[Cite as *State v. Threats*, 2016-Ohio-8478.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	CASE NO. 15 JE 0005
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	OPINION
	)	
STEPHEN THREATS,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Jefferson County, Ohio Case No. 14-CR-82
JUDGMENT:	Affirmed in part and Reversed and Remanded in part

APPEARANCES:

For Plaintiff-Appellee:	Atty. Jane Hanlin Assistant Prosecuting Attorney Jefferson County Justice Center 16001 State Route 7 Steubenville, Ohio 43952
For Defendant-Appellant:	Atty. Stephen P. Hardwick Assistant Public Defender Office of the Ohio Public Defender 250 East Broad Street Suite 1400 Columbus, Ohio 43215

JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 16, 2016

[Cite as *State v. Threats*, 2016-Ohio-8478.]
ROBB, J.

{¶1} Defendant-Appellant Stephen Threats appeals his conviction and sentence entered by the Jefferson County Common Pleas Court after he pled guilty to murder with a firearm specification and tampering with evidence. Appellant asks this court to vacate his plea because the trial court conflated the ideas of parole and post-release control when advising him what would occur when he was released from prison. As prejudice is not apparent on the record, Appellant's plea is upheld, and his first assignment of error is overruled.

{¶2} Appellant also argues the trial court erroneously sentenced him to five years of mandatory post-release control for tampering with evidence, which is a felony of the third degree. As this offense was subject only to a discretionary term of up to three years of post-release control, Appellant's second assignment of error must be sustained. For the following reasons, Appellant's conviction is affirmed, but the portion of his sentence dealing with post-release control for the tampering with evidence offense is reversed and remanded for resentencing with regards to post-release control.

STATEMENT OF THE CASE

{¶3} Chad Taravella was shot and killed on May 14, 2014 in Wintersville, Ohio. Appellant was arrested soon thereafter. At the May 20, 2014 preliminary hearing, a witness testified Appellant had been staying at her apartment for a few nights. On the night of the shooting, Appellant smoked marijuana and drank alcohol. He went on a walk with two females and a male who were also visiting the witness. When they returned, Appellant reported a man pulled a gun on him, and the other three confirmed this report. The foursome then left her apartment again. The females returned to the apartment crying and upset; one declared that Appellant "shot that dude that pulled a gun on us." Appellant too stated, "I shot that kid dead that pulled that gun on me." This witness testified Appellant called her later to say he "got rid of the gun" in the woods. She shared this information with the police, and they found the gun in the woods in the vicinity of her apartment building.

{¶4} After the preliminary hearing, Appellant was bound over to the grand jury. Appellant was indicted for: aggravated murder under R.C. 2903.01(A), which entails prior calculation and design; a firearm specification under R.C. 2941.145; and tampering with evidence (a Hi-Point firearm) in violation of R.C. 2921.12(A)(1), a third-degree felony. Appellant's attorney initially filed a motion to suppress cell phone data without a warrant, but he withdrew the request when it was discovered the information was provided by the recipient of Appellant's messages.

{¶5} At a pretrial on November 10, 2014, a rejected plea offer was placed on the record. The prosecutor pointed out the potential sentence for aggravated murder was life in prison with a possibility of parole after 20, 25, or 30 years up to a maximum of life without parole. The state agreed to amend this count to murder for which the penalty would be 15 years to life preceded by three years of actual incarceration for the firearm specification. The state's offer also involved a recommendation of the maximum sentence of 36 months on the tampering with evidence count to be served consecutively, for a total of 21 years to life.

{¶6} After the rejection of the prosecutor's offer, the state issued subpoenas for trial. The witness who testified at the preliminary hearing was subpoenaed as were the three individuals with Appellant at the time of the shooting and an individual who remained at the apartment with the witness.

{¶7} A plea agreement was reached at the final pretrial on December 12, 2014. The state agreed to amend the count of aggravated murder to murder and recommend a *concurrent* sentence of 36 months for the tampering with evidence count. Adding the three-year mandatory firearm specification, the accepted offer entailed a recommended sentence of life in prison with a possibility of parole after 18 years.

{¶8} During the plea hearing, Appellant answered he was making the plea voluntarily, no one threatened or coerced him, and no one promised him anything other than the recommendation placed on the record. He was advised the court was not bound to accept the state's recommendation and three years could be added before parole eligibility. The court emphasized Appellant was not required to plead

guilty and could go to trial. The court explained the plea admitted his guilt, waived his defenses, and allowed the court to sentence him that day. The court also explained the requirement of a lifetime weapon disability.

{¶9} It was noted the original charge of aggravated murder carried a minimum sentence of 20, 25, or 30 years to life and a maximum sentence of life without parole, plus three years for the firearm specification. The court reviewed the elements of the offenses. In doing so, the court asked Appellant what he did to get in trouble, and he responded, "I killed someone." (Plea Tr. 9). The court pointed out a murder conviction requires the homicide to be done on purpose, and Appellant responded that it was. (Plea Tr. 9-10). Appellant also said he shot the victim with a 380 firearm four or five times and took the gun from the scene; he later threw it in the woods so it would not be found. (Plea Tr. 10-11).

{¶10} Appellant said he understood he was waiving his rights: to a trial by jury where 12 jurors could not convict him unless they were unanimously convinced the state met its burden to prove each element of the offense beyond a reasonable doubt; to confrontation of witnesses where he could be present at every stage and his attorney could cross-examine each witness brought by the state; to compulsory process to force witnesses to testify by issuing subpoenas; and to testify or remain silent, which the jury shall not hold against him. The court also explained he had the right to be represented by an attorney through the entire process, including free counsel if he was no longer able to afford his retained attorney. Appellant said he was satisfied with his representation, answering there was nothing counsel did or did not do that he wished was different.

{¶11} The court then advised Appellant about post-release control. This appeal is based upon the following colloquy:

> THE COURT: If you were to wind up in prison in this case, which is likely given the agreement and the sentencing requirements and the mandatory nature of Count One and the gun spec, there would be some things you need to know when you got out and among those is a concept known as post-release control which would work like this.

> When you would get out of prison the Parole Board would have the mandatory duty to put conditions and restrictions on your release for a period of 5 years. Do you understand that?
>
> THE DEFENDANT: Say that last part one more time.
>
> THE COURT: The Parole Board would put-when you get out of prison-
>
> THE DEFENDANT: Uh-huh.
>
> THE COURT: -- the Parole Board is going to put conditions and restrictions on your release for a period of 5 years. It's going to be like being on parole.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: That's what they used to call it.
>
> THE DEFENDANT: Okay.
>
> THE COURT: And if you violate those conditions or restrictions the Parole Board can either add additional conditions and restrictions making life tougher on you or they could actually send you back to prison. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And if they send you back to prison they can send you back to prison for up to nine months each time you mess up. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And they can pile up those additional nine-month terms up to half of whatever it is I give you. So, if I was to -- to go along with this agreed recommendation of -- of really what's 18 years to life, they can give you another nine -- or nine years nine months at a time. You would have to mess up a whole bunch of times to get all that.

(Tr. 15-16). The court then recapped, "So, whatever it is I give you they can give you half of that again nine months at a time if you messed up that many times when you got out." Lastly, the court advised Appellant he could be prosecuted for any violations that are also crimes. (Tr. 17).

{¶12} The court accepted Appellant's plea and moved to the sentencing hearing. Defense counsel spoke of the victim pulling a gun on Appellant and three others. He noted the proper response would have been to get away and call the police rather than to leave, return with a gun, and shoot the victim in the chest. Counsel spoke of the culture in the community where the shooting took place, voicing how being disrespected results in a violent response. Appellant exercised his right to allocution, saying: "I reacted in a way it's not me. It's -- the way I reacted was the life I was trying to get away from and I just got -- all I have to say is I'm sorry for what I did and I'm being punished and I'm just going to go about my punishment and come out a better person." (Tr. 21).

{¶13} The court then imposed the recommended sentence of three years for the firearm specification to be followed by life with eligibility for parole after 15 years with a concurrent sentence of three years for tampering with evidence for a total of 18 years to life. The court also imposed five years of mandatory post-release control. This was reiterated in the court's December 18, 2014 sentencing entry.

{¶14} Appellant filed his notice of appeal on March 16, 2015. He sought leave to file a delayed appeal, which this court granted. Upon Appellant's request, the briefing schedule was stayed pending trial court proceedings on a petition for post-conviction relief. As a result, this case was not fully briefed until July 2016. Appellant sets forth two assignments of error; they are both related to post-release control.

POST-RELEASE CONTROL

{¶15} Post-release control is provided for in R.C. 2967.28. Upon a violation of post-release control, "the period of a prison term that is imposed as a post-release control sanction under this division shall not exceed nine months, and the maximum cumulative prison term for all violations under this division shall not exceed one-half of the stated prison term originally imposed upon the offender as part of this sentence." R.C. 2967.28(F)(3). *See also* R.C. 2943.032 (inform pleading defendant of nine-month prison terms for violations); R.C. 2929.19(B)(2)(c)-(e) (notifications at sentencing).

{¶16} R.C. 2967.28 also defines whether a term of post-release control is mandatory or discretionary with the parole board and sets forth the length of the term, depending on the degree of felony and whether the offense is a felony sex offense. *See* R.C. 2967.28(B)-(C). For instance, post-release control is mandatory when a prison term is imposed for a felony of the first degree, a felony of the second degree, a felony sex offense, or a felony of the third degree that is an offense of violence. R.C. 2967.28(B). For a felony of the first degree or for a felony sex offense, the term of post-release control must be five years. R.C. 2967.28(B)(1). Unless the offense is a felony sex offense, the term of post-release control is a mandatory three years for a second degree felony or third degree felony offense of violence. R.C. 2967.28(B)(2).

{¶17} If a prison sentence is imposed for a felony of the third degree that is not a felony sex offense and is not an offense of violence, then the parole board has the discretion to impose post-release control for "up to three years." R.C. 2967.28(C). Tampering with evidence is a third degree felony. R.C. 2921.12(B). It is not a felony sex offense; nor is it an offense of violence. *See* R.C. 2901.01(A)(9) (defining offense of violence).

{¶18} Murder is an unclassified felony generally subject to an indefinite sentence of 15 years to life. *See* R.C. 2903.02(A), (D); R.C. 2929.02(B)(1). *See also* R.C. 2901.02(A), (C) (distinguishing aggravated murder and murder from degreed felonies). Post-release control does not apply to unclassified felonies such as aggravated murder or murder. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 36 (person sentenced for aggravated murder is not subject to post-release control as the crime is an unclassified felony); *State v. Ortiz*, 7th Dist. No. 15 MA 0023, 2016-Ohio-4813, ¶ 1, 4 (post-release control does not apply to murder).

{¶19} Rather, a murder sentence carries a possibility of parole after fifteen years. *See* R.C. 2929.02(B)(1); R.C. 2967.13(A)(1) (eligibility for parole at expiration of minimum term for murder). Eligibility for parole does not guarantee parole will be granted. *See, e.g., Clark*, 119 Ohio St.3d 239 at ¶ 37. A defendant granted parole is released from confinement before the maximum term of the indefinite sentence, but

he remains in the state's custody until the sentence expires or he is granted final release by the Adult Parole Authority. *See id.* at ¶ 36. If the defendant violates parole, he could be required to serve the remainder of the original sentence. *Id.*

{¶20} If a person is convicted of both an unclassified felony and a classified felony, the court still has obligations regarding post-release control as it relates to the classified felony. See *State v. Roseberry*, 7th Dist. No. 11 BE 21, 2012-Ohio-4115, ¶ 15. *See also State v. Wilcox*, 10th Dist. No. 13AP-402, 2013-Ohio-4347, ¶ 10 ("When a defendant has been convicted of both an offense that carries mandatory post-release control and an unclassified felony to which post-release control is inapplicable, the trial court's duty to notify of post-release control is not negated.") "[T]he presence of an indefinite and a definite sentence does not eliminate the postrelease-control requirement * * *." *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110, ¶ 20. "If an offender is serving an indefinite prison term or a life sentence in addition to a stated prison term,[1]" R.C. 2967.28(F)(4) provides the procedural mechanism to satisfy post-release control release. See *id.*

{¶21} Pursuant to Crim.R. 11(C)(2)(a), the court must determine 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 * * *." Where post-release control applies, the trial court is

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[1] The remainder of R.C. 2967.28(F)(4) provides:

> the offender shall serve the period of post-release control in the following manner:
> (a) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under a life sentence or an indefinite sentence, and if the period of post-release control ends prior to the period of parole, the offender shall be supervised on parole. The offender shall receive credit for post-release control supervision during the period of parole. The offender is not eligible for final release under section 2967.16 of the Revised Code until the post-release control period otherwise would have ended.
> (b) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under an indefinite sentence, and if the period of parole ends prior to the period of post-release control, the offender shall be supervised on post-release control. The requirements of parole supervision shall be satisfied during the post-release control period.

required to inform the defendant of its applicability due to this rule. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 7-10, 22 (2008).

{¶22} As notice of post-release control does not involve the advisement of a constitutional right, substantial compliance with Crim.R. 11 is sufficient. *Clark*, 119 Ohio St.3d 239 at ¶ 31. If there is no substantial compliance with regard to a non-constitutional right, the reviewing court is to ascertain whether there was partial compliance or a total failure to comply with the rule. *Id.* at ¶ 32. If there is a complete failure to advise of post-release control, the plea must be vacated, and an analysis of prejudice is not even required. *Sarkozy*, 117 Ohio St.3d 86 at ¶ 22, 25. If there is partial compliance, the plea cannot be vacated unless the defendant shows he was prejudiced. *Clark*, 119 Ohio St.3d 239 at ¶ 32 (providing as an example the situation where a court mentions, but does not explain, mandatory post-release control).

{¶23} A trial court is not required to explain parole since it is not certain to occur. *Clark*, 119 Ohio St.3d 239 at ¶ 37. Here, Appellant was eligible for parole on the murder conviction but also subject to post-release control for the tampering with evidence conviction.

ASSIGNMENT OF ERROR ONE: VOLUNTARINESS OF PLEA

{¶24} Appellant's first assignment of error provides:

"The trial court erred by accepting an involuntary guilty plea."

{¶25} Appellant asks us to vacate his plea and remand for trial. He contends he could not have understood the implication of his guilty plea due to misinformation provided by the trial court at the plea hearing. Appellant points out post-release control is inapplicable to the murder charge and complains the trial court conflated parole and post-release control in the plea colloquy.

{¶26} Specifically, he contends the plea did not substantially comply with Crim.R. 11 and was not voluntary because: (1) the court said he faces only five years of supervision upon release when he actually faces a lifetime of supervision; (2) the court said he could only be returned to prison for nine months for a violation when he actually faces up to life in prison for a violation; and (3) the court said the

cumulative total time he could be returned to prison after release was nine years or half the original sentence when he actually faces up to life in prison for a single violation. The parties agree the trial court's colloquy on these items was misinformative as the court related information on post-release control to the murder charge and to any parole he would receive thereunder. The parties cite the Ohio Supreme Court's *Clark* case.

{¶27} In *Clark*, the defendant was indicted for aggravated murder and two lesser included counts of murder for the death of his wife; he was also charged with two gun specifications. He pled guilty to aggravated murder with a gun specification. The maximum sentence was life without parole, but the parties jointly recommended a sentence of 25 years to life plus three years on the gun specification.

{¶28} At the plea hearing, the judge incorrectly told Clark: if he received parole, he would be subject to post-release control which could last for five years; a violation could result in a new prison term of up to nine months; and the total of all new prison terms could not exceed one-half of the original sentence.[2] The trial judge incorrectly referred to post-release control when only parole applied and improperly used the terms parole and post-release control interchangeably. *See Clark*, 119 Ohio St.3d 239 at ¶ 15. "The trial judge's comments completely obfuscated the maximum sentence, to the point that it was unclear how the sentence would end and what sanctions Clark would face upon release from prison." *Id.* at ¶ 34. The Supreme Court emphasized the significant differences between a term of post-release control and supervision under parole. *Id.* at ¶ 35-37.

{¶29} The Court noted the judge was not required to provide an advisement on either parole (because it is not guaranteed to occur) or post-release control (because it was inapplicable to an unclassified felony). *Id.* at ¶ 38. However, where a judge choses to provide additional information, it should be correct. *See id.* at ¶ 26, 34, 38-39. The judge did provide Clark with some correct information as to the

[2] Clark was also misadvised in the written plea and at the sentencing hearing. In the case at bar, no detailed written plea agreement was filed. A change of plea and jury waiver was signed by Appellant and filed; this filing noted the entry of a guilty plea to an amended indictment and said the right to a trial by jury was being waived.

maximum sentence. *Id.* at ¶ 33. The remaining information, however, was considered to be "substantial misinformation," which the Supreme Court concluded did not substantially comply with Crim.R. 11. *Id.* at ¶ 39.

{¶30} The Court found that, although the trial judge did not substantially comply with his duties, the judge did not totally ignore his duties under Crim.R. 11(C)(2)(a). *Id.* at ¶ 40. "Because the trial judge partially complied with the rule, Clark must show that he was prejudiced by the trial court's misinformation to successfully vacate his plea." *Id*. The Supreme Court then remanded the case to the Eleventh District Court of Appeals "for a full determination of prejudice." *Id.* In evaluating prejudice, the test is "whether the plea would have otherwise been made." *Id.* at ¶ 32.

{¶31} On remand, the Eleventh District concluded Clark failed to demonstrate "he would not have entered his plea but for the trial judge's erroneous explanation of parole/post-release control." *State v. Clark*, 11th Dist. No. 2006-A-0004, 2008-Ohio-6768, ¶ 12, 24. The defendant urged he received nothing for his plea besides the (erroneous) post-release control as he pled to aggravated murder with a gun specification (and the state merely dismissed lesser included offenses). In evaluating prejudice, the appellate court pointed to portions of the record which demonstrated the defendant's guilt "was not reasonably in question." *Id.* Additionally, the court observed: "The evidence before this court indicates that it was the possibility of early release from prison, not the particular terms or conditions of that release, that was critical to the plea agreement." *Id.* at ¶ 16.

{¶32} The appellate court also pointed out how the United States Supreme Court found no prejudice in a habeas case where the petitioner sought vacation of his plea because his attorney incorrectly advised him he would be eligible for parole six years earlier than he would actually be eligible. *Hill v. Lockhart*, 474 U.S. 52, 54-55, 60, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The Eleventh District found there was no evidence to suggest Clark was induced to plead guilty by the trial judge's statements regarding post-release control or he would have insisted on a trial but for the belief that any release from prison would be subject to the terms of post-release control.

Clark, 11th Dist. No. 2006-A-0004 at ¶ 13, 18, 22 ("Without some evidence that Clark was motivated by the expectation of being subject to post-release control upon release, we must affirm the plea.").

{¶33} Similarly, the Second District addressed an appeal from a conviction entered after a guilty plea where the trial court misadvised a murder defendant about post-release control. *See State v. Eggers*, 2d Dist. No. 2011-CA-48, 2013-Ohio-3174. The defendant pled guilty to felony murder, and the state dismissed other charges. At the plea hearing, the court explained the punishment for the offense of felony murder was fifteen years to life and advised the defendant that he was subject to a mandatory term of five years of post-release control. *Id.* at ¶ 7.

{¶34} After reviewing the *Clark* case, the Second District concluded the defendant failed to demonstrate prejudice resulting from the trial court's erroneous discussion of post-release control as: "There is nothing in the record to suggest Eggers would not have entered his guilty plea had the trial court not erroneously informed him that he was subject to a mandatory five-year term of postrelease control." *Id.* at ¶ 30 (vacating the portion of the sentence imposing post-release control). The Ninth District has similarly refused to vacate a guilty plea after finding there was no evidence the defendant's decision to plead guilty "hinged" on the statements concerning a court's advisement on post-release control as opposed to parole. *State v. Pope*, 9th Dist. No. 26928, 2014-Ohio-3212, ¶ 15-16 (finding no evidence in the record that the defendant would have proceeded to trial "but for the belief that he would be subject to postrelease control" for the murder charge).

{¶35} Appellant recognizes the Supreme Court remanded the *Clark* case to the appellate court to determine whether the defendant was prejudiced by the misinformation and the appellate court found no prejudice. However, he urges his case is distinguishable as he rejected an earlier plea offer where he was not misinformed about post-release control. Appellant contends this is sufficient evidence of prejudice.

{¶36} The state responds by urging the record fails to show Appellant was prejudiced by the trial court's conflation of parole with post-release control. The state

asserts there is overwhelming evidence of Appellant's guilt, claiming for instance: a security video of the shooting shows an ambush of the victim; DNA results show only Appellant's DNA on the gun recovered in the woods; gunshot residue was discovered on Appellant's clothes; there are more than two eyewitnesses; and Appellant made incriminating statements.

{¶37} Appellant suggests he could have gone to trial arguing self-defense or voluntary manslaughter. Appellant points out many of these items mentioned by the state are not in the record before this court. Appellant also complains the state failed to cite to the record to show where these items exist.

{¶38} Still, the preliminary hearing transcript is part of the record on appeal. This transcript contains the testimony of a witness who: heard Appellant and three other visitors to her apartment say a man pulled a gun on them while they were on a walk; saw the group go on another walk later; watched the group return with two of them crying and upset, one of whom declared Appellant shot the man who pulled a gun on them earlier; heard Appellant admit that he shot the man; and heard Appellant say where he hid the gun. Furthermore, Appellant made statements at the plea hearing with regard to his purposeful shooting of the victim and his disposing of the gun.

{¶39} The state emphasizes the driving force behind Appellant's plea was not what would happen upon his potential release but whether he would be released at all and when he would be eligible for release. Appellant was charged with aggravated murder due to the alleged prior calculation and design involved when Appellant went to an apartment from a different apartment complex, retrieved a gun, and searched for the man who had previously disrespected him. He faced a maximum sentence on the aggravated murder charge of life without parole; other sentencing options were life with possibility of parole after 30 years, life with possibility of parole after 25 years, and life with possibility of parole after 20 years. In addition, he faced a three-year term of actual incarceration for the firearm specification and 36 months on the charge of tampering with evidence.

{¶40} Although Appellant rejected a plea offer to an amended charge of murder on November 10, 2014, the offer was not the same one to which he pled guilty on December 12, 2014. The rejected offer was a recommendation of fifteen years to life for murder after a three-year sentence on the firearm specification plus a consecutive sentence of 36 months for tampering with evidence, for a total of 21 years to life. The accepted offer involved the state changing its recommendation on the tampering charge to a concurrent sentence for a total recommendation of 18 years to life.

{¶41} Thus, Appellant had an aggravated murder charge (for which there was evidence in the record) reduced to murder, and he gained a recommendation that the sentence on his other charge would run concurrent with the murder sentence. These facts support the state's position and tend to show less prejudice than that involved in *Clark*. Moreover, there was no written plea agreement erroneously advising Appellant of post-release control prior to the plea hearing as in the *Clark* case.

{¶42} Also diminishing the prejudice in this case, when compared to cases such as *Clark*, *Eggers*, and *Pope* (all of which found no prejudice), is the fact the trial court here *was required to provide Appellant with information on post-release control* due to the plea to an offense which was subject to post-release control. In the three cited cases, the trial court provided information on post-release control when it was totally inapplicable to the case as the defendants were pleading to only one offense which was an unclassified felony. Still, those courts found no prejudice to the defendant.

{¶43} The Twelfth District ruled on a case where the defendant pled guilty to aggravated murder along with other offenses which were subject to post-release control. *See State v. Douglass*, 12th Dist. No. CA2008-07-168, 2009-Ohio-3826. The written plea agreement listed the maximum sentences and disclosed post-release control would apply to the first degree felonies. At the plea hearing, the court explained the defendant could be sentenced to life with a possibility of parole after 20, 25, or 30 years or to life without parole. The court also provided the maximum sentence on the other charges. The defendant was advised that if he were ever

released from prison, then he would be subject to post-release control for five years and could receive additional time up to one-half of the original sentence in increments of nine months per violation. At a later sentencing hearing, the court sentenced the defendant to life without parole on the aggravated murder.

{¶44} Douglass appealed arguing his plea was not entered knowingly, intelligently, and voluntarily because the trial court misinformed him he would be subject to five years of mandatory post-release control if he were ever released from prison. Although post-release control was applicable to the classified felonies, the trial court's colloquy did not substantially comply with Crim.R. 11 because it inadvertently inferred the mandatory term of post-release control would apply to all charges, creating the potential for confusion; that is, the trial court failed to expressly distinguish between the effect of the guilty plea to aggravated murder, an unclassified felony, and the guilty plea to the remaining offenses. *Id.* at ¶ 35. The Twelfth District found partial compliance and a lack of prejudice, concluding: "there is simply nothing to suggest appellant's guilty plea would have been different had the trial court explicitly informed him that aggravated murder was not subject to a mandatory term of postrelease control at the plea hearing." *Id.* at ¶ 36.

{¶45} Similarly, the trial court's statements at the plea hearing in the case at bar could lead a defendant to believe the post-release control, which the trial court was required to discuss due to other offenses, applied upon his release on parole for the murder charge. Although the court was not required to discuss the parole potential on Appellant's murder charge, the court discussed the topic as if the post-release control provisions governed upon any release on the murder charge. This would represent partial compliance with Crim.R. 11 under *Clark*. As the parties agree, *Clark* requires the defendant to demonstrate prejudice due to the conflation of parole and post-release control.

{¶46} Appellant's contention, that the information on post-release control provided at his plea hearing was the impetus for his plea, is not supported by the record. By pleading guilty, Appellant had an aggravated murder charge reduced to murder, thereby obtaining a guarantee he would at least be eligible for parole, and he

had the state's recommendation to make him eligible three years early by eliminating the previously-recommended consecutive sentence on the tampering charge. There is no indication Appellant's plea would not have been entered but for the trial court's statements at the plea hearing regarding post-release control. For all of the foregoing reasons, this assignment of error is overruled.

ASSIGNMENT OF ERROR TWO: SENTENCING ERROR

{¶47} Appellant's next assignment of error provides:

"The trial court erred by imposing five years of mandatory postrelease [control] instead of three years of discretionary postrelease control."

{¶48} This assignment of error is based on the court's imposition of a mandatory five-year term of post-release control instead of a discretionary three-year term. As set forth supra, murder is an unclassified felony not subject to post-release control. *See Ortiz*, 7th Dist. No. 15 MA 0023 (post-release control does not apply to murder); R.C. 2901.02(A), (C). *See also Clark*, 119 Ohio St.3d 239 at ¶ 36 (aggravated murder is not subject to post-release control as the crime is an unclassified felony). Notably, the language used by the trial court *at the sentencing hearing* and *in the sentencing entry* does not connect the term of post-release control to the murder offense. The sentencing issue is thus limited to the tampering with evidence offense.

{¶49} Appellant's only offense subject to post-release control is tampering with evidence. As tampering with evidence is a third-degree felony, which is not a felony sex offense or an offense of violence, there is a potential term of post-release control for up to three years. *See* R.C. 2921.12(B) (tampering is felony of the third degree); R.C. 2901.01(A)(9) (defining offense of violence); R.C. 2967.28(C) ("up to three years" if parole board determines it is necessary).

{¶50} Pursuant to R.C. 2929.19(B)(2)(d), a sentencing court imposing a prison term for this type of offense shall notify the defendant he "may be" supervised under R.C. 2967.28 after he is released from prison. Pursuant to R.C. 2929.19(B)(2)(e), the sentencing court shall also notify the defendant that the parole

board may impose a prison term, as part of the sentence for a violation, of up to one-half of the stated prison term originally imposed upon the offender.

{¶51} At both the sentencing hearing and in the sentencing entry, the trial court incorrectly imposed a mandatory five-year term of post-release control. As aforestated, a discretionary term of up to three years was the correct term of post-release control for tampering with evidence. Appellant's second assignment of error must be sustained. The state agrees a remand for resentencing is appropriate. This remand is limited to the imposition of post-release control on the tampering with evidence offense. The trial court is instructed to provide the notice as to post-release control at the hearing under R.C. 2929.19(B)(2)(d) and (e) and to issue a new sentencing entry in accordance.

{¶52} For all of the foregoing reasons, Appellant's conviction is upheld, but the post-release control portion of his sentence is reversed and remanded for resentencing on post-release control.

Donofrio, P.J., concurs.

Waite, J., concurs.