

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,	:	
	:	Case No. 2009-0897
Plaintiff-Appellee,	:	
	:	On Appeal from the Summit
vs.	:	County Court of Appeals
	:	Ninth Appellate District
LONDEN K. FISCHER,	:	
	:	C.A. Case No. CA-24406
Defendant-Appellant.	:	

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STATEMENT OF THE CASE AND FACTS

On July 9, 2001, Londen K. Fischer was indicted by a Summit County grand jury on three counts of aggravated robbery, violations of R.C. 2911.01(A); two counts of aggravated burglary, violations of R.C. 2911.11(A)(2); one count of felonious assault, a violation of R.C. 2903.11(A)(2); and one count of intimidation of a crime victim or witness, a violation of R.C. 2921.04. All counts included firearm specifications under R.C. 2941.145. On September 19, 2001, a supplemental indictment was filed against Mr. Fischer, which included one count of having weapons while under disability, a violation of R.C. 2923.13(A)(3), and a related firearm specification. The charges stemmed from two separate robberies that allegedly occurred on June 24 and June 25, 2001. Mr. Fischer elected to go to trial. At the close of all evidence, the jury returned a verdict of not guilty on two counts of aggravated robbery and one count of intimidation, as well as their related firearm specifications. Mr. Fischer was found guilty on the remaining counts.

A sentencing hearing was held on February 4, 2002, in which Mr. Fischer was sentenced to an aggregate term of fourteen years of incarceration and a mandatory five-year term of postrelease control. While the trial court did advise Mr. Fischer that he was subject to postrelease control, the trial court did not advise him that a violation of postrelease control could lead to additional incarceration. Mr. Fischer timely appealed, arguing that his convictions on all counts were against the manifest weight of the evidence. The Ninth District Court of Appeals affirmed Mr. Fischer's conviction. *State v. Fischer*, 9th Dist. No. 20988, 2003-Ohio-95.

On July 11, 2007, this Court decided *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, holding that when postrelease control is not properly included in a sentence, that sentence is void. On May 28, 2008, Mr. Fischer filed a pro se motion for resentencing with the trial court,

citing *Bezak*. The trial court held a resentencing hearing on August 6, 2008, at which Mr. Fischer was advised of postrelease control and given the same sentence of imprisonment as previously imposed.

Mr. Fischer took a timely direct appeal from his resentencing. On appeal, Mr. Fischer argued that because his original sentence was void, his original direct appeal was not valid. Mr. Fischer asserted that because the appeal from his resentencing was his first valid direct appeal, he was not limited to issues from his resentencing. Instead, Mr. Fischer raised a substantive trial issue related to lay witness testimony, in addition to his argument that his first direct appeal was a legal nullity. Mr. Fischer also questioned the constitutionality of his sentence under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

The Ninth District Court of Appeals affirmed Mr. Fischer's conviction, holding that the first direct appeal was not invalid. *State v. Fischer*, 181 Ohio App.3d 758, 2009-Ohio-1491, at ¶5. Rather, the *Fischer* court held that the law-of-the-case doctrine precluded Mr. Fischer from raising trial issues in his subsequent appeal. *Id.* at ¶8. As a result, the court further found Mr. Fischer's substantive trial issue could not properly be reviewed in his second appeal. *Id.* at ¶9.

Mr. Fischer timely appealed the Ninth District's decision to this Court. In July 2009, this Court denied leave to appeal. *7/29/2009 Case Announcements*, 2009-Ohio-3625. Mr. Fischer filed a motion for reconsideration citing this Court's decision in *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577. This Court subsequently granted jurisdiction as to Mr. Fischer's first proposition of law.

ARGUMENT

A direct appeal from a void sentence is a legal nullity; therefore, a criminal defendant's appeal following a *Bezak* resentencing is the first direct appeal as of right from a valid sentence. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250.

A. Introduction

When Londen Fischer was originally “sentenced”, the trial court failed to advise him that a violation of postrelease control could lead to additional incarceration. As a result, his sentence was void, and he was entitled to a de novo sentencing hearing. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at syllabus. Mr. Fischer took a direct appeal from his void sentence. Because the first sentence was void, it was not a final, appealable order. Without a final, appealable order, the court of appeals lacked subject-matter jurisdiction to review Mr. Fischer's conviction. R.C. 2953.02. Therefore, his original direct appeal as of right was invalid.

Mr. Fischer was subsequently sentenced under *Bezak* and took a timely direct appeal. That direct appeal was Mr. Fischer's first valid direct appeal stemming from a judgment of conviction that resulted in a final, appealable order. As such, he should have been able to raise any and all trial issues cognizable on direct appeal. Because his first direct appeal was a legal nullity, the law-of-the-case doctrine and res judicata do not apply to bar him from raising trial issues. The Ninth District Court of Appeals erred in applying law-of-the-case doctrine to bar Mr. Fischer's substantive claims. Therefore, this Court must reverse and remand Mr. Fischer's appeal for a decision on the merits of his claims.

B. A Direct Appeal Taken from a Void Sentence Is Invalid.

This Court has repeatedly held that when postrelease control is not properly included in a criminal sentence, as mandated by statute, that sentence is void. *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, at ¶35; *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, at

¶3; *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at ¶1; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at syllabus; *Bezak*, 114 Ohio St.3d, at syllabus; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, at ¶25; *State v. Beasley* (1984), 14 Ohio St.3d 74, 75. See *State v. Singleton*, Slip Opinion No. 2009-6434; *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509; *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, at ¶16; *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171. Based on this Court's lengthy jurisprudence, Mr. Fischer's original sentence was void and his direct appeal from that sentence was invalid.

1. The court of appeals lacks subject-matter jurisdiction to review a conviction stemming from a void sentence.

This Court defines a void judgment as “one that has been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act.” *Simpkins*, at ¶12, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642. A court of appeals lacks subject-matter jurisdiction to review a case when it lacks a final, appealable order. *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, at ¶8, quoting *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20. A judgment of conviction must include “the sentence and the means of conviction... to be a final appealable order under R.C. 2505.02.” *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, at ¶17.

a. When the original sentence is void, the conviction lacks a final, appealable order.

Revised Code Section 2953.02 grants review of a lower court's decision to Ohio's courts of appeals when there is a “judgment or final order.” Under R.C. 2505.02, an order is a final, appealable order when 1) it affects a substantial right in an action that determines the action or prevents judgment, 2) it affects a substantial right in a special proceeding, 3) it vacates or sets aside a judgment or grants a new trial, 4) it grants or denies a provisional remedy, 5) it grants or

denies class action status, 6) it determines the constitutionality of changes to the Ohio Revised Code, 7) it stems from an appropriation proceeding. “[I]n a criminal case there must be a sentence which constitutes a judgment or final order which amounts ‘to a disposition of the cause’ before there is a basis for appeal.” *State v. Chamberlain* (1964), 177 Ohio St. 104, 106-07. For criminal defendants, “the final judgment is the sentence.” *State v. Danison*, 105 Ohio St.3d 127, 2005-Ohio-781, at ¶6, citing *Columbus v. Taylor* (1988), 39 Ohio St.3d 162, 165. See *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972, at ¶8-11 (a void judgment means there is no final, appealable order).

Absence of a sentence means that a conviction is not final. *State v. Henderson* (1979), 58 Ohio St.2d 171, 178-79. In the context of a guilty plea, this Court held in *Henderson* that Crim.R. 32 requires a sentencing for there to be a final adjudication on the merits. *Id.* at 178. This Court analogized that rule to “the general rule that a sentence must be pronounced before the process of appellate review can be instituted.... [T]o require anything less than a final judgment of conviction would be as precarious as permitting an appeal prior to judgment.” *Id.* Similarly, when a trial court fails to comply with Crim.R. 32(C), this Court held that the entry was not a final, appealable order and therefore not appealable. *State ex. rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, at ¶9-10.

In the instant case, Mr. Fischer’s original sentence was void, because it failed to properly advise him of postrelease control. The effect of a void sentence 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.” *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268. Because Mr. Fischer’s original sentence was void, that sentencing should have been treated as though it never occurred. Because there was no valid sentencing, Mr. Fischer’s conviction was not final.

As a result of there being no final judgment, subject-matter jurisdiction was never conferred on the court of appeals via a final, appealable order. Therefore, the Ninth District Court of Appeals lacked subject-matter jurisdiction in its first review of Mr. Fischer's case. That appeal should be considered a nullity in reviewing Mr. Fischer's instant appeal, which is his first direct appeal as of right from a valid sentence.

2. It is not invited error for a criminal defendant to take a direct appeal as of right from a void sentence when only subsequent clarifications of the law bring to light the void nature of that sentence.

The doctrine of invited error holds that "a party is not entitled to take advantage of an error that he himself invited or induced the court to make." *State ex. rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, at ¶27, citing *Lester v. Leuck* (1943), 142 Ohio St. 91, paragraph one of the syllabus. However, this Court has held that the invited-error doctrine should not be applied when there is a question of the reviewing court's subject-matter jurisdiction. *Id.* In *Kline*, it was a question of challenging the assignment and transfer of a case, which this Court found to be "an attack on the subject-matter jurisdiction of the transferee court." *Id.* C.f. *Davis v. Wolfe*, 92 Ohio St.3d 549, 552, 2001-Ohio-1281, superseded by statute as to holding not at issue, R.C. 2951.09, as recognized in *State v. Breckenridge*, 10th Dist. No. 09AP-95, 2009-Ohio-3620, at ¶7 (the issue of subject-matter jurisdiction in state habeas cannot be waived and can be raised anytime).

Likewise, Mr. Fischer's proposition of law challenges the subject-matter jurisdiction of the court of appeals in his original direct appeal. While Mr. Fischer did take a direct appeal from his first "sentencing", he had no way to know that his sentence was void. This Court's clarification of the law in *Bezak* and subsequent, related cases, shone a light on postrelease control advisements. Mr. Fischer initiated a direct appeal because he acquiesced in the trial

court's summation that he had been convicted through a proper sentencing procedure. But "invited error must be more than mere 'acquiescence in the trial judge's erroneous conclusion.'" *State v. Campbell*, 90 Ohio St.3d 320, 324, 2000-Ohio-183, citing *Carrothers v. Hunter* (1970), 23 Ohio St.2d 99, 103. Applying this Court's holding in *Kline*, the invited-error doctrine should not be applied to bar Mr. Fischer in the instant appeal.

C. The Law-of-the-Case Doctrine Is Not a Bar to Trial Issues Raised in a Subsequent Appeal When the First Appeal Was Invalid.

The law-of-the-case doctrine requires that decisions of a reviewing court in a case remain the law of the case on the legal questions involved in subsequent proceedings at the trial and reviewing levels. *State ex. rel. Dannaher v. Crawford*, 78 Ohio St.3d 391, 394, 1997-Ohio-72, citing *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3. The doctrine precludes litigants from making arguments at retrial that either were or could have been fully litigated in a first appeal. *Id.*, citing *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404-05, 1996-Ohio-174. Accord *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769.

The Ninth District Court of Appeals improperly relied on the law-of-the-case doctrine in refusing to review the merits of Mr. Fischer's subsequent direct appeal. *State v. Fischer*, 181 Ohio App.3d 758, 760-61, 2009-Ohio-1491, at ¶4-8. "The doctrine [of law-of-the-case] is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results." *Nolan*, 11 Ohio St.3d at 3. The doctrine should not be applied "as a sword which may be employed as an instrument of oppression and injustice." *Gohman v. City of St. Bernard* (1924), 111 Ohio St. 726, 730-31, overruled on other grounds by *New York Life Ins. Co. v. Hosbrook* (1935), 130 Ohio St. 101, 106. Moreover, the doctrine does not apply to decisions that the court had no jurisdiction to make on the former review. *Russell v. Fourth Nat. Bank* (1921), 102 Ohio St. 248, 263-64. "[A] lack of subject-matter jurisdiction

prevails over even the law-of-the-case doctrine.” *Worell v. Court of Common Pleas* (Sept. 21, 1993), 4th Dist. No. 1506, 1993 Ohio App. LEXIS 4571, rev’d on other grounds, 69 Ohio St.3d 491.

Here, application of the law-of-the-case doctrine would lead to unjust results, as Mr. Fischer would be denied his only direct appeal as of right from a valid sentence. Because Mr. Fischer’s first direct appeal was invalid as it stemmed from a void sentence, there is no law of the case to apply. The court of appeals lacked jurisdiction to review Mr. Fischer’s conviction, as there was no final, appealable order. Therefore, this Court must review Mr. Fischer’s appeal as his first appeal as of right from his only validly imposed sentence.

1. There is no reasonable expectation of finality in a void sentence.

When a sentence is void, there is no reasonable, legitimate expectation of finality. *Simpkins*, at ¶36, citing *United States v. Crawford* (C.A. 5 1985), 769 F.2d 253, 257-58; *Jones v. Thomas* (1989), 491 U.S. 376, 395. Because the sentence lacks statutory authority and is invalid, no expectation of finality triggers double jeopardy or due process protections. *Jordan*, at ¶25, citing *Beasley*, at 75. The law-of-the-case doctrine is a practice rule designed to protect against endless litigation. *Hopkins*, at ¶15. Because the doctrine exists to protect cases from being litigated again and again, it relies on a presumption of finality.

Here, Mr. Fischer’s first appeal had no finality. Because his original “sentence” was void, no expectation of finality attached to it. Likewise, the court of appeals lacked jurisdiction to review his case. The lack of finality bled from Mr. Fischer’s void sentence into his appeal, rendering it invalid. As the first direct appeal lacked any validity, finality is not implicated and law-of-the-case does not apply.

2. The Ninth District Court of Appeals' subsequent decisions support the instant proposition of law.

Since it affirmed Mr. Fischer's conviction, the Ninth District Court of Appeals has changed its position on the legal effect of a void sentence on subsequent appeals. When the Ninth District decided Mr. Fischer's direct appeal from his resentencing hearing, it considered Mr. Fischer's first direct appeal to be a valid one. *Fischer*, 181 Ohio App.3d at 760-61. The court relied on its earlier decision in *State v. Ortega*, 9th Dist. No. 08CA009316, 2008-Ohio-6053, in which the defendant was prevented from arguing trial issues in his direct appeal from a postrelease control resentencing hearing. The *Fischer* court held that Mr. Fischer's first appeal created law-of-the-case, which could not be overturned in "subsequent arguments" in a second appeal. *Id.* at 761.

Subsequently, this Court issued its decision in *Boswell*, which held that a motion to withdraw a plea when a defendant has been given a void sentence must be considered a presentence motion. *Boswell*, at syllabus. In light of *Boswell*, the Ninth District decided *State v. Holcomb*, 9th Dist. No. 24287, 2009-Ohio-3187, which reviewed the denial of a motion to correct a sentence for failure to properly impose postrelease control. *Id.* at ¶3. The *Holcomb* court held that the defendant's motion for a sentence correction should be treated as a presentence motion, rather than be reclassified as a postconviction petition. *Id.*

Following *Holcomb*, the Ninth District vacated a void judgment and remanded a case for a new sentencing hearing in light of improper postrelease control advisements. *Bedford*, 2009-Ohio-3972. The court found that the postrelease control mistake not only rendered the sentence void but deprived the appellate court of jurisdiction. *Id.* at ¶9-11. For that reason, *Bedford* recognized that it had to treat the sentencing as though it never occurred. *Id.* at ¶10. "Accordingly, since the trial court's journal entry is void because it included a mistake regarding

postrelease control, this Court concludes there is no final, appealable order.” *Id.* at ¶11. The court of appeals then applied the same ruling to numerous, factually similar subsequent cases¹.

Finally, the Ninth District decided *State v. Harmon*, 9th Dist. No. 24495, 2009-Ohio-4512, which all but overruled its earlier decision in *Fischer*. The *Harmon* court, relying on this Court’s decision in *Culgan*, reviewed the merits of an appeal from a postrelease control resentencing, even though the defendant originally took a direct appeal from his void sentence. *Id.* at ¶2-3, 7. The *Harmon* court held that “regardless of whether a defendant has already appealed his conviction, if the order from which the first appeal was taken is not final and appealable, he is entitled to a new sentencing entry which can itself be appealed.” *Id.* at ¶6. The *Harmon* court recognized that this Court has not explicitly made a connection between the logic in *Culgan* and postrelease control cases, but “the logic inherent in recent Supreme Court cases involving postrelease control leads to a similar result.” *Id.*

Applying that same logic to the instant case, Mr. Fischer’s void sentence was a legal nullity, rendering his direct appeal invalid. Because there was no sentencing to create the necessarily final, appealable order required by R.C. 2953.02, the court of appeals lacked subject-matter jurisdiction to rule on Mr. Fischer’s first direct appeal. Therefore, the court of appeals was not bound by its prior decision under the law-of-the-case doctrine in reviewing Mr. Fischer’s instant direct appeal.

¹ *State v. Whitehouse*, 9th Dist. No. 09CA009581, 2009-Ohio-6504; *State v. Miller*, 9th Dist. No. 24692, 2009-Ohio-6281; *State v. Horne*, 9th Dist. No. 24691, 2009-Ohio-6283; *State v. Sammons*, 9th Dist. No. 24724, 2009-Ohio-5166; *State v. Weseman*, 9th Dist. No. 24588, 2009-Ohio-5168; *State v. Robertson*, 9th Dist. No. 07CA0120-M, 2009-Ohio-5052; *State v. Smith*, 9th Dist. No. 24677, 2009-Ohio-4865; *State v. Pirovolos*, 9th Dist. No. 08CA0087-M, 2009-Ohio-4422; *State v. Perezlaraos*, 9th Dist. No. 24474, 2009-Ohio-4170; *State v. Sommerville*, 9th Dist. No. 24427, 2009-Ohio-4160; *State v. Morton*, 9th Dist. No. 24531, 2009-Ohio-4168.

a. Other courts of appeals agree with Mr. Fischer's proposition of law.

In *State v. Jordan*, 8th Dist. No. 91869, 2009-Ohio-3078, the Eighth District Court of Appeals heard a case stemming from a postrelease control resentencing. The defendant in *Jordan*, like Mr. Fischer, took a direct appeal from his original void sentence, then filed a motion for resentencing and took a direct appeal from his valid sentence. *Id.* at ¶4-8. Although the State claimed that Mr. Jordan's arguments were barred by res judicata because of his first appeal, the *Jordan* court disagreed. *Id.* at ¶12. Acknowledging that Mr. Jordan's first sentence was void, the court decided that "it is as if appellant's initial sentence and the issues he raised in his first appeal related to his sentence do not exist." *Id.*

The *Jordan* decision, coupled with *Harmon*, signal a change in how Ohio's courts of appeals are treating direct appeals that stem from postrelease control resentencing hearings. Without a ruling from this Court, lower appellate courts will be left to make their own conclusions as to the affect of a void sentence on subsequent appeals. Clarification by this Court in the instant case will avoid future inconsistent results.

3. Likewise, res judicata does not apply to subsequent direct appeals when the original direct appeal was invalid.

This Court declined to apply res judicata to void sentences. *Simpkins*, at ¶30. The *Simpkins* Court recognized that res judicata is a doctrine of "fundamental and substantial justice," and it should not be used to allow the State to "bind the people or the court to an unlawful or otherwise void sentence by failing to appeal it correctly." *Id.* at ¶25, 28. Res judicata operates only to prevent defendants from raising claims that "[were] raised or could have been raised by the defendant at the trial, **which resulted in that judgment of conviction**, or on appeal from that judgment." *State v. Perry* (1967), 10 Ohio St.3d 175, paragraph nine of

the syllabus, emphasis added. A judgment of conviction must include the sentence to be a final appealable order under R.C. 2505.02. *Baker*, at ¶17.

In Mr. Fischer's case, there was no valid judgment of conviction until after his resentencing hearing. His original judgment of conviction lacked a valid sentence, which resulted in no final, appealable order. Res judicata is intended to preclude the cumulative litigation of issues that could have been raised in an earlier proceeding. But res judicata requires a judgment of conviction in order to apply. As there was no valid judgment of conviction when Mr. Fischer took his first direct appeal, res judicata does not apply to bar him from litigating his trial issues on appeal now.

CONCLUSION

Mr. Fischer's first sentence was void, because it lacked a statutorily required postrelease control advisement. His void sentence did not create a final, appealable order. Without the final, appealable order required by R.C. 2953.02, the court of appeals lacked subject-matter jurisdiction to decide his first appeal. Mr. Fischer's resentencing was his first valid sentence; therefore, his second direct appeal must be treated as his only direct appeal as of right. As such, Mr. Fischer must be allowed to litigate any and all trial issues cognizable on direct appeal. This Court must reverse and remand this case to the Ninth District Court of Appeals for a review of the merits of Mr. Fischer's appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Appellant Londen K. Fischer's Merit Brief** was forwarded by regular U.S. Mail, postage pre-paid, to Heaven DiMartino, Summit County Assistant Prosecutor, 53 University Avenue, 7th Floor, Safety Building, Akron, Ohio 44308, on this 29th day of December, 2009.



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Assistant State Public Defender
Counsel of Record

COUNSEL FOR DEFENDANT-APPELLANT,
LONDEN K. FISCHER

#311220



LEXSEE 2009 OHIO 3972

STATE OF OHIO, Appellee v. JOSEPH R. BEDFORD, Appellant

C. A. No. 24431

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT
COUNTY

2009 Ohio 3972; 2009 Ohio App. LEXIS 3384

August 12, 2009, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO. CASE No. CR 08 05 1623.

DISPOSITION: Judgment vacated, and cause remanded.

COUNSEL: APPEARANCES: SUSAN E. POULOS, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN R. DIMARTINO, assistant prosecuting attorney, for appellee.

JUDGES: CLAIR E. DICKINSON, Presiding Judge. WHITMORE, J. CONCURS, BELFANCE, J. CONCURS.

OPINION BY: CLAIR E. DICKINSON

OPINION

DECISION AND JOURNAL ENTRY

DICKINSON, Presiding Judge.

INTRODUCTION

[*P1] A jury convicted Joseph Bedford of domestic violence and disrupting public services, which are felonies of the fourth degree. At his sentencing hearing, the trial court told him that his sentence would be two years in prison "with a period of three years . . . mandatory post-release control . . ." It then wrote in its journal entry that, as part of Mr. Bedford's sentence, he "may be

supervised by the Adult Parole Authority after [he] leaves prison . . . for a mandatory Three (3) years as determined by the Adult Parole Authority." Mr. Bedford has appealed his convictions, assigning five errors. Because the trial court made a mistake in its journal entry regarding post-release control, the journal entry is void. [**2] This Court, therefore, exercises its inherent power to vacate the void judgment and remands for a new sentencing hearing.

FINAL APPEALABLE ORDER

[*P2] The Ohio Constitution restricts an appellate court's jurisdiction over trial court decisions to the review of final orders. *Ohio Const. Art. IV, § 3(B)(2)*. "[I]n order to decide whether an order issued by a trial court in a criminal proceeding is a reviewable final order, appellate courts should apply the definitions of 'final order' contained in *R.C. 2505.02*." *State v. Muncie, 91 Ohio St. 3d 440, 444, 2001 Ohio 93, 746 N.E.2d 1092 (2001)*. "An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, [if] it is . . . [a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment." *R.C. 2505.02(B)(1)*.

[*P3] The Ohio Supreme Court has held that "a judgment of conviction qualifies as an order that 'affects a substantial right' and 'determines the action and prevents a judgment' in favor of the defendant." *State v. Baker, 119 Ohio St. 3d 197, 2008 Ohio 3330, 893 N.E.2d 163, at P9*. It has further held that "[a] judgment of conviction is a final appealable order under *R.C. 2505.02* [if] it sets forth [**3] (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court." *Id.* at

syllabus. The trial court's journal entry sets forth the jury's verdict and Mr. Bedford's sentence, has the judge's signature, and was entered by the clerk of courts. Accordingly, it appears, on its face, to be a final, appealable order.

POST-RELEASE CONTROL

[*P4] *Section 2967.28(C) of the Ohio Revised Code* provides that "[a]ny 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 postrelease control of up to three years after the offender's release from imprisonment, if the parole board . . . determines that a period of post-release control is necessary for that offender." Similarly, *Section 2929.14(F)(2)* provides that, "[i]f a court imposes a prison term for a felony of the third, fourth, or fifth degree . . . , it shall include in the sentence a requirement that the offender be subject to a period of post-release control after [*4] [his] release from imprisonment, in accordance with *[Section 2967.28]*, if the parole board determines that a period of post-release control is necessary." In addition, *Section 2929.19(B)(3)(d)* provides that, "if the sentencing court determines . . . that a prison term is necessary or required, [it] shall . . . [n]otify the offender that [he] may be supervised under *section 2967.28 of the Revised Code* after [he] leaves prison if [he] is being sentenced for a felony of the third, fourth, or fifth degree"

[*P5] At the sentencing hearing, the trial court told Mr. Bedford that it was imposing a mandatory three-year period of post-release control, and it wrote in its journal entry that he "may" be supervised "for a mandatory three (3) years." Under *Section 2967.28(C)*, however, the parole board has discretion to impose up to three years of post-release control for felonies of the fourth degree that are not felony sex offenses. The court apparently thought that Mr. Bedford fell within an exception under *Section 2967.28(B)(3)*, which provides that three years of post-release control is mandatory "[f]or a felony of the third degree that is not a felony sex offense and in the commission of which [*5] the offender caused or threatened physical harm to a person." The court stated at the sentencing hearing that, "[b]ecause there was harm or threat of harm," Mr. Bedford's post-release control "will be . . . mandatory."

[*P6] The physical harm exception, however, only applies to felonies of the third degree. Because Mr. Bedford was convicted of two felonies of the fourth degree, it did not apply to him. Accordingly, the trial court improperly told Mr. Bedford that he was subject to mandatory post-release control and improperly wrote that in its journal entry.

[*P7] In *State v. Simpkins*, 117 Ohio St. 3d 420, 2008 Ohio 1197, 884 N.E.2d 568, the Ohio Supreme Court held that, "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void" *Id.* at syllabus. It noted that "no court has the authority to substitute a different sentence for that which is required by law." *Id.* at P20. It, therefore, concluded that "a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void" *Id.* at P22.

[*P8] Because the trial court made a mistake [**6] regarding post-release control in its journal entry, Mr. Bedford's sentence is void. This Court notes that "[a] court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum." *Schenley v. Kauth*, 160 Ohio St. 109, 113 N.E.2d 625, paragraph one of the syllabus (1953). Accordingly, not only is Mr. Bedford's sentence void, it follows that the journal entry in which the court attempted to impose that sentence is also void.

JURISDICTION REVISITED

[*P9] Having concluded that the trial court's journal entry is void, this Court must determine the effect of that conclusion. In particular, this Court must determine whether it can consider Mr. Bedford's assignments of error regarding his convictions in this appeal or whether it must wait to consider them following a valid journal entry.

[*P10] "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. Bloomer*, 122 Ohio St. 3d 200, 2009 Ohio 2462, at P27 (quoting *State v. Bezak*, 114 Ohio St. 3d 94, 2007 Ohio 3250, at P12, 868 N.E.2d 961). Taking the Supreme Court [**7] at its word, this Court must act as if the journal entry containing Mr. Bedford's void sentence "had never occurred" and "as if there had been no judgment." *Id.* (quoting *Bezak*, 114 Ohio St. 3d 94, 2007 Ohio 3250, at P12, 868 N.E.2d 961). This Court, therefore, must reevaluate its jurisdiction over the appeal in light of the fact that "there ha[s] been no judgment." *Id.* (quoting *Bezak*, 114 Ohio St. 3d 94, 2007 Ohio 3250, at P12, 868 N.E.2d 961).

[*P11] As noted previously, the Ohio Constitution restricts an appellate court's jurisdiction over trial court decisions to the review of final orders. *Ohio Const. Art. IV, § 3(B)(2)*. While a judgment of conviction qualifies as a final order if it contains the requirements identified in *State v. Baker*, 119 Ohio St. 3d 197, 2008 Ohio 3330, 893 N.E.2d 163, if there has been no judgment then there

is no final order. Accordingly, since the trial court's journal entry is void because it included a mistake regarding post-release control, this Court concludes there is no final, appealable order. To the extent that this Court's decision in *State v. Vu*, 9th Dist. Nos. 07CA0094-M, 07CA0095-M, 07CA0096-M, 07CA0107-M, 07CA0108-M, 2009 Ohio 2945, is inconsistent with that conclusion, it is overruled.

INHERENT POWER OF THE COURT

[*P12] Although the trial court's [**8] void journal entry may not be a final, appealable order, that does not end this Court's analysis. While this Court may not have jurisdiction under *Section 2505.02(B)*, the Ohio Supreme Court has "recognized the inherent power of courts to vacate void judgments." *Cincinnati Sch. Dist. Bd. of Educ. v. Hamilton County Bd. of Revision*, 87 Ohio St. 3d 363, 368, 2000 Ohio 452, 721 N.E.2d 40 (2000). "A court has inherent power to vacate a void judgment because such an order simply recognizes the fact that the judgment was always a nullity." *Van DeRyt v. Van DeRyt*, 6 Ohio St. 2d 31, 36 (1966). If an appellate court is exercising its inherent power to vacate a void judgment, it does not matter whether the notice of appeal was timely filed or whether there is a final, appealable order. *Card v. Roysden*, 2d Dist. No. 95 CA 108, 1996 Ohio App. LEXIS 2309, 1996 WL 303571 at *1 (June 7, 1996); see *Reed v. Montgomery County Bd. of Mental Retardation and Developmental Disabilities*, 10th Dist. No. 94APE10-1490, 1995 Ohio App. LEXIS 1755, 1995 WL 250810 at *3 (Apr. 27, 1995) (concluding that, if an entry is void ab initio, "[w]hether or not the . . . entry constitutes a final appealable order does not affect appellant's ability to appeal the matter.").

[*P13] Exercising this Court's inherent [**9] power to vacate the trial court's void judgment is consistent with the instructions of the Ohio Supreme Court. In *State v. Jordan*, 104 Ohio St. 3d 21, 2004 Ohio 6085, 817 N.E.2d 864, it held that, "[i]f a trial court fails to notify an offender about postrelease control . . . it fails to comply with the mandatory provisions of R.C. 2929.19(B)(3)(c) and (d), and, therefore, the sentence must be vacated and the matter remanded to the trial court for resentencing." *Id.* at paragraph two of the syllabus. In *State v. Simpkins*, 117 Ohio St. 3d 420, 2008 Ohio 1197, 884 N.E.2d 568, it noted that, "[b]ecause a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void, it must be vacated." *Id.* at P22. Furthermore, in *State v. Foster*, 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470, it noted that, "[i]f a sentence is deemed void, the ordinary course is to vacate that sentence and remand to the trial court for a new sentencing hearing." *Id.* at P103 (citing *Jordan*, 104 Ohio St. 3d 21, 2004 Ohio 6085, at P23, 817 N.E.2d 864).

[*P14] Although this Court has inherent power to vacate a void judgment, its power is limited to recognizing that the judgment is a nullity. It does not have authority to consider the merits of Mr. Bedford's [**10] appeal. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (noting that, if the trial court's action exceeds its jurisdiction, "we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court . . .") (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)).

CONCLUSION

[*P15] Because the trial court's journal entry included a mistake regarding post-release control, it is void. This Court exercises its inherent power to vacate the journal entry and remands this matter to the trial court for a new sentencing hearing.

Judgment vacated,

and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court [**11] of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed equally both parties.

CLAIR E. DICKINSON

FOR THE COURT

CONCUR BY: WHITMORE; BELFANCE

CONCUR

WHITMORE, J.

CONCURS, SAYING:

[*P16] I concur with the majority opinion. I write separately to address this Court's decision in *State v. Vu*, 9th Dist. Nos. 07CA0094-M, 07CA0095-M, 07CA0096-M, 07CA0107-M & 07CA0108-M, 2009 Ohio 2945. *Vu* presented this Court with several codefendants who, ac-

ording to the Ohio Supreme Court's recent decisions, had void sentences because the trial court improperly advised them about post-release control. This Court's decision to review the sufficiency of the evidence supporting their convictions assured the defendants that the findings of guilt that held them in prison were supported by sufficient evidence.

[*P17] Unfortunately, in *Vu*, as in this case, the trial court's improper post-release control notification "leads [**12] to a more serious problem, for a defendant may be caught in limbo. Unless a defendant in prison were to seek mandamus or procedendo for a trial court to prepare a new entry, appellate review of the case would be impossible." *State v. Baker*, 119 Ohio St.3d 197, 2008 Ohio 3330, at P16, 893 N.E.2d 163. *Vu* addressed the Supreme Court's concern for a defendant caught in limbo, a valid concern, as this Court has already reviewed cases where a defendant sat in prison for many months waiting to be resentenced following reversal because of an improper post-release control notification. See, e.g., *State v. Roper*, 9th Dist. No. 24321, 2009 Ohio 3185.

[*P18] This Court's holding today is a logical extension of our decision in *State v. Holcomb*, 9th Dist. No. 24287, 2009 Ohio 3187. It follows, therefore, that this Court cannot review the sufficiency of the evidence because there is no final order to review. I reluctantly agree

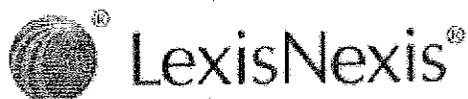
that *Vu* must be overruled on that point. Of course, if the defendant's sentence were voidable, rather than void, the result in this case, and many others, would be different. The Supreme Court has held to the contrary, however, and the fear the Supreme Court explained in *Baker* that defendants will [**13] be "caught in limbo" applies with equal force here. *Baker at P16*.

[*P19] I encourage the trial court in this case, and others like it, to sentence the defendant as quickly as possible. In appropriate cases, a trial court may utilize the remedy set forth in *R.C. 2929.191* to add the missing notification to the defendant's sentence without holding another full sentencing hearing. Whatever method is used to impose a proper sentence, if a defendant desires to appeal, the defendant can file a new appeal and ask this Court to transfer the briefs to the new appeal and consider it in an expedited manner. See, e.g., *State v. Miller*, 9th Dist. No. 06CA0046-M, 2007 Ohio 1353, at P20.

BELFANCE, J.

CONCURS, SAYING:

[*P20] I concur. I write separately to note that I also share the concerns expressed by Judge Whitmore in her concurring opinion.



LEXSEE 2003 OHIO 95

STATE OF OHIO, Appellee v. LONDON K. FISCHER, Appellant

C.A. No. 20988

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT
COUNTY*2003 Ohio 95; 2003 Ohio App. LEXIS 87*

January 15, 2003, Decided

SUBSEQUENT HISTORY: Subsequent appeal at *State v. Fischer*, 2009 Ohio 1491, 2009 Ohio App. LEXIS 1310 (Ohio Ct. App., Summit County, Mar. 31, 2009)

PRIOR HISTORY: [*1] APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO. CASE No. CR 01 06 1593.

DISPOSITION: Trial court's judgment was affirmed.

COUNSEL: LEONARD J. BREIDING, Attorney at Law, Akron, Ohio, for appellant.

SHERRI BEVAN WALSH, Summit County Prosecutor, PHILLIP BOGDANOFF, Assistant Summit County Prosecutor, Akron, Ohio, for appellee.

JUDGES: DONNA J. CARR, Judge. SLABY, P. J., WHITMORE, J., CONCUR.

OPINION BY: DONNA J. CARR

OPINION

DECISION AND JOURNAL ENTRY

Dated: January 15, 2003

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

Appellant, London K. Fischer, appeals the decision of the Summit County Court of Common Pleas, which found him guilty of aggravated robbery, aggravated burglary, felonious assault, and having a weapon while under disability, with a gun specification for all counts. This Court affirms.

I.

On June 25, 2001, appellant was arrested and charged for criminal activity that took place on June 24 and June 25, 2001. On July 9, 2001, a grand jury indicted appellant on three counts of aggravated robbery in violation of *R.C. 2911.01(A)(1)*, two [*2] counts of aggravated burglary in violation of *R.C. 2911.11(A)(2)*, and one count of felonious assault in violation of *R.C. 2903.11*, one count of intimidation of crime victim or witness in violation of *R.C. 2921.04*. All seven counts had corresponding firearm specifications in violation of *R.C. 2941.145*. Appellant entered a not guilty plea to all counts in this indictment.

On September 19, 2001, the grand jury returned a supplemental indictment adding one count of having a weapon while under disability in violation of *R.C. 2923.13*. This count also had a corresponding firearm specification in violation of *R.C. 2941.145*. Appellant entered a not guilty plea to this supplemental count.

A jury trial commenced on January 29, 2002. During jury selection, the defense counsel raised discrimination issues with respect to the State's two peremptory strikes. The trial court allowed the peremptory strikes. The jury returned its verdict on February 1, 2002, finding appellant guilty of one count of aggravated robbery with a firearm specification, [*3] two counts of aggravated burglary with firearm specifications, one count of feloni-

ous assault with a firearm specification, and one count of having a weapon while under disability with a firearm specification. The jury found appellant not guilty to two counts of aggravated robbery and one count of intimidation of crime victim or witness.

On February 4, 2002, the trial court held appellant's sentencing hearing. The court sentenced appellant to the mandatory 3-year sentence on two of the firearm specifications, to be served consecutively. Appellant was also sentenced to eight years on the aggravated robbery count, eight years on each of the aggravated burglary counts, seven years on the felonious assault count, and one year on the having a weapon under disability count. Appellant's sentences were to run concurrent to one another, but consecutively to the firearm specification counts, for a total of fourteen years in prison.

Appellant timely appealed and sets forth five assignments of error for review.

II.

FIRST ASSIGNMENT OF ERROR

"APPELLANT'S CONVICTIONS OF AGGRAVATED ROBBERY, AGGRAVATED BURGLARY, AND FELONIOUS ASSAULT REGARDING ERIC PATTEN WERE CONTRARY TO THE [*4] MANIFEST WEIGHT OF THE EVIDENCE."

SECOND ASSIGNMENT OF ERROR

"APPELLANT'S CONVICTION OF AGGRAVATED BURGLARY REGARDING LAIRD STREET WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

THIRD ASSIGNMENT OF ERROR

"APPELLANT'S CONVICTION OF HAVING A WEAPON WHILE UNDER A DISABILITY WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

In his first three assignments of error, appellant argues that his convictions were against the manifest weight of the evidence. This Court disagrees.

In reviewing whether a conviction is against the manifest weight of the evidence, this Court reviews the entire record and "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App. 3d 172, 175, 20 Ohio B. 215, 485 N.E.2d 717. Furthermore, "the discretionary power to grant a new trial should be exercised only in the excep-

tional case in which the evidence weighs heavily against the conviction." *Id.*

In [*5] the instant case, appellant was convicted of one count of aggravated robbery in violation of *R.C. 2911.01(A)(1)*, which provides that "no person, in attempting or committing a theft offense, *** or in fleeing immediately after the attempt or offense, shall *** have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it [.]" Appellant was also convicted of two counts of aggravated burglary in violation of *R.C. 2911.11(A)(2)*, which provides:

"no person, by force, stealth, or deception, shall trespass in an occupied structure *** when another person other than an accomplice of the offender is present, with purpose to commit in the structure *** any criminal offense, if *** the offender has a deadly weapon *** on or about the offender's person or under the offender's control."

Appellant was also convicted of one count of felonious assault in violation of *R.C. 2903.11*, which provides, in relevant part, that "no person shall knowingly *** cause physical harm to another *** by means of a deadly [*6] weapon [.]" Lastly, appellant was convicted of one count of having a weapon while under disability in violation of *R.C. 2923.13*, which provides, in relevant part:

"unless relieved from disability as provided in *section 2923.14 of the Revised Code*, no person shall knowingly acquire, have, carry, or use any firearm *** if *** the person *** has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse."

Appellant contends that the manifest weight of the evidence does not support his convictions because there were conflicts in evidence and testimony during his trial. Specifically, appellant challenges the credibility of the victims, as well as the police officers, because all their testimonies are contradictory to appellant's story.

At trial, all the victims testified concerning appellant's independent crimes against them. Mr. Tolbert testified that appellant, pointing a gun at Tolbert, forced his way into Tolbert's home, hit Tolbert across his right [*7] cheek with the gun, and demanded money and car keys from Tolbert and his girlfriend. Tolbert further testified that appellant cocked the gun and further threatened Tolbert, but fled out the back of the house when Tolbert's neighbor came and knocked on the front door. Tolbert's girlfriend provided testimony that corroborated these events. Both Tolbert and his girlfriend identified appel-

lant as their armed attacker from a photo array later shown to them by Sergeant Callahan.

Mr. Patten also testified that appellant, holding a gun, forced his way into Patten's home, pointed the gun at Patten, and demanded money. Patten further testified that appellant cocked the gun and threatened to kill Patten if he did not give appellant money. Patten testified that he tried to reach for appellant's gun when he looked away, a violent struggle ensued between them through-out the house, and appellant started firing the gun. Patten testified that appellant shot him through the right arm, also accidentally shot himself, dropped the gun and fled out of Patten's house. Patten's girlfriend provided testimony that corroborated these events.

Over ten police officers, both patrolmen and detectives, testified [*8] to their involvement with one or both of the Laird Street and Laffer Street crime scenes. They provided testimony and evidence that corroborated the victims' testimonies concerning the separate attacks by appellant. The State admitted into evidence, from both crime scenes, the following exhibits: an audio tape of the 911 call from Tolbert, a video tape of Patten's house, bullets and casings found in Patten's house, BCI reports, photographs from the Laird Street crime scene and the Laffer Street crime scene, Patten and appellant's bloody clothes, hospital medical records of Patten's wound, the gun used by appellant, GSR kits for both Patten and appellant, and the photo array from which Tolbert and his girlfriend identified appellant as their attacker.

Appellant claims that he could not have been Tolbert's attacker because he was at a bar at the time Tolbert and his girlfriend were attacked. Although he claims this alibi, appellant could not provide the name of one person to verify his whereabouts or testify that they witnessed appellant at the bar that night. Appellant also asserts that he was at Patten's house the night Patten was shot, but that Patten pulled a gun on him and attacked [*9] him and any harm appellant caused to Patten was out of self-defense. Appellant did not present any other witnesses in his defense to corroborate his testimony. Moreover, the State presented the results of the GSR kits performed on appellant and Patten, which showed gunshot residue on the inside of appellant's hands and no gunshot residue on the inside of Patten's hands. This evidence further corroborates the testimony that appellant fired the gun and Patten did not fire the gun.

Furthermore, appellant admits to lying to the police concerning both incidents. Appellant admits that he lied when he told police he did not know Tolbert when he was questioned about the Laird Street incident. Appellant also lied when he fabricated a story to the police that he was shot by a white male at a totally different location than Patten's house. When questioned by the State as to

why appellant would need to make up such a story if Patten was really the perpetrator at Laffer Street, appellant claims he was afraid to admit he was buying drugs and he did not want to go to jail.

This Court notes that the testimony that the trial court relied on in reaching its decision was disputed by appellant's testimony. [*10] Although the testimony was conflicting, this Court declines to overturn appellant's convictions because the trial court believed the State's witnesses. It is well recognized that matters of credibility are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. In reviewing the trial court's actions, this Court is mindful that, as the trier of fact, "the [jury] is best able to view witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Giurbino v. Giurbino* (1993), 89 Ohio App.3d 646, 659, 626 N.E.2d 1017.

Appellant's convictions are not against the manifest weight of the evidence merely because there was conflicting testimony before the jury. See *State v. Haydon* (Dec. 22, 1999), 9th Dist. No. 19094, 1999 Ohio App. LEXIS 6174, appeal not allowed (2000), 88 Ohio St. 3d 1482, 727 N.E.2d 132, citing *State v. Gilliam* (Aug. 12, 1998), 9th Dist. No. 97 CA006757, 1998 Ohio App. LEXIS 3668. At appellant's trial, the jury had the opportunity to observe all the witnesses' testimonies and weigh the credibility of said testimonies; therefore, this [*11] Court must give deference to the jury's decision. See *Berger v. Dare* (1994), 99 Ohio App.3d 103, 106, 649 N.E.2d 1316.

The jury clearly found the victims', police officers', and other State's witnesses' testimony more credible than appellant's testimony.

Upon careful review of the testimony and evidence presented at appellant's trial, this Court cannot find that the jury clearly lost its way and created such a manifest miscarriage of justice that appellant's convictions must be reversed and a new trial ordered. This Court concludes that appellant's convictions were not against the manifest weight of the evidence. Appellant's first three assignments of error are overruled.

FOURTH ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S *CRIMINAL RULE 29* MOTION TO DISMISS THE TWO AGGRAVATED BURGLARY CHARGES, THE AGGRAVATED ROBBERY CHARGE, THE FELONIOUS ASSAULT CHARGE, AND THE HAVING A WEAPON WHILE UNDER A DISABILITY CHARGE FOLLOWING THE CONCLUSION OF THE STATE'S CASE."

In his fourth assignment of error, appellant argues that the trial court erred in failing to grant his motion to dismiss the charges against him. This Court disagrees.

[*12] *Crim.R. 29(A)* provides that a trial court "shall order the entry of a judgment of acquittal *** if the evidence is insufficient to sustain a conviction of such offense or offenses." "A trial court may not grant an acquittal by authority of *Crim.R. 29(A)* if the record demonstrates that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt. In making this determination, all evidence must be construed in a light most favorable to the prosecution. 'In essence, sufficiency is a test of adequacy.'" (Citations omitted.) *State v. Manges*, 9th Dist. No. 01 CA007850, 2002 Ohio 3193, P23.

This Court notes that sufficiency of the evidence produced by the State and weight of the evidence advanced at trial are legally distinct issues. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 1997 Ohio 52, 678 N.E.2d 541. "While the test for sufficiency requires a determination of whether the state met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, 2000 Ohio App. LEXIS 969, citing *Thompkins*, 78 Ohio St.3d at 390 [*13] (Cook, J., concurring). However, this Court has held that "because sufficiency is required to take a case to a jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96 CA006462, 1997 Ohio App. LEXIS 4255.

Therefore, this Court's determination above that appellant's convictions are supported by the weight of the evidence necessarily settles the issue that the trial court had sufficient evidence before it from the State to prohibit it from granting an acquittal upon appellant's request. The trial court did not err in denying appellant's motion to dismiss the charges against him. Appellant's fourth assignment of error is overruled.

FIFTH ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN FAILING TO SUSTAIN THE APPELLANT'S BATSON CHALLENGE."

In his fifth assignment of error, appellant argues that the trial court erred in failing to sustain his Batson challenge. This Court disagrees.

The *Equal Protection Clause of the* [*14] *United States Constitution* prohibits purposeful discrimination by the State in the exercise of its peremptory challenges in order to exclude members of minority groups from jury service. *Batson v. Kentucky* (1986), 476 U.S. 79, 89, 90 L. Ed. 2d 69, 106 S. Ct. 1712., In *State v. Phillips* (Nov. 1, 2000), 9th Dist. Nos. 99CA007297, 99 CA007302, 2000 Ohio App. LEXIS 5051, this Court summarized the three-part test from *Batson* used to determine if a peremptory challenge is impermissibly based on race:

"First, the defendant must make a prima facie showing that the state purposefully discriminated in exercising a peremptory challenge to remove a prospective juror. To demonstrate a prima facie case of purposeful discrimination, the defendant must demonstrate: (1) that members of a cognizable racial group were peremptorily challenged, and (2) that all of the facts and circumstances raise an inference that the State used the peremptory challenges to exclude jurors on account of their race.

"Second, if the defendant makes a prima facie case of discrimination, then the burden is allocated to the state to then provide a race-neutral explanation. 'The second step of this process [*15] does not demand an explanation that is persuasive, or even plausible. *** 'Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'"

"Thereafter, the trial court must determine whether the proffered explanation by the State is credibly race-neutral or instead a pretext for unconstitutional discrimination. 'In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge.' Since the findings of the trial court are based in large part upon the trial court's evaluation of credibility, reviewing courts must accord such determinations great deference. Therefore, the trial court's findings are evaluated under the clearly erroneous standard of review." (Citations omitted.)

In this case, the State made a peremptory challenge to strike juror 10, an African American, from which the following discussion ensued between counsel and the judge:

"Mr. Pierce: For cause?"

"Ms. Haslinger: [*16] No, no. As a peremptory. I want to bring this to the Court's attention before, the reason why I'm doing it. Certainly according to *State v. Darion McElrath* I don't have to indicate a reason unless

a pattern is shown but I will state one anyway for the record.

"She's indicated she knows the defendant in this case.

" ***

"She feels uncomfortable in this case, and also the fact that she indicated her boyfriend sold drugs. So that would be my race-neutral reason.

"The Court: All right. The record should reflect No. 10 is an African-American female.

"Mr. Pierce: Judge, for the record, I would make a Batson Challenge to that, that bump.

"Ms. Haslinger: Okay.

"The Court: She has enunciated a race-neutral reason, several of them."

The State also made a peremptory challenge to strike juror 14, an African American, in the following dialogue:

"Ms. Haslinger: *** I would indicate that I have noticed Juror No. 14, who I anticipate will be on the panel, is very inattentive. I am concerned that she's not paying attention.

"Also, I would indicate - -

"The Court: I have noticed that as well.

"Ms. Haslinger: - - she has a brother that was convicted of a robbery offense, which is a theft [*17] by force. So that is concerning to me. She indicated that there's a drug case pending now for counterfeit controlled substances, and that's all I would anticipate, Judge.

"The Court: All right. The record should reflect that Juror No. 14 is also African-American.

"All right. Anything further?

"Mr. Pierce: I just ask the Court to note my objection to it on the grounds of Batson for Juror No. 14 as well."

The judge then asked counsel if they had any juror challenges for cause, both attorneys stated they had no challenges for cause, and the judge proceeded to allow

the State to exercise its peremptory challenges against jurors 10 and 14.

As an initial matter, this Court notes that the trial court never made a determination that appellant set forth a prima facie case of discrimination when he challenged the State's peremptory challenges. Defense counsel merely objected to the challenges, but did not raise any particular facts and/or circumstances from which to infer discrimination. Nonetheless, the State provided facially valid race-neutral reasons for striking the jurors in question. "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the [*18] court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Phillips*, quoting *Hernandez v. New York (1991)*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 111 S. Ct. 1859.

Under a clearly erroneous standard of review, this Court must give deference to the trial court's determination of credibility because "the trial court weighed the various explanations of the state, and was in the best position to evaluate the sincerity and verity of the states explanations." *Id.* The record in this case reflects that the State came forward with neutral reasons that the two jurors it challenged might be biased against the prosecution. After evaluating the reasons proffered by the State in defense of their peremptory challenges, this Court cannot conclude that the trial court's decision to find the State's explanation credible was clearly erroneous. Appellant's fifth assignment of error is overruled.

III.

Accordingly, appellant's assignments of error are overruled. The judgment of the trial court is affirmed.

Judgment affirmed.

DONNA J. CARR

Judge.

FOR THE COURT

SLABY, [*19] P. J.

WHITMORE, J.

CONCUR



LEXSEE 2009 OHIO 4512

STATE OF OHIO, Appellee v. JIMMY L. HARMON, Appellant

C.A. No. 24495

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT
COUNTY

2009 Ohio 4512; 2009 Ohio App. LEXIS 3809

September 2, 2009, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO. CASE No. CR 04 02 0547(C).

State v. Harmon, 2005 Ohio 3631, 2005 Ohio App. LEXIS 3351 (Ohio Ct. App., Summit County, July 20, 2005)

DISPOSITION: Judgment affirmed.

COUNSEL: NEIL P. AGARWAL, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.

JUDGES: CARLA MOORE, Presiding Judge. WHITMORE, J., DICKINSON, J., CONCUR.

OPINION BY: CARLA MOORE

OPINION**DECISION AND JOURNAL ENTRY**

MOORE, Presiding Judge.

[*P1] Appellant, Jimmy L. Harmon, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

[*P2] In 2004, a jury found Harmon guilty of engaging in a pattern of corrupt activity, a first-degree felony,

and two counts of trafficking in cocaine, a third-degree felony. The trial court sentenced him to an aggregate prison term of nine years. During sentencing, the trial court did not inform Harmon of his obligations regarding postrelease control, and the trial court's sentencing entry provided that Harmon would be "subject to post-release control to the extent the parole board may determine as provided by law." Harmon appealed to this Court, and we affirmed his convictions on July 20, 2005. *State v. Harmon*, 9th Dist. No. 22399, 2005 Ohio 3631.

[*P3] Later, both Harmon and [**2] the State filed motions for resentencing based on the trial court's failure to inform Harmon of his postrelease control obligations. On November 4, 2008, however, Harmon moved to "dismiss" the resentencing hearing, arguing that the trial court lacked jurisdiction to resentence him with the addition of postrelease control. The trial court conducted a second sentencing hearing on November 7, 2008, then denied Harmon's motion to dismiss, permitted him to withdraw his own motion for resentencing, and resentedenced him to the same sentence previously imposed. The trial court informed Harmon of his postrelease control obligations during the sentencing hearing and included postrelease control notification in the new sentencing entry. Harmon timely appealed. He has raised seven assignments of error for this Court's review, some of which have been rearranged for ease of disposition.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING DEFENDANT'S RIGHT TO FULLY

CROSS-EXAMINE AND IMPEACH A STATE'S WITNESS ABOUT HIS PREVIOUS CONVICTIONS WHEN IT REFUSED TO PERMIT DEFENDANT TO QUESTION THE WITNESS ABOUT THE CIRCUMSTANCES OF HIS PREVIOUS CONVICTIONS."

[*P4] As an initial matter, [**3] this Court must determine whether Harmon's first assignment of error can be considered in the context of this appeal. The State argues that prior decisions of this Court limit our review to errors arising out of the resentencing. See *State v. Fischer*, 9th Dist. No. 24406, 2009 Ohio 1491, 910 N.E.2d 1083; *State v. Ortega*, 9th Dist. No. 08CA009316, 2008 Ohio 6053. This Court must revisit this issue, however, in light of *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008 Ohio 4609, 895 N.E.2d 805, and *State v. Bedford*, 9th Dist. No. 24431, 2009 Ohio 3972.

Finality and *Crim.R. 32(C)*

[*P5] In *Culgan*, the Supreme Court of Ohio considered whether Culgan, whose convictions in 2002 had been affirmed by this Court in a direct appeal, was entitled to writs of mandamus and procedendo compelling the Medina County Court of Common Pleas to enter a judgment on his convictions that complied with *Crim.R. 32(C)*. Despite Culgan's direct appeal from that conviction, the Court observed:

"[I]f Culgan is correct that appellees' sentencing entry violated *Crim.R. 32(C)*, which would render the entry nonappealable, his claims for writs of mandamus and procedendo would have merit, and the court of appeals erred in sua [**4] sponte dismissing his complaint." (Emphasis added.) *Culgan*, 119 Ohio St. 3d 535, 2008 Ohio 4609, at P9, 895 N.E.2d 805.

The Court concluded that Culgan's sentencing entry did not, in fact, comply with *Crim.R. 32(C)* and granted a writ compelling the court of common pleas to issue a final appealable order. *Id.* at P10-11. Two justices dissented, emphasizing that Culgan had already appealed and, therefore, obtained the relief that he requested. *Id.* at P16.

[*P6] The implication of the Supreme Court's opinion in *Culgan* is that regardless of whether a defendant has already appealed his conviction, if the order from which the first appeal was taken is not final and appeal-

able, he is entitled to a new sentencing entry which can itself be appealed. Although the connection between *Culgan* and cases involving postrelease control has not yet been explicitly stated, the logic inherent in recent Supreme Court cases regarding postrelease control leads to a similar result. See *Fischer*, 2009 Ohio 1491, at P15, 910 N.E.2d 1083 (Dickinson, J., concurring) (observing that two of the appellant's assignments of error, which challenged his underlying conviction and the continuing viability of this Court's earlier opinion in his direct appeal, were "the logical extension [**5] of the Ohio Supreme Court's decisions in *State v. Simpkins*, 117 Ohio St.3d 420, 2008 Ohio 1197, 884 N.E.2d 568, and *State v. Bezak*, 114 Ohio St.3d 94, 2007 Ohio 3250, 868 N.E.2d 961.").

Finality and Postrelease Control

[*P7] In *Bedford*, this Court considered the implications of the Supreme Court's holdings that failure to notify a defendant of postrelease control renders a sentence void rather than voidable. Bedford was misinformed regarding his postrelease control obligations and assigned the trial court's error on direct appeal. This Court concluded that, while Bedford's sentencing order complied with *Crim.R. 32(C)*, both the sentence and the journal entry in which the trial court attempted to impose the sentence were void. *Bedford*, 2009 Ohio 3972, at P8. We then considered our jurisdiction in light of the void sentencing entry:

"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. Bloomer*, 122 Ohio St.3d 200, 2009 Ohio 2462, at P 27, 909 N.E.2d 1254 (quoting *State v. Bezak*, 114 Ohio St.3d 94, 2007 Ohio 3250, at P 12, 868 N.E.2d 961). Taking the Supreme Court at its word, [**6] this Court must act as if the journal entry containing Mr. Bedford's void sentence 'had never occurred' and 'as if there had been no judgment.' *Id.* (quoting *Bezak*, 114 Ohio St. 3d 94, 2007 Ohio 3250, at P 12, 868 N.E.2d 961).

**** While a judgment of conviction qualifies as a final order if it contains the requirements identified in *State v. Baker*, 119 Ohio St.3d 197, 2008 Ohio 3330, 893 N.E.2d 163, if there has been no judgment then there is no final order." *Bedford* at P10-11.

Because the order from which Bedford had appealed was void, this Court exercised its inherent power to vacate the order despite the fact that we lacked jurisdiction to review the merits of his appeal. *Id.* at P14-15.

[*P8] In this case, the trial court failed to inform Harmon of his postrelease control obligations in its 2004 sentencing entry. Although he appealed that entry, *Bezak* and *Simpkins* require the conclusion that his original sentence -- and the journal entry in which the trial court attempted to impose that sentence -- are void. See *Bedford* at P8. "Taking the Supreme Court at its word," as this Court did in *Bedford*, the journal entry that purported to impose sentence upon Harmon in 2004 must be considered as if no judgment had been entered. *Id.* at P10. "[I]f [*7] there has been no judgment then there is no final order." *Id.* at P11.

Final, Appealable Order

[*P9] Harmon was entitled to be resentenced to correct the error in notification of postrelease control and to a final order that, once issued, could be appealed notwithstanding his direct appeal in 2005. See *Culgan* at P9-11. In light of *Culgan* and *Bedford*, therefore, this Court is reluctantly compelled to address Harmon's first assignment of error.

Merits of the Appeal

[*P10] Harmon's first assignment of error is that the trial court erred by limiting his cross-examination of a witness against him at trial. Specifically, Harmon argues that *Evid.R. 609(A)(1)* permitted him to inquire into the facts surrounding the prior criminal convictions of Kevin Reynolds, who testified that he purchased drugs from Harmon twice as part of an undercover operation.

[*P11] *Evid.R. 609(A)(1)* permits evidence that a witness has been convicted of a crime punishable by death or more than one year of imprisonment for purposes of attacking the witness's credibility, subject to *Evid.R. 403*. *Evid.R. 609* does not require unlimited cross-examination with respect to facts surrounding a prior conviction. See *State v. Robb* (2000), 88 Ohio St.3d 59, 71, 2000 Ohio 275, 723 N.E.2d 1019. [*8] Instead, "[u]nder *Evid.R. 609*, a trial court has broad discretion to limit any questioning of a witness on cross-examination which asks more than the name of the crime, the time and place of conviction and the punishment imposed, when the conviction is admissible solely to impeach general credibility." *State v. Amburgey* (1987), 33 Ohio St.3d 115, 515 N.E.2d 925, syllabus. Because "*Evid.R. 609* must be read in conjunction with *Evid.R. 403*," trial courts consider all of the factors set forth in *Evid.R. 403*

to determine the extent to which cross-examination should be permitted. *State v. Wright* (1990), 48 Ohio St.3d 5, 7, 548 N.E.2d 923. A trial court's decision to limit the scope of cross-examination in light of *Evid.R. 609(A)(1)* and *Evid.R. 403* is reviewed for abuse of discretion. *Amburgey* at 117.

[*P12] *Evid.R. 403* limits the admissibility of *relevant* evidence. In this case, we need look no further into the Rule. The State elicited testimony from Reynolds during his direct examination that described his prior convictions. In addition, Reynolds testified about his discussions with police and his agreement to perform controlled drug buys from Harmon, including the reduction in sentence that he hoped to obtain. During cross-examination, [*9] Harmon tried to question Reynolds regarding the details of his convictions not to further undermine his credibility as a witness, but to elicit testimony that Reynolds believed he had been "convicted for a crime that he did not commit." As Harmon's attorney explained during a proffer related to the cross-examination, he hoped to raise the specter of unfair treatment by the police to bolster Harmon's own claim "that the police are trying to pin something on Mr. Harmon that he did not do[.]" Testimony about Reynolds' perception that he was treated unfairly by police in connection with his own convictions does not have "any tendency to make the existence of any fact that is of consequence *** more probable or less probable" with respect to Harmon's case. *Evid.R. 401*. See, also, *Robb*, 88 Ohio St.3d at 71. Because this testimony was irrelevant, the trial court did not abuse its discretion by limiting the scope of cross-examination under *Evid.R. 609(A)(1)*. Harmon's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING DEFENDANT'S U.S. CONST. AMEND V RIGHTS WHERE HIS SENTENCE HAS BEEN INCREASED AFTER HE HAD ALREADY COMMENCED SERVICE [*10] OF HIS SENTENCE."

[*P13] In his second assignment of error, Harmon argues that the trial court violated his constitutional right to be free from double jeopardy by enhancing his prison sentence through the addition of postrelease control. In *Simpkins*, however, the Supreme Court of Ohio concluded that when a trial court omits to inform a criminal defendant of his postrelease control obligations, the sentence is issued "without the authority of law" and the defendant does "not have a legitimate expectation of fi-

nality in his sentence." *Simpkins*, 117 Ohio St. 3d 420, 2008 Ohio 1197, at P37, 884 N.E.2d 568.

[*P14] As in *Simpkins*, Harmon had no expectation of finality in a void sentence, and the constitutional prohibition against double jeopardy does not apply. "Because jeopardy does not attach to a void sentence, the subsequent imposition of the statutorily required sentence cannot constitute double jeopardy." *State v. Bloomer*, 122 Ohio St.3d 200, 2009 Ohio 2462, at P27, 909 N.E.2d 1254, citing *State v. Jordan*, 104 Ohio St.3d 21, 2004 Ohio 6085, at P25, 817 N.E.2d 864. Harmon's second assignment of error is overruled.

ASSIGNMENT OF ERROR IV

"DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN THE TRIAL COURT FAILED TO APPLY THE DOCTRINE OF RES JUDICATA TO CLAIMS WHERE A SENTENCE [**11] HAS BEEN INCREASED BY ADDING A TERM OF POSTRELEASE CONTROL."

[*P15] Harmon's fourth assignment of error is that the trial court erred by imposing a sentence including postrelease control when the State's motion to resentence was barred by application of res judicata. The Supreme Court of Ohio also considered, and rejected, this argument in *Simpkins*. *Id.* at P24-36. Harmon's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR III

"DEFENDANT HAS BEEN DENIED HIS CONSTITUTIONAL RIGHT WHEN THE TRIAL COURT APPLIED A STATUTE ENACTED IN 2006 IN AN EX POST FACTO AND RETROACTIVE MANNER TO A CONVICTION AND SENTENCE THAT WAS ORIGINALLY IMPOSED IN 2004."

ASSIGNMENT OF ERROR V

"AM SUB. H.B. 137 VIOLATES THE SINGLE SUBJECT RULE UNDER OHIO CONST. ART. II, § 15(D)."

ASSIGNMENT OF ERROR VI

"AM. SUB. H.B. 137 RENDERS POSTRELEASE CONTROL UNCONSTITUTIONAL BECAUSE IT PERMITS THE EXECUTIVE TO IMPOSE THE SANCTION WITHOUT A COURT ORDER."

ASSIGNMENT OF ERROR VII

"ORC § 2929.191 IS UNCONSTITUTIONAL UNDER THE SEPARATION OF POWERS DOCTRINE CONTAINED IN OHIO CONST. ART. IV, § 5(B)."

[*P16] Harmon's third assignment of error argues that *R.C. 2929.191* is unconstitutionally retroactive in effect and operates as an ex post facto [**12] law because, by its terms, it applies to criminal defendants who were sentenced before the effective date of the statute. Harmon's fifth, sixth, and seventh assignments of error argue that the remedy created by *R.C. 2929.191* violates the single subject rule and separation of powers provisions of the Ohio Constitution. This Court need not address Harmon's constitutional arguments with respect to *R.C. 2929.191*, however, because the trial court did not proceed under the statute in this case.

[*P17] As this Court recently recognized in *State v. Holcomb*, 9th Dist. No. 24287, 2009 Ohio 3187, the Supreme Court of Ohio has created a remedy in cases in which the failure to notify a defendant of his postrelease control obligations is apparent from the record. *Id.* at P13-14, citing *Simpkins*. In such cases, the trial court must resentence the defendant, an obligation that arises not by statute but by virtue of the fact that the trial court is both authorized and obligated to correct a void sentence. *Holcomb* at P14. In *Simpkins*, the Supreme Court explicitly concluded that when there has been an error in postrelease control notification, "the state is entitled to a new sentencing hearing to have postrelease [**13] control imposed on the defendant unless the defendant has completed his sentence." (Emphasis added.) *Id.* at syllabus. In *Holcomb*, this Court recognized that a defendant may also move the trial court for resentencing under the authority of the Supreme Court's recent cases regarding postrelease control. *Holcomb* at P19-21.

[*P18] In this case, both Harmon and the State moved the trial court for resentencing under the authority of *Simpkins* without reference to *R.C. 2929.191*. The trial court permitted Harmon to withdraw his motion prior to the resentencing hearing, but the hearing proceeded on the State's motion without amendment. Because Harmon

was not resentenced pursuant to *R.C. 2929.191*, he does not have standing to challenge the constitutionality of the statute. See *Bloomer*, 122 Ohio St. 3d 200, 2009 Ohio 2462, at P31, 909 N.E.2d 1254 (concluding that the defendant lacked standing to challenge the constitutionality of *R.C. 2929.191* because, in that case, he was resentenced before July 11, 2006). Harmon's third, fifth, sixth, and seventh assignments of error are overruled.

III.

[*P19] Harmon's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable [**14] grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execu-

tion. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to Appellant.

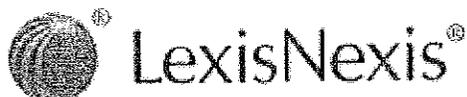
CARLA MOORE

FOR THE COURT

WHITMORE, J.

DICKINSON, J.

CONCUR



LEXSEE 2009 OHIO 3187

STATE OF OHIO, Appellee v. DANIEL LEE HOLCOMB, Appellant

C.A. No. 24287

COURT OF APPEALS OF OHIO, NINTH JUDICIAL DISTRICT, SUMMIT
COUNTY

2009 Ohio 3187; 2009 Ohio App. LEXIS 2714

June 30, 2009, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS, COUNTY OF SUMMIT, OHIO. CASE No. CR 1999 10 2235.

State v. Holcomb, 2009 Ohio 587, 2009 Ohio App. LEXIS 500 (Ohio Ct. App., Summit County, Feb. 11, 2009)

DISPOSITION: Judgment reversed, sentence vacated, and cause remanded.

COUNSEL: Appearances: DANIEL L. HOLCOMB, Pro se, appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellee.

JUDGES: BETH WHITMORE. DICKINSON, P. J. CONCURS. CARR, J. CONCURS.

OPINION

DECISION AND JOURNAL ENTRY

PER CURIAM

[*P1] In 2000, as part of a plea agreement, Daniel Holcomb pleaded guilty to three felonies, and the trial court sentenced him to 13 years in prison. In 2008, Holcomb moved the trial court to "correct sentencing," arguing that it had failed to include mandatory postrelease control as part of his sentence, thereby rendering the sentence void. The trial court held that Holcomb's motion was, in substance, an untimely and successive petition

for postconviction relief and, accordingly, dismissed it. This Court reverses.

[*P2] Since his guilty plea, Holcomb has filed a number of motions with this Court and the trial court. Among other things, he moved this Court for leave to file a delayed appeal; he twice moved the trial court for leave to withdraw his plea; he moved the trial court to correct [**2] void sentencing orders; he moved the trial court to correct unlawful sentencing instructions; he moved the trial court to correct sentencing journal entry and vacate sentence; and he petitioned the trial court for post-conviction relief. This Court has previously issued three opinions as a result of his appeals from various actions by the trial court. *State v. Holcomb*, 9th Dist. No. 23447, 2007 Ohio 2607; *State v. Holcomb*, 9th Dist. No. 21682, 2003 Ohio 7167; *State v. Holcomb*, 9th Dist. No. 21637, 2003 Ohio 6322. This appeal is from the trial court's denial of his latest filing, which he captioned a "Motion to Correct Sentencing."

ASSIGNMENT OF ERROR

"The trial court exceeded its authority in denying [Holcomb's] motion to vacate his sentence, because his sentence is void, a violation of the *Due Process clauses of both the United States and the Ohio Constitutions*."

[*P3] Holcomb argues that the trial court erred when it denied his motion to correct his sentence. This case provides this Court with an opportunity to review the Ohio Supreme Court's jurisprudence regarding void and voidable sentences.

Historical Perspective

[*P4] The Ohio Supreme Court has addressed void and voidable sentences for well [*3] over one hundred years. An early decision, *Ex parte Shaw (1857)*, 7 Ohio St. 81, 82, involved a trial court's sentence that fell below that required by statute. The Supreme Court held that the trial court "had jurisdiction over the offense and its punishment. It had authority to pronounce sentence; and while in the legitimate exercise of its power, committed a manifest error and mistake in the award of the number of years of the punishment. The sentence was not void, but erroneous." *Id.* Twenty years later, the Supreme Court reached the same result when considering a sentence above the statutory maximum. It held that "[t]he punishment inflicted by the sentence, in excess of that prescribed by the law in force, was erroneous and voidable, but not absolutely void." *Ex parte Van Hagan (1874)*, 25 Ohio St. 426, 432.

[*P5] Just over one hundred years ago, the Supreme Court reviewed a sentence that omitted language required by statute. In *Hamilton v. State (1908)*, 78 Ohio St. 76, 77, 84 N.E. 601, 5 Ohio L. Rep. 620, the Court reviewed a sentence which committed the defendant to the workhouse until his fines and costs were paid, without allowing a credit for each day of confinement on the fine and costs. The Court held that, "while [*4] not wholly void [the sentence] is incomplete and erroneous, and, where such sentence has not been executed, it will be reversed." Over the years that followed, the Court continued to hold that sentences imposed in violation of a statute were voidable. See, e.g., *Ex parte Winslow (1915)*, 91 Ohio St. 328, 110 N.E. 539, 12 Ohio L. Rep. 558; *Ex parte Fenwick (1924)*, 110 Ohio St. 350, 2 Ohio Law Abs. 357, 144 N.E. 269; *Stahl v. Currey (1939)*, 135 Ohio St. 253, 20 N.E.2d 529. In one of the last cases in this line, *Carmelo v. Maxwell (1962)*, 173 Ohio St. 569, 570, 184 N.E.2d 405, the Supreme Court held that a sentence imposed contrary to the terms of a statute does not void the sentence.

Void or Voidable

[*P6] The first thorough, modern discussion about void and voidable judgments in the criminal context appears in *State v. Perry (1967)*, 10 Ohio St.2d 175, 226 N.E.2d 104, decided two years after the adoption of Ohio's postconviction relief statute. The Supreme Court first discussed the term "void":

"Within the meaning of the statute, a judgment of conviction is void if rendered by a court having either no jurisdiction over the person of the defendant or no jurisdiction of the subject matter, i.e., juris-

diction to try the defendant for the crime for which he was convicted. Conversely, where a judgment of conviction [*5] is rendered by a court having jurisdiction over the person of the defendant and jurisdiction of the subject matter, such judgment is not void * * *." *Id.* at 178-79.

As for "voidable," the Court described it this way: "The word 'voidable' has caused some confusion. Thus, an erroneous judgment that is not void could be considered as in effect 'voidable,' so long as it may be set aside on appeal." *Id.* at 179. The Court provided two examples of voidable convictions and cited two cases; interestingly, neither of those decisions use the word "void" or "voidable" to describe the claim. The first example of a voidable conviction was one where the factual basis for a constitutional claim was not known until after the judgment of conviction. *Id.* at 179. The second example was one where the defendant was not represented by counsel at the trial or plea hearing that resulted in the judgment of conviction; the judgment would be voidable at any time prior to a final judicial determination that the defendant knowingly and intelligently waived the right to counsel. *Id.* at 179-80.

[*P7] Just two months later, the Supreme Court considered another case, *Romito v. Maxwell (1967)*, 10 Ohio St.2d 266, 267, 227 N.E.2d 223, involving [*6] void and voidable judgments, and, rather than refer to *Perry*, the Court cited to *Tari v. State (1927)*, 117 Ohio St. 481, 493-94, 5 Ohio Law Abs. 830, 159 N.E. 594, which stated:

"This decision must turn in its last analysis upon the distinction to be made between a void and a voidable judgment. If it was a void judgment, it is a mere nullity, which could be disregarded entirely, and could have been attacked collaterally, and the accused could have been discharged by any other court of competent jurisdiction in habeas corpus proceedings. If it was voidable, it is not a mere nullity, but only liable to be avoided by a direct attack and the taking of proper steps to have its invalidity declared. Until annulled, it has all the ordinary consequences of a legal judgment."

Void sentences -- disregard statutory requirements

[*P8] The Supreme Court turned its attention to void sentences in 1984 in an oft-cited case, *State v. Beasley* (1984), 14 Ohio St.3d 74, 14 Ohio B. 511, 471 N.E.2d 774. In *Beasley*, the Supreme Court reviewed a sentence it found void, holding:

"Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void. The applicable sentencing statute in this case, R.C. 2929.11, mandates [**7] a two to fifteen year prison term and an optional fine for felonious assault. The trial court disregarded the statute and imposed only a fine. In doing so the trial court exceeded its authority and this sentence must be considered void." *Id.* at 75.

This language has been cited repeatedly for the proposition that a sentence that disregards statutory authority is void, a conclusion that seems to conflict with *Ex parte Shaw* (1857), 7 Ohio St. 81, and other decisions discussed above, that would conclude that the sentence would be voidable, not void.

[*P9] *Beasley* played a significant role twenty years later when the Supreme Court confronted a trial court's failure to advise a defendant about postrelease control. In *State v. Jordan* (2004), 104 Ohio St.3d 21, 2004 Ohio 6085, 817 N.E.2d 864, the Ohio Supreme Court considered the trial court's failure to advise the defendant about postrelease control at the sentencing hearing. The Supreme Court quoted *Beasley* and held that the trial "court's duty to include a notice to the offender about postrelease control at the sentencing hearing is the same as any other statutorily mandated term of a sentence. And based on the reasoning in *Beasley*, a trial court's failure to [**8] notify an offender at the sentencing hearing about postrelease control is error." *Id.* at P26. Again, this conclusion conflicts with earlier decisions that seemingly would have concluded the sentence was voidable, not void.

[*P10] The Court revisited this issue three years later in *State v. Bezak*, 114 Ohio St.3d 94, 2007 Ohio 3250, 868 N.E.2d 961, The Court held that "[w]hen 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. The offender is entitled to a new sentencing hearing for that particular offense." *Id.* at syllabus. The Court held that *Jordan* controlled its decision: "Bezak was not informed about the imposition of postrelease control at his sentencing hearing. As a result, the

sentence imposed by the trial court is void. '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.' (Citations omitted.) *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268, 227 N.E.2d 223." *Id.* at P12. The Supreme Court held [**9] that when the "trial court fails to notify an offender that he may be subject to postrelease control at a sentencing hearing, as required by former R.C. 2929.19(B)(3), the sentence is void * * *. 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. The offender is entitled to a new sentencing hearing for that particular offense." *Id.* at P16.

Confusion about Void and Voidable

[*P11] We have noted inconsistencies in the Supreme Court's application of the void and voidable concepts. The Supreme Court has recognized its own confusion. A decade ago, in *State v. Green* (1998), 81 Ohio St.3d 100, 105, 1998 Ohio 454, 689 N.E.2d 556, the Supreme Court reversed a sentence and remanded for a new trial because a three-judge panel in a capital case had not followed specific statutory requirements. The Court held that "there has been no valid conviction and Green's sentence is therefore void." *Id.* Six years later, in *Kelley v. Wilson*, 103 Ohio St.3d 201, 2004 Ohio 4883, P14, 814 N.E.2d 1222, the Court stated that "despite our language in *Green* that the specified errors rendered the sentence 'void,' the judgment [**10] was voidable and properly challenged on direct appeal."

[*P12] More recently, the Court discussed void and voidable in detail in *State v. Payne*, 114 Ohio St.3d 502, 2007 Ohio 4642, 873 N.E.2d 306. The Court began with the simple notion that "void and voidable sentences are distinguishable." *Id.* at P27. "A void sentence is one that a court imposes despite lacking subject-matter jurisdiction or the authority to act." *Id.* at P27. "[A] voidable sentence is one that a court has jurisdiction to impose, but was imposed irregularly or erroneously." *Id.* Where a trial court has jurisdiction but erroneously exercises it, the sentence is not void, and the sentence can be set aside only if successfully challenged on direct appeal. *Id.* at P28. In a footnote, the Court stated that "It is axiomatic that imposing a sentence outside the statutory range, contrary to the statute, is outside a court's jurisdiction, thereby rendering the sentence void ab initio." *Id.* at P29, n.3. Two concurring opinions recognized the importance of clarifying the difference between a void and voidable sentence.

[*P13] Notwithstanding this clarification, the following year the Supreme Court again addressed the dis-

tion between void and voidable sentences. [**11] In *State v. Simpkins*, 117 Ohio St.3d 420, 2008 Ohio 1197, P6, 884 N.E.2d 568, the Court held that "in cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void[.]" The Court clarified by recognizing that, "[i]n general, a void judgment is one that has been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act. Unlike a void judgment, a voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but the court's judgment is invalid, irregular, or erroneous." *Id.* at P12 (citation omitted). The Court recognized that, although it normally holds "that sentencing errors are not jurisdictional and do not necessarily render a judgment void, * * * there are exceptions to that general rule. The circumstances in this case—a court's failure to impose a sentence as required by law—present one such exception." *Id.* at P13 (citations omitted).

[*P14] The Court reviewed a long list of cases, back to *Beasley*, and concluded that "[b]ecause a sentence that does not conform to statutory mandates requiring the imposition of postrelease [**12] control is a nullity and void, it must be vacated. The effect of vacating the sentence places the parties in the same position they would have been in had there been no sentence." *Id.* at P22. The Court recognized that a "trial court's jurisdiction over a criminal case is limited after it renders judgment, but it retains jurisdiction to correct a void sentence and is authorized to do so. Indeed, it has an obligation to do so when its error is apparent." *Id.* at P23 (citations omitted).

Remedy for Void Sentences

[*P15] Although the Supreme Court's mandate appeared clear, the remedy was not. Following the Supreme Court's recent decisions, many criminal defendants filed motions to resentence, a motion not specifically authorized under the Ohio Rules of Criminal Procedure. The Supreme Court has directed courts to reclassify a motion that is not filed pursuant to a specific rule of criminal procedure in order for the court to know the criteria by which the motion should be judged. *State v. Bush*, 96 Ohio St.3d 235, 2002 Ohio 3993, at P 10, 773 N.E.2d 522. "Where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his [**13] or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21." *State v. Reynolds* (1997), 79 Ohio St.3d 158, 1997 Ohio 304, 679 N.E.2d 1131, syllabus.

[*P16] In *State v. Price*, 9th Dist.No. 07CA0025, 2008 Ohio 1774, this Court concluded that *Reynolds* and *Bush* required a trial court to reclassify a motion to re-sentence as a petition for postconviction relief because the motion was filed after direct appeal, claimed a denial of constitutional rights, asked the trial court to vacate his sentence, and sought recognition that the trial court's judgment was void. *Id.* at P5. Having reclassified the motion as a petition for postconviction relief, the trial court lacked jurisdiction to consider it because it was an untimely or successive petition. *Id.* at P8. This conclusion, seemingly in conflict with *Simpkins* and *Bezak*, followed naturally from the procedure the Supreme Court established in *Bush* and *Reynolds*.

[*P17] The legal landscape changed in April 2009 when the Supreme Court decided *State v. Boswell*, 121 Ohio St.3d 575, 2009 Ohio 1577, 906 N.E.2d 422. *Boswell* concluded that a "motion to withdraw a plea of guilty or no contest made by a defendant who has been given a void sentence [**14] must be considered as a presentence motion under *Crim.R. 32.1*." *Id.* at syllabus. *Boswell* pleaded guilty and was sentenced, but the trial court failed to properly notify him about postrelease control. Five years after he was sentenced, he moved to withdraw his plea, and the trial court granted the motion. The state appealed and the court of appeals reversed. The Supreme Court again reviewed its line of cases involving void sentences.

[*P18] After deciding the *Crim.R. 32.1* issue, the Court noted that it "must also address the status of the void sentence." *Id.* at P12. The Court recognized that, unlike prior cases, neither party to this appeal challenged the sentence, although the parties agreed it was void. This case reached the Court on *Boswell's* motion to withdraw his guilty plea, which did not challenge his sentence as void. The Supreme Court held that, "Despite the lack of a *motion for resentencing*, we still must vacate the sentence and remand for a resentencing hearing in the trial court. Because the original sentence is actually considered a nullity, a court cannot ignore the sentence and instead must vacate it and order resentencing." *Id.* at P12 (emphasis added). The Supreme Court vacated [**15] "*Boswell's* void sentence and order[ed] resentencing if his motion to withdraw his guilty plea is ultimately denied." *Id.* at P13.

[*P19] In *Boswell*, for the first time, the Supreme Court provided direction about how to raise or consider a void sentence. A defendant may raise this claim in the trial court by filing a motion for resentencing and, in light of *Boswell's* analysis, the motion should not be reclassified as a petition for postconviction relief. If a sentence is void for failure to include postrelease control notification, the trial court -- or the reviewing court -- has an obligation to recognize the void sentence, vacate it,

and order resentencing. *Boswell at P13*. Presumably, this means that a trial court, confronted with an untimely or successive petition for postconviction relief that challenges a void sentence must ignore the procedural irregularities of the petition and, instead, vacate the void sentence and resentence the defendant.

This Court's Remedy

[*P20] Because a clear, consistent approach to handling these cases will best assist parties, attorneys, and the courts in this District, this Court adopts the approach suggested by *Boswell* outlined above: a defendant may request resentencing [*16] because of a trial court's failure to properly include postrelease control in a sentencing entry by filing a motion for resentencing. The trial court should not reclassify the motion or request as a petition for postconviction relief. To the extent that this Court's decisions, under these specific circumstances, require a trial court to reclassify a motion for resentencing as a petition for postconviction relief, see, e.g., *State v. Price, 9th Dist.No. 07CA0025, 2008 Ohio 1774*, or as a motion for relief from judgment under *Civ.R. 60(B)(5)*, see, e.g., *State v. Whatley, 9th Dist.No. 24231, 2008 Ohio 6128*, those decisions should not be followed. If a sentence is void for failure to include proper postrelease control notification, the trial court -- or the reviewing court -- has an obligation to recognize the void sentence, vacate it, and order resentencing. *Boswell at P12*. Further, a trial court, confronted with an untimely or successive petition for postconviction relief that challenges a sentence that is void, must ignore the procedural irregularities of the petition and, instead, vacate the void sentence and resentence the defendant. *Id.*

Holcomb's Void Sentence

[*P21] The record reflects that [*17] Holcomb was not advised that his sentence included a mandatory five-year period of post-release control. Accordingly, his sentence is void. Pursuant to *Boswell*, this Court vacates Holcomb's sentence and remands this case to the trial court to resentence him. "The effect of vacating the sentence places the parties in the same position they would have been in had there been no sentence." *Boswell at P8*, quoting *Simpkins at P22*.

Conclusion

[*P22] The trial court incorrectly categorized Holcomb's motion to correct sentencing as a petition for post-conviction relief. The judgment of the Summit County Common Pleas Court is reversed, Holcomb's sentence is vacated, and this cause is remanded for the trial court to resentence him according to law.

Judgment reversed, sentence vacated, and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and [*18] it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to appellee.

BETH WHITMORE

FOR THE COURT

CONCUR BY: DICKINSON; CARR

CONCUR

DICKINSON, P. J.

CONCURS, SAYING:

[*P23] I reluctantly join in the per curiam opinion. The trial court had personal jurisdiction over Mr. Holcomb when it sentenced him and had subject matter jurisdiction over the proceeding. It made a mistake in imposing sentence. That mistake made his sentence voidable. That is, subject to being reversed on direct appeal. It did not make his sentence void ab initio. See *State v. Perry, 10 Ohio St. 2d 175, 178-79, 226 N.E.2d 104 (1967)*.

[*P24] In *State v. Simpkins, 117 Ohio St. 3d 420, 2008 Ohio 1197, 884 N.E.2d 568*, the trial court had personal jurisdiction over the defendant and subject matter jurisdiction over the proceeding. Despite that, the Supreme Court held that, because its sentencing entry contained a mistake, the sentence was void ab initio. The moving party in *Simpkins* was the State. Because of that, I thought the [*19] ruling could be restricted to cases in which the State was the moving party. I realize that distinction didn't make a lot of sense, but my belief was that, just because the Supreme Court holds that the sun rises in the west on Sundays, we should not extend that ruling to other days of the week. Accordingly, in *State v. Price, 9th Dist. No. 07CA0025, 2008 Ohio 1774*, we, in effect, treated a sentence that did not include postrelease control as voidable rather than void.

[*P25] More recently, the Ohio Supreme Court decided *State v. Boswell*, 121 Ohio St. 3d 575, 2009 Ohio 1577, 906 N.E.2d 422, a case in which it vacated a sentence as void when nobody had even asked it to. Again, the trial court that sentenced Mr. Boswell had personal jurisdiction over him and subject matter jurisdiction over the case. I take this as a holding that the sun rises in the west on Mondays and infer from that the Ohio Supreme Court believes it does so all week.

[*P26] Abraham Lincoln said, "upon the subjects of which I have treated, I have spoken as I thought. I may be wrong in regard to any or all of them; but holding it a sound maxim, that it is better to be only sometimes right, than at all times wrong, so soon as I discover my opinions [**20] to be erroneous, I shall be ready to renounce them." Letter from Abraham Lincoln to the People of Sangamo County (Mar. 9, 1832), in *Abraham Lincoln. Speeches and Writings 1832-1858*, at 4-5 (The Library of America 1989). While acknowledging I was wrong about the broadness of *Simpkins*, I urge the Ohio Supreme Court to look again at its holding in that case to determine if we can't get the earth again spinning in the right direction.

CARR, J.

CONCURS, SAYING:

[*P27] For the following reasons, I respectfully concur in judgment only.

[*P28] Courts around the State, including this Court, have struggled with how to apply the Ohio Supreme Court's numerous decisions about postrelease control. The Judges of this Court have recognized that there are different approaches that could be taken to decide these issues. This Court has taken different approaches in similar cases.

[*P29] In *In re J.J.*, 111 Ohio St. 3d 205, 2006 Ohio 5484, P20, 855 N.E.2d 851, the Supreme Court issued a "directive that appellate courts should resolve conflicts within their respective appellate districts." In light of the Supreme Court's mandate, the Judges of this Court considered various approaches to resolving these cases. The result is that this Court will [**21] follow the broad approach outlined in the per curiam opinion.

[*P30] There was not complete agreement with this outcome. A minority of the Judges of this Court would apply the Supreme Court's holdings on the narrow bases on which they were decided, an approach this Court has followed in other circumstances. See, e.g., *State v. Hultz*, 9th Dist.No. 06CA0032, 2007 Ohio 2040, P12 ("The narrow holding in *Miller* does not apply in the instant case * * *"); *State v. Brintzenhose* (May 12, 1999), 9th Dist.No. 18924, 1999 Ohio App. LEXIS 2159, at *4. Consistent with a narrow approach, the Supreme Court's postrelease control decisions could be applied to cases with the same procedural and factual history. The holding in *Simpkins*, for example, could be applied solely to cases in which the State has sought a new sentencing hearing because the trial court failed to impose postrelease control, as stated in the syllabus. This Court has already distinguished *Simpkins* based on the facts of the case. See, e.g., *State v. Spears*, 9th Dist.No. 07CA0036-M, 2008 Ohio 4045, P15 ("The facts in *Simpkins* distinguish it from Mr. Spears's situation."). *Bezak* and *Jordan* could be applied in the same manner. Finally, the Supreme Court could revisit [**22] these questions to address the confusion that currently surrounds these cases. See *Simpkins* (Lanzinger, J., dissenting); *State v. Fischer*, 9th Dist.No. 24406, 181 Ohio App. 3d 758, 2009 Ohio 1491, P15, 910 N.E.2d 1083 (Dickinson, J., concurring).

[*P31] Reasonable jurists disagree about how to interpret and apply the Supreme Court's postrelease control cases. The Supreme Court has not been unanimous in its decisions on these difficult and complicated questions. See, e.g., *State v. Bloomer*, 122 Ohio St. 3d 200, 2009 Ohio 2462, 909 N.E.2d 1254; *Boswell*; *Simpkins*. The Justices continue to raise these questions, including, for example, the oral argument heard June 3, 2009 in *State v. Singleton*, Supreme Court Case No. 2008-1255 (oral argument available at http://www.ohiochannel.org/media_archives/supreme_court/media.cfm?file_id=120614&).

[*P32] I would not resolve this case in the same manner as the lead opinion. But a majority of the Judges of this Court have agreed to follow this approach. I believe consistency of decisions will benefit the parties, attorneys, and trial courts in this District. Accordingly, I concur in this Court's judgment.



LEXSEE 2009 OHIO 6283

STATE OF OHIO, Appellee v. MARSHAWN LYNDELL LORE HORNE, Appellant

C. A. No. 24691

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT COUNTY

2009 Ohio 6283; 2009 Ohio App. LEXIS 5285

December 2, 2009, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS, COUNTY OF SUMMIT, OHIO. CASE No. CR 08 08 2603.

DISPOSITION: Judgment vacated, and cause remanded.

COUNSEL: SHUBHRA N. AGARWAL, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.

JUDGES: DICKINSON, P. J., BELFANCE, J., CONCUR. CARR, J., DISSENTS.

OPINION BY: CLAIR E. DICKINSON

OPINION

DECISION AND JOURNAL ENTRY

Per Curiam.

[*P1] Appellant, Marshawn Lyndell Lore Horne, appeals the judgment of the Summit County Court of Common Pleas. This Court exercises its inherent power to vacate a void judgment and remands this case for a new sentencing hearing.

I.

[*P2] On September 11, 2008, Marshawn Horne was indicted on one count of aggravated robbery in violation of *RC. 2911.01(A)(1)*, a felony of the first degree; one count of having weapons while under disability in violation of *RC. 2923.13*, a felony of the third degree; and one count of grand theft in violation of *R.C. 2913.02(A)(1)/(4)*, a felony of the fourth degree. Count one of the indictment contained a firearm specification. After a jury trial, Horne was found guilty of aggravated robbery with a firearm specification, having weapons while under disability, [**2] and grand theft. The sentencing entry accurately states the terms of post-release control. However, at the sentencing hearing, the trial court did not notify Horne that he would be subject to post-release control upon his release from prison.

[*P3] Horne appeals his convictions to this Court, raising seven assignments of error.

II.

ASSIGNMENT OF ERROR I

"TRIAL COURT ERRED AND COMMITTED PLAIN ERROR BY ALLOWING THE PROSECUTOR TO INTRODUCE EVIDENCE ABOUT PRIOR, SEPARATE CRIMINAL CONDUCT IN VIOLATION OF OHIO STATUTORY LAW AND *OHIO RULES OF EVIDENCE 403 AND 404.*"

ASSIGNMENT OF ERROR II

"TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR,

BY ACCEPTING JOURNAL ENTRIES OF DEFENDANT'S PRIOR CONVICTIONS AS EVIDENCE."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR MISTRIAL."

ASSIGNMENT OF ERROR IV

"TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR WHEN IT PERMITTED INTO EVIDENCE TESTIMONY REGARDING RESULTS OF POLYGRAPH EXAM." (sic)

ASSIGNMENT OF ERROR V

"TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR WHEN IT REVERSED ITS PRIOR RULING AND PERMITTED THE PROSECUTOR TO REFER TO DEFENDANT AS 'KILLER[.]'"

ASSIGNMENT OF ERROR VI

"TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR WHEN IT [**3] FAILED TO PROPERLY INSTRUCT THE JURY ABOUT THE ESSENTIAL ELEMENTS OF THE OFFENCE OF AGGRAVATE ROBBERY[.]" (sic)

ASSIGNMENT OF ERROR VII

"DEFENDANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]"

[*P4] Horne has raised seven assignments of error on appeal. This Court declines to address Horne's arguments on the merits as the record indicates his sentence is void.

[*P5] Horne's conviction for aggravated robbery is a felony of the first degree. Pursuant to *R.C. 2967.28(B)*, "[e]ach sentence to a prison term for a felony of the first degree *** 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." For a felony of the first degree, the period is five years. *R.C. 2967.28(B)(1)*. Under *R.C. 2929.14(F)(1)*, "[i]f a court imposes a prison term for a felony of the first degree *** it shall include in the sen-

tence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment[.]" In addition, *R.C. 2929.19(B)(3)(c)* provides that, "if the sentencing court determines at the sentencing hearing that a prison term is necessary [**4] or required, [it] shall *** [n]otify the offender that [he] will be supervised under *section 2967.28 of the Revised Code* after [he] leaves prison if [he] is being sentenced for a felony of the *** first degree[.]"

[*P6] Pursuant to *R.C. 2967.28(B)*, an offender convicted of a felony of the first degree is subject to a mandatory term of five years post-release control. In this case, the trial court's sentencing entry stated that Horne "is ordered subject to post-release control of 5 years, as provided by law." However, the trial court did not notify Horne about mandatory post-release control at the sentencing hearing.

[*P7] The Supreme Court of Ohio has held that a trial court's failure to properly impose a mandatory term of post-release control renders a sentence void. *State v. Simpkins*, 117 Ohio St.3d 420, 2008 Ohio 1197, 884 N.E.2d 568, at syllabus. The Supreme Court's reasoning emanates from "the fundamental understanding that no court has the authority to substitute a different sentence for that which is required by law." *Id.* at P20, citing *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438, 195 N.E.2d 811. "Because a sentence that does not conform to statutory mandates requiring the imposition of post-release control is a nullity [**5] and void, it must be vacated." *Simpkins* at P22. The Supreme Court has recognized that if an offender's sentence is void, a reviewing court must vacate the sentence even if neither party has moved for resentencing. *State v. Boswell*, 121 Ohio St.3d 575, 2009 Ohio 1577, at P12, 906 N.E.2d 422; *State v. Bedford*, 9th Dist. No. 24431, 2009 Ohio 3972, at P12. "[T]he effect of vacating the trial court's original sentence is to place the parties in the same place as if there had been no sentence." *State v. Bezak*, 114 Ohio St.3d 94, 2007 Ohio 3250, at P13, 868 N.E.2d 961.

[*P8] In this case, the trial court did not properly inform Horne about the imposition of post-release control at the sentencing hearing. It follows that the judgment entry is void and must be vacated.

III.

[*P9] Because Horne's sentence is void, this Court cannot address his assignments of error. This Court exercises its inherent power to vacate the journal entry and remands this matter to the trial court for a new sentencing hearing.

Judgment vacated, and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into [**6] execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to Appellee.

CLAIR E. DICKINSON

FOR THE COURT

DICKINSON, P. J.

BELFANCE, J.

CONCUR

DISSENT BY: CARR

DISSENT

CARR, J.

DISSENTS, SAYING:

[*P10] I respectfully dissent for the reasons I articulated in *State v. King, 9th Dist. No. 24675, 2009 Ohio 5158* (Carr, J., dissenting).



LEXSEE 2009 OHIO 3078

STATE OF OHIO, PLAINTIFF-APPELLEE vs. BURK JORDAN, DEFENDANT-
APPELLANT

No. 91869

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYA-
HOGA COUNTY

2009 Ohio 3078; 2009 Ohio App. LEXIS 2614

June 25, 2009, Released

SUBSEQUENT HISTORY: Discretionary appeal not allowed by *State v. Jordan*, 123 Ohio St. 3d 1426, 2009 Ohio 5340, 914 N.E.2d 1065, 2009 Ohio LEXIS 2906 (Ohio, Oct. 14, 2009)

PRIOR HISTORY: [**1]

Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-352721.

DISPOSITION: Judgment affirmed.

COUNSEL: FOR APPELLANT: Margaret Amer Robey, Gregory Scott Robey, Robey & Robey, Maple Heights, Ohio.

FOR APPELLEE: William D. Mason, Cuyahoga County Prosecutor, BY: Thorin Freeman, Assistant Prosecuting Attorney, Cleveland, Ohio.

JUDGES: BEFORE: Celebrezze, J., Cooney, A.J., and Boyle, J. COLLEEN CONWAY COONEY, A.J., and MARY JANE BOYLE, J., CONCUR.

OPINION BY: FRANK D. CELEBREZZE, JR.

OPINION

JOURNAL ENTRY AND OPINION

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)* 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(C)* 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(C)*. See, also, *S.Ct. Prac.R. II, Section 2(A)(1)*.

FRANK D. CELEBREZZE, JR., J.:

[*P1] Appellant, Burk Jordan, brings this appeal challenging his sentence. After a thorough review of the record, [**2] and for the reasons set forth below, we affirm.

[*P2] This case stems from a 1996 incident in which appellant fired eight or nine shots at a passing car containing four passengers, injuring one. In 1997, appellant was charged with four counts of felonious assault in violation of *R.C. 2903.11*, with gun specifications, and two counts of intimidation in violation of *R.C. 2921.04*. On August 1, 1997, a jury found appellant guilty on all four counts of felonious assault, all attached gun specifications, and one count of intimidation. The jury found him not guilty on the other count of intimidation.

[*P3] On October 8, 1997, the trial court sentenced appellant to eight years on each of the felonious assault convictions, to run consecutively; three years on each gun specification, to run consecutively; and five years on the intimidation conviction, to run concurrently; for an aggregate total of 44 years in prison.

[*P4] Appellant filed an appeal challenging, among other alleged errors, his sentence and the trial court's failure to merge several counts for the purposes of sentencing. On November 25, 1998, this court affirmed in part and modified in part. *State v. Jordan* (Nov. 25,

1998), *Cuyahoga App. No. 73364, 1998 Ohio App. LEXIS 5571* [**3] ("*Jordan I*"). The portion of appellant's appeal that was modified related solely to his sentence.

[*P5] In *Jordan I*, the first issue appellant raised was whether the trial court could sentence him on four separate felonious assault charges stemming from a single transaction. Relying on *State v. Gregory (1993), 90 Ohio App.3d 124, 628 N.E.2d 86*, this court held that appellant could be convicted of four separate counts because there were four potential victims in the car, appellant knew there were four passengers, and he shot eight or nine times at the car, even though only one passenger was shot and suffered physical injuries. On the issue of merging the four firearm specifications, this court held that the trial court could not impose more than one additional prison term on the four separate firearm specifications. See *R.C. 2929.14(D)*.

[*P6] Appellant also argued that the trial court erred by sentencing him to maximum consecutive sentences. Relying on *State v. Beasley (June 11, 1998), Cuyahoga App. No. 72853, 1998 Ohio App. LEXIS 2597*, this court held that the trial court did not abuse its discretion by imposing maximum consecutive sentences on the four felonious assault convictions. See, also, *R.C. 2929.13(B)(2)(b)*. The end [**4] result was that this court vacated a portion of the sentence as it related to the firearm specifications, merged those four counts, and appellant's sentence was modified to 35 years.

[*P7] The Ohio Supreme Court denied jurisdiction. *State v. Jordan (1999), 85 Ohio St.3d 1476, 709 N.E.2d 849*.

[*P8] On May 2, 2007, appellant filed a pro se motion for resentencing, arguing that his sentence was void based on the trial court's failure to impose postrelease control. The trial court denied appellant's motion. Subsequently, the state filed a motion for resentencing on the same grounds. On June 12, 2008, the trial court granted the state's motion on the authority of *State v. Simpkins, 117 Ohio St.3d 420, 2008 Ohio 1197, 884 N.E.2d 568*. On June 30, 2008, appellant was resentenced to the same 35 years in prison, and the trial court imposed three years of postrelease control.

[*P9] On July 30, 2008, appellant filed a notice of appeal raising two assignments of error for our review.

Review and Analysis

Consecutive Sentences

[*P10] "I. The trial court erred and violated appellant's Fifth Amendment right to be free from double

jeopardy when it ordered consecutive service for allied offenses."

[*P11] Appellant argues that he cannot be sentenced [**5] for four counts of felonious assault when there was a single animus -- the act of shooting at the passing car. Appellant contends he committed a single offense and should serve concurrent sentences at most. The state argues that appellant's claim is barred by the doctrine of res judicata and, in the alternative, under this fact pattern, appellant's four sentences for felonious assault should not merge where there were four separate victims.

[*P12] We are not persuaded by the state's argument that appellant's claim is barred. When the trial court resentenced appellant on June 30, 2008, it did so because his first sentence was void. See *State v. Bezak, 114 Ohio St.3d 94, 2007 Ohio 3250, 868 N.E.2d 961*, at syllabus. Therefore, it is as if appellant's initial sentence and the issues he raised in his first appeal related to his sentence do not exist. The only sentence we now review is the sentence imposed by the trial court on June 30, 2008.

[*P13] Nor are we persuaded by appellant's argument that his four sentences for felonious assault should merge and require concurrent service.

[*P14] Appellant's reliance on *State v. Sutton (July 24, 2008), Cuyahoga App. No. 90172, 2008 Ohio 3677*, is misplaced. Unlike in *Sutton*, where [**6] the court merged the convictions for attempted murder and felonious assault for each victim, the case at bar does not involve two or more convictions based on a single animus toward a single victim. There were four victims because appellant shot at a car in which he knew there were four passengers. In *State v. Franklin, 97 Ohio St.3d 1, 2002 Ohio 5304, 776 N.E.2d 26*, the Ohio Supreme Court held that "[e]ven though appellant set only one fire, each aggravated arson count recognizes that his action created a risk of harm to a separate person." Similarly, appellant's act of shooting at a passing car created a known risk of harm to four separate people.¹ See, also, *State v. Jones (1985), 18 Ohio St.3d 116, 18 Ohio B. 148, 480 N.E.2d 408*.

¹ Arguably, appellant committed more than a single act given that he shot his weapon eight or nine separate times.

[*P15] Appellant's first assignment of error is overruled.

Disproportionate Sentence

[*P16] "II. The trial court erred and abused its discretion by imposing an unreasonable and disproportionately harsh sentence on appellant, which was grossly

inconsistent with sentences imposed on similar offenders for similar crimes and violated his Eighth Amendment rights."

[*P17] In his second assignment of error, appellant challenges the severity of his sentence by arguing that similarly situated defendants were not given maximum consecutive sentences. Because appellant did not raise this issue before the trial court at resentencing, we are barred from reviewing it here.

[*P18] This court has repeatedly recognized that in order to support a contention that a "sentence is disproportionate to sentences imposed upon other offenders, a defendant must raise this issue before the trial court and present some evidence, however minimal, in order to provide a starting point for analysis and to preserve the issue for appeal." *State v. Redding*, 8th Dist. No. 90864, 2008 Ohio 5739, at P18, fn. 7, quoting *State v. Edwards*, 8th Dist. No. 89181, 2007 Ohio 6068, P11.

[*P19] Appellant offers no other cases in which a similarly situated defendant was given a lighter sentence, nor does he demonstrate that the court did not consider the guiding principles of R.C. 2929.11 and 2929.12. He merely argues that serving his sentence will keep him in

prison until he is 63 years old. This argument has no merit.

[*P20] Appellant's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant [*8] costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

FRANK D. CELEBREZZE, JR., JUDGE

COLLEEN CONWAY COONEY, A.J., and

MARY JANE BOYLE, J., CONCUR



LEXSEE 2009 OHIO 6281

STATE OF OHIO, Appellee v. JENNIFER R. MILLER, Appellant

C. A. No. 24692

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT
COUNTY

2009 Ohio 6281; 2009 Ohio App. LEXIS 5282

December 2, 2009, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS, COUNTY OF SUMMIT, OHIO. CASE No. CR 08 08 2577.

DISPOSITION: Judgment vacated, and cause remanded.

COUNSEL: RHONDA L. KOTNIK, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN R. DIMARTINO, assistant prosecuting attorney, for appellee.

JUDGES: CLAIR E. DICKINSON, Judge, MOORE, P. J. BELFANCE, J. CONCUR.

OPINION BY: CLAIR E. DICKINSON

OPINION

DECISION AND JOURNAL ENTRY

INTRODUCTION

DICKINSON, Judge.

[*P1] A jury convicted Jennifer R. Miller of unlawful sexual conduct with a minor. She has appealed, arguing that the trial court incorrectly denied her motion for acquittal under *Rule 29 of the Ohio Rules of Criminal Procedure*. Because the trial court made a mistake regarding post-release control in Ms. Miller's sentencing entry, the sentencing entry is void. This Court, therefore, exercises its inherent authority to vacate the void judgment and remands for a new sentencing hearing.

POST-RELEASE CONTROL

[*P2] Ms. Miller's conviction is a felony of the third degree. The trial court sentenced her to two years of incarceration and suspended the sentence on the condition that Ms. Miller complete three years of community control. The trial court warned Ms. Miller that [**2] violation of her community control requirements would lead to "[t]wo (2) years in prison and in addition post release control of up to Three (3) years."

[*P3] Under *Section 2967.28(B) of the Ohio Revised Code* "[e]ach sentence to a prison term for a . . . felony sex offense . . . 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." For a felony sex offense, the period is five years. *R.C. 2967.28(B)(1)*. Under *Section 2929.14(F)(1)*, "[i]f a court imposes a prison term . . . for a felony sex offense, . . . it shall include in the sentence a requirement that the offender be subject to a period of post-release control after [her] release from imprisonment" In addition, *Section 2929.19(B)(3)(c)* provides that, "if the sentencing court determines . . . that a prison term is necessary or required, [it] shall . . . [n]otify the offender that [she] will be supervised under *section 2967.28 of the Revised Code* after [she] leaves prison if [she] is being sentenced . . . for a felony sex offense"

[*P4] In its journal entry, the trial court warned Ms. Miller that violation of her [**3] community control requirements would lead to "[t]wo (2) years in prison and in addition post release control of up to Three (3) years." That would have been correct if Ms. Miller's third-degree felony had not been a felony sex offense. *Section*

2967.28(A)(3) defines a "[f]elony sex offense" as "a violation of a section contained in *Chapter 2907 of the Revised Code* that is a felony." A jury convicted Ms. Miller of violating *Section 2907.04*, a felony of the third degree. Due to her conviction for a felony sex offense, she was subject to a mandatory five years of post-release control, rather than up to three years for a third-degree felony.

[*P5] In *State v. Simpkins*, 117 Ohio St. 3d 420, 2008 Ohio 1197, 884 N.E.2d 568, the Ohio Supreme Court held that, "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void . . ." *Id.* at syllabus. The Supreme Court reasoned that "no court has the authority to substitute a different sentence for that which is required by law." *Id.* at P 20. It concluded that "a sentence that does not conform to statutory mandates requiring the imposition of postrelease [**4] control is a nullity and void [and] must be vacated." *Id.* at P 22.

[*P6] In *State v. Bedford*, 9th Dist. No. 24431, 2009 Ohio 3972, at P 11, this Court held that, if "[a] journal entry is void because it included a mistake regarding post-release control . . . there is no final, appealable order." Accordingly, this Court does not have jurisdiction to consider the merits of Ms. Miller's appeal. *Id.* at P 14. It does have limited inherent authority, however, to recognize that the journal entry is a nullity and vacate the void judgment. *Id.* at P 12 (quoting *Van De Ryt v. Van De Ryt*, 6 Ohio St. 2d 31, 36, 215 N.E.2d 698 (1966)).

CONCLUSION

[*P7] The trial court's journal entry included a mistake regarding post-release control. It, therefore, is void. This Court exercises its inherent authority to vacate the journal entry and remands this matter to the trial court for a new sentencing hearing.

Judgment vacated, and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately [**5] upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to appellee.

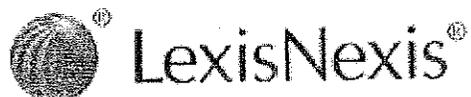
CLAIR E. DICKINSON

FOR THE COURT

MOORE, P. J.

BELFANCE, J.

CONCUR



LEXSEE 2009 OHIO 4168

STATE OF OHIO, Appellee v. ANTHONY J. MORTON, Appellant

C.A. No. 24531

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT
COUNTY

2009 Ohio 4168; 2009 Ohio App. LEXIS 3513

August 19, 2009, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS, COUNTY OF SUMMIT, OHIO. CASE No. 2008-04-1308.

DISPOSITION: Judgment vacated, and cause remanded.

COUNSEL: Appearances: MATILDA O. CARRENA, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN DIMARTINO, assistant prosecuting attorney, for appellee.

JUDGES: CLAIR E. DICKINSON, Judge. WHITMORE, J., CONCURS. MOORE, P. J., CONCURS IN JUDGMENT ONLY.

OPINION BY: CLAIR E. DICKINSON

OPINION

DECISION AND JOURNAL ENTRY

DICKINSON, Judge.

INTRODUCTION

[*P1] A jury convicted Anthony Morton of aggravated possession of drugs, a felony of the second degree. He has appealed his conviction, arguing that the trial court incorrectly denied his motion to suppress. Because the trial court made a mistake regarding post-release control at the sentencing hearing and in its journal entry, the journal entry is void. This Court, therefore, exercises its

inherent power to vacate the void judgment and remands for a new sentencing hearing.

POST-RELEASE CONTROL

[*P2] *Section 2967.28(B) of the Ohio Revised Code* provides that "[e]ach sentence to a prison term for a felony of the . . . second degree . . . shall include a requirement that the offender be subject to a period of post-release control [**2] imposed by the parole board after the offender's release from imprisonment." For a felony of the second degree that is not a felony sex offense, the period is three years. *R.C. 2967.28(B)(2)*. Under *Section 2929.14(F)(1)*, "[i]f a court imposes a prison term . . . for a felony of the second degree . . . it shall include in the sentence a requirement that the offender be subject to a period of post-release control after [his] release from imprisonment" In addition, *Section 2929.19(B)(3)(c)* provides that, "if the sentencing court determines . . . that a prison term is necessary or required, [it] shall . . . [n]otify the offender that [he] will be supervised under *section 2967.28 of the Revised Code* after [he] leaves prison if [he] is being sentenced for a felony of the . . . second degree"

[*P3] At the sentencing hearing, the trial court told Mr. Morton that it was sentencing him "to a mandatory sentence of two years in prison with up to three years of post-release control as the Ohio Parole Authority may determine." In its journal entry, it wrote that, "[a]fter release from prison, [Mr. Morton] is ordered subject to 3 years post-release control to the extent the parole board [**3] may determine as provided by law." The court, therefore, made a couple of mistakes. At the sentencing hearing, it incorrectly told Mr. Morton that post-release control would be for up to three years even though *Section 2967.28* requires a full three years. At the sentencing

hearing and in its journal entry, the court incorrectly suggested that the imposition of post-release control was at the discretion of the parole board, instead of mandatory under *Section 2967.28(B)*.

[*P4] In *State v. Simpkins*, 117 Ohio St. 3d 420, 2008 Ohio 1197, 884 N.E.2d 568, the Ohio Supreme Court held that, "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void . . ." *Id. at syllabus*. The Supreme Court reasoned that "no court has the authority to substitute a different sentence for that which is required by law." *Id. at P20*. It concluded that "a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void [and] must be vacated." *Id. at P22*.

[*P5] In *State v. Bedford*, 9th Dist. No. 24431, 2009 Ohio 3972, at P11, this Court held that, if "[a] [*4] journal entry is void because it included a mistake regarding post-release control . . . there is no final, appealable order." Accordingly, this Court does not have jurisdiction to consider the merits of Mr. Morton's appeal. *Id. at P14*. It does have limited inherent authority, however, to recognize that the journal entry is a nullity and vacate the void judgment. *Id. at P12* (quoting *Van De Ryt v. Van De Ryt*, 6 Ohio St. 2d 31, 36, 215 N.E.2d 698 (1966)).

CONCLUSION

[*P6] The trial court's journal entry included a mistake regarding post release control. It, therefore, is void. This Court exercises its inherent power to vacate the

journal entry and remands this matter to the trial court for a new sentencing hearing.

Judgment vacated,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals [*5] at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT
WHITMORE, J.

CONCURS

MOORE, P. J.

CONCURS IN JUDGMENT ONLY



LEXSEE 2008 OHIO 6053

STATE OF OHIO, Appellee v. CARLOS ORTEGA, Appellant

C.A. No. 08CA009316

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, LORAIN COUNTY

2008 Ohio 6053; 2008 Ohio App. LEXIS 5074

November 24, 2008, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO. CASE No. 04CR065942.

State v. Ortega, 2006 Ohio 2177, 2006 Ohio App. LEXIS 2029 (Ohio Ct. App., Lorain County, May 3, 2006)

DISPOSITION: Judgment affirmed.

COUNSEL: Appearances: KENNETH N. ORTNER, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, BILLIE JO BELCHER and CHRISTOPHER J. PIERRE, Assistant Prosecuting Attorneys, for Appellee.

JUDGES: DONNA J. CARR, Presiding Judge. WHITMORE, J., CONCURS. SLABY, J., CONCURS IN JUDGMENT ONLY.

OPINION BY: DONNA J. CARR

OPINION

DECISION AND JOURNAL ENTRY

CARR, Presiding Judge.

[*P1] Appellant, Carlos Ortega ("Ortega"), appeals the judgment of the Lorain County Court of Common Pleas which re-sentenced Ortega to an aggregate sentence of twenty-seven years and advised him of his post-release control obligations. This Court affirms.

I.

[*P2] On August 19, 2004, Ortega was indicted on one count of aggravated burglary under R.C. 2911.11(A)(1), and one count aggravated burglary under R.C. 2911.11(A)(2), both counts containing a three-year firearm specification, as well as a one-year firearm specification. On September 2, 2004, a supplemental indictment was filed indicting Ortega on one count of aggravated murder under R.C. 2903.01(B), one count of aggravated robbery under R.C. 2911.01(A)(1), one count of aggravated robbery [**2] under R.C. 2911.01(A)(3), one count of robbery under R.C. 2911.02(A)(1), one count of tampering with evidence under R.C. 2921.12(A), one count of murder under R.C. 2903.02(B), one count of felonious assault under R.C. 2903.11(A)(1) & (2), and firearm specifications for all counts. On January 14, 2005, the jury found Ortega guilty of count one, aggravated burglary; count two, aggravated burglary; count three, aggravated murder; count seven, tampering with evidence; count eight, murder; count nine, felonious assault; and all of the corresponding specifications. Ortega was sentenced to "an aggregate sentence of 27 years to life."

[*P3] On February 14, 2005, Ortega filed a notice of appeal with this Court. On July 21, 2005, Ortega's appeal was dismissed because he failed to file his brief within the statutory period. On November 3, 2005, this Court granted Ortega's motion for reconsideration. On May 5, 2006, this Court affirmed the ruling of the Lorain County Court of Common Pleas.

[*P4] On October 19, 2007, Ortega filed a "motion to set aside void sentence[.]" On December 13, 2007, the trial court sentenced Ortega to an aggregate sentence of twenty-seven (27) years on the counts for which he had [**3] been convicted, and advised Ortega of the post-

release control to which he would be subjected. Ortega filed a timely appeal on January 11, 2008.

MITTED INTO EVIDENCE TO THE DETRIMENT OF MR. ORTEGA."

II.

ASSIGNMENT OF ERROR I

"THE JURY LOST ITS WAY WHEN IT FOUND MR. ORTEGA GUILTY FOR CONSPIRACY, AS THE DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

ASSIGNMENT OF ERROR VI

"THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE PROSECUTOR TO QUESTION [**4] A STATE WITNESS ON RE-DIRECT EXAMINATION ABOUT MATTERS OUTSIDE THE SCOPE OF CROSS EXAMINATION."

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED TO THE DETRIMENT OF MR. ORTEGA WHEN ADMITTING TESTIMONY INTO EVIDENCE THAT WAS ELICITED THROUGH LEADING QUESTIONS ON DIRECT EXAMINATION[.]"

ASSIGNMENT OF ERROR VII

"THE TRIAL COURT ERRED TO THE DETRIMENT OF MR. ORTEGA BY NOT ALLOWING DEFENSE COUNSEL TO PROPERLY PRESENT CLOSING ARGUMENT."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED TO THE DETRIMENT OF MR. ORTEGA WHEN IT ALLOWED THE DETECTIVE IN THE CASE TO TESTIFY ABOUT APPELLANT'S ATTEMPT TO ENFORCE HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT WHEN QUESTIONED BY THE POLICE."

ASSIGNMENT OF ERROR VIII

"THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS DEPRIVED MR. ORTEGA OF A FAIR TRIAL."

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED WITNESSES TO TESTIFY AS TO MATTERS OF WHICH ONLY AN EXPERT IN THE FIELD OF PHYSICIS [sic] COULD HAVE TESTIFIED TO THE DETRIMENT OF MR. ORTEGA."

[*P5] Ortega sets forth eight assignments of error on appeal. However, because this Court already affirmed his conviction in his first appeal, Ortega is now precluded from setting forth new arguments which are unrelated to his re-sentencing.

ASSIGNMENT OF ERROR V

"THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED HEARSAY TESTIMONY TO BE AD-

[*P6] "The law of the case doctrine 'provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.'" *Neiswinter v. Nationwide Mut. Fire Ins. Co.*, 9th Dist. No. 23648, 2008 Ohio 37, at P10, quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 11 Ohio B. 1, 462 N.E.2d 410. Ultimately, "the doctrine of law of the case precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal. New arguments are subject to issue preclusion, [**5] and are barred." *Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St.3d 402, 404-05, 1996 Ohio 174, 659 N.E.2d 781.

[*P7] More specific to the case at hand, it has been found that where a "court affirm[s] the convictions in the First Appeal, the propriety of those convictions [becomes] the law of the case, and subsequent arguments seeking to overturn them [become] barred. Thus, in the Second Appeal, only arguments relating to the resentencing [are] proper." *State v. Harrison, 8th Dist. No. 88957, 2008 Ohio 921, at P9.*

[*P8] In the case sub judice, Ortega does not set forth any arguments challenging the propriety or validity of his new sentence. Rather, Ortega sets forth new arguments attacking his conviction as entered by the trial court which were available to be pursued in his first appeal. Because this Court has already affirmed Ortega's conviction in ruling on his first appeal, he is now precluded from attempting to overturn that conviction on his second appeal after resentencing, and is limited to setting forth arguments relating only to his re-sentencing. Therefore, Ortega's eight new assignments of error challenging his conviction are barred by the "law of the case" doctrine. Accordingly, Ortega's eight assignments of [**6] error are overruled.

III.

[*P9] Ortega's eight assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27.*

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(F).* The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30.*

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT
WHITMORE, J.

CONCURS

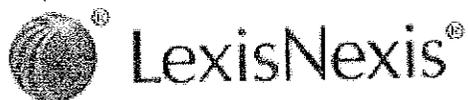
CONCUR BY: SLABY

CONCUR

SLABY, J.

CONCURS IN JUDGMENT ONLY, SAYING:

[*P10] SLABY I agree with the result reached by the majority in this case, but write separately because I would reach this result, and affirm, based on *res judicata* rather than the doctrine [**7] of the law of the case.



LEXSEE 2009 OHIO 4170

STATE OF OHIO, Appellee v. LUCAS PEREZLARAOS, Appellant

C.A. No. 24474

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT
COUNTY

2009 Ohio 4170; 2009 Ohio App. LEXIS 3517

August 19, 2009, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS, COUNTY OF SUMMIT, OHIO. CASE No. CR 08 03 0892.

DISPOSITION: Judgment vacated, and cause remanded.

COUNSEL: Appearances: MARIA TORRES CHIN, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN DIMARTINO, assistant prosecuting attorney, for appellee.

JUDGES: CLAIR E. DICKINSON, Presiding Judge. WHITMORE, J., BELFANCE, J., CONCUR.

OPINION BY: CLAIR E. DICKINSON

OPINION

DECISION AND JOURNAL ENTRY

DICKINSON, Presiding Judge.

INTRODUCTION

[*P1] A jury convicted Lucas Perezlaraos of domestic violence and felonious assault. He has appealed, arguing that the trial court incorrectly failed to dismiss the jury panel after one of the prospective jurors questioned whether he (Mr. Perezlaraos) was in the United States illegally and that the trial court incorrectly allowed a forensic nurse examiner to testify about victim behavior in abusive relationships. He has also argued that his convictions are not supported by sufficient evidence and

are against the manifest weight of the evidence. Because the trial court made a mistake regarding post-release control in its sentencing entry, the sentencing entry is void. This Court, therefore, exercises its inherent power to vacate [**2] the void judgment and remands for a new sentencing entry.

POST-RELEASE CONTROL

[*P2] Mr. Perezlaraos's felonious assault conviction is a felony of the second degree. The trial court sentenced him on it to two years in the custody of the Ohio Department of Rehabilitation and Correction, to be served concurrently with a 180-day sentence for his misdemeanor domestic violence conviction.

[*P3] Under *Section 2967.28(B) of the Ohio Revised Code* "[e]ach sentence to a prison term for a felony of the . . . second degree . . . 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." For a felony of the second degree that is not a felony sex offense, the period is three years. *R.C. 2967.28(B)(2)*. Under *Section 2929.14(F)(1)*, "[i]f a court imposes a prison term . . . for a felony of the second degree, . . . it shall include in the sentence a requirement that the offender be subject to a period of post-release control after [his] release from imprisonment" In addition, *Section 2929.19(B)(3)(c)* provides that, "if the sentencing court determines . . . that a prison term is necessary or required, [**3] [it] shall . . . [n]otify the offender that [he] will be supervised under *section 2967.28 of the Revised Code* after [he] leaves prison if [he] is being sentenced for a felony of the . . . second degree"

[*P4] At the sentencing hearing, the trial court correctly told Mr. Perezlaraos that, following his release, "he will be placed on three years of what's called Post-Release Control, which is another name for parole." But in its journal entry, it incorrectly wrote that "he may be placed on post release control for a period of three years." That is, the journal entry incorrectly suggested that the imposition of post-release control was discretionary instead of mandatory under *Section 2967.28(B)*.

[*P5] In *State v. Simpkins*, 117 Ohio St. 3d 420, 2008 Ohio 1197, 884 N.E.2d 568, the Ohio Supreme Court held that, "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void . . ." *Id.* at syllabus. The Supreme Court reasoned that "no court has the authority to substitute a different sentence for that which is required by law." *Id.* at P20. It concluded that "a sentence that does not conform [*4] to statutory mandates requiring the imposition of postrelease control is a nullity and void [and] must be vacated." *Id.* at P22.

[*P6] In *State v. Bedford*, 9th Dist. No. 24431, 2009 Ohio 3972, at P11, this Court held that, if "[a] journal entry is void because it included a mistake regarding post-release control . . . there is no final, appealable order." Accordingly, this Court does not have jurisdiction to consider the merits of Mr. Perezlaraos's appeal. *Id.* at P14. It does have limited inherent authority, however, to recognize that the journal entry is a nullity and vacate the void judgment. *Id.* at P12 (quoting *Van DeRyt v. Van DeRyt*, 6 Ohio St. 2d 31, 36, 215 N.E.2d 698 (1966)).

CONCLUSION

[*P7] The trial court's journal entry included a mistake regarding post-release control. It, therefore, is void. This Court exercises its inherent power to vacate the journal entry and remands this matter to the trial court for a new sentencing entry.

Judgment vacated,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal [**5] entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to appellee.
CLAIR E. DICKINSON
FOR THE COURT
WHITMORE, J.
BELFANCE, J.
CONCUR



LEXSEE 2009 OHIO 4422

STATE OF OHIO, Appellee v. ANGELO PIROVOLOS, Appellant

C. A. No. 08CA0087-M

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, MEDINA
COUNTY

2009 Ohio 4422; 2009 Ohio App. LEXIS 3737

August 31, 2009, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS, COUNTY OF MEDINA, OHIO. CASE No. 08-CR-0191.

DISPOSITION: Judgment vacated, and cause remanded.

COUNSEL: DAVID V. GEDROCK, attorney at law, for appellant.

DEAN HOLMAN, prosecuting attorney, and RUSSELL HOPKINS, assistant prosecuting attorney, for appellee.

JUDGES: CLAIR E. DICKINSON, Presiding Judge. WHITMORE, J., BELFANCE, J., CONCUR.

OPINION BY: CLAIR E. DICKINSON

OPINION

DECISION AND JOURNAL ENTRY

DICKINSON, Presiding Judge.

INTRODUCTION

[*P1] Angelo Pirovolos pleaded no contest to attempted murder, a felony of the first degree, felonious assault, a felony of the second degree, and having weapons while under disability, a felony of the third degree. The trial court found him guilty of the charges and sentenced him to twelve years in prison. He has appealed his convictions, arguing that the court incorrectly denied his motion to suppress. Because the court made a mistake regarding post-release control in its journal entry, the

journal entry is void. This Court, therefore, exercises its inherent power to vacate the void judgment and remands for a new sentencing hearing.

SENTENCING ERROR

[*P2] Although not addressed by the parties, this Court must first consider whether it has jurisdiction to [**2] hear the appeal. *Section 2967.28(B) of the Ohio Revised Code* provides that "[e]ach sentence to a prison term for a felony of the first degree, for a felony of the second degree, . . . 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." For a felony of the first degree, the period is five years. *R.C. 2967.28(B)(1)*. "For a felony of the second degree that is not a felony sex offense," the period is three years. *R.C. 2967.28(B)(2)*. "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," the period is three years. *R.C. 2967.28(B)(3)*. Under *Section 2929.14(F)(1)*, "[i]f a court imposes a prison term for a felony of the first degree, for a felony of the second degree, . . . 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 [**3] to cause physical harm to a person, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after [his] release from imprisonment"

[*P3] At Mr. Pirovolos's sentencing hearing, the trial court correctly told him that he would be subject to five years post-release control. In its journal entry, how-

ever, it wrote that "post release control is mandatory in this case up to a maximum of 5 years [on the attempted murder count] and post release control is mandatory in this case up to a maximum of 3 years on [the felonious assault and having weapons while under disability counts]." The court, therefore, mistakenly indicated that Mr. Pirovolos could be subject to less than five years of post-release control on the attempted murder count instead of writing that he will be subject to the full term of five years. It also mistakenly wrote that he could be subject to less than three years of post-release control on the felonious assault and having a weapon under disability counts. See *State v. Morton*, 9th Dist. No. 24531, 2009 Ohio 4168, at P3; *State v. Moton*, 9th Dist. No. 24262, 2009 Ohio 4169, at P5.

[*P4] In *State v. Simpkins*, 117 Ohio St. 3d 420, 2008 Ohio 1197, 884 N.E.2d 568, [**4] the Ohio Supreme Court held that, "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void . . ." *Id. at syllabus*. The Supreme Court reasoned that "no court has the authority to substitute a different sentence for that which is required by law." *Id. at P20*. It concluded that "a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void [and] must be vacated." *Id. at P22*.

[*P5] In *State v. Bedford*, 9th Dist. No. 24431, 2009 Ohio 3972, at P11, this Court held that, if "[a] journal entry is void because it included a mistake regarding post-release control . . . there is no final, appealable order." Accordingly, this Court does not have jurisdiction to consider the merits of Mr. Pirovolos's appeal. *Id. at P14*. It does have limited inherent authority, however, to recognize that the journal entry is a nullity and vacate the void judgment. *Id. at P12* (quoting *Van De*

Ryt v. Van De Ryt, 6 Ohio St. 2d 31, 36, 215 N.E.2d 698 (1966)).

CONCLUSION

[*P6] The trial court's journal entry included a mistake regarding post release control. [**5] It, therefore, is void. This Court exercises its inherent power to vacate the journal entry and remands this matter to the trial court for a new sentencing hearing.

Judgment vacated,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to appellee.

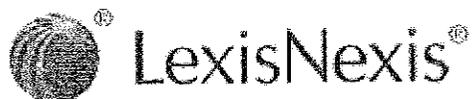
CLAIR E. DICKINSON

FOR THE COURT

WHITMORE, J.

BELFANCE, J.

CONCUR



LEXSEE 2009 OHIO 5052

STATE OF OHIO, Appellee v. LEONARD E. ROBERTSON, Appellant

C.A. No. 07CA0120-M

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, MEDINA COUNTY

2009 Ohio 5052; 2009 Ohio App. LEXIS 4303

September 28, 2009, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS, COUNTY OF MEDINA, OHIO. CASE No. 05-CR-0539.

DISPOSITION: Judgment vacated, and cause remanded.

COUNSEL: JOSEPH F. SALZGEBER, attorney at law, for appellant.

DEAN HOLMAN, prosecuting attorney, and RUSSELL A. HOPKINS, assistant prosecuting attorney, for appellee.

JUDGES: CLAIR E. DICKINSON, Judge. MOORE, P.J., WHITMORE, J., CONCUR.

OPINION BY: CLAIR E. DICKINSON

OPINION

DECISION AND JOURNAL ENTRY

DICKINSON, Judge.

INTRODUCTION

[*P1] As part of a plea agreement, Leonard E. Robertson pleaded guilty to 54 counts of sexual battery, one count of gross sexual imposition, and two counts of attempted gross sexual imposition. Mr. Robertson was convicted of those charges and has appealed, arguing that his guilty pleas were not knowingly, intelligently, and voluntarily made because the trial court failed to advise him, at his change of plea hearing, that he would be sub-

ject to a mandatory term of five years of post-release control. Mr. Robertson, however, has not moved the trial court to withdraw his plea. Because the trial court made a mistake regarding post-release control in its sentencing entry, the sentencing entry is void. This Court, therefore, exercises its inherent power to vacate the void [**2] judgment and remands for a new sentencing hearing.

POST-RELEASE CONTROL

[*P2] Mr. Robertson's sexual battery convictions are felony sex offenses of the third degree. His other three convictions are felony sex offenses of lesser degrees. The trial court sentenced him to a total of fifteen years in the custody of the Ohio Department of Rehabilitation and Correction and ordered him to serve "up to" five years of post-release control.

[*P3] Under *Section 2967.28(B) of the Ohio Revised Code*, "[e]ach sentence to a prison term . . . for a felony sex offense . . . 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." For a felony sex offense, the period is five years. *R.C. 2967.28(B)(1)*. Under *Section 2929.14(F)(1)*, "[i]f a court imposes a prison term . . . for a felony sex offense, . . . it shall include in the sentence a requirement that the offender be subject to a period of post-release control after [his] release from imprisonment . . ."

[*P4] In its sentencing entry of March 31, 2008, the trial court wrote that "post release control is mandatory in this case up to a maximum of 5 years." [**3] Although the trial court correctly wrote that Mr. Robertson was subject to "mandatory" post-release control, it incorrectly described that post-release control as lasting

"up to a maximum of 5 years," thereby implying that it could last for less than 5 years. Under *Section 2967.28*, any sentence to a prison term for a felony, except un-categorized special felonies, "shall include a requirement that the offender be subject to a period of post-release control" following release. *R.C. 2967.28(B), (C)*. Thus, if the trial court imposes a prison term for such an offense, it must include that requirement in the sentence. To that extent, the requirement that the offender be "subject" to post-release control under *Section 2967.28* is always "mandatory" because the trial court has no discretion over whether to include it in the sentence.

[*P5] The trial court also has no discretion over whether post-release control is actually imposed or, when it is, the length of that post-release control. To the extent anyone has discretion regarding post-release control, it is the parole board, not the trial court. Depending upon the offense, *Section 2967.28* dictates either a definite period of three or five years [**4] under part B, or a possible period of up to three years under part C, "if the parole board . . . determines that a period of post-release control is necessary for that offender." *R.C. 2967.28(C)*.

[*P6] Mr. Robertson was convicted of third-degree felony sex offenses within the coverage of *Section 2967.28(B)(1)*. The trial court, therefore, should have included in his sentence that he would be subject to post-release control for a definite period of five years. The language in the sentencing entry about a term of "up to" five years incorrectly implies that Mr. Robertson could serve less than five years.

[*P7] In *State v. Simpkins*, 117 Ohio St. 3d 420, 2008 Ohio 1197, 884 N.E.2d 568, the Ohio Supreme Court held that, "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void . . ." *Id.* at syllabus. The Supreme Court reasoned that "no court has the authority to substitute a different sentence for that which is required by law." *Id.* at P20. It concluded that "a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void [and] [**5] must be vacated." *Id.* at P22.

[*P8] In *State v. Bedford*, 9th Dist. No. 24431, 2009 Ohio 3972, at P11, this Court held that, if "[a] journal entry is void because it included a mistake regarding post-release control . . . there is no final, appealable order." Accordingly, this Court does not have jurisdiction to consider the merits of Mr. Robertson's appeal. *Id.* at P14. It does have limited inherent authority, however, to recognize that the journal entry is a nullity and vacate the void judgment. *Id.* at P12 (quoting *Van De Ryt v. Van De Ryt*, 6 Ohio St. 2d 31, 36, 215 N.E.2d 698 (1966)).

CONCLUSION

[*P9] The trial court's journal entry included a mistake regarding post-release control. It, therefore, is void. This Court exercises its inherent power to vacate the journal entry and remands this matter to the trial court for a new sentencing hearing.

Judgment vacated,

and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, [**6] this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to appellee.

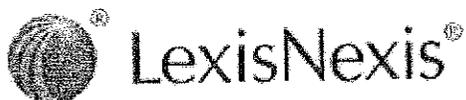
CLAIR E. DICKINSON

FOR THE COURT

MOORE, P. J.

WHITMORE, J.

CONCUR



LEXSEE 2009 OHIO 5052

STATE OF OHIO, Appellee v. LEONARD E. ROBERTSON, Appellant

C.A. No. 07CA0120-M

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, MEDINA COUNTY

2009 Ohio 5052; 2009 Ohio App. LEXIS 4303

September 28, 2009, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS, COUNTY OF MEDINA, OHIO. CASE No. 05-CR-0539.

DISPOSITION: Judgment vacated, and cause remanded.

COUNSEL: JOSEPH F. SALZGEBER, attorney at law, for appellant.

DEAN HOLMAN, prosecuting attorney, and RUSSELL A. HOPKINS, assistant prosecuting attorney, for appellee.

JUDGES: CLAIR E. DICKINSON, Judge. MOORE, P.J., WHITMORE, J., CONCUR.

OPINION BY: CLAIR E. DICKINSON

OPINION

DECISION AND JOURNAL ENTRY

DICKINSON, Judge.

INTRODUCTION

[*P1] As part of a plea agreement, Leonard E. Robertson pleaded guilty to 54 counts of sexual battery, one count of gross sexual imposition, and two counts of attempted gross sexual imposition. Mr. Robertson was convicted of those charges and has appealed, arguing that his guilty pleas were not knowingly, intelligently, and voluntarily made because the trial court failed to advise him, at his change of plea hearing, that he would be sub-

ject to a mandatory term of five years of post-release control. Mr. Robertson, however, has not moved the trial court to withdraw his plea. Because the trial court made a mistake regarding post-release control in its sentencing entry, the sentencing entry is void. This Court, therefore, exercises its inherent power to vacate the void [**2] judgment and remands for a new sentencing hearing.

POST-RELEASE CONTROL

[*P2] Mr. Robertson's sexual battery convictions are felony sex offenses of the third degree. His other three convictions are felony sex offenses of lesser degrees. The trial court sentenced him to a total of fifteen years in the custody of the Ohio Department of Rehabilitation and Correction and ordered him to serve "up to" five years of post-release control.

[*P3] Under *Section 2967.28(B) of the Ohio Revised Code*, "[e]ach sentence to a prison term . . . for a felony sex offense . . . 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." For a felony sex offense, the period is five years. *R.C. 2967.28(B)(1)*. Under *Section 2929.14(F)(1)*, "[i]f a court imposes a prison term . . . for a felony sex offense, . . . it shall include in the sentence a requirement that the offender be subject to a period of post-release control after [his] release from imprisonment . . ."

[*P4] In its sentencing entry of March 31, 2008, the trial court wrote that "post release control is mandatory in this case up to a maximum of 5 years." [**3] Although the trial court correctly wrote that Mr. Robertson was subject to "mandatory" post-release control, it incorrectly described that post-release control as lasting

"up to a maximum of 5 years," thereby implying that it could last for less than 5 years. Under *Section 2967.28*, any sentence to a prison term for a felony, except uncategorized special felonies, "shall include a requirement that the offender be subject to a period of post-release control" following release. *R.C. 2967.28(B), (C)*. Thus, if the trial court imposes a prison term for such an offense, it must include that requirement in the sentence. To that extent, the requirement that the offender be "subject" to post-release control under *Section 2967.28* is always "mandatory" because the trial court has no discretion over whether to include it in the sentence.

[*P5] The trial court also has no discretion over whether post-release control is actually imposed or, when it is, the length of that post-release control. To the extent anyone has discretion regarding post-release control, it is the parole board, not the trial court. Depending upon the offense, *Section 2967.28* dictates either a definite period of three or five years [**4] under part B, or a possible period of up to three years under part C, "if the parole board . . . determines that a period of post-release control is necessary for that offender." *R.C. 2967.28(C)*.

[*P6] Mr. Robertson was convicted of third-degree felony sex offenses within the coverage of *Section 2967.28(B)(1)*. The trial court, therefore, should have included in his sentence that he would be subject to post-release control for a definite period of five years. The language in the sentencing entry about a term of "up to" five years incorrectly implies that Mr. Robertson could serve less than five years.

[*P7] In *State v. Simpkins*, 117 Ohio St. 3d 420, 2008 Ohio 1197, 884 N.E.2d 568, the Ohio Supreme Court held that, "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void . . ." *Id.* at syllabus. The Supreme Court reasoned that "no court has the authority to substitute a different sentence for that which is required by law." *Id.* at P20. It concluded that "a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void [and] [**5] must be vacated." *Id.* at P22.

[*P8] In *State v. Bedford*, 9th Dist. No. 24431, 2009 Ohio 3972, at P11, this Court held that, if "[a] journal entry is void because it included a mistake regarding post-release control . . . there is no final, appealable order." Accordingly, this Court does not have jurisdiction to consider the merits of Mr. Robertson's appeal. *Id.* at P14. It does have limited inherent authority, however, to recognize that the journal entry is a nullity and vacate the void judgment. *Id.* at P12 (quoting *Van De Ryt v. Van De Ryt*, 6 Ohio St. 2d 31, 36, 215 N.E.2d 698 (1966)).

CONCLUSION

[*P9] The trial court's journal entry included a mistake regarding post-release control. It, therefore, is void. This Court exercises its inherent power to vacate the journal entry and remands this matter to the trial court for a new sentencing hearing.

Judgment vacated,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, [**6] this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to appellee.

CLAIR E. DICKINSON

FOR THE COURT

MOORE, P. J.

WHITMORE, J.

CONCUR



LEXSEE 2009 OHIO 4865

STATE OF OHIO, Appellee v. MARRION P. SMITH, Appellant

C.A. No. 24677

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT
COUNTY*2009 Ohio 4865; 2009 Ohio App. LEXIS 4129*

September 16, 2009, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS, COUNTY OF SUMMIT, OHIO. CASE No. CR 08 03 1065.

DISPOSITION: Judgment vacated, and cause remanded.

COUNSEL: DAVID M. WATSON, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN DIMARTINO, assistant prosecuting attorney, for appellee.

JUDGES: CLAIR E. DICKINSON, Judge. MOORE, P. J., WHITMORE, J., CONCUR.

OPINION BY: CLAIR E. DICKINSON

OPINION

DECISION AND JOURNAL ENTRY

DICKINSON, Judge.

INTRODUCTION

[*P1] A jury convicted Marrion P. Smith of aggravated robbery with a gun specification, having weapons while under disability, and four counts of retaliation. The trial court subsequently found that Mr. Smith is a repeat violent offender. Mr. Smith has appealed, arguing, among other things, that the trial court incorrectly denied his motion to sever the first two counts of the indictment, violated his speedy trial rights, and incorrectly denied his motion for acquittal on certain counts. Because the trial

court made a mistake regarding post-release control in its sentencing entry, the sentencing entry is void. This Court, therefore, exercises its inherent power to vacate the void judgment and remands for a new sentencing hearing.

POST-RELEASE CONTROL

[*P2] Mr. Smith's [**2] aggravated robbery conviction is a felony of the first degree. His other convictions are lesser offenses. For the aggravated robbery conviction, the trial court sentenced him to ten years in the custody of the Ohio Department of Rehabilitation and Correction. In its sentencing entry, the trial court ordered Mr. Smith to serve three years of post-release control.

[*P3] Under *Section 2967.28(B) of the Ohio Revised Code* "[e]ach sentence to a prison term for a felony of the first degree . . . 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." For a felony of the first degree, the period is five years. *R.C. 2967.28(B)(1)*. Under *Section 2929.14(F)(1)*, "[i]f a court imposes a prison term for a felony of the first degree, . . . it shall include in the sentence a requirement that the offender be subject to a period of post-release control after [his] release from imprisonment" In addition, *Section 2929.19(B)(3)(c)* provides that, "if the sentencing court determines . . . that a prison term is necessary or required, [it] shall . . . [n]otify the offender that [he] will be supervised [**3] under *section 2967.28 of the Revised Code* after [he] leaves prison if [he] is being sentenced for a felony of the first degree"

[*P4] At his sentencing hearing, the trial court correctly advised Mr. Smith that he would be required to serve five years of post-release control. In its journal entry, however, it wrote that, "[a]fter release from prison, the Defendant is ordered to serve Three (3) years of post-release control."

[*P5] In *State v. Simpkins*, 117 Ohio St. 3d 420, 2008 Ohio 1197, 884 N.E.2d 568, the Ohio Supreme Court held that, "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void . . ." *Id.* at syllabus. The Supreme Court reasoned that "no court has the authority to substitute a different sentence for that which is required by law." *Id.* at P20. It concluded that "a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void [and] must be vacated." *Id.* at P22.

[*P6] In *State v. Bedford*, 9th Dist. No. 24431, 2009 Ohio 3972, at P11, this Court held that, if "[a] journal entry is void because it included a [**4] mistake regarding post-release control . . . there is no final, appealable order." Accordingly, this Court does not have jurisdiction to consider the merits of Mr. Smith's appeal. *Id.* at P14. It does have limited inherent authority, however, to recognize that the journal entry is a nullity and vacate the void judgment. *Id.* at P12 (quoting *Van De Ryt v. Van De Ryt*, 6 Ohio St. 2d 31, 36, 215 N.E.2d 698 (1966)).

CONCLUSION

[*P7] The trial court's journal entry included a mistake regarding post-release control. It, therefore, is void. This Court exercises its inherent power to vacate the journal entry and remands this matter to the trial court for a new sentencing hearing.

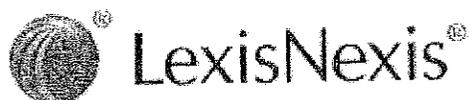
Judgment vacated,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin [**5] to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to appellee.
CLAIR E. DICKINSON
FOR THE COURT
MOORE, P. J.
WHITMORE, J.
CONCUR



LEXSEE 2009 OHIO 4160

STATE OF OHIO, Appellee v. THOMAS D. SOMMERVILLE, Appellant

C.A. No. 24427

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT
COUNTY

2009 Ohio 4160; 2009 Ohio App. LEXIS 3507

August 19, 2009, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS, COUNTY OF SUMMIT, OHIO. CASE No. CR 08 06 1996 (B).

DISPOSITION: Judgment vacated, and cause remanded.

COUNSEL: Appearances: NICHOLAS SWYRYDENKO, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN DIMARTINO, assistant prosecuting attorney, for appellee.

JUDGES: CLAIR E. DICKINSON, J. MOORE, P. J., WHITMORE, J., CONCUR.

OPINION BY: CLAIR E. DICKINSON

OPINION

DECISION AND JOURNAL ENTRY

DICKINSON, J.

INTRODUCTION

[*P1] A jury convicted Thomas D. Sommerville II of felonious assault. He has appealed, arguing that the trial court incorrectly allowed the State to impeach him with evidence of a perjury conviction that was more than ten years old and that his conviction is against the manifest weight of the evidence. Because the trial court made a mistake regarding post-release control at Mr. Sommerville's sentencing hearing and in its sentencing entry, the sentencing entry is void. This Court, therefore, exercises

its inherent power to vacate the void judgment and remands for a new sentencing hearing.

POST-RELEASE CONTROL

[*P2] Mr. Sommerville's felonious assault conviction is a felony of the second degree. The trial court sentenced him to seven years in the custody of [**2] the Ohio Department of Rehabilitation and Correction and to five years of post-release control.

[*P3] Under *Section 2967.28(B) of the Ohio Revised Code* "[e]ach sentence to a prison term for a felony of the . . . second degree . . . 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." For a felony of the second degree that is not a felony sex offense, the period is three years. *R.C. 2967.28(B)(2)*. Under *Section 2929.14(F)(1)*, "[i]f a court imposes a prison term . . . for a felony of the second degree, . . . it shall include in the sentence a requirement that the offender be subject to a period of post-release control after [his] release from imprisonment" In addition, *Section 2929.19(B)(3)(c)* provides that, "if the sentencing court determines . . . that a prison term is necessary or required, [it] shall . . . [n]otify the offender that [he] will be supervised under *section 2967.28 of the Revised Code* after [he] leaves prison if [he] is being sentenced for a felony of the . . . second degree"

[*P4] At the sentencing hearing, the trial court told Mr. Sommerville that [**3] it was imposing on him five years of post-release control. Similarly, in its journal entry, it wrote that, "[a]fter release from prison, the Defendant is ordered to serve Five (5) years of post-release control."

[*P5] In *State v. Simpkins*, 117 Ohio St. 3d 420, 2008 Ohio 1197, 884 N.E.2d 568, the Ohio Supreme Court held that, "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void . . ." *Id. at syllabus*. The Supreme Court reasoned that "no court has the authority to substitute a different sentence for that which is required by law." *Id. at P20*. It concluded that "a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void [and] must be vacated." *Id. at P22*.

[*P6] In *State v. Bedford*, 9th Dist. No. 24431, 2009 Ohio 3972, at P11, this Court held that, if "[a] journal entry is void because it included a mistake regarding post-release control . . . there is no final, appealable order." Accordingly, this Court does not have jurisdiction to consider the merits of Mr. Sommerville's appeal. *Id. at P14*. It does have limited [*4] inherent authority, however, to recognize that the journal entry is a nullity and vacate the void judgment. *Id. at P12* (quoting *Van De Ryt v. Van De Ryt*, 6 Ohio St. 2d 31, 36, 215 N.E.2d 698 (1966)).

CONCLUSION

[*P7] The trial court's journal entry included a mistake regarding post-release control.

It, therefore, is void. This Court exercises its inherent power to vacate the journal entry and remands this matter to the trial court for a new sentencing hearing.

Judgment vacated, and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed [*5] to appellee.

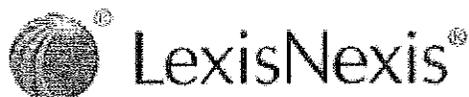
CLAIR E. DICKINSON

FOR THE COURT

MOORE, P. J.

WHITMORE, J.

CONCUR



LEXSEE 2009 OHIO 5168

STATE OF OHIO, Appellee v. WILLIAM H. WESEMANN, Appellant

C. A. No. 24588

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT
COUNTY

2009 Ohio 5168; 2009 Ohio App. LEXIS 4381

September 30, 2009, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS, COUNTY OF SUMMIT, OHIO. CASE No. CR 08 06 1914.

DISPOSITION: Judgment vacated, and cause remanded.

COUNSEL: RHONDA L. KOTNIK, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN R. DIMARTINO, assistant prosecuting attorney, for appellee.

JUDGES: CLAIR E. DICKINSON, Presiding Judge. BELFANCE, J., CONCURS. CARR, J., DISSENTS.

OPINION BY: CLAIR E. DICKINSON

OPINION

DECISION AND JOURNAL ENTRY

DICKINSON, Presiding Judge.

INTRODUCTION

[*P1] A jury convicted William Wesemann of burglary, criminal damaging or endangering, and two counts of domestic violence. He has appealed, arguing that the trial court incorrectly denied his motion for acquittal under *Rule 29 of the Ohio Rules of Criminal Procedure*. Because the trial court made a mistake regarding post-release control at Mr. Wesemann's sentencing hearing and in its sentencing entry, the sentencing entry is void. This Court, therefore, exercises its inherent power to

vacate the void judgment and remands for a new sentencing hearing.

POST-RELEASE CONTROL

[*P2] Mr. Wesemann's burglary conviction is a felony of the second degree. His other convictions include a fourth-degree felony and two misdemeanors. For the burglary conviction, [**2] the trial court sentenced him to three years in the custody of the Ohio Department of Rehabilitation and Correction and to five years of post-release control.

[*P3] Under *Section 2967.28(B) of the Ohio Revised Code* "[e]ach sentence to a prison term for a felony of the . . . second degree . . . 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." For a felony of the second degree that is not a felony sex offense, the period is three years. *R.C. 2967.28(B)(2)*. Under *Section 2929.14(F)(1)*, "[i]f a court imposes a prison term . . . for a felony of the second degree, . . . it shall include in the sentence a requirement that the offender be subject to a period of post-release control after [his] release from imprisonment . . ." In addition, *Section 2929.19(B)(3)(c)* provides that, "if the sentencing court determines . . . that a prison term is necessary or required, [it] shall . . . [n]otify the offender that [he] will be supervised under *section 2967.28 of the Revised Code* after [he] leaves prison if [he] is being sentenced for a felony of the . . . second degree . . ."

[*P4] At the [**3] sentencing hearing, the trial court told Mr. Wesemann that it was imposing on him five years of post-release control. Similarly, in its journal entry, it wrote that, "[a]fter release from prison, the De-

fendant is ordered subject to post-release control of 5 years, as provided by law."

[*P5] In *State v. Simpkins*, 117 Ohio St. 3d 420, 2008 Ohio 1197, 884 N.E.2d 568, the Ohio Supreme Court held that, "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void . . ." *Id.* at syllabus. The Supreme Court reasoned that "no court has the authority to substitute a different sentence for that which is required by law." *Id.* at P20. It concluded that "a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void [and] must be vacated." *Id.* at P22.

[*P6] In *State v. Bedford*, 9th Dist. No. 24431, 2009 Ohio 3972, at P11, this Court held that, if "[a] journal entry is void because it included a mistake regarding post-release control . . . there is no final, appealable order." Accordingly, this Court does not have jurisdiction to consider [*4] the merits of Mr. Wesemann's appeal. *Id.* at P14. It does have limited inherent authority, however, to recognize that the journal entry is a nullity and vacate the void judgment. *Id.* at P12 (quoting *Van DeRyt v. Van DeRyt*, 6 Ohio St. 2d 31, 36, 215 N.E.2d 698 (1966)).

CONCLUSION

[*P7] The trial court's journal entry included a mistake regarding post-release control. It, therefore, is void. This Court exercises its inherent power to vacate the journal entry and remands this matter to the trial court for a new sentencing hearing.

Judgment vacated, and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R.* 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R.* 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make [*5] a notation of the mailing in the docket, pursuant to *App.R.* 30.

Costs taxed to appellee.

CLAIR E. DICKINSON

FOR THE COURT

BELFANCE, J.

CONCURS

DISSENT BY: CARR

DISSENT

CARR, J.

DISSENTS, SAYING:

[*P8] I respectfully dissent.

[*P9] In a recent line of cases, the Supreme Court of Ohio has consistently held that sentences which fail to impose mandatory post-release control are void. See *State v. Boswell*, 121 Ohio St.3d 575, 2009 Ohio 1577, at P8, 906 N.E.2d 422; *State v. Simpkins*, 117 Ohio St.3d 420, 2008 Ohio 1197, 884 N.E.2d 568, syllabus; *State v. Bezak*, 114 Ohio St.3d 94, 2007 Ohio 3250, 868 N.E.2d 961, syllabus. In *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006 Ohio 5795, at P24, 856 N.E.2d 263, the high court noted that the General Assembly's goal of achieving "truth in sentencing" resulted in a felony-sentencing law in 1996 that was intended to ensure that all persons with an interest in a sentencing decision would know exactly the sentence a defendant is to receive upon conviction for committing a felony. The *Cruzado* court went on to note that "[c]onfidence in and respect for the criminal-justice system flow from a belief that courts and officers of the courts perform their duties pursuant to established law." *Id.*

[*P10] The debate regarding whether sentences which fail to [*6] comply with statutory requirements are void or voidable is complex and well-documented. See, e.g., *State v. Simpkins*, 117 Ohio St. 3d 420, 2008 Ohio 1197, 884 N.E.2d 568; *State v. Holcomb*, 9th Dist. No. 24287, 2009 Ohio 3187. Although I am uncomfortable with the existing approach adopted by this Court, I will continue to support the framework outlined in the majority opinion on the basis of stare decisis and in the interest of consistency for the reasons I enunciated in *Holcomb*, *supra*, (Carr, J., concurring). However, I am unwilling to extend that analysis to defendants who are sentenced after July 11, 2006.

[*P11] In his assignment of error, Wesemann argues the trial court committed reversible error when it denied his motion for a judgment of acquittal under *Crim.R.* 29. While Wesemann does not specifically challenge whether the trial court properly put him on notice of post-release control, the majority holds that his sentence is void on the basis that it does not satisfy statutory requirements. This case presents an example of how a sentence may be considered void even though the trial court's actions did not run afoul of the statutory framework. As the majority noted, the current version of *R.C.*

2967.28(B) [**7] states that each sentence to a prison term for a felony of the second degree shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender is released from prison. However, the statute also states:

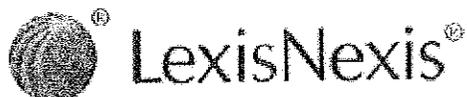
"If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a sentencing court to notify the offender pursuant to *division (B)(3)(c) of section 2929.19 of the Revised Code* of this requirement or to include in the judgment of 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." *Id.*

The current version of *R.C. 2929.19(B)(3)(c)* contains parallel language to *R.C. 2967.28(B)* regarding the imposition of post-release control in situations where an offender was not given notice at the sentencing hearing or in the journal entry. A jury found Wesemann guilty of burglary, criminal damaging or endangering, and two counts of domestic violence on December 18, 2008. Subsequently, [**8] Wesemann was sentenced under the current statutory framework on January 9, 2009.

[*P12] In *Woods v. Telb* (2000), 89 Ohio St.3d 504, 512, 2000 Ohio 171, 733 N.E.2d 1103, the Supreme Court held that the former version of Ohio's post-release control statute did not violate the separation of powers

doctrine but went on to emphasize that "post-release control is part of the original judicially imposed sentence." In *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006 Ohio 126, at P18, 844 N.E.2d 301, the Supreme Court held that under the former version of Ohio's post-release control statute, the Adult Parole Authority was not authorized to impose post-release control on a defendant when the trial court did not inform the defendant about the mandatory term of post-release control at the sentencing hearing and had failed to incorporate post-release control in its sentencing entry. See, also, *State v. Jordan*, 104 Ohio St.3d 21, 2004 Ohio 6085, P9, 817 N.E.2d 864. Unlike the version of the statute which was at issue in *Woods* and *Hernandez*, the amended post-release control statute, which became effective in 2006, empowers the APA to impose mandatory post-release control regardless of whether the trial court gave the defendant notice of the mandatory term of post-release [**9] control. *R.C. 2967.28(B)*.

[*P13] The recent line of cases which have consistently held that sentences which fail to impose a mandatory term of post-release control are void have been premised on the fundamental understanding that trial courts do not have the authority to impose sentences which do not comply with the law. *Boswell at P8*; *Simpkins at P20*. Under the current language of *R.C. 2967.28(B)*, post-release control may be imposed when the trial court does not put the offender on notice at the sentencing hearing or by journal entry. Because confidence in and respect for the criminal justice system flow from a belief that courts and officers of courts perform their duties pursuant to established law, the current disconnect between the approach adopted by Ohio appellate courts and the language in *R.C. 2967.28(B)* must be reconciled. In this case, I would address Wesemann's assignment of error on the merits.



LEXSEE 2009 OHIO 6504

STATE OF OHIO, Appellee v. SEAN E. WHITEHOUSE, Appellant

C. A. No. 09CA009581

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, LORAIN COUNTY

2009 Ohio 6504; 2009 Ohio App. LEXIS 5475

December 14, 2009, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS, COUNTY OF LORAIN, OHIO. CASE No. 08CR076198.

DISPOSITION: Judgment vacated, and cause remanded.

COUNSEL: PAUL A. GRIFFIN, attorney at law, for appellant.

DENNIS P. WILL, prosecuting attorney, and LAURA ANN E. SWANSINGER, assistant prosecuting attorney, for appellee.

JUDGES: CLAIR E. DICKINSON, Judge. MOORE, P. J., CONCURS. CARR, J., DISSENTS.

OPINION BY: CLAIR E. DICKINSON

OPINION

DECISION AND JOURNAL ENTRY

DICKINSON, Judge.

INTRODUCTION

[*P1] The trial court convicted Sean Whitehouse of one count of domestic violence. He has attempted to appeal in order to challenge the sufficiency and manifest weight of the evidence and to argue that the trial court incorrectly allowed the State to impeach its own witness. Because the trial court made a mistake regarding post-release control in its sentencing entry, the sentencing entry is void. This Court, therefore, exercises its inherent

power to vacate the void judgment and remands for a new sentencing hearing.

POST-RELEASE CONTROL

[*P2] At the bench trial in this case, Brittany Kramer testified that she is the mother of Mr. Whitehouse's daughter and that, in June 2008, she and their daughter were living with him. She further acknowledged that she called [**2] the police to report an argument between her and Mr. Whitehouse. She allowed the officer who came to the house to take pictures inside, showing furniture askew as well as a broken ceiling fan blade. She also allowed the officer to take pictures of her body, showing bruising on her leg and red marks on her neck. At trial, she agreed that she had written a police witness statement that blamed Mr. Whitehouse for the furniture being thrown about and for the bruises on her leg. In the statement, she also accused Mr. Whitehouse of refusing to allow her to leave the house and of choking her and throwing her onto the bed. But, she testified that she had lied to the police officer because she had been angry with Mr. Whitehouse. She testified that he had not physically attacked her. Despite Ms. Kramer's recantation of her allegations, the trial court found Mr. Whitehouse guilty of violating *Section 2919.25(A) of the Ohio Revised Code*. Under that Section, "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." *R.C. 2919.25(A)*.

[EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O> <O] IS OVERSTRUCK IN THE SOURCE.]

[*P3] Due to two prior domestic violence convictions, [**3] Mr. Whitehouse's domestic violence conviction in this case is a felony of the third degree. Using a preprinted form, the trial court sentenced him to one year

of prison. Regarding post-release control, the form provided alternative terms in parentheses, allowing the court to choose between the words "mandatory" and "optional" and between the numbers "3" and "5." In Mr. Whitehouse's case, the trial court circled the word "mandatory" and scratched out the word "optional." It also circled the number "3" and scratched out the number "5": "post release control is (mandatory/[O>optional<O]) in this case up to a maximum of (3/[O>5<O]) years"

[*P4] Under *Section 2967.28(B) of the Ohio Revised Code*, "[e]ach sentence to a prison term . . . 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." Under *Section 2929.14(F)(1)*, "[i]f a court imposes a prison term . . . 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, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after [his] release from imprisonment" The period of post-release control for a third-degree felony 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 is three years. *R.C. 2967.28(B)(3)*.

[*P5] The trial court used both mandatory and discretionary language in its entry. Although it wrote that Mr. Whitehouse was subject to a "mandatory" term of post-release control, it incorrectly described the term as lasting "up to a maximum of" three years. *Section 2967.28(B)* governs mandatory post-release control. Each of the subsections of *Section 2967.28(B)* dictates a definite term of either three or five years, depending on the offense. Mr. Whitehouse's conviction required the trial court to sentence him to a definite term of three years of post-release control under *Section 2967.28(B)(3)*. The sentencing entry incorrectly implies that his term of post-release control could be less than three [*5] years.

[*P6] The Parole Board does not have discretion over the length of a term of post-release control imposed under *Section 2967.28(B)*. The Parole Board has discretion only over the length of a term of post-release control imposed under *Section 2967.28(C)*. The use of the trial court's form sentencing entry in mandatory post-release control cases results in the mixing of mandatory and discretionary language because it does not allow the court to choose the term "for" rather than "up to a maximum of" three or five years when the term "mandatory" is chosen.

[*P7] In *State v. Simpkins*, 117 Ohio St. 3d 420, 2008 Ohio 1197, 884 N.E.2d 568, the Ohio Supreme Court held that, "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void . . ." *Id.* at syllabus. The Supreme Court reasoned that "no court has the authority to substitute a different sentence for that which is required by law." *Id.* at P20. It concluded that "a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void [and] must be vacated." *Id.* at P22.

[*P8] In *State v. Bedford*, 9th Dist. No. 24431, 2009 Ohio 3972, at P11, [*6] this Court held that, if "[a] journal entry is void because it included a mistake regarding post-release control . . . there is no final, appealable order." Accordingly, this Court does not have jurisdiction to consider the merits of Mr. Whitehouse's appeal. *Id.* at P14. It does have limited inherent authority, however, to recognize that the journal entry is a nullity and vacate the void judgment. *Id.* at P12 (quoting *Van DeRyt v. Van DeRyt*, 6 Ohio St. 2d 31, 36, 215 N.E.2d 698 (1966)).

CONCLUSION

[*P9] The trial court's journal entry included a mistake regarding post-release control. It, therefore, is void. This Court exercises its inherent power to vacate the journal entry and remands this matter to the trial court for a new sentencing hearing.

Judgment vacated, and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by [*7] the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to appellee.

CLAIR E. DICKINSON

FOR THE COURT

MOORE, P. J.

CONCURS

DISSENTS, SAYING:

DISSENT BY: CARR

DISSENT

CARR, J.

[*P10] I respectfully dissent for the reasons I articulated in *State v. King*, 9th Dist. No. 24675, 2009 Ohio 5158 (Carr, J., dissenting).



LEXSEE 1993 OHIO APP. LEXIS 4571

JOHN M. WORRELL, Plaintiff-Relator, v. COURT OF COMMON PLEAS OF
ATHENS COUNTY, OHIO, Defendant-Respondent.

CASE NO. 1506

COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT, ATHENS
COUNTY

1993 Ohio App. LEXIS 4571

September 21, 1993, Entered

DISPOSITION: [*1] WRIT GRANTED

COUNSEL: COUNSEL FOR RELATOR: Lee Fisher,
Ohio Attorney General, by Gerald A. Mollica, 35 North
College Street, P.O. Drawer 958, Athens, Ohio 45701.

COUNSEL FOR RESPONDENT: Edward S. Robe, 14
W. Washington Street, P.O. Box 272, Athens, Ohio
45701.

JUDGES: Earl E. Stephenson, Judge, Lawrence Grey,
Judge, Peter B. Abele, Judge

OPINION BY: PER CURIAM**OPINION**

DECISION AND JUDGMENT ENTRY

PER CURIAM.

This is an original action brought by John M. Worrell, Jr. M.D., relator herein, requesting a writ of prohibition permanently enjoining and prohibiting the Athens County Common Pleas Court (common pleas court), respondent herein, from entertaining subject matter jurisdiction and further proceeding in *Walker v. Worrell* Case No. CI 85-4-224, unless and until the Ohio Court of Claims makes an explicit determination that Worrell acted manifestly outside the scope of his employment or official responsibilities, or with malicious purpose, in bad faith, or in a wanton or reckless manner.

In the instant complaint, Worrell notes Bruce Walker, the plaintiff in *Walker v. Worrell*, filed an action

against Ohio University and the State of Ohio in *Walker v. Ohio University*, Ohio Court [*2] of Claims Case No. 83-01395.

In his January 25, 1983 complaint in *Walker v. Ohio University*, Walker alleged he enrolled in Ohio University beginning fall quarter 1974 as a graduate student in the mathematics department. He further alleged that prior to his enrollment and continuing until the summer of 1981, various employees of Ohio University, including Worrell, then a mathematics professor, represented to him that he could earn a masters degree, and later a doctoral degree, by pursuing a non-traditional program of instruction which would not require him to attend classes or take comprehensive examinations, but would rather require him to teach classes and pursue an independent course of study under Worrell's direction. Walker alleged that as a result those representations, and as a result of Ohio University's refusal to grant him academic credit for the work he completed pursuant to those representations, he lost employment opportunities and wages, and he sustained a reduced earning capacity.

Walker based the *Walker v. Ohio University* complaint on breach of contract grounds. In the alternative, Walker alleged that if his non-traditional program was unauthorized, then Ohio [*3] University: (1) negligently misrepresented that an unauthorized program was authorized; (2) failed to adequately supervise, train and control its agents and employees; and (3) failed to exert sufficient direction and control over its curriculum and course of study. Walker prayed for \$ 750,000 from the defendants, Ohio University and the State of Ohio.

Although Walker mentioned Worrell in the *Walker v. Ohio University* complaint, Walker made no allegation

that Worrell acted manifestly outside the scope of his employment with Ohio University or with a malicious purpose, in bad faith, or in a wanton or reckless manner. Walker's complaint did not request the court of claims to determine whether Worrell acted manifestly outside the scope of his employment or with a malicious purpose, in bad faith, or in a wanton or reckless manner.

After a trial on the merits, the Ohio Court of Claims issued judgment in *Walker v. Ohio University* on August 10, 1984 finding that Walker failed to meet his burden of proving Ohio University breached a duty relative to the supervision of either Walker or Worrell with regard to Walker's degree progress. The court wrote in pertinent part:

"Plaintiff [*4] submits that beginning in 1978, when with Dr. Worrell's encouragement he decided to forego obtaining an M. Sc. and to go directly for a Ph. D., Dr. Worrell repeatedly told him not to be concerned about comprehensive examinations. Plaintiff's testimony on this point is corroborated by the testimony of a fellow student, Mr. Pilati. *The totality of the evidence here, however, is not unequivocal.* In his deposition, Dr. Worrell admits that he told plaintiff and Pilati not to be concerned about comprehensives, and that he thought them to be a nuisance. But he also told them that he would exert his efforts to see that comprehensives would not be required. The last question asked of Dr. Worrell in his deposition is illustrative:

'Q. * * * Did you ever promise Mr. Walker that [he] didn't have to take any form of comprehensive exams if he stayed at Ohio University?

A. No, I have never made such a promise.'

Regardless of whether Dr. Worrell ever promised plaintiff that he would not have to take comprehensive examinations, it does appear that Dr. Worrell was sufficiently assertive so that plaintiff did indeed believe that they would be dispensed with in his case, and he planned [*5] and continued his academic program in accordance with that reliance for over three

years. *The court, however, finds that such reliance was not justified.*

First, it must be borne in mind that plaintiff was not an uneducated teen-ager at the time the question of comprehensives arose. He was in his mid twenties, had already obtained an undergraduate college degree, and had been involved in a graduate degree program for nearly four years. Secondly, he was aware of catalogue requirements regarding comprehensive examinations as a prerequisite for a Ph. D. degree. He himself brought up the matter with Dr. Worrell in 1978 when he decided to work on a Ph. D. Thirdly, his acceptance of what Dr. Worrell told him as gospel, without further inquiry, was unwarranted, in light of the positive language of the catalogue. The evidence established that the office of the dean of the college, and of the chairman of the mathematics department, was always open to him.

Lastly, there was no evidence that Dr. Worrell, as a professor of mathematics, and not any member of any university governing body, had any authority to waive a university degree requirement. Neither was there any evidence that [*6] defendant did anything to lead plaintiff to believe that Dr. Worrell had such authority. Apparent authority on the part of an agent cannot be established solely by the acts and conduct of the principal. *Logsdon v. ABCO Construction Co. (1956), 103 Ohio App. 233, 141 N.E.2d 216; Ammerman v. Avis Rent-A-Car (1982), 7 Ohio App.3d 338, 455 N.E.2d 1041.*

For reasons given, this court accordingly finds that plaintiff has not met his burden of proof in establishing any of his alleged grounds for relief. * * * "

(Emphasis added.)

Although the court of claims found there was no evidence to prove Worrell had authority to waive a university requirement, the court of claims made no express determination that Worrell acted outside the scope of his employment. The court of claims did not include the terminology "outside the scope of employment" in its judgment entry.

On April 30, 1985, within a year after the Ohio Court of Claims issued the judgment entry quoted above, Walker filed *Walker v. Worrell* in the common pleas court, alleging in pertinent part as follows:

"On August 10, 1984, the Court of Claims determined that the acts of defendant John M. Worrell, Jr. M.D. [*7] as described in the Complaint filed with that Court were manifestly outside the scope of said defendant's office or employment, entitling plaintiff to bring this action directly against said defendant."

Although the court of claims did not expressly determine whether Worrell acted outside the scope of his employment, Walker alleged the court of claims made such a determination.

Walker apparently made his allegation with R.C. 2743.02(A)(1) in mind. The statute provides that the filing of a civil action in the court of claims is a complete waiver of any cause of action against an employee based upon the same act or omission. Once an action is filed in the court of claims, the common pleas court has no jurisdiction unless and until the court of claims makes a special determination. The statute provides in pertinent part:

(A)(1) * * *

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court [*8] determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

(Emphasis added.)

On June 18, 1985, Worrell moved to dismiss the complaint, arguing that Walker failed to state a claim upon which relief could be granted. In particular, Worrell cited R.C. 2743.02(A)(1) and argued that the court of claims found the evidence was not unequivocal. Worrell further argued that the court of claims found that even if

Walker relied upon Worrell's representations, Walker's reliance was not justified. In conclusion, Worrell stated:

"It is respectfully submitted that all issues presented by the Complaint have already been tried in Case No. 83-01395 of the Ohio Court of Claims and the, further, *Ohio Revised Code Section 2743.02* bars this action."

On December 19, 1985, the common pleas court overruled the motion to dismiss "given the current status of the record."

Worrell filed an amended motion to dismiss on August 26, 1987, citing several new cases. Worrell cited *McIntosh v. University of Cincinnati (1985)*, [*9] 24 Ohio App.3d 116, 24 OBR 187, 493 N.E.2d 321, and *Perotti v. Seiter* (June 3, 1986), Franklin App. No. 86AP-90, unreported, for the proposition that, pursuant to R.C. 2743.01(A)(1), the court of claims must make a clear and precise finding that the employee acted outside the scope of employment, ¹ before the common pleas court may exercise jurisdiction over the case. Worrell argued the court of claims in *Walker v. Ohio University* did not issue a clear and precise finding that Worrell acted outside the scope of his employment. Worrell further argued Walker could have, but did not, utilize Civ.R. 52 to elicit such a finding by the court of claims.

1 No one involved in any of the cases involving Walker and Worrell alleges that Worrell acted with a malicious purpose, in bad faith, or in a wanton or reckless manner. For simplicity's sake, when referring to R.C. 2743.02, we will mention only the portions of the statute concerning actions outside the scope of employment.

Worrell emphasized that the court [*10] of claims found Walker had no right to rely on any representations Worrell might have made. Worrell argued that if the court of claims had believed Worrell acted outside the scope of his employment, the court of claims would not have spent two and one-half pages in its August 10, 1984 judgment entry discussing Walker's allegation regarding fraudulent misrepresentation.

In a memorandum supplementing his amended motion to dismiss, Worrell cited *Cooperman v. University Surgical Assn. (1987)*, 32 Ohio St.3d 191, 513 N.E.2d 288, and the new R.C. 2743.02(F). Worrell noted that in *Cooperman*, the court held that where the plaintiff has filed an action in the court of claims, before a common pleas court may assume subject matter jurisdiction over an action against the employee, the court of claims first

must make a determination that the employee acted outside the scope of employment.

Worrell further argued that Walker must follow the procedure described in the new *R.C. 2743.02(F)*. The Ohio legislature enacted *R.C. 2743.02(F)* on October 20, 1987 in an effort to clarify the statute in response to *Cooperman*.² The new statute provides in pertinent part:

"(F) A civil action against [*11] an officer or employee as defined in *section 109.36 of the Revised Code*, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under *section 9.86 of the Revised Code* and whether the courts of common pleas have jurisdiction over the civil action."

Worrell argued the new *R.C. 2743.02(F)* is procedural and thus should be given retroactive effect. We note the Ohio Supreme Court recently determined *R.C. 2743.02(F)* should not be given retroactive effect. See *Nease v. Medical College Hosp. (1992)*, 64 Ohio St.3d 396, 596 N.E.2d 432.

² In *Conley v. Shearer (1992)*, 64 Ohio St.3d 284, 286, 595 N.E.2d 862, the court noted the fact that the Ohio legislature enacted *R.C. 2743.02(F)* in response to *Cooperman*.

[*12] On December 2, 1988, the common pleas court granted Worrell's amended motion to dismiss after converting it into a *Civ.R. 56* motion for summary judgment. We note the court did not mention Worrell's *R.C. 2743.02(A)(1)* subject matter jurisdiction argument. Although the court mentioned Worrell's *R.C. 2743.02(F)* subject matter jurisdiction argument, the court did not address that argument. The court responded to the *R.C. 2743.01(F)* argument as follows:

"Without reaching the issue of whether the amendment to *R.C. 2743.02 [R.C. 2743.02(F)]* is retroactive, the Court can properly dispose of this action. It is a well settled judicial premise that a Court need

only rule on such issues as are necessary for the disposition of a case. * * * "

The court disposed of the case by holding that the court of claims' finding that Walker was not justified in relying on Worrell's representations, collaterally estops Walker from relitigating the issue of justifiable reliance.

Walker appealed the common pleas court's December 2, 1988 judgment entry. On August 21, 1990, we reversed the judgment. See *Walker v. Worrell* (Aug. 21, 1990), Athens App. No. 1410, unreported. In our opinion, we [*13] noted that the common pleas court did not address Worrell's argument regarding the applicability of *R.C. 2743.02(A)(1)* or the new *R.C. 2743.02(F)*. At this juncture; we note neither of the assignments of error presented for our review in *Walker v. Worrell* directly involved *R.C. 2743.02*.

We reversed the common pleas court not specifically on *R.C. 2743.02* grounds, but rather because we found merit to Walker's second assignment of error which stated:

"The trial court erred in applying the doctrine of collateral estoppel to dismiss appellant's complaint in the Athens County Court of Common Pleas when there was no identity of either parties or issues with a prior complaint in the Court of Claims."

Although the assignment of error focused on the issue of collateral estoppel, we mentioned *R.C. 2743.02* as follows during our discussion of the second assignment of error:

" *R.C. 2743.02* is a statute which waives the immunity which might be asserted by the State of Ohio when an employee commits a tortious act within the course and scope of his state employment. Such actions are instituted in the court of claims, and initially a determination is made on whether the employee was [*14] acting within the course of his employment. If it is found he was not, the action in the court of claims is over because the State of Ohio is not liable for the acts done outside the scope of employment. But the employee may still be liable for his acts.

R.C. 2743.02 and the court of claims are not designed to protect state employees from their tortious acts. If a state em-

ployee has an auto accident while, arguably, on state business, but the court of claims finds he was not on state business, the injured party still may pursue an action against the employee individually.

In this case, Appellant brought an action in the court of claims alleging fraud and breach of contract relying on a respondeat superior theory. The court of claims rejected the breach of contract claim and rejected the fraud claim on the grounds that Ohio University could not be held liable for the misrepresentations of agent because appellant could not have justifiably relied on those representations so as to hold the university responsible. But this holding is no different than any holding where the principal is held not to have invested his agent with implied authority. In such a case, while the principal is [*15] not liable for its agent's misrepresentations, the agent may still be liable. Whether Walker justifiably relied on Worrell's representations, and whether Worrell's conduct was fraudulent are questions of fact which cannot be resolved on summary judgment."

We concluded our discussion of Walker's second assignment of error by finding the common pleas court should not have applied the doctrine of collateral estoppel on the issue of whether Walker justifiably relied on Worrell's misrepresentations.

When reaching our conclusion, we reasoned that the court of claims action and the common pleas court action shared neither an identity of issues nor an identity of parties. We noted the court of claims' August 10, 1984 judgment found Worrell was not acting as an agent of Ohio University in his dealings with Walker. We wrote in pertinent part:

"While Walker was the plaintiff in both suits, in Walker's court of claims action Ohio University was the defendant and in the action Walker brought in the trial court below Dr. Worrell was the defendant. The decision of the court of claims found that Ohio University breached no contract with nor duty toward Walker, and that Ohio University [*16] was not negligent. *The court of claims further found that Worrell was not acting as an agent of Ohio University in his dealings with*

Walker regarding Walker's graduate degrees. However, the latter holding cannot be construed to say that Worrell was not personally liable to Walker as a result of his action."

(Emphasis added.)

Although we interpreted the court of claims' judgment as stating Worrell was not acting as an agent, we did not interpret the court of claims' judgment as stating Worrell was acting outside the course and scope of his employment. As we will discuss *infra*, the fact that an employee is not acting as an agent does not necessarily mean the employee is acting outside the course and scope of employment.

On January 31, 1991, after our remand to the common pleas court, Worrell filed yet another motion to dismiss arguing the common pleas court lacked subject matter jurisdiction. On May 2, 1991, the common pleas court denied Worrell's motion to dismiss. The court noted that Walker, in response to the motion, argued that the law of the case doctrine precludes Worrell from raising the *R.C. 2743.02(A)(1)* and *(F)* subject matter jurisdiction arguments again. [*17] The common pleas court agreed with Walker and wrote in pertinent part as follows:

"Succinctly stated, the doctrine of the law of the case provides that the decision of an appellate court remains the law of that case as to the legal issues involved during all subsequent proceedings at both the trial and reviewing levels. * * *

The decision of the Fourth District Court of Appeals (*Walker v. Worrell* (August 21, 1990), Athens App. No. 1410, unreported) was issued almost three years after the passage of [the new *R.C. 2743.02(F)*] * * *

More importantly, the issue of retroactivity is, in effect, moot, because the Fourth District Court interprets the Court of Claims' decision as a ruling that Worrell was acting outside the scope of his employment. In the first instance, the appellate court, at page four, states: ". . . [The Court of Claims'] holding is no different than any holding where the principal is held not to have invested his agent with implied authority." In the second instance, the court, at page five, states: "The court of claims further found that Worrell

was not acting as an agent of Ohio University in his dealings with Walker regarding Walker's graduate degrees.' [*18] *If Worrell was not acting as an agent of the university, then he was acting outside the scope of his authority.*

(Emphasis added.)

At this juncture, we wish to summarize and emphasize what we believe to be a major chain of confusion in this Walker-Worrell family of litigation. On August 10, 1984, the court of claims issued judgment without expressly determining whether Worrell acted outside the scope of his employment when making representations to Walker.³ On August 21, 1990, when discussing Walker's second assignment of error in *Walker v. Worrell*, we interpreted the court of claims' judgment entry as finding Worrell *was not acting as an agent* of Ohio University when he made representations to Walker. On May 2, 1991, when ruling on Worrell's latest motion to dismiss, the common pleas court concluded that *if* Worrell was not acting as an agent, *then* he was acting outside the scope of his employment.

3 As we noted before, Walker did not request the court of claims to make such a determination.

[*19] On November 12, 1991, Worrell filed the instant complaint seeking a writ of prohibition. Worrell, again citing *R.C. 2743.02*, alleges the common pleas court lacks subject matter jurisdiction unless and until the court of claims determines that Worrell acted outside the scope of his employment at the time in question. The common pleas court answered the complaint by arguing that the court of claims found Worrell acted outside the scope of his employment and, consequently, the common pleas court has subject matter jurisdiction in *Walker v. Worrell*.

On March 4, 1992, Worrell and the common pleas court filed agreed stipulations of fact sufficient to enable us to determine this action.

On March 25, 1992, Worrell filed a brief outlining five arguments for our review. On April 23, 1992, the common pleas court filed a brief in a format with five issues presented for our review.

On May 8, 1992, Worrell filed a reply brief. On February 9, 1993, the parties filed a joint motion requesting leave to supplement their arguments with briefs discussing two recent Ohio Supreme Court cases, *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 595 N.E.2d 862, and *Nease v. Medical College Hospital* [*20] (1992), 64 Ohio St.3d 396, 596 N.E.2d 432. On February 23, 1993,

we granted the parties leave to file the supplemental briefs instantler.

We must determine whether to grant Worrell's request for a writ of prohibition. Before we can grant a writ of prohibition, the relator must demonstrate that: (1) the court is about to exercise judicial power; (2) the exercise of the power is unauthorized by law; and (3) the refusal of the writ would result in injury for which there exists no adequate remedy in the ordinary course of law. *State ex rel. McKee v. Cooper* (1974), 40 Ohio St.2d 65, 320 N.E.2d 286, paragraph one of the syllabus. In *State ex rel. Sanquily v. Lucas County Court of Common Pleas* (1991), 60 Ohio St.3d 78, 79, 573 N.E.2d 606, 608, the court recognized that although appeal is usually an adequate remedy at law:

" * * * where there is a complete want of jurisdiction on the part of the inferior court, the writ will issue 'to prevent usurpation of jurisdiction. * * *'"

See, also, *State ex rel. TRW, Inc. v. Jaffe* (1992), 78 Ohio App.3d 411, 413, 604 N.E.2d 1376, 1378; *State ex rel. Bohlman v. O'Donnell* (Jan. 21 1993), Cuyahoga App. No. 64388, unreported.

[*21] We will discuss the parties' arguments and issues in six groups as follows:

I

[Retroactivity of *R.C. 2743.02(F)*]

RELATOR'S SECOND ARGUMENT:

" *R.C. 2743.02(F)* SHOULD BE GIVEN RETROACTIVE APPLICATION. THE COURT OF CLAIMS HAS EXCLUSIVE, ORIGINAL JURISDICTION TO DETERMINE, INITIALLY, WHETHER DR. WORRELL IS ENTITLED TO CIVIL IMMUNITY AND WHETHER RESPONDENT HAS JURISDICTION OVER THE CIVIL ACTION. RESPONDENT LACKS JURISDICTION UNTIL THE COURT OF CLAIMS MAKES SUCH A DETERMINATION."

RESPONDENT'S FOURTH ISSUE FOR REVIEW:

"WHETHER *R.C. 2743.02(F)* APPLIES RETROACTIVELY."

II

[Lack of Prior Cross-Appeal]

RELATOR'S FIFTH ARGUMENT:

"RELATOR DID NOT WAIVE REVIEW OF RESPONDENT'S SUBJECT MATTER JURISDICTION BY CHOOSING NOT TO FILE A CROSS-APPEAL TO THIS COURT."

III

[Law of the Case Doctrine]

RELATOR'S FOURTH ARGUMENT:

"RESPONDENT IMPROPERLY DETERMINED THAT THE DOCTRINE OF THE LAW OF THE CASE RESTRICTED RESPONDENT FROM GRANTING RELATOR'S MOTION TO DISMISS."

RESPONDENT'S SECOND ISSUE FOR REVIEW:

"WHETHER THE DOCTRINE OF THE LAW OF THE CASE NOW BARS RELATOR'S LITIGATION OF THE ISSUE CONCERNING WHETHER RELATOR ACTED OUTSIDE THE SCOPE OF HIS [*22] AUTHORITY, THE ISSUE CONCERNING HIS LACK OF IMMUNITY, AND THE ISSUE OF JURISDICTION UNDER *R.C. 2743.02*."

IV

[Our Previous Determination]

RESPONDENT'S FIRST ISSUE FOR REVIEW:

"WHETHER THIS COURT PREVIOUSLY DETERMINED THAT RELATOR ACTED OUTSIDE THE SCOPE OF HIS STATE EMPLOYMENT, THAT RELATOR IS NOT ENTITLED TO IMMUNITY UNDER *R.C. 9.86* AND THAT THE RESPONDENT HAS JURISDICTION UNDER *R.C. 2743.02*."

V

[The Court of Claims' Judgment Entry]

RELATOR'S THIRD ARGUMENT:

"IF AN AGGRIEVED PARTY HAS FILED AN ACTION IN THE COURT OF CLAIMS AGAINST THE STATE,

THEN IN AN ACTION BASED UPON THE SAME ACT OR OMISSION, A COURT OF COMMON PLEAS LACKS JURISDICTION OVER AN ACTION AGAINST STATE OFFICERS OR EMPLOYEES IF THE COURT OF CLAIMS HAS NOT FIRST DETERMINED THAT THE ACT OR OMISSION WHICH IS THE SUBJECT OF THE ACTION WAS MANIFESTLY OUTSIDE THE SCOPE OF THE OFFICER'S OR EMPLOYEE'S OFFICE OR EMPLOYMENT, OR THAT THE OFFICER OR EMPLOYEE ACTED WITH MALICIOUS PURPOSE, IN BAD FAITH, OR IN A WANTON RECKLESS MANNER."

RESPONDENT'S THIRD ISSUE FOR REVIEW:

"WHETHER THE COURT OF CLAIMS EFFECTIVELY DETERMINED THE JURISDICTIONAL QUESTION UNDER *R.C. 2743.02*."

VI

[Adequate Remedy at [*23] Law]

RELATOR'S FIRST ARGUMENT:

"RELATOR IS ENTITLED TO A WRIT OF PROHIBITION BECAUSE RESPONDENT IS ABOUT TO EXERCISE JUDICIAL POWER, SUCH EXERCISE OF POWER IS UNAUTHORIZED BY LAW, AND RELATOR HAS NO OTHER ADEQUATE REMEDY AT LAW."

RESPONDENT'S FIFTH ISSUE FOR REVIEW:

"WHETHER THIS COURT SHOULD ISSUE A WRIT OF PROHIBITION WHERE THE RELATOR HAS AN ADEQUATE REMEDY AT LAW."

I

In his second argument, Worrell asserts *R.C. 2743.02(F)* should be given retroactive application. In its fourth argument, the common pleas court argues to the contrary.

We note in *Nease v. Medical College Hospital (1992)*, 64 Ohio St.3d 396, 596 N.E.2d 432, the court held *R.C. 2743.02(F)* should not be applied retroactively.

The court concluded that the version of *R.C. 2743.02* in effect at the time the plaintiffs' claim arose should control.

Accordingly, we will decide this case based upon the version of *R.C. 2743.02* in effect at the time the claim arose.

II

In his fifth argument, Worrell asserts that his failure to file a cross-appeal in *Walker v. Worrell* (Aug. 21, 1990), Athens App. No. 1410, unreported, did not waive his right to contest the common pleas court's subject matter [*24] jurisdiction in the instant action. We agree for two reasons.

First, we note subject matter jurisdiction cannot be waived. *In re Palmer* (1984), 12 Ohio St.3d 194, 465 N.E.2d 1312; *Painesville v. Lake County Budget Comm.* (1978), 56 Ohio St.2d 282, 383 N.E.2d 896; *Fox v. Eaton Corp.* (1976), 48 Ohio St.2d 236, 358 N.E.2d 536. Whenever a court finds a lack of subject matter jurisdiction, the action must be dismissed. As discussed *infra*, a lack of subject matter jurisdiction prevails over even the law of the case doctrine. See *Gohman v. City of St. Bernard* (1924) 111 Ohio St. 726, 745, 146 N.E. 291, 296.⁴

⁴ We note in *New York Life Ins. v. Hosbrook*, (1935), 130 Ohio St. 101, 196 N.E. 888, paragraph two of the syllabus, the court, rejecting the notion that an appellate court could forestall review by the Supreme Court, overruled the first and second paragraphs of the *Gohman* syllabus.

Second, we note Worrell prevailed in the trial court's judgment in *Walker v. Worrell*. Worrell [*25] had no reason to file a cross-appeal. A party satisfied with the trial court's judgment need not file a cross-appeal to argue that the judgment should have been the same, but based upon other reasons. See *Pang v. Minch* (1990), 53 Ohio St. 3d 186, 200, 559 N.E.2d 1313, 1326; *App.R. 3(C)(2)*, effective July 1, 1992.

III

In its second issue presented for review, the common pleas court argues the law of the case doctrine requires both the common pleas court and us to follow our decision in *Walker v. Worrell* (Aug. 21, 1990), Athens App. No. 1410, unreported, where we wrote in pertinent part:

"The court of claims further found that Worrell was not acting as an agent of Ohio University in his dealings with Walker regarding Walker's graduate degrees."

The common pleas court argues the above sentence indicates we decided that the court of claims did, in fact, determine that Worrell acted outside the scope of his employment. The common pleas court further argues that, according to *R.C. 2743.02*, such a determination grants the common pleas court subject matter jurisdiction over the instant action.

Worrell, in his fourth argument, asserts the law of the case doctrine [*26] does not apply. Worrell cites *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410, 413, where the court described the doctrine as follows:

" * * * where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law."

Worrell also cites *Gohman, supra*, paragraph one of the syllabus, where the court held:⁵

"Where after a definite determination the Court of Appeals has reversed and remanded a cause for further action in the trial court, and the unsuccessful party does not prosecute error therefrom to this court, and the trial court has proceeded in substantial conformity with the directions of the Court of Appeals, its action will not be questioned on a second review, even though upon such second review the Court of Appeals should be of the opinion that its former determination was erroneous."

(Emphasis added.)

Worrell argues we made no "definite determination" in our prior decision on the question of whether the common pleas court had subject matter jurisdiction over this [*27] action. Worrell notes we did not determine whether *R.C. 2743.02(F)* should apply retroactively. Worrell further notes we did not determine whether *R.C. 2743.02(A)(1)* denies the common pleas court subject matter jurisdiction unless and until the court of claims makes an express determination that Worrell acted outside the scope of his employment. Rather, our prior decision rested on the doctrine of collateral estoppel. We held that the doctrine of collateral estoppel did not bar the common pleas court from hearing Walker's action.

5 See *New York Life Ins., supra* at paragraph two of the syllabus, where the Ohio Supreme Court overruled the first and second paragraphs of the syllabus in *Gohman*.

Worrell next argues the doctrine of law of the case does not apply to questions regarding subject matter jurisdiction. Worrell cites *Gohman at 745, 146 N.E. 291*, where the court, while discussing the doctrine of the law of the case, wrote:

"It is universally agreed that if a court does not have jurisdiction [*28] of the subject-matter of an action, any judgment becomes a mere nullity."

Accord, *Aubrey v. Almy (1855), 4 Ohio St. 524*. We agree with Worrell that if the common pleas court lacks subject matter jurisdiction over the instant action, the doctrine of law of the case does not require us to hold to the contrary.

The common pleas court agrees the ultimate question is whether the common pleas court has subject matter jurisdiction. The common pleas court, however, further argues that the decision we made on the underlying question--whether the court of claims made a determination that Worrell acted outside the scope of his employment--operates to bar more litigation on that question. Respondent thus urges us to consider the subject matter jurisdiction question separately from the "determination" question. We find no merit to the common pleas court's argument.

We cannot separate the question of subject matter jurisdiction from the question of whether the court of claims determined Worrell acted outside the scope of his employment. *R.C. 2743.02(A)(1)* merges the two questions. The statute provides that where an action is first filed in the court of claims, the common pleas court [*29] has no subject matter jurisdiction unless and until the court of claims determines that the employee acted outside the scope of employment. Without such a determination, the common pleas court lacks jurisdiction. With such a determination, the common pleas court has jurisdiction.

IV

In the first issue the common pleas court presents for review, the common pleas court argues we previously determined that the common pleas court has subject matter jurisdiction to hear *Walker v. Worrell*. While it is true that our August 21, 1990 judgment entry remanded the case for trial, if we now decide that the common pleas court lacks subject matter jurisdiction over *Walker v.*

Worrell, we must grant Worrell's petition for writ of prohibition. As we discussed *supra*, the doctrine of law of the case does not bar an appellate court from reversing its position where the appellate court finds a lack of subject matter jurisdiction.

V

The crux of this appeal requires us to determine whether the common pleas court has subject matter jurisdiction over *Walker v. Worrell. R.C. 2743.02(A)(1)* ⁶ provides in pertinent part:

(A)(1) * * *

*Except in the case of a civil action filed by the [*30] state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.*

(Emphasis added.)

The question we must answer is whether the court of claims determined that Worrell acted manifestly outside the scope employment.

6 Both parties agree that in the absence of the retroactivity of *R.C. 2743.02(F)*, *R.C. 2743.02(A)(1)* controls the question of whether the common pleas court has subject matter jurisdiction to hear *Walker v. Worrell*.

We have read the clear language of the court of claims' August 10, 1984 judgment entry. The court of claims not once used [*31] the phrase "outside the scope of employment." The following sentences in the court of claims' judgment entry, however, did criticize Worrell's actions:

"Regardless of whether Dr. Worrell ever promised plaintiff that he would not have to take comprehensive examinations, it does appear that Dr. Worrell was sufficiently assertive so that plaintiff did indeed believe that they would be dispensed with in his case, and he planned and continued his academic program in accor-

dance with that reliance for over three years.

* * *

Lastly, there was *no evidence that Dr. Worrell, as a professor of mathematics, and not any member of any university governing body, had any authority to waive a university degree requirement.* * * *

(Emphasis added.)

Notwithstanding our judgment entry in the earlier appeal of this case, we agree with Worrell that the above sentences do not constitute a *R.C. 2743.02(A)(1)* determination that Worrell acted outside the scope of his employment.

The fact that an employee "was sufficiently assertive" to convince another person does not necessarily mean the employee acted outside the scope of employment. Similarly, the fact that there is no evidence [*32] that an employee has authority to do a certain act (waive a university requirement), does not necessarily mean the employee acted outside the scope of employment by being sufficiently assertive to convince another person that the employer would do the act (waive the university requirement).

Many cases have defined what constitutes an act outside the scope of employment. Generally, the act must have been sufficiently divergent from the course of the employee's normal duties that the act severs the master/servant relationship. In *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 344 N.E.2d 334, the court wrote:

"The term 'scope of employment' has never been accurately defined and this court has stated that it cannot be defined because it is a question of fact and each case is *sui generis*. It has also been stated that the act of an agent is the act of the principal within the course of the employment when the act can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of the service to be rendered, or a natural, direct, and logical result of it. * * *

* * *

It is recognized, however, that not every deviation from the strict [*33] course of duty is a departure such as will relieve a master of liability for the acts of

a servant. The fact that a servant, while performing his duty to his master, incidentally does something for himself or a third person, does not automatically relieve the master from liability for negligence which causes injury to another. * * *

To sever the servant from the scope of his employment, *the act complained of must be such a divergence from his regular duties that its very character severs the relationship of master and servant.* * * *

(Emphasis added.)

See, also, *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 590 N.E.2d 411, *Peppers v. Ohio Dept. of Rehab. & Corr.* (1988), 50 Ohio App.3d 87, 553 N.E.2d 1093; *Thomas v. Ohio Dept. of Rehab. & Corr.* (1988) 48 Ohio App.3d 86, 548 N.E.2d 991.

In *Thomas* the court noted that even a prison guard's use of excessive force does not take his actions outside the scope of his employment. The court quoted the trial court's decision in pertinent part as follows:

" * * * Indeed, the very basis of the doctrine of respondeat-superior is that the master is liable if the servant 'breaks the rules' in furtherance [*34] of the master's business. Since no employer specifically authorizes his employee to be negligent or commit intentional torts *the concept of vicarious liability would disappear in the face of a rule which declared any action by an employee not in compliance with the employer's standard procedure to be outside the scope of employment.*"

(Emphasis added.)

The Tenth District agreed, and wrote in pertinent part as follows:

"Contrary to appellant's argument, the fact that Roberson's use of force was determined unjustified does not automatically take his actions outside the scope of his employment. If such were the case, the statute would be devoid of any meaning since anytime the use of force was unjustified the state would be shielded from any liability * * * "

Id. 48 Ohio App.3d at 89, 548 N.E.2d at 994. We must not expand the definition of "outside the scope of employment" to situations that signify less than a severance of the employer/employee relationship. See, also, *Szydowski v. Ohio Dept. of Rehab. & Corr.* (1992), 79 Ohio App.3d 303, 305, 607 N.E.2d 103, 105, where the court equated actions outside the scope of employment with actions performed [*35] for the employee's own personal benefit without benefit to the employer.

We find nothing in the court of claims' August 10, 1984 judgment entry that constitutes a finding that Worrell's actions (in being sufficiently assertive to cause Walker to believe that the university would waive some requirements) amounted to a severance of the employment relationship between Worrell and Ohio University. The court of claims' finding that there was no evidence that Worrell had authority to waive university requirements likewise does not amount to a finding that the employment relationship between Worrell and Ohio University was severed by Worrell's acts. Lastly, we note the court of claims' judgment entry contains no finding or implication that Worrell acted for his own personal benefit.

In at least two cases the Tenth District Court of Appeals has noted that where a plaintiff in a court of claims action does not specifically request a determination that the employee acted outside the scope of employment, the court of claims does not error by failing to make such a determination. See *Knecht v. Ohio Dept. of Rehab. & Corr.* (1992), 78 Ohio App.3d 360, 604 N.E.2d 820; *Bennett v. Ohio Dept. [*36] of Rehab. & Corr.* (May 1, 1990), 1990 Ohio App. LEXIS 1736, Franklin App. No. 89AP-1222, unreported. In *Knecht*, the court noted that although the plaintiff alleged the employee's acts were outside the scope of employment, the plaintiff did not request the court to make such a determination.

In *Walker v. Ohio University*, not only did Walker fail to request the court of claims to make a determination that Worrell's acts were outside the scope of his employment, Walker failed to even make an allegation to that effect.⁷

⁷ Although *Knecht* and *Bennett* involved R.C. 2743.02(F) rather than (A)(1), we note neither paragraph of the statute expressly requires the plaintiff to request the critical determination. Hence, we find the rationale of *Knecht* and *Bennett* applies to actions based upon R.C. 2743.02(A)(1).

In conclusion, we emphasize that our consideration of this case does not involve whatever evidence Walker produced in the past or might be able to produce in the

future concerning Worrell's [*37] actions. Rather, our consideration of this case involves whether the court of claims determined that Worrell acted outside the scope of his employment. We find no such determination expressed or implied in the court of claims' August 10, 1984 judgment entry.

VI

In his first argument, Worrell asserts he is entitled to a writ of prohibition because the common pleas court is about to exercise judicial power, that such exercise of power is unauthorized by law, and Worrell has no other adequate remedy at law. Worrell cites *State ex rel. Sanquily, v. Lucas County Court of Common Pleas* (1991), 60 Ohio St.3d 78, 573 N.E.2d 606, for the proposition that a relator has no adequate remedy at law if a common pleas court seeks to exercise jurisdiction in a lawsuit against a state employee before the court of claims determines whether the state employee is immune from suit. Worrell argues that *Sanquily* "patently and unambiguously held" that a common pleas court lacks jurisdiction over a state employee until the court of claims determines whether the state employee is entitled to immunity.

The common pleas court argues that when we found, in the previous appeal, that the court of claims [*38] found Worrell was not acting as an agent of Ohio University, we were in fact finding that the court of claims had determined that Worrell acted outside the scope of his employment.

As we have discussed *supra*, the court of claims made no finding that Worrell acted outside the scope of his employment. We find the common pleas court therefore lacks subject matter jurisdiction to hear *Walker v. Worrell*. In accordance with *Sanquily*, we find that further appeal does not afford Worrell an adequate remedy at law.

Accordingly, based upon the foregoing reasons, we grant Worrell's petition for a writ of prohibition.

WRIT GRANTED

JUDGMENT ENTRY

We hereby grant Relator's request for a writ of prohibition. We prohibit Respondent, the Athens County Court of Common Pleas, from exercising subject matter jurisdiction in *Walker v. Worrell* Case No. CI 85-4-224, unless and until the Ohio Court of Claims makes an explicit determination that Worrell acted manifestly outside the scope of his employment or official responsibilities, or with malicious purpose, in bad faith, or in a wanton or reckless manner.

It is further ordered that Relator recover of Respondent costs herein [*39] taxed.

The Court finds there were reasonable grounds for this action.

Exceptions.

Stephenson, J. & Abele, J.: Concur in Judgment & Opinion

Grey, J.: Dissents with Dissenting Opinion

For the Court:

BY: Earl E. Stephenson, Judge

BY: Lawrence Grey, Judge

BY: Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 11, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

DISSENT BY: LAWRENCE GREY

DISSENT

GREY, J. DISSENTING:

With all due respect to my colleagues, I must dissent because the result that obtains in this case can only be described as silly.

R.C. 2743 was enacted to handle suits brought against the state, and sets out a fairly straightforward procedure. Where a defendant might arguably be considered acting as a state employee, the plaintiff must first file in the Court of Claims for an initial determination of the state's potential liability. *Tschantz v. Ferguson* (1989), 49 Ohio App.3d 9, 550 N.E.2d 544.

Where an action is brought against a state employee which alleges that he acted outside the scope of his employment or maliciously or in bad faith, R.C. 2743.02 (F) requires [*40] that the Court of Claims make a determination, " * * * whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas has jurisdiction over the civil action."

The Court of Claims has no choice in the matter. Under R.C. 2743.03 it has exclusive jurisdiction, *Boggs v. State*, (1983), 8 Ohio St.3d 15, 455 N.E.2d 1286, and they cannot decline to hear cases involving the state where the employee acted within the scope of his employment. If the Court of Claims declines to hear a case, it can only be because they have decided that the state is

not liable and that the employee acted outside the scope of his employment. Such a declination is a ruling that they do not have jurisdiction and that the common pleas courts do.

In this case, Walker sued Ohio University and Worrell in the Court of Claims, which dismissed the action in the Court of Claims. What does that dismissal mean? How is this court to construe it? The majority construes it to mean that the Court of Claims has ruled that Ohio University is not liable for the acts of Worrell, and I have no quarrel with that construction. But if Ohio University is [*41] not liable, it can only be because Worrell had no authority to describe degree requirements and that he acted outside the scope of his employment.

What I object most to, perhaps, is the attempt to return to old rules of code pleading. Under the majority opinion, a plaintiff suing a state employee must file in the Court of Claims a complaint which asks that the court rule that the employee acted within the scope of his employment. Seeking such relief, he would have the burden of proof on such issue and would have to try to prove that assertion.

If the plaintiff intends to seek recovery in the event the Court of Claims declines jurisdiction, he must get a ruling that the defendant acted outside the scope of his employment, and would have the burden of proof on that issue too. We are adopting a rule which says that the plaintiff has the burden of proof on both sides of the issue of scope of employment.

In this case, the Court of Claims has already ruled that Ohio University is not liable because Worrell was not acting within the scope of his employment. Whether Worrell committed a tort against Walker is an issue for the court of common pleas, which has jurisdiction to hear cases involving [*42] state employees who were not acting within the scope of their employment.

I would emphasize that this case is an action in prohibition - a question of jurisdiction. If the court of common pleas does not have jurisdiction, must Walker now return to the Court of Claims and seek a ruling that Worrell acted outside the scope of his employment? Will this procedural two step be required of every party - first you seek to have the court hold the employee was within the scope of employment and then, losing on that issue, seek to have a new hearing proving just the opposite?

I do not believe the legislature intended such procedural nonsense when it enacted R.C. Chapter 2743. I believe they intended that this is a state case or it is not. First the Court of Claims decides if it is a state case, and if not the parties go to common pleas. The Court of Claims has decided that this case is not a state case. That's the end of R.C. Chapter 2743's relevance to this

case. This is a simple tort action between two private individuals. Let's get on with it

Thus, I dissent from this procedural morass.

LEXSTAT O.R.C. 2505.02

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TITLE 25. COURTS -- APPELLATE
 CHAPTER 2505. PROCEDURE ON APPEAL

Go to the Ohio Code Archive Directory

ORC Ann. 2505.02 (2009)

§ 2505.02. Final order

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to *section 2307.85 or 2307.86 of the Revised Code*, a prima-facie showing pursuant to *section 2307.92 of the Revised Code*, or a finding made pursuant to division (A)(3) of *section 2307.93 of the Revised Code*.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234 [2305.23.4], 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018 [5111.01.8], and the enactment of *sections 2305.113 [2305.11.3], 2323.41, 2323.43,*

and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131 [2305.13.1], 2315.18, 2315.19, and 2315.21 of the Revised Code.

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

HISTORY:

GC § 12223-2; 116 v 104; 117 v 615; 122 v 754; Bureau of Code Revision, 10-1-53; 141 v H 412 (Eff 3-17-87); 147 v H 394. Eff 7-22-98; 150 v H 342, § 1, eff. 9-1-04; 150 v H 292, § 1, eff. 9-2-04; 150 v S 187, § 1, eff. 9-13-04; 150 v H 516, § 1, eff. 12-30-04; 150 v S 80, § 1, eff. 4-7-05; 152 v S 7, § 1, eff. 10-10-07.

LEXSTAT ORC ANN. 2903.11

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2903. HOMICIDE AND ASSAULT
ASSAULT

Go to the Ohio Code Archive Directory

ORC Ann. 2903.11 (2009)

§ 2903.11. Felonious assault

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another or to another's unborn;

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

(1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;

(2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;

(3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under *section 2907.02 of the Revised Code*.

(D) (1) (a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.

(b) Regardless of whether the felonious assault is a felony of the first or second degree under division (D)(1)(a) of this section, if the offender also is convicted of or pleads guilty to a specification as described in *section 2941.1423 [2941.14.23] of the Revised Code* that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in this division or unless a longer prison term is required under any other provision of law, the court shall sentence the offender to a mandatory prison term as provided in division (D)(8) of *section 2929.14 of the Revised Code*. If the victim of the offense is a peace officer, or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of *section 2929.13 of the*

Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, 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*.

(E) As used in this section:

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

(2) "Motor vehicle" has the same meaning as in *section 4501.01 of the Revised Code*.

(3) "Peace officer" has the same meaning as in *section 2935.01 of the Revised Code*.

(4) "Sexual conduct" has the same meaning as in *section 2907.01 of the Revised Code*, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under *section 109.541 [109.54.1] of the Revised Code*.

(6) "Investigator" has the same meaning as in *section 109.541 [109.54.1] of the Revised Code*.

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 7-1-83); 139 v H 269 (Eff 7-1-83); 140 v S 210 (Eff 7-1-83); 146 v S 2 (Eff 7-1-96); 146 v S 239 (Eff 9-6-96); 148 v S 142 (Eff 2-3-2000); 148 v H 100, Eff 3-23-2000; 151 v H 95, § 1, eff. 8-3-06; 151 v H 347, § 1, eff. 3-14-07; 151 v H 461, § 1, eff. 4-4-07; 152 v H 280, § 1, eff. 4-7-09.

LEXSTAT ORC ANN. 2911.01

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
 ROBBERY

Go to the Ohio Code Archive Directory

ORC Ann. 2911.01 (2009)

§ 2911.01. Aggravated robbery

(A) No person, in attempting or committing a theft offense, as defined in *section 2913.01 of the Revised Code*, or in fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
- (2) Have a dangerous ordnance on or about the offender's person or under the offender's control;
- (3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

- (1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;
- (2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

(D) As used in this section:

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

(2) "Law enforcement officer" has the same meaning as in *section 2901.01 of the Revised Code* and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 1-5-83); 140 v S 210 (Eff 7-1-83); 146 v S 2 (Eff 7-1-96); 147 v H 151. Eff 9-16-97.

LEXSTAT O.R.C. 2911.11

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
BURGLARY

Go to the Ohio Code Archive Directory

ORC Ann. 2911.11 (2009)

§ 2911.11. Aggravated burglary

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

(B) Whoever violates this section is guilty of aggravated burglary, a felony of the first degree.

(C) As used in this section:

(1) "Occupied structure" has the same meaning as in *section 2909.01 of the Revised Code*.

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

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 1-5-83); 140 v S 210 (Eff 7-1-83); 146 v S 2 (Eff 7-1-96); 146 v S 269. Eff 7-1-96.

LEXSTAT ORC ANN. 2921.04

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2921. OFFENSES AGAINST JUSTICE AND PUBLIC ADMINISTRATION
 BRIBERY AND INTIMIDATION

Go to the Ohio Code Archive Directory

ORC Ann. 2921.04 (2009)

§ 2921.04. Intimidation of attorney, victim or witness in criminal case

(A) No person shall knowingly attempt to intimidate or hinder the victim of a crime in the filing or prosecution of criminal charges or a witness involved in a criminal action or proceeding in the discharge of the duties of the witness.

(B) No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness.

(C) Division (A) of this section does not apply to any person who is attempting to resolve a dispute pertaining to the alleged commission of a criminal offense, either prior to or subsequent to the filing of a complaint, indictment, or information, by participating in the arbitration, mediation, compromise, settlement, or conciliation of that dispute pursuant to an authorization for arbitration, mediation, compromise, settlement, or conciliation of a dispute of that nature that is conferred by any of the following:

(1) A section of the Revised Code;

(2) The Rules of Criminal Procedure, the Rules of Superintendence for Municipal Courts and County Courts, the Rules of Superintendence for Courts of Common Pleas, or another rule adopted by the supreme court in accordance with *Section 5 of Article IV, Ohio Constitution*;

(3) A local rule of court, including, but not limited to, a local rule of court that relates to alternative dispute resolution or other case management programs and that authorizes the referral of disputes pertaining to the alleged commission of certain types of criminal offenses to appropriate and available arbitration, mediation, compromise, settlement, or other conciliation programs;

(4) The order of a judge of a municipal court, county court, or court of common pleas.

(D) Whoever violates this section is guilty of intimidation of an attorney, victim, or witness in a criminal case. A violation of division (A) of this section is a misdemeanor of the first degree. A violation of division (B) of this section is a felony of the third degree.

HISTORY:

140 v S 172 (Eff 9-26-84); 146 v H 88. Eff 9-3-96.

LEXSTAT ORC ANN. 2923.13

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2923. CONSPIRACY, ATTEMPT, AND COMPLICITY; WEAPONS CONTROL; CORRUPT ACTIVITY
WEAPONS CONTROL

Go to the Ohio Code Archive Directory

ORC Ann. 2923.13 (2009)

§ 2923.13. Having weapons while under disability

(A) Unless relieved from disability as provided in *section 2923.14 of the Revised Code*, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

(1) The person is a fugitive from justice.

(2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

(3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.

(4) The person is drug dependent, in danger of drug dependence, or a chronic alcoholic.

(5) The person is under adjudication of mental incompetence, has been adjudicated as a mental defective, has been committed to a mental institution, has been found by a court to be a mentally ill person subject to hospitalization by court order, or is an involuntary patient other than one who is a patient only for purposes of observation. As used in this division, "mentally ill person subject to hospitalization by court order" and "patient" have the same meanings as in *section 5122.01 of the Revised Code*.

(B) Whoever violates this section is guilty of having weapons while under disability, a felony of the third degree.

HISTORY:

134 v H 511 (Eff 1-1-74); 146 v S 2. Eff 7-1-96; 150 v H 12, § 1, eff. 4-8-04.

LEXSTAT ORC ANN. 2941.145

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2941. INDICTMENT
 FORM AND SUFFICIENCY

Go to the Ohio Code Archive Directory

ORC Ann. 2941.145 (2009)

§ 2941.145. Specification that offender displayed, brandished, indicated possession of or used firearm

(A) Imposition of a three-year mandatory prison term upon an offender under division (D)(1)(a) of *section 2929.14 of the Revised Code* is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be stated in substantially the following form:

"SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense)."

(B) Imposition of a three-year mandatory prison term upon an offender under division (D)(1)(a) of *section 2929.14 of the Revised Code* is precluded if a court imposes a one-year or six-year mandatory prison term on the offender under that division relative to the same felony.

(C) The specification described in division (A) of this section may be used in a delinquent child proceeding in the manner and for the purpose described in *section 2152.17 of the Revised Code*.

(D) As used in this section, "firearm" has the same meaning as in *section 2923.11 of the Revised Code*.

HISTORY:

146 v S 2 (Eff 7-1-96); 148 v S 107 (Eff 3-23-2000); 148 v S 179, § 3. Eff 1-1-2002.

LEXSTAT ORC ANN. 2951.09

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND
FILED WITH THE SECRETARY OF STATE THROUGH NOVEMBER 10, 2009 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH OCTOBER 28, 2009 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2951. PROBATION

Go to the Ohio Code Archive Directory

ORC Ann. 2951.09 (2009)

§ 2951.09. Repealed

Repealed, 149 v H 490, § 2 [GC § 13452-7; 113 v 123(202), ch 31, § 7; 115 v 532; Bureau of Code Revision, 10-1-53; 143 v S 258 (Eff 11-20-90); 146 v S 2. Eff 7-1-96]. Eff 1-1-04.

[Repealed]

LEXSTAT ORC ANN. 2953.02

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND
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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2953. APPEALS; OTHER POSTCONVICTION REMEDIES

Go to the Ohio Code Archive Directory

ORC Ann. 2953.02 (2009)

§ 2953.02. Review of judgments

In a capital case in which a sentence of death is imposed for an offense committed before January 1, 1995, and in any other criminal case, including a conviction for the violation of an ordinance of a municipal corporation, the judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals. A final order of an administrative officer or agency may be reviewed in the court of common pleas. A judgment or final order of the court of appeals involving a question arising under the Constitution of the United States or of this state may be appealed to the supreme court as a matter of right. This right of appeal from judgments and final orders of the court of appeals shall extend to cases in which a sentence of death is imposed for an offense committed before January 1, 1995, and in which the death penalty has been affirmed, felony cases in which the supreme court has directed the court of appeals to certify its record, and in all other criminal cases of public or general interest wherein the supreme court has granted a motion to certify the record of the court of appeals. In a capital case in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the judgment or final order may be appealed from the trial court directly to the supreme court as a matter of right. The supreme court in criminal cases shall not be required to determine as to the weight of the evidence, except that, in cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, and in which the question of the weight of the evidence to support the judgment has been raised on appeal, the supreme court shall determine as to the weight of the evidence to support the judgment and shall determine as to the weight of the evidence to support the sentence of death as provided in *section 2929.05 of the Revised Code*.

HISTORY:

GC § 13459-1; 113 v 123(211), ch 38; Bureau of Code Revision, 10-1-53; 128 v 141 (Eff 1-1-60); 133 v S 530 (Eff 6-12-70); 139 v S 1 (Eff 10-19-81); 146 v S 4. Eff 9-21-95.

LEXSTAT OHIO CRIM.R. 32

OHIO RULES OF COURT SERVICE
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*** RULES CURRENT THROUGH OCTOBER 1, 2009 ***
 *** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 32 (2009)

Review Court Orders which may amend this Rule.

Rule 32. Sentence**(A) Imposition of sentence.**

Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:

(1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.

(2) Afford the prosecuting attorney an opportunity to speak;

(3) Afford the victim the rights provided by law;

(4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate.

(B) Notification of right to appeal.

(1) After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.

(2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.

(3) If a right to appeal or a right to seek leave to appeal applies under division (B)(1) or (B)(2) of this rule, the court shall also advise the defendant of all of the following:

(a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;

(b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;

(c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;

(d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf.

Upon defendant's request, the court shall forthwith appoint counsel for appeal.

(C) Judgment.

A judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence. Multiple judgments of conviction may be addressed in one judgment entry. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall

sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

HISTORY: Amended, eff 7-1-92; 7-1-98; 7-1-04; 7-1-09.

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

LONDEN K. FISCHER,

Defendant-Appellant.

Case No.

09-0897

On Appeal from the Summit
County Court of Appeals
Ninth Appellate District

C.A. Case No. CA-24406

NOTICE OF APPEAL OF APPELLANT LONDEN K. FISCHER

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COUNSEL FOR DEFENDANT-APPELLANT
LONDEN K. FISCHER

FILED
MAY 15 2009
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT LONDON K. FISCHER

Appellant London K. Fischer hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case No. CA-24406 on March 31, 2009.

This case raises a substantial constitutional question, involves a felony, and is of public or great general interest.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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Assistant State Public Defender
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APPELLANT LONDON K. FISCHER

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Notice of Appeal for Appellant Londen K. Fischer** was forwarded by regular U.S. Mail, postage pre-paid, to Heaven DiMartino, Summit County Assistant Prosecutor, 53 University Avenue, 7th Floor, Safety Building, Akron, Ohio 44308, on this 15th day of May, 2009.



Handwritten signature of Claire R. Cahoon in black ink, written over a horizontal line.

CLAIRE R. CAHOON #0082335
Assistant State Public Defender
(COUNSEL FOR RECORD)

COUNSEL FOR DEFENDANT-
APPELLANT LONDEN K. FISCHER

STATE OF OHIO

COUNTY OF SUMMIT

STATE OF OHIO

Appellee

v.

LONDEN K. FISCHER

Appellant

COURT OF APPEALS
DANIEL J. HERRIGAN

7:55 PM MAR 31 2009

SUMMIT COUNTY
COURT OF COURTS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

C. A. No. 24406

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 01 06 1593

DECISION AND JOURNAL ENTRY

Dated: March 31, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Londen Fischer ("Fischer"), appeals from the decision of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On July 9, 2001, Fischer was indicted on three counts of aggravated robbery in violation of R.C. 2911.01(A)(1), two counts of aggravated burglary in violation of R.C. 2911.11(A)(2), one count of felonious assault in violation of R.C. 2903.11 and one count of intimidation of a crime victim or witness in violation of R.C. 2921.04. All seven counts had corresponding firearm specifications as set forth in R.C. 2941.145. On September 19, 2001, a supplemental indictment was filed, charging Fischer with one count of having a weapon while under disability in violation of R.C. 2923.13. This count also had a corresponding firearm specification in violation of R.C. 2941.145. Fischer pled not guilty to all of the charges.

{¶3} On January 29, 2002, a jury trial commenced. The jury returned its verdict on February 1, 2002, finding Fischer guilty of one count of aggravated robbery with a firearm specification, two counts of aggravated burglary with firearm specifications, one count of felonious assault with a firearm specification, and one count of having a weapon while under disability with a firearm specification. The jury acquitted Fisher of the two counts of aggravated robbery and one count of intimidation of a crime victim or witness. On February 4, 2002, the trial court sentenced Fischer to a total of 14 years of incarceration. Fischer timely appealed his convictions and sentence, and on January 15, 2003, this Court affirmed the trial court's judgment. On August 4, 2008, the trial court held a resentencing hearing, at which it advised Fischer of post-release control and sentenced him to the same sentences it had previously imposed. Fischer has timely appealed from this resentencing. He has raised four assignments of error for our review, some of which we have combined for ease of review.

II.

ASSIGNMENT OF ERROR I

“AS [] FISCHER’S ORIGINAL SENTENCE WAS VOID, HIS INITIAL DIRECT APPEAL WAS ALSO INVALID. THE INSTANT APPEAL IS [] FISCHER’S FIRST DIRECT APPEAL FROM A VALID SENTENCE.”

{¶4} In his first assignment of error, Fischer contends that because his original sentence was void, his initial direct appeal was also invalid and therefore, the instant appeal is his first direct appeal from a valid sentence. We do not agree.

{¶5} Specifically, Fischer contends that because his original sentence did not include a notice of post-release control, it was void pursuant to *State v. Bezak*, 114 Ohio St.3d. 94, 2007-Ohio-3250, at syllabus. While we agree with this statement of law, we do not agree with

Fischer's contention that due to this defect, his original direct appeal is invalid and therefore he can now "raise any and all trial errors cognizable on direct appeal."

{¶6} We recently decided a similar issue in *State v. Ortega*, 9th Dist. No. 08CA009316, 2008-Ohio-6053. In that case, Ortega was convicted by a jury and sentenced to 27 years of incarceration to life. He appealed from that decision, and this Court dismissed the appeal as untimely. Ortega subsequently filed a motion for reconsideration, which we granted and affirmed the trial court's ruling.

{¶7} Over a year after his initial appeal was decided, Ortega filed a motion in the trial court to set aside a void judgment. He contended that his sentence was void due to the lack of notice of post-release control. Ortega was resentenced and subsequently appealed to this Court. On appeal, Ortega attempted to raise several issues with regard to his jury trial, held two years prior to his resentencing. We determined that the doctrine of the law of the case governed the appeal.

"The law of the case doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. Ultimately, "the doctrine of law of the case precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal. New arguments are subject to issue preclusion, and are barred." (Internal citations and quotations omitted). *Id.*, at ¶6.

{¶8} As applied to the facts before the Court in *Ortega*, we determined that when a "court affirms the convictions in the First Appeal, the propriety of those convictions becomes the law of the case, and subsequent arguments seeking to overturn them become barred. Thus, in the Second Appeal, only arguments relating to the resentencing are proper." *Id.*, at ¶7, quoting *State v. Harrison*, 8th Dist. No. 88957, 2008-Ohio-921, at ¶9. Accordingly, Fischer's contention

that he may raise any and all issues relating to his conviction in this appeal is without merit. His first assignment of error is overruled.

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING LAY WITNESS OPINION TESTIMONY, OVER OBJECTION, THAT WAS UNRELATED TO THAT WITNESS’S PERCEPTIONS AND CALLED FOR SPECIALIZED KNOWLEDGE.”

{¶9} In his second assignment of error, Fischer contends that the trial court abused its discretion in admitting lay witness opinion testimony that was unrelated to that witness’ perceptions and called for specialized knowledge.

{¶10} As we explained above, because we already affirmed Fischer’s conviction in his first appeal, *State v. Fisher*, 9th Dist. No. 20988, 2003-Ohio-95, the doctrine of the law of the case limits our review to issues stemming from Fischer’s resentencing hearing. An issue regarding witness testimony is clearly an issue that Fischer could have pursued in his initial appeal. *Ortega*, supra, at ¶6. Accordingly, Fischer’s second assignment of error is overruled.

ASSIGNMENT OF ERROR III

“THE RESENTENCING COURT ERRED BY IMPOSING NON-MINIMUM AND CONSECUTIVE SENTENCES IN VIOLATION OF THE DUE PROCESS AND EX POST FACTO CLAUSES OF THE UNITED STATES CONSTITUTION.”

ASSIGNMENT OF ERROR IV

“TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, FOR FAILING TO OBJECT TO THE RESENTENCING COURT’S RETROACTIVE APPLICATION OF THE OHIO SUPREME COURT’S REMEDY IN STATE V. FOSTER.”

{¶11} In his third and fourth assignments of error, Fischer contends that the resentencing court erred by imposing non-minimum and consecutive sentences in violation of the due process and ex-post facto clauses of the United States Constitution. He further states that his trial

counsel was ineffective for failing to object to this issue at the resentencing hearing. We do not agree.

{¶12} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Ohio Supreme Court found that Ohio's sentencing structure was unconstitutional to the extent that it required judicial fact-finding. *Id.*, at paragraphs one through seven of the syllabus. In constructing a remedy, the Court excised the portions of the statute it found to offend the Sixth Amendment and thereby granted full discretion to trial court judges to sentence defendants within the bounds prescribed by statute. See *Id.*; *State v. Dudukovich*, 9th Dist. No. 05CA008729, 2006-Ohio-1309, at ¶19.

{¶13} Fischer contends that the remedy outlined in *Foster* violates the ex-post facto and due process clauses of the United States Constitution because it allowed him to be sentenced to a non-minimum and consecutive term without the trial court having to make any findings on the record as was previously required by R.C. 2929.14(B), R.C. 2929.14(C), and R.C. 2929.14(E)(4). We have previously determined that the remedy in *Foster* does not violate the due process and ex-post facto clauses of the United States Constitution. *State v. Rowles*, 9th Dist. No. 24154, 2008-Ohio-6631, at ¶10. We have repeatedly stated that “[w]e are obligated to follow the Ohio Supreme Court’s directive and we are, therefore, bound by *Foster*. Furthermore, we are confident that the Supreme Court would not direct us to violate the Constitution.” *State v. McClanahan*, 9th Dist. No. 23380, 2007-Ohio-1821, at ¶7, quoting *State v. Newman*, 9th Dist. No. 23038, 2006-Ohio-4082, at ¶11, citing *U.S. v. Wade* (C.A.8, 2006), 435 F.3d 829, 832 (holding that the Eighth Circuit is required to follow the directive of the U.S. Supreme Court and presumes that the U.S. Supreme Court would not order a court to violate the Constitution). As this Court cannot overrule or modify *Foster*, we decline to consider Fischer’s challenges thereto. Accordingly, we conclude that Fischer was not prejudiced by any alleged failure of his trial

counsel to object to this issue. See *Strickland v. Washington* (1984), 466 U.S. 668, 687 (requiring an appellant to show that he was prejudiced by counsel's deficient behavior). Fischer's third and fourth assignments of error are overruled.

III.

{¶14} Fischer's assignments of error are overruled and the judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS

DICKINSON, J.
CONCURS, SAYING:

{¶15} Mr. Fischer's first two assignments of error are the logical extension of the Ohio Supreme Court's decisions in *State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197, and *State v. Bezak*, 114 Ohio St. 3d 94, 2007-Ohio-3250. As noted by Justice Lanzinger in her dissent in *Simpkins*, however, "[t]he holding that a sentence imposed with a missing mandatory term is void rather than voidable . . . obscures the distinction between these two legal concepts in the context of a criminal case." *Simpkins*, 2008-Ohio-1197, at ¶40 (Lanzinger, J., dissenting). The trial court had subject matter jurisdiction when it sentenced Mr. Fischer, and its failure to include a mandatory term in that sentence rendered the sentence voidable, not void.

{¶16} Abraham Lincoln, when accused of changing his position, said he would rather be right some of the time than wrong all the time. I urge the Ohio Supreme Court to again look at the distinction between void and voidable in this context.

APPEARANCES:

CLAIRE R. CAHOON, Assistant State Public Defender, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.