

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 113445
 v. :
 :
 MATTHEW PONOMARENKO, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 3, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-21-661581-A

Appearances:

Dave Yost, Ohio Attorney General, and Katherine E. Mullin, Senior Assistant Attorney General; Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anna Faraglia, Chad Cleveland, and Anthony Thomas Miranda, Assistant Prosecuting Attorneys, *for appellee*.

Wegman Hessler Valore and Dean M. Valore, *for appellant*.

LISA B. FORBES, J.:

{¶ 1} Matthew Ponomarenko (“Ponomarenko”) appeals his guilty plea to aggravated murder, kidnapping, and endangering children and his accompanying

prison sentence of life with parole eligibility after 45-49 years. After reviewing the facts of the case and pertinent law, we affirm the trial court's decision.

I. Facts and Procedural History

{¶ 2} On March 25, 2021, Ponomarenko beat his five-year-old son to death with a baseball bat.

{¶ 3} On July 27, 2021, Ponomarenko was indicted for two counts of aggravated murder and two counts of endangering children. As indicted, Ponomarenko faced the possibility of the death penalty. Over the course of the next two years, Ponomarenko's "serious mental illness" ("SMI") status and eligibility for the death penalty under R.C. 2929.025 was at issue in various court filings and proceedings.

{¶ 4} On November 9, 2023, Ponomarenko withdrew the issue of his SMI status and pled guilty to aggravated murder in violation of R.C. 2903.01(C), kidnapping in violation of R.C. 2905.01(A)(3), and endangering children in violation of R.C. 2919.22(B)(2). The court sentenced Ponomarenko to an agreed term of life in prison with parole eligibility after 45-49 years. Ponomarenko now appeals, raising two assignments of error for our review:

I. Appellant's plea was not knowingly, voluntarily, and intelligently entered.

II. The trial court committed reversible error prejudicing appellant when it imposed an unconstitutional sentence upon appellant pursuant to the "Reagan-Tokes Law," which is unconstitutional on its face.

II. Plea Hearing

{¶ 5} At the November 9, 2023 plea hearing, the parties stipulated to Ponomarenko’s sanity and competency to stand trial. The State set forth the plea offer on the record as follows: aggravated murder in violation of R.C. 2903.02(C), with a maximum penalty of life in prison without parole; kidnapping in violation of R.C. 2905.01(A)(3), with a maximum penalty of 11 years in prison, subject to the Reagan Tokes Law; and endangering children in violation of R.C. 2919.22(B)(2), with a maximum penalty of eight years in prison. The State explained that the prison terms would be served consecutively. The State requested that the court

impose an agreed upon sentence [of] life with the eligibility of parole after 45 years. And we understand that with regards to [aggravated murder], it would be life imprisonment with parole eligibility after 30 full years, an indefinite prison term on [kidnapping] with a minimum term of eight years. With regards to [child endangering], an indefinite prison term of seven years.

{¶ 6} The State also set forth that, as part of his plea, Ponomarenko “will be waiving defects of notice and service in this [amended] indictment process” and that the remaining count of child endangering would be dismissed. The court clarified that the Reagan Tokes Law portion of the sentence included an “additional possibility” of four more years in prison. The State further explained that, if he was released from prison, Ponomarenko would have to register as a violent offender.

{¶ 7} Defense counsel set forth on the record that they, as a team, worked with Ponomarenko and the State for “two years and three months to be exact,” negotiating the plea and explaining it to Ponomarenko. In their opinion, Ponomarenko would be making the plea knowingly, voluntarily, and intelligently.

Defense counsel further stated that Ponomarenko would withdraw his SMI claim as part of his plea agreement.

{¶ 8} The court asked Ponomarenko if he was on any medication at the time of the plea hearing. He answered, “I’m on medication, but it doesn’t affect any ability to think. . . . I’m all right. I’m good.” The court asked Ponomarenko if he understood that, as part of his plea, his prison sentence would be “without the death penalty specification.” Next, the court explained the constitutional rights Ponomarenko would be giving up by pleading guilty. Ponomarenko responded that he understood.

{¶ 9} The plea colloquy continued:

THE COURT: So if you waive that right to trial and you plead guilty, you are taking responsibility for the actions for which you’re charged. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And you’re waiving any future claim of not being guilty, obviously, to what you plead guilty to. Do you understand?

THE DEFENDANT: Yes, Sir.

{¶ 10} The court asked Ponomarenko several times during the plea hearing, “Do you have any questions about the plea process?” Each time, Ponomarenko replied, “No.” The court explained all three charges to Ponomarenko, including repeating the maximum prison terms and the agreed-upon sentence. Ponomarenko again stated that he understood.

{¶ 11} Ponomarenko pled guilty to all three charges on the record in open court. In accepting the guilty pleas, the court stated as follows:

All right. Seeing no cause not to accept these — I’ve seen no evidence that he isn’t of sound mind, capable of making the plea in court — I accept it. I accept it based on the reports I reviewed from the teams of psychiatrists who from the initial evaluation of competency and sanity through the SMI psychiatrist who, obviously, reaching the same conclusion, that he is capable of — and from my own observations and the observations of counsel, he is capable of making these decisions that he has made.

{¶ 12} After accepting Ponomarenko’s guilty plea, the court explained that if he was released from prison, he would be subject to a minimum of five years of parole for the aggravated murder, two-to-five years of postrelease control for the kidnapping, and one-and-a-half-to-three years of postrelease control for the child endangering. The court further explained that parole and postrelease-control violations could result in an additional prison sentence. The court also noted that in Ponomarenko’s case, postrelease control was “redundant” because his sentence for aggravated murder required him to be placed on parole should he be released from prison.

{¶ 13} The court sentenced Ponomarenko to the agreed-upon prison term of life with parole eligibility after 45-49 years.

III. Law and Analysis

A. Crim.R. 11 Guilty Plea

{¶ 14} Pursuant to Crim.R. 11(C)(2), the trial court

shall not accept a plea of guilty . . . without first addressing the defendant personally . . . and . . .:

(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.

(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.

(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.

{¶ 15} The Ohio Supreme Court summarized appellate review of compliance with Crim.R. 11(C) as follows:

Properly understood, the questions to be answered are simply: (1) has the trial court complied with the relevant provision of the rule? (2) if the court has not complied fully with the rule, is the purported failure of a type that excuses a defendant from the burden of demonstrating prejudice? and (3) if a showing of prejudice is required, has the defendant met that burden?

State v. Dangler, 2020-Ohio-2765, ¶ 17. “If the plea was not made knowingly, intelligently, and voluntarily, enforcement of that plea is unconstitutional.” *Id.* at ¶ 10.

{¶ 16} A defendant demonstrates prejudice in the context of a Crim.R. 11 guilty plea by showing that he or she “would not have entered the plea but for the incomplete explanation.” *Dangler* at ¶ 2. The *Dangler* Court further explained that no demonstration of prejudice is required in two limited circumstances. First, “[w]hen a trial court fails to explain the constitutional rights that a defendant waives by pleading guilty or no contest, we presume that the plea was entered involuntarily

and unknowingly, and no showing of prejudice is required.” *Dangler* at ¶ 14. We note that a defendant’s constitutional rights concerning a guilty plea are found in Crim.R. 11(C)(2)(c) and the nonconstitutional rights are found in Crim.R. 11(C)(2)(a) and (b). Second, “a trial court’s complete failure to comply with a portion of Crim.R. 11(C) eliminates the defendant’s burden to show prejudice.” *Id.* at ¶ 15.

{¶ 17} In Ponomarenko’s first assignment of error, he argues that his plea was not knowingly, voluntarily, and intelligently entered for two reasons. First, the trial court failed to inform him of postrelease control, and second, the court failed to obtain a proper waiver of his “trial rights.”

1. Failure to Advise of Postrelease Control

{¶ 18} Under the first part of this assignment of error, Ponomarenko argues that the “trial court’s first mention of post-release control” occurred after he entered his guilty pleas and this violated Crim.R. 11(C), which requires the trial court to make the appropriate advisements before accepting a defendant’s guilty plea.

{¶ 19} This court has held that postrelease control constitutes “a portion of the maximum penalty involved in an offense for which a prison term is imposed” under Crim.R. 11(C)(2)(a). *State v. Simmons*, 2013-Ohio-5026, ¶ 4 (8th Dist.). As noted, this right is nonconstitutional.

{¶ 20} However, in *State v. Clark*, 2008-Ohio-3748, ¶ 36, the Ohio Supreme Court held that “an individual sentenced for aggravated murder . . . is not subject to postrelease control, because that crime is an unclassified felony to which the

postrelease control statute does not apply.” *See also* R.C. 2929.03 (explaining the range of life imprisonment sentences for aggravated murder). The *Clark* Court further stated that the “trial judge was not required to discuss postrelease control or parole in Clark’s plea colloquy under Crim.R. 11(C)(2), as Clark was not eligible for postrelease control, given his plea to an unclassified felony.” *Id.* at ¶ 38. *See also State v. Wolford*, 2010-Ohio-434, ¶ 26 (8th Dist.) (“Because parole is not certain to occur, trial courts are not required to explain it as part of the maximum possible penalty in a Crim.R. 11 colloquy.”).

{¶ 21} We acknowledge that, in addition to his plea to aggravated murder, Ponomarenko pled guilty to two offenses that are subject to the postrelease-control statute. The court explained postrelease control at Ponomarenko’s plea and sentencing hearing, albeit after he entered his guilty pleas. In *State v. Johnson*, 40 Ohio St.3d 130, 133 (1988), the Ohio Supreme Court concluded that compliance with the portion of Crim.R. 11(C)(2)(a) concerning the “maximum penalty involved” applied “cumulatively to the total of all sentences received for all charges which a criminal defendant may answer in a single proceeding.” The *Johnson* Court found “there was no error by the trial court here because it carried out the specific mandate of Crim.R. 11(C) by stating to the defendant the exact maximum sentence for each of the crimes as provided by law.” *Id.* at 134.

{¶ 22} In applying the three-part *Dangler* test to the case at hand, we find that the court partially complied with the provision of Crim.R. 11(C)(2)(a) concerning maximum penalties. Specifically, prior to accepting Ponomarenko’s

guilty plea, the court explained the maximum potential prison term for each offense but failed to explain postrelease control, which applied to two of the three offenses to which Ponomarenko pled guilty. As stated earlier in this opinion, the maximum penalty is a statutory right, not a constitutional right. Partial compliance with a nonconstitutional right does not eliminate the defendant's requirement of showing prejudice under *Dangler*.

{¶ 23} Upon review, we find that Ponomarenko has not met the burden to show prejudice, i.e., that he would not have pled guilty but for the incomplete explanation under Crim.R. 11(C). By pleading guilty to aggravated murder, Ponomarenko exposed himself to a potential maximum prison sentence of life without parole. This maximum penalty for aggravated murder was addressed in open court at Ponomarenko's plea hearing. Had he received this sentence, he would never have been placed on postrelease control as a practical matter, because he would never have been released from prison.

{¶ 24} Furthermore, at the plea hearing, all parties consented to an agreed prison term of life with eligibility for parole after serving 45-49 years, which is in fact the sentence that the court imposed. Should Ponomarenko be released after serving at least 45-49 years in prison, he will be subject to parole for at least five years. *See* R.C. 2967.19(A) (“[I]n the case of a paroled prisoner whose sentence is life imprisonment, the [adult parole] authority shall not grant a final release earlier than five years after the paroled prisoner is released from the institution on parole.”). After accepting Ponomarenko's guilty plea, the court explained that, upon

his potential release from prison, he would be subject to a maximum of five years of postrelease control on the kidnapping and child endangering charges. Again, as a practical matter, a five-year postrelease-control period would have elapsed by the earliest date that Ponomarenko could possibly be granted final release from parole, should he be released from prison. In other words, as the trial court stated, postrelease control is “redundant” in this case.

{¶ 25} Given the extensive time that the parties spent negotiating this plea agreement — “two years and three months to be exact” — we cannot say that Ponomarenko demonstrated that he would not have entered this guilty plea had the court explained postrelease control, to which he will never be subject. Accordingly, we find that Ponomarenko failed to show prejudice under *Dangler* and we cannot say that his guilty plea was not knowingly, voluntarily, and intelligently entered regarding the issue of postrelease control.

2. Waiver of Trial Rights

{¶ 26} Under the second part of this assignment of error, Ponomarenko initially argues that the trial court “failed to determine [he] understood he was waiving all of his trial rights as required by [Crim.R.] 11(C)(2)(c)” As stated previously in this opinion, Crim.R. 11(C)(2)(c) lists the constitutional rights a defendant waives when pleading guilty, including the right to a jury trial, the right to call witnesses to testify, and the right to require the State to prove his or her guilt beyond a reasonable doubt. However, in Ponomarenko’s appellate brief, he

concedes that, “[b]efore accepting [his] plea, the [trial] court went over his trial rights.”

{¶ 27} The remainder of Ponomarenko’s brief under this assignment of error argues that the court failed to comply with Crim.R. 11(C)(2)(b), which states that, prior to accepting a guilty plea, the trial court must “inform[] the defendant of and determin[e] that the defendant understands the effect of the plea of guilty” Crim.R. 11(B)(1) states that the effect of a guilty plea “is a complete admission of the defendant’s guilt.” The right to be informed of the effect of a guilty plea is a nonconstitutional right. *See State v. Moore*, 2017-Ohio-8483, ¶ 16 (8th Dist.)

{¶ 28} At the plea hearing, the court stated as follows: “[Y]ou are taking responsibility for the actions for which you’re charged[,]” and “[Y]ou’re waiving any future claim of not being guilty” Although the court did not use the precise words “complete admission of guilt,” we note that in *State v. Griggs*, 2004-Ohio-4415, ¶ 19, the Ohio Supreme Court held 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.” The *Griggs* Court also stated that the United States Supreme Court spoke on this issue in *North Carolina v. Alford*, 400 U.S. 25 (1970). “In light of *Alford*’s recognition that a guilty plea typically subsumes an admission of guilt[,] . . . this record demonstrates that Griggs understood that by entering his guilty plea, he admitted to committing voluntary manslaughter and burglary.” *Griggs* at ¶ 19.

See also State v. Kauffman, 2021-Ohio-1584, ¶ 16 (8th Dist.) (“Because appellant did not assert actual innocence at any time during the plea hearing, the trial court’s failure to specifically inform him of the effect of his guilty plea is presumed not to be prejudicial.”).

{¶ 29} This court recently released *State v. Fontanez*, 2024-Ohio-4579, ¶ 14, 20 (8th Dist.), in which the majority determined, pursuant to App.R. 26 and Loc.App.R. 26’s en banc procedure, the following:

[C]ommon sense dictates that Fontanez understood that his guilty plea was an admission of his guilt.

...

We, therefore, find that where a trial court does not explicitly state that a guilty plea constitutes a complete admission of guilty during a Crim.R. 11 colloquy but the court otherwise complies with the rule and the defendant does not assert actual innocence, we may presume that the defendant understood that his guilty plea was a complete admission of guilt.

{¶ 30} Upon review of the record in the case at hand, we find that Ponomarenko did not assert actual innocence. Therefore, he is presumed to understand that by pleading guilty, he is completely admitting his guilt. Our review of the record shows that Ponomarenko did not overcome the presumption against prejudice. When analyzing whether a defendant has demonstrated prejudice in conjunction with a Crim.R. 11 guilty plea, the “test is whether the plea would have otherwise been made.” *State v. Nero*, 56 Ohio St.3d 106, 108 (1990).

{¶ 31} As part of the plea, the State amended the indictment to remove the death penalty as a possible sentence for Ponomarenko. Furthermore,

Ponomarenko’s agreed-upon sentence for aggravated murder was life in prison with parole eligibility after 30 years and the maximum penalty for a noncapital aggravated murder is life in prison with no possibility of parole. Additionally, Ponomarenko was facing two counts of aggravated murder, both with maximum penalties of life in prison. As part of the plea agreement, the State amended the indictment to change one of the aggravated murder charges to a kidnapping charge, which carries a maximum sentence of 11 years in prison. The State also dismissed one of the child-endangering counts. In other words, Ponomarenko “significantly reduced his exposure to prison time by pleading guilty” *State v. Robinson*, 2022-Ohio-82, ¶ 22 (8th Dist.).

{¶ 32} Accordingly, Ponomarenko’s first assignment of error is overruled.

B. Constitutionality of the Reagan Tokes Law

{¶ 33} In his second assignment of error, Ponomarenko argues that the Reagan Tokes Law is unconstitutional because it violates the right to a trial by jury, the separation-of-powers doctrine, and the right to due process. Pursuant to the Ohio Supreme Court’s holding in *State v. Hacker* that the Reagan Tokes Law is constitutional in that, on its face, the statute does not violate the right to a trial by jury, the separation-of-powers doctrine, and the right to due process, Ponomarenko’s second assignment of error is overruled. *State v. Hacker*, 2023-Ohio-2535, ¶ 40.

{¶ 34} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LISA B. FORBES, JUDGE

MICHELLE J. SHEEHAN, P.J., and
EILEEN T. GALLAGHER, J., CONCUR