

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-Appellant

-vs-

JASON SINGLETON

Defendant-Appellee

MERIT BRIEF OF APPELLANT

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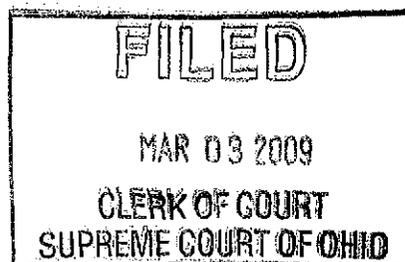


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I. SUMMARY OF ARGUMENT

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, *Bezak* was decided prior to the effective date of R.C. 2929.191. As this statute is now in force and applicable to Appellee Jason Singleton; the remedy in this case for any sentencing error should not be resentencing *de novo* as ordered, but rather, the trial court should be ordered to correct only the postrelease control sanction where there is no error in the imposition of other sanctions in Appellee's sentence.

The State asks that this court review and modify the appellate opinion in this matter to order that the sentencing court apply R.C. 2929.191 and give full force and effect to that statute and the legislative intent to provide a method to correct error in imposing the sanction of postrelease control. Further, the State asks that this Court determine that R.C. 2929.191 provides a means to correct sentences where a sentencing court did not properly impose the sanction of postrelease control. This Court should adopt the State's proposition of law and hold within its syllabus in this matter, 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.

In this matter, this Court can decide which branch of government crafts Ohio's felony sentencing procedures, the Legislature or the Courts. So far, 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. This remedy for an error in the imposition of the sanction of postrelease control is not required by statute. Specifically, in *Singleton, supra*, the appellate court reversed Appellee's entire sentence and ordered the court to conduct a sentencing *de novo*. This contradicts the clear intent and applicability of R.C. 2929.191.

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* 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 result. Now, R.C. 2929.191 provides a procedure to remedy a sentence that lacks a properly imposed sanction of 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. In this case, the appellate court effectively abrogated the General Assembly's legislative role to define the felony

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.

sentencing process. Further, these courts have provided a means that vacates sanctions within a sentence not found to be in error.

Serious offenders such as Appellee with felony convictions should not be allowed to escape sanctions imposed properly. By not applying R.C. 2929.191 to this case, the process of vacating the entirety of a criminal sentence erodes the stability and finality of the criminal justice system as well. Appellee pleaded guilty to felonious assault and rape in the year 2000, nine years ago. Following the Eighth District's opinion, he now will have the opportunity to litigate sanctions imposed in 2000 that were not found to be in error on appeal. R.C. 2929.191 provides a clear showing of the intent of the General Assembly to insure that offenders like Appellee receive post-release control as required by Ohio Law. Ohio Courts should enforce the General Assembly's plain intent and recognize R.C. 2929.191 as a means to impose the sanction of post-release control without disturbing validly imposed sanctions.

II. 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 to vacate the plea.

Appellee appealed that judgment complaining of error in postrelease control notification at the time of his plea. The Eighth District Court of Appeals affirmed the trial court's denial of the motion to vacate plea. It found that the trial court did not misinform Singleton of the mandatory nature of the sanction of postrelease control, stating that, "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).” *State v. Singleton*, Cuyahoga App. No. 90042, 2008-Ohio-2351, at ¶ 40.

Appellee further complained to the Eighth District Court that the imposition of postrelease control was in error and that he was entitled to a new sentence. The appellate court found that the sentence to be void due to error in the imposition of the sanction of postrelease control. *Id.*, at ¶ 48. Rather than recognize the viability of R.C. 2929.191, the appellate court ordered that the resentencing in this matter be done in full, thereby vacating sanctions not found to be in error, despite the fact that R.C. 2929.191 provides for resentencing an offender to only the postrelease control sanction.

II. 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 by R.C. 2929.191 that a court may correct error in the imposition of a postrelease control (“PRC”) sanction. A PRC sanction is merely one sanction of several to be imposed in a sentence and is severable from other sanctions; as such, the appellate court erred by vacating all sanctions imposed as a sentence. This Court should find that the trial court need only address that 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 was applied to a lower court decision issued in the year 2004, a decision 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 specify any procedure whereby a sentence lacking a mandatory PRC sanction could be remedied. It now does so and this Court should recognize this change in law and allow courts to apply it.

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 was required by the holdings 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 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.

2. The sanction of postrelease control is only one of several sanctions 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 Appellee to serve a sanction of imprisonment. In finding error in this case, 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, that the imposition of postrelease control is a severable sanction. “R.C. 2929.01(FF) defines ‘sentence’ as ‘the sanction or combination of sanctions imposed by the

sentencing court on an offender who is convicted of or pleads guilty to an offense.”
State v. Evans, 113 Ohio St.3d 100, 863 N.E.2d 113, 2007-Ohio-861, at ¶14 A sanction,
“[M]eans any penalty imposed upon an offender who is convicted of or pleads guilty to
an offense, as punishment for the offense” and any sanction imposed pursuant to any
that can be imposed within the provisions in R.C. 2929. R.C. 2929.01(EE). This Court
has decided a series of cases on felony sentencing procedure and the appellate
process in the past several years. 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. But, in this matter, the appellate court
vacated the entire sentence imposed rather than recognizing R.C. 2929.191 as a
remedy. Following these cases, this Court held in *Bezak*, that

Although this Court distinguished *Saxon* in the later decided *Bezak* case, it failed
to address the effect of this court's decision in *Evans*. In this case, the reasoning in
Evans is applicable to the resolution of the issue as to what remedy is available to
correct an error by the trial court in imposing the PRC sanction. 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 sanctions imposed in the sentence. Since *Jordan*, this Court refined the definition of what constitutes a sentence in its decisions 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 sanction 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.

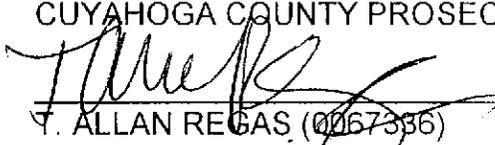
IV. CONCLUSION

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 appellate 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 R.C. 2929.191 is now in force and applicable to Appellee Jason Singleton, this Court should remand the matter to the trial court and order that it correct the postrelease control sanction imposed. The State further asks that this Court adopt its proposition of law as its syllabus and hold that 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.

Respectfully submitted,

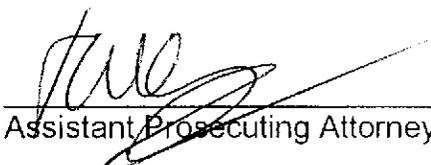
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SERVICE

A copy of the foregoing Merit Brief has been mailed this 2nd day of March 2009, to John J. Gill, 1370 Ontario Street #1240, Cleveland, Ohio 44113.


Assistant Prosecuting Attorney

CASE NO. **08-1255**

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE EIGHTH DISTRICT COURT OF APPEALS
CUYAHOGA COUNTY, OHIO
CA 90042

STATE OF OHIO
Plaintiff/Appellant

vs.

JASON SINGLETON
Defendant/Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

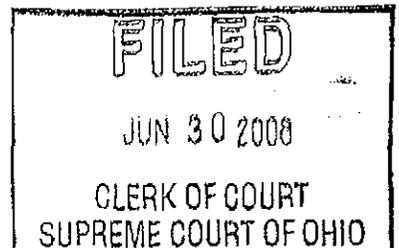
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CASE NO.

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE EIGHTH DISTRICT COURT OF APPEALS
CUYAHOGA COUNTY, OHIO
CA 90042

STATE OF OHIO
Plaintiff/Appellant

vs.

JASON SINGLETON
Defendant/Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

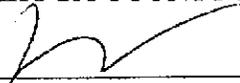
Now comes the State of Ohio and hereby give Notice of Appeal to the Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District, journalized May 15, 2008, which affirmed in part, vacated the sentence, and remanded for resentencing, the Trial Court's Decision.

Said cause did not originate in the Court of Appeals, is a felony, involves a substantial constitutional question, and is of great general and public interest.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

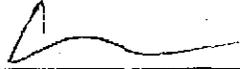
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SERVICE

A copy of the foregoing Notice of Appeal has been mailed this 27th day of June, 2008 to John J. Gill, 1370 Ontario Street #1240, Cleveland, OH 44113; and the Ohio Public Defender's Office, 8 East Long Street, 11 Floor, Columbus, OH 43215.



Assistant Prosecuting Attorney

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

DIANE SMILANICK
ASST. COUNTY PROSECUTOR
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CLEVELAND, OH 44113

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 Grim 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.

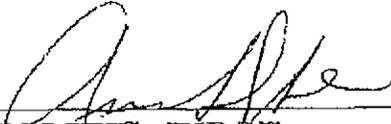
Defendant's guilty plea is affirmed, the sentence is vacated and the matter is remanded for resentencing.

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

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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).

CHAPTER 2929: PENALTIES AND SENTENCING

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ion (B) of this section is a degree or, if the offender pled of or pleaded guilty to two n (B) of this section, a felony of

ff 10-9-2001.

ection 3 of HB 730.

Section

[IN GENERAL]

2929.01 Definitions.

[PENALTIES FOR MURDER]

2929.02 Penalties for aggravated murder or murder.

[2929.02.1] 2929.021 Notice to supreme court of indictment charging aggravated murder; plea.

[2929.02.2] 2929.022 Determination of aggravating circumstances of prior conviction.

[2929.02.3] 2929.023 Defendant may raise matter of age.

[2929.02.4] 2929.024 Investigation services and experts for indigent.

2929.03 Imposing sentence for aggravated murder.

2929.04 Criteria for imposing death or imprisonment for a capital offense.

2929.05 Appellate review of death sentence.

2929.06 Resentencing after sentence of death or life imprisonment without parole is set aside, nullified, or vacated.

[PENALTIES FOR FELONY]

2929.11 Purposes of felony sentencing; discrimination prohibited.

2929.12 Seriousness and recidivism factors.

2929.13 Guidance by degree of felony; monitoring of sexually oriented offenders by global positioning device.

2929.14 Basic prison terms.

[2929.14.1] 2929.141 New felony committed by person on release.

[2929.14.2] 2929.142 Mandatory prison term for aggravated vehicular homicide where offender has previous OVI-type convictions.

2929.15 Community control sanctions.

2929.16 Residential sanctions.

2929.17 Nonresidential sanctions.

2929.18 Financial sanctions; restitution.

[2929.18.1] 2929.181 Repealed.

2929.19 Sentencing hearing.

[2929.19.1] 2929.191 Correction to judgment of conviction concerning post-release control.

[2929.19.2] 2929.192 Forfeiture of public retirement system benefits.

2929.20 Judicial release.

[PENALTIES FOR MISDEMEANOR]

2929.21 Overriding purposes of misdemeanor sentencing; discrimination prohibited.

2929.22 Considerations in imposing sentence for misdemeanor.

[2929.22.1] 2929.221 Renumbered.

[2929.22.3] 2929.223 Repealed.

2929.23 Sentencing for sexually oriented offense or child-victim misdemeanor offense committed on or after January 1, 1997.

2929.24 Definite jail terms for misdemeanor; eligibility for county jail industry program; reimbursement sanction; costs of confinement.

2929.25 Community control sanctions.

2929.26 Community residential sanctions; testing and treatment for contagious diseases; use of halfway house.

2929.27 Nonresidential and other sanctions; community service.

2929.28 Financial sanctions; court costs.

2929.29 Renumbered.

[ORGANIZATIONAL PENALTIES]

2929.31 Organizational penalties.

2929.32 Additional fine for certain offenders; collection of fines; crime victims recovery fund.

Section

2929.34 Type of institution where term of imprisonment to be served.

[REIMBURSEMENT OF COSTS OF CONFINEMENT IN LOCAL DETENTION FACILITY]

2929.35 Renumbered.

2929.36 Definitions.

2929.37 Policy requiring prisoner to pay costs of confinement.

2929.38 One-time reception fee; fees for medical treatment or service and random drug test.

[MULTIPLE SENTENCES]

2929.41 Multiple sentences.

2929.42 Prosecutor to notify appropriate licensing board.

2929.43 Procedure for accepting peace officer's guilty plea to felony or after conviction; negotiated misdemeanor pleas.

[MODIFICATION OF SENTENCE]

2929.51 Repealed.

[OFFENSES PRIOR TO JANUARY 1, 1974, CERTAIN FELONIES PRIOR TO JULY 1, 1983]

2929.61 Offense committed prior to January 1, 1974, third or fourth degree felony committed between that date and July 1, 1983.

[REIMBURSEMENT BY ARSONIST]

2929.71 Arsonist to reimburse agencies for costs of investigation and prosecution.

2929.72 Repealed.

[IN GENERAL]

§ 2929.01 Definitions.

As used in this chapter:

(A)(1) "Alternative residential facility" means, subject to division (A)(2) of this section, any facility other than an offender's home or residence in which an offender is assigned to live and that satisfies all of the following criteria:

(a) It provides programs through which the offender may seek or maintain employment or may receive education, training, treatment, or habilitation.

(b) It has received the appropriate license or certificate for any specialized education, training, treatment, habilitation, or other service that it provides from the government agency that is responsible for licensing or certifying that type of education, training, treatment, habilitation, or service.

(2) "Alternative residential facility" does not include a community-based correctional facility, jail, halfway house, or prison.

(B) "Bad time" means the time by which the parole board administratively extends an offender's stated prison term or terms pursuant to section 2967.11 of the Revised Code because the parole board finds by clear and convincing evidence that the offender, while serving the prison term or terms, committed an act that is a criminal offense under the law of this state or the United States,

whether or not the offender is prosecuted for the commission of that act.

(C) "Basic probation supervision" means a requirement that the offender maintain contact with a person appointed to supervise the offender in accordance with sanctions imposed by the court or imposed by the parole board pursuant to section 2967.28 of the Revised Code. "Basic probation supervision" includes basic parole supervision and basic post-release control supervision.

(D) "Cocaine," "crack cocaine," "hashish," "L.S.D.," and "unit dose" have the same meanings as in section 2925.01 of the Revised Code.

(E) "Community-based correctional facility" means a community-based correctional facility and program or district community-based correctional facility and program developed pursuant to sections 2301.51 to 2301.58 of the Revised Code.

(F) "Community control sanction" means a sanction that is not a prison term and that is described in section 2929.15, 2929.16, 2929.17, or 2929.18 of the Revised Code or a sanction that is not a jail term and that is described in section 2929.26, 2929.27, or 2929.28 of the Revised Code. "Community control sanction" includes probation if the sentence involved was imposed for a felony that was committed prior to July 1, 1996, or if the sentence involved was imposed for a misdemeanor that was committed prior to January 1, 2004.

(G) "Controlled substance," "marihuana," "schedule I," and "schedule II" have the same meanings as in section 3719.01 of the Revised Code.

(H) "Curfew" means a requirement that an offender during a specified period of time be at a designated place.

(I) "Day reporting" means a sanction pursuant to which an offender is required each day to report to and leave a center or other approved reporting location at specified times in order to participate in work, education or training, treatment, and other approved programs at the center or outside the center.

(J) "Deadly weapon" has the same meaning as in section 2923.11 of the Revised Code.

(K) "Drug and alcohol use monitoring" means a program under which an offender agrees to submit to random chemical analysis of the offender's blood, breath, or urine to determine whether the offender has ingested any alcohol or other drugs.

(L) "Drug treatment program" means any program under which a person undergoes assessment and treatment designed to reduce or completely eliminate the person's physical or emotional reliance upon alcohol, another drug, or alcohol and another drug and under which the person may be required to receive assessment and treatment on an outpatient basis or may be required to reside at a facility other than the person's home or residence while undergoing assessment and treatment.

(M) "Economic loss" means any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes any loss of income due to lost time at work because of any injury caused to the victim, and any property loss, medical cost, or funeral expense incurred as a result of the commission of the offense. "Economic loss" does not include non-economic loss or any punitive or exemplary damages.

(N) "Education or training" includes study at, or in conjunction with a program offered by, a university, college, or technical college or vocational study and also includes the completion of primary school, secondary school, and literacy curricula or their equivalent.

(O) "Firearm" has the same meaning as in section 2923.11 of the Revised Code.

(P) "Halfway house" means a facility licensed by the division of parole and community services of the department of rehabilitation and correction pursuant to section 2967.14 of the Revised Code as a suitable facility for the care and treatment of adult offenders.

(Q) "House arrest" means a period of confinement of an offender that is in the offender's home or in other premises specified by the sentencing court or by the parole board pursuant to section 2967.28 of the Revised Code and during which all of the following apply:

(1) The offender is required to remain in the offender's home or other specified premises for the specified period of confinement, except for periods of time during which the offender is at the offender's place of employment or at other premises as authorized by the sentencing court or by the parole board.

(2) The offender is required to report periodically to a person designated by the court or parole board.

(3) The offender is subject to any other restrictions and requirements that may be imposed by the sentencing court or by the parole board.

(R) "Intensive probation supervision" means a requirement that an offender maintain frequent contact with a person appointed by the court, or by the parole board pursuant to section 2967.28 of the Revised Code, to supervise the offender while the offender is seeking or maintaining necessary employment and participating in training, education, and treatment programs as required in the court's or parole board's order. "Intensive probation supervision" includes intensive parole supervision and intensive post-release control supervision.

(S) "Jail" means a jail, workhouse, minimum security jail, or other residential facility used for the confinement of alleged or convicted offenders that is operated by a political subdivision or a combination of political subdivisions of this state.

(T) "Jail term" means the term in a jail that a sentencing court imposes or is authorized to impose pursuant to section 2929.24 or 2929.25 of the Revised Code or pursuant to any other provision of the Revised Code that authorizes a term in a jail for a misdemeanor conviction.

(U) "Mandatory jail term" means the term in a jail that a sentencing court is required to impose pursuant to division (G) of section 1547.99 of the Revised Code, division (E) of section 2929.24 of the Revised Code, division (E) of section 2903.06 or division (D) of section 2903.08 of the Revised Code, division (B) of section 4510.14 of the Revised Code, or division (G) of section 4511.19 of the Revised Code or pursuant to any other provision of the Revised Code that requires a term in a jail for a misdemeanor conviction.

(V) "Delinquent child" has the same meaning as in section 2152.02 of the Revised Code.

(W) "License violation report" means a report that is made by a sentencing court, or by the parole board pursuant to section 2967.28 of the Revised Code, to the regulatory or licensing board or agency that issued an offender a professional license or a license or permit to do business in this state and that specifies that the offender has been convicted of or pleaded guilty to an offense that may violate the conditions under which the offender's professional license or license or permit to do business in this state was granted or an offense for which the offender's professional license or license or permit to do business in this state may be revoked or suspended.

(X) "Major drug offender" means a person who is convicted of or pleads guilty to or offer to sell any drug, compound or substance that consists of one thousand grams of hashish; or crack cocaine; at least one thousand unit doses of crack cocaine; at least one hundred unit doses or two hundred fifty thousand unit doses of L.S.D. in a liquid concentrated distillate form; or at least one unit dose of any other schedule I or II than marihuana that is necessary to constitute a third degree pursuant to 2925.05, or 2925.11 of the Revised Code, the possession of, sale of, or distribution of, of such a substance.

(Y) "Mandatory prison term" means:

(1) Subject to division (Y)(2), a term in prison that must be imposed for a conviction in divisions of section 2929.13 and divisions of the Revised Code. Except as provided in sections 2925.03, 2925.04, 2925.05, 2925.06, 2925.07, 2925.08, 2925.09, 2925.10, 2925.11, 2925.12, 2925.13, 2925.14, 2925.15, 2925.16, 2925.17, 2925.18, 2925.19, 2925.20, 2925.21, 2925.22, 2925.23, 2925.24, 2925.25, 2925.26, 2925.27, 2925.28, 2925.29, 2925.30, 2925.31, 2925.32, 2925.33, 2925.34, 2925.35, 2925.36, 2925.37, 2925.38, 2925.39, 2925.40, 2925.41, 2925.42, 2925.43, 2925.44, 2925.45, 2925.46, 2925.47, 2925.48, 2925.49, 2925.50, 2925.51, 2925.52, 2925.53, 2925.54, 2925.55, 2925.56, 2925.57, 2925.58, 2925.59, 2925.60, 2925.61, 2925.62, 2925.63, 2925.64, 2925.65, 2925.66, 2925.67, 2925.68, 2925.69, 2925.70, 2925.71, 2925.72, 2925.73, 2925.74, 2925.75, 2925.76, 2925.77, 2925.78, 2925.79, 2925.80, 2925.81, 2925.82, 2925.83, 2925.84, 2925.85, 2925.86, 2925.87, 2925.88, 2925.89, 2925.90, 2925.91, 2925.92, 2925.93, 2925.94, 2925.95, 2925.96, 2925.97, 2925.98, 2925.99, 2926.00, 2926.01, 2926.02, 2926.03, 2926.04, 2926.05, 2926.06, 2926.07, 2926.08, 2926.09, 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feet of or within the same residential unit as a child who is under eighteen years of age, regardless of whether the offender knows the age of the child or whether the offender knows the offense is being committed within thirty feet of or within the same residential unit as the child and regardless of whether the child actually views the commission of the offense.

(NN) "Family or household member" has the same meaning as in section 2919.25 of the Revised Code.

(OO) "Motor vehicle" and "manufactured home" have the same meanings as in section 4501.01 of the Revised Code.

(PP) "Detention" and "detention facility" have the same meanings as in section 2921.01 of the Revised Code.

(QQ) "Third degree felony OVI offense" means a violation of division (A) of section 4511.19 of the Revised Code that, under division (C) of that section, is a felony of the third degree.

(RR) "Random drug testing" has the same meaning as in section 5120.63 of the Revised Code.

(SS) "Felony sex offense" has the same meaning as in section 2967.28 of the Revised Code.

(TT) "Body armor" has the same meaning as in section 2941.1411 [2941.14.11] of the Revised Code.

(UU) "Electronic monitoring" means monitoring through the use of an electronic monitoring device.

(VV) "Electronic monitoring device" means any of the following:

(1) Any device that can be operated by electrical or battery power and that conforms with all of the following:

(a) The device has a transmitter that can be attached to a person, that will transmit a specified signal to a receiver of the type described in division (VV)(1)(b) of this section if the transmitter is removed from the person, turned off, or altered in any manner without prior court approval in relation to electronic monitoring or without prior approval of the department of rehabilitation and correction in relation to the use of an electronic monitoring device for an inmate on transitional control or otherwise is tampered with, that can transmit continuously and periodically a signal to that receiver when the person is within a specified distance from the receiver, and that can transmit an appropriate signal to that receiver if the person to whom it is attached travels a specified distance from that receiver.

(b) The device has a receiver that can receive continuously the signals transmitted by a transmitter of the type described in division (VV)(1)(a) of this section, can transmit continuously those signals by telephone to a central monitoring computer of the type described in division (VV)(1)(c) of this section, and can transmit continuously an appropriate signal to that central monitoring computer if the receiver is turned off or altered without prior court approval or otherwise tampered with.

(c) The device has a central monitoring computer that can receive continuously the signals transmitted by telephone by a receiver of the type described in division (VV)(1)(b) of this section and can monitor continuously the person to whom an electronic monitoring device of the type described in division (VV)(1)(a) of this section is attached.

(2) Any device that is not a device of the type described in division (VV)(1) of this section and that conforms with all of the following:

(a) The device includes a transmitter and receiver that can monitor and determine the location of a subject person at any time, or at a designated point in time,

through the use of a central monitoring computer or through other electronic means.

(b) The device includes a transmitter and receiver that can determine at any time, or at a designated point in time, through the use of a central monitoring computer or other electronic means the fact that the transmitter is turned off or altered in any manner without prior approval of the court in relation to the electronic monitoring or without prior approval of the department of rehabilitation and correction in relation to the use of an electronic monitoring device for an inmate on transitional control or otherwise is tampered with.

(3) Any type of technology that can adequately track or determine the location of a subject person at any time and that is approved by the director of rehabilitation and correction, including, but not limited to, any satellite technology, voice tracking system, or retinal scanning system that is so approved.

(WW) "Non-economic loss" means nonpecuniary harm suffered by a victim of an offense as a result of or related to the commission of the offense, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; mental anguish; and any other intangible loss.

(XX) "Prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

(YY) "Continuous alcohol monitoring" means the ability to automatically test and periodically transmit alcohol consumption levels and tamper attempts at least every hour, regardless of the location of the person who is being monitored.

(ZZ) A person is "adjudicated a sexually violent predator" if the person is convicted of or pleads guilty to a violent sex offense and also is convicted of or pleads guilty to a sexually violent predator specification that was included in the indictment, count in the indictment, or information charging that violent sex offense or if the person is convicted of or pleads guilty to a designated homicide, assault, or kidnapping offense and also is convicted of or pleads guilty to both a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information charging that designated homicide, assault, or kidnapping offense.

(AAA) An offense is "committed in proximity to a school" if the offender commits the offense in a school safety zone or within five hundred feet of any school building or the boundaries of any school premises, regardless of whether the offender knows the offense is being committed in a school safety zone or within five hundred feet of any school building or the boundaries of any school premises.

HISTORY: 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 445 (Eff 9-3-96); 146 v H 480 (Eff 10-16-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 147 v H 378 (Eff 3-10-98); 147 v S 111 (Eff 3-17-98); 148 v S 9 (Eff 3-8-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 349 (Eff 9-22-2000); 148 v S 222 (Eff 3-22-2001); 148 v S 179, § 3 (Eff 1-1-2002); 149 v H 327, Eff 7-8-2002; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v S 5, § 1, Eff 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v S 57, § 1, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v H 162, § 1, eff. 10-12-06; 151 v S 260, § 1, eff. 1-2-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08; 152 v S 220, § 1, eff. 9-30-08.

The effective date is set by § 3 of 152 v S 10.

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Revised Code, enacted in Secti to conduct and Conduct and off governed by the was committed.

See provisor § 2919.25.

See provision § 2923.36.

[P.F.]

§ 2929. or murder.

(A) Whoever vated murder in Code shall su determined pe 2929.03, and 2: person who rai 2929.023 [2929 found to have i time of the com

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central monitoring computer or other means.

includes a transmitter and receiver that transmits or receives information at a designated point in time, or at a designated point in time, from a central monitoring computer or other device, or that the transmitter is turned off or on without prior approval of the department of electronic monitoring or without the approval of the department of rehabilitation and correction, or the use of an electronic monitoring device on transitional control or other device.

technology that can adequately track or locate a subject person at any time and place, and the director of rehabilitation and correction, but not limited to, any satellite tracking system, or retinal scanning technology.

"Economic loss" means nonpecuniary harm or damage, including, but not limited to, an offense as a result of or related to the offense, including, but not limited to, loss of society, consortium, companionship, assistance, attention, protection, advice, instruction, training, or education, or any other intangible loss.

has the same meaning as in section 1-1-1 Code.

"Alcohol monitoring" means the ability to detect and periodically transmit alcohol concentration and tamper attempts at least every twenty-four hours of the person who is being monitored.

A person who is adjudicated a sexually violent predator, convicted of or pleads guilty to a sexually violent predator specification that was included in the indictment, or that violent sex offense or if the person pleads guilty to a designated kidnapping offense and also is convicted of or pleads guilty to a sexually violent predator specification in the indictment, count in the indictment charging that designated homicide, or offense.

is "committed in proximity to a school" means the offender commits the offense in a school zone, or within five hundred feet of any school premises, regardless of whether the offender knows the offense is being committed in a school zone or within five hundred feet of the boundaries of any school zone.

(Eff. 7-1-96); 146 v S 269 (Eff. 7-1-96); 146 v H 480 (Eff. 10-16-96); 146 v H 180 (Eff. 1-1-97); 147 v H 378 S 111 (Eff. 3-17-98); 148 v S 9 (Eff. 7-1-98); 148 v S 22 (Eff. 9-22-2000); 148 v S 222 (Eff. 9-22-2000); 149 v H 327 (Eff. 9-22-2000); 149 v S 123, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 162, § 1, eff. 10-12-06; 151 v H 461, § 1, eff. 4-4-07; 152 v S 220, § 1, eff. 9-30-08.

set by § 3 of 152 v S 10.

The provisions of § 6 of 152 v S 10 read as follows:

SECTION 6. * * * Section 2929.01 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. H.B. 461 and Am. Sub. S.B. 260 of the 126th General Assembly. * * * The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composites are the resulting versions of the sections in effect prior to the effective date of the sections as presented in this act.

The provisions of § 5(B) of 151 v H 461 read as follows:

SECTION 5. (B) Section 2929.01 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. H.B. 95 and Am. Sub. H.B. 162 of the 126th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

The provisions of § 3(B) of 151 v S 260 read as follows:

SECTION 3. * * * (B) Section 2929.01 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. H.B. 95 and Am. Sub. H.B. 162 of the 126th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

The provisions of § 3 of H.B. 473 (150 v —) read as follows:

SECTION 3. * * * Sections 2929.01, 2929.13, and 2929.14 of the Revised Code are presented in this act as composites of the sections as amended by both Sub. H.B. 52 and Am. Sub. H.B. 163 of the 125th General Assembly. * * * The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composites are the resulting versions of the sections in effect prior to the effective date of the sections as presented in this act.

The effective date is set by section 4 of H.B. 490.

Not analogous to former RC § 2929.01 (134 v H 511; 136 v H 300; 137 v H 565; 139 v S 199; 140 v S 210; 142 v H 261; 145 v H 571; 145 v S 186, repealed 146 v S 2, § 2, eff. 7-1-96.

The provisions of § 5 of S.B. 123 (149 v —), as amended by § 3 of H.B. 163 (150 v —), read as follows:

SECTION 5. Notwithstanding division (B) of section 1.58 of the Revised Code, the provisions of the Revised Code amended or enacted in Sections 1 and 2 of this act shall apply only in relation to conduct and offenses committed on or after January 1, 2004. Conduct and offenses committed prior to January 1, 2004, shall be governed by the law in effect on the date the conduct or offense was committed.

See provisions, § 4 of HB 327 (149 v —) following RC § 2919.25.

See provisions, § 11 of SB 179 (148 v —) following RC § 2923.36.

[PENALTIES FOR MURDER]

§ 2929.02 Penalties for aggravated murder or murder.

(A) Whoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022 [2929.02.2], 2929.03, and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In

addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B)(1) Except as otherwise provided in division (B)(2) or (3) of this section, whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life.

(2) Except as otherwise provided in division (B)(3) of this section, if a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code, the victim of the offense was less than thirteen years of age, and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the court shall impose an indefinite prison term of thirty years to life pursuant to division (B)(3) of section 2971.03 of the Revised Code.

(3) If a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code and also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information that charged the murder, the court shall impose upon the offender a term of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(4) In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to the offender or to the dependents of the offender, or will prevent the offender from making reparation for the victim's wrongful death.

(D)(1) In addition to any other sanctions imposed for a violation of section 2903.01 or 2903.02 of the Revised Code, if the offender used a motor vehicle as the means to commit the violation, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(2) As used in division (D) of this section, "motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

HISTORY: 134 v H 511 (Eff. 1-1-74); 139 v S 1 (Eff. 10-19-81); 146 v H 180 (Eff. 1-1-97); 147 v S 107 (Eff. 7-29-98); 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08.

The effective date is set by § 3 of 152 v S 10.

See provisions, § 4 of HB 180 (146 v —), following RC § 2921.34.

[§ 2929.02.1] § 2929.021 Notice to supreme court of indictment charging aggravated murder; plea.

(A) If an indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the clerk of the court in which the indictment is filed, within fifteen days after the day on which it

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(H) No financial sanction imposed under this section or section 2929.32 of the Revised Code shall preclude a victim from bringing a civil action against the offender.

HISTORY: 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 480 (Eff 10-16-96); 146 v S 166 (Eff 10-17-96); 147 v H 122 (Eff 7-29-98); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 528 (Eff 2-13-2001); 149 v H 170. Eff 9-6-2002; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 151 v H 461, § 1, eff. 4-4-07; 151 v H 241, § 1, eff. 7-1-07; 152 v S 17, § 1, eff. 9-30-08.

The provisions of § 3 of 152 v S 17 read as follows:

SECTION 3. Section 2929.18 of the Revised Code is presented in this act as a composite of the section as amended by both Sub. H.B. 241 and Am. Sub. H.B. 461 of the 126th General Assembly.

* * * The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

See provisions of § 4 of 151 v H 241 following RC § 2901.01. The effective date is set by section 4 of HB 490.

The provisions of § 5 of HB 490 (149 v —) read as follows:

SECTION 5. Section 2929.18 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. S.B. 123 and Sub. H.B. 170 of the 124th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the specified composite is the resulting version of the specified sections in effect prior to the effective date of the section as presented in this act.

See provisions of § 5 of S.B. 123 (149 v —) following RC § 2929.01.

The provisions of § 4 of HB 170 (149 v —) read as follows:

SECTION 4. Section 2929.18 of the Revised Code is presented in this act as a composite of the section as amended by Am. H.B. 528, Am. Sub. S.B. 22, and Am. Sub. S.B. 107 of the 123rd General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

Comment, Legislative Service Commission

Section 2929.18 of the Revised Code is amended by Sub. H.B. 241 and Am. Sub. H.B. 461 of the 126th General Assembly. Comparison of these amendments in pursuance of section 1.52 of the Revised Code discloses that they are not irreconcilable so that they are required by that section to be harmonized to give effect to each amendment.

[§ 2929.18.1] § 2929.181 Repealed, 146 v S 269, § 2 and by 148 v S 107, § 2 [146 v S 2]. Eff 7-1-96.

This section concerned determination of offender's ability to pay; withholding or deduction orders. See now RC § 2929.18(E).

The provisions of § 3 of SB 107 (148 v —) read as follows:

SECTION 3. The General Assembly hereby declares that the repeal of section 2929.181 of the Revised Code in Section 2 of this act is intended to be a ratification of the repeal of section 2929.181 of the Revised Code by Am. Sub. S.B. 269 of the 121st General Assembly, which was effective on July 1, 1996, and that section 2929.181 of the Revised Code, as enacted by Am. Sub. S.B. 2 of the 121st General Assembly, is not currently in effect.

Section 2929.181 of the Revised Code was enacted by Am. Sub. S.B. 2 of the 121st General Assembly, which was effective on July 1, 1996, was amended by Sub. H.B. 480 of the 121st General Assembly, which was enacted on May 23, 1996, and effective on

October 16, 1996, and was repealed by Am. Sub. S.B. 269 of the 121st General Assembly, which was enacted on May 30, 1996, and effective on July 1, 1996. The different enactment dates and effective dates of Sub. H.B. 480 and Am. Sub. S.B. 269 of the 121st General Assembly have caused some confusion as to whether section 2929.181 of the Revised Code continued in effect after the effective date of Sub. H.B. 480 of the 121st General Assembly, despite the repeal of the section by Am. Sub. S.B. 269.

It was the intent of the 121st General Assembly to repeal section 2929.181 of the Revised Code effective on July 1, 1996, by Am. Sub. S.B. 269 of the 121st General Assembly. This repeal is supported by section 1.52 of the Revised Code, which provides that, if statutes enacted by the same session of the General Assembly are irreconcilable, the statute latest in date of enactment prevails. Am. Sub. S.B. 269 of the 121st General Assembly was enacted on May 30, 1996, seven days after the enactment of Sub. H.B. 480 of the 121st General Assembly. Therefore, the repeal of section 2929.181 of the Revised Code contained in Am. Sub. S.B. 269 of the 122nd General Assembly controlled over the amendment of that section by Sub. H.B. 480 of the 121st General Assembly, and the section was repealed effective July 1, 1996.

§ 2929.19 Sentencing hearing.

(A) The court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony and before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded pursuant to section 2953.07 or 2953.08 of the Revised Code. At the hearing, the offender, the prosecuting attorney, the victim or the victim's representative in accordance with section 2930.14 of the Revised Code, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case. The court shall inform the offender of the verdict of the jury or finding of the court and ask the offender whether the offender has anything to say as to why sentence should not be imposed upon the offender.

(B)(1) At the sentencing hearing, the court, before imposing sentence, shall consider the record, any information presented at the hearing by any person pursuant to division (A) of this section, and, if one was prepared, the presentence investigation report made pursuant to section 2951.03 of the Revised Code or Criminal Rule 32.2, and any victim impact statement made pursuant to section 2947.051 [2947.05.1] of the Revised Code.

(2) The court shall impose a sentence and shall make a finding that gives its reasons for selecting the sentence imposed in any of the following circumstances:

(a) Unless the offense is a violent sex offense or designated homicide, assault, or kidnapping offense for which the court is required to impose sentence pursuant to division (C) of section 2929.14 of the Revised Code, if it imposes a prison term for a felony of the fourth or fifth degree or for a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of section 2929.13 of the Revised Code for purposes of sentencing, its reasons for imposing the prison term, based upon the overriding purposes and principles of felony sentencing set forth in section 2929.11 of the Revised Code, and any factors listed in divisions (B)(1)(a) to (i) of section 2929.13 of the Revised Code that it found to apply relative to the offender.

(b) If it does not impose a prison term for a felony of the first or second degree or for a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and for which a presumption in favor of a prison

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term is specified as being applicable, its reasons for not imposing the prison term and for overriding the presumption, based upon the overriding purposes and principles of felony sentencing set forth in section 2929.11 of the Revised Code, and the basis of the findings it made under divisions (D)(1) and (2) of section 2929.13 of the Revised Code.

(c) If it imposes consecutive sentences under section 2929.14 of the Revised Code, its reasons for imposing the consecutive sentences;

(d) If the sentence is for one offense and it imposes a prison term for the offense that is the maximum prison term allowed for that offense by division (A) of section 2929.14 of the Revised Code or section 2929.142 [2929.14.2] of the Revised Code, its reasons for imposing the maximum prison term;

(e) If the sentence is for two or more offenses arising out of a single incident and it imposes a prison term for those offenses that is the maximum prison term allowed for the offense of the highest degree by division (A) of section 2929.14 of the Revised Code or section 2929.142 [2929.14.2] of the Revised Code, its reasons for imposing the maximum prison term.

(3) Subject to division (B)(4) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

(a) Impose a stated prison term;

(b) Notify the offender that, as part of the sentence, the parole board may extend the stated prison term for certain violations of prison rules for up to one-half of the stated prison term;

(c) Notify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person. If a court imposes a sentence including a prison term of a type described in division (B)(3)(c) of this section on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(3)(c) of this section that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under division (B) of section 2967.28 of the Revised Code. Section 2929.191 [2929.19.1] of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of this section and failed to notify the offender pursuant to division (B)(3)(c) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(d) Notify the offender that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the third, fourth, or fifth degree that is not subject to division (B)(3)(c) of this section. Section 2929.191 [2929.19.1] of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(3)(d) of this section and failed to notify the offender pursuant to division (B)(3)(d) of this section regarding

post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(e) Notify the offender that, if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of this section, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of section 2967.131 [2967.13.1] of the Revised Code, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender. If a court imposes a sentence including a prison term on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(3)(e) of this section that the parole board may impose a prison term as described in division (B)(3)(e) of this section for a violation of that supervision or a condition of post-release control imposed under division (B) of section 2967.131 [2967.13.1] of the Revised Code or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the authority of the parole board to so impose a prison term for a violation of that nature if, pursuant to division (D)(1) of section 2967.28 of the Revised Code, the parole board notifies the offender prior to the offender's release of the board's authority to so impose a prison term. Section 2929.191 [2929.19.1] of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term and failed to notify the offender pursuant to division (B)(3)(e) of this section regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control.

(f) Require that the offender not ingest or be injected with a drug of abuse and submit to random drug testing as provided in section 341.26, 753.33, or 5120.63 of the Revised Code, whichever is applicable to the offender who is serving a prison term, and require that the results of the drug test administered under any of those sections indicate that the offender did not ingest or was not injected with a drug of abuse.

(4)(a) The court shall include in the offender's sentence a statement that the offender is a tier III sex offender/child-victim offender, and the court shall comply with the requirements of section 2950.03 of the Revised Code if any of the following apply:

(i) The offender is being sentenced for a violent sex offense or designated homicide, assault, or kidnapping offense that the offender committed on or after January 1, 1997, and the offender is adjudicated a sexually violent predator in relation to that offense.

(ii) The offender is being sentenced for a sexually oriented offense that the offender committed on or after January 1, 1997, and the offender is a tier III sex offender/child-victim offender relative to that offense.

(iii) The offender is being sentenced on or after July 31, 2003, for a child-victim oriented offense, and the offender is a tier III sex offender/child-victim offender relative to that offense.

(iv) The offender is being sentenced under section 2971.03 of the Revised Code for a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or after January 2, 2007.

(v) The offender is sentenced to a term of life without parole under division (B) of section 2907.02 of the Revised Code.

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include in the judgment of the journal or in the sentence a release control.

that, if a period of supervision is imposed on the offender's release from prison, as provided in division (c) or (d) of this section, and if the offender is not supervised under division (B) of section 2929.13 of the Revised Code, the parole board, as part of the sentence, shall state the prison term originally imposed on the offender. If a court imposes a sentence on or after July 11, 2006, the offender pursuant to division (C)(1) of this section, the parole board may impose a term at the parole board may impose a term as specified in division (B)(3)(e) of this section, that supervision or a condition of supervision entered on the journal or otherwise not negate, limit, or otherwise modify the parole board to so impose a term of that nature if, pursuant to section 2967.28 of the Revised Code, the offender prior to the offender's sentence to so impose a prison term. [1] of the Revised Code applies, a court imposed a sentence and failed to notify the offender of this section regarding the parole board imposing a prison term for or a condition of post-release

offender not ingest or be injected submit to random drug testing as provided in sections 26, 753.33, or 5120.63 of the Revised Code is applicable to the offender who does not require that the results of the offender any of those sections indicate that the offender did not ingest or was not injected

include in the offender's sentence if the offender is a tier III sex offender, the court shall comply with the provisions of section 2950.03 of the Revised Code if the offender is a tier III sex offender.

being sentenced for a violent sex offense, homicide, assault, or kidnapping committed on or after January 1, 2007, as adjudicated a sexually violent offender.

being sentenced for a sexually violent offense committed on or after July 11, 2006, the offender is a tier III sex offender relative to that offense.

being sentenced on or after July 31, 2007, for a violent sex offense, homicide, assault, or kidnapping committed on or after July 31, 2007, as adjudicated a sexually violent offender relative to that offense.

being sentenced under section 2929.13 of the Revised Code for a violation of division (C)(1) of section 2929.13 of the Revised Code committed on or after July 11, 2006.

being sentenced to a term of life without parole under section 2907.02 of the Revised Code.

(vi) The offender is being sentenced for attempted rape committed on or after January 2, 2007, and a specification of the type described in section 2941.1418 [2941.14.18], 2941.1419 [2941.14.19], or 2941.1420 [2941.14.20] of the Revised Code.

(vii) The offender is being sentenced under division (B)(3)(a), (b), (c), or (d) of section 2971.03 of the Revised Code for an offense described in those divisions committed on or after the effective date of this amendment.

(b) Additionally, if any criterion set forth in divisions (B)(4)(a)(i) to (vii) of this section is satisfied, in the circumstances described in division (G) of section 2929.14 of the Revised Code, the court shall impose sentence on the offender as described in that division.

(5) If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed and the court is not prohibited from imposing a community control sanction, the court shall impose a community control sanction. The court shall notify the offender that, if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation officer, the court may impose a longer time under the same sanction, may impose a more restrictive sanction, or may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a sanction for the violation, as selected by the court from the range of prison terms for the offense pursuant to section 2929.14 of the Revised Code.

(6) Before imposing a financial sanction under section 2929.18 of the Revised Code or a fine under section 2929.32 of the Revised Code, the court shall consider the offender's present and future ability to pay the amount of the sanction or fine.

(7) If the sentencing court sentences the offender to a sanction of confinement pursuant to section 2929.14 or 2929.16 of the Revised Code that is to be served in a local detention facility, as defined in section 2929.36 of the Revised Code, and if the local detention facility is covered by a policy adopted pursuant to section 307.93, 341.14, 341.19, 341.21, 341.23, 753.02, 753.04, 753.16, 2301.56, or 2947.19 of the Revised Code and section 2929.37 of the Revised Code, both of the following apply:

(a) The court shall specify both of the following as part of the sentence:

(i) If the offender is presented with an itemized bill pursuant to section 2929.37 of the Revised Code for payment of the costs of confinement, the offender is required to pay the bill in accordance with that section.

(ii) If the offender does not dispute the bill described in division (B)(7)(a)(i) of this section and does not pay the bill by the times specified in section 2929.37 of the Revised Code, the clerk of the court may issue a certificate of judgment against the offender as described in that section.

(b) The sentence automatically includes any certificate of judgment issued as described in division (B)(7)(a)(ii) of this section.

(C)(1) If the offender is being sentenced for a fourth degree felony OVI offense under division (C)(1) of section 2929.13 of the Revised Code, the court shall impose the mandatory term of local incarceration in accordance with that division, shall impose a mandatory fine in accordance with division (B)(3) of section 2929.18 of the Revised Code, and, in addition, may impose additional sanctions as specified in sections 2929.15, 2929.16, 2929.17, and 2929.18 of the Revised Code. The court shall not impose

a prison term on the offender except that the court may impose a prison term upon the offender as provided in division (A)(1) of section 2929.13 of the Revised Code.

(2) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the court shall impose the mandatory prison term in accordance with that division, shall impose a mandatory fine in accordance with division (B)(3) of section 2929.18 of the Revised Code, and, in addition, may impose an additional prison term as specified in section 2929.14 of the Revised Code. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may impose a community control sanction on the offender, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(D) The sentencing court, pursuant to division (K) of section 2929.14 of the Revised Code, may recommend placement of the offender in a program of shock incarceration under section 5120.031 [5120.03.1] of the Revised Code or an intensive program prison under section 5120.032 [5120.03.2] of the Revised Code, disapprove placement of the offender in a program or prison of that nature, or make no recommendation. If the court recommends or disapproves placement, it shall make a finding that gives its reasons for its recommendation or disapproval.

HISTORY: 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 149 v H 349 (Eff 9-22-2000); 149 v H 485 (Eff 6-13-2002); 149 v H 327 (Eff 7-8-2002); 149 v H 170 (Eff 9-6-2002); 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v S 5, § 1, Eff 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 137, § 1, eff. 7-11-06; 151 v S 260, § 1, eff. 1-2-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08.

The effective date is set by § 3 of 152 v S 10.

The provisions of § 6 of 152 v S 10 read as follows:

SECTION 6 * * * Section 2929.19 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. H.B. 461 and Am. Sub. S.B. 260 of the 126th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composites are the resulting versions of the sections in effect prior to the effective date of the sections as presented in this act.

See provisions of § 5 of 151 v H 137 following RC § 2929.191.

The effective date is set by § 7 of 151 v H 137.

The effective date is set by section 4 of H.B. 490.

The provisions of § 5 of HB 490 (149 v S 10) read as follows:

SECTION 5 Section 2929.19 of the Revised Code is presented in this act as a composite of the section as amended by Sub. H.B. 170, Sub. H.B. 485, and Am. Sub. S.B. 123, all of the 124th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the specified composite is the resulting version of the specified sections in effect prior to the effective date of the section as presented in this act.

The provisions of § 7 of S.B. 5 (150 v S 10) read as follows:

SECTION 7 (A) Section 2929.19 of the Revised Code, effective until January 1, 2004, is presented in Section 1 of this act as a composite of the section as amended by both Sub. H.B. 170 and Sub. H.B. 485 of the 124th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composites are the resulting versions of the sections in effect prior

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encing. Also, because the two es properly documented the sentence and the filing date resentencing, there was no nts occurred. State v. Barnes, d —, 2007 Ohio App. LEXIS 9), 2007).

nced, upon remand pursuant 3.07, to the same sentence he ing hearing, it was not shown duct a complete resentencing Ann. § 2929.19(A)(1), or that er new evidence defendant l judge said the resentencing sider the sentence previously io App. 3d —, — N.E. 2d —, 05 Ohio 6418, (Dec. 2, 2005).

ed on remand after State v. d because defendant had not ndictive in nature. The State sed sentence on the ground cepting responsibility, and it defendants involved in the drug ed and had accepted full re- etween two and six years in o App. 3d —, — N.E. 2d —, 07 Ohio 1046, (Mar. 9, 2007). e dictates of Ohio Rev. Code on judicial fact-finding when um term of imprisonment, Amendment jury trial rights d pursuant to the directive in ceing was mandated. Upon ful term within the statutory to Ohio Rev. Code Ann. io App. 3d —, — N.E. 2d —, 06 Ohio 6455, (Dec. 6, 2006). eed under Ohio Rev. Code l 2929.19(B)(2), his sentence se had to be remanded for tutes had been held to be — Ohio App. 3d —, — N.E. 71, 2006 Ohio 5918, (Nov. 9,

cretion by finding that the e restitution ordered for the v. Anderson, 172 Ohio App. hio 3849, (2007). il court's determination that y restitution in the amount defendant would be only 28 e from imprisonment. If the entencing hearing, and his lision, were genuine, defen- ictive life upon release, and ate v. Anderson, 172 Ohio 07 Ohio 3849, (2007). l of complicity to theft and ng, defendant was properly § 2929.18(A)(1) and RC i of the entire amount of the nsistency in sentencing did e allocated between defen- : State v. Ankrom, — Ohio

App. 3d —, — N.E. 2d —, 2007 Ohio App. LEXIS 3094, 2007 Ohio 3374, (June 29, 2007).

Pursuant to RC §§ 2929.18 and 2929.19(B)(6), a trial court properly considered defendant's ability to pay the restitution that it ordered, although it did not explicitly state that it had considered defendant's present and future ability to pay. As the money stolen in defendant's bank robbery had already been fully recovered by police and the restitution order was for that exact amount, the trial court clearly considered that defendant had the ability to pay that sum. State v. Smith, — Ohio App. 3d —, — N.E. 2d —, 2007 Ohio App. LEXIS 2885, 2007 Ohio 3129, (June 25, 2007).

As a trial court indicated that it intended to consider defendant's pre-sentence investigation and the victim impact statements prior to imposing restitution, the requirements of RC § 2929.19(B)(6) for determining defendant's ability to pay were met. State v. Smith, — Ohio App. 3d —, — N.E. 2d —, 2007 Ohio App. LEXIS 1699, 2007 Ohio 1884, (Apr. 17, 2007).

Trial court erred by ordering defendant to pay \$17,029 in restitution because, at the sentencing hearing, it made no inquiry into his present or future ability to pay restitution, as required by RC § 2929.19(B)(6). That issue never came up. The restitution order was based on the damage amounts reported by the victims. State v. Frock, — Ohio App. 3d —, — N.E. 2d —, 2007 Ohio App. LEXIS 952, 2007 Ohio 1026, (Mar. 9, 2007).

Where a trial court failed to consider defendant's present or future ability to pay financial sanctions, including restitution, fines, and costs pursuant to Ohio Rev. Code Ann. §§ 2929.18(A)(4) and 2929.19(B)(6), the sanctions required reversal and a remand for resentencing. State v. Hamblin, — Ohio App. 3d —, — N.E. 2d —, 2006 Ohio App. LEXIS 3092, 2006 Ohio 3202, (June 16, 2006).

Sentence affirmed

As the record from the sentencing hearing provided sufficient reasons to support the trial court's denial of defendant's eligibility for an intensive prison program pursuant to Ohio Rev. Code Ann. § 5120.032, the record "as a whole" was sufficient to meet the requirements of Ohio Rev. Code Ann. § 2929.19(D). The trial court noted that defendant has previously served a prison term, that he had a history of criminal convictions, and that the shortest prison term would demean the seriousness of defendant's conduct. State v. Jackson, — Ohio App. 3d —, — N.E. 2d —, 2006 Ohio App. LEXIS 3932, 2006 Ohio 3994, (Aug. 2, 2006).

Six-month jail sentence on one offense was consecutive to a one-year prison term imposed on a second offense, but the jail sentence was not a "prison term." Rather, it was an element of a community control sanction, and since no consecutive prison terms were imposed, Ohio Rev. Code Ann. § 2929.19(B)(2)(c) did not apply. State v. Burns, — Ohio App. 3d —, — N.E. 2d —, 2006 Ohio App. LEXIS 2495, 2006 Ohio 2666, (May 26, 2006).

Sentencing

When defendant pled guilty to rape, it was not error for a trial court to consider defendant's pre-sentence investigation report prior to imposing sentence because RC § 2929.19(A)(1) required the trial court to consider such a report at sentencing. State v. Bartholomew, — Ohio App. 3d —, — N.E. 2d —, 2007 Ohio App. LEXIS 2884, 2007 Ohio 3130, (June 25, 2007).

Trial court erred in imposing a term of imprisonment for the alleged community control violation because defendant was not advised at his original sentencing that he would be subject to prison time if he violated the community control sanctions, as required by Ohio Rev. Code Ann.

§ 2929.19(B)(5) and Ohio Rev. Code Ann. § 2929.15. The trial court's journal entry originally sentencing defendant to community control sanctions was entirely devoid of any suspended sentence or any notification to defendant as to the specific prison term he faced if he violated the community control sanctions. State v. Hayes, — Ohio App. 3d —, — N.E. 2d —, 2006 Ohio App. LEXIS 5849, 2006 Ohio 5924, (Nov. 9, 2006).

Victim statements

Trial court's consideration of the victim impact statement pursuant to Ohio Rev. Code Ann. § 2947.051 in defendant's criminal matter was used to help it determine the appropriate sentence to impose pursuant to Ohio Rev. Code Ann. §§ 2929.19(B)(1) and 2929.14(A), and it was accordingly not an abuse of discretion. There was no constitutional violation in the trial court's use of the statement, as the Foster court had expressly allowed consideration of the statement without it being a violation of a jury trial right under Ohio Const. art. 1, § 10, and it was not contrary to law. State v. Williams, — Ohio App. 3d —, — N.E. 2d —, 2006 Ohio App. LEXIS 4683, 2006 Ohio 4768, (Sept. 14, 2006).

Because the trial court relied on Ohio Rev. Code Ann. § 2929.14(C) when it imposed the maximum sentences, and that provision had been found to be unconstitutional and was severed, the sentences were vacated and defendant had to be resentenced. The trial court did not err, however, in relying on the victim impact statements since it was a requirement under Ohio Rev. Code Ann. § 2929.19(B)(1). State v. Slagle, — Ohio App. 3d —, — N.E. 2d —, 2006 Ohio App. LEXIS 4070, 2006 Ohio 4101, (Aug. 10, 2006).

[§ 2929.19.1] § 2929.191 Correction to judgment of conviction concerning post-release control.

(A)(1) 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.

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)(d) of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division that the offender may 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)(2) of section 2929.14 of the Revised Code, at any time before the offender is released from imprisonment

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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 may be supervised under section 2967.28 of the Revised Code after the offender leaves prison.

(2) If a court prepares and issues a correction to a judgment of conviction as described in division (A)(1) of this section before the offender is released from imprisonment under the prison term the court imposed prior to the effective date of this section, the court shall place upon the journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. If the court sends a copy of the entry to the department, the department promptly shall deliver a copy of the entry to the offender. The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the sentence and the judgment of conviction entered on the journal and had notified the offender that the offender will be so supervised regarding a sentence including a prison term of a type described in division (B)(3)(c) of section 2929.19 of the Revised Code or that the offender may be so supervised regarding a sentence including a prison term of a type described in division (B)(3)(d) of that section.

(B)(1) If, prior to the effective date of this section, a court imposed a sentence including a prison term and failed to notify the offender pursuant to division (B)(3)(e) of section 2929.19 of the Revised Code regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control or to include in the judgment of conviction entered on the journal a statement to that effect, 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 if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of section 2929.19 of the Revised Code, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of section 2967.131 [2967.13.1] of the Revised Code the parole board may impose as part of the sentence a prison term of up to one-half of the stated prison term originally imposed upon the offender.

(2) If the court prepares and issues a correction to a judgment of conviction as described in division (B)(1) of this section before the offender is released from imprisonment under the term, the court shall place upon the journal of the court an entry nunc pro tunc to

record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. If the court sends a copy of the entry to the department, the department promptly shall deliver a copy of the entry to the offender. The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the judgment of conviction entered on the journal and had notified the offender pursuant to division (B)(3)(e) of section 2929.19 of the Revised Code regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control.

(C) On and after the effective date of this section, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division. Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing, the prosecuting attorney of the county, and the department of rehabilitation and correction. The offender has the right to be physically present at the hearing, except that, upon the court's own motion or the motion of the offender or the prosecuting attorney, the court may permit the offender to appear at the hearing by video conferencing equipment if available and compatible. An appearance by video conferencing equipment pursuant to this division has the same force and effect as if the offender were physically present at the hearing. At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction.

HISTORY: 151 v H 137, § 1, eff. 7-11-06.

The provisions of § 5 of 151 v H 137 read as follows:

SECTION 5. (A) The General Assembly hereby declares that its purpose in amending sections 2929.14, 2929.19, and 2967.28 and enacting section 2929.191 of the Revised Code in Sections 1 and 2 of this act and in amending section 2929.14 of the Revised Code in Sections 3 and 4 of this act is to reaffirm that, under the amended sections as they existed prior to the effective date of this act: (1) by operation of law and without need for any prior notification or warning, every convicted offender sentenced to a prison term for a felony of the first or second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person always is subject to a period of post-release control after the offender's release from imprisonment pursuant to and for the period of time described in division (B) of section 2967.28 of the Revised Code; (2) by operation of law, every convicted offender sentenced to a prison term for a felony of the third, fourth, or fifth degree that is not subject to the provision described in clause (1) of

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judgment of conviction entry to the offender or, present at the hearing, to the department of for delivery to the of copy of the entry to the promptly shall deliver a der. The court's place- entry nunc pro tunc ed from imprisonment are, and shall have the at the time of original tement in the judgment urnal and had notified on (B)(3)(e) of section egarding the possibility ; a prison term for a ndition of post-release

the date of this section, a l issue a correction to a e described in division n shall not issue the as conducted a hearing Before a court holds a n, the court shall pro- ce, and purpose of the is the subject of the y of the county, and the id correction. The of- ysically present at the court's own motion or e prosecuting attorney, nder to appear at the equipment if available by video conferencing ion has the same force e physically present at the of the offender and the ce a statement as to e a correction to the

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137 read as follows: ssembly hereby declares ns 2929.14, 2929.19, and 31 of the Revised Code in ending section 2929.14 and 4 of this act is to sections as they existed t: (1) by operation of law ication or warning, every rison term for a felony of ony sex offense, or for a a felony sex offense and der caused or threatened vays is subject to a period offender's release from the period of time de- 7.28 of the Revised Code; ed offender sentenced to d, fourth, or fifth degree escribed in clause (1) of

this sentence is subject to a period of post-release control after the offender's release from imprisonment pursuant to division (C) of section 2967.28 of the Revised Code if the parole board determines in accordance with specified criteria that post-release control is necessary; and (3) by operation of law and without need for any prior notification or warning, every convicted offender sentenced to a prison term and subjected to supervision under a period of post-release control after the offender's release from imprisonment always is subject to having the Parole Board impose in accordance with section 2967.28 of the Revised Code a prison term of up to one-half of the stated prison term originally imposed upon the offender if the offender violates that supervision or a condition of post-release control imposed under division (B) of section 2967.131 of the Revised Code.

(B) The General Assembly hereby declares that it believes that the amendments made to sections 2929.14, 2929.19, and 2967.28 and the enactment of section 2929.191 of the Revised Code in Sections 1 and 2 of this act and the amendment made to section 2929.14 of the Revised Code in Sections 3 and 4 of this act are not substantive in nature and merely clarify that the amended sections operate as described in division (A) of this Section, that the convicted offenders described in clause (1) under division (A) of this Section always are subject by operation of law and without need for any prior notification or warning to a period of post-release control after their release from imprisonment as described in that division, that the convicted offenders described in clause (2) under division (A) of this Section are subject by operation of law to post-release control after their release from imprisonment if the Parole Board makes certain determinations, that the convicted offenders described in clause (3) under division (A) of this Section always are subject by operation of law to having the Parole Board impose a prison term if they violate their supervision or a condition of post-release control as described in that division, and that the amendments made to sections 2929.14, 2929.19, and 2967.28 and the enactment of section 2929.191 of the Revised Code in Sections 1 and 2 of this act and the amendment made to section 2929.14 of the Revised Code in Sections 3 and 4 of this act thus are remedial in nature. The General Assembly declares that it intends that the clarifying, remedial amendments made to sections 2929.14, 2929.19, and 2967.28 and the enactment of section 2929.191 of the Revised Code in Sections 1 and 2 of this act and the amendment made to section 2929.14 of the Revised Code in Sections 3 and 4 of this act apply to all convicted offenders described in division (A) of this Section, regardless of whether they were sentenced prior to, or are sentenced on or after, the effective date of this act.

The effective date is set by § 7 of 151 v H 137.

CASE NOTES AND OAG

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Constitutionality

Where a trial court failed to properly notify a defendant at the original sentencing hearing concerning postrelease control, it may vacate the sentence, and then resentence the defendant: *State v. Ryan*, 172 Ohio App. 3d 281, 874 N.E.2d 853, 2007 Ohio 3092, (2007).

There was no ex post facto violation in correcting the sentence to include notification of post-release control because defendant was subject to a mandatory period of post-release control of five years, based on his conviction for a felony of the first degree, pursuant to R.C. § 2967.28(B)(1); the trial court possessed no discretion to alter that period of post-release control. Thus, the trial court's correction of its judgment entry merely subjected defendant to the same penalty to which he was already subject under the statute. *State v. Sharpless*, — Ohio App. 3d —, — N.E. 2d —, 2007 Ohio App. LEXIS 1731, 2007 Ohio 1922, (Apr. 20, 2007).

Allocation

Defendant's notification of post-release control in resentencing did not equate to an increase in his overall sentence because the purpose of the resentencing was to give defendant notice of a condition that already existed at the time of his original sentence; defendant's right to allocation was not affected as the right to allocation only applied during the time of sentencing and the very purpose of allocation was to mitigate the punishment. Although defendant was entitled, pursuant to RC § 2929.191(C), to have a right to speak at the hearing, defendant's right to speak did not affect the length of the post-release control that had to be applied and thus, the trial court's failure to allow defendant to speak was harmless error at best. *State v. Barnes*, — Ohio App. 3d —, — N.E. 2d —, 2007 Ohio App. LEXIS 3088, 2007 Ohio 3362, (June 29, 2007).

Applicability

As defendant was properly notified at both the sentencing hearing, which was conducted upon remand for resentencing pursuant to Foster, and in the trial court's sentencing entry that she was subject to post-release control pursuant to RC § 2967.28(B)(1) based upon her conviction of a first-degree felony, the amendments of Am. Sub. H.B. 137, Gen. Assem. (Ohio 2006), including RC § 2929.191, were not applicable to defendant's sentencing; accordingly, she lacked standing to assert a constitutional challenge to that statutory scheme on appeal. *State v. Calhoun*, — Ohio App. 3d —, — N.E. 2d —, 2007 Ohio App. LEXIS 3307, 2007 Ohio 3612, (July 16, 2007).

Application

When defendant was resentenced pursuant to Foster, RC § 2929.191 did not apply because (1) the prior sentence had to be treated as if it did not exist, making the subsequent sentence the only viable sentence, and (2) the subsequent sentence was imposed after the effective date of § 2929.191, so the trial court, upon resentencing, had to comply with the terms of RC § 2929.19, requiring notice of post-release control, rather than simply a judgment entry noting defendant's post-release control term. *State v. Smith*, — Ohio App. 3d —, — N.E. 2d —, 2007 Ohio App. LEXIS 2641, 2007 Ohio 2841, (June 11, 2007).

Authority of court

An inmate's prohibition petition against a judge who presided over the inmate's underlying criminal matter failed to state a viable claim where the judge acted within the scope of his jurisdiction pursuant to Ohio Rev. Code Ann. § 2929.191(A)(1) when he held a new hearing to determine whether to impose a possible term of post-release control

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section with the victim's name and the authority, at least three weeks before the prisoner is transferred from transitional control to the department of rehabilitation and correction, shall notify the victim of the pending transfer and the victim's right to submit a statement regarding the impact of the transfer on the victim's life. If the victim submits a statement of that nature to the authority, the authority shall consider the statement in deciding whether to transfer the prisoner to transitional control. The department of rehabilitation and correction shall, prior to a hearing to transfer the prisoner to transitional control pursuant to this section, shall maintain pursuant to section 5(2)(b) the prisoner's name and all information specified in division (A)(1)(c)(iv) of this section and independent of the authority's transfer of the prisoner to transitional control. In addition to reports, and statements it considers relevant and (3) of this section or that it otherwise considers, the authority shall consider each statement in accordance with this division in deciding whether to transfer the prisoner to transitional control. A prisoner transferred to transitional control shall be confined in the manner provided in division (A) of this section during any period in which the prisoner is not actually working a job, employed, engaged in a vocational or other educational program, engaged in a program designated by the director, or engaged in a program approved by the department. The department of rehabilitation and correction shall make arrangements for transferring eligible prisoners to transitional control, supervising and confining prisoners in transitional control, and administering the transitional control program in accordance with this section, and using the money in the transitional control fund established in division (E) of this section. The department of rehabilitation and correction shall, for the issuance of passes for the limited purpose of visiting a relative in imminent danger of death, or private viewing of the body of a deceased relative, shall issue passes to prisoners who are temporarily released from transitional control under this section. If the rules of that nature, the rules shall provide for the issuance of passes to prisoners who are temporarily released from transitional control under this section. Upon the adoption of this division, the department may issue passes to prisoners who are transferred to transitional control in accordance with the rules of this division. All passes issued under this section shall be valid for a maximum of forty-eight hours and only for the following purposes:

- (1) relative in imminent danger of death;
- (2) private viewing of the body of a deceased relative;
- (3) to visit family;
- (4) to receive medical aid in the rehabilitation of the prisoner;
- (5) the parole authority may require a prisoner to be transferred to transitional control to pay to the

of parole and community services the reasonable expenses incurred by the division in supervising or confining the prisoner while under transitional control. Inability to pay those reasonable expenses shall not be grounds for refusing to transfer an otherwise eligible prisoner to transitional control. Amounts received by the division of transitional control shall be deposited into the transitional control fund, which is created in the state treasury and which hereby succeeds the furlough services fund that previously existed in the state treasury. All moneys that are transferred into the furlough services fund on March 17, 1998, shall be transferred on that date to the transitional control fund. The transitional control fund shall be used solely to pay the costs related to the operation of the transitional control program established under this section. The department of rehabilitation and correction shall adopt rules in accordance with section 111.15 of the Revised Code for the use of the fund.

(F) A prisoner who violates any rule established by the department of rehabilitation and correction under division (A), (C), or (D) of this section may be transferred to a state correctional institution pursuant to rules adopted under division (A), (C), or (D) of this section, but the prisoner shall receive credit towards completing the prisoner's sentence for the time spent under transitional control.

If a prisoner is transferred to transitional control under this section, upon successful completion of the period of transitional control, the prisoner may be released on parole or under post-release control pursuant to section 2967.13 or 2967.28 of the Revised Code and rules adopted by the department of rehabilitation and correction. If the prisoner is released under post-release control, the duration of the post-release control, the type of post-release control sanctions that may be imposed, the enforcement of the sanctions, and the treatment of prisoners who violate the sanctions applicable to the prisoner are governed by section 2967.28 of the Revised Code.

HISTORY: 134 v H 567 (EFF 3-7-72); 136 v H 637 (EFF 1-27-76); 139 v S 1 (EFF 10-19-81); 139 v H 694 (EFF 11-15-81); 139 v S 199 (EFF 7-1-83); 140 v S 210 (EFF 7-1-83); 142 v S 94 (EFF 7-20-88); 145 v H 152 (EFF 7-1-93); 145 v H 571 (EFF 10-8-94); 145 v S 186 (EFF 10-12-94); 146 v S 2 (EFF 7-1-96); 146 v H 180 (EFF 1-1-97); 147 v S 111 (EFF 3-17-98); 148 v S 107 (EFF 3-23-2000); 149 v H 510. EFF 3-31-2003; 149 v H 490, § 1, eff. 1-1-04; 151 v H 15, § 1, eff. 11-23-05.

The provisions of § 3 of 151 v H 15 read as follows:
SECTION 3. Section 2967.26 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. H.B. 490 and Sub. H.B. 510 of the 124th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act. The effective date is set by section 4 of H.B. 490.

§ 2967.27 Escorted visits.

(A)(1) The department of rehabilitation and correction may grant escorted visits to prisoners confined in any state correctional facility for the limited purpose of visiting a relative in imminent danger of death or having a private viewing of the body of a deceased relative.
 (2) Prior to granting any prisoner an escorted visit for the limited purpose of visiting a relative in imminent danger of death or having a private viewing of the body of a deceased relative under this section, the department

shall notify its office of victims' services so that the office may provide assistance to any victim or victims of the offense committed by the prisoner and to members of the family of the victim.

(B) The department of rehabilitation and correction shall adopt rules for the granting of escorted visits under this section and for supervising prisoners on an escorted visit.

(C) No prisoner shall be granted an escorted visit under this section if the prisoner is likely to pose a threat to the public safety or has a record of more than two felony commitments (including the present charge), not more than one of which may be for a crime of an assaultive nature.

(D) The procedure for granting an escorted visit under this section is separate from, and independent of, the transitional control program described in section 2967.26 of the Revised Code.

HISTORY: 135 v H 217 (EFF 9-26-74); 139 v S 1 (EFF 10-19-81); 145 v H 571 (EFF 10-6-94); 145 v S 186 (EFF 10-12-94); 146 v S 2 (EFF 7-1-96); 146 v S 269 (EFF 7-1-96); 146 v H 180 (EFF 1-1-97); 147 v S 111 (EFF 3-17-98); 149 v H 510. EFF 3-31-2003.

§ 2967.28 Period of post-release control for certain offenders; sanctions; proceedings upon violation.

(A) As used in this section:
 (1) "Monitored time" means the monitored time sanction specified in section 2929.17 of the Revised Code.

(2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(3) "Felony sex offense" means a violation of a section contained in Chapter 2907. of the Revised Code that is a felony.

(B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. If a court imposes a sentence including a prison term of a type described in this division on or after the effective date of this amendment, the failure of a sentencing court to notify the offender pursuant to division (B)(3)(c) of section 2929.19 of the Revised Code of this requirement or to include in the judgment of conviction entered on the journal a statement that the offender's sentence includes this requirement does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under this division. Section 2929.191 [2929.19.1] of the Revised Code applies if, prior to the effective date of this amendment, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(c) of section 2929.19 of the Revised Code regarding post-release control or to include 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 a statement regarding post-release control. Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of post-release control required by this

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division for an offender shall be of one of the following periods:

(1) For a felony of the first degree or for a felony sex offense, five years;

(2) For a felony of the second degree that is not a felony sex offense, three years;

(3) For a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years.

(C) Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender. Section 2929.191 [2929.19.1] of the Revised Code applies if, prior to the effective date of this amendment, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(d) of section 2929.19 of the Revised Code regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(2) of section 2929.14 of the Revised Code a statement regarding post-release control.

(D)(1) Before the prisoner is released from imprisonment, the parole board shall impose upon a prisoner described in division (B) of this section, may impose upon a prisoner described in division (C) of this section, and shall impose upon a prisoner described in division (B)(2)(b) of section 5120.031 [5120.03.1] or in division (B)(1) of section 5120.032 [5120.03.2] of the Revised Code, one or more post-release control sanctions to apply during the prisoner's period of post-release control. Whenever the board imposes one or more post-release control sanctions upon a prisoner, the board, in addition to imposing the sanctions, also shall include as a condition of the post-release control that the individual or felon not leave the state without permission of the court or the individual's or felon's parole or probation officer and that the individual or felon abide by the law. The board may impose any other conditions of release under a post-release control sanction that the board considers appropriate, and the conditions of release may include any community residential sanction, community nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to sections 2929.16, 2929.17, and 2929.18 of the Revised Code. Prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under this division, the parole board shall review the prisoner's criminal history, all juvenile court adjudications finding the prisoner, while a juvenile, to be a delinquent child, and the record of the prisoner's conduct while imprisoned. The parole board shall consider any recommendation regarding post-release control sanctions for the prisoner made by the office of victims' services. After considering those materials, the board shall determine, for a prisoner described in division (B) of this section, division (B)(2)(b) of section 5120.031 [5120.03.1], or division (B)(1) of section 5120.032 [5120.03.2] of the Revised Code, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances or, for a prisoner described in division (C) of this section,

whether a post-release control sanction is necessary and, if so, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances. In the case of a prisoner convicted of a felony of the fourth or fifth degree other than a felony sex offense, the board shall presume that monitored time is the appropriate post-release control sanction unless the board determines that a more restrictive sanction is warranted. A post-release control sanction imposed under this division takes effect upon the prisoner's release from imprisonment.

Regardless of whether the prisoner was sentenced to the prison term prior to, on, or after the effective date of this amendment, prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under this division, the parole board shall notify the prisoner that, if the prisoner violates any sanction so imposed or any condition of post-release control described in division (B) of section 2967.131 [2967.13.1] of the Revised Code that is imposed on the prisoner, the parole board may impose a prison term of up to one-half of the stated prison term originally imposed upon the prisoner.

(2) At any time after a prisoner is released from imprisonment and during the period of post-release control applicable to the releasee, the adult parole authority may review the releasee's behavior under the post-release control sanctions imposed upon the releasee under this section. The authority may determine, based upon the review and in accordance with the standards established under division (E) of this section, that a more restrictive or a less restrictive sanction is appropriate and may impose a different sanction. Unless the period of post-release control was imposed for an offense described in division (B)(1) of this section, the authority also may recommend that the parole board reduce the duration of the period of post-release control imposed by the court. If the authority recommends that the board reduce the duration of control for an offense described in division (B)(2), (B)(3), or (C) of this section, the board shall review the releasee's behavior and may reduce the duration of the period of control imposed by the court. In no case shall the board reduce the duration of the period of control imposed by the court for an offense described in division (B)(1) of this section, and in no case shall the board permit the releasee to leave the state without permission of the court or the releasee's parole or probation officer.

(E) The department of rehabilitation and correction, in accordance with Chapter 119. of the Revised Code, shall adopt rules that do all of the following:

(1) Establish standards for the imposition by the parole board of post-release control sanctions under this section that are consistent with the overriding purposes and sentencing principles set forth in section 2929.11 of the Revised Code and that are appropriate to the needs of releasees;

(2) Establish standards by which the parole board can determine which prisoners described in division (C) of this section should be placed under a period of post-release control;

(3) Establish standards to be used by the parole board in reducing the duration of the period of post-release control imposed by the court when authorized under division (D) of this section, in imposing a more restrictive post-release control sanction than monitored time upon a prisoner convicted of a felony of the fourth or fifth degree other than a felony sex offense, or in imposing a less restrictive control sanction upon a releasee based on the

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under the period of post-release control imposed for the earlier felony as determined by the parole board.

HISTORY: 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 147 v S 111 (Eff 3-17-98); 148 v S 107 (Eff 3-23-2000); 149 v H 327 (Eff 7-8-2002); 149 v H 510; Eff 3-31-2003; 151 v H 137, § 1, eff. 7-11-06.

See provisions of § 5 of 151 v H 137 following RC § 2929.191. The effective date is set by § 7 of 151 v H 137.

§ 2967.31 Repealed, 146 v S 2, § 2 [134 v H 511; 136 v H 1; 139 v S 199; 139 v 432; 145 v H 571]. Eff 7-1-96.

This section set guidelines for shock parole. The effective date is set by section 6 of SB 2.

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