

NO. **08-1255**

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 90042

STATE OF OHIO,

Plaintiff-Appellee

-vs-

JASON SINGLETON,

Defendant-Appellant

MEMORANDUM IN SUPPORT OF JURISDICTION

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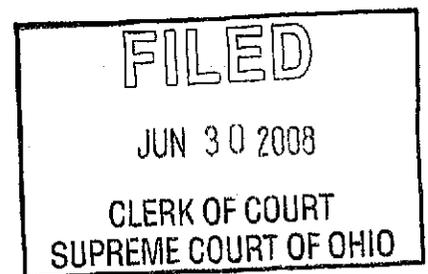


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State v. Singleton, Cuyahoga App. No. 90042, 2008-Ohio-2351

**EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST**

In this matter, the appellate court ordered the trial court to conduct a complete resentencing, despite the clear dictate of R.C. 2929.191 that provides a mechanism by which error in the imposition of the sanction of postrelease control may be corrected. This error is compounded by the court's reasoning that *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250 requires this holding; however, this case was decided upon a case prior to the effective date of R.C. 2929.191. As this statute is now in force and applicable to Appellee Jason Singleton, the trial court should be ordered only to correct the postrelease control sanction as Appellee did not complain of any other error in his sentence

The State asks that this court review and modify the appellate opinion in this matter to order the sentencing court to apply R.C. 2929.191 and give full force and effect to intent that provides a method to correct error where only the sanction of postrelease control was imposed in error and to determine R.C. 2929.191 provides a means to correct those sentences where the sentencing court did not properly impose the sanction of postrelease control. This case raises an important legal question that remains unclear: which branch of government crafts Ohio's felony sentencing procedures?

The Eighth District, as well as the First, Tenth Districts, and Eleventh Districts,¹ have used *Bezak, supra*, to reverse judges that followed R.C. 2929.191 because trial courts failed to hold *de novo* hearings, a process not required by statute. In this matter, the appellate court reversed Appellee's sentence and has ordered the court to conduct a sentencing *de novo*.

¹ In addition to the Eighth District's opinion in this case, the courts in *State v. Bond*, Hamilton App. No. C-060611, 2007-Ohio-4194, *State v. Bock*, Franklin App. No. 07AP-119, 2007-Ohio-6276, and *State v. Bruner*, Ashtabula App. No. 2007-A-0012, 2007-Ohio-4767, required full *de novo* resentencing hearings rather apply R.C. 2929.121.

This Honorable Court has explained that “[t]he General Assembly has the authority to enact laws defining criminal conduct and to prescribe its punishment* * *.” *State v. Thompkins* (1996), 75 Ohio St.3d 558, 560, 664 N.E.2d 926. Likewise, “[i]n the absence of a constitutional concern * * * the judiciary’s function is to interpret the law as written by the General Assembly.” *Beagle v. Walden* (1997), 78 Ohio St.3d 59, 62, 676 N.E.2d 506. *Bezak, supra*, and its predecessors *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085 and *State v. Beasley* (1984), 14 Ohio St.3d 74, 471 N.E.2d 774, each held that a sentence that lacked a statutorily required component was void. In the absence of any specific statute specifying a resentencing procedure, a *de novo* resentencing was a logical common law result. Now, R.C. 2929.191 provides a procedure to remedy a sentence that lacks post-release control. It should be the responsibility of the legislature, not the judiciary, to define what constitutes a sentence and under what circumstance a sentence may be corrected. By using decisional law that interprets former statutes, several Ohio appellate courts have effectively abrogated the General Assembly’s legislative role to define the felony sentencing process. Further, these courts have provided a means that vacates sanctions within a sentence not found to be in error.

This problem is of great public interest because serious offenders such as Appellee with felony convictions should not be allowed to escape the sanctions imposed. This process further erodes the stability and finality of the criminal justice system as well. In this case, Singleton pleaded guilty to felonious assault and rape in 2000, eight years ago. Following the Eighth District’s opinion in this case, Singleton now will have the opportunity to litigate the sanctions imposed in 2000, that were not found to be in error. R.C. 2929.191 fulfills the General Assembly intent that offenders like Singleton receive the post-release control that Ohio Law requires and

Ohio Courts should enforce the General Assembly's plain intent and should not vacate a lawfully imposed (pursuant to R.C. 2929.191) post-release control term.

STATEMENT OF THE CASE AND FACTS

On November 13, 2000, Appellee Jason Singleton pleaded guilty to felonious assault and rape and was thereafter sentenced to serve an aggregate prison term of ten years. On October 25, 2006, Singleton filed a motion to vacate his plea. The trial court denied the motion. On appeal, the Eighth District Court of Appeals affirmed the trial court's denial of the motion to vacate plea but found the sentence to be void due to error in the imposition of the sanction of postrelease control. The appellate court ordered that the resentencing in this matter be done in full, vacating sanctions not in error, despite R.C. 2929.191 that provides for resentencing the offender to impose only the postrelease control sanction.

LAW AND ARGUMENT

PROPOSITION OF LAW: PRIOR TO THE EXPIRATION OF AN ORIGINALLY IMPOSED PRISON TERM, A TRIAL COURT MAY CORRECT AN OFFENDER'S FELONY SENTENCE PURSUANT TO THE PROCEDURE OUTLINED IN R.C. 2929.191 IF THAT SENTENCE LACKS THE SANCTION OF POSTRELEASE CONTROL.

The Eighth District Court of Appeals has ordered a complete and de novo sentencing in the matter despite the procedure provided for by R.C. 2929.191 that allows a court to correct only that portion of the sentence found to be in error. Postrelease control is merely one sanction of several to be imposed in a sentence and is severable from the other sanctions; as such, the appellate court erred vacating the entire sentence. The appellate court erred by vacating the entirety of the sentence imposed and this Court find that the trial court need only correct the portion of the sentence that was found to be in error and follow the dictates of R.C. 2929.191.

Moreover, this case concerns whether the General Assembly's procedure for correcting felony sentences remains viable after of *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250. Prior to R.C. 2929.191, a felony sentence lacking a mandatory term was void and required a *de novo* resentencing. It is well-settled and beyond dispute that Ohio Law as defined by the Revised Code mandates a term of postrelease control for certain offenders. Because a trial court has a statutory duty to provide notice of postrelease control at the sentencing hearing, any sentence imposed without such notification is contrary to law. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, at ¶ 23.

In *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at ¶ 6, this Honorable Court relied on *Beasley, supra*, and *Jordan, supra*, to hold that when a trial court fails to notify an offender at a sentencing hearing of a mandatory term of post-release control ("PRC"), the resulting sentence is void and must be resentedenced *de novo*. *Bezak* relied on the straightforward interpretations of Ohio's felony sentencing statutes explained in *Jordan, State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, and *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746 to conclude that a sentence that is void for lack of PRC must be repaired through resentencing. *Bezak, supra*, at ¶¶ 7-9, 11. *Bezak* itself applied to a lower court decision issued in 2004 that predated the enactment of R.C. 2929.191. When the trial judges in *Jordan, supra*, and *Bezak, supra*, imposed those particular sentences, the Revised Code did not yet specify any procedure whereby a void sentence lacking mandatory PRC could be repaired.

1. Because the Revised Code does not require a *de novo* resentencing hearing to correct a felony sentence lacking a mandatory PRC term, such a hearing should no longer be required.

The General Assembly enacted R.C. 2929.191 on July 11, 2006. R.C. 2929.191(A)(1)

reads in relevant part:

If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of section 2929.14 of the Revised Code, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, **the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison.**

(Emphasis added).

R.C. 2929.191 does not require that a sentencing correction be “*de novo*,” as required in *Bezak* and *Jordan*. In this case, the appellate court grafted the holding in *Bezak* to this statute and ordered the trial court to conduct a sentencing *de novo*, despite the plain language of R.C. 2929.191. As was noted by Justice Lanzinger in her dissenting opinion in *Bezak*, “*Beasley* involved the sentencing procedure in effect before Senate Bill 2, and the trial court disregarded the mandatory minimum prison term of two to 15 years with an optional fine for felonious assault and instead imposed only a fine.” *Bezak, supra*, at ¶ 30 (Lanzinger, J., dissenting). Just as *Beasley* applied to prior sentencing laws, the *de novo* hearings required by *Bezak* and *Jordan* should not apply to those cases using new procedure outlined in R.C. 2929.191. This Honorable Court explained in *J. T. Weybrecht's Sons Co. v. Hartford Acc. & Indem. Co.* (1954), 161 Ohio St. 436, 440-41, 119 N.E.2d 836 that its duty is to apply its own precedent “and leave it to the General Assembly to effect any change in the law for the future.” Despite the fact that the General Assembly has changed the PRC resentencing scheme, lower courts continue to apply precedent from this Court that predates the change. Although the basic problem illustrated by *Bezak* and *Jordan* persists—felony sentences remain defective without a necessary PRC

component—the statutory remedy has changed and therefore supplanted the *de novo* remedy created by prior Supreme Court precedent.

The State submits that the holdings of *Bezak* and *Jordan* do not apply to the R.C. 2929.191 procedure. This Honorable Court has previously explained that “[t]he General Assembly has the authority to enact laws defining criminal conduct and to prescribe its punishment* * *.” *State v. Thompkins* (1996), 75 Ohio St.3d 558, 560, 664 N.E.2d 926. Likewise, “[i]n the absence of a constitutional concern * * * the judiciary’s function is to interpret the law as written by the General Assembly.” *Beagle v. Walden* (1997), 78 Ohio St.3d 59, 62, 676 N.E.2d 506. In *Beasley, supra*, this Honorable Court also noted that “[i]t is the function of a court to construe statutes, not defeat them.” *Id.*, citing *Ex parte United States* (1916), 242 U.S. 27, 29, 37 S.Ct. 72. In its opinion in this case, the Eighth District simply applied *Bezak* to vacate the entirety of the sanctions imposed. None of the aforementioned cases, apart from *Beasley*, govern what should be the relevant issue, the constitutionality of the new statute.

Beasley, supra, which underpins *Bezak, supra*, and *Jordan, supra*, supports the constitutionality of the R.C. 2929.191 procedure. In *Beasley*, the trial court imposed a sentence that was not authorized by statute. In response, the prosecutor in *Beasley* sought, and obtained, a mandamus order requiring the trial judge to impose the statutorily correct sentence. *Beasley* challenged the resentencing by arguing that it violated her double jeopardy rights. This Honorable Court explained that “[t]he trial court exceeded its authority and this sentence must be considered void. Jeopardy did not attach to the void sentence, and, therefore, the court’s imposition of the correct sentence did not constitute double jeopardy.” *Beasley, supra*, at 75. Just as in *Beasley, supra*, a felony sentence lacking a proper PRC term can still be considered

void. By enacting R.C. 2929.191, the General Assembly simply provided a new sentencing tool. Where there is no real constitutional defect behind the statute, the Eighth District should not require the trial court to ignore what the General Assembly requires.

3. The sanction of postrelease control is only one of several sanction imposed and it is error to vacate those sanctions not found by the appellate court to be in error. In this case, the trial court did not properly impose the sanction of postrelease control when it sentenced him to prison. In finding error, the appellate court stated:

{¶ 46} R.C. 2929.191(C) requires a trial court to conduct a resentencing hearing in order to notify felony offenders about post-release control before their prison terms expire. The statute does not specify whether a de novo or partial resentencing should be conducted. Thereafter, the Supreme Court of Ohio held that, "when a trial court fails to notify an offender that he may be subject to post-release control at a sentencing hearing * * *, the sentence is void; the sentence must be vacated and the matter remanded to the trial court for resentencing. The trial court must resentence the offender as if there had been no original sentence." *State v. Bezak*, supra.

State v. Singleton, Cuyahoga App. No. 90042, 2008-Ohio-2351, at ¶ 46.

This Court can find that the procedure in R.C. 2929.191 is proper by finding, as it did in *State v. Evans*, 113 Ohio St.3d 100, 863 N.E.2d 113, 2007-Ohio-861, that the imposition of postrelease control is a severable sanction. In *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, syllabus, and *Evans*, supra, this court found that sanctions are to be imposed independently, are to be reviewed independently, and as such are subject to be vacated and corrected independently.

Although this Court distinguished *Saxon* in *Bezak*, it failed to address *Evans*, which reasoning is applicable to the resolution of the issue. The *Evans* court held that, "An appellate court may not vacate and remand an entire sentence imposed upon a defendant when the error in sentencing pertains only to a sanction imposed for one specification." 113 Ohio St.3d 100, 863 N.E.2d 113, 2007 -Ohio- 861, syllabus. By extending the reasoning of *Saxon*, this Court

determined that a sanction imposed upon a specification, even though dependent upon an underlying offense was severable from the sanction imposed on the underlying offense. *Id.*, at ¶16 “[T]hough specifications depend on the existence of underlying offenses and serve to enhance the penalties for those offenses, the Revised Code does not provide that either a trial court or an appellate court may consider an offense and an attendant specification together as a ‘bundle.’” *Id.*

The logic behind not vacating the entirety of a sentence where only one component of that sentence was set forth in *Evans*:

[T]he sentencing statutes set forth the sanctions available for an underlying offense and, separately, the additional sanctions for a specification. See R.C. 2929.11 through 2929.19. In this way, the sanctions imposed for the conviction of the underlying offense are separate from those imposed for conviction of the specification, and an error in the sanction imposed for a specification does not affect the remainder of the sentence.

2007 -Ohio- 861, at ¶ 16.

The sanction of postrelease control is separately stated in the Revised Code. In this regard, it is no different than sanctions discussed in *Evans*. In deciding *Bezak*, this Court may have believed it to be bound to follow *Jordan* in its entirety and vacate all sentences imposed. Since *Jordan*, this Court refined the definition of what constitutes a sentence in *Saxon* and *Evans*. Because of these refinements, a defendant’s right to be free from multiple punishments under the double jeopardy clause of the U.S. and Ohio Constitutions is not implicated by declaring void only one sentence of several imposed. Accordingly, the procedure of sentencing and the review thereof as stated in *Saxon* and *Evans* is applicable to this case and double jeopardy is not implicated. A valid sanction contained within a sentence need not be vacated to correct an error in another, separately imposed and independent sanction or sentence. For these reasons, this Court should review and modify the appellate decision in order to give effect to R.C. 2929.191.

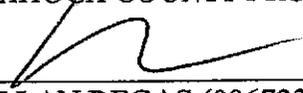
CONCLUSION

The State of Ohio respectfully requests that this Honorable Court grant jurisdiction and hear this case on its merits. The Eighth District improperly vacated the sentence imposed and ordered the trial court to hold a de novo resentencing hearing.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

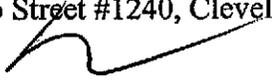
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A copy of the foregoing Memorandum In Support of Jurisdiction has been mailed this 27th day of June, 2008, to John J. Gill, 1370 Ontario Street #1240, Cleveland, OH 44113.



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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90042

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JASON SINGLETON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART, SENTENCE VACATED AND
REMANDED FOR RESENTENCING**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-394116

BEFORE: Dyke, J., Kilbane, P.J., and Blackmon, J.

RELEASED: May 15, 2008

JOURNALIZED:

CA 90042

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ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

MAY 15 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

Defendant Jason Singleton appeals from the order of the trial court that denied his motion to vacate his guilty plea. For the reasons set forth below, we affirm defendant's guilty plea, vacate the sentence and remand for resentencing.

On February 10, 2000, complaints were filed in the juvenile court which alleged that defendant was delinquent in connection with an offense which, if committed by an adult, would constitute aggravated burglary, aggravated robbery, kidnapping, rape and felonious assault. Following an amenability hearing, the matter was transferred to the General Division of the Court of Common Pleas. Defendant was subsequently indicted for aggravated burglary, aggravated robbery, felonious assault, rape with a sexually violent predator specification and kidnapping with sexual motivation and sexually violent predator specifications.

Defendant subsequently entered into a plea agreement with the state whereby the charges of kidnapping, aggravated robbery and aggravated burglary were dismissed, and defendant entered guilty pleas to felonious assault and rape, which was amended to delete the sexually violent predator specification. The transcript of the plea hearing provides in relevant part as follows:

"THE COURT: When you are sent to prison, Mr. Singleton, please keep in mind the parole authority has the power to place conditions upon you when you

are released. Those conditions will last five years. Do you understand that?

"THE DEFENDANT: No.

"THE COURT: When you are released from prison they can place conditions upon you. * * * * These conditions would last five years.

"Do you understand that?

"THE DEFENDANT: Yes, your Honor.

"THE COURT: If you violate any of their conditions you could find yourself back in prison, and you can serve up to nine months for each incident, and for repeated violations up to one half of the maximum term.

"Do you understand that?

"THE DEFENDANT: Yes, your Honor."

Later, when defendant was sentenced for the offenses, the trial court informed defendant that he would receive "Five years of postrelease control." The journal entry of the sentence states, "defendant was informed of possibility of 5 years postrelease control."

On October 25, 2006, defendant filed a motion to vacate his guilty plea in which he asserted that the trial court failed to advise him of the mandatory period of postrelease control, and failed to advise him of the consequences of violating postrelease control, and thereby failed to comply with Crim.R. 11. In support of the motion, defendant averred, in relevant part, that he was not

informed of mandatory postrelease control, was not informed of the consequences of violating postrelease control and would not have entered the guilty pleas if he had known that postrelease control was mandatory. The trial court denied the motion and defendant now appeals, assigning three errors for our review:

The first and second assignments of error are interrelated and state:

“The trial court erred by not allowing the defendant to withdraw his guilty plea.”

“The defendant’s guilty pleas were invalid since the trial court failed to advise of the consequences of violating postrelease control.”

Crim.R. 32.1 governs the withdrawal of a guilty or no contest plea and states:

“[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice. The court, after sentence, may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.” A reviewing court will not disturb a trial court’s decision whether to grant a motion to withdraw a plea absent an abuse of discretion. *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715.

In this matter, defendant asserts that the trial court accepted his guilty plea without notifying him of postrelease control, and thereby failed to meet the requirements of Crim.R. 11 and prevented the guilty plea from being knowingly,

intelligently, and voluntarily entered.

Pursuant to Crim.R. 11(C)(2) a trial court "shall not accept a plea of guilty * * * without first addressing the defendant personally and * * * determining that the defendant is making the plea voluntarily, with understanding * * * of the maximum penalty involved * * *." The trial court must also provide the defendant information pertaining to postrelease control during the plea hearing. *State v. Imburgia*, Cuyahoga App.No. 87917, 2007-Ohio-390; *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d 78, citing *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171, 733 N.E.2d 1103. Inasmuch as it is a non-constitutional requirement, a reviewing court must determine whether there was substantial compliance. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio 6894, 820 N.E.2d 355. "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 92-93, 364 N.E.2d 1163.

In *State v. Sarkozy*, 117 Ohio St.3d 86; 2008-Ohio-509, the Supreme Court discussed the issue of substantial compliance with regard to the duty to advise a defendant of postrelease control during plea proceedings and held as follows:

"1. If a trial court fails during a plea colloquy to advise a defendant that

the sentence will include a mandatory term of postrelease control, the defendant may dispute the knowing, intelligent, and voluntary nature of the plea either by filing a motion to withdraw the plea or upon direct appeal.

“2. If the trial court fails during the plea colloquy to advise a defendant that the sentence will include a mandatory term of postrelease control, the court fails to comply with Crim.R. 11, and the reviewing court must vacate the plea and remand the cause.”

The *Sarkozy* Court explained:

“[W]e find that there was no compliance with Crim.R. 11. The trial court did not merely misinform Sarkozy about the length of his term of postrelease control. Nor did the court merely misinform him as to whether postrelease control was mandatory or discretionary. Rather, the court failed to mention postrelease control at all during the plea colloquy. Because the trial court failed, before it accepted the guilty plea, to inform the defendant of the mandatory term of postrelease control, which was a part of the maximum penalty, the court did not meet the requirements of Crim.R. 11(C)(2)(a). A complete failure to comply with the rule does not implicate an analysis of prejudice.”

Accord *State v. Cleland*, Medina App. No. 06CA0073-M, 2008-Ohio-1319

(because the trial court did not mention post-release control during the plea hearing, the guilty plea had to be vacated and the issue was not subject to

analysis as to whether the defendant actually suffered prejudice).

In *State v. Torres*, Court of Appeals No. L-07-1036, 2008-Ohio-815, the court considered whether a plea should be vacated where the trial court erroneously indicated that a discretionary period of postrelease control might be imposed. The *Torres* Court held that the trial court substantially complied with Crim.R. 11(C)(2)(a) in accepting appellant's guilty plea because a reasonable person in appellant's circumstances would have had actual notice that five years of postrelease control was a mandatory part of his sentence.

In this matter, the transcript from the plea proceedings provides in pertinent part as follows:

"THE COURT I'm not going to discuss community control with you because it won't apply in this case.

"When you are sent to prison, Mr. Singleton, please keep in mind the parole authority has the power to place conditions upon you when you are released. Those conditions will last five years.

"Do you understand that?

"THE DEFENDANT: No.

"THE COURT: When you are released from prison they can place conditions upon you. * * * Those conditions would last five years.

"Do you understand that?

"THE DEFENDANT: Yes, your Honor.

"THE COURT: If you violate any of their conditions you could find yourself back in prison, and you can serve up to nine months for each incident, and for repeated violations up to one-half of the maximum term.

"Do you understand that?

"THE DEFENDANT: Yes, your Honor."

We note that the trial court explicitly advised defendant that the parole authority "has the power to place conditions upon you when you are released [which] will last five years." (Emphasis added). Although the trial court's statement that the parole authority "can place conditions on you" would seem to suggest that the postrelease control was discretionary rather than mandatory, the trial court added that the "conditions will last five years." The Websters New Collegiate Dictionary (1980) 1378 indicates that the word will is "used to express inevitability." Accordingly, under the totality of the circumstances the record indicates that defendant was informed and understood that he would be subject to a mandatory period of postrelease control of one-half of his prison term. The trial court substantially complied with Crim.R. 11 and the lower court did not err in denying the motion to vacate the guilty plea.

The first and second assignments of error are without merit.

For his third assignment of error, defendant asserts that his sentence is

void because the journal entry of the sentence does not indicate that he was placed on postrelease control. In support of this argument, defendant relies upon, inter alia, *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 96.

In *Bezak*, supra, the Supreme Court held that when a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void. In such instance, the offender is entitled to a new sentencing hearing for that particular offense, where a trial court fails to notify a defendant at the sentencing hearing that he may be subject to postrelease control, the sentence imposed by the trial court is void, the judgment is a mere nullity and the parties are in the same position as if there had been no judgment. *Id.* In *State v. Simpkins*, 2008-Ohio-1197, ___ N.E.2d ___, the court reaffirmed the holding of *Bezak* and held that, because the journal entry on sentencing did not indicate that Simpkins was subject to postrelease control, it did not conform to statutory mandates requiring the imposition of postrelease control and was therefore a nullity and void.

Pursuant to R.C. 2929.14(F), if a court imposes a prison term for a felony, the sentence shall include a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment. See, also,

R.C. 2967.28. Pursuant to R.C. 2929.19(B)(3), the sentencing court notify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison.

The Supreme Court of Ohio has interpreted these provisions as requiring a trial court to give notice of post-release control both at the sentencing hearing and by incorporating it into the sentencing entry. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraph one of the syllabus. The Supreme Court has further held that a sentencing entry is erroneous if it refers to discretionary postrelease control where the postrelease control period is actually mandated by law. See *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N. E.2d 78.

R.C. 2929.191(C) requires a trial court to conduct a resentencing hearing in order to notify felony offenders about post-release control before their prison terms expire. The statute does not specify whether a de novo or partial resentencing should be conducted. Thereafter, the Supreme Court of Ohio held that, "when a trial court fails to notify an offender that he may be subject to post-release control at a sentencing hearing * * *, the sentence is void; the sentence must be vacated and the matter remanded to the trial court for resentencing. The trial court must resentence the offender as if there had been no original sentence." *State v. Bezak*, supra.

Moreover, such resentencing does not violate finality or double jeopardy prohibitions as the "effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment." *State v. Bezak*, supra, quoting *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268, 39 O.O.2d 414, 227 N.E.2d 223.

In this matter, the journal entry of the sentence states, "defendant was informed of possibility of 5 years postrelease control." Applying the foregoing, we conclude that the trial court's sentencing entry is erroneous since it incorrectly references discretionary rather than mandatory postrelease control. Accordingly, the sentence is void and the matter must be remanded for resentencing.

The third assignment of error is well-taken.

The guilty plea is affirmed but the sentence is vacated and the matter is remanded for resentencing.

Insofar as defendant additionally contends that his trial counsel was ineffective at sentencing, this claim is moot. App.R. 12.

Defendant's guilty plea is affirmed, the sentence is vacated and the matter is remanded for resentencing.

It is ordered that appellee and appellant share the 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 conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for resentencing.

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



ANN DYKE, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR