[Cite as *State v. Berch*, 2009-Ohio-2895.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	CASE NO. 08-MA-52
	)	
KENNETH BERCH,	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 07CR1354
JUDGMENT:	Affirmed in Part Reversed and Remanded in Part
APPEARANCES: For Plaintiff-Appellee	Ralph M. Rivera Assistant Prosecutor 21 W. Boardman St. 6th Floor Youngstown, Ohio 44503-1426
For Defendant-Appellant	Attorney Mark I. Verkhlin 839 Southwestern Run Youngstown, Ohio 44514

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: June 11, 2009

[Cite as *State v. Berch*, 2009-Ohio-2895.]
DONOFRIO, J.

{¶1} Defendant-appellant, Kenneth Berch, appeals a decision of the Mahoning County Common Pleas Court sentencing him to six years in prison following his guilty plea to felonious assault with a firearm specification. He alleges that the trial court failed to adequately inform him that he would be subject to a mandatory three-year period of post-release control at the plea and sentencing hearings. He contends this resulted in a plea that was not made knowingly, intelligently, and voluntarily, and rendered his sentence contrary to law.

{¶2} On November 15, 2007, a Mahoning County grand jury indicted Berch as follows: (1) Count one – attempted murder in violation of R.C. 2923.02(A) and R.C. 2903.02(A)(D), a first-degree felony, and (2) Count two – felonious assault in violation of R.C. 2903.11(A)(2)(D), a second-degree felony. Each count carried an attendant firearm specification under R.C. 2941.145(A). Berch pleaded not guilty and the case proceeded to discovery and other pretrial matters.

{¶3} On January 7, 2008, following plea negotiations, Berch agreed to withdraw his not guilty plea and pleaded guilty to felonious assault with an amended firearm specification. On February 27, 2008, the trial court conducted a sentencing hearing and sentenced Berch to five years in prison for felonious assault and one year in prison for the amended firearm specification with both terms to be served consecutive to each other for an aggregate sentence of six years in prison. This appeal followed.

{¶4} Berch sets forth two assignments of error. Berch's first assignment of error states:

{¶5} "The Trial Court committed reversible error when it accepted a Plea of Guilty that was not knowingly, intelligently and voluntarily entered into when it failed to advise a defendant during plea proceedings of mandatory definite post-release control, as set by R.C. 2967.28(B)(2)."

{¶6} Berch argues that the trial court failed to inform him at the plea hearing that he would be subject to a mandatory three-year period of post-release control. The result, he contends, is that he did not enter his guilty plea knowingly, intelligently,

and voluntarily. In response, the state argues that the trial court told Berch enough to substantially comply with Crim.R. 11's requirements concerning entry of guilty pleas.

{¶7} Before a trial court can accept a guilty plea to a felony charge, it must explain to the defendant that they are waiving certain constitutional and nonconstitutional rights by entering a guilty plea. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶13; *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶26-27; Crim.R. 11(C)(2). When advising of constitutional rights, the trial court must strictly comply with Crim.R. 11(C)(2); however, as to nonconstitutional rights, only substantial compliance with Crim.R. 11(C)(2) is required. *Veney*, supra at ¶14-17; *Clark*, supra at ¶30-31; *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶19-26. An advisement on postrelease control, if it is applicable, falls under one of the nonconstitutional rights that the trial court must inform a defendant about prior to accepting the guilty plea. *Sarkozy*, supra at ¶19-26.

{¶8} The Ohio Supreme Court has recently explained the substantial compliance rule:

{¶9} "[I]f the trial judge imperfectly explained nonconstitutional rights such as the right to be informed of the maximum possible penalty and the effect of the plea, a substantial-compliance rule applies. [*State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶12]. Under this standard, a slight deviation from the text of the rule is permissible, so long as the totality of the circumstances indicates that 'the defendant subjectively understands the implications of his plea and the rights he is waiving,' the plea may be upheld. [*State v.*] *Nero* [(1990)], 56 Ohio St.3d [106,] 108, 564 N.E.2d 474.

{¶10} "When the trial judge does not *substantially* comply with Crim.R. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court *partially* complied or *failed* to comply with the rule. If the trial judge partially complied, e.g., by mentioning mandatory postrelease control without explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect. See

Nero, 56 Ohio St.3d at 108, 564 N.E.2d 474, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 93, 5 O.O.3d 52, 364 N.E.2d 1163, and Crim.R. 52(A); see also *Sarkozy,* 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶23. The test for prejudice is 'whether the plea would have otherwise been made.' *Nero* at 108, citing *Stewart,* id. If the trial judge completely failed to comply with the rule, e.g., by not informing the defendant of a mandatory period of postrelease control, the plea must be vacated. See *Sarkozy,* 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, paragraph two of the syllabus. 'A complete failure to comply with the rule does not implicate an analysis of prejudice.' Id. at ¶22." *Clark*, supra at ¶31-32.

{¶11} In this case, the relevant portions of the plea hearing transcript concerning post-release control read as follows:

{¶12} "THE COURT: Whatever sentence there is, once you do the time and you get out you will be put on something called postrelease control, and the control period may be a maximum of three --

{¶13} "MR. SHIDEL [assistant prosecutor]: Yes, Your Honor.

{¶14} "THE COURT: Are you sure? It is an F-2.

{¶15} "MR. SHIDEL: There is no -- it is optional unless there was an offense of -- sexual offense. It is my understanding it is three years.

{¶16} "THE COURT: All right. And so it is a maximum of three years they can put you on -- but it is mandatory that he gets --

{¶17} ""MR. SHIDEL: No. Your Honor, in this case --

{¶18} "THE COURT: It may.

{¶19} "MR. SHIDEL: -- there is a presumption; however, it is not mandatory postrelease control. There's presumption though; however, it is an offense of violence.

{¶20} "THE COURT: Whatever, it is run by the Adult Parole Authority. If you violate any of the rules they can extend it up to three years. They can put you on new restrictions or they can send you to a prison in segments of 30, 60 or 90 days up to

nine months, but they can't put you in any longer than one-half of the sentence you get. Do you understand that?

{¶21} "THE DEFENDANT: Yes, sir.

{¶22} "THE COURT: Now, if you commit another felony while on postrelease control -- I understand you don't plan to, but if you did then you could serve one-half or whatever is left on the postrelease control or one year, whichever is greater, consecutive to the time. That's the law. I'm required to tell you that.

{¶23} "It is required?

{¶24} "MR. SHIDEL: Because it is an offense of violence.

{¶25} "THE COURT: Yeah. So you'll be required to be on postrelease control. * * *" (Plea Hearing Tr. 8-10.)

{¶26}

{¶27} Undoubtedly, the plea colloquy is confusing as to whether postrelease control was mandatory or discretionary; both the trial court and the prosecutor were confused. It appears that the trial court believed it was mandatory, but the prosecutor insisted it was discretionary, not mandatory. Then moments later the prosecutor stated that it was mandatory and the trial court once again stated that it was mandatory. In addition to that confusion, the written plea agreement incorrectly indicated that postrelease control was discretionary, not mandatory. (Docket 14, p. 4.)

{¶28} However, despite the confusion over whether the postrelease control was mandatory or discretionary, the trial court's advisement regarding the rest of postrelease control was accurate and was not confusing. The trial court correctly indicated that the term of postrelease control would be three years and that if Berch violated the rules of the APA, the APA could place new restrictions on him or send him "to prison in segments of 30, 60, or 90 days up to nine months," but not for longer than one-half of the sentence he received. Thus, given that instruction, we find that there is some compliance here.

{¶29} Admittedly, the Ohio Supreme Court in *Sarkozy* stated in paragraph two of the syllabus:

{¶30} "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."

{¶31} At first blush, the foregoing quote seems to support the idea that Berch's plea should be vacated. However, factually in *Sarkozy*, the Ohio Supreme Court was ruling on a plea colloquy that failed to mention postrelease control at all and found in that instance, that there was no compliance with Crim.R. 11. During its analysis it stated:

{¶32} "Rather, we find that there was no compliance with Crim.R. 11. The trial court did not merely misinform Sarkozy about the length of his term of postrelease control. Nor did the court merely misinform him as to whether postrelease control was mandatory or discretionary. Rather, the court failed to mention postrelease control at all during the plea colloquy. Because the trial court failed, before it accepted the guilty plea, to inform the defendant of the mandatory term of postrelease control, which was a part of the maximum penalty, the court did not meet the requirements of Crim.R. 11(C)(2)(a)." Id. at ¶22.

{¶33} This paragraph seems to indicate that misinforming a defendant about whether the postrelease control is mandatory or discretionary does not per se amount to a Crim.R. 11 violation that necessitates the vacation of a plea. Thus, the question now becomes, did the trial court substantially comply or only partially comply with Crim.R. 11(C). Because of the confusion at the plea colloquy as to whether the postrelease control was mandatory or discretionary and the fact that the written plea agreement incorrectly stated that the postrelease control was discretionary instead of mandatory, there was no substantial compliance. However, due to the correctness of the remaining advisement on postrelease control there was partial compliance.

{¶34} Since there was partial compliance, the only way that the plea can be vacated is if Berch can demonstrate a prejudicial effect. As stated above, the test for prejudice is "whether the plea would have otherwise been made." *Nero,* 56 Ohio St.3d at 108. The Supreme Court has not offered much guidance as to what this entails.

{¶35} That said, given the facts of this case, prejudice cannot be found. In this instance, Berch was indicted for attempted murder and felonious assault, both of which carried firearms specifications. Berch pled guilty to felonious assault and an amended firearm specification; the state dismissed the attempted murder charge and the firearm specification attached to that charge. Furthermore, during the plea transcript, Berch stated that he did assault the victim. (Plea Tr. 10). This admission and the dismissal of the attempted murder charge and amendment to the firearm specification indicate that the plea was made so that Berch would not face the attempted murder charge. It was a plea agreement favorable to Berch and provided a compelling incentive to plead. To conclude that the plea would not have been made if the period of postrelease control was mandatory instead of discretionary, defies logic and common sense. Not surprisingly, the record does not disclose any concern by the defendant or his counsel on this issue.

{¶36} Accordingly, Berch's first assignment is without merit.

{¶37} Berch's second assignment of error states:

{¶38} "The Trial Court committed reversible error when it failed to inform Appellant that he would be subject to a mandatory three year period of post release control at either Appellant's sentencing hearing or in its sentencing entry, rendering Appellant's sentence contrary to law."

{¶39} Here, Berch argues that the trial court failed to inform him at the sentencing hearing and in the judgment entry of sentence that the three year period of post-release control was mandatory. In response, the state argues that the sentencing transcript and judgment entry of sentence were sufficient to inform Berch

that he was going to be subject to a mandatory three year period of post-release control.

{¶40} Berch pled guilty to second degree felonious assault, which required the imposition of a mandatory three year postrelease control period. R.C. 2967.28(B)(2). The trial court was required to notify him of the mandatory term of postrelease control.

{¶41} "[I]f a trial court has decided to impose a prison term upon a felony offender, it is duty-bound to notify that offender at the sentencing hearing about postrelease control and to incorporate postrelease control into its sentencing entry, which thereby empowers the executive branch of government to exercise its discretion." *State v. Jordan,* 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶22; R.C. 2929.19(B)(3)(c).

{¶42} If a trial court fails to notify an offender at the sentencing hearing of the mandatory term of postrelease control, the sentence is void and it must be vacated and remanded to the trial court for resentencing. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶16; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568.

{¶43} At the sentencing hearing, the trial court advised Berch, "Once you're released from prison, you -- well, at least I'm recommending it you will be subject to a term of post-release control under the rules and supervision of the Adult Parole Authority." (Sentencing Tr. 9). The judgment entry of sentence states, "Upon completion of the prison term, the offender may be subject to a period of Post-Release Control (PRC) up to three (3) years as determined by the Parole Board pursuant to R.C. 2967.28." 03/07/08 J.E.

{¶44} The language used at both the sentencing hearing (recommending postrelease control) and in the judgment entry ("may be subject" and "up to three (3) years") do not adequately indicate that the three year term of postrelease control was mandatory. Recently, in addressing the "up to three years" language, we have stated that this statement indicates that the offender "may be subject to less than three

years, possibly even no years, of postrelease control." *State v. Jones*, 7th Dist. No. 06MA17, 2009-Ohio-794, ¶12. Such an advisement does not sufficiently advise an offender of the mandatory nature or period of the postrelease control. Id. at ¶13, citing *State v. Osborne*, 116 Ohio St.3d 1228, 2008-Ohio-261, 880 N.E.2d 921, ¶2 and *State v. Osborne*, 8th Dist. No. 88453, 2007-Ohio-3267, ¶39. The *Jones* reasoning equally applies to the trial court's other statements of recommending postrelease control and stating that Berch "may be subject to" postrelease control. Consequently, it cannot be held that the advisements at the sentencing hearing and in the judgment entry are definite statements on the mandatory nature and duration of the postrelease control; the advisements are inadequate.

{¶45} Accordingly, Berch's second assignment of error has merit.

{¶46} Berch's conviction is hereby affirmed. Berch's sentence is hereby reversed and vacated, and this matter remanded for resentencing based on our resolution of his second assignment of error.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.