

[Cite as *State v. Morton*, 2011-Ohio-1488.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 10AP-562 (C.P.C. No. 05CR09-6438)
	:	
Byron L. Morton,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on March 29, 2011

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*Ron O'Brien*, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

*Yeura R. Venters*, Public Defender, and *Allen V. Adair*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Byron L. Morton, appeals from a judgment of the Franklin County Court of Common Pleas, in which the trial court resentenced appellant and advised him of mandatory post-release control ("PRC"). Because appellant has not demonstrated plain error, we affirm that judgment.

**Facts and Procedural History**

{¶2} In 2006, appellant entered a guilty plea to one count of burglary, a violation of R.C. 2911.12 and a second degree felony, and one count of having weapons under

disability, a violation of R.C. 2923.13 and a third degree felony. The trial court accepted appellant's guilty pleas, found him guilty, and sentenced him to five years of community control.

{¶3} Appellant subsequently violated the terms and conditions of his community control. Accordingly, in 2007, the trial court modified its original sentence and sentenced appellant to concurrent four-year prison terms for both counts. After imposing sentence, the trial court notified appellant that he would be subject to a period of optional PRC for three years after being released from prison.

{¶4} Shortly before appellant's scheduled release from prison, the trial court held a resentencing hearing. Appellant appeared from prison by videoconference. Appellant was represented by counsel who was physically present at the hearing. Pursuant to that hearing, the trial court reimposed four-year concurrent prison sentences. The court also notified appellant that he would be subject to three years of mandatory, not optional, PRC after his release from prison.

{¶5} Appellant appeals the judgment of the trial court and assigns the following errors:

[1.] The trial court failed to prove notice to appellant of the resentencing hearing, or to obtain a waiver of his right to notice of that hearing.

[2.] The hearing to add postrelease control to appellant's sentence, conducted using video conferencing equipment, did not conform to the requirements of Criminal Rule 43.

[3.] Conducting a resentencing hearing to add postrelease control to appellant's sentence without appellant being physically present in the courtroom, or first obtaining a waiver of his right to be present, violated his rights secured by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

**Standard of Review**

{¶6} Appellant's assignments of error all concern his resentencing hearing. Appellant did not object to his resentencing hearing or to his appearance by videoconference. Nor did appellant express any objection during the hearing. Accordingly, appellant has forfeited all but plain error. *State v. Arnold*, 189 Ohio App.3d 238, 2009-Ohio-3636, ¶30; *State v. Warren*, 10th Dist. No. 10AP-376, 2010-Ohio-5718, ¶4.

{¶7} Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be: (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights, i.e., affected the outcome of the trial. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. Even if an error satisfies these prongs, appellate courts are not required to correct the error. Appellate courts retain discretion to correct plain errors. *Id.*; *State v. Litreal*, 170 Ohio App.3d 670, 2006-Ohio-5416, ¶12. Courts are to notice plain error under Crim .R. 52(B) " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Barnes* (quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of syllabus).

**First Assignment of Error- Notice of Resentencing Hearing**

{¶8} Appellant argues in his first assignment of error that the trial court erred in failing to provide him notice of the resentencing hearing or to obtain a waiver of his right to notice of that hearing. We disagree.

{¶9} The trial court resentenced appellant pursuant to R.C. 2929.191(C). That statute, in part, requires that "[b]efore a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing, the prosecuting attorney of the county, and the department of rehabilitation and correction." Appellant claims he never received notice of his resentencing hearing. Appellant fails to demonstrate plain error.

{¶10} First, there was no obvious defect in the trial court's proceedings. Appellant has the burden to prove that the trial court failed to provide him with notice or failed to obtain a waiver of his right to notice of that hearing by reference to matters in the record. *State v. Burks*, 10th Dist. No. 07AP-553, 2008-Ohio-2463, ¶63 (citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199). Appellant has not met that burden. Notably, appellant appeared at the resentencing hearing by videoconference and his counsel was physically present. Therefore, appellant and his counsel must have received some notice of the resentencing hearing.

{¶11} Second, there is no indication that the trial court's alleged failure to provide notice, or its failure to obtain a waiver of such notice, affected the outcome of the proceeding. The trial court held the resentencing hearing to make it clear that PRC was mandatory. The three-year term of PRC was mandatory because appellant pled guilty to a second degree felony. See R.C. 2967.28(B)(2). The resentencing occurred shortly before appellant completed his four-year concurrent sentences. The trial court reimposed the same four-year concurrent sentences appellant received in 2007. Because PRC was mandatory, appellant has not shown that the alleged lack of notice affected the outcome of the proceeding.

{¶12} For these reasons, appellant has failed to demonstrate plain error. Accordingly, we overrule appellant's first assignment of error.

### **Second Assignment of Error - Crim.R. 43**

{¶13} Appellant contends in his second assignment of error that the resentencing hearing, conducted using videoconferencing equipment, did not conform to the requirements of Crim.R. 43. Even if appellant is correct, we fail to find plain error.

{¶14} R.C. 2929.191(C) permits trial courts to conduct resentencing hearings by videoconferencing. Crim.R. 43 regulates the use of videoconferencing. Because this is a felony case, Crim.R. 43(A)(3) requires an express waiver of the defendant's right to be physically present for a court to permit the presence and participation of a defendant by videoconferencing. Appellant contends that he did not waive his right to be physically present at the resentencing hearing. Even if we assume that appellant did not waive his right to be physically present at his resentencing hearing, appellant has not demonstrated plain error. Appellant has not presented a credible argument that the outcome of the sentencing hearing would have been different if he had been physically present. As previously noted, appellant pled guilty to a second degree felony, and R.C. 2967.28(B)(2) mandates a three-year PRC term for a second degree felony conviction. Thus, the trial court had no discretion to impose anything but a three-year PRC term. Additionally, the resentencing hearing was held shortly before appellant was scheduled to be released, and the new sentence did not impact that release date.

{¶15} Appellant also argues in this assignment of error that the trial court did not comply with Crim.R. 43 by failing to make provisions to allow him the opportunity to confer privately with counsel before the resentencing hearing. Crim.R. 43(A)(2)(d). Throughout

the hearing, however, neither appellant nor his counsel indicated a desire to confer privately. Additionally, appellant fails to show how this alleged failure affected the outcome of the proceeding.

{¶16} For these reasons, appellant has failed to demonstrate plain error. Accordingly, we overrule appellant's second assignment of error.

### **Third Assignment of Error - The Right to be Present**

{¶17} Appellant contends in his final assignment of error that conducting a resentencing hearing without his physical presence in the courtroom, or without first obtaining a waiver of his right to be present, violated his constitutional right to be present in the courtroom at every stage of the proceedings. Again, we find no plain error.

{¶18} A criminal defendant has a fundamental right to be present at all critical stages of his criminal trial. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶100; Sixth and Fourteenth Amendments to the United States Constitution; Article I, Section 10 of the Ohio Constitution. However, a criminal defendant's absence "does not necessarily result in prejudicial or constitutional error." *State v. Davis*, 116 Ohio St.3d. 404, 2008-Ohio-2, ¶90. See also *State v. Reed*, 10th Dist. No. 09AP-1164, 2010-Ohio-5819, ¶13. "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Davis* at ¶90 (quoting *Snyder v. Massachusetts* (1934), 291 U.S. 97, 107-108, 54 S.Ct. 330, 333). Therefore, a defendant's absence in violation of Crim.R. 43(A) can constitute harmless error where he suffered no prejudice, even though such absence was improper. See *State v. Williams* (1983), 6 Ohio St.3d 281, 285-87 (defendant's absence not prejudicial because his interests were "more than adequately represented by his attorney who was

present," and appellant's presence "would have contributed little to his defense"); *Reed* at ¶13.

{¶19} In the present case, appellant has not shown that he suffered prejudice by being resentenced via videoconference. Appellant's rights were adequately protected at his resentencing hearing because he was represented by counsel, who was physically present. Appellant has not demonstrated how his own physical presence could have changed the outcome of the hearing. As noted above, the trial court resentenced appellant to the same sentence as originally ordered, and the three-year period of PRC imposed by the trial court was mandatory. In similar situations, this court has found no plain error with the use of videoconferencing. *Reed* at ¶14 (rejecting claim that resentencing via videoconference violated right to be present where defendant represented by counsel and trial court reimposed same sentence); *Warren* at ¶8-9 (same). Accordingly, we overrule appellant's third assignment of error.

{¶20} In conclusion, we overrule appellant's three assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BRYANT, P.J., and FRENCH, J., concur.

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