

ORIGINAL

IN THE SUPREME COURT OF OHIO
2010

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

COREY HAZEL,

Defendant-Appellee.

Case No.

10-0639

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

Court of Appeals
Case Nos. 09AP-1132, 09AP-
1133, 09AP-1156, 09AP-1157

MEMORANDUM OF PLAINTIFF-APPELLANT IN SUPPORT OF
JURISDICTION

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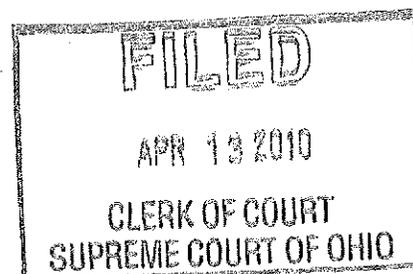


TABLE OF CONTENTS

STATEMENT OF QUESTIONS OF GREAT PUBLIC INTEREST1

STATEMENT OF THE CASE AND FACTS3

ARGUMENT5

 PROPOSITION OF LAW ONE: 5

 When, in resolving multiple cases, a trial court advises a guilty-pleading defendant at the sentencing hearing that he will be subject to post-release control in one case, but fails to provide specific oral advice regarding a concurrent term of discretionary post-release control, and when the trial court includes in the sentencing entries both the correct length of the time the defendant will serve post-release control as well as the mandatory/discretionary nature of the post-release control terms, the defendant's sentences are properly imposed. 5

 PROPOSITION OF LAW TWO: 5

 When the trial court includes language that the defendant must serve a term of post-release control of up to three years, mandatory, for a second-degree felony conviction, the defendant's sentence is properly imposed. 5

 PROPOSITION OF LAW THREE: 5

 Res judicata applies to claims challenging the trial court's imposition of post-release control..... 5

CONCLUSION.....14

CERTIFICATE OF SERVICE15

STATEMENT OF QUESTIONS OF GREAT PUBLIC INTEREST

The instant case presents questions of great public interest warranting further review by this Court. It is therefore respectfully submitted that jurisdiction be accepted.

This case presents this Court with the opportunity to articulate the appropriate legal analysis when a defendant seeks to file a successive collateral challenge to his conviction based on a claim that error occurred in the trial court's imposition of post-release control. In the instant case, the defendant pled guilty in multiple cases at one time, and the trial court imposed a jointly recommended prison term. The defendant did not file a timely appeal, but instead filed an unsuccessful motion for leave to file a delayed appeal, and he filed multiple petitions seeking state post-conviction relief, and motions to withdraw his guilty pleas, raising *inter alia* a claim challenging the trial court's imposition of post-release control. He also filed unsuccessful appeals from each of those decisions, before he filed the instant motions for resentencing two-and-one-half years after his conviction.

In rejecting the State's argument that res judicata applied to bar review of the defendant's claims, the court of appeals found that, notwithstanding the trial court's oral notice at the sentencing hearing of the imposition of a three-year term of mandatory post-release control, the trial court's failure to also specifically orally advise the defendant at the sentencing hearing of the imposition of a concurrent discretionary three-year term of post-release control on one of the defendant's cases rendered that sentence "void," notwithstanding inclusion of the correct post-release control terms in the defendant's sentencing entries. The court of appeals also determined that the trial court's inclusion of language stating that the defendant must serve "up to" three years of "mandatory" post-release control rendered the defendant's sentence on his second-degree felony "void." But because the trial court provided the requisite oral notification of the imposition of a mandatory three-year term of post-release control, and because the trial court

included the correct period of time as well as the mandatory/discretionary nature of the post-release control sanctions imposed in the judgment entries in each of the defendant's cases, the trial court complied with R.C. 2929.14 and 2929.19, and the defendant's convictions were validly entered. The court of appeals' conclusion finding that the defendant's sentences were void simply cannot withstand scrutiny.

Moreover, in reaching its conclusions that the defendant's sentences were void, and that the defendant could continually challenge his sentence in a successive collateral proceeding, the court of appeals declined to consider any of the procedural irregularities presented by this case, but this Court's precedent governing collateral post-conviction actions, generally, and the imposition of post-release control, specifically, do not support such a far-reaching analysis, and for this reason as well, the court of appeals' decision must be reversed.

Accordingly, because this case presents questions of great public interest regarding the correct legal analysis to be applied when a defendant seeks to file successive collateral challenges to the trial court's imposition of post-release control, the State respectfully requests that this Court accept jurisdiction over this case and reverse the court of appeals' decision. At some point there must be finality to litigation. In the instant case, the defendant had actual oral notification of the imposition of a mandatory term of post-release control. He also had written notification of the imposition of both mandatory and discretionary post-release control. The trial court included the correct post-release control sanctions in the judgment entries. The defendant's claim had been raised and rejected in prior litigation in this case. This case presents questions of great public interest regarding the finality of a conviction and the propriety of filing successive collateral challenges to a defendant's guilty plea and the imposition of a jointly recommended sentence.

STATEMENT OF THE CASE AND FACTS

The procedural history of this case is contained in paragraphs one through eight of the court of appeals' decision, which the State incorporates by reference here. In addition, the State notes that the plea forms which the defendant signed contained notice that the defendant would have to complete a mandatory three-year period of post-release control for the second-degree felony conviction, and discretionary post-release control for the third-degree felony conviction.

A copy of the transcript of the sentencing proceedings attached to the defendant's previously filed amended post-conviction petition reflected that the trial court orally advised the defendant of the imposition of three years of post-release control, see Transcript of Sentencing Proceedings, March 8, 2007, at p. 23, and the trial court's judgment entries provided, in pertinent part: "After the imposition of sentence, the Court notified the Defendant, orally and in writing, that the applicable period of post-release control pursuant to R.C. 2929.19(B)(3)(c), (d), and (e) is up to Three years --- Mandatory" with respect to the defendant's second-degree felony conviction, and further "[a]fter the imposition of sentence, the Court notified the Defendant, orally and in writing, that the applicable period of post-release control pursuant to R.C. 2929.19(B)(3)(c), (d), and (e) is up to Three years --- Optional" with respect to the defendant's third-degree felony conviction. The defendant did not file a timely direct appeal, and his motion for leave to file a delayed appeal was denied by the Tenth District Court of Appeals, in *State v. Hazel* (Aug. 16, 2007), 10th Dist. No. 07AP-451, 07AP-452.

On March 28, 2008, the defendant filed a motion for post-conviction relief, and on April 9, 2008 the defendant filed a motion to withdraw his guilty plea. In the motion to withdraw his guilty plea, the defendant raised a claim challenging the trial court's notice of post-release control at the plea hearing. The trial court denied the defendant's motions by entry filed on

August 27, 2008. As pertinent here, the trial court found that the defendant was properly informed at the sentencing hearing of the imposition of three years of post-release control.

On February 26, 2009, the court of appeals affirmed the trial court's decisions in *State v. Hazel*, 10th Dist. Nos. 08AP-789, 08AP-790, 2009-Ohio-880. And this Court declined to review the appellate court's decision. *State v. Hazel*, 122 Ohio St.3d 1457, 2009-Ohio-3131; *State v. Hazel*, 122 Ohio St.3d 1481, 2009-Ohio-3625.

Thereafter, the defendant filed an additional motion to withdraw guilty plea, a motion for default judgment and a motion for summary judgment, which the trial court denied by entry filed October 17, 2008. The defendant appealed, and on May 7, 2009, the court of appeals affirmed those decisions by the trial court in *State v. Hazel*, 10th Dist. Nos. 08AP-1002, 08AP-1003, 2009-Ohio-2144. Again this Court declined to review the appellate court's decision. *State v. Hazel*, 122 Ohio St.3d 1524, 2009-Ohio-4776; *State v. Hazel*, 123 Ohio St.3d 1473, 2009-Ohio-5704.

Thereafter, on November 2, 2009, over two-and-one-half years after the defendant pleaded guilty and received a jointly recommended sentence, the defendant filed the instant motions for resentencing, claiming that the trial court erred in its notice of the imposition of post-release control. On November 23, 2009, the trial court denied the defendant's motions, from which the defendant timely appealed, and those cases were docketed in the court of appeals under case numbers 09AP-1132 and 09AP-1133. The defendant also filed motions requesting correction of clerical mistake and for reconsideration, which the trial court denied by entries filed on December 2, and December 8, 2009, respectively. The defendant's timely appeals from those decisions were docketed under court of appeals' case numbers 09AP-1156 and 09AP-1157. On December 18, 2009, the appellate court ordered the defendant's cases consolidated for review.

On March 31, 2010, the court of appeals issued a decision vacating the defendant's sentences and remanding the cases to the trial court for resentencing. *State v. Hazel* (Mar. 31, 2010), 10th Dist. Nos. 09AP-1132, 09AP-1133, 09AP-1156, 09AP-1157. The court of appeals concluded that the trial court erred when it treated the defendant's motion for resentencing as a post-conviction petition, *id.* at ¶12; that the trial court failed to properly orally notify the defendant of the imposition of discretionary post-release control arising out of his third-degree felony conviction at the sentencing hearing rendering that sentence void, *id.* at ¶16, and that the trial court's inclusion of the words "up to three years" when imposing mandatory post-release control for the defendant's second-degree felony conviction rendered that sentence void, requiring resentencing. *Id.* at ¶22. The State now brings this cause before this Court seeking a granting of this Court's discretionary jurisdiction.

ARGUMENT

Proposition of Law One:

When, in resolving multiple cases, a trial court advises a guilty-pleading defendant at the sentencing hearing that he will be subject to post-release control in one case, but fails to provide specific oral advice regarding a concurrent term of discretionary post-release control, and when the trial court includes in the sentencing entries both the correct length of the time the defendant will serve post-release control as well as the mandatory/discretionary nature of the post-release control terms, the defendant's sentences are properly imposed.

Proposition of Law Two:

When the trial court includes language that the defendant must serve a term of post-release control of up to three years, mandatory, for a second-degree felony conviction, the defendant's sentence is properly imposed.

Proposition of Law Three:

Res judicata applies to claims challenging the trial court's imposition of post-release control.

If a trial court imposes a prison term for an offense carrying a mandatory post-release control term, “it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender’s release from imprisonment, in accordance with that division.” R.C. 2929.14(F)(1). In such a case, the trial court must also at the sentencing hearing “[n]otify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison * * * .” R.C. 2929.19(B)(3)(c). The trial court must further notify the offender of the potential consequences for violating post-release control. R.C. 2929.19(B)(3)(e). Similarly, the trial court must advise the defendant of the imposition of discretionary post-release control at the sentencing hearing, and include discretionary post-release control in the sentencing entry. R.C. 2929.19(B)(3)(d) and R.C. 2929.14(F)(2).

In the instant cases, the defendant entered guilty pleas in two cases resolved at the same time, and he received jointly recommended prison terms. At the sentencing hearing conducted on both cases, the trial court advised the defendant that he would be subject to three years of post-release control for his second-degree felony conviction and the consequences for violating post-release control, and the court included the applicable post-release control terms in each sentencing entry. Accordingly, the trial court complied with R.C. 2929.14 and 2929.19, and the defendant’s sentences were not void. The court of appeals’ conclusions to the contrary are therefore incorrect and must be reversed.

Unlike cases where a sentencing entry is truly void because it contains no reference at all to post-release control – i.e. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197; *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795; *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126 – the sentencing entries in these cases specifically included both the length of time the defendant must serve post-release control and the mandatory/discretionary nature of

the applicable periods of post-release control imposed. The court of appeals' conclusion in this case that the trial court's failure to specifically orally advise the defendant of the imposition of discretionary post-release control at the sentencing hearing, notwithstanding the trial court's oral advice at the sentencing hearing of the imposition of mandatory post-release control, is erroneous for several reasons.

Most importantly, the defendant cannot reasonably claim that he lacked actual notice of the imposition of a three-year term of discretionary post-release control in addition to the mandatory three-year term of post-release control, as he signed two forms advising him of the imposition of post-release control for his conviction of the third-degree felony; both the plea form, signed when he entered his guilty plea, and the notice of prison imposed form, signed by the defendant and his attorney on the date of the sentencing hearing, provided the defendant with written notice of the imposition of post-release control for the defendant's third-degree felony conviction. This written notification should be sufficient compliance with the statutory notification requirement. *State v. Amburgy*, 10th Dist. 04AP-1332, 2006-Ohio-135 (no oral mention of post-release control at plea hearing, but written plea form advising of post-release control was used; "even assuming that this [oral exchange] was not a sufficient verbal notification, we still conclude that the trial court properly notified appellant about post-release control and properly accepted his guilty plea.", quoting *State v. Duncan* (1998), 10th Dist. No. 97AP-1044).

In addition, R.C. 2967.28(F)(4)(c) requires that multiple terms of post-release control be served concurrently. Because both three-year terms of post-release control imposed by the trial court in these two cases were statutorily required to run concurrently, the trial court's oral notification of the mandatory term of post-release control was adequate to notify the defendant of

the post-release control sanctions imposed. See Crim.R. 43(A) (ensuring defendant right to be present at sentencing hearing).

And the State disagrees with the notion that the lack of oral notification of post-release control at sentencing would make the judgment's imposition of post-release control "void." At most, a failure to pronounce a part of the sentence would be a non-jurisdictional sentencing error. See *State ex rel. Massie v. Rogers* (1997), 77 Ohio St.3d 449, 450; *Majoros v. Collins* (1992), 64 Ohio St.3d 442, 443 ("[w]e have consistently held that sentencing errors are not jurisdictional * * *"); *Johnson v. Sacks* (1962), 173 Ohio St. 452, 454 ("The imposition of an erroneous sentence does not deprive the trial court of jurisdiction."). Accordingly, in light of the trial court's oral advice at the sentencing hearing of the imposition of a mandatory three-year term of post-release control, coupled with the written notifications the defendant received regarding the imposition of a three-year term of discretionary post-release control for his third-degree felony conviction, the court of appeals erred when it determined that the defendant's sentence on the third-degree felony was void.

Additionally, the trial court's judgment entry stating that the defendant must serve up to three years of mandatory post-release control was not void. This Court held, in *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, that a sentencing entry need not specifically state that a post-release control term is mandatory in order to authorize the DRC to enforce a mandatory post-release control term. In *Watkins*, several inmates – all of whom were incarcerated for violating their mandatory post-release control terms – sought habeas corpus relief, claiming that their sentencing entries mistakenly included language indicating that the post-release control terms were discretionary. The sentencing entries at issue in *Watkins* either expressly stated that post-release control was discretionary or were ambiguous as to whether

post-release control was discretionary or mandatory. The inmates claimed that “by misrepresenting the mandatory nature of their postrelease control, the trial courts never properly imposed such control, and that they therefore could not be imprisoned for violating that control.” *Id.* at ¶43.

This Court denied the inmates’ habeas petitions. After noting that “sentencing errors are not jurisdictional and are not cognizable in habeas corpus,” *id.* at ¶40, quoting *Majoros v. Collins* (1992), 64 Ohio St.3d 442, 443, this Court noted that “the sentencing entries for the petitioners here specified that postrelease control was, at a minimum, discretionary and was part of their sentences.” *Watkins*, at ¶50. Accordingly, “the sentencing entries are sufficient to afford notice to a reasonable person that the courts were authorizing postrelease control as part of each petitioner’s sentence.” *Id.* at ¶51. Moreover, “[a]ny challenge to the propriety of the sentencing court’s imposition of postrelease control in the entries could have been raised on appeal.” *Id.* “This conclusion is consistent with the preeminent purpose of R.C. 2967.28 – that offenders subject to postrelease control know at sentencing that their liberty could continue to be restrained after serving their initial sentences.” *Id.* at ¶52.

Also pertinent to this case is this Court’s decision in *Patterson v. Ohio Adult Parole Auth.*, 120 Ohio St. 3d 311, 2008-Ohio-6147, which addressed an entry stating “up to” five years of post-release control. This Court held that the “up to” language was sufficient to allow enforcement of the mandatory five-year post-release control term. “We have never held that these claims can be raised by extraordinary writ when the sentencing entry includes postrelease control, however inartfully it might be phrased.” *Id.* at ¶8. The *Patterson* Court quoted the *Watkins* decision for the view that “habeas corpus is not available to contest any error in the

sentencing entries, and petitioners have or had an adequate remedy by way of appeal to challenge the imposition of postrelease control.” *Id.* at ¶8 (quoting *Watkins*, ¶53).

The *Patterson* Court distinguished cases like *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, and *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250. In *Hernandez*, the “sentencing entry did not include postrelease control.” *Patterson*, at ¶8. In *Bezak*, the defendant had pursued his challenge to post-release control “in direct appeal from sentence imposing postrelease control.” *Id.*

In this case, the court of appeals erroneously relied upon this Court’s summary reversal of the court of appeals’ decision in *State v. Osborne*, 8th Dist. No. 88453, 2007-Ohio-3267, ¶39 to support its decision finding that the sentencing entry for the defendant’s second-degree felony conviction was void. *Osborne* rejected the claim raised on direct appeal that “up to” language in an entry was erroneous. But the challenge came on direct appeal, and so, after *Bezak*, this Court summarily reversed that decision. *State v. Osborne*, 116 Ohio St.3d 1228, 2008-Ohio-261. The reversal at most reflects that the issue is correctable on direct appeal; it does not mean that this Court believed that the “up to” language rendered the sentence “void.”

And this Court has warned about the limited precedential value of summary reversals, since they often do not directly address an issue and often come with limited briefing. There are no “implicit” precedents, and the Court is not bound by “perceived implications” of an earlier decision that did not “definitively resolve” the issue, see *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶¶ 10, 12, especially a summary reversal that results from a concession or did not come after full briefing. *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, ¶¶29, 31.

Various other cases are not dispositive vis-à-vis whether the “up to” language can be challenged collaterally by a post-judgment motion. In *State v. Boswell*, 121 Ohio St.3d 575,

2009-Ohio-1577, there had been no post-release control language in the judgment and the narrow issue was whether the motion to withdraw plea would be considered a pre-sentence motion or a post-sentence motion. In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, the defendant was appealing from a resentencing, which had occurred because of a total absence of post-release control language in the original entry.

In *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the only issue was whether the resentencing should have been de novo or whether R.C. 2929.191 would allow a narrow correction vis-à-vis post-release control. Because the prosecution was not disputing the lower court's "void" holding, see *id.* at ¶36, this Court had no occasion to address the *Watkins-Patterson* issue. In *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, the defendant was appealing on direct appeal, and the "void sentence" complaint arose from a failure to provide adequate notification at sentencing, not a complaint about the sufficiency of the entry. And in *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, this Court reviewed various issues arising during post-release control resentencing hearings.

None of these cases overrule *Watkins* or *Patterson*, and none of these cases invalidated judgment entries which included the correct length of time the defendant would have to serve post-release control and identified the mandatory/discretionary nature of the post-release control term imposed, and which had been challenged in a successive collateral post conviction motion.

This Court's standards for adhering to stare decisis would weigh strongly against overruling *Watkins* or *Patterson*. Principles of stare decisis are at their height in the sentencing context, particularly in the post-release control context. *Simpkins*, 2008-Ohio-1197, ¶19, n. 2. One of the requirements for overruling precedent is that "abandoning the precedent would not create an undue hardship for those who have relied upon it." *Westfield Ins. Co. v. Galatis*, 100

Ohio St.3d 216, 2003-Ohio-5849, paragraph one of the syllabus. Applying a “void sentence” approach several years after the fact, and several years after *Watkins* and *Patterson*, would upset these reliance interests.

Even if there were a tension between these cases and this Court’s decisions in *Watkins* and *Patterson*, *Watkins* and *Patterson* should still control, as only this Court can conclude that the precedents should be overruled because they have been undermined by subsequent decisions. *Agostini v. Felton* (1997), 521 U.S. 203, 237-38 (“if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”; quoting another case); *Smith v. Klem* (1983), 6 Ohio St.3d 16, 18 (only Supreme Court can decide that a part of earlier syllabus was dicta). “Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.” *Hohn v. United States* (1998), 524 U.S. 236, 252-53. The application of the *Galatis* factors, including especially the reliance factor, should lead this Court to reaffirm *Watkins* and *Patterson*.

Accordingly, because the defendant had actual oral notification of the trial court’s imposition of a mandatory three-year term of post-release control, in addition to written notification of the imposition of a concurrent discretionary three-year term of post-release control imposed, and because the sentencing entries included the correct term of years of post-release control imposed, as well as the mandatory/discretionary nature of the post-release control terms, the defendant’s sentences were not void, and the court of appeals’ decision must therefore be reversed.

Finally, res judicata applies to bar relief. “Under the doctrine of res judicata, a final judgment bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that the defendant raised or could have raised at trial or on appeal. *State v. Brown*, 167 Ohio App.3d 239, 2006-Ohio-3266, ¶ 7, citing *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 96; see, also, *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. As *Watkins* and *Patterson* recognize, an irregularity of this sort could have been raised on direct appeal. It is barred by res judicata now, particularly in light of the fact that the defendant unsuccessfully raised an issue challenging the trial court’s imposition of post-release control in the prior litigation in his case.

Because the court of appeals incorrectly determined that the defendant’s sentences were void based on its determination that the oral advice regarding the imposition of post-release control at the defendant’s sentencing hearing was inadequate, and its determination that the language contained in the defendant’s sentencing entry that he would serve a mandatory term of up to three years of post-release control, and because the defendant previously raised a challenge to the trial court’s imposition of post-release control, the court of appeals erred in finding the defendant’s sentences were void, and that decision must be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal presents questions of such great public interest as to warrant further review by this Court. It is therefore respectfully submitted that jurisdiction be accepted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, April 13th, 2010, to Corey Hazel, #546-846, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601.



BARBARA A. FARNBACHER 0036862
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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	No. 09AP-1132
	:	and 09AP-1156
Plaintiff-Appellee,	:	(C.P.C. No. 05CR-7105)
v.	:	No. 09AP-1133
	:	and 09AP-1157
Corey M. Hazel,	:	(C.P.C. No. 06CR-4742)
Defendant-Appellant.	:	(REGULAR CALENDAR)

MEMORANDUM DECISION

Rendered on March 31, 2010

Ron O'Brien, Prosecuting Attorney, and Barbara A. Fambacher, for appellee.

Corey M. Hazel, pro se.

APPEALS from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} In these consolidated appeals, defendant-appellant, Corey M. Hazel, appeals from judgments of the Franklin County Court of Common Pleas, denying his motions for re-sentencing and for correction of clerical mistake.

{¶2} On October 19, 2005, appellant was indicted in case No. 05CR-7105 on one count of engaging in a pattern of corrupt activity, two counts of theft, seventeen counts of forgery, fifteen counts of securing writings by deception, and thirteen counts of money laundering. On June 27, 2006, appellant was indicted in case No. 06CR-4742 on

two counts of forgery, one count of theft, one count of money laundering, and one count of securing writings by deception.

{¶3} On March 1, 2007, appellant entered a guilty plea in case No. 05CR-7105 to one count of engaging in a pattern of corrupt activity, a stipulated felony of the second degree, one count of forgery, a felony of the third degree, and one count of securing writings by deception, a felony of the third degree. The trial court ordered a nolle prosequi as to the remaining counts. Also on March 1, 2007, in case No. 06CR-4742, appellant entered a guilty plea to one count of forgery, a felony of the third degree, and the court entered a nolle prosequi on the remaining counts of that indictment.

{¶4} In case No. 05CR-7105, the trial court sentenced appellant to six years incarceration on Count 1 (engaging in a pattern of corrupt activity), two years incarceration on Count 15 (forgery), and two years incarceration on Count 29 (securing writings by deception). Pursuant to a joint recommendation of the parties, the trial court ordered Counts 1, 15, and 29 to be served concurrently, for a total sentence of six years incarceration. Further in case No. 06CR-4742, the trial court sentenced appellant to two years incarceration, with such sentence to run concurrently with the sentence in case No. 05CR-7105. On May 31, 2007, appellant filed pro se motions for leave to file delayed appeals in case Nos. 05CR-7105 and 06CR-4742, which this court denied by memorandum decision filed August 16, 2007.

{¶5} Appellant subsequently filed with the trial court motions for post-conviction relief and motions to withdraw his guilty pleas in case Nos. 05CR-7105 and 06CR-4742, which the trial court denied by entries filed August 27, 2008. Appellant later filed motions in both cases for default judgment and summary judgment, as well as successive motions

to withdraw his guilty pleas. On October 17, 2008, the trial court filed entries denying appellant's motions for default judgment and summary judgment, and dismissing appellant's successive motions to withdraw his guilty pleas. Appellant appealed the trial court's denial of post-conviction relief, as well as the court's entries denying his motions to withdraw guilty pleas, and his motions for summary judgment and default judgment.

{¶6} On February 26, 2009, this court affirmed the trial court's decisions denying appellant's petitions for post-conviction relief. *State v. Hazel*, 10th Dist. No. 08AP-789, 2009-Ohio-880. On May 7, 2009, this court affirmed the judgments of the trial court denying appellant's motions to withdraw guilty pleas, and denying his motions for default judgment and for summary judgment. *State v. Hazel*, 10th Dist. No. 08AP-1002, 2009-Ohio-2144.

{¶7} On November 2, 2009, appellant filed with the trial court motions for re-sentencing in case Nos. 05CR-7105 and 06CR-4742. The state filed memorandum contra the motions. The trial court, by entries filed November 23, 2009, denied appellant's motions for re-sentencing. On November 30, 2009, appellant filed motions to correct a clerical mistake in case Nos. 05CR-7105 and 06CR-4742, which the trial court denied by entries filed December 2, 2009.

{¶8} Appellant appeals from the trial court's entries denying his motions for re-sentencing and to correct a clerical mistake, setting forth the following four assignments of error for this court's review:

FIRST ASSIGNMENT OF ERROR FOR REVIEW

The Trial Court Committed Reversible Error When It Failed To Properly Advise Appellant In The 05CR7105 Sentencing Entry Of The Mandatory Three Year Period Of Post Release

Control Which Rendered The Sentence Void And Contrary To Law.

SECOND ASSIGNMENT OF ERROR FOR REVIEW

Trial Court Abused Its Discretion When It Determined That A Motion For Resentencing Must Be Reclassified As An Untimely Or Successive Petition For Post Conviction Under R.C. 2953.21 and 2953.23.

THIRD ASSIGNMENT OF ERROR FOR REVIEW

The Trial Court Committed Reversible Error When It Determined That It Did Not Have Jurisdiction To Correct A Void Sentence.

FOURTH ASSIGNMENT OF ERROR FOR REVIEW

The Trial Court Committed Reversible Error When It Failed To Inform Appellant At The Sentencing Hearing In Case 06CR4742 That The Applicable Period of Post Release Control Pursuant To R.C. 2929.19(B)(3)(c)(d) and (e) Is Up To Three Years-Optional.

{¶9} Appellant's assignments of error are somewhat interrelated and will be considered together. Under the first assignment of error, appellant challenges, in case No. 05CR-7105, language in the trial court's judgment entry providing in part that appellant had been notified that the applicable period of post-release control "is up to Three years." Appellant argues that such language is contrary to statutory requirements and case law as it does not adequately indicate that the three-year term is mandatory. Under his fourth assignment of error, appellant challenges his sentence in case No. 06CR-4742, based upon his contention that the trial court failed to inform him, during the sentencing hearing, that post-release control was discretionary.

{¶10} At the outset, we address whether the trial court properly treated appellant's motions for re-sentencing as successive motions for post-conviction relief, an issue raised

under appellant's second assignment of error. In his motions for re-sentencing, appellant argued before the trial court that his sentences were void due to the trial court's failure to properly inform him of post-release control. The trial court construed the motions for re-sentencing as successive petitions for post-conviction relief and determined, pursuant to R.C. 2953.23(A), that appellant had failed to satisfy the requirements for an exception to the general prohibition against second or successive petitions.

{¶11} Appellee asserts that the trial court properly considered the motions for re-sentencing as successive petitions, arguing there is no provision permitting a criminal defendant to file a motion for re-sentencing. Appellate courts, however, have recognized the propriety of such a motion to challenge a void sentence, citing language by the Supreme Court of Ohio in *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, ¶12 ("[d]espite the lack of a motion for resentencing, we still must vacate the sentence and remand for a resentencing hearing"). See *State v. Holcomb*, 9th Dist. No. 24287, 2009-Ohio-3187, ¶19 (defendant may raise claim of void sentence 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"). See also *State v. Scott*, 6th Dist. No. E-09-048, 2010-Ohio-297, ¶19 (same), citing *Holcomb* and *Boswell*.

{¶12} Courts have thus held that, assuming a sentence is actually void, a trial court errs by characterizing a motion for re-sentencing as an untimely and successive petition for post-conviction relief and denying the motion on that basis. *State v. Wheeler*, 9th Dist. No. 24488, 2009-Ohio-3557, ¶10. See also *Holcomb* at ¶19 ("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"). Finding the above authorities persuasive, the issue we now consider is whether appellant's sentence "is indeed void as alleged in his motion for resentencing due to improper notification as to post-release control." *Wheeler* at ¶10.

{¶13} As noted under the facts, appellant entered guilty pleas in case No. 05CR-7105 to one felony of the second degree and two felonies of the third degree, while in case No. 06CR-4742 he entered a guilty plea to one felony of the third degree. Pursuant to R.C. 2967.28(B)(2), an offender convicted of a felony of the second degree (that is not a sex offense) is subject to a mandatory term of three years post-release control. R.C. 2967.28(C) provides in part that a sentence for a third-degree felony (which is not a sex offense and where the defendant did not cause or threaten physical harm) "shall include a requirement that the offender be subject to a period of post-release control of up to three years."

{¶14} The transcript of appellant's sentencing hearing, in which the court sentenced appellant in both case Nos. 05CR-7105 and 06CR-4742, indicates that the trial court orally addressed the issue of post-release control with appellant in the following manner:

Now let me advise you that you are subject and will be subject to a period of post-release control of three years for a conviction of the felony of the second degree. When you are released, you'll be subject to that three-year control. If you violate the terms and conditions of that control, you can be returned to the institution for up to one-half of your original sentence.

{¶15} The trial court's sentencing entry in case No. 05CR-7105 provides in part: "After the imposition of sentence, the Court notified the Defendant, orally and in writing,

that the applicable period of post-release control * * * is up to Three years – Mandatory." The court's sentencing entry in case No. 06CR-4742 states in part: "After the imposition of sentence, the Court notified the Defendant, orally and in writing, that the applicable period of post-release control * * * is up to Three years – Optional."

{¶16} A review of the transcript of the sentencing hearing indicates that the trial court only addressed the issue of post-release control as to the mandatory three-year term for the second-degree felony offense in case No. 05CR-7105; the court did not inform appellant, at the time of the sentencing hearing, that he would be subject to post-release control with respect to the third-degree felony offenses in case No. 05CR-7105, or the third-degree felony offense in case No. 06CR-4742. Thus, while the sentencing entry in case No. 06CR-4742 correctly indicates that appellant was subject to "up to Three years – Optional" post-release control, the court's failure to notify appellant during the sentencing hearing of discretionary post-release control for the felony three forgery offense constituted error, and rendered that sentence void. See *Scott* at ¶10 (while trial court properly informed defendant he was subject to a mandatory three-year term of post-release for burglary offense, court erred in not advising defendant he may be subject to discretionary terms of up to three years for two other offenses and, thus, the sentences imposed "for those two offenses are void").

{¶17} We note that the trial court, in its entries denying appellant's motions for correction of clerical mistake, addressed appellant's contention that he was not orally advised of post-conviction relief with respect to the felony three offense in case No. 06CR-4742. The trial court observed that, while appellant's conviction for the third-

degree felony "could also result in up to three years of postrelease control, it must be concurrent and cannot increase the time defendant spends on postrelease control."

{¶18} In *Scott*, the court addressed similar rationale by the state. Specifically, the state argued that, "because appellant was properly notified of the three year mandatory term, it was not necessary to notify him that he may be subject to two additional three year discretionary terms since they would be served concurrently with" the mandatory term. *Scott* at ¶13. The court, while recognizing that the state's argument "makes some sense," nevertheless held that "the fact remains" the law provides that failure to give notification of "possible" post-release control will support reversal for re-sentencing. *Id.* The court cited the language of R.C. 2929.19(B)(3)(d), providing in part that the sentencing court "shall" notify the offender that he or she may be supervised under R.C. 2967.28 if sentenced for a third, fourth or fifth-degree felony. In considering that language, the court held in part: "By indicating that the sentencing court 'shall do all of the following,' the legislature clearly placed a mandatory duty upon the trial court rather than granting it discretion." *Scott* at ¶17. In the instant case, we similarly conclude that, despite the fact the sentence in case No. 06CR-4742 may run concurrently with the mandatory term in case No. 05CR-7105, the trial court was still required to notify appellant of post-release control with respect to that third-degree felony offense.

{¶19} Regarding case No. 05CR-7105, while the trial court informed appellant during the sentencing hearing that he would be subject to three years of post-release control for the second-degree felony offense, the court's sentencing entry in that case contains discretionary language, i.e., "up to three years," in stating the duration of the term. Reviewing courts have held that a trial court's "language of 'up to three years' is a

statement that appellant may be subject to less than three years, possibly even no years, of post release control." *State v. Jones*, 7th Dist. No. 06 MA 17, 2009-Ohio-794, ¶12. See also *State v. Osborne*, 116 Ohio St.3d 1228, 2008-Ohio-261 (summarily reversing and remanding appellate court's decision not to vacate case where trial court advised defendant he would be subject to "up to three years" of post-release control where defendant was required to serve full three-year term); *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, ¶2 (at sentencing hearing, trial court's notification that defendant was subject to post-release control "for a period of up to five years" was erroneous because his offense "warranted a mandatory postrelease control period of five years, not 'up to' five years").

{¶20} Here, the trial court's sentencing entry in case No. 05CR-7105 erroneously suggests that appellant's period of post-release control could be less than three years for the second-degree felony offense. See *State v. Steidl*, 9th Dist. No. 09CA0010-M, 2009-Ohio-5053, ¶5 (language in sentencing entry stating that "post[-]release control is mandatory in this case *up to a maximum of 5 years* for Counts I through III" rendered sentence void, as it employed "discretionary language when stating the duration of the term for which he would be subject to post-release control"); *State v. Olah*, 9th Dist. No. 08CA009447, 2009-Ohio-3651, ¶7 (where the defendant was subject to a five-year mandatory period of post-release control, trial court's entry stating defendant's post-release control is "mandatory in this case *up to a maximum of 5 years*" mistakenly indicates defendant could be subject to less than, but no more than, five years of post-release control instead of stating he in fact will be subject to the full term of five years). (Emphasis sic.)

{¶21} Upon review, we conclude that the trial court's failure to notify appellant during the sentencing hearing that he was subject to terms of post-release control with respect to the third-degree offenses in case Nos. 05CR-7105 and 06CR-4742, as well as the court's inclusion of erroneous language in the sentencing entry in case No. 05CR-7105, rendered the sentences in those cases void, requiring a remand for re-sentencing. See *Scott* at ¶19 ("[I]f a sentence is void for failure to include post-release control notification, the trial court – or the reviewing court – has an obligation to recognize the void sentence, vacate it, and order resentencing"). Accordingly, appellant's first, second, and fourth assignments of error are hereby sustained and, in light of our disposition of those assignments of error, appellant's third assignment of error is rendered moot.

{¶22} Based upon the foregoing, appellant's first, second, and fourth assignments of error are sustained, the third assignment of error is rendered moot, the judgments of the Franklin County Court of Common Pleas are vacated, and these matters are remanded to the trial court for re-sentencing.

Judgments vacated; causes remanded.

BRYANT and KLATT, JJ., concur.

B7/154

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
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2010 MAR 31 PM 3:39
CLERK OF COURTS

State of Ohio,	:	No. 09AP-1132
	:	and 09AP-1156
Plaintiff-Appellee,	:	(C.P.C. No. 05CR-7105)
v.	:	No. 09AP-1133
	:	and 09AP-1157
Corey M. Hazel,	:	(C.P.C. No. 06CR-4742)
Defendant-Appellant.	:	(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on March 31, 2010, appellant's first, second, and fourth assignments of error are sustained, and appellant's third assignment of error is rendered moot. It is the judgment and order of this court that the judgments of the Franklin County Court of Common Pleas are vacated, and these matters are remanded to that court for re-sentencing. Costs are assessed against appellee.

BROWN, BRYANT & KLATT, JJ.



Judge Susan Brown