

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-132
PATRICK R. SHERMAN	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Richland County Court of Common Pleas, Case No. 09-CR-28

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: August 19, 2010

APPEARANCES:

For Plaintiff-Appellee

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Gwin, P.J.

{¶1} Defendant-appellant Patrick R. Sherman appeals his convictions on one count of having weapons while under disability, with a one-year firearm specification, and possession of crack cocaine, with a forfeiture specification. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On January 7, 2009, appellant was indicted by the Richland County Grand Jury for one count of having weapons while under disability, a felony of the third degree, with a firearm specification; one count of carrying a concealed weapon, a felony of the fourth degree; one count of improper handling of a firearm in a motor vehicle, a felony of the fourth degree; two counts of trafficking in drugs, felonies of the second and third degree, with forfeiture specifications for \$1,255.00 in cash, and two counts of possession of drugs, felonies of the second and fourth degrees, with forfeiture specifications for \$1,255,00 in cash¹.

{¶3} On September 28, 2009, the day his case was scheduled to proceed to trial, appellant entered into a plea agreement with the State of Ohio. Appellant agreed to plead guilty to having weapons while under disability, with a one-year firearm specification, and possession of crack cocaine, with a forfeiture specification for \$1,255.00 in cash. In exchange for appellant's plea, the state agreed to dismiss the remaining counts. The state also agreed to recommend a sentence of eight years for the two counts on which appellant pled guilty, to run concurrent with the sentence that

¹ A Statement of the Facts underlying Appellant's original conviction is unnecessary to our disposition of this appeal. Any facts needed to clarify the issues addressed in Appellant's assignment of error shall be contained therein.

he was already serving. The final term of the agreement was that appellant could apply for judicial release when eligible; however, there were no guarantees or promises regarding whether judicial release would be granted.

{¶4} Prior to accepting appellant's plea, the terms of the plea agreement were set forth on the record by the state and the appellant's attorney. Appellant indicated that he understood those terms, and that he was satisfied by his attorney's representation. The trial court explained appellant's rights pursuant to Crim.R. 11, the maximum penalties for each offense, and the terms of post-release control. Appellant indicated that he understood those rights and penalties, and that he wished to plead guilty under the plea agreement. Based upon its colloquy with appellant, the trial court accepted his plea.

{¶5} After accepting appellant's plea, the trial court proceeded to sentencing. On the having weapons while under disability charge, the trial court sentenced appellant to two years on the underlying charge, and one-year mandatory on the firearm specification. On the possession of crack cocaine charge, the trial court sentenced appellant to five years, two years of which were mandatory. These sentences were run consecutive for a total sentence of eight years, three of which were mandatory. As agreed the eight-year sentence was run concurrent to the sentence appellant was already serving on an unrelated case.

{¶6} On appeal, appellant challenges only the validity of his plea, raising two assignments of error:

{¶17} "I. TRIAL COURT ERRED TO THE DEFENDANT/APPELLANT'S PREJUDICE WHEN IT FOUND HE MADE HIS GUILTY PLEA KNOWINGLY AND VOLUNTARILY.

{¶18} "II. DEFENDANT/APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL TO HIS PREJUDICE."

I.

{¶19} In his first assignment of error, appellant argues that his guilty plea was invalid based on confusion about when he would be eligible for judicial release. Specifically, appellant argues that his pleas of guilty were improperly accepted by the court because the court failed to determine that he understood that he is, in reality, ineligible for judicial release under the agreed upon sentence before it accepted his guilty pleas. We agree.

{¶10} Before accepting appellant's plea at the plea hearing, the trial judge was bound by the requirements of Crim.R. 11(C) (2). Crim.R. 11(C) (2) states:

{¶11} "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:

{¶12} "(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.*

{¶13} "(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶14} "(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself." (Emphasis added).

{¶15} In determining whether the trial court has satisfied its duties under Crim.R. 11 in taking a plea, reviewing courts have distinguished between constitutional and non-constitutional rights. *State v. Clark*, 119 Ohio St.3d 239, 893 N.E.2d 462, 2008-Ohio-3748 at ¶ 32; *State v. Aleshire*, Licking App. No. 2007-CA-1, 2008-Ohio-5688 at ¶ 10. The trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights. *State v. Clark*, 119 Ohio St.3d at 244, 893 N.E.2d at 499, 2008-Ohio-3748 at ¶ 31.

{¶16} In *State v. Clark*, supra, the Ohio Supreme Court set forth the following procedure for a reviewing court, "When the trial judge does not substantially comply with Crim.R. 11 in regard to a non-constitutional 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 post release 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 post release 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. In *Clark*, the Ohio Supreme Court concluded that the right to be informed of the maximum possible penalty and the effect of the plea are subject to the substantial compliance test. 119 Ohio St.3d at 244, 893 N.E.2d at 469, 2008-Ohio-3748 at ¶ 31. (Citations omitted).

{¶17} A defendant's ineligibility for judicial release is not one of the matters regarding which Crim.R. 11(C)(2)(a) requires the court to determine a defendant's understanding concerning the sentence the court may impose when the defendant enters a plea of guilty or no contest. *State v. Byrd*, 178 Ohio App.3d 646, 653, 899 N.E.2d 1033, 1038, 2008-Ohio-5515 at ¶ 28. See also, *State v. Smith*, Muskingum App. No. CT2007-0073, 2008-Ohio-3306 at ¶17. “[T]he trial court need not inform a defendant about his eligibility for judicial release unless it is incorporated into a plea bargain.” *State v. Simmons*, 1st Dist. No. C-050817, 2006-Ohio-5760, ¶ 13, citing *State v. Mitchell*, 11th Dist. No.2004-T-0139, 2006-Ohio-618, and *State v. Cline*, 10th Dist. No. 05AP-869, 2006-Ohio-4782. See, *State v. Gibson*, Mahoning App. No. 07 MA 98, 2008-Ohio-4518 at ¶ 9. There is no constitutional or inherent right to be released before the expiration of a valid sentence. *Greenholtz v. Inmates of Nebraska Penal &*

Correctional Complex (1979), 442 U.S. 1, 7, 97 S.Ct. 2100, 2104, 60 L.Ed.2d 668, 675; *State ex rel. Hogan v. Ghee* (1999), 85 Ohio St.3d 150, 151, 707 N.E.2d 494, 495.

{¶18} In the case at bar, the “Admission of Guilt / Judgment Entry,” filed September 29, 2009 advised appellant that by pleading guilty “I am not eligible for judicial release during the mandatory imprisonment.” At the change of plea hearing, the following exchange occurred:

{¶19} [The Court]: We’ve been informed that the Defendant, his attorney, and the prosecuting attorney have reached an agreement. At this time, the prosecutor can state on the record what the nature of the agreement is.

{¶20} [The Prosecutor]: Your Honor, the nature of the agreement is as follows: The State anticipates the Defendant pleading guilty to Count 1 with a one-year firearm specification and Count 6 with a forfeiture specification of \$1, 255 cash as those counts are contained within the indictment. The State would, upon the Court’s acceptance of those pleas, move to dismiss Counts 2, 3, 4, 5 and 7. The Defendant and the State agree that the Court will impose an eight year prison term on the counts that the guilty plea was accepted to. The State is further agreeing that the eight year prison sentence will go concurrent to his current time beginning on today’s date anticipating that the Court will immediately move to sentencing. And further, that the Defendant may file a motion for judicial release when he is eligible, and that neither the State, the Court, and nobody else involved in the case is going to make any promises as to that motion being granted, but that he may file when eligible.” (T. at 3-4). Appellant’s trial counsel informed the court as follows,

{¶21} [Defense Counsel]: Your Honor ...I've been informed by my client that he is willing to accept the pleas. I have had an opportunity to work back and forth with the State to negotiate this plea. I have not, however, had an opportunity to go over this plea sheet that I'm about to ask my client to sign, but I have explained to him that the agreement is that the State and Defendant would agree that in Counts 1 and 6 he would be sentenced to eight years in prison to run concurrent from today's date with his current sentencing and that he could file a motion for judicial release when he is eligible, but that comes without a promise from the State or the Court that the motion would be granted...."(T. at 4-5).

{¶22} Before accepting appellant's plea of guilty, the trial court proceeded to inform appellant "Defendant may file for judicial release when eligible. No promise of any kind. That the motion will be filled without any promise that it be granted." (T. at 18).

{¶23} Finally, prior to imposing sentence, one of appellant's parents addressed the court:

{¶24} [Unidentified Speaker]: ...I would like if he could come closer [to home] and maybe you could consider judicial release

{¶25} "* * *

{¶26} "[Unidentified Speaker]: About the judicial release, could you just please consider –

{¶27} "[The Court]: Well –

{¶28} "[Unidentified Speaker]: -- when the time comes?

{¶29} "[The Court]: When the time comes, I will give it every consideration." (T. at 20).

{¶30} Finally, the trial court stated, “I’ve indicated that I will consider a motion for judicial release. When filed, I’ll take a look at it and give it every consideration...” (T. at 22).

{¶31} R.C. 2920.20 governs judicial release and provides, in relevant part as follows,

{¶32} “(C) An eligible offender may file a motion for judicial release with the sentencing court within the following applicable periods:

{¶33} “* * *

{¶34} “(3) If the stated prison term is five years or more but not more than ten years, the eligible offender may file the motion not earlier than five years after the eligible offender is delivered to a state correctional institution or, if the prison term includes a mandatory prison term or terms, not earlier than five years after the expiration of all mandatory prison terms.”

{¶35} In the case at bar, appellant’s “stated prison term” for all of the charges to which he pled is eight years, of which three years are mandatory. Accordingly, pursuant to R.C. 2920.20(C)(3) appellant cannot file a motion for judicial release until five years after he has served the three year mandatory sentence. Thus, the statements that appellant can file a motion for judicial release “when eligible” while technically correct, are misleading under the facts of this case.

{¶36} Interestingly, we note that in *State v. Peoples*, 102 Ohio St.3d 460, 2004-Ohio-3923, 812 N.E.2d 963, *Peoples*, the offender, was sentenced to a prison term of exactly five years. *Id.* at 461, 812 N.E.2d 963. The statute governing *Peoples*' eligibility for judicial release was identical to the current version of R.C. 2929.20(C) (3), excerpted

above. *State v. Rizzi*, Auglaize App. No. 2-10-04, 2010-Ohio-2519 at ¶ 15. There, the court held that the former version of R.C. 2929.20(B) (3) violated the Ohio Constitution because offenders sentenced to exactly five years were ineligible for judicial release, while offenders sentenced to five years or more, but less than ten years were eligible after serving five years. Important to the court's analysis was its conclusion that the class of offenders eligible for judicial release after serving five years, i.e., those sentenced to a prison term of five years or more but fewer than ten years, included offenders who had been sentenced to exactly five years. *Id.* at ¶ 6, 812 N.E.2d 963. See, *Silverman v. Lazaroff* (SD OH Aug. 19, 2009), No. 2:07-CV-01233, 2009WL2591676 at n. 5. The court also found significant the fact that the General Assembly withheld judicial-release eligibility from offenders sentenced to exactly five years but granted eligibility to offenders sentenced to longer prison terms within the class. *Id.* at ¶ 8, 812 N.E.2d 963. *Silverman v. Lazaroff*, *supra*. "[T]he legislature *included* prisoners like Peoples serving terms of exactly five years in the category of those eligible for early judicial release, but *excluded* them from ever applying for or receiving early judicial release because the law required them to serve the full five years of incarceration before being able to apply for early judicial release." (Emphasis sic.) *Id.* at ¶ 12, 812 N.E.2d 963. (O'Donnell, J., concurring). *Silverman v. Lazaroff*, *supra*.

{¶37} However, until appellant files a motion for judicial release and the trial court denies it pursuant to R.C. 2929.20(C)(3), appellant has not suffered a concrete injury and lacks standing to challenge the constitutionality of the statute. See *State v. Brinkley*, 5th Dist. No.1999CA00412 (holding that the issue of eligibility for judicial release is not ripe for appeal until appellant applies for judicial release); see also *State*

v. Strausbaugh (1997), 87 Ohio Misc.2d 31, 688 N.E.2d 1149 (noting that the offender sentenced to exactly five years successfully challenged the state statute governing her eligibility for judicial release *only after* she applied for judicial release). (Emphasis Added). *State v. Rizzi* at ¶ 20.

{¶38} Instead, appellant in the case at bar argues that his guilty pleas are void because his trial counsel, the prosecuting attorney, and the trial court misinformed appellant that he would be eligible for judicial release when in fact he is not. Accordingly, he argues that he did not knowingly, intelligently, and voluntarily plead guilty. We conclude that because it appears from the record in this case that the filing of a motion for judicial release was part of the inducement to plead guilty, the trial court was obliged to correctly inform appellant as to if and when appellant would become eligible for judicial release.

{¶39} Appellant's situation resembles that reviewed by the Ohio Supreme Court in *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462. In *Clark*, the Ohio Supreme Court noted that defendants who are sentenced for unclassified felonies are not subject to post release control, pursuant to R.C. 2967.28. Such defendants are either ineligible for parole or become eligible for parole after serving a period of 20, 25, or 30 years in prison. *Id.*, citing R.C. 2929.03(A) (1) and R.C. 2967.13(A).

{¶40} The *Clark* Court further held that, because the defendant who is sentenced to an unclassified felony is not eligible for post release control, the trial court is not required to discuss post release control or parole in the defendant's plea colloquy under Crim.R. 11(C) (2). *State v. Clark*, 119 Ohio St.3d at 246, 893 N.E.2d at 471. The *Clark* Court then noted that, during the plea colloquy, the trial court provided Clark with

an incorrect recitation of the law because it informed him of a "hybrid system that combined the mandatory term of years and the maximum possible sentences associated with post release control with the uncertainty of release associated with parole." The *Clark* Court then reversed and remanded for a determination of whether the defendant was prejudiced by the trial court's misinformation.

{¶41} In the case at bar, the court was not obligated to discuss judicial release. However, if a trial judge, the prosecuting attorney and defense counsel choose to offer a request that an accused be permitted to file a motion for judicial release "when eligible" in a Crim.R. 11 plea colloquy, the information conveyed must be accurate. *State v. Clark* at ¶ 39. Because of the substantial misinformation as to his possible eligibility for judicial release, his plea was not entered knowingly or intelligently and the trial court erred in accepting the plea.

{¶42} Appellant's first assignment of error is sustained.

{¶43} Because appellant's first assignment of error is dispositive, we decline to address appellant's remaining assignment of error. See App.R. 12(A) (1) (c).

{¶44} For the foregoing reasons, the judgment of the Richland County Court of Common Pleas is reversed and this case is remanded to the trial court for further proceedings in accord with the law and consistent with this opinion.

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

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