

IN THE SUPREME COURT OF OHIO

07-0854

State of Ohio,

Plaintiff-Appellee,

vs.

Ricardo E. Jackson,

Defendant-Appellant.

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District.

Court of Appeals
Case No. 06AP-631

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT
RICARDO E. JACKSON

Yeura R. Venters (0014879)
Franklin Count Public Defender

and

Allen V. Adair (0014851) (Counsel of Record)
373 South High Street
Twelfth Floor
Columbus, Ohio 43215
Phone: (614) 719-2061
Fax: (614) 461-6470

Counsel for Appellant Ricardo E. Jackson

Ronald J. O'Brien (0017245)
Franklin County Prosecuting Attorney

and

Laura M. Swisher (0071197)
Assistant Prosecuting Attorney
373 South High Street
13th Floor
Columbus, Ohio 43215
Phone: (614) 462-3555
Fax: (614) 462-6103

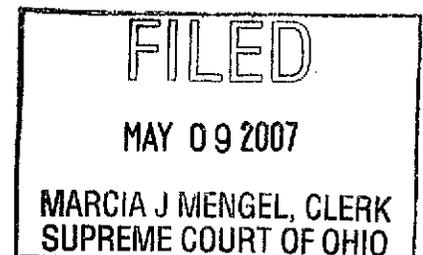


TABLE OF CONTENTS

Explanation Why This Case Involves a Substantial Constitutional Question, and Merits Granting Leave to Appeal in a Felony Case and in a Case of Public or Great General Interest.....	1
Statement of the Case and Facts	2
Argument	
Proposition of Law: A defendant who has been sentenced to a term of imprisonment that does not include post-release control may not be sentenced anew in order to add post-release control unless the state has challenged the failure to include post-release control in a timely direct appeal.	4
I. Inaction.	5
II. The Criminal Rules do not permit motions for reconsideration.	5
III. Addition of post-release control was not a proper subject for a nunc pro tunc entry...	6
IV. Res Judicata.	6
V. Double Jeopardy.	8
Conclusion.	9
Proof of Service	9
Appendix:	
Judgment Entry, Court of Appeals of Ohio, Tenth Appellate District, March 29, 2007	A-1
Opinion, court of Appeals of Ohio, Tenth Appellate District, March 29, 2007	A-2

EXPLANATION WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION, AND MERITS GRANTING LEAVE TO APPEAL IN A FELONY CASE AND IN A CASE OF PUBLIC OR GREAT GENERAL INTEREST.

This court has accepted for review State v. Simpkins, No. 07-0052, which will address the validity of adding post-release control to the sentence of an individual in the same position as appellant in this case. It is asked that the Court accept this case for review as well.

In Hernandez v. Kelly, 108 Ohio St. 3d 395, 2006-Ohio-126 this court granted habeas relief to an inmate who had not had post-release control made a part of his initial sentence, but had nonetheless had it administratively imposed by the Adult Parole Authority. When he was imprisoned for violating of the terms of post-release control he challenged the validity of his confinement. This court held that if post-release control was not properly addressed at the sentencing hearing and in the judgment entry, it could not be imposed or enforced by the Adult Parole Authority once the defendant had completed his prison term, even when post-release control was mandatory.

Citing Kaine v. Marion Prison Warden (2000), 88 Ohio St. 3d 454, and State ex rel Geauga County Board of Commissioners v. Milligan, 100 Ohio St. 3d 366, 2003-Ohio-6608, for the proposition a court of record speaks only through its journal entries, the Court concluded:

...Here, the trial court's sentencing entry specified only Hernandez's seven-year sentence, which he completed in February 2005. Because his only journalized sentence has now expired, habeas corpus is an appropriate remedy. See Morgan v. Ohio Adult Parole Authority (1994), 68 Ohio St. 3d 244, 346, 6262 N.E.2d 939 ("habeas corpus is available where an individual's maximum sentence has expired and he is being held unlawfully."); Heddleston v. Mack (1998), 84 Ohio St. 3d 213, 214. 702 N.E.2d 1198.

Hernandez, ¶30-31.

This led to activity by prosecutors around the state to avoid such consequences by having post-release control added to the sentences of those still in prison and those who had been released. For appellant this meant a return to court for resentencing shortly before the completion of his prison term. The General Assembly has enacted R.C. 2929.191 permitting such corrective measures, but it did not go into effect until July 11, 2006, after the May 5, 2006 hearing which

added post-release control to appellant's sentence, and after appellant's July 2, 2007 release from prison. Though the constitutionality of that statute is yet to be determined, it is not at issue in this case.

STATEMENT OF THE CASE AND FACTS

In 2001 appellant Ricardo Jackson was indicted in Franklin County for two counts of aggravated arson (R.C. 2909.02) and one count of intimidation of a crime victim or witness (R.C. 2921.04.) The case involved fire damage to a wood deck attached to a second floor apartment. Count one alleged appellant's acts created a substantial risk of serious physical harm to any person other than himself. Count two alleged he caused physical harm to a occupied structure. Count three was based on an angry phone call from the jail, picked up by a friend of the person with whom appellant shared the apartment where the arson allegedly occurred.

The case was tried to a jury. Prior to jury selection a nolle prosequi was entered as to count one. Appellant was found guilty of the remaining count of aggravated arson and of intimidation. When the verdict forms were read it was recited that appellant was found guilty of "aggravated arson as he stands charged in the indictment" and of "intimidation of a crime victim or witness as he stands charged in the indictment." The December 19, 2001 judgment entry sets forth that he was found guilty of "Count One," the dismissed count.

At the December 18, 2001 sentencing hearing the court stated the term of imprisonment for each offense and made findings supporting imposition of consecutive sentences. Jail time credit was awarded. As has become relevant in the current appeal, no mention was made of post-release control. Nor did the December 19th judgment entry make any mention of post-release control.

A notice of appeal was filed in an manner deemed untimely by the court of appeals, which was apparently unaware appellant had filed a motion for a new trial. Ultimately a delayed appeal was allowed. Counsel advanced six assignments of error. Appellant, pro se, submitted a supplemental brief advancing twelve assignments of error. None of these addressed the trial court's

failure to make post-release control a part of the sentence.

The court of appeals sustained counsel's assignment of error number two, finding conviction on the intimidation count was not supported by the evidence. The Court also sustained counsel's assignment of error number three insofar as the trial court had erroneously entered conviction on aggravated arson as a first degree felony, though appellant was found guilty only of a second degree felony. State v. Jackson, Franklin App. No. 02AP-867, 2003-Ohio-6183. Efforts to seek further review by this court were unavailing.

On May 23, 2005 the trial court put on a "Modified Judgment Entry with Entry of Acquittal" sentencing appellant to five years on the remaining count. Paragraph two states in part:

The previous judgment entry is further modified to reflect that the defendant was convicted in count one of the indictment of the charge of aggravated arson in violation of R.C. 2920.02(A)(2), which is a felony of the second degree instead of a felony of the first degree as was erroneously entered in the previous judgment entry.

The five-year prison term that was imposed on the conviction for the charge of aggravated arson remains unchanged...

Again, no mention was made of post-release control.

Hernandez v. Kelly was decided by this court on January 12, 2006. In light of the Hernandez, decision the Franklin County Prosecutor filed what was styled as a "Motion for Corrected Judgment Entry and/or Resentencing." The supporting memorandum sought reconsideration of appellant's sentence and the addition of post-release control. A hearing on the motion was conducted on May 26, 2006, as the July 2, 2006 date for appellant's release from prison was imminent.

The parties argued the merits of the prosecutor's motion concerning post-release control. The judge noted he had ruled on a comparable issue in State v. Ramey, published shortly before the hearing at 136 Ohio Misc. 2d 24, 2006-Ohio-885. Counsel for Mr. Jackson argued that if the court was of the view that an illegal sentence could be corrected at any time, appellant was entitled to immediate release as he had been serving time on "count one," the count dismissed prior to the start of the trial. That request was denied. The court indicated that it would "enter the corrected

judgment entry here today," a copy being available for counsel to inspect. Appellant was advised of the consequences in the event he violated the terms of post-release control.

The Tenth District Court of Appeals affirmed in an opinion rendered March 29, 2007. State v. Jackson, Franklin App. No. 06AP-631 and 06AP-668. The opinion also addressed appellant's efforts to obtain postconviction relief, which is not carried forward in appellant's effort to secure further review by this court.

Appellant is before this court asserting the right to further appeal based on the substantial constitutional questions presented. In the alternative he seeks leave to appeal in a felony case and in a case of public or great general interest.

PROPOSITION OF LAW: A defendant who has been sentenced to a term of imprisonment that does not include post-release control may not be sentenced anew in order to add post-release control unless the state has challenged the failure to include post-release control in a timely direct appeal.

The phrasing of the proposed proposition of law is identical to the proposition of law in the memorandum in support of jurisdiction in State v. Simpkins, No. 07-0052.

R.C. 2953.08 allows both defendants and the state to appeal in a timely manner sentences that are contrary to law. But at some point a judgment, even though imperfect, becomes final, conclusively settling the rights of the parties. If the court has jurisdiction over the subject matter and the parties, the prosecution may not treat its judgment as voidable at any time any more than the defense may do so. The state's history of inaction precludes obtaining a modification of the sentence.

The trial court was under a statutory obligation to make post-release control a part of the sentence. See R.C. 2929.19(B)(3) and R.C. 2967.28(B). Though the trial court is required to advise defendants that they are subject to post-release control, and to include it in the sentence, it is the Adult Parole Authority that upon the defendant's release from prison actually imposes post-release control and specifies its conditions. See R.C. 2967.28(D)(1). The requirement that post-release control be made a part of the initial sentence avoided the separation of powers issue that

invalidated administrative imposition of "bad time" for misconduct in prison. Compare State ex rel. Bray v. Russell (2000), 89 Ohio St. 3d 132 and Woods v. Telb (2000), 89 Ohio St. 3d 504.

I. Inaction.

The trial court failed to mention post-release control at the original sentencing hearing in December 2001 or in the corresponding judgment entry, though it was required to make post-release control a part of the sentence imposed at that time. The omission was manifest, but the trial prosecutor did not call it to the attention of the trial court. Nor did the prosecutor take an appeal from the initial judgment of the trial court. Eventually appellant was able to pursue a delayed appeal following confusion over the timeliness of his initial notice of appeal. The prosecutor did not attempt to initiate a cross-appeal in that context. In fact judgement in appellant's case did not become final until the court formally overruled his motion for a new trial on September 29, 2003. Again the prosecutor failed to pursue an appeal. When appellant was resentenced in May 2003 following reversal by the court of appeals, post-release control was again ignored by the trial court. Again the prosecutor failed to appeal. The state having repeatedly waived the issue of post-release control being made a part of the sentence, the issue is settled between the parties, the prior judgment of the trial court had become final, and the sentence was not subject to modification.

II. The Criminal Rules do not permit motions for reconsideration.

The Ohio Rules of Criminal Procedure make no provision for motions for reconsideration Cleveland Heights v. Richardson (1983), 9 Ohio App. 3d 152. Richardson follows Pitts v. Department of Transportation (1981), 67 Ohio St. 2d 378, where paragraph one of the syllabus holds:

The Ohio Rules of Civil Procedure do not prescribe motions for reconsideration after a final judgment in the trial court.

The prosecutor's "Motion for Corrected Judgment Entry and/or Resentencing" read together with the supporting memorandum is plainly a motion for reconsideration in light of the decision in Hernandez v. Kelly, 108 Ohio St. 2d 396, 2006-Ohio-126.

III. Addition of post-release control was not a proper subject for a nunc pro tunc entry.

Adding post-release control in 2006 was beyond the permissible scope of a nunc pro tunc entry:

The purpose of a nunc pro tunc order is to have the judgment of the court reflect its true action. The power to enter a judgment nunc pro tunc is restricted to placing upon the record evidence of judicial action which has actually been taken. * * * It does not extend beyond the power to make the journal entry speak the truth * * *, and can be exercised only to supply omissions in the exercise of functions which are merely clerical * * *. It is not made to show what the court might or should have decided, or intended to decide, but what it actually did decide.

McKay v. McKay (1985), 24 Ohio App. 3d 74, 75. Adopted and followed: State v. Pocius (1995), 104 Ohio App. 3d 18, 21. Here the court took new action and did not merely add to the entry to reflect action already taken.

IV. Res judicata.

The court of common pleas has subject matter jurisdiction over crimes and offenses committed by adults. See Article IV, Section 4(B) of the Ohio Constitution and R.C. 2931.03. The trial court had personal jurisdiction over appellant because the crime alleged in the indictment was committed in Franklin County. The court may have erred in its exercise of this jurisdiction, but the prosecutor's failure to pursue a timely appeal makes the sentence imposed res judicata between the parties, though incomplete in the fulfillment of statutory duties.

The broadest application of res judicata to forestall collateral attack in lieu of appeal has been in the context of postconviction actions pursuant to R.C. 2953.21.

Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment. (State v. Perry [1967], 10 Ohio St. 2d 175...paragraph nine of the syllabus, approved and followed; State v. Westfall [1995], 71 Ohio St. 3d 565...disapproved.)

State v. Szefcyk (1996), 77 Ohio St. 3d 93, syllabus. Also see State v. Perry (1967), 10 Ohio St. 2d 175. In Szefcyk the defendant sought the benefit of a Supreme Court opinion following his

conviction which held a minor misdemeanor traffic offense could not serve as the predicate offense for the charge of involuntary manslaughter. Despite the manifest inequity of remaining imprisoned for a crime that no longer existed, the Court noted:

* * * Our holding today underscores the importance of finality of judgments of conviction. Public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We have stressed that the doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and private peace, which should be cordially regarded and enforced by the courts.

Szefcyk at 95 (internal quotation marks omitted). Also see Federated Department Stores v. Moitie (1981), 452 U.S. 394, 398-399. The rule has been firmly enforced, even when claims are based on a combination of matters of record and beyond the record. The same value placed on finality underlies the Court's rejection of the sentencing package doctrine in State v. Saxon, 109 Ohio St.3d 176, 2006-Ohio-1245.

In Pratts v. Hurley, 102 Ohio St. 3d 81, 2004-Ohio-1980, the defendant pled guilty to capital murder in exchange for the prosecutor's agreement not to seek the death penalty. The defendant waived his right to jury trial and agreed to enter the plea before a single judge instead of a three-judge panel. No direct appeal was filed. But subsequently Pratts sought relief in habeas corpus. The court of appeals found sentencing of Pratts by a single judge was an erroneous exercise of jurisdiction. But it was not subject to collateral attack, and was res judicata between the parties. This court agreed. In the same manner the prosecutor's motion in the present case was a collateral attack on a final judgment that had become res judicata between the parties. The logic set forth in the Court's opinion in Pratts demonstrates appellant's sentence was not open to modification. "There is a distinction between a court that lacks subject matter jurisdiction over a case and a court that improperly exercises that subject matter jurisdiction. Pratts, ¶10. "Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of the case, it can never be waived and may be challenged at any time." Id. at ¶ 11, citing United States v. Cotton (12002), 535

U.S. 625, 630 and State ex rel. Tubbs Jones v. Suster (1998), 84 Ohio St. 3d 70, 75. "Once a tribunal has jurisdiction over both the subject matter of an action and the parties to it, * * * the right to hear and determine it is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred * * *." Id. quoting State ex rel Pizza v. Rayford (1992), 62 Ohio St. 3d 382, 384, in turn quoting Sheldon's Lessee v. Newton (1854), 3 Ohio St. 494, 499.

In Pratts the Court discussed its prior decisions involving jury waiver and waiver of the right to trial before a three judge panel, absent amendment of the indictment to delete death specifications. Relief had been granted on direct appeal that would not have been available in a collateral attack such as habeas corpus or prohibition. Citing the lower court opinion in Pratts, the court stated:

We concur with the conclusion of the appellate court that Parker, Filiaggi, and Pless stand for the following principles: "1) the statutes require strict compliance, 2) that the failure to strictly comply is error in the exercise of jurisdiction, 3) that strict compliance may not voluntarily be waived and is always reversible error on direct appeal, but 4) after direct appeal, any error is, in effect, waived, and cannot be remedied through collateral attack."

102 Ohio St. 3d 81 at ¶32.

V. Double jeopardy.

The Double Jeopardy Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides three separate protections:

...It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

North Carolina v. Pearce (1969), 395 U.S. 711, 717, citing 75 Yale L.J. 262, 265-266. Adding post-release control to a sentence that is final and beyond appeal violates the third of these protections. It also violates the equivalent guarantee under Article I, Section 10 of the Ohio Constitution. State v. Gustafson (1996), 76 Ohio St. 3d 425, 432.

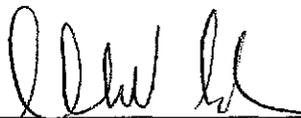
CONCLUSION

For the above stated reasons, further review of this cause is warranted.

Respectfully submitted,

Yeura R. Venters 0014879
Franklin County Public Defender

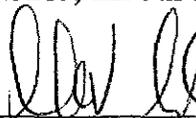
By



Allen V. Adair 0014851
(Counsel of Record)
373 South High Street
12th Floor
Columbus, Ohio 43215
Phone: 614-719-2061
Counsel for Appellant
Ricardo E. Jackson

PROOF OF SERVICE

I hereby certify that a copy of this Memorandum in Support of Jurisdiction was hand delivered to the office of the Franklin County Prosecuting Attorney, Counsel for Appellee, 373 South High Street, 13th Floor, Columbus, Ohio 43215, this 9th day of May, 2007.



Allen V. Adair, Counsel of Record
Counsel for Appellant,
Ricardo E. Jackson

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN COUNTY, OHIO
2007 MAR 29 PM 1:52
CLERK OF COURTS

State of Ohio, :
 : No. 06AP-631 ✓
 : and
 Plaintiff-Appellee, : No. 06AP-668
 : (C.P.C. No. 01CR07-3970)
 v. :
 :
 Ricardo E. Jackson, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on March 29, 2007, appellant's assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

FRENCH, J., SADLER, P.J., and BROWN, J.

By Judith L. French
Judge Judith L. French

ALLEN V. ADAIR
F.C. PUBLIC DEFENDER
373 SOUTH HIGH STREET
12 FLOOR
COLUMBUS, OH 43215

Allen V. Adair, APD

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN COUNTY OHIO
2007 MAR 29 PM 1:44
CLERK OF COURTS

State of Ohio, :
Plaintiff-Appellee, :
v. :
Ricardo E. Jackson, : (REGULAR CALENDAR)
Defendant-Appellant. :

No. 06AP-631
and
No. 06AP-668
(C.P.C. No. 01CR07-3970)

O P I N I O N

Rendered on March 29, 2007

Ron O'Brien, Prosecuting Attorney, and Laura R. Swisher,
for appellee.
Yeura R. Venters, Public Defender, and Allen V. Adair,
for appellant.

APPEALS from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Ricardo E. Jackson ("appellant"), appeals from two judgment entries issued by the Franklin County Court of Common Pleas on May 26, 2006: (1) a corrected judgment entry, which specifically sentenced appellant to three years of post-release control; and (2) a journal entry denying his petition for post-conviction relief. For the following reasons, we affirm.

A-2

ALLEN V. ADAIR
F.C. PUBLIC DEFENDER
373 SOUTH HIGH STREET
12 FLOOR
COLUMBUS, OH 43215

{¶2} By indictment filed July 13, 2001, appellant was charged with two counts of aggravated arson, in violation of R.C. 2909.02(A), and one count of intimidation of a crime victim or witness, in violation of R.C. 2921.04. A jury found appellant guilty of one count of aggravated arson and one count of intimidation. On December 17, 2001, the trial court sentenced appellant to a prison term of five years for each count and ordered those sentences to be served consecutively. A three-year term of post-release control was also mandatory for the aggravated conviction, as a second-degree felony. However, the record reflects no discussion at sentencing concerning post-release control, nor does the trial court's judgment entry refer to or impose a sentence for post-release control.

{¶3} On appeal, in *State v. Jackson*, Franklin App. No. 02AP-867, 2003-Ohio-6183 ("*Jackson I*"), this court affirmed the aggravated arson conviction, but reversed the intimidation conviction. The court also ordered the trial court to correct the portion of the judgment entry that mistakenly identified the aggravated arson conviction as a first-degree felony, rather than a second-degree felony. On remand, in May 2005, the trial court issued a modified judgment entry in accordance with this court's order. This modified judgment entry does not refer to or impose a sentence for post-release control.

{¶4} On April 10, 2006, plaintiff-appellee, State of Ohio ("appellee"), filed a motion for corrected judgment entry and/or resentencing. Appellee filed the motion in response to the decision of the Ohio Supreme Court in *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, in which the court held that the Ohio Adult Parole Authority ("OAPA") had no authority to impose post-release control where a judgment entry did not refer to post-release control.

{¶5} On May 26, 2006, the trial court held a sentencing hearing, during which the court expressly advised appellant that he would be "responsible to the Adult Parole Authority for three years of mandatory Post-Release Control upon [his] release from imprisonment in July" 2006. (May 26, 2006 Tr. at 9.) The court also issued a corrected judgment entry, which expressly sentenced appellant to three years of post-release control.

{¶6} That same date, the court also issued an entry denying, without a hearing, appellant's petition for post-conviction relief, which appellant had filed on July 17, 2002. The court considered appellant's petition following this court's December 2, 2004 remand for findings of fact and conclusions of law concerning appellant's stated grounds for post-conviction relief, see *State v. Jackson*, Franklin App. No. 03AP-1065, 2004-Ohio-6438 ("*Jackson II*"), and failure of service following the trial court's August 12, 2005 denial of appellant's petition.

{¶7} In this appeal, appellant raises the following assignments of error:

[1.] The trial court erred by imposing a term of postrelease control as appellant neared the end of his five-year prison sentence and the time for appeal or cross-appeal from the original conviction had long expired.

[2.] The court's attempt to add postrelease control to appellant's sentence violates the Double Jeopardy Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution.

[3.] The court below erred by not conducting an evidentiary hearing on appellant's petition for postconviction relief.

{¶8} In his first and second assignments of error, appellant argues that the trial court erred by issuing a modified judgment entry that expressly imposed post-release

control upon him. As appellant notes, this is one of many cases reaching this court as a result of similar post-*Hernandez* modifications by trial courts to impose post-release control sentences.

{¶9} R.C. 2929.14(F) and 2967.28(B)(2) require a trial court to impose a mandatory three-year period of post-release control when an offender is sentenced to a prison term for a second-degree felony that is not a felony sex offense. In addition, R.C. 2929.19(B)(3)(c) requires the trial court to notify the offender at the sentencing hearing that he will be subject to OAPA supervision after serving his sentence for a second-degree felony. Pursuant to these statutory requirements, the Ohio Supreme Court held that, "[w]hen sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about postrelease control and is further required to incorporate that notice into its journal entry imposing sentence." *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph one of the syllabus. Given this statutory duty, "any sentence imposed without such notification is contrary to law." *Id.* at ¶23. Where a sentence is contrary to law or void because it does not contain a statutorily mandated term, the proper remedy is resentencing. *Id.*, citing *State v. Beasley* (1984), 14 Ohio St.3d 74.

{¶10} Here, the trial court originally sentenced (and, following this court's remand, resentenced) appellant to a prison term of five years on the aggravated arson charge, a second-degree felony. Thus, the court was required to notify appellant at the sentencing hearing that he was subject to post-release control following his release from prison and to incorporate that notice into its journal entry imposing sentence. ^{A-5} Because the trial court failed to so inform appellant and failed to impose post-release

control in its sentencing entry, pursuant to *Jordan*, the sentence was void and subject to correction via resentencing.

{¶11} Appellant argues, first, that principles of waiver and res judicata bar resentencing. If appellee wanted to modify the sentence, he argues, appellee should have filed an appeal from his original, or even his second, sentencing. However, this court has already addressed, and rejected, such an argument in this context.

{¶12} In *State v. Ramey*, Franklin App. No. 06AP-245, 2006-Ohio-6429, this court addressed the question whether a trial court could modify a judgment entry to impose a mandatory three-year sentence for post-release control upon a defendant/inmate who was scheduled to be released from prison one day after the modification. In finding that the defendant was properly subject to resentencing, the court expressly rejected the defendant's assertions that the state had either waived the error or that res judicata barred appellee from raising it. The court found:

"The function and duty of a court is to apply the law as written." *Beasley*, at 75. As noted in *Colegrove v. Burns* (1964), 175 Ohio St. 437, "[c]rimes are statutory, as are the penalties therefore, and the only sentence which a trial court may impose is that provided for by statute * * *. A court has no power to substitute a different sentence for that provided for by statute or one that is either greater or lesser than that provided for by law." *Id.* at 438. The state's failure to appeal an illegal sentence does affect the trial court's duty to impose sentence according to law. See *State v. Thomas* (1996), 111 Ohio App.3d 510, 512 * * *. When a trial court enters a void judgment, it retains jurisdiction to correct the void entry. *State v. Hinkle*, Allen App. No. 1-02-41, 2002-Ohio-5585 * * *. Moreover, where no statutory authority exists to support a judgment, res judicata does not act to bar a trial court from correcting the error. * * *

Id. at ¶12. We find the *Ramey* court's analysis applicable here, and we similarly reject appellant's claim of res judicata.

{¶13} Appellant also argues that Ohio law does not provide for motions for reconsideration of criminal sentencing. Again, this court addressed this very issue in *Ramey* and concluded: "A trial court's authority to correct a void sentence does not hinge upon how the court became aware of its illegality." *Ramey* at ¶13.

{¶14} Appellant attempts to distinguish *Ramey*, in which it was undisputed that the trial court had verbally advised the defendant, following his guilty plea, that he would be subject to post-release control, but the court did not include post-release control in the judgment entry. In contrast, appellant argues, "[t]his case involved a jury trial and repeated failures to make postrelease control a part of the sentence." We find, however, that any distinction between the facts of this case and those at issue in *Ramey* does not make a difference in our conclusion that the court's prior judgment entries were void. As noted above, "[a] court has no power to substitute a different sentence for that provided for by statute or one that is either greater or lesser than that provided for by law." *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438. Here, the three-year sentence for post-release control was mandatory, and the trial court's failure to advise appellant—either at the sentencing hearing or in the judgment entry, or both—caused the judgments to be void. As such, the trial court had authority to resentence appellant, and we overrule appellant's first assignment of error.

{¶15} In his second assignment of error, appellant asserts that the resentencing subjects him to double jeopardy in violation of the Fifth Amendment to the United States Constitution and Section 10, Article I, of the Ohio Constitution. This court rejected that same argument in *Ramey*, as follows:

* * * In *Beasley*, the court expressly held that the trial court, in correcting a statutorily incorrect sentence, does not violate

a defendant's constitutional guarantee against double jeopardy. *Id.* at 76. In accordance with *Beasley*, this court held that an invalid sentence may be corrected although the defendant began to serve the invalid sentence. [*State v. Bush* (Nov. 30, 1999), Franklin App. No. 99AP-4], citing *State v. Jones* (Mar. 18, 1999), Franklin App. No. 98AP-639. Further, following a review of federal authorities addressing double jeopardy implications in resentencing, the court in *State v. McColloch* (1991), 78 Ohio App.3d 42, * * * the court concluded that a defendant's commencing to serve his sentence does not negate the holding in *Beasley*. *McColloch*, at 44. The court held that "an invalid sentence for which there is no statutory authority is * * * a circumstance under which there can be no expectation of finality" to trigger the protections of the Double Jeopardy Clause. *Id.* at 46.

Ramey at ¶16.

{¶16} Here, the trial court was statutorily required to impose a three-year period of post-release control upon appellant. Neither the original sentencing entry nor the May 2005 resentencing entry included the imposition of post-release control; therefore, they were void. Because jeopardy did not attach to the void sentence, the trial court did not violate appellant's constitutional guarantee against double jeopardy by correcting the sentence. Accordingly, we overrule appellant's second assignment of error.

{¶17} In his third assignment of error, appellant asserts that the court erred by not conducting an evidentiary hearing on appellant's petition for post-conviction relief. In this appeal, only one issue remains for our consideration: whether the trial court should have conducted an evidentiary hearing on appellant's claim that he received ineffective assistance of counsel because his trial counsel did not secure an independent arson investigator and did not obtain a recording of the 911 emergency call made by Sheila Gardner.

{¶18} Appellant's right to post-conviction relief arises from R.C. 2953.21(A)(1), which provides:

Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

{¶19} The post-conviction relief process is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen* (1994), 70 Ohio St.3d 399, 410. It is a means to reach constitutional issues that would otherwise be impossible to reach because the trial court record does not contain evidence supporting those issues. *State v. Murphy* (Dec. 26, 2000), Franklin App. No. 00AP-233. Appellant does not have a constitutional right of post-conviction review. Rather, post-conviction relief is a narrow remedy that affords appellant no rights beyond those granted by statute. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281. A post-conviction petition does not provide appellant a second opportunity to litigate his conviction. *State v. Hessler*, Franklin App. No. 01AP-1011, 2002-Ohio-3321.

{¶20} A petitioner seeking post-conviction relief is not automatically entitled to an evidentiary hearing. *Calhoun* at 282. The trial court "shall determine whether there are substantive grounds for relief" before granting a hearing on a post-conviction petition. R.C. 2953.21(C). Pursuant to R.C. 2953.21(C), a trial court properly denies a post-conviction petition without an evidentiary hearing if the petition, supporting documents,

and court record "do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *Calhoun* at 291.

{¶21} A trial court may also dismiss a petition for post-conviction relief without holding an evidentiary hearing when the doctrine of res judicata bars the claims raised in the petition. *State v. Szefcyk* (1996), 77 Ohio St.3d 93. "Res judicata is applicable in all postconviction relief proceedings." *Id.* at 95. Under the doctrine of res judicata, a defendant who was represented by counsel is barred from raising an issue in a petition for post-conviction relief if the defendant raised or could have raised the issue at trial or on direct appeal. *Id.*, syllabus. *State v. Reynolds* (1997), 79 Ohio St.3d 158, 161. For a defendant to avoid dismissal of the petition by operation of res judicata, the evidence supporting the claims in the petition must be competent, relevant, and material evidence outside the trial court record, and it must not be evidence that existed or was available for use at the time of the trial. *State v. Cole* (1982), 2 Ohio St.3d 112, syllabus; *State v. Lawson* (1995), 103 Ohio App.3d 307, 315.

{¶22} We apply an abuse of discretion standard when reviewing a trial court's decision to deny a post-conviction petition without a hearing. *State v. Campbell*, Franklin App. No. 03AP-147, 2003-Ohio-6305, citing *Calhoun* at 284. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶23} Here, appellant contends that the court abused its discretion as he set forth sufficient operative facts to support his ineffective assistance of counsel claims, thereby warranting an evidentiary hearing. The United States Supreme Court has

established a two-prong test for ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668. First, the defendant must show that counsel's performance was outside the range of professionally competent assistance and, therefore, deficient. *Id.* at 687. Second, the defendant must show that counsel's deficient performance prejudiced the defense and deprived the defendant of a fair trial. *Id.* Moreover, a defendant must overcome a strong presumption that the challenged action constitutes trial strategy. *State v. Carter* (1995), 72 Ohio St.3d 545, 558.

{¶24} Appellant argues, first, that his counsel was ineffective for failing to hire an independent arson investigator. In his petition, appellant asserted that such an investigator "would have been able to take a sample of the burnt deck and have laboratory tests performed to determine whether an accelerant was the cause of the fire." Appellant had made the same assertion during sentencing proceedings before the trial court on December 18, 2001. On that date, his attorney responded:

*** We have consulted with experts. Our experts would help the State more than [appellant], so we chose not to retain them. We contacted fire experts, we read their reports. They have been out to the scene personally, have taken digital pictures of the fire, have provided those to [appellant]. We had those available, as well as we copied all of the photographs.

(Dec. 18, 2001 Tr. at 9.)

{¶25} Appellant countered that he was only aware of one expert who had been contacted. Appellant's counsel appeared to acquiesce in appellant's account of contacts with this individual. (Dec. 18, 2001 Tr. at 10.) We also note that, throughout this case's history, appellant has repeatedly challenged his counsel's alleged contact with an arson investigator.

{¶26} In any event, this court has already addressed this alleged error, as appellant raised it in his initial appeal. See *Jackson I* at ¶76. There, this court concluded that appellant had failed to show that his counsel was ineffective for failing to obtain the testimony of an independent fire investigator. As we noted then, "the failure to call an expert witness and instead rely on cross-examination of the state's expert witness does not constitute ineffective assistance of counsel." *Id.* And, here, "counsel was not able to retain a favorable expert to testify and, instead, chose to rely on cross-examination of the state's expert witness. We cannot say that strategy was unreasonable." *Id.*

{¶27} In this appeal, appellant has presented no competent, relevant, and material evidence outside the trial court record on this issue, nor has he presented evidence that did not exist or was not available for use at the time of the trial. Instead, he presents only his own affidavit, which states, in pertinent part:

2) Prior to the beginning of my trial, I asked my defense attorneys to hire an independent arson investigator. * * *

3) My attorneys did not hire an independent arson investigator to review my case. Had an independent arson investigator been hired, I truthfully believe that the investigator would have concluded that I did not maliciously cause a fire to burn the wooden deck of my home.

{¶28} Appellant's self-serving statements are not material evidence supporting his claim of ineffectiveness on this basis. Therefore, the doctrine of res judicata barred consideration of this claim, and the trial court did not abuse its discretion in finding no operative facts to support an evidentiary hearing.

{¶29} Appellant argues, second, that his counsel was ineffective for failing to obtain a recording of the 911 call made by the victim. Appellant attached to his petition

a document that he purports to be a transcript of that 911 call. The transcript includes a statement by the caller that "he grilled and he started a fire in the place below." Appellant asserts that this statement is inconsistent with the victim's testimony at trial that the deck did not have a hole burned into it when she left to call police. In addition, appellant asserts, the recording would have contradicted the testimony of the state's witness, who testified that the fire was intentionally set and burned in about 30 minutes.

{¶30} The trial court concluded that the transcript is not favorable to appellant, and we agree. The transcript includes the following statements by the caller:

[CALLER]: * * * [H]e is threatening to hit if I can't pay on his _____ [sic], he grilled and he started a fire in the place below. I believe there is a warrant out for his arrest from domestic violence from before.

* * *

[CALLER]: Last weekend he stole my car, and he went into his job on Monday and said he had an alcohol problem or something else.

* * *

[DISPATCHER]: Were any guns or knives involved?

[CALLER]: Um, they are there – he keeps threatening I don't know if there's one actually there or not. He keeps threatening with one.

{¶31} Even assuming this is an accurate transcript of the call, it does not present evidence that the fire was accidental, nor does it present evidence helpful to appellant. While appellant asserts that a recording of the 911 call could have been used to impeach witness testimony, we agree with the trial court that the recording also might have enflamed the jury against appellant. Even without the recording, defense counsel was able to conduct extensive cross-examination. Under these circumstances, we

cannot conclude that appellant was prejudiced by the absence of this evidence at trial. Thus, the trial court did not abuse its discretion in determining that evidence of any failure to obtain a recording of the 911 call did not present operative facts sufficient to support an evidentiary hearing to determine his counsel's competence.

{¶32} Having concluded that the trial court did not err in denying appellant's petition without a hearing, we overrule appellant's third assignment of error.

{¶33} For these reasons, we overrule appellant's first, second, and third assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER, P.J., and BROWN, J., concur.