[Cite as *State v. Peck*, 2015-Ohio-1279.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 14 MA 56
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
JASON PECK	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 12CR554
JUDGMENT:	Affirmed in part and reversed and remanded in part for a new postrelease control hearing.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. Ralph M. Rivera Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Atty. P. Nicholas Sebastiano Sebastiano Heddaeus LTD. 6600 Summit Drive Canfield, Ohio 44406
JUDGES:	
Hon. Carol Ann Robb Hon. Cheryl L. Waite Hon. Mary DeGenaro	Dated: March 30, 2015

ROBB, J.

{¶1} Defendant-appellant Jason Peck ("Appellant") appeals the re-sentencing order issued by the Mahoning County Common Pleas Court. Three issues are raised in this appeal. The first is whether the trial court abused its discretion when it denied Appellant's motion to withdraw his guilty plea. The second and third issues pertain to postrelease control. The second issue is whether the trial court incorrectly stated in the sentencing judgment entry that Appellant was subject to a mandatory five year term of postrelease control. The third issue is whether the trial court failed to advise Appellant at the sentencing hearing of the terms and consequences for violating postrelease control.

{¶2} Regarding the first issue, we hold that the trial court did not abuse its discretion in denying the motion. As to the second and third issues, the state concedes error. We hold that those concessions are correct.

{¶3} Thus, the trial court's decision is affirmed in part and reversed and remanded in part. Upon remand the trial court is instructed to hold a new postrelease control hearing. At that hearing, the trial court must advise Appellant of the terms and consequences for violating postrelease control. Furthermore, those advisements must also be incorporated into the sentencing judgment entry.

Statement of the Case

{¶4} Appellant was indicted on one count of felonious assault, a violation of R.C. 2903.11(A)(1), a second-degree felony and one count of domestic violence, a violation of R.C. 2919.25(A), a first-degree misdemeanor. 5/24/12 Indictment. Appellant originally pled not guilty to the offenses. However, on September 25, 2012, he changed his plea to guilty. A sentencing hearing was held on October 24, 2012. The victim of both crimes made a statement at the sentencing hearing explaining the physical and emotional trauma Appellant caused her.

{¶5} At the hearing, the trial court ordered Appellant to serve six years for the felonious assault conviction and stated that he would be subject to a mandatory three year period of postrelease control. 10/24/12 Sentencing Tr. 12. The trial court

did not orally pronounce a sentence for the domestic violence conviction and no oral advisements concerning postrelease control were given.

{¶6} On November 1, 2012, the trial court's judgment entry of sentence was filed. In this entry, the trial court sentenced Appellant to a six year sentence for the felonious assault conviction, a twelve month sentence for the domestic violence conviction and ordered those sentences to be served concurrently. The entry further stated that Appellant was orally advised of and provided written notice of possible postrelease control sanctions for any violation of postrelease control. This reference to a written notice of postrelease control concerns another entry that was filed on November 1, 2012. This separate document was signed by Appellant and stated that the judge gave him notice that he was subject to a mandatory period of three years of postrelease control. The document also contained advisements concerning the sanctions that could be implemented if Appellant violated postrelease control. The October 2012 sentencing transcript does not indicate this document was given to Appellant at the sentencing hearing.

{¶7} Appellant timely appealed the November 1, 2012 sentencing entry. *State v. Peck*, 7th Dist. No. 12MA205, 2013-Ohio-5526, ¶ 2 (*Peck I*). Three issues were raised to this court in *Peck I*.

{¶8} The first issue concerned whether the offense of assault and domestic violence, as charged, were allied offenses of similar import. *Id*. at ¶ 10-19. We found some merit with Appellant's argument and explained that it appeared from the indictment and the plea agreement that the two crimes could be allied offenses. *Id*. at ¶ 18. However, we explained that the determination of whether they "actually are allied offense depends on the circumstances of the two crimes." *Id*. We then explained that there was no indication in the record that the trial court considered the circumstances of the offenses. *Id*. Thus, based on prior case law from this court, we remanded the matter to the trial court to conduct the necessary inquiry into whether the offenses should be considered allied offenses of similar import. *Id*., citing *State v. Williams,* 7th Dist. No. 11MA131, 2012–Ohio–6277.

{¶9} The second issue concerned the sentence for domestic violence. *Peck I*, 2013-Ohio-5526, ¶ 5. Appellant argued that the maximum sentence for first-degree misdemeanor domestic violence was 180 days and that the trial court's sentence of twelve months for first-degree misdemeanor domestic violence was contrary to law. We agreed and reversed the sentence. *Id*.

{¶10} The third issue concerned the postrelease control advisement. *Id*. at ¶ 6-9. Appellant argued he was not properly notified about postrelease control as required by R.C. 2929.19(B)(2) and R.C. 2967.28. We agreed. *Id*. at ¶ 7. In our decision we explained that for a second-degree felony R.C. 2929.19(B)(2)(c) and (e) mandate a trial court to give notice of postrelease control at sentencing if a prison term is imposed and to incorporate the notice into the sentencing entry. *Id*. at ¶ 8. Furthermore, we added that even if the written document the trial court used provided all the statutorily required information, the record was not clear as to whether the information was provided to Appellant at sentencing. *Id*. at ¶ 9. In order to avoid future errors, we advised the trial court that it "should discontinue its use of its postrelease control notice form as it appears to be the sole basis used to show compliance with the statutory notice requirements." *Id*.

{¶11} Due to the multiple sentencing errors, we remanded the matter to the trial court for a "de novo sentencing hearing that includes a discussion of postrelease control." *Id*. at ¶ 9, 20.

{¶12} Upon remand, the matter was set for a de novo sentencing hearing for early January 2014. Sentencing, however, did not occur at that time due to counsel's oral motion to withdraw as counsel, which was granted. New counsel was appointed and filed a Crim.R. 32.1 motion to withdraw Appellant's guilty plea, which further delayed the sentencing hearing. 04/01/14 Crim.R. 32.1 Motion. The state filed a motion in opposition to the motion to withdraw the guilty plea on April 7, 2014. The motion to withdraw a guilty plea and the sentencing hearing were held on April 21, 2014.

{¶13} At that hearing, the trial court first heard arguments and testimony regarding the motion to withdraw the guilty plea. 04/21/14 Tr. 2-16. Following the

arguments the trial court overruled the motion. 04/21/14 Tr. 16. The case proceeded to sentencing. The state at that time moved to dismiss the domestic violence charge, which was granted. 04/21/14 Tr. 16-17, 19. The trial court then pronounced sentence on the felonious assault conviction; the trial court issued a six year prison sentence and informed Appellant he would be subject to a mandatory three year term of postrelease control. 04/21/14 Tr. 19-20. No other advisements concerning postrelease control were made.

{¶14} The trial court's judgment regarding that hearing was filed May 21, 2014. In that judgment entry, the trial court overruled the motion to withdraw the guilty plea. It then dismissed the domestic violence violation and sentenced Appellant to a six year prison term for the felonious assault conviction. The trial court stated this term of imprisonment would be followed by a mandatory period of postrelease control of "FIVE (5) YEARS." 05/21/14 J.E. No other advisements concerning postrelease control were made in the judgment entry.

{¶15} Appellant timely appeals from those rulings.

First Assignment of Error

"The trial [sic] abused its discretion by overruling the Appellant-Defendant's April 1, 2014, Defendant's Motion to Withdraw Guilty Plea."

{¶16} The trial court summarily denied the Motion to Withdraw the Guilty Plea without explaining its decision.

{¶17} Appellant spends two pages of his brief asserting that the motion should be treated as a pre-sentence motion to withdraw a guilty plea as opposed to a post-sentence motion to withdraw a guilty plea. Trial courts should "freely and liberally" grant pre-sentence motions to withdraw guilty pleas, while post-sentence motions should only be granted to correct a manifest injustice. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992) (sets forth the standard for deciding pre-sentence motions to withdraw); Crim.R. 32.1 (sets forth the standard for deciding post-sentence motions to withdraw). The state does not dispute that the motion should be treated as a pre-sentence motion to withdraw a guilty plea.

{¶18} The state and Appellant's position that the motion is a pre-sentence motion to withdraw a guilty plea is correct. In *Peck I,* as discussed above, we found multiple errors with the sentencing. Thus, we vacated the sentence and remanded the matter for a de novo sentencing hearing. *Peck I*, 2013-Ohio-5526 at ¶ 20. This meant when the matter returned to the trial court no sentence was imposed. Therefore, the motion to withdraw the guilty plea occurred prior to sentencing and is treated as a pre-sentence motion to withdraw a guilty plea. *See State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, ¶ 10 (superseded by statute on other grounds) (a motion to withdraw a guilty plea made by a defendant who has been given a void sentence is to be treated as a pre-sentence motion to withdraw a guilty plea.).

{¶19} In so holding, the first conundrum this court must address is whether the trial court treated this motion as a pre-sentence motion to withdraw a guilty plea. The trial court's decision summarily denied the motion without indicating whether it was treating the motion as a pre-sentence or post-sentence motion. 05/21/14 J.E. ("Defense Counsel filed a Motion to Withdraw Guilty Plea on April 1, 2014. Said motion is hereby overruled."); 04/21/14 Re-Sentencing Tr. 16 ("The Court is going to overrule the Defendant's motion to withdraw his plea.").

{¶20} Although the trial court did not clearly indicate that it was treating the motion as a pre-sentence motion, both parties treated the motion as a pre-sentence motion to withdraw a guilty plea agreeing that the freely and liberally standard applied. Thus, since the parties agreed that the motion is a pre-sentence motion and there is no indication in the record that the trial court treated it as anything but a pre-sentence motion to withdraw a guilty plea, we conclude that the trial court applied the correct standard.

{¶21} Our attention now turns to whether the trial court abused its discretion in denying the pre-sentence motion to withdraw a guilty plea. *Xie,* 62 Ohio St.3d at 526, 527 (standard of review for denying or granting a pre-sentence motion to withdraw a guilty plea). Abuse of discretion means that the trial court's ruling was

"unreasonable, arbitrary or unconscionable." *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶22} As stated above, the Ohio Supreme Court has stated that pre-sentence motions to withdraw a guilty plea "should be freely and liberally granted." *Xie*, 62 Ohio St.3d at 527. That, however, does not mean a defendant has an absolute right to withdraw a guilty plea prior to sentencing. *Id.* at paragraph one of the syllabus. Rather, there must be "a reasonable and legitimate basis for withdrawal of the plea." *Id.*

{¶23} We have previously set forth the factors to be considered when making a decision on a motion to withdraw a guilty plea. *State v. Cuthbertson,* 139 Ohio App.3d 895, 898–899, 746 N.E.2d 197 (7th Dist.2000), citing *State v. Fish,* 104 Ohio App.3d 236, 661 N.E.2d 788 (1st Dist.1995). They are as follows: (1) prejudice to the state; (2) counsel's representation; (3) adequacy of the Crim.R. 11 plea hearing; (4) extent of the plea withdrawal hearing; (5) whether the trial court gave full and fair consideration to the motion; (6) timing; (7) the reasons for the motion; (8) the defendant's understanding of the nature of the charges and the potential sentences; and (9) whether the defendant was perhaps not guilty or has a complete defense to the charge. *Cuthbertson*, citing *Fish*.

{¶24} Appellant argues the prejudice factor is the most important factor. We disagree. We have previously explained that no one factor is absolutely conclusive for the determination of whether the trial court should have granted the motion to withdraw the plea. *State v. Morris*, 7th Dist. No. 13MA19, 2014-Ohio-882, ¶ 22, citing *State v. Leasure,* 7th Dist. No. 01BA42, 2002–Ohio–5019, ¶ 19 (lack of prejudice to state is important, but the mere lack of prejudice does not mandate plea withdrawal). Rather, it is a weighing process. *Cuthbertson,* 139 Ohio App.3d at 899. Therefore, we must consider all of the factors and weigh them to determine whether the trial court abused its discretion.

{¶25} The first factor is prejudice to the state. In its motion in opposition to the motion to withdraw the guilty plea, the state indicated that it would be prejudiced by the granting of the motion. It indicated that there has been no contact with any of

the witnesses since the plea was entered and thus, availability of witnesses was in jeopardy. 04/07/14 Motion in Opposition. It also pointed out that evidence may have been destroyed because of the guilty plea. 04/07/14 Motion in Opposition.

{¶26} At the time of the motion in opposition roughly one and one half years had passed. Witness' memory does diminish over time, as does a witness' availability. That said, the state did not indicate any attempt to contact witnesses and determine their availability. Furthermore, the state's statement that evidence may have been destroyed is supposition; there is no indication that the state attempted to determine whether the evidence was destroyed. Considering the non-conclusive nature of the state's evidence, this factor does not weigh heavily in either party's favor.

{¶27} The second factor is counsel's representation. Both the state and Appellant agree that Attorney Douglas Taylor, who represented Appellant during the plea and first sentencing, has a reputation for providing quality representation to his clients. Despite that reputation, Appellant asserts that this factor weighs in his favor because Attorney Taylor guaranteed and assured him that he would receive probation with a period of rehabilitation at the Community Correction Association Residential facility. He also claims that given his poor mental health, which Attorney Taylor acknowledged on the record, there should have been a request for a mental health evaluation.

{¶28} The record in this case clearly indicates that Attorney Taylor acknowledged Appellant's mental health issues. 10/24/12 Sentencing Tr. 4-5. Despite acknowledging the issue, Attorney Taylor did not request a formal mental health evaluation. However, he did attempt to have Appellant placed with CCA, TASC, the Central Ohio Corrections Center facility in "Winterfield, Ohio" and the Central Ohio Correctional Facility in Stark County. 10/24/12 Sentencing Tr. 5-6. CCA would not accept Appellant because the medication he was on was too "strong" for CCA. 10/24/12 Sentencing Tr. 5. TASC would not give Attorney Taylor an affirmative response. 10/24/12 Sentencing Tr. 5-6. The facility in "Winterfield, Ohio" could not accept him because it did not have an opening until January. 10/24/12

Sentencing Tr. 6. The facility in Stark County could not accept Appellant due to budget issues. 10/24/12 Sentencing Tr. 6. Following these rejections, Attorney Taylor asked Turning Point to work with Appellant. It agreed if the trial court sentenced Appellant to probation. 10/24/12 Sentencing Tr. 6. Counsel asked the trial court for probation, but it opted to sentence Appellant to a prison term. 10/24/12 Sentencing Tr. 6.

{¶29} Clearly Attorney Taylor was attempting to have Appellant's "issues" addressed. In fact, some of those mental issues were addressed while Appellant was in jail.

{¶30} As to the allegation that Appellant was promised probation if he pled, the record does not support such position. At the plea colloquy, Appellant was asked if anyone forced him to change his plea or if he was promised anything in order to get him to change his plea. He answered those questions in the negative. 09/25/12 Plea Tr. 8.

{¶31} Consequently, given the state of the record, this factor does not weigh in Appellant's favor.

{¶32} The third factor is the adequacy of the Crim.R. 11 plea hearing. Appellant contends that the trial court failed to substantially comply with Crim.R. 11(C)(2) when it failed to advise him of the effect of the guilty plea. The state contends that the argument is barred by res judicata because it could have been raised in the first appeal.

{¶33} We decline to rule on that state's position because, as demonstrated below, this factor weighs in the state's favor, not in Appellant's favor.

{¶34} The only argument that Appellant raises concerning the plea colloquy is that the trial court did not advise him of the effect of a guilty plea. The right to be informed that a guilty plea is a complete admission of guilt is a nonconstitutional right and therefore is subject to review under a standard of substantial compliance. *State v. Griggs,* 103 Ohio St.3d 85, 814 N.E.2d 51, 2004-Ohio-4415, at ¶ 12, citing *State* v. *Nero,* 56 Ohio St.3d 106, 107, 564 N.E.2d 474 (1990).

{¶35} Failure to comply with nonconstitutional rights will not invalidate a plea unless the defendant thereby suffered prejudice. *Nero* at 108. The test for prejudice is "whether the plea would have otherwise been made." *Id*. Under the substantial-compliance standard, we review the totality of circumstances surrounding the plea and determine whether the defendant subjectively understood that a guilty plea is a complete admission of guilt. *Id*.

{¶36} In order "[t]o satisfy the effect-of-plea requirement under Crim.R. 11(C)(2)(b), a trial court instead must inform the defendant, either orally or in writing, of the language in Crim.R. 11(B), which defines 'effect of guilty plea' as 'a complete admission of the defendant's guilt.'" *State v. Portis*, 2d Dist. No. 2013-CA-53, 2014-Ohio-3641, ¶ 11, quoting *State v. Jones,* 116 Ohio St.3d 211, 2007–Ohio–6093, 877 N.E.2d 677, paragraph two of the syllabus, ¶ 23–24, 51.

{¶37} Admittedly, the trial court did not expressly state at the plea hearing that a guilty plea is a complete admission of his guilt. However, that statement was included in the written Crim.R. 11 plea that was signed by defense counsel, Appellant and the prosecuting attorney. 09/25/12 Plea of Guilty Pursuant to Crim.R. 11(F). That written advisement clearly complies with Crim.R. 11(C)(2)(b).

{¶38} However, even if it did not, he cannot demonstrate prejudice. In *Griggs*, the Ohio Supreme Court held:

> Accordingly, we hold that a defendant who has entered a guilty plea without asserting actual innocence is presumed to understand that he has completely admitted his guilt. In such circumstances, a court's failure to inform the defendant of the effect of his guilty plea as required by Crim.R. 11 is presumed not to be prejudicial.

Griggs, 2004-Ohio-4415 at ¶ 19.

{¶39} Here, Appellant did not proclaim his innocence. Rather, he stated:

> Well, Your Honor, I'd just like to state with me and [the victim], it was a bad situation. We were both out doing our thing, and it just – it was a bad situation that happened that day, and I apologize for

> everything that did happen that day. You know, I'm not to the book straight guilty to what she's accusing me of. I just don't want to really get into that, but there's stuff that I did do, there's stuff that I didn't do.

10/24/12 Sentencing Tr. 9.

{¶40} Appellant's statement is not a claim of actual innocence, rather it is an admission to doing some "stuff." Consequently, given the above, this factor does not weigh in Appellant's favor because the trial court substantially complied with Crim.R. 11(C) and Appellant cannot establish prejudice. Thus, the factor weighs in the state's favor.

{¶41} The fourth factor is the extent of the plea withdrawal hearing. Appellant admits there was a plea withdrawal hearing, Appellant testified, and the parties presented arguments. He concedes the hearing was technically sufficient. However, he asserts that it does not appear that the trial court applied the correct standard in ruling on the plea withdrawal motion because the trial court did not expressly state the standard for a pre-sentence motion to withdraw.

{¶42} Appellant is correct that the hearing was technically sufficient. The transcript for the hearing is 16 pages long, Appellant testified and the parties presented their arguments. As to the assertion that it does not appear that the trial court applied the correct standard, as discussed above, this argument lacks merit. Appellant presented the motion as a pre-sentence motion to withdraw a guilty plea and the state conceded that it was a pre-sentence motion to withdraw. No one asserted that it should be treated as a post-sentence motion to withdraw a guilty plea. Thus, based on the arguments presented, this court holds that the trial court did treat it as a pre-sentence motion to withdraw a guilty plea. This factor weighs in the state's favor.

{¶43} The fifth factor is whether the trial court gave full and fair consideration to the motion. Appellant's argument that the trial court did not fully and fairly consider the motion are the same as those asserted under the fourth factor. This argument fails for the same reasons expressed above.

{¶44} The sixth factor is timing. The motion to withdraw the guilty plea occurred roughly 18 months after the plea was entered. While that time seems to be lengthy, the circumstances of this case indicate that it was not unreasonable. As aforementioned, the plea occurred in September 2012 and the initial sentencing occurred in October 2012. Appellant then appealed the decision. Our decision, which vacated the sentence and remanded the matter for a new sentencing hearing, was released in December 2013. The motion to withdraw the plea was filed in April 2014. The appeal most likely divested the trial court of jurisdiction to rule on any motion to withdraw a guilty plea. Thus, had Appellant filed the motion to withdraw prior to the resolution of the appeal, the trial court most likely would have issued a judgment indicating that it had no jurisdiction to decide the issue until the appeal was resolved. Therefore, the motion would not have been resolved until after the appeal.

{¶45} For those reasons, the timing of the motion was not unreasonable and this factor weighs in Appellant's favor.

{¶46} The seventh factor is the reasons for the motion. The stated reasons for the motion are that Appellant was unaware that his plea was a complete admission of his guilt, he was unable to understand the effect of his plea due to mental illness and strong medications, he received faulty advice from counsel that if he pled he would receive probation, and he is not guilty.

{¶47} Regarding the first and fourth reasons, they fail for the reasons espoused above. Specifically, Appellant was advised through the written plea agreement that his guilty plea was a complete admission. However, even if he was not adequately advised, he cannot show prejudice because at the sentencing hearing he admitted that he did commit some of the acts.

{¶48} His second reason concerning his mental illness and medications, also fails. Nothing in the record demonstrates that use of medications to control his mental illness or the mental illness itself prevented him from entering a knowing, voluntary, and intelligent plea. The transcript of the plea colloquy consists of nine pages. The trial court viewed him at the time of the change of plea and was in the best position to determine whether he was incapacitated due to medication.

Furthermore, as the state pointed out at the hearing on motion to withdraw the guilty plea, despite claiming he was "loopy" at the time of the plea, his testimony of his recollection is very clear as to what occurred when he was entering his plea. 04/21/14 Re-Sentencing Tr. 15. Moreover, the record does not disclose what his mental health issues are other than an anger issue and that he was diagnosed with ADHD. No evidence was offered to support a finding that those two issues would prevent him from entering a knowing, intelligent and voluntary plea.

{¶49} The third reason for moving to withdraw the guilty plea is Appellant's claim that he was advised he would receive probation if he pled. As explained above, the record does not support this claim. While the record demonstrates that counsel did make multiple attempts to get Appellant into a facility for his issues, none of those attempts came to fruition. Counsel requested probation, however, the trial court denied that request. At the plea hearing, Appellant clearly indicated he was promised nothing for the change of plea. 09/25/12 Plea Tr. 7-8. He was advised of the maximum and minimum prison terms for the felonious assault conviction and advised that he was eligible for community control. 09/25/12 Plea Tr. 5.

{¶50} Given the advisements, Appellant's motion to withdraw his guilty plea appears to be based on a change of heart because he was not sentenced to probation as his counsel requested. A mere change of heart forms an insufficient basis to withdraw a guilty plea; it makes no difference as to whether the motion is a pre-sentence motion or if it is a post-sentence motion. *State v. Perez*, 7th Dist. No. 12MA110, 2013-Ohio-3587, ¶ 10; *State v. Hill*, 7th Dist. No. 12CA881, 2013-Ohio-2552, ¶ 30; *State v. Jones*, 7th Dist. No. 09MA50, 2011-Ohio-2903, ¶ 1; *State v. Johnston,* 7th Dist. No. 06CO64, 2007–Ohio–4620, ¶ 32; *State v. Kramer,* 7th Dist. No. 01CA107, 2002–Ohio–4176, ¶ 50. This factor does not weigh in Appellant's favor.

{¶51} The eighth factor is Appellant's understanding of the nature of the charges and the potential sentences. At the plea hearing Appellant was advised of both the charges and of the potential sentences. 09/25/14 Plea Tr. 4-5. Furthermore, he was asked multiple times if he was freely making the plea. He

indicated that he was. 09/25/14 Plea Tr. 7. He was also asked if anybody forced him to change his plea or if he was promised anything in order to get him to change his plea. 09/25/14 Plea Tr. 7-8. He responded that he was not. 09/25/14 Plea Tr. 7-8. This factor weighs in favor of the state and not in Appellant's favor.

{¶52} The last and final factor is whether Appellant is perhaps not guilty or has a complete defense to the charge. As stated above, Appellant's statement at his first sentencing hearing was that while he was not "book straight guilty," he did do "stuff." 10/24/12 Sentencing Hearing. Although he testified at the motion to withdraw hearing that he is not guilty, that belies his earlier statement. 08/21/14 Tr. 13. This factor does not weigh in Appellant's favor.

{¶53} Considering the factors in totality, they do not weigh in Appellant's favor. We cannot conclude that the trial court abused its discretion when it denied the pre-sentence motion to withdraw a guilty plea. This assignment of error is deemed meritless.

Second Assignment of Error

"The trial court, in its May 20, 2014 Judgment Entry of Re-Sentencing, sentenced Defendant to the incorrect period of post release control under Ohio Revised Code Section 2967.28(B)(2)."

{¶54} As previously explained, at the sentencing hearing the trial court advised Appellant that upon release from prison he would be subject to a mandatory three year term of postrelease control. 04/21/14 Re-Sentencing 20. However, in the judgment entry the trial court sentenced him to a mandatory five year term of postrelease control.

{¶55} Appellant argues that the five year sentence is contrary to law. The state concedes error. That concession is correct.

{¶56} In *Peck I* we stated, "R.C. 2967.28(B) requires the trial court to include a mandatory period of three-years of postrelease control in its sentence if a prison term is imposed for a second degree felony." *Peck I*, 2013-Ohio-5526, at ¶ 7. This statement was an acknowledgment that the correct mandatory term of postrelease control for Appellant's felonious assault conviction is three years.

{¶57} Furthermore, the language of R.C. 2967.28(B)(2) specifically provides:

> (B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is an offense of violence and is not a felony sex offense shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. * * *:
>
> * * *
>
> (2) For a felony of the second degree that is not a felony sex offense, three years.

R.C. 2967.28(B)(2).

{¶58} Consequently, Appellant can only be subject to a mandatory three year term of postrelease control. This assignment of error has merit.

Third Assignment of Error

"The trial court, [sic] failed to include proper notification of post-release control provisions during the Re-Sentencing hearing and in the resulting Judgment Entry."

{¶59} Under this assignment of error, Appellant argues that the trial court failed to advise him of the consequences for violating the terms and/or condition of postrelease control and failed to incorporate those notifications into the judgment entry. The state concedes error.

{¶60} The parties are correct that there is no advisement concerning the consequences for violating the terms and/or conditions of postrelease control. The May 21, 2014 Re-Sentencing Judgment Entry does not contain any express advisements. Furthermore, the re-sentencing transcript is devoid of any advisement concerning consequences for violating the terms and/or conditions of postrelease control. Only one line of the re-sentencing transcript is devoted to postrelease control and that line indicates that Appellant is sentenced to a "post-release control time of three years." 04/21/14 Re-Sentencing Tr. 20.

{¶61} In *Peck I,* we clearly indicated that the trial court was required to advise Appellant of the consequences for violating the terms and/or conditions of post-release control at the re-sentencing hearing and to incorporate those advisements into the judgment entry:

> R.C. 2929.19(B)(2)(c) and (e) require that a trial court give notice of postrelease control to a defendant at sentencing if a prison term is imposed for a second degree felony. The court is required to notify the defendant of four things: (1) the offender will be subject to postrelease control supervision under R.C. 2967.28; (2) if the offender violates postrelease control supervision or a condition of postrelease control, the parole board may impose a term of incarceration, as part of the sentence, of up to one-half of the stated prison term originally imposed; (3) whether postrelease control is mandatory or discretionary; and (4) the duration of postrelease control. *State v. Newsome,* 3d Dist. No. 12–12–03, 2012–Ohio–6119, ¶ 72; *State v. Fischer,* 128 Ohio St.3d 92, 2010–Ohio–6238, ¶ 27–29. This information must be told to the defendant at the sentencing hearing after the court decides to impose a prison term, and it must also be stated in the sentencing judgment entry: "The Supreme Court of Ohio has held that these statutes mandate a trial court to give notice of postrelease control both at the sentencing hearing and by incorporating it into the sentencing entry." *State v. Mock,* 187 Ohio App.3d 599, 2010–Ohio–2747, 933 N.E.2d 270, ¶ 45 (7th Dist.).
>
> Assuming *arguendo* that the written document the trial court used to provide notice of postrelease control contains all the required statutory information, it is not clear from the record that this information was provided to Appellant at sentencing. Further, the record reflects that not all of the requisite postrelease control notices are in the sentencing judgment entry. This matter must be remanded to correct

> these errors. *Singleton, Butler,* and *Mock, supra.* Typically, when the only issue on remand is to correct a postrelease control notice error, the case is remanded only to correct that error under the procedure set forth in R.C. 2929.191. Because there are multiple sentencing errors to be corrected on remand here, the court should conduct a *de novo* sentencing hearing that includes a discussion of postrelease control. To avoid future errors of this sort, the trial court should discontinue its use of its postrelease control notice form as it appears to be the sole basis used to show compliance with the statutory notice requirements. Appellant's third assignment of error has merit, and the case is remanded for resentencing so that proper postrelease control notices may be provided at sentencing.

Peck I, 2013-Ohio-5526, at ¶ 8-9. *See also State v. Mikolaj*, 7th Dist. No. 13MA152, 2014-Ohio-4007, ¶ 21-26.

{¶62} The trial court, in this instance, did comply with our advisement to stop using the postrelease control notice form. However, the trial court failed to comply with our order to advise Appellant of the consequences for violating the terms and/or conditions of postrelease control and to incorporate that advisement into the judgment entry. Hence, this assignment of error has merit.

Conclusion

{¶63} The trial court's decision is hereby affirmed in part and reversed and remanded in part. The first assignment of error is meritless. The trial court correctly denied the motion to withdraw the guilty plea. The second and third assignments of error, however, have merit. The trial court failed to correctly advise Appellant about postrelease control. Consequently, the sentence, as it pertains to postrelease control is reversed and the matter is remanded for a new postrelease control hearing. At the postrelease control hearing, the trial court is instructed to comply with the mandates of *Peck I*. Thus, at the new postrelease control hearing the trial court is required to notify Appellant of the following: (1) Appellant will be subject to postrelease control supervision under R.C. 2967.28; (2) if he violates postrelease control supervision or a

condition of postrelease control, the parole board may impose a term of incarceration, as part of the sentence, of up to one-half of the stated prison term originally imposed; (3) postrelease control is mandatory; and (4) the duration of postrelease control is three years. *Peck I*, 2013-Ohio-5526, ¶ 7-8. Those notifications must also be incorporated into the judgment entry. *Id*. at ¶ 8.

Waite, J., Concurs.

DeGenaro, J., Concurs.