. McCollins*, Cuyahoga App. No. 87182, 2006-Ohio-4886; *State v. Crosswhite*, Cuyahoga App. No. 86345, 2006-Ohio-1081; *State v. Pendleton*, Cuyahoga App. No. 84514, 2005-Ohio-3126.

We further find that Boswell was not required to demonstrate prejudice by the trial court's error. In *State v. Delventhal*, Cuyahoga App. No. 81034, 2003-Ohio-1503, this court determined that the prejudice requirement is applied as part of the substantial compliance rule. "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." *Cortez*, supra.

Additionally, we overrule any argument that because Boswell was not subjected to a term of postrelease control, no manifest injustice occurred. This argument ignores the fact that at the time Boswell entered his plea, he was not fully informed of the maximum penalty involved. The fact that the trial court did not subject Boswell to a term of postrelease control is irrelevant; at the time

he entered his plea, he did not know the maximum penalty involved. Therefore, the trial court did not comply with Crim.R. 11 and R.C. 2943.032(E).

Because the trial court failed to advise Boswell of the maximum length of postrelease control before entering his guilty plea, the trial court did not substantially comply with the requirements of Crim.R. 11(C)(2)(a) and R.C. 2943.032. Therefore, we affirm the trial court's decision to vacate Boswell's plea.

The State also raises the argument that the merits of Boswell's motion to vacate his plea are barred by the doctrine of res judicata. However, in putting forth this argument, the State has failed to separately argue it in its brief, in violation of App.R. 16(A). Accordingly, we may disregard this portion of the State's appeal. App.R. 12(A)(2).

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Mary Eileen Kilbane
MARY EILEEN KILBANE, JUDGE

KENNETH A. ROCCO, J., and
MARY J. BOYLE, J., DISSENTS (SEE SEPARATE DISSENTING OPINION)

MARY JANE BOYLE, J., DISSENTING:

I respectfully dissent. For the following reasons, I would reverse and remand the trial court's plea vacation.

First, I disagree with the majority's statement that claiming the state failed to separately address its claim, as required by App.R. 16(A), that Boswell's motion to withdraw his plea was barred by res judicata. App.R. 16(A)(7) provides that an appellant's brief must contain an argument "with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." Under App.R. 12(A)(2), this court may then disregard *an assignment of error*, if the party raising it "fails to argue the assignment separately in the brief, as required under App.R. 16(A)."

In its appellate brief, the state presented *a single assignment of error*, as the majority sets forth. Under the assignment of error, i.e., that the trial court

erred when it granted Boswell's motion to withdraw his plea, the state presents several arguments, *only one* of which is the res judicata argument. If Boswell's Crim.R. 32.1 motion is barred by res judicata, then the trial court erred when it granted it. Thus, the res judicata argument fully falls within Boswell's *single assignment of error*.

Furthermore, within its res judicata argument, the state sets forth a thorough argument and analysis, supported by extensive case law, including cases from this district, as well as eight other appellate districts. If this court concluded that res judicata barred Boswell's motion to vacate his plea, then we would have to conclude that the trial court erred in granting the motion for that reason. If we concluded that it did not bar it, then we would get to the issue that is the crux of this appeal; i.e., whether a trial court's notice to a defendant at his plea hearing that he *may* receive postrelease control, when it was actually *mandatory* postrelease control, meets the extraordinarily high standard of "manifest injustice" within a post-sentence Crim.R. 32.1 motion. Thus, it is this author's view that the issue of res judicata must first be addressed.

Most appellate courts, including this court, have applied res judicata to Crim.R. 32.1 motions at one time; but not consistently, and often times, the issue of res judicata is completely ignored. See *State v. Reynolds*, 3d Dist. No. 12-01-11, 2002-Ohio-2823 (for a list of cases from each district representing the

procedural “quagmire” and “turmoil” this issue presents). Nevertheless, it is my view that we are bound by this court’s decision in *State v. Gaston*, 8th Dist. No. 82628, 2003-Ohio-5825, which held that res judicata barred Gaston’s post-judgment Crim.R. 32.1 motion.

Gaston had entered a plea of guilty in April 2001. He directly appealed his sentence and conviction, but did not challenge his plea. We affirmed in February 2002. See *State v. Gaston*, 8th Dist. No. 79626, 2002-Ohio-506. Gaston filed a Crim.R. 32.1 motion to withdraw his plea seven months later, in September 2002.

This court disagreed with the state that Gaston’s motion was barred on jurisdictional grounds, since Gaston did not question his plea in his direct appeal. *Id.* at ¶4-5. Nevertheless, this court held that his motion was barred by res judicata. *Id.* at ¶8.

In *Gaston*, we discussed the Supreme Court’s decision in *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993 (where the Supreme Court held that R.C. 2953.21 and R.C. 2953.23 (postconviction relief statutes) do not govern a Crim.R. 32.1 post-sentence motion to withdraw a guilty plea). *Id.* We concluded that the holding in *Bush* only distinguished Crim.R. 32.1 motions from postconviction relief petitions, but did not address the issue of res judicata. *Id.*

We further reasoned in *Gaston* that just because the Supreme Court made it clear that a Crim.R. 32.1 motion is not a collateral attack, and is filed in the original action, did not mean that res judicata did not apply. *Id.* We relied on *State v. Szefcyk* (1996), 77 Ohio St.3d 93, for the proposition that: "Res judicata applies to 'any proceeding' initiated after a final judgment of conviction and direct appeal." *Id.* Therefore, in *Gaston*, this court concluded that a Crim.R. 32.1 motion would be included within "any proceeding," and as such, "res judicata bars any part of the motion that could have been raised on direct appeal." *Id.* See, also, *State v. Daily*, 8th Dist. No.84123, 2004-Ohio-5391; *Reynolds*, *supra*; *State v. Brown*, 167 Ohio App.3d 239, 2006-Ohio-3266 (Tenth District). But, see, *State v. Spencer*, 2d Dist. No. 2006 CA42, 2007-Ohio-2140.

The same analysis applies to the case sub judice. Boswell contends that his plea was not voluntary because the trial court misinformed him at his plea hearing that he may receive, rather than he would receive, postrelease control. However, Boswell could have raised that issue on direct appeal. Thus, his motion is barred by res judicata.

Boswell further asserts that res judicata should not apply, since his trial counsel was ineffective when he did not recognize the trial court's error regarding postrelease control, and did not object. However, Boswell even states that, "the record of the plea hearing demonstrates" this alleged error. Since the

alleged ineffective assistance of counsel appeared on the face of the record, he could have directly appealed it.

Moreover, if an alleged ineffective assistance of counsel claim *does not appear on the face of the record*, a defendant can file a petition for postconviction relief within the time frame under R.C. 2953.21. "Matters outside the record that allegedly corrupted the defendant's choice to enter a plea of guilty or no contest so as to render the plea less than knowing and voluntary are proper grounds for an R.C. 2953.21 petition for post-conviction relief. *** (T)he availability of R.C. 2953.21 relief on those same grounds removes them from the form of extraordinary circumstances demonstrating a manifest injustice which is required for Crim.R. 32.1 relief." (Ellipses in original.) *State v. Cochran*, 2d Dist. No. 2006CA87, 2007-Ohio-4545, at ¶71, quoting *State v. Hartzell* (Aug. 20, 1999), 2d Dist. No. 17499, 1999 Ohio App. LEXIS 3812.

Therefore, it is my view that res judicata bars Boswell's Crim.R. 32.1 motion and, as such, the trial court abused its discretion when it granted it.

Even if this court held that res judicata did not bar Boswell's motion, this author would still conclude that the trial court abused its discretion when it granted Boswell's Crim.R. 32.1 motion, nearly six years after he pled guilty, as it did not rise to the extraordinarily high standard of "manifest injustice."

Crim.R. 32.1 provides as follows: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." This rule imposes a strict standard for deciding a post-sentence motion to withdraw a plea. *State v. Griffin* (2001), 141 Ohio App.3d 551, 553. A defendant may only be allowed to withdraw a plea after sentencing in "extraordinary cases." *State v. Smith* (1977), 49 Ohio St.2d 261, 264. The defendant bears the burden of showing a manifest injustice warranting the withdrawal of a plea. *Id.* at paragraph one of the syllabus. "The logic behind this precept is to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdrawing the plea if the sentence was unexpectedly severe." *State v. Wynn* (1998), 131 Ohio App.3d 725, 728, citing *State v. Caraballo* (1985), 17 Ohio St.3d 66.

In *State v. Wolford* (Sept. 17, 1999), 2d Dist. No. 99CA10, 1999 Ohio App. LEXIS 4282, the Second District explained:

"The term *injustice* is defined as 'the withholding or denial of justice. In law, the term is almost invariably applied to the act, fault, or omission of a court, as distinguished from that of an individual.' Black's Law Dictionary, 5th Ed. A 'manifest injustice' comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the

resulting prejudice through another form of application reasonably available to him or her.

“Failure to comply with the requirements of Crim.R. 11(C) when taking a plea is a defect that may be the subject of a merit appeal which supports reversal of a defendant’s conviction when prejudice results. *State v. Ballard* (1981), 66 Ohio St. 2d 473. Even when a timely appeal is not taken, a delayed appeal is available pursuant to App.R. 5(A), upon a proper showing. Therefore, a court’s failure to comply with the requirements of Crim.R 11(C) is not an extraordinary circumstance demonstrating a form of manifest injustice required for Crim.R. 32.1 relief.” (Emphasis in original and parallel citations omitted.) *Id.* at 4-5.

It is this writer’s view that Boswell has not demonstrated an “extraordinary circumstance” which would rise to the high standard of “manifest injustice,” such that his plea should have been vacated post-sentence, post-judgment, and nearly six years after he entered into his plea. His lack of proper notification appeared on the face of the record, and thus, he should have directly appealed the trial court’s postrelease control notification. He also could have filed a delayed appeal within a reasonable amount of time after discovering the error, rather than nearly six years later.

Thus, Boswell could have sought redress from the resulting prejudice through three different avenues that were reasonably available to him: (1) a timely direct appeal; (2) a more timely delayed appeal; or (3) a timely petition for post-conviction relief. He failed to take advantage of any of them. Boswell has not presented an extraordinary circumstance demonstrating a manifest injustice, which is required by a post-sentence Crim.R. 32.1 motion. Thus, it is this writer's view that the trial court abused its discretion when it granted Boswell's motion.

In addition, I disagree with the majority that it was "irrelevant" that Boswell did not *actually* receive postrelease control as part of his sentence. Regardless of whether he will be sentenced *in the future* to postrelease control pursuant to R.C. 2929.191, that is not the issue before us in the instant case. At this point, he is not subject to postrelease control, and as such, was not prejudiced by the trial court misinforming him of the mandatory nature of postrelease control. See *State v. Ballard* (1981), 66 Ohio St. 2d 473.

The majority cites six cases for the proposition that, "[t]his court has repeatedly held that, where the trial court failed to personally address a defendant and inform him of the maximum length of postrelease control before accepting his guilty plea, the court fails to substantially comply with Crim.R.

11(C)(2)(a) and R.C. 2943.032.” I agree that all six cases stand for that proposition.³

In none of the cases cited by the majority, however, did the appellants file a Crim.R. 32.1 motion to withdraw their plea, let alone one that was filed nearly five years after they pled guilty. In each of the six cases, it was the appellant’s direct appeal, where he claimed that the trial court erred when it accepted his guilty plea – because it was not knowingly, voluntarily, and intelligently made.

³As the state correctly points out, this court has also held that a trial court substantially complies with Crim.R. 11 when it misinforms defendants at their plea hearing that they may, rather than they will, receive postrelease control. See *State v. Fleming*, 8th Dist. No. 87773, 2006-Ohio-6773; *State v. Shorter*, 8th Dist. No. 86826, 2006-Ohio-2882; and *State v. Rankin*, 8th Dist. No. 86706, 2006-Ohio-2571 (informed defendant that postrelease control was mandatory, but improperly told him he could receive “anywhere from three to five years”).

It is significant to note that on January 24, 2007, the Supreme Court granted discretionary review of a case from this district, where we affirmed the trial court’s denial of a defendant’s Crim.R. 32.1 motion and held that the trial court substantially complied with Crim.R. 11, despite the fact that the trial court made *no mention of postrelease control* at the plea hearing (Sweeney, J., dissented, concluding that he would have vacated the plea). See *State v. Sarkozy*, 8th Dist. No. 96952, 2006-Ohio-3977, accepted for review by *State v. Sarkozy*, 112 Ohio St.3d 1441, 2007-Ohio-3977. The proposition of law accepted by the Supreme Court was: “The failure during a plea colloquy to correctly advise a defendant of the length of postrelease control that will be part of the sentence of imprisonment causes the plea to be invalid. (Courts must exercise discretion in determining whether substantial compliance exists in relation to the alleged failure to advise of postrelease control.)” Oral argument in this case was held on October 16, 2007.

In all six cases, this court vacated the appellant's plea and remanded the case. Thus, it is my view that these cases, which do not have the same procedural issue as the one presented here, do not apply to the case at bar.

Even if the six cases could be relied on in this case, for the following reasons, I still would not agree that Boswell's plea should have been vacated.

"R.C. 2943.032(E) requires that, prior to accepting a guilty plea for which a term of imprisonment will be imposed, the trial court must inform a defendant regarding post release control sanctions in a reasonably thorough manner." *Rankin*, supra, at ¶29, citing *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171.

In *Fleming*, supra, at ¶3-4, this court stated:

"In resolving whether a criminal defendant knowingly, intelligently, and voluntarily entered a plea, our query is whether the trial court adequately guarded constitutional or non-constitutional rights promised by Crim.R. 11(C). The applicable standard of review depends upon which right or rights the appellant raises on appeal. We require strict compliance if the appellant raises a violation of a constitutional right delineated in Crim.R. 11(C)(2)(c); alternatively, if the appellant raises a violation of a non-constitutional right found in Crim.R. 11(C)(2)(b), we look for substantial compliance.' *State v. Moviel*, [8 th Dist. No.] 86244, 2006 Ohio 697, ¶10, citations omitted.

"As outlined by the Ohio Supreme Court:

“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. 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. The test is whether the plea would have been made otherwise. *State v. Nero* (1990), 56 Ohio St.3d 106, 108.”

Boswell argues here that he has raised a constitutional error, and thus strict compliance with Crim.R. 11 is required. However, the rights implicated (informing a defendant of the maximum penalty he could receive) are not of constitutional dimension and fall, instead, within the parameters of Crim.R. 11(C)(2)(b). Thus, only substantial compliance is necessary. *Fleming* at ¶5.

One of the cases cited by the majority, *Crosswhite*, supra, bears further discussion regarding what is required by “substantial compliance.” In *Crosswhite*, the trial court informed the appellant at his plea hearing that upon his release from prison, he “might be released on what is called postrelease control[.]” But the appellant’s postrelease control was mandatory, “by operation of law.” *Id.* at ¶9. We held that under the totality of the circumstances, the trial court did not substantially comply with the requirements of Crim.R. 11 when it accepted the appellant’s guilty plea. *Id.* at ¶12.

Two months later, in *State v. Holloway*, 8th Dist. Nos. 86426 and 86247, 2006-Ohio-2591 (“*Holloway I*”), we stated, “[t]his court recently addressed an identical situation in [*Crosswhite*].” *Id.* at ¶17. Relying on *Crosswhite*, we concluded that, by informing the appellant that he *may* get five years of postrelease control, rather than he *would* get it – because it was mandatory – that the appellant’s plea was not knowingly, intelligently, and voluntarily entered. *Id.* at ¶18. We vacated the appellant’s plea. *Id.*

Notably, however, on December 6, 2006, *Holloway I* was reversed by the Supreme Court of Ohio, in a one sentence opinion. See *State v. Holloway*, 111 Ohio St.3d 496, 2006-Ohio-6114. It stated, “The judgment of the court of appeals is reversed on the authority of *Watkins v. Collins* (2006), 111 Ohio St.3d 425[.]” On February 28, 2007, the Supreme Court, upon a motion for reconsideration, remanded *Holloway* to this court for consideration of the remaining assignments of error (since we vacated the appellant’s plea, we did not address the remaining assignments). See *State v. Holloway*, 112 Ohio St.3d 1495.

Upon remand, this court explained that, in *Watkins*, the Supreme Court held, “the failure of the trial court to inform the defendant that postrelease control was mandatory did not result in an invalid plea or sentence.” *State v. Holloway*, 8th Dist. Nos. 86426 and 86427, 2007-Ohio-2221, at ¶11 (“*Holloway II*”). We then concluded that the appellant’s assignment of error, claiming that

he was denied due process of law because he was not informed that he would be subjected to mandatory postrelease control at his plea hearing, was without merit. *Id.*

Watkins was an action for writ of habeas corpus to compel the release of twelve petitioners who were in prison for violating the terms of their postrelease control. *Id.* at ¶2. Each petitioner claimed that he was informed at his *sentencing hearing* that he *may* be subjected to postrelease control, but was not properly informed of the mandatory nature of the postrelease control.

In *Watkins*, the Supreme Court stated, “[h]ere, while not specifying the post[-]release control as mandatory, the trial courts did at least notify the petitioners that they could be subject to post[-]release control at their sentencing hearings.” *Id.* at ¶46. The Supreme Court further reasoned, “[w]hile these entries erroneously refer to discretionary instead of mandatory post[-]release control, they contain significantly more information than any of the sentencing entries held insufficient in [*Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126] (no reference to postrelease control) and [*Gensley v. Eberlin*, 110 Ohio St.3d 1474, 2006-Ohio-126] (vague reference about petitioner’s understanding the possibilities penalties).” *Id.* at ¶51. Thus, the Supreme Court concluded, “the sentencing entries are sufficient to afford notice to a reasonable person that the courts were authorizing post[-]release control as part of each petitioner’s

sentence. A reasonable person in the position of any of the petitioners would have had sufficient notice that post[-]release control could be imposed following the expiration of the person's sentence. ***" Id.

Holloway I only addressed appellant's argument that his *plea was invalid* because he was not informed of the mandatory nature of his postrelease control *at his plea hearing*. Despite the fact that *Watkins* was a habeas corpus action dealing with *postrelease control notification at sentencing*, the Supreme Court still reversed our decision in *Holloway I* based on the authority of *Watkins*.

Recently, the First District Court of Appeals was faced with the same issue as in *Holloway I* and *Crosswhite*; i.e., the appellant was misinformed at his plea hearing that he *may* receive postrelease control, when it was actually mandatory. See *State v. Fuller*, 1st Dist. No. C-040318, 2007-Ohio-1020. Because of this, the appellant in *Fuller* claimed that his plea was not voluntary, knowing, and intelligent, and therefore, the trial court violated Crim.R. 11(C)(2)(a) –as Boswell claims in the case sub judice. Id. at ¶1.

The First District discussed *Holloway I* and its reversal by the Supreme Court on the authority of *Watkins*. Id. at ¶7-9. It concluded that although the Supreme Court did not elaborate on its decision to reverse, the decision could “only be read to renounce the rule, applied by the Eighth District in its decision, that a trial court violates its duty under Crim.R. 11(C)(2)(a) when it misinforms

a defendant that a mandatory period of postrelease control is discretionary.” Id. at ¶9.

In light of the Supreme Court’s reversal of *Holloway I*, this writer agrees the high Court has made it clear that if a trial court misinforms a defendant at a plea hearing that he or she *may* receive postrelease control, when it was actually mandatory, the trial court has substantially complied with Crim.R. 11. As such, appellate courts err if they vacate a plea under these circumstances. The same reasoning would equally apply – and even more so – to a trial court’s plea vacation in the context of the “manifest injustice” standard under a Crim.R. 32.1 post-sentence motion to withdraw the plea.

Thus, it is my view that the trial court abused its discretion when it vacated Boswell’s motion to withdraw his plea, filed nearly six years after he entered into it. I would reverse and remand, and instruct the trial court to reinstate Boswell’s guilty plea.



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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

STATE OF OHIO
Plaintiff

PARRIS BOSWELL
Defendant

Case No: CR-00-387210-ZA

Judge: JOHN D SUTULA

INDICT: 2911.11 AGGRAVATED BURGLARY
2903.13 ASSAULT

JOURNAL ENTRY

DEFENDANT'S MOTION TO VACATE PLEA IS GRANTED. DEFENDANT ORDERED RETURNED FROM MANSFIELD REFORMATORY.

SHERIFF ORDERED TO TRANSPORT DEFENDANT PARRIS BOSWELL, DOB: 07/05/1979, GENDER: MALE, RACE: BLACK.

05/09/2006
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Judge Signature

Date

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HEAR
05/09/2006

Sheriff Signature

OMS 5.12.06

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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

STATE OF OHIO
Plaintiff

PARRIS BOSWELL
Defendant

Case No: CR-00-388072-A

Judge: JOHN D SUTULA

INDICT: 2911.01 AGGRAVATED ROBBERY W/FIREARM
SPECIFICATIONS
2903.11 FELONIOUS ASSAULT WITH FIREARM
SPECIFICATIONS
2923.13 HAVING WEAPONS WHILE UNDER
DISABILITY

JOURNAL ENTRY

DEFENDANT'S MOTION TO VACATE PLEA IS GRANTED. DEFENDANT ORDERED RETURNED FROM MANSFIELD REFORMATORY.
SHERIFF ORDERED TO TRANSPORT DEFENDANT PARRIS BOSWELL, DOB: 07/05/1979, GENDER: MALE, RACE: BLACK.

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Judge Signature

Date

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05/09/2006

Sheriff Signature

AMS 5-12-06