

COURT OF APPEALS  
HOLMES COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08-CA13; 08-CA-14
EDWARD J. KULA	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Holmes County Court of  
Common Pleas Case No. 05CR060 &  
07CR033

JUDGMENT: AFFIRMED IN PART; REVERSED AND  
REMANDED IN PART.

DATE OF JUDGMENT ENTRY: June 18, 2009

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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*Delaney, J.*

{¶1} Defendant-Appellant, Edward Kula, appeals from his guilty pleas and convictions of one count of Non-Support of Dependents in case number 05-CR-060 and four counts of Non-Support of Dependents and one count of Failure to Appear in case number 07-CR-033. The State of Ohio is Plaintiff-Appellee.

{¶2} On September 19, 2005, Appellant was indicted in the Holmes County Court of Common Pleas in case number 05-CR-060 on two counts of Non-Support of Dependents, felonies of the fifth degree, in violation of R.C. 2919.21(B). He originally entered a not guilty plea on September 23, 2005.

{¶3} On November 2, 2005, he filed a notice of acceptance of a plea offer made by the State. On November 30, 2005, Appellant entered his guilty plea on the record, pleading guilty to one count of Non-Support of Dependents. The other count was dismissed. Sentencing was continued, and on June 15, 2006, Appellant failed to appear for his sentencing hearing and a warrant was issued for his arrest.

{¶4} On June 18, 2007, Appellant was indicted in the Holmes County Court of Common Pleas in case number 07-CR-033 on four additional counts of Non-Support of Dependents, felonies of the fourth degree, in violation of R.C. 2919.21(B) and one count of Failure to Appear, in violation of R.C. 2937.99(A), a felony of the fourth degree.

{¶5} Appellant was arrested on August 14, 2007.

{¶6} On September 25, 2007, Appellant pled guilty to the indictment in case number 07-CR-033.

{¶7} Sentencing for both cases was held on October 2, 2007, at which time, the court sentenced Appellant to six months in prison for the one count of Non-Support

out of case number 05-CR-060, and eight months in prison on each of the four counts of Non-Support in case number 07-CR-033. He was additionally sentenced to ten months on the charge of Failure to Appear. All sentences were ordered to be served consecutively, for a total of 48 months in prison.

{¶8} Appellant raises one Assignment of Error:

{¶9} “I. IN THE SENTENCING COURT COMMITTED ERROR OR PLAIN ERROR OF CONSTITUTIONAL OR STATUTORY MAGNITUDE BY ACCEPTING EDWARD KULA’S GUILTY PLEAS WITHOUT PERSONALLY INFORMING HIM OF THE POTENTIAL EXTENSIONS OF HIS PRISON TERM PURSUANT TO CRIM. R. 11 AND R.C. 2943.032; CONSEQUENTLY, MR. KULA’S PLEAS WERE NOT KNOWING AND VOLUNTARY.”

I.

{¶10} In his sole assignment of error, Appellant argues that the trial court violated Criminal Rule 11 by failing to inform Appellant of how long he would be subject to post-release control and that if he violated post-release control, he would be subject to an additional term of incarceration.

{¶11} Criminal Rule 11 governs the process of entering a plea. Criminal Rule 11(C), which is pertinent to our analysis, provides:

{¶12} “(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶13} “(a) Determining that 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.”

{¶14} In *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, the Supreme Court held that a trial court must inform a defendant of mandatory post-release control as part of the requirements of Crim. R. 11(C). In *Sarkozy*, there was a complete failure by the trial court to notify the defendant that he would be subject to post-release control. The Supreme Court, therefore, rejected a substantial compliance test with respect to Crim. R. 11 based on the fact that there was no mention *at all* by the trial court of post-release control.

{¶15} Some compliance with respect to post-release control notification triggers a substantial compliance analysis and a resultant prejudice analysis. See *State v. Alfarano*, 1<sup>st</sup> Dist. No. C-061030, 2008-Ohio-3476. The Supreme Court itself has addressed this issue with respect to substantial compliance with Crim. R. 11 as it relates to nonconstitutional rights:

{¶16} “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, 564 N.E.2d 474, 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.”

{¶17} In the present cases, we are confronted with two separate plea hearings. In case number 05-CR-060, the trial court did mention post-release control during the plea colloquy and it was also delineated in both the plea form and the sentencing entry.

{¶18} At the plea hearing the trial court had the following exchange with Appellant:

{¶19} “THE COURT: I have a document in front of me entitled ‘Plea of Guilty.’ Is this your signature on the last page?

{¶20} “MR. KULA: Yes, it is.

{¶21} “THE COURT: Before you signed this document did you have an opportunity to read it over?

{¶22} “MR. KULA: Yes.

{¶23} “THE COURT: Did you have an opportunity to review it with Mr. Mason and ask him any questions you wanted to about this document?

{¶24} “MR. KULA: Yes, I did.

{¶25} “THE COURT: Do you believe that you understand everything contained in this document?

{¶26} “MR. KULA: Yes.

{¶27} “THE COURT: Are all the representations that you’re making to the Court in this document true?

{¶28} “MR. KULA: Yes. \* \* \*

{¶29} “THE COURT: Do you understand that if I send you to prison that post-release control is a potential option for the parole board for a period of up to three years after you are released from prison?

{¶30} “MR. KULA: Yes.”

{¶31} Additionally, in the Guilty Plea form, which was signed by Appellant, the following paragraph on post-release control was included:

{¶32} “Post Release Control. In addition, a period of supervision by the Adult Parole Authority after release from prison is (mandatory/option) in this case. If I am sentenced to prison for a felony 1 or felony sex offense, after my prison release, I will have 5 years of post release control under conditions determined by the Parole Board. If I am sentenced to prison for a felony 2 or a felony 3 which involved causing or threatening physical harm, I will have mandatory post release control of 3 years. If I receive prison for a felony 3, 4, or 5, I may be given up to 3 years of post release control. A violation of any post-release control rule or condition can result in a more restrictive sanction while I am under post release control, and increased duration of supervision or control, up to the maximum term and reimprisonment even though I have served the entire stated prison term upon me by this Court for all offenses. If I violate conditions of supervision while under post release control, the Parole Board could return me to prison for up to nine months for each violation, for a total of ½ of my originally stated prison term. If the violation is a new felony, I could receive a prison term of the

greater of one year or the time remaining on post release control, in addition to any other prison term imposed for the new offense.”

{¶33} Moreover, the judgment entry, which consolidated both cases, again informed Appellant that post-release control would be optional for three years and again informed Appellant that if he “violates post-release control, he is warned that he may be required to serve an additional prison term of up to nine months for each violation up to a maximum of ½ of the sentence imposed by this Court. If Defendant commits a new felony while on post release control, he may be required to serve a prison term of the time remaining on post-release control or 12 months, whichever is greater plus a consecutive sentence for the new felony. Defendant is ordered to serve as part of this sentence any term of post-release control imposed by the parole board, and any prison term for violation of that post-release control.”

{¶34} Accordingly, we conclude that Appellant had notice that he would receive a maximum of three years' post-release control, and that if he violated the terms of his post-release control, he could serve up to 50 percent of his original prison sentence. Under these circumstances, we hold that the trial court substantially complied with Crim. R. 11(C)(2)(a) in case number 05-CR-060. See *State v. Alfarano*, supra, citing *State v. Moviel*, 8th Dist. No. 86244, 2006-Ohio-697, at ¶ 17-23; see also *State v. Fleming*, 6<sup>th</sup> Dist. No. OT-07-024, 2008-Ohio-3844.

{¶35} Moreover, Appellant has not alleged that he would not have entered a guilty plea to the charge, had he known that that his optional term of post-release control was three years. As such, he has failed to demonstrate prejudice in that case.

{¶36} Regarding case number 07-CR-033, however, we find that the trial court failed to comply with Crim. R. 11 because it did not orally advise Appellant at his plea hearing that he would be subject to any post-release control after his release from prison. Pursuant to the Supreme Court's holding in *Sarkozy*, supra, Appellant's plea could not have been knowingly and intelligently given because the trial court failed to advise him at the plea hearing that post-release control would be part of his sentence. Because Appellant established that the trial court failed during the plea colloquy to advise him that the sentence included a term of optional post-release control in case number 07-CR-033, we vacate Appellant's plea in that case and remand the cause to the trial court.

{¶37} Based on the foregoing, we affirm the trial court's decision in part and vacate and remand the decision in part for proceedings not inconsistent with this opinion.

By: Delaney, J.

Hoffman, P.J. and

Edwards, J. concur.

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HON. PATRICIA A. DELANEY

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HON. WILLIAM B. HOFFMAN

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HON. JULIE A. EDWARDS

