

ORIGINAL

IN THE SUPREME COURT OF OHIO **09-1019**

STATE OF OHIO

Plaintiff-Appellee,

vs.

RICKY DRISKILL,

Defendant-Appellant.

CASE NO.

C.A. No. CA 10-08-10/11

**T.C. No. 05 CRM 067
06 CRM 097**

**ON APPEAL FROM THE COURT OF APPEALS
FOR THE THIRD APPELLATE DISTRICT OF OHIO
MERCER COUNTY, OHIO**

**APPELLANT'S MEMORANDUM IN SUPPORT
OF SUPREME COURT JURISDICTION**

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TABLE OF CONTENTS

CITES	PAGE(S)
TABLE OF CONTENTS	i-ii
JURISDICTIONAL STATEMENT	1
Authorities cited (in the order in which they appear in the brief):	
<i>State v. Sarkozy</i>	1
(2008) 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224	
<i>State v. Clark</i>	1
(2008) 119 Ohio St.3d 239, 246, 2008-Ohio-3748, 893 N.E.2d 462	
<i>State v. Boswell</i>	1
(Apr. 9, 2009) Supreme Court No. 2007-2373, 2009-Ohio-1577	
<i>State v. Xie</i>	2
(1992) 62 Ohio St.3d 521, 584 N.E.2d 715	
<i>State v. Simpkins</i>	3
(2008) 117 Ohio St.3d 420, 426, 2008-Ohio-1197, 884 N.E.2d 568	
<i>State v. Arnold</i>	3
(Dec. 19, 2008) Clark No. 2008 CA 28, 2008-Ohio-6720	
STATEMENT OF THE CASE AND FACTS	4

<i>Revised Code 2913.02(A)(2),(D))</i>	4
<i>Revised Code 2913.02(A)(1),(B)(5)</i>	4
<i>Revised Code 2903.08(A)(2)(b),(C)(2)</i>	4
FIRST PROPOSITION OF LAW	5
WHEN A DEFENDANT FILES A MOTION TO VACATE A GUILTY PLEA BASED ON THE TRIAL COURT'S FAILURE TO ADVISE HIM OR HER OF MANDATORY POSTRELEASE CONTROL SANCTIONS, THE MOTIONS SHOULD BE GRANTED BECAUSE THE FAILURE TO SO ADVISE RENDERS THE SUBSEQUENT PLEA INVOLUNTARY; MOREOVER, RES JUDICATA DOES NOT BAR SUCH A CLAIM WHEN THE INITIAL MOTION WAS FILED WITHIN A FEW MONTHS OF SUPREME COURT PRECEDENT ESTABLISHING THAT RIGHT.	
SECOND PROPOSITION OF LAW	
<i>State v. Jordan</i>	6
(2004) 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864	
<i>Romito v. Maxwell</i>	6
(1967) 10 Ohio St.2d 266, 267-268, 227 N.E.2d 223	
<i>Revised Code 2929.19(B)(3)</i>	6
<i>State v. Bezak</i>	6,7
(2007) 114 Ohio St.3d 94, 97, 2007-Ohio-3250, 868 N.E.2d 961	
<i>State v. Aleshire</i>	7
(2008) 117 Ohio St.3d 402, 2008-Ohio-1272, 884 N.E.2d 57	
CONCLUSION	9
CERTIFICATE OF SERVICE	9

WHY THIS COURT SHOULD GRANT JURISDICTION

This Court has issued a number of opinions recently concerning when a trial court fails to *advise* a criminal defendant of postrelease control sanctions when that defendant enters a guilty plea. Other recent cases have addressed the validity of a plea when the trial court fails to *impose* mandatory postrelease control sanctions at sentencing. This case presents several related issues not addressed in these other cases.

In the present case the trial court failed to advise appellant of the mandatory postrelease control provisions when he entered the plea. The court did, however, impose the mandatory provisions at sentencing. Appellant filed a motion to withdraw the guilty plea because he was not advised about postrelease control. On that same basis he also filed a motion to declare that sentence null and void. The trial court did not conduct a hearing on the motions, and denied them. The Third District Court of Appeals affirmed.

The trial court's failure to inform a defendant that his sentence will include a mandatory term of postrelease control provides a basis for a defendant to vacate his plea based on its not being knowing, voluntary and intelligent. *State v. Sarkozy* (2008) 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224. A trial court does not comply, even substantially, with Rule 11 if it does not inform a defendant at the time of his plea that the potential sentence will include a mandatory term of post-release control. *Id.* "When a sentence includes mandatory postrelease control, the trial judge must inform the defendant of that fact in the plea colloquy or the plea will be vacated." *State v. Clark* (2008) 119 Ohio St.3d 239, 246, 2008-Ohio-3748, 893 N.E.2d 462.

Very recently, this Court decided *State v. Boswell* (Apr. 9, 2009) Supreme Court No. 2007-2373, 2009-Ohio-1577. There, the trial court failed to advise the defendant during the plea colloquy of the mandatory

postrelease control provisions. In addition, the court failed to impose those conditions as part of the sentence. The defendant in *Boswell*, like the defendant in this case, filed a motion to withdraw the guilty plea. *Boswell* holds that since the defendant's sentence was void – since although the defendant had been through a sentencing hearing, the trial judge acted without authority in imposing the sentence (*Id.*, at ¶ 9.) – the motion to withdraw the plea should be considered under the deferential standard of *State v. Xie* (1992) 62 Ohio St.3d 521, 584 N.E.2d 715. The motion should be considered a pre-sentence motion to withdraw and “should be freely and liberally granted.” *Id.*, 62 Ohio St.3d at p. 527. Thus, “the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea.” *Boswell, supra*, at ¶ 10, citing *State v. Xie, supra*.

The appellate court in this case held that appellant's sentence “was not void because postrelease control was properly included in his sentence.” (Appellate Opinion, p. 17.) Appellant believes that this statement overlooks this Court's observation in *Clark* that unless the court informs a defendant of postrelease control during the plea colloquy, the plea “will be vacated.” *State v. Clark, supra*. The Court of Appeals also held that under *Boswell*, this application to withdraw the plea should not have been “freely and liberally granted” because in this case, unlike *Boswell*, appellant was sentenced to the mandatory postrelease control provisions. (Appellate opinion, p. 17.) Appellant again disagrees. He submits that this is a distinction without a difference. If, under *Sarkozy* and *Clark*, the plea is involuntary due to the failure to properly advise appellant during the plea colloquy, then the plea should be able to be withdrawn.

Moreover, even if the above were not true, the appellate court would seem to have violated *Boswell* since *Boswell* suggests that, at

minimum there must be a hearing on the motion to vacate the plea. *State v. Boswell, supra*, at ¶ 10. Here, there was no hearing.

Finally, the appellate court also held that the motions were barred by res judicata. The court concluded that since appellant did not appeal the error initially, and since he did not raise the issue in his subsequent petition for postconviction relief, that the claim should now be barred. (Appellate opinion, pp. 19-20.) Appellant has a different view.

Appellant primarily bases its argument on *State v. Sarkozy, supra*, and cases decided after that one. *Sarkozy* was decided on February 14, 2008. Appellant filed his motions that are the basis of this appeal within about three months of that date. Thus, its not as if appellant was just passing the time – he filed his motions shortly after it was clear that this Court had recognized a right that had not been so clear up until that point.

“Res judicata is a rule of fundamental and substantial justice that is to applied in particular situations as fairness and justice require, and that is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice. *We would achieve neither fairness nor justice by permitting a void sentence to stand.*” *State v. Simpkins* (2008) 117 Ohio St.3d 420, 426, 2008-Ohio-1197, 884 N.E.2d 568, internal citations omitted, emphasis added. In *State v. Arnold* (Dec. 19, 2008) Clark No. 2008 CA 28, 2008-Ohio-6720, the Second District addressed the merits of this issue even when the defendant’s motion to vacate the sentence was filed on January 29, 2008 and when his conviction on the initial direct appeal was affirmed on September 23, 2002, at least 5 years earlier. The appellate court found that the trial court had abused its discretion in denying the motion to vacate the sentence.

Thus, because *Sarkozy* announced a new rule, and because this Court's cases suggest that this sentence is void and not voidable, the trial court erred in not addressing the merits of the argument.

This case thus presents many interesting issues. Should the failure to advise a defendant of postrelease control sanctions during the plea colloquy render the subsequent sentence void or voidable? What is the standard for withdrawing a plea when the court fails to advise the defendant about postrelease control during the plea, but does in fact impose those sanctions at sentencing? Finally, how does the concept of *res judicata* play into all of this?

Appellant therefore asks this Court to take jurisdiction.

STATEMENT OF THE CASE AND OF THE FACTS¹

On August 25, 2006, and in Case number 05-CRM-067, appellant pleaded guilty to one count of felonious assault (R.C. 2903.11(A)(2),(D)) and one count of theft of a motor vehicle. (R.C. 2913.02(A)(1),(B)(5).) On that same date, in Case number 06-CRM-097 appellant pleaded no contest to one count of vehicular assault. (R.C. 2903.08(A)(2)(b), (C)(2).)

A sentencing hearing was conducted on October 13, 2006. On October 19, 2006, the trial court actually imposed sentence. In Case number 05-CRM-067 the court imposed a total prison term of five years and four month. In Case number 05-CRM-097 the court imposed a consecutive sentence of two years. The total prison term is thus seven years and four months.

On December 20, 2006 appellant filed a post-conviction petition. On March 5, 2007 the trial court issued a decision denying the petition and also denying appellant's request for a hearing on the motion. Appellant appealed to the Court of Appeals for the Third Appellate

¹ The facts underlying the offenses are not at issue in this appeal. The issue concerns the trial court's denial of appellant's motions to withdraw the plea and a motion to declare his sentence null and void.

District, arguing that the trial court erred in not granting him a hearing on the petition. However, on March 3, 2008, the appellate court affirmed the convictions.

On May 22, 2008, appellant filed two motions in the trial court. One was a motion to declare his sentence null and void. The other was a motion to withdraw his pleas. The basis of both motions was that the trial court had failed to inform him, when he entered the pleas, that he would be subject to post release control provisions upon completing his prison term. In a decision issued on September 18, 2008, the trial court denied both motions.

From that decision and entry, appellant again appealed to the Court of Appeals. On May 4, 2009, the appellate court issued its opinion affirming the judgment of the trial court.

This memorandum and notice of appeal follow.

PROPOSITION OF LAW

WHEN A DEFENDANT FILES A MOTION TO VACATE A GUILTY PLEA BASED ON THE TRIAL COURT'S FAILURE TO ADVISE HIM OR HER OF MANDATORY POSTRELEASE CONTROL SANCTIONS, THE MOTIONS SHOULD BE GRANTED BECAUSE THE FAILURE TO SO ADVISE RENDERS THE SUBSEQUENT PLEA INVOLUNTARY; MOREOVER, RES JUDICATA DOES NOT BAR SUCH A CLAIM WHEN THE INITIAL MOTION WAS FILED WITHIN A FEW MONTHS OF SUPREME COURT PRECEDENT ESTABLISHING THAT RIGHT.

In this case, the sentencing transcript reveals that at the time he entered the plea, the trial court never advised appellant that he was subject to the mandatory five year post release control provisions. There was no discussion at all about post release control. (And in its decision denying the motions, the trial court even acknowledged that it did not

advise appellant orally of the postrelease control provisions.) In this argument appellant maintains that since he was never notified about this post-release control period at the time he was sentenced, his sentence should be declared null and void.

This Court has held that “[w]hen sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about postrelease control and is further required to incorporate that notice into its journal entry imposing sentence.” *State v. Jordan* (2004) 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraph one of the syllabus. If the trial court sentences the defendant and fails to notify him of a mandatory of post-release control to follow a term of imprisonment, the sentence is rendered is void for failing to contain a statutorily-mandated term. *Jordan*, 104 Ohio St.3d at 23; *State v. Boswell, supra*, ¶ 8. “The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment.” *Romito v. Maxwell* (1967) 10 Ohio St.2d 266, 267-268, 227 N.E.2d 223. Therefore, as the Court further held, “when a trial court fails to notify an offender that he may be subject to postrelease control at a sentencing hearing, as required by former R.C. 2929.19(B)(3), the sentence is void; the sentence must be vacated and the matter remanded to the trial court for resentencing. The trial court must resentence the offender as if there had been no original sentence. When a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense.” *State*

v. Bezak (2007) 114 Ohio St.3d 94, 97, 2007-Ohio-3250, 868 N.E.2d 961.

More recently, this Court reiterated this principle, holding that “[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence.” *State v. Simpkins, supra*.

The cases cited above deal mostly with the trial court’s failure to impose mandatory postrelease control sanctions at sentencing. In the present case the trial court did in fact impose those sanctions. However, when he entered the plea, the trial court failed to advise him that these sanctions would in fact be imposed. This Court has also spoken to that issue.

The trial court’s failure to inform a defendant that his sentence will include a mandatory term of postrelease control provides a basis for a defendant to vacate his plea based on its not being knowing, voluntary and intelligent. *State v. Sarkozy, supra*. The Court did not leave any discretion on this matter; a trial court does not comply, even substantially, with Rule 11 if it does not inform a defendant at the time of his plea that the potential sentence will include a mandatory term of post-release control. *Id.* “When a sentence includes mandatory postrelease control, the trial judge must inform the defendant of that fact in the plea colloquy or the plea will be vacated.” *State v. Clark, supra*. The Court has begun enforcing this precedent. See *State v. Aleshire* (2008) 117 Ohio St.3d 402, 2008-Ohio-1272, 884 N.E.2d 57.

In *State v. Boswell, supra*, the trial court failed to advise the defendant during the plea colloquy of the mandatory postrelease control provisions, and it also failed to impose those sanctions as part of the sentence. The defendant in *Boswell*, as the defendant in this case, filed a motion to withdraw the guilty plea. *Boswell* holds that since the defendant's sentence was void – since although the defendant had been through a sentencing hearing, the trial judge acted without authority in imposing the sentence (*Id.*, at ¶ 9.) – the motion to withdraw the plea should be considered under the deferential standard of *State v. Xie, supra*. The motion should be considered a pre-sentence motion to withdraw and "should be freely and liberally granted." *Id.*, 62 Ohio St.3d at p. 527. Thus, "the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Boswell, supra*, at ¶ 10, citing *State v. Xie, supra*.

Appellant believes that res judicata principles should not apply. Again, this case was decided only months after *Sarkozy*. And in *Simpkins*, the State moved to resentence the defendant *one year prior to the completion of an eight year prison sentence*. This Court nonetheless addressed the merits of the issue, holding that the sentence was void. "Res judicata is a rule of fundamental and substantial justice that is to applied in particular situations as fairness and justice require, and that is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice. *We would achieve neither fairness nor justice by permitting a void sentence to stand.*" *State v. Simpkins, supra*, 117 Ohio St.3d at p. 426, internal citations omitted, emphasis added.²

² This Court has been especially sensitive to such issues recently. In October it held that the constitutional components of the advisements under Criminal Rule 11 must be strictly complied with. *State v. Veney* (2008) 120 Ohio St.3d 176, 2008-Ohio-5200, ___ N.E.2d ___.

CONCLUSION

For the reasons stated in the foregoing brief, appellant asks this Court to accept jurisdiction.

Respectfully submitted,



JOHN H. RION
RION, RION & RION, L.P.A., INC.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a copy of this Notice of Appeal was delivered to Matthew Fox, 119 N. Walnut Street, Celina, OH 45822, by regular U.S. mail on the same day as filing.



JOHN H. RION
RION, RION & RION, L.P.A., INC.

[Cite as *State v. Driskill*, 2009-Ohio-2100.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MERCER COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 10-08-10

v.

RICKY DRISKILL,

OPINION

DEFENDANT-APPELLANT.

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 10-08-11

v.

RICKY DRISKILL,

OPINION

DEFENDANT-APPELLANT.

Appeals from Mercer County Common Pleas Court
Trial Court No. 2005 CRM 067
Trial Court No. 2006 CRM 097

Judgments Affirmed

Date of Decision: May 4, 2009

APPEARANCES:

Jon Paul Rion for Appellant

Matthew K. Fox for Appellee

ROGERS, J.

{¶1} Defendant-Appellant, Ricky Driskill, appeals the judgment of the Mercer County Court of Common Pleas denying his motion to withdraw his guilty plea and motion to declare his sentence void and for resentencing in consolidated cases numbered 10-08-10 and 10-08-11. On appeal, Driskill contends that, pursuant to *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, he should be permitted to withdraw his pleas and his sentence should be declared void because he was not advised at his change of plea hearing that he was subject to a mandatory five-year term of postrelease control. Finding that Driskill's arguments are barred by res judicata, we affirm the judgment of the trial court.

{¶2} In May 2005, in case 10-08-10¹, the Mercer County Grand Jury indicted Driskill on two counts of felonious assault in violation of R.C. 2903.11(A)(2), felonies of the first degree, and one count of grand theft of a motor vehicle in violation of R.C. 2913.02(A)(1), a felony of the fourth degree. The indictment stemmed from a May 2005 incident during which Driskill consumed large amounts of illegal drugs; drove his vehicle and struck another vehicle, injuring its occupants; stole the truck of an emergency responder to the accident; drove the truck into a river; and, brandished a knife at the police officers who were attempting to apprehend him.

¹ We note that case 10-08-10 corresponds to Mercer County Common Pleas Court case 2005 CRM 067.

Case No. 10-08-10 and 10-08-11

{¶3} In August 2005, Driskill entered a plea of not guilty by reason of insanity and a plea of not guilty as to each count in case 10-08-10.

{¶4} In July 2006, in case 10-08-11², the Mercer County Grand Jury indicted Driskill on one count of aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a);(B)(1)(a), a felony of the second degree, and one count of vehicular assault in violation of R.C. 2903.08(A)(2)(b);(C)(2), a felony of the third degree. The indictment stemmed from the same May 2005 incident.

{¶5} In August 2006, Driskill entered into plea agreements with the State in both case 10-08-10 and 10-08-11. Under the agreements, Driskill agreed to withdraw his prior pleas of not guilty and not guilty by reason of insanity and to enter pleas of guilty to one count of felonious assault and one count of theft of a motor vehicle, and the State agreed to request a nolle prosequi on the remaining count of felonious assault. Additionally, Driskill agreed to plead no contest to the vehicular assault count, and the State agreed to request a nolle prosequi on the aggravated vehicular assault count. Both plea agreements signed by Driskill provided, in pertinent part:

POST RELEASE CONTROL. In addition, a period of supervision by the Adult Parole Authority after release from prison may be mandatory in this case. If I am sentenced to prison for a felony 1 or felony sex offense, after my prison release I will have a mandatory 5 years of post release control under conditions determined by the Parole Board. If I am

² We note that case 10-08-11 corresponds to Mercer County Common Pleas Court case 2006 CRM 097.

sentenced to prison for a felony 2 or 3 which involved causing or threatening physical harm, I will have mandatory post release control of 3 years. If I receive prison for any other felony 3, felony 4, or felony 5, I may be given up to 3 years of post release control. A violation of any post-release control rule or condition can result in a more restrictive sanction while I am under post release control, AND/OR increased duration of supervision or control, up to the maximum term, OR re-imprisonment even though I have served the entire state prison term imposed upon me by this Court for all offenses. If I violate conditions of supervision while under post release control, the Parole Board could return me to prison for up to nine months for each new violation, for a total of ½ of my originally stated prison term. If the violation is a new felony, I could receive a prison term of the greater of one year or the time remaining on post release control, in addition to any other prison term imposed for the offense.

(Aug. 2006 Plea Agreements, p. 3).

{¶6} Subsequently, the trial court held a plea hearing, during which Driskill executed a “Waiver of Constitutional Rights Prior to Entering a Plea of Guilty” in each case, which included notifications that, if he was sentenced for a first or second degree felony, he would be subject to a period of postrelease control pursuant to R.C. 2967.28. Driskill acknowledged to the trial court that he had read and understood both the plea agreement and the waiver of constitutional rights. The trial court then conducted a Crim.R. 11 colloquy with Driskill, accepted his pleas, and found him guilty of one count of felonious assault, one count of theft of a motor vehicle, and one count of vehicular assault. The transcript of the hearing reflects that the trial judge did not orally address the issue of postrelease control.

Case No. 10-08-10 and 10-08-11

{¶7} On October 13, 2006, the trial court held a sentencing hearing for both cases. Shortly thereafter, on October 19, 2005, the trial court conducted a “Pronouncement of Sentence.” In case 10-08-10, the trial court sentenced Driskill to a four-year prison term on the felonious assault conviction and to a sixteen-month prison term on the theft of a motor vehicle conviction, to be served consecutively to each other and to his sentence in case 10-08-11. In case 10-08-11, the trial court sentenced him to a two-year prison term for vehicular assault. At the pronouncement of sentence, the trial court orally informed Driskill of the following:

I need to advise you that when you complete your prison sentences for these offenses, the total of which would be seven years and four months, you are – you will be subject to what’s called post-release control for a term of up to five years. And during that period of time, you will be subject to supervision if placed on post-release control by the Adult Parole Authority. And if you violate those conditions, the law requires me to notify you at this time that you are subject to being re-incarcerated for a term of up to one-half of the total prison terms hereby imposed in these two cases, so that would be a total of three years and eight months.

(Oct. 2006 Pronouncement of Sentence, p. 7). Additionally, the trial court filed judgment entries of sentence in both cases, providing that Driskill “may” be required to serve a term of postrelease control. Shortly thereafter, Driskill appealed his conviction and sentence in both cases, each of which this Court dismissed in April 2007 for want of prosecution.

Case No. 10-08-10 and 10-08-11

2006 Postconviction Petitions

{¶8} In December 2006, Driskill filed petitions for postconviction relief in both case 10-08-10 and 10-08-11, seeking to vacate his plea on the basis that his trial counsel was ineffective for failing to convey to him the chances of receiving jail time; for promising him probation; and, for failing to raise possible defenses. Additionally, Driskill requested an oral hearing.

{¶9} In March 2007, the trial court denied both petitions for postconviction relief as well as the request for an oral hearing, which Driskill appealed.

{¶10} In March 2008, this Court affirmed the trial court's overruling of Driskill's petitions for postconviction relief in *State v. Driskill*, 3d Dist. Nos. 10-07-03, 10-07-04, 2008-Ohio-827.

Motion to Withdraw Guilty Plea/ Motion for Resentencing

{¶11} In May 2008, Driskill filed a motion to withdraw his guilty plea pursuant to Crim.R. 32.1 and a motion to declare his sentence void and for resentencing in both cases 10-08-10 and 10-08-11. The basis for both motions was that the trial court did not orally inform him prior to entering his pleas that he would be subject to a mandatory term of postrelease control.

{¶12} In September 2008, the trial court found that Driskill's motion to withdraw his guilty plea and his motion to declare his sentence void were untimely.

Case No. 10-08-10 and 10-08-11

motions for postconviction relief under R.C. 2953.21, divesting it of jurisdiction to consider them. Additionally, the trial court found that, even if it had jurisdiction to consider the motions, Driskill's argument was barred by res judicata because he failed to object on that issue at sentencing or on appeal. Finally, the trial court found that Driskill was informed of postrelease control in the written negotiated plea agreement he signed.

{¶13} It is from the trial court's denial of his motion to withdraw his guilty plea and motion to declare his sentence void that Driskill appeals, presenting the following assignment of error for our review.

THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO WITHDRAW THE PLEA AND MOTION TO DECLARE HIS SENTENCE NULL AND VOID[.]

{¶14} In his sole assignment of error, Driskill contends that the trial court abused its discretion when it denied his motion to withdraw his plea and his motion to declare his sentence void. Specifically, Driskill argues that *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, requires that his sentence be declared void, and that the trial court should not have construed his motion to withdraw his plea as a postconviction relief petition because it was filed pursuant to Crim.R. 32.1.

{¶15} As Driskill's argument is two-fold, we will discuss his motion to declare his sentence void and his motion to withdraw his plea separately, preceded by an overview of Crim.R. 11 requirements and recent Ohio Supreme Court cases.

Crim.R. 11, State v. Sarkozy, and State v. Boswell

{¶16} Crim.R. 11 governs entry of pleas and is designed to ensure that pleas are entered knowingly, intelligently, and voluntarily. Crim.R. 11(C); *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179. Specifically, Crim.R. 11(C) provides:

(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.

(Emphasis added).

{¶17} Generally, where a defendant asserts that his plea was not entered voluntarily and knowingly because he was not adequately advised of his Crim.R. 11 non-constitutional rights, a court will not invalidate the plea unless the defendant suffered prejudice. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. The test for whether a defendant suffered prejudice is "whether the plea would have otherwise been made." *Id.* Under this "substantial compliance" analysis, courts

Case No. 10-08-10 and 10-08-11

are directed to “review the totality of circumstances surrounding [the defendant’s] plea and determine whether he subjectively understood [the effect of his plea].” *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶12.

{¶18} The Supreme Court of Ohio recently discussed the requirements of Crim.R. 11(C)(2)(a) and the substantial compliance analysis in *Sarkozy*, supra. In *Sarkozy*, a defendant entered guilty pleas to several offenses. Prior to accepting his pleas, the trial court orally advised him of the prison terms involved with the relevant offenses. However, the trial court did not orally inform him that he would be subject to postrelease control, of the duration of the postrelease control, or of the consequences he would face upon violating postrelease control. After entering his pleas, but prior to sentencing, Sarkozy made a pro se oral motion to withdraw his guilty plea pursuant to Crim.R. 32.1, challenging his attorney’s performance. The trial court denied the motion and Sarkozy directly appealed his conviction and sentence, arguing that his plea was invalid because the trial court did not inform him that postrelease control would be part of his sentence. The appellate court rejected this argument and affirmed his convictions, but remanded for resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Thereafter, the Supreme Court accepted a discretionary appeal and vacated Sarkozy’s plea, holding that:

- 1. If a trial court fails during a plea colloquy to advise a defendant that the sentence will include a mandatory term of**

postrelease control, the defendant may dispute the knowing, intelligent, and voluntary nature of the plea either by filing a motion to withdraw the plea or upon direct appeal.

2. If the trial court fails during the plea colloquy to advise a defendant that the sentence will include a mandatory term of postrelease control, the court fails to comply with Crim.R. 11, and the reviewing court must vacate the plea and remand the cause.

Sarkozy, 2008-Ohio-509, at paragraphs one and two of the syllabus. Additionally, the Supreme Court differentiated the situation in *Sarkozy* from other situations implicating a substantial compliance analysis. The Court held that, where the trial court completely failed to even mention postrelease control during the plea colloquy, substantial compliance could not be accomplished, as “[a] complete failure to comply with [Crim.R. 11] does not implicate an analysis of prejudice.” *Id.* at ¶ 22. But, see, *Id.* at ¶¶27-30 (Lanzinger, J., and Cupp, J., concurring in part and dissenting in part) (finding that the traditional test under *Nero*, 56 Ohio St.3d at 108, requiring the defendant to demonstrate prejudice should apply in these circumstances).

{¶19} Additionally, the Supreme Court very recently addressed Crim.R. 32.1 and a trial court’s failure to address postrelease control in *State v. Boswell*, --- Ohio St.3d ---, 2009-Ohio-1577. In *Boswell*, a defendant pleaded guilty to offenses requiring a mandatory term of postrelease control. At the plea hearing, the trial court advised Boswell that he may be subject to postrelease control;

however, the trial court did not explain postrelease control. Additionally, the sentencing entry did not impose postrelease control. Five years after his conviction and sentencing, Boswell filed a motion to vacate his plea on the basis that the trial court had not informed him of postrelease control during the plea hearing, which the trial court granted and appeals court affirmed. Thereafter, the Supreme Court accepted a discretionary appeal from the State, affirming the lower courts' decisions. The Supreme Court found that, because Boswell's sentence failed to impose the mandatory term of postrelease control required by statute, it was void. *Id.* at ¶¶8, 13. The Court then concluded that, because the sentence was void, it must be vacated, and required Boswell's motion to be treated as a *presentence* motion to withdraw his guilty plea. *Id.* at ¶10. Notably, the Court declined to address whether Boswell's motion was barred by *res judicata*, as the State failed to raise that issue in any proposition of law. *Id.* at ¶10. In conclusion, the trial court held "pursuant to Crim.R. 32.1, that a defendant's motion to withdraw a guilty plea following the imposition of a void sentence must be considered as a presentence motion and be freely and liberally granted." *Id.* at ¶13.

Motion to Declare Sentence Void

{¶20} First, we address Driskill's argument that his sentence should be declared void because he was not advised at his plea hearing that he would be

subject to mandatory postrelease control. Driskill contends that, pursuant to *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, and *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, his sentence is void because postrelease control was mandatory for his offenses, but was not properly included in his sentence. Additionally, Driskill cites *Simpkins*, supra, and *State v. Whatley*, 9th Dist. No. 24231, 2008-Ohio-6128, ¶17, for the proposition that res judicata should not bar his motion to declare his sentence void because a void sentence should not stand.

{¶21} Initially, we note that Driskill's motion to declare his sentence void was not filed pursuant to a specific rule of criminal procedure. The Supreme Court of Ohio has held that, "[w]here a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21." *State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304, syllabus, holding limited by *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, ¶10 (holding that *Reynolds* applies only to a motion that fails to specifically delineate whether it is filed pursuant to Crim.R. 32.1 or the postconviction relief statute). Accordingly, we find that the trial court appropriately categorized Driskill's motion as a petition for postconviction relief.

{¶22} An appellate court reviews a trial court's denial of a petition for postconviction relief under an abuse of discretion standard. *State v. Jones*, 3d Dist. No. 4-07-02, 2007-Ohio-5624, ¶16, citing *State v. Campbell*, 10th Dist. No. 03-AP-147, 2003-Ohio-6305; *State v. Calhoun*, 86 Ohio St.3d 279, 284, 1999-Ohio-102. An abuse of discretion connotes more than an error of law or judgment and implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *State v. Nagle*, 11th Dist. No. 99-L-089, 2000 WL 777835, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying an abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court. *Id.*

{¶23} R.C. 2953.21, Ohio's postconviction relief statute, provides “a remedy for a collateral attack upon judgments of conviction claimed to be void or voidable under the United States or the Ohio Constitution.” *State v. Scott-Hoover*, 3d Dist. No. 3-04-11, 2004-Ohio-4804, ¶10, quoting *State v. Yarbrough*, 3d Dist. No. 17-2000-10, 2001-Ohio-2351. Thus, a petitioner must establish that there has been a denial or infringement of his constitutional rights in order to prevail on a petition for postconviction relief. *Scott-Hoover*, 2004-Ohio-4804, at ¶10; R.C. 2953.21(A)(1). Additionally, untimely and successive postconviction petitions are prohibited by R.C. 2953.23(A) unless certain exceptions apply. *State v. Keith*, 176 Ohio App.3d 260, 2008-Ohio-741, ¶25. Finally, “[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 on an appeal from that judgment.” *State v. Szefcyk*, 77 Ohio St.3d 93, 1996-Ohio-337, syllabus. The Supreme Court of Ohio has held that the doctrine of res judicata bars a defendant from raising any defenses or constitutional claims in a petition for postconviction relief under R.C. 2953.21 that were raised or could have been raised on direct appeal. *Jones*, 2007-Ohio-5624, at ¶19, citing *State v. Perry* (1967), 10 Ohio St.2d 175, 180; see, also, *State v. Deal*, 3d Dist. No. 5-08-15, 2008-Ohio-5408, ¶8.

{¶24} R.C. 2929.14(F)(1) governs prison terms and provides that, if a court imposes a prison term for a felony, the sentence shall include a requirement that the offender be subject to a period of postrelease control after the offender's release from imprisonment. Additionally, R.C. 2929.19(B)(3) requires that the sentencing court notify the offender that the offender will be supervised under R.C. 2967.28 after the offender leaves prison. The Supreme Court of Ohio has interpreted these statutes as requiring a trial court to give notice of postrelease control both at the sentencing hearing and by incorporating it into the sentencing entry. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph one of the syllabus; see, also, *State v. Watt*, 175 Ohio App.3d 613, 2008-Ohio-1009, ¶11.

Case No. 10-08-10 and 10-08-11

Where the trial court fails to do both, it fails to comply with R.C. 2929.19(B)(3)(c) and (d), requiring the sentence to be vacated and the matter remanded for resentencing. *Id.*

{¶25} Several years after deciding *Jordan*, the Supreme Court of Ohio clarified its decision in *Bezak*, holding that:

[w]hen a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense.

2007-Ohio-3250, at syllabus. Similarly, in *Simpkins*, the Supreme Court held that:

[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence.

2008-Ohio-1197, at ¶6.

{¶26} In *Bezak*, the defendant was convicted of offenses requiring postrelease control, which was properly included in the judgment entry of sentence; however, the defendant was not orally advised of such at the sentencing hearing. Similarly, in *Simpkins* and *Boswell*, *supra*, the defendants were convicted of offenses requiring mandatory postrelease control; however, the journal entries of sentencing did not indicate that the defendants were subject to postrelease control. In *Whatley*, the defendant was convicted of offenses requiring mandatory

postrelease control but was not orally advised of such at the time of his sentencing.

These scenarios differ from Driskill's situation, where, although Driskill was not orally notified at his plea hearing that he would be subject to postrelease control, he was orally notified of such at the pronouncement of sentence, and postrelease control was properly included in the judgment entry of sentence. Therefore, unlike *Bezak*, *Simpkins*, *Boswell*, and *Whatley*, Driskill's sentence was not void. Additionally, as this error was apparent on the face of the record, Driskill could have raised these issues on direct appeal or in a timely petition for postconviction relief. See *Szefcyk*, *supra*, *Deal*, *supra*. Accordingly, the trial court did not abuse its discretion in finding that Driskill's argument in regard to his sentence was barred by *res judicata*.

Motion to Withdraw Guilty Plea

{¶27} Driskill next argues that the trial court should not have construed his Crim.R. 32.1 motion to withdraw his plea as a petition for postconviction relief pursuant to R.C. 2953.21, and that the trial court should have allowed him to withdraw his plea in light of *Sarkozy*, *supra*.

{¶28} Appellate review of the trial court's denial of a motion to withdraw a guilty plea is limited to whether the trial court abused its discretion. *State v. Nathan* (1995), 99 Ohio App.3d 722, 725, citing *State v. Smith* (1977), 49 Ohio St.2d 261. An abuse of discretion connotes more than an error of law or judgment

Case No. 10-08-10 and 10-08-11

and implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Nagle*, supra, citing *Blakemore*, 5 Ohio St.3d at 219. When applying an abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court. *Id.*

{¶29} Crim.R. 32.1 governs withdrawal of guilty and no contest pleas and provides:

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.

{¶30} Initially, we note that, as discussed above, Driskill's sentence was not void because postrelease control was properly included in his sentence. Thus, the holding of *Boswell* that a motion to withdraw a guilty plea be considered as a presentence motion where the defendant's sentence is void does not apply here. Accordingly, we consider Driskill's motion as a post-sentence motion.

{¶31} The party moving to withdraw his plea of guilty post-sentence bears the burden of establishing a manifest injustice. *Smith*, 49 Ohio St.2d 261, at paragraph one of the syllabus. A manifest injustice is an exceptional defect in the plea proceedings, *State v. Vogelsong*, 3d Dist. No. 5-06-60, 2007-Ohio-4935, ¶12, or a "clear or openly unjust act." *State v. Walling*, 3d Dist. No. 17-04-12, 2005-Ohio-428, ¶6, quoting *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208,

Case No. 10-08-10 and 10-08-11

1998-Ohio-271. Accordingly, a post-sentence motion to withdraw a guilty plea is only granted in "extraordinary cases." *Smith*, 49 Ohio St.2d at 264.

{¶32} The Supreme Court of Ohio has held that a trial court may not categorize or construe a Crim.R. 32.1 post-sentence motion to withdraw a guilty plea as a petition for postconviction relief pursuant to R.C. 2953.21 because these motions exist independently. *State v. Brown*, 3d Dist. No. 14-08-11, 2008-Ohio-4649, ¶25, citing *Bush*, 2002-Ohio-3993, at ¶14. See, also, *Whatley*, 2008-Ohio-6128, at ¶8. Additionally, this Court has previously held that a trial court has no jurisdiction to consider a Crim.R. 32.1 motion to withdraw a guilty plea after the judgment of conviction has been affirmed by an appellate court. *State v. Bright*, 3d Dist. No. 9-07-51, 2008-Ohio-1341, ¶11, citing *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97-98.

{¶33} Here, under *Bush*, the trial court erred when it categorized Driskill's motion to withdraw his plea as a petition for postconviction relief. As his motion was specifically filed pursuant to Crim.R. 32.1, the trial court should have considered it as a post-sentence motion to withdraw a guilty plea. However, this error alone does not warrant reversal, as untimeliness under R.C. 2953.21 was only one basis for the trial court's denial of the motion. See, *Brown*, 2008-Ohio-4649, at ¶26 (finding that a "judgment by the trial court which is correct, but for a

different reason, will be affirmed on appeal as there is no prejudice to the appellant”).

{¶34} The trial court also denied Driskill’s motion on the basis that his argument was barred by res judicata because he failed to object to the issue at sentencing. As discussed above, res judicata operates to prohibit a defendant from raising issues in another proceeding when those issues were raised or could have been raised on direct appeal of the trial court’s judgment. *Deal*, 2008-Ohio-5408, at ¶8, citing *Perry*, 10 Ohio St.2d 175, at paragraph nine of the syllabus. Additionally, “[r]es judicata bars claims raised in a Crim.R. 32.1 post-sentence motion to withdraw guilty plea that were raised or could have been raised in a prior proceeding.” *State v. Sanchez*, 3d Dist. No. 4-06-31, 2007-Ohio-218, ¶18; see, also, *Whatley*, 2008-Ohio-6128, at ¶9.

{¶35} Here, the trial court’s error in failing to orally notify Driskill of postrelease control at his plea hearing was apparent on the face of the record as the trial court notified Driskill of postrelease control at the pronouncement of sentence and in the judgment entry of sentencing. Thus, Driskill could have raised on appeal the trial court’s failure to orally notify him of postrelease control at his plea hearing. Further, Driskill could have raised this issue in his 2006 petitions for postconviction relief, in which he sought withdrawal of his plea due to ineffective

assistance of counsel. Accordingly, the trial court did not err in denying Driskill's motion to withdraw his plea, as it was barred by res judicata.

{¶36} Finally, we note that, even if Driskill's argument was not barred by res judicata, we would distinguish this case from the facts presented in *Sarkozy*. First, in *Sarkozy*, the defendant sought to withdraw his plea in a pro se oral motion prior to sentencing and in his direct appeal. Here, Driskill did not seek to withdraw his plea prior to sentencing or in his direct appeal. Additionally, in *Sarkozy*, there was no evidence that the defendant was advised of postrelease control via a signed, written plea agreement and a signed, written waiver of constitutional rights prior to entering his plea. Here, as Driskill signed both a written plea agreement and waiver of constitutional rights that notified him he would be subject to postrelease control, he had actual notice of such. Cf. *State v. Abuhashish*, 6th Dist. No. WD-07-048, 2008-Ohio-3849, ¶¶35-36 (finding that trial court substantially complied with Crim.R. 11 when, although the trial court did not expressly outline the maximum penalties defendant faced, the written plea agreement was correct and trial court questioned defendant as to whether he understood the terms of the agreement); *State v. Aleshire*, 5th Dist. No. 2007-CA-1, 2008-Ohio-5688.

{¶37} Accordingly, we overrule Driskill's assignment of error.

Case No. 10-08-10 and 10-08-11

{¶38} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

PRESTON, P.J. and WILLAMOWSKI, J., concur.

/jlr