

**IN THE SUPREME COURT OF OHIO**

**CASE NO.**

**11-1343**

**STATE OF OHIO**

*Plaintiff-Appellee*

**vs.**

**GREGORY EPPINGER**

*Defendant-Appellant*

ON APPEAL FROM THE  
COURT OF APPEALS FOR  
CUYAHOGA COUNTY, EIGHT  
APPELLATE DISTRICT

COURT OF APPEALS  
CASE NO. 95685

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT**

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

This case is of importance because an important issue concerning whether a trial court, in accepting a plea of guilty, was required to advise defendant as part of the penalty that forfeitures will be ordered. The Court of Appeals for Cuyahoga County, in its opinion, ruled that the trial court was not required to advise defendant concerning the forfeiture even though the forfeiture was part of the plea and sentence. Thus the Court of Appeals ruled:

Eppinger contends his plea was invalid because the trial court did not explain the nature of the forfeiture specification to him. The forfeiture, in the context of this case, was intended as a penalty for the underlying felony. The right to be informed of a forfeiture of property prior to entering a plea is a nonconstitutional right. See, *e.g. State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224 (holding that right to be informed of maximum penalty involved is reviewed for substantial compliance); *State v. Rebman* (June 11, 1997), Lorain App. No. 96CA006520 (substantial compliance analysis applied to notification of forfeiture during plea colloquy). As such, we review the plea proceedings to determine if there was substantial compliance with the rule. (Opinion @ p.7).

The cases relied on by the Court of Appeals in reaching this conclusion had nothing to do with the present forfeiture statute nor did any of those cases have anything to do with a review for substantial compliance.

The provision for forfeiture contained in Chapter 2981 of the Ohio Revised Code were not effective until July 1, 2007. The cases cited by the court predated the enactment. There were different provisions for forfeiture. Thus those cases were inapposite.

Second, what was overlooked by the court involves the entry of a forfeiture judgment for \$1,300.00 in Case No.531519. Defendant appealed both sentences in this appeal. While the court stated that the forfeiture of \$4,931.00 was proper, the court did not address the \$1,300.00 which was forfeited in Case No. CR 531579 for which the court made no mention. Attached hereto is the journal entry of sentencing in Case CR531519 which forfeited \$1,300.00. That forfeiture was never mentioned by the court or prosecutor. It should not have been granted. The notice of appeal in this case appealed both of the

judgment and sentences in Common Pleas Court Case Nos. CR530873 and CR531519. Therefore, the forfeiture of \$1,300.00 ordered in Common Pleas Case No. CR531519 should be vacated and set aside.

Further, the Court of Appeals ruled that even though there were mandatory requirements concerning post-release control the court substantially complied with these provisions.

There was not substantial compliance with §2943.032 of the Ohio Revised Code which provides:

Prior to accepting a guilty plea or a plea of no contest to an indictment, information, or complaint that charged a felony, the court shall inform the defendant personally that, if the defendant pleads guilty or no contest to the felony so charged or any other felony, if the court imposes a prison term upon the defendant for the felony, and if the offender violates the conditions of a post-release control sanction imposed by the parole board upon the completion of the stated prison term, the parole board may impose upon the offender a residential sanction that includes a new prison term of up to nine months.

Moreover, there was no compliance with §2929.19(B)(3)(d)-(e) of the Ohio Revised Code concerning the post-release advice that the court must give concerning post-release control.

There is nothing in ***State v. Sarkozy***, 117 Ohio St.3d 86, 881 N.E.2d 1224 (2008), which holds that only “**substantial compliance**” with advice concerning post-release control at sentencing will satisfy post-release control notification that is permissive or mandatory. The defendant must be properly advised. As post-release control in this case was permissive defendant was still subjected to the possibility or probability to receive post-release control and was entitled to be properly advised. Thus, as stated ***Sarkozy***:

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.

### **STATEMENT OF THE CASE AND FACTS**

In the Common Pleas Court Case No. CR530873 defendant was indicted in a five count indictment. Defendant was charged with one count trafficking in drugs, heroin, on November 4, 2009. Defendant was also charged with possession of criminal tools, money, occurring on the same date.

Defendant was also charged in another count with trafficking in cocaine along with a count of possession of cocaine and a count of possession of heroin. Defendant, at his arraignment entered a plea of not guilty.

In Common Pleas Court Case No. CR531519 defendant was indicted on December 18, 2009 along with co-defendants, Andrew Jackson and Wayne Stamper in five count indictment. Defendant was charged with one count of drug trafficking involving oxycontin along with one count of possession of oxycontin. Defendant was also charged with one count of deception to obtain a dangerous drug, one count of illegal processing of drug documents. Count five only charged Andrew Jackson with possession of drugs. At his arraignment defendant entered a plea of not guilty.

Defendant appeared in court on May 25, 2009 along with co-defendant, Wayne Stamper. The prosecutor stated that defendant, Gregory Eppinger, would enter a plea of guilty to amended count one, trafficking in drugs with a schoolyard specification with an amended bulk amount being less than 5 times bulk amount and by a deletion of he schoolyard specification. Defendant would also enter a plea of guilty to count three, attempted deception to obtain a dangerous drug a felony of the third degree. (Tr.3).

The court jointly addressed both co-defendant, Wayne Stamper and defendant, determining that Wayne Stamper was 72 years of age and Gregory Eppinger was 58 years of age. (Tr.4). The court then advised defendant as to what he would be pleading to:

THE COURT: Mr. Eppinger, you're going to be pleading to some felonies, felony threes. The 3s carry anywhere from 1 to 5 years in prison in yearly increments and/or a fine up to \$10,000. That's a minimum mandatory of 1 year, correct, on the felony three. (Tr.5-6).

The court then advised defendant of his constitutional rights that he was waiving by entering pleas of guilty. (Tr.6-8). After advising defendant he would be subjected to a discretionary period of post-release control up to three (3) years defendant entered pleas of guilty in both cases. (Tr.8-9). The court referred the case of Wayne Stamper to the probation department for a presentence investigation report and proceeded with sentencing defendant, Gregory Eppinger. (Tr.10).

As an aside apparently overheard by the court reporter and the court the prosecutor stated there would be forfeiture of \$4931.00. (Tr.10). The court first pronounced sentence as follows:

THE COURT: Very good. In 531519, one year count one and three concurrent to each other.

In case number 530673 I will give you 6 months on counts 1 through 5, concurrent to each other, concurrent to the sentence in 531519. It's going to run consecutive to the sentence that you are doing in Summit. No credit for time served.

Do you understand that?

MR. EPPINGER: No. (Tr.11).

Thereafter the court again pronounced sentence as follows:

THE COURT: then I will give him a year and a half and time to be served consecutive to his Summit County time. One year on counts one and three concurrent to each other.

I will give him 6 months on 530873 concurrent to each other, but consecutive to the time in case number 531519. You will get credit for time served, and it will run consecutive to your Summit County.

Three years post release control from discharge from prison. That will involve restrictions. If you violate those you could be returned to prison for up to one-half of your original sentence. (Tr.12).

**ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW**  
**PROPOSITION OF LAW NO. I**  
**A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN A COURT, IN**  
**ITS JOURNAL ENTRY OF SENTENCING ORDERS A FORFEITURE WHERE THERE**  
**WAS NO PRONOUNCEMENT OF A FORFEITURE AT SENTENCING.**

The record reflects that in each of the journal entries with respect to the sentencing the court ordered a forfeiture. However there was no pronouncement in open court of a forfeiture. The pronounced sentence as follows:

THE COURT: Very good. In 531519, one year count one and three concurrent to each other.

In case number 530673 I will give you 6 months on counts 1 through 5, concurrent to each other, concurrent to the sentence in 531519. It's going to run consecutive to the sentence that you are doing in Summit. No credit for time served.

Do you understand that?

MR. EPPINGER: No. (Tr.11).

Thereafter the court again pronounced sentence as follows:

THE COURT: then I will give him a year and a half and time to be served consecutive to his Summit County time. One year on counts one and three concurrent to each other.

I will give him 6 months on 530873 concurrent to each other, but consecutive to the time in case number 531519. You will get credit for time served, and it will run consecutive to your Summit County.

Three years post release control from discharge from prison. That will involve restrictions. If you violate those you could be returned to prison for up to one-half of your original sentence. (Tr.12).

The law is that **"if there is a variance between oral pronouncement of sentence and the written judgment of conviction, the oral sentence generally controls."** *United States v. DeMartino*, 112 F.3d 75, 78-79 (2d Cir.1997). This is because the written judgment is only a ministerial act which reflects that which occurred at the oral pronouncement of sentence. See *United States v. Maquez*, 506 F.2d 620, 622 (2d Cir.1974).

**PROPOSITION OF LAW NO. II**  
**A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN A COURT**  
**DOES NOT FULLY INFORM A DEFENDANT CONCERNING A FORFEITURE**

The court at the plea on May 25, 2010 addressed defendant concerning the penalty:

THE COURT: Mr. Eppinger, you're going to be pleading to some felonies, felony threes. The 3s carry anywhere from 1 to 5 years in prison in yearly increments and/or a fine up to \$10,000. That's a minimum mandatory of 1 year, correct, on the felony three. (Tr.5-6).

MISS MURPHY: Yes.

THE COURT: Do you understand that sir?

MR. EPPINGER: Yes. (Tr.5-6)

Nowhere was it stated that defendant would forfeit any property or money. Although the prosecutor later stated there was forfeiture that was apparently only heard by the court. The court did not address defendant on any forfeiture issue prior to the imposition of sentence. (Tr.10). However, in the journal entry in Case No. CR530873 the court ordered a forfeiture of \$4931.00. In Case No. CR531519 the court ordered the forfeiture of \$1,300.00. Since these were not discussed by the court as part of the plea the court should not have ordered forfeiture in its journal entries. As a result, defendant was not informed of the maximum penalty that could be imposed.

Rule 11(C)(2)(a) of the Ohio Rules of Criminal Procedure mandates that a court, in accepting a plea of guilty, do so **"with understanding of the nature of the charges and of the maximum penalty involved, ..."** Defendant was not informed of the maximum penalty which included a forfeiture. Thus his plea was unconstitutional. See **State v. Sarkozy**, 117 Ohio St.3d 86, 88-89, 881 N.E.2d 1224, 1226-28 (2008).

In **State v. Kaplowitz**, 100 Ohio St.3d 205, 210-11, 797 N.E.2d 977-982 (2003), the court said **"that since defendant did not know all the ramifications of his plea prior to this court's clarification, the defendant should therefore have the option to withdraw his plea and plead anew, withdraw his plea and proceed with trial or be resentenced consistent with this opinion."** **Pickens v. Howes**, 549 F.3d 377 (6<sup>th</sup> Cir. 2008).

In **Hart v. Marion Correctional Institution**, 927 F.2d 256 (6<sup>th</sup> Cir.1991), the defendant pled guilty to six (6) counts of rape. He sought habeas corpus relief stating that his guilty plea was not knowingly, intelligently or voluntarily entered. The only claim in **Hart**

was that petitioner claimed that the maximum period of incarceration was misstated to him. In granting habeas corpus relief the court noted that **"The defendant must at least have a sufficient awareness of relevant circumstances and likely consequences. ' ..."** 927 F.2d at 257.

**PROPOSITION OF LAW NO. III  
A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN A COURT, IN  
ACCEPTING A PLEA OF GUILTY DOES NOT PROPERLY INFORM A DEFENDANT  
CONCERNING POST-RELEASE CONTROL.**

The court, on May 25, 2010 advised defendant as follows concerning post-release control:

THE COURT: With respect to you, Mr. Eppinger, you will be subject to a discretionary period of the post release control up to 3 years upon your release from prison.

That would involve restrictions on your activities. If you were to violate any of those restrictions you can be returned to prison for up to one half of your sentence. (Tr.8)

This appears to be improper and does not comply with the law as set forth in §2943.032 of the Ohio Revised Code:

Prior to accepting a guilty plea or a plea of no contest to an indictment, information, or complaint that charged a felony, the court shall inform the defendant personally that, if the defendant pleads guilty or no contest to the felony so charged or any other felony, if the court imposes a prison term upon the defendant for the felony, and if the offender violates the conditions of a post-release control sanction imposed by the parole board upon the completion of the stated prison term, the parole board may impose upon the offender a residential sanction that includes a new prison term of up to nine months.

The Ohio Supreme Court has ruled that where there was improper advice concerning post-release control a defendant was entitled to withdraw his plea either through a motion to withdraw the plea, on appeal or a post-conviction petition. In **State v. Sarkozy**, 117 Ohio St.3d 86, 881 N.E.2d 1224 (2008), the court ruled:

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.

In ***Brady v. United States***, 397 U.S. 742 (1970), the Supreme Court considered the parameters of a voluntary plea:

[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes). 397 U.S. at 755.

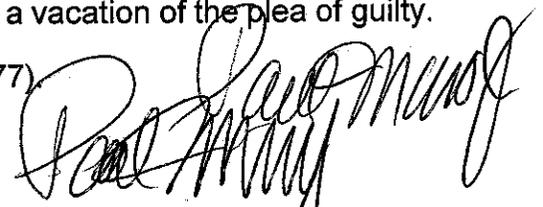
It is very clear that the plea of guilty was not constitutionally entered in this case.

As observed by the United States Supreme Court:

There can be no doubt that, if the allegations contained in the petitioner's motion and affidavit are true, he is entitled to have his sentence vacated. A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack. See *Walker v. Johnston*, 312 U.S. 275; *Waley v. Johnston*, 316 U.S. 101; *Shelton v. United States*, 356 U.S. 26. 'A plea of guilty differs in purpose and effect from a mere admission or an extra judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More it is not requires; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advise and with full understanding of the consequences.' *Kercheval v. United States*, 368 U.S. 487, 493 (1962).

In similar circumstances the Ohio Supreme Court has ruled that where a plea of guilty is induced by improper advice given to a defendant in a criminal case the only remedy is permitting the withdrawal of the plea of guilty or a vacation of the plea of guilty.

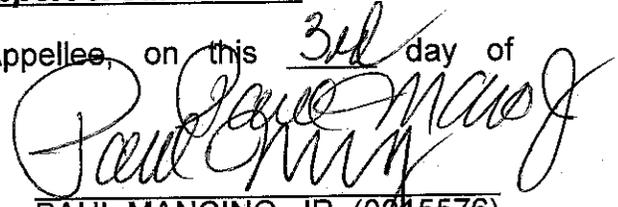
***State v. Bowen***, 52 Ohio St. 2d 27, 368 N.E. 2d 843 (1977)



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**SERVICE**

A copy of the foregoing **Memorandum in Support of Jurisdiction** has been sent to William D. Mason, Attorney for Plaintiff-Appellee, on this 3<sup>rd</sup> day of AUGUST, 2011.



PAUL MANCINO, JR. (0015576)  
Attorney for Defendant-Appellant

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.  
95685

LOWER COURT NO.  
CP CR-530873

COMMON PLEAS COURT

-vs-

GREGORY EPPINGER

Appellant

MOTION NO. 444899

Date 06/24/11

Journal Entry

MOTION BY APPELLANT FOR RECONSIDERATION IS DENIED.

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ALL PARTIES.-COSTS TAXED

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JUN 24 2011

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY SMU DEP.



Judge SEAN C. GALLAGHER, Concur

Judge KATHLEEN ANN KEOUGH, Concur

*Colleen Conway Cooney*  
Presiding Judge  
COLLEEN CONWAY COONEY

APPENDIX

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# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 95685

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**GREGORY EPPINGER**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED IN PART AND REVERSED IN PART**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-530873

**BEFORE:** Cooney, P.J., and S. Gallagher, J., and Keough, J.

**RELEASED AND JOURNALIZED:** May 19, 2011



COLLEEN CONWAY COONEY, P.J.:

Defendant-appellant, Gregory Eppinger, appeals his convictions and sentences after pleading guilty to several drug offenses in two separate cases. We affirm his convictions, but remand the case for a limited hearing on court costs.

In Case No. CR-531519, Eppinger was charged with one count of drug trafficking, two counts of drug possession, one count of deception to obtain a dangerous drug, and one count of illegal processing of drug documents. All counts contained forfeiture specifications in the amount of \$1,300. In Case No. CR-530873, Eppinger was charged with two counts of drug trafficking, two counts of drug possession, and one count of possession of criminal tools. All counts included forfeiture specifications for \$4,931.

Eppinger reached a plea agreement with the State and pled guilty to the indictment in CR-530873 and to amended counts of drug trafficking and attempted deception to obtain a dangerous drug in CR-531519. The remaining counts in CR-531519 were nolle.

After the court accepted the pleas but before sentencing, counsel for the State reminded the court that Eppinger was pleading guilty to a money forfeiture in the amount of \$4,931. The court offered both Eppinger and his

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counsel an opportunity to address the forfeiture issue on the record and both replied that they had nothing to say.

The court imposed concurrent six-month prison terms on all the convictions in CR-530873. In CR-513519, the court sentenced Eppinger to concurrent one-year prison terms on both counts, to be served consecutive to the sentence in CR-530873. The court ordered the aggregate 18-month prison term to run concurrently with another sentence Eppinger was serving for a Summit County case.

Eppinger now appeals, raising four assignments of error.

Forfeiture

In his first assignment of error, Eppinger argues the trial court violated his constitutional right to due process by ordering the forfeiture of money in its journal entry when there was no pronouncement of forfeiture at sentencing.

R.C. Chapter 2981.01 et seq. set forth procedures that must be followed to effectuate the forfeiture of seized property including contraband and money resulting from criminal activity. R.C. 2981.03(A)(1) provides, in part, that “[t]itle to the property vests with the state \* \* \* when the trier of fact renders a final forfeiture verdict or order under section 2981.04 or 2981.05.”

R.C. 2981.04, which governs forfeiture specifications, provides, in part, that “[i]f a person pleads guilty to or is convicted of an offense \* \* \* and the

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complaint, indictment or information charging the offense \* \* \* contains a specification covering property subject to forfeiture under section 2981.02 of the Revised Code, the trier of fact shall determine whether the person's property shall be forfeited." However, this court has held that when the defendant enters a plea agreement calling for the forfeiture of seized property, adherence to the statutory procedures are unnecessary. *State v. Chappell*, Cuyahoga App. No. 93298, 2010-Ohio-2465, ¶37-38. When the property is forfeited through a plea agreement, the forfeiture is "not effectuated by operation of the statutory provisions governing forfeiture of contraband, but rather by the parties' agreement." *State v. Harper* (Feb. 28, 1996), Summit App. No. 17570, citing *State v. Gladden* (1993), 86 Ohio App.3d 287, 289 ("[I]t cannot be said that appellant's due process rights were violated because by entering into the plea agreement, appellant clearly had notice of and agreed to the forfeiture of his property.")

At the plea hearing, the court specifically explained on the record that each count in CR-530873 contained forfeiture specifications, and Eppinger pled guilty to all the counts in that case. After the court accepted his plea, the prosecutor reminded the court that forfeiture was part of the plea agreement and the following exchange took place:

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"MISS MURPHY: Your Honor, if I may, in Eppinger, you said he was pleading guilty to a forfeiture, and just for the record the forfeiture is \$4,931 in cash.

"THE COURT: Thank you. Mr. Mancino,<sup>1</sup> do you or your client wish to address the Court?

"MR. MANCINO: No. I have nothing to say.

"THE COURT: Mr. Eppinger, you got anything to say?

"MR. EPPINGER: Not at this time."

Because Eppinger voluntarily agreed to the forfeiture by virtue of his plea agreement, adherence to the statutory forfeiture procedures set forth in R.C. Chapter 2981 was unnecessary, and there was no violation of Eppinger's due process rights. In return for the state's agreement to reduce the charges against him, Eppinger agreed not to contest the forfeiture of the property listed in the indictment. When given the opportunity to question the amount being forfeited, neither Eppinger nor his counsel objected.

Accordingly, the first assignment of error is overruled.

#### Court Costs

In his second assignment of error, Eppinger argues that the trial court erred when it imposed court costs in the sentencing journal entry without first addressing court costs at his sentencing hearing.

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<sup>1</sup> Mr. Mancino was Eppinger's trial counsel as well as counsel in the instant appeal.

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R.C. 2947.23(A)(1) provides that “[i]n all criminal cases the judge or magistrate shall include in the sentence the costs of prosecution \* \* \* and render a judgment against the defendant for such costs.” In *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶22, the Ohio Supreme Court held that it is reversible error for the trial court to impose costs in its sentencing entry when it did not impose those costs in open court at the sentencing hearing. The court held that the error did not void the defendant’s sentence, but explained that the defendant had been harmed because the trial court’s failure to mention court costs during sentencing denied him the opportunity to claim indigency and seek waiver of the payment of the costs. *Id.* Therefore, the court remanded the matter to the trial court to allow the defendant to move for a waiver of the payment of court costs. *Id.* at ¶23.

The State concedes the trial court failed to impose court costs during Eppinger’s sentencing. Accordingly, we reverse the trial court’s judgment as to costs and remand the case to the trial court for a limited hearing on court costs.

Accordingly, we sustain Eppinger’s second assignment of error.

#### Guilty Plea

In his third and fourth assigned errors, Eppinger contends he did not enter his guilty plea knowingly, voluntarily, or intelligently because, prior to

accepting his plea, the trial court did not explain the effect of the forfeiture specification and failed to properly explain postrelease control.

Under Crim.R. 11(C), prior to accepting a guilty plea in a felony case, a court must conduct an oral dialogue with the defendant to determine that the plea is voluntary, that the defendant understands the nature of the charges and the maximum penalty involved, and to personally inform the defendant of the constitutional guarantees he is waiving by pleading guilty.

A trial court must strictly comply with the Crim.R. 11(C)(2) requirements regarding the waiver of constitutional rights, meaning the court must actually inform the defendant of the constitutional rights he is waiving and make sure the defendant understands them. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 876 N.E.2d 621, ¶18 and 27. For nonconstitutional rights, scrupulous adherence to Crim.R. 11(C) is not required and “substantial compliance” is sufficient. *Id.* at ¶14, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163; *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶31. “Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.” *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474.

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If the trial judge partially complied with the rule with respect to nonconstitutional rights, the plea may be vacated only if the defendant demonstrates a prejudicial effect. *Veney* at ¶17 (“A defendant must show prejudice before a plea will be vacated for a trial court’s error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the colloquy are at issue.”) The test for prejudice is “whether the plea would have otherwise been made.” *Clark* at ¶32, quoting *Nero* at 108.

Eppinger contends his plea was invalid because the trial court did not explain the nature of the forfeiture specification to him. The forfeiture, in the context of this case, was intended as a penalty for the underlying felony. The right to be informed of a forfeiture of property prior to entering a plea is a nonconstitutional right. See, e.g., *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224 (holding that right to be informed of maximum penalty involved is reviewed for substantial compliance); *State v. Rebman* (June 11, 1997), Lorain App. No. 96CA006520 (substantial compliance analysis applied to notification of forfeiture during plea colloquy). As such, we review the plea proceedings to determine if there was substantial compliance with the rule.

In accordance with CrimR. 11(F), the trial court stated the parties’ plea agreement on the record. Specifically, the court stated:

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"[Eppinger] will plead guilty to count three as amended, attempted deception to obtain a dangerous drug with a forfeiture specification, felony of the third degree. Is that correct?"

\* \* \*

"MR. MANCINO: Yes."

Immediately following Eppinger's guilty plea, the prosecutor clarified for the record that Eppinger was pleading guilty to a forfeiture in the amount of \$4,931. The court gave Eppinger and his counsel an opportunity to object or assert that Eppinger did not know or understand that he was forfeiting \$4,931 by pleading guilty. They both told the court that they had "nothing to say."

There is no question on this record that Eppinger was aware of the terms of the plea agreement, including the fact he was forfeiting \$4,931. Therefore, the court substantially complied with its obligation to notify Eppinger that he would be forfeiting \$4,931 by pleading guilty.

Eppinger also contends his plea was invalid because the court failed to advise him of postrelease control. The right to be informed at the plea hearing of the maximum possible penalty that could be imposed upon conviction is also a nonconstitutional right. *Stewart* at 93. When a trial court fails to mention postrelease control "at all" during a plea colloquy, the court fails to comply with Crim.R. 11, and the reviewing court must vacate the plea and remand the cause. *Sarkozy* at ¶25. But "some compliance" with the rule with respect to

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postrelease control “prompts a substantial-compliance analysis and the corresponding ‘prejudice’ analysis.” *Id.* at ¶23; see, also, *Clark* at ¶32.

During the plea colloquy, the court explained:

“With respect to you, Mr. Eppinger, you will be subjected to a discretionary period of postrelease control up to 3 years upon your release from prison.

“That would involve restrictions on your activities. If you were to violate any of those restrictions you can be returned to prison for up to one half of your sentence.

“Having said all that, you understand that?”

“MR. EPPINGER: Yes.”

R.C. 2967.28(B) and (C) relate to postrelease control and provide that third degree felonies, except certain sex offenses and violent crimes, are subject to discretionary postrelease control up to three years. Thus, it is clear the court correctly notified Eppinger of postrelease control and the possible consequences for violating its terms.

Accordingly, we find that Eppinger’s plea was knowingly, voluntarily, and intelligently made and that the trial court substantially complied with the requirements of Crim.R. 11(C) in accepting the plea.

~~The third and fourth assignments of error are overruled.~~

Judgment affirmed in part and reversed in part.

Case remanded for the limited purpose of holding a hearing on costs.

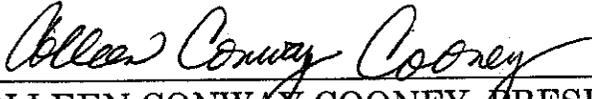
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It is ordered that appellant and appellee share the costs herein taxed.

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.



COLLEEN CONWAY COONEY, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and  
KATHLEEN ANN KEOUGH, J., CONCUR