

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

: Case No.

**07-1203**

Plaintiff-Appellee,

: On appeal from the Stark County  
Court of Appeals, Fifth Appellate

vs.

: District

BRIAN L. BALDERSON,

: Court of Appeals Case No. 2006 CA 0226

Defendant-Appellant.

:

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF  
APPELLANT BRIAN L. BALDERSON**

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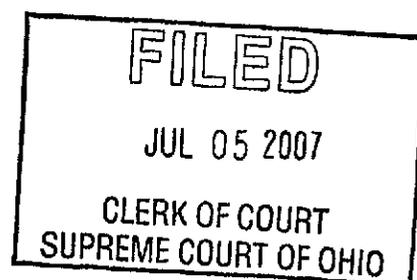
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## STATEMENT OF SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents a question of great general interest and a substantial constitutional question regarding this Court's treatment of the distinction between void and voidable judgments in the context of criminal sentencing. First, this case presents the same issues raised in *State v. Simpkins*, Case No. 2007-0052, which this Court accepted for review on March 28, 2007. As was true in *Simpkins*, Mr. Balderson's sentencing entry contained no reference to postrelease control. Unlike *Simpkins*, the prosecutor in Mr. Balderson's case did not move for resentencing. Rather, the court, acting sua sponte, brought Mr. Balderson back to court nearly seven years after the original sentencing, conducted a hearing, and purported to add a period of postrelease control to Mr. Balderson's sentence. Based upon the identity of the issues asserted and the similarity of the facts, Mr. Balderson respectfully requests the Court to grant review and stay briefing pending the decision in *Simpkins*.

Moreover, this case involves an attack on the continuing validity of *State v. Beasley* (1984), 14 Ohio St.3d 74, 471 N.E.2d 774, that was not asserted in *Simpkins*. The Court should accept this case for review to consider the *Beasley* claim in tandem with *Simpkins*. The analysis in *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, which applied *Beasley*, fails to recognize that the sentencing reforms enacted by 1995 Senate Bill 2, in effect, overruled *Beasley's* holding that an erroneous sentence is void ab initio and may be modified at any time. By enacting Section 2953.08 of the Ohio Revised Code, the General Assembly created an appellate process for correcting erroneous sentences, a process that did not exist when this Court announced *Beasley*. R.C. 2953.08(B)(2) ("a prosecuting attorney . . . may appeal **as a matter of right** a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony . . . on any of the following grounds: . . . (2) The sentence is contrary to law.") (emphasis added).

By creating a process of direct review for sentences that are contrary to law, the General Assembly unambiguously provided that legally erroneous sentences are voidable, not void. *Beasley*, therefore, has been displaced. Although *Beasley*'s holding that illegal sentences are void made sense when there was no legal procedure available for correcting such sentences, the General Assembly eliminated that rationale when it subjected illegal sentences to direct review – going so far as to grant the State the right to appeal illegal sentences. *Id.* What purpose does Section 2953.08 serve if illegal sentences are void? By continuing to apply *Beasley*, this Court has rendered Section 2953.08 superfluous. In addition, the court below disposed of Appellant's vital Double Jeopardy claim by applying *Beasley*. Until this Court repudiates it, *Beasley* will continue to work its pernicious impact on the substantial constitutional rights of criminal defendants in Ohio.

That *Beasley* is an anomaly in the post-Senate Bill 2 era is further borne out by the fact that it is inconsistent with this Court's recent jurisprudence on the distinction between judgments that are void ab initio and judgments that are voidable.<sup>1</sup> In *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, and similar cases, this Court held that violations of Section 2945.06 of the Revised Code render a sentence voidable, but not void ab initio, as *Beasley* would hold. *Pratts* at ¶32. Being voidable, the judgment must be corrected on direct review. The rationale underpinning *Pratts* is diametrically opposed to that supporting *Beasley*. The Court in *Pratts* harkened back to its analysis in *State v. Filiaggi*, 86 Ohio St.3d 230, 1999-Ohio-99, and indicated that the difference between “void ab initio” and “voidable” is whether the court issuing the judgment had personal and subject matter jurisdiction when it rendered the judgment:

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<sup>1</sup> A judgment that is void ab initio may be collaterally challenged; a judgment that is voidable is correctible only on direct review. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶32; *State v. Filiaggi*, 86 Ohio St.3d 230, 240, 1999-Ohio-99.

Where it is apparent from the allegations that the matter alleged is within the class of cases in which a particular court has been empowered to act, jurisdiction is present. Any subsequent error in the proceedings is only error in the 'exercise of jurisdiction,' as distinguished from the want of jurisdiction in the first instance. . . .

In cases where the court has *undoubted jurisdiction of the subject matter, and of the parties*, the action of the trial court, though involving an erroneous exercise of jurisdiction, which might be taken advantage of by direct appeal, or by direct attack, yet the judgment or decree is not void though it might be set aside for the irregular or erroneous exercise of jurisdiction if appealed from. *It may not be called into question collaterally.*

*Filiaggi* at 240, quoting *In the Matter of Waite* (1991), 188 Mich. App. 189, 200, 468 N.W.2d 912, 917 (emphasis supplied by the Court, internal quotation marks omitted).<sup>2</sup>

This rationale entirely undercuts *Beasley*. Where a court has jurisdiction of the parties and of the subject matter, but fails to impose a required term of postrelease control, for example, the judgment is not void (as *Beasley* holds). Rather, the judgment merely involves an error in the exercise of the court's jurisdiction; thus, the judgment is voidable rather than void. The proper remedy is correction on direct review as directed by the General Assembly. See R.C. 2953.08.

It is time for the Court to fully effectuate Section 2953.08 and put *Beasley* to rest. Doing so will promote uniformity in the Court's decisions involving void and voidable judgments. As long as *Beasley* retains vitality, the Court's decisions will continue to be inconsistent. Repudiating *Beasley*, as a relic of a sentencing system that no longer exists, will also serve to protect the vital constitutional bar against imposition of multiple punishments.

This case also involves a substantial constitutional question involving the violation of Mr. Balderson's right to be free from multiple punishments under the Double Jeopardy Clauses of the Ohio and United States Constitutions. Under the well-settled analysis of *United States v. Di-Francesco* (1980), 449 U.S. 117, Mr. Balderson had a legitimate expectation of finality in his sentence when the State failed to appeal the court's error in not imposing a term of postrelease

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<sup>2</sup> Also see *State v. Pless*, 74 Ohio St. 3d 333, 339, 1996-Ohio-102; and *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5485, ¶15.

control. The court's sua sponte imposition of a term of postrelease control, nearly two-and-one-half years later, violated the multiple-punishments prong of the Double Jeopardy bar.

Finally, this case involves the substantial constitutional question whether a court violates due process when it imposes a term of postrelease control by issuing a void nunc pro tunc entry. The trial court attempted to impose a postrelease control term by issuing a nunc pro tunc entry on August 4, 2006, to supply the postrelease control term that was absent from the original sentencing entry. Under well-settled Ohio law, the August 4, 2006, nunc pro tunc entry was void because it worked a substantive change in the original entry. The August 4, 2006 nunc pro tunc entry is unenforceable and should be vacated. Limiting Mr. Balderson's freedom through a void entry violates due process and any notion of fundamental fairness.

#### **STATEMENT OF THE CASE AND FACTS**

This appeal arises from the trial court's attempt to impose a term of postrelease control on Mr. Balderson in the wake of *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126. At the September 22, 1998, plea and sentencing hearing, the court advised Mr. Balderson that he "may have up to 3 years post release control", and that postrelease control was optional in his case. The court did not impose a term of postrelease control when enunciating the sentence at the hearing. The court's September 24, 1998, sentencing entry also failed to even mention postrelease control.

Nearly eight years later, on June 26, 2006, the court sua sponte conducted a hearing on postrelease control. The prosecutor explained that, at the original sentencing hearing, Mr. Balderson "was notified on the record of postrelease control. However that did not make it into the official Judgment Entry. So he is being brought back to notify him again formally of postrelease control so that an entry can be done." 6/26/06 Tr. pp. 3-4. The court then indicated that it originally advised Mr. Balderson erroneously that postrelease control was optional in his case. It then

advised Mr. Balderson that a three-year term of postrelease control was mandatory. Mr. Balderson's counsel objected to the court's modifying the sentence. The court overruled the objection. On June 29, 2006, the court issued a nunc pro tunc entry intended to "modify the entry to reflect postrelease control." 6/26/06 Tr. p. 7. However, the nunc pro tunc entry fails to mention postrelease control.

The court conducted a second postrelease control hearing on June 30, 2006. The court advised the parties that, because the guilty-plea form that Mr. Balderson signed in 1998 indicated that postrelease control would be optional, and because the court advised Mr. Balderson at the plea and sentencing hearing that postrelease control would be optional, the court "is going to reaffirm what was said at the time of sentencing . . . ." 6/30/06 Tr. p. 3. The court again gave Mr. Balderson the erroneous advice that postrelease control was optional in his case. Again, defense counsel's objection was overruled. The court stated, "there is no change in the original sentencing, this is exactly what the original sentencing was, it's reflected in the transcript of the proceedings." *Id.* at 5. Notwithstanding these assertions, the court did **not** impose a term of postrelease control in the original sentencing entry or at the September 22, 1998, sentencing hearing.

On August 4, 2006, the court issued two orders. The first entry indicated that the court advised Mr. Balderson at the June 30, 2006, hearing that he was subject to an optional postrelease control term of up to three years, and directed the prosecutor to prepare an appropriate nunc pro tunc entry. The entry also required Mr. Balderson "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." 8/4/06 Order, 1-2. The court's second entry was a nunc pro tunc entry that modified the original sentence to include a requirement that Mr. Balderson serve as part of his sentence any term of postrelease control imposed by the Parole Board.

That is, the court added a term of postrelease control after Mr. Balderson had served eight years and two months of his 8½-year sentence.

## ARGUMENT

### FIRST PROPOSITION OF LAW

**Imposing a term of postrelease control, at a hearing conducted sua sponte after the State had forfeited its right to appeal and after the defendant had served all but four months of his eight-and-one-half-year sentence, violates the defendant's rights under the Double Jeopardy Clauses of the Ohio and United States Constitutions.**

When the court, on its own motion, issued the August 4, 2006 entries imposing a term of postrelease control, it violated Mr. Balderson's rights under the Double Jeopardy Clauses of the Ohio and United States Constitutions. The court imposed a term of postrelease control that was not imposed in the original sentence (which was silent as to postrelease control). This constitutes a multiple punishment for Double Jeopardy purposes.

Adding a new postrelease control term to a sentence constitutes a multiple punishment. Under Ohio law, a term of postrelease control is part of a defendant's sentence. *Woods v. Telb*, 89 Ohio St.3d 504, 512, 2000-Ohio-171. Therefore, when imposing a term of postrelease control, a court imposes a sentence. Thus, the May 6, 2006 POSTRELEASE CONTROL entry imposed a sentence, and one that the court omitted from its original sentence. The court imposed this punishment long after the expiration of the time for the State to appeal the original sentence, and well after the sentence had been executed. Mr. Balderson had served nearly seven years of his sentence by May 6, 2006.

A defendant has no reasonable expectation of finality in a sentence that is subject to an appeal by the prosecution. *United States v. DiFrancesco* (1980), 449 U.S. 117, 139; *United States v. Arrellano-Rios* (9th Cir. 1986), 799 F.2d 520, 523 ("The defendant in *DiFrancesco* had no expectation of finality because Congress had specifically provided that his sentence was subject to

appeal by either the defendant or the government.”). In sum, under *DiFrancesco*, “unless the statute specifically provides for sentence modification . . . or the defendant knowingly engages in deception, a sentence may not be altered in a manner prejudicial to the defendant after he has started serving the sentence.” *United States v. Jones* (11th Cir. 1983), 722 F.2d 632, 638-39 (footnote omitted). Ohio law provides that the State can appeal a sentence as a matter of right where, among other things, the “sentence is contrary to law.” R.C. 2953.08(B)(2). Thus, Mr. Balderson had no reasonable expectation of finality so long as the State had the right to appeal his sentence.

However, the State elected not to appeal the postrelease control aspect of Mr. Balderson’s original sentence. After the time for appealing the original sentencing entry had expired, Mr. Balderson’s expectation of finality has been both reasonable and legitimate. The *DiFrancesco* Court stated that a defendant “has no expectation of finality in his sentence *until the appeal is concluded or the time to appeal has expired.*” *DiFrancesco*, 449 U.S. at 136. (emphasis added). A primary purpose of the Double Jeopardy Clause is to protect this interest in finality. *Crist v. Bretz* (1978), 437 U.S. 28, 33.

Because R.C. 2953.08 gives the State the right to appeal a sentence that is contrary to law, Mr. Balderson did not initially have a reasonable expectation of finality in the sentence. Thus, the State had the opportunity to challenge the court’s failure to impose the required five-year term of postrelease control in its August 25, 1999 entry; however, the prosecutor elected not to appeal. As a result, the sentence became final in 1999. At that time, Mr. Balderson reasonably and legitimately expected that his sentence was final, since the State had renounced the only legally sanctioned manner of challenging the legality of the sentence. The double jeopardy bar, as demonstrated above, protects this reasonable expectation of finality. Therefore, the trial court was barred from imposing an additional sentence in 2006.

*DiFrancesco*'s protection of a defendant's legitimate expectation of finality makes no exception for illegal sentences. The fact that Mr. Balderson's sentence was illegal (because it omitted a term of postrelease control) does not shield a resentencing from double jeopardy review. Thus, the Ohio courts' reliance on *State v. Beasley* (1984), 14 Ohio St.3d 74, 471 N.E.2d 774, is misplaced. Ohio law provides for direct review of illegal sentences; R.C. 2953.08(B)(2) specifically authorized the State to appeal Mr. Balderson's illegal sentence. The State's failure to appeal the error gave rise to a legitimate expectation of finality in the original sentence, whether the sentence was legal or not.

Furthermore, under due process principles, a defendant's interest in finality increases as the defendant approaches the end of his or her sentence. See *United States v. Lundien* (4th Cir. 1985), 769 F.2d 981, 987 (due process may be violated "when a sentence is enhanced after the defendant has served so much of his sentence that his expectations as to its finality have crystallized and it would be fundamentally unfair to defeat them."); See, also, *Breest v. Helgemore* (1st Cir. 1978), 579 F.2d 95, 101. The First Circuit indicated that the due process analysis requires "that attention must be given--our list is not exclusive--to the lapse of time between the mistake and the attempted increase in sentence, to whether or not the defendant contributed to the mistake and the reasonableness of his intervening expectations, to the prejudice worked by a later change, and to the diligence exercised by the state in seeking the change." *DeWitt v. Ventetoulo* (1st Cir. 1996), 6 F.3d 32, 35. Applying those factors here demonstrates that the imposition of postrelease control four months before the expiration of Mr. Balderson's 8-1/2 year sentence violated due process.

Therefore, Mr. Balderson respectfully requests the Court to grant review and vindicate his rights to due process and to be free from multiple punishments under the Due Process and Double Jeopardy Clauses of the Ohio and United States Constitutions.

## SECOND PROPOSITION OF LAW

**A nunc pro tunc entry that imposes a term of postrelease control that was not included in the original sentencing entry is void, because it improperly works a substantive change in the original entry; therefore, it violates the defendant's rights to due process and a fair proceeding under the Due Process Clauses of the Ohio and United States Constitutions.**

The trial court had no authority to impose a term of postrelease control through the June 29 and August 4, 2006, nunc pro tunc entries.<sup>3</sup> A court may not use a nunc pro tunc entry to correct a substantive error in a previous judgment. Although courts have the inherent authority to correct errors in entries, a “nunc pro tunc entry is inappropriate when it reflects a substantive change in the judgment.” *State ex rel. Litty v. Leskovyansky* (1996), 77 Ohio St.3d 97, 100, 1996-Ohio-340. A nunc pro tunc judgment may not be used to indicate “what the court might or should have decided or what the court intended to decide.” *Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 656 N.E.2d 1288. For example, in *Ohio Dept. of Commerce v. NCM Plumbing Corp.*, Summit App. No. 21878, 2004-Ohio-4322, the trial court issued a nunc pro tunc entry that reinstated a previously dismissed cross-claim, and it did so five months after the time for appealing the dismissal expired. *NCM Plumbing*, 2004-Ohio-4322, at ¶13, 15. The court of appeals vacated the entry as invalid, because “the trial court attempted to alter a matter that was previously decided by it, and was journalized after the appeal time from the [previous] order had expired . . . .” *Id.* at ¶7. That is precisely what the trial court attempted in Mr. Balderson's case.

Moreover, a nunc pro tunc entry that does more than reflect what was actually decided by the court is void and must be vacated. In *Bayes v. Toledo Edison Co.*, Lucas App. Nos. L-03-1177 and L-03-1194, 2004-Ohio-5752, the trial court “improperly issued a void nunc pro tunc judgment,” since the judgment did more than correct a clerical mistake by the court. *Bayes*,

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<sup>3</sup> Although the court issued the June 29, 2006, entry in an effort to correct the failure to include a term of postrelease control in the original sentencing entry, the June 29, 2006, entry actually contains no language regarding postrelease control. However, the August 4, 2006, nunc pro tunc entry (which did impose a postrelease control term) was intended to modify the June 29, 2006, entry. So both nunc pro tunc entries are the subject of this claim.

2004-Ohio-5752, at ¶94. Such a nunc pro tunc entry is void, because the trial court “lack[s] authority to enter a nunc pro tunc order that fails to reflect what the court had previously actually decided.” *Litty*, 77 Ohio St.3d at 100; *NCM Plumbing*, 2004-Ohio-4322, at ¶18 (“When a court exceeds its power in entering a nunc pro tunc order, such an order is invalid.”), citing *National Life Ins. Co. v. Kohn* (1937), 133 Ohio St. 111, 11 N.E.2d 1020, paragraph three of the syllabus. It is also well settled that a court may only enter a nunc pro tunc order where the evidence “shows ‘clearly and convincingly’ that such former action was in fact taken.” *NCM Plumbing*, 2004-Ohio-4322, ¶19, citing *Jacks v. Adamson* (1897), 56 Ohio St. 397, 47 N.E. 48, syllabus. The remedy is to vacate the improper nunc pro tunc entry. *NCM Plumbing*, 2004-Ohio-4322, ¶23.

The original sentencing entry in Mr. Balderson's case was void of any reference to postrelease control. 9/24/98 Entry. Likewise, the court did not impose a term of postrelease control as part of the sentence enunciated at the sentencing hearing. *Id.* at pp. 22-23. Nowhere in the sentencing portion of that hearing did the court mention a term of postrelease control. This record fails to demonstrate “clearly and convincingly” that a term of postrelease control was included in the original sentence. Instead, the record clearly and convincingly refutes the court’s statement at the June 30, 2006, hearing that “there is no change in the original sentencing, this is exactly what the original sentencing was, it’s reflected in the transcript of the proceedings.” 6/30/06 Tr. p. 5.

The August 4, 2006, nunc pro tunc entry imposed a term of postrelease control upon Mr. Balderson which was not part of the original sentence. Thus, the entry did more than correct a mere clerical error; it modified the substance of Mr. Balderson's sentence. The entry subjects him to three years of supervision on postrelease control that the original sentence did not authorize. Therefore, the entry is void. The only remedy is for this Court to vacate the entry.

**CONCLUSION**

For the foregoing reasons, Mr. Balderson requests this Court to grant jurisdiction and reverse the decision of the court of appeals. In the alternative, Mr. Balderson requests the Court to grant review and hold his case pending this Court's decision in *State v. Simpkins*, Case No. 2007-0052.

Respectfully submitted,

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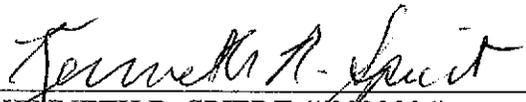
  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant Brian L. Balderson was sent by regular U.S. Mail, postage prepaid, this fifth day of July, 2007, to Ronald Mark Caldwell, Assistant Stark County Prosecutor, 110 Central Plaza, South, Suite 510, Canton, Ohio 44702-1413.

  
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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No.
Plaintiff-Appellee,	:	On appeal from the Stark County
vs.	:	Court of Appeals, Fifth Appellate
	:	District
BRIAN L. BALDERSON,	:	Court of Appeals Case No. 2006 CA 0226
Defendant-Appellant.	:	

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**APPENDIX TO MEMORANDUM IN SUPPORT  
OF JURISDICTION OF APPELLANT BRIAN L. BALDERSON**

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COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

BRIAN L. BALDERSON

Defendant-Appellant

JUDGES:

John W. Wise, P.J.

Julie A. Edwards, J.

Patricia A. Delaney, J.

Case No. 2006-CA-00226

OPINION

CHARACTER OF PROCEEDING:

Criminal Appeal From Stark County Court  
Of Common Pleas Case No. 1998 CR 0838

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

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*Edwards, J.*

{¶1} Defendant-appellant Brian Balderson appeals from the June 29, 2006, "Change of Plea and Sentence Nunc Pro Tunc (as of 9/24/98)", the August 4, 2006, Order and the August 4, 2006, "Change of Plea and Sentence Nunc Pro Tunc (as of 9/24/98)" issued by the Stark County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

{¶2} On August 21, 1998, the Stark County Grand Jury indicted appellant on one count of aggravated vehicular homicide in violation of R.C. 2903.06, a felony of the third degree, with a specification of being under the influence of alcohol, one count of driving while intoxicated in violation of R.C. 4511.19(A)(1) a felony of the fourth degree, one count of failure to comply with order or signal of police officer in violation of R.C. 2921.331, a felony of the fourth degree, one count of receiving stolen property in violation of R.C. 2913.51, a felony of the fourth degree, and one count of driving under suspension in violation of R.C. 4507.02, a misdemeanor. At his arraignment on August 28, 1998, appellant entered a plea of not guilty to charges contained in the indictment.

{¶3} Subsequently, on September 22, 1998, appellant withdrew his former plea of not guilty and entered a plea of guilty to all of the charges contained in the indictment. At the sentencing hearing on the same date, the trial court sentenced appellant to an aggregate prison term of 8 1/2 years. At the hearing, the trial court stated on the record, in relevant part, as follows:

{¶4} "After prison release you may have up to 3 years post release control. The period of post release control is optional in this case. For violations the Parole Board may impose more restrictive or longer parole sanction including a 9 month prison

term for each violation up to a maximum of 50 percent of the prison term stated at sentencing.” Transcript of September 22, 1998 hearing at 15.

{¶5} Appellant's sentence was memorialized in a Judgment Entry filed September 24, 1998. No mention of post-release control was made in such entry.

{¶6} Subsequently, in response to the Ohio Supreme Court's decision in *Hernandez v. Kelley*, 108 Ohio St.3d 395, 844 N.E.2d 301, 2006-Ohio-126, the trial court set a status hearing for June 26, 2006, to “re-advise” appellant of his post-release control obligations. At the hearing, at which appellant was present, the trial court stated on the record, in relevant part, as follows:

{¶7} “The Court did indicate to you at the time of sentencing that you would be subject to post-release control, although the record will reflect that the Court indicated that it was optional. However, out of an abundance of caution, and given the nature of the offenses, the Court is going to again indicate to you that after prison release, you will have a three year period of post-release control. The period of post-release control is mandatory in this case.” Transcript of June 26, 2006 hearing at 5.

{¶8} In its June 28, 2006, Judgment Entry, the trial court stated, in pertinent part, as follows:

{¶9} “The Court finds that on September 22, 1998, as reflected by the transcript of proceedings and the plea form, that Defendant was previously advised of his post release control obligations.

{¶10} “Whereupon in open court, the Court re-advise the Defendant of his post release control obligations as had been done on the date of his plea.

{¶11} "Whereupon, the Court advised the Defendant that post release control is optional in this case up to a maximum of three (3) years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code Section 2967.28. The 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."

{¶12} On June 29, 2006, the trial court filed a "Change of Plea and Sentence Nunc Pro Tunc (as of 9/24/98)." Such entry did not include any reference to post-release control.

{¶13} Thereafter, on June 30, 2006, the trial court held another hearing to address whether post-release control was optional or mandatory in appellant's case. At such hearing, the trial court stated, in relevant part, as follows on the record:

{¶14} "THE COURT: Yes. Attorney Bible, Mr. Balderson, the Court has had another opportunity to review and consider this matter. And upon looking at the plea form, the plea form did indicate an optional three-year period of post-release control, as did the original sentencing transcript.

{¶15} "And so the Court is going to reaffirm what was said at the time of sentencing and also indicated at the time of the plea and written in the plea form, and the Court will reaffirm that the community control in this case - - I'm sorry, that the post-release control, after your release from prison, Mr. Balderson, is an optional three-year period of post-release control. That would be up to a maximum of three years." Transcript of June 30, 2006 hearing at 3-4.

{¶16} Pursuant to a Judgment Entry filed on August 4, 2006, the trial court vacated the Judgment Entries of June 28, 2006, and June 29, 2006, "as they do not accurately reflect the proceedings and were filed in error."

{¶17} On August 4, 2006, the trial court also filed a "Change of Plea and Sentence Nunc Pro Tunc (as of 9/24/98)." Such entry stated that the trial court had advised appellant that post-release control was optional up to a maximum of three years and ordered appellant to serve any term of post-release control imposed by the Parole Board,

{¶18} In a separate order filed on the same day, the trial court stated that it had notified appellant of his post-release control obligations.

{¶19} Appellant now raises the following assignments of error on appeal:

{¶20} "I. A TRIAL COURT HAS NO AUTHORITY TO CONDUCT A SUA SPONTE, AFTER-THE-FACT RESENTENCING HEARING FOR THE PURPOSE OF IMPOSING A TERM OF POST-RELEASE CONTROL AS PART OF THE DEFENDANT'S SENTENCE. IN CONDUCTING THE AFTER-THE-FACT RESENTENCING HEARING, THE COURT VIOLATED APPELLANT'S RIGHT UNDER THE DUE PROCESS, DOUBLE JEOPARDY, AND EX POST FACTO CLAUSES OF THE OHIO AND UNITED STATES CONSTITUTIONS.

{¶21} "II. THE TRIAL COURT'S JUNE 29 AND AUGUST 4, 2006, NUNC PRO TUNC ENTRIES ARE VOID, AS THEY ATTEMPTED TO CORRECT A SUBSTANTIVE ERROR IN THE ORIGINAL SENTENCING ENTRY. THE AUGUST 4, 2006, NUNC PRO TUNC ENTRY WAS PREJUDICIAL AND VIOLATED MR. BALDERSON'S RIGHTS TO DUE PROCESS UNDER THE OHIO AND UNITED STATES

CONSTITUTIONS BECAUSE IT IMPOSED A TERM OF POST-RELEASE CONTROL THAT WAS NOT INCLUDED IN THE ORIGINAL SENTENCING ENTRY.”

I

{¶22} Appellant, in his first assignment of error, challenges the trial court's after the fact resentencing hearing as violative of his due process rights, protection against double jeopardy, and protection against ex-post facto laws under the Ohio and United States Constitutions.

{¶23} For the reasons set forth in this Court's decision in *State v. Rich*, Stark App. No.2006CA00171, 2007-Ohio-362, we overrule appellant's due process, ex-post facto and double jeopardy arguments. See, also, *State v. Roberson*, Stark App. No 2006CA00155, 2007-Ohio-643.

{¶24} Appellant further argues because the state could have, but elected not to, appeal the trial court's failure to provide the requisite post-release control notice in the original sentencing entry, the doctrines of res judicata and collateral estoppel bar relief through a resentencing hearing. We disagree.

{¶25} The Ohio Supreme Court, in *State ex rel Cruzado v. Zaleski*, 111 Ohio St.3d 353, 856 N.E.2d 263, 2006-Ohio-5795, discussed two exceptions to the general rule that a trial court lacks authority to reconsider its own valid final judgments in criminal cases. The *Cruzado* court explained that a trial court is authorized to correct a void sentence. Additionally, a trial court can correct clerical errors in judgment. We find the trial court's action in the case sub judice corrected a void sentence.

{¶26} In the September 24, 1998, Sentencing Entry, the trial court failed to notify appellant of his post-release control term, which is required by

R.C. 2967.28(B) whether the post-release control is mandatory or, as here, optional *State v. Phillips*, Logan App. No. 8-06-14, 2007-Ohio-686 at paragraph 23. Citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 471 N.E.2d 774, the *Cruzado* Court stated that, "Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." *Id* at paragraph 20. The Supreme Court explained that the proper remedy for correcting a sentence which is void because it does not contain a statutorily mandated term is to resentence the offender.

{¶27} Although, at the original sentencing hearing, in September of 1998, the trial court notified appellant of post-release control, the trial court failed to include such notification in the sentencing entry as required by R.C. 2967.28(B). The court's September 24, 1998, Judgment Entry was, therefore, void. Prior to the completion of appellant's sentence, the trial court returned appellant to the court for resentencing. Under *Cruzado*, because appellant's sentence was void, the trial court was authorized to correct the sentence to include the appropriate, post-release control language. See also *State v. Broyles*, Stark App. No. 2006CA00170, 2007-Ohio-487.

{¶28} Appellant's first assignment of error is, therefore, overruled.

## II

{¶29} Appellant, in his second assignment of error, argues that the trial court's June 29, 2006, and August 4, 2006, Nunc Pro Tunc Judgment Entries are void because they attempted to correct a substantive error in the original sentencing entry.

{¶30} With respect to the trial court's June 29, 2006, Judgment Entry, we note that the trial court vacated the same pursuant to a Judgment Entry filed on August 4, 2006.

{¶31} Moreover, we concur with appellee that the trial court has inherent authority to correct clerical mistakes in its entries to reflect what occurred at the original sentencing. See Crim. R. 36. In the case sub judice, appellant was advised on the record at the September 22, 1998 sentencing hearing of post-release control, although the trial court's September 24, 1998 entry did not reflect that appellant was notified of the same. The August 4, 2006, Nunc Pro Tunc Judgment Entry corrected the court's earlier entry to reflect this.

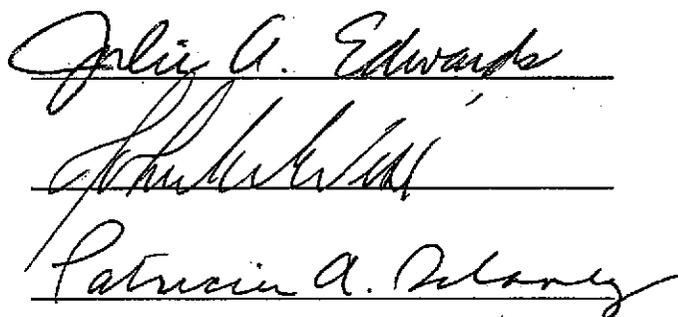
{¶32} Appellant's second assignment of error is, therefore, overruled.

{¶33} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, J.

Wise, P.J. and

Delaney, J. concur



JUDGES

JAE/0223

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED  
CLERK OF COURT OF APPEALS  
STARK COUNTY, OHIO  
OCT 21 1 PM 2:53

STATE OF OHIO

Plaintiff-Appellee

-vs-

BRIAN L. BALDERSON

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2006-CA-00226

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellant.

*Jolie G. Edwards*

*[Signature]*

*Patricia A. Delany*

JUDGES

**Attachment not scanned**