

ORIGINAL

In the Supreme Court of Ohio

State of Ohio, in the Relation of
Kyle L. Clutter,
Relator/Appellant,

Vs.

Crawford County Court of Common
Pleas & Judge Russell D. Wiseman,
Respondent/Appellees.

* Case Number 10-0931
* On Appeal from the Crawford County
Court of Appeals, Third Appellate
District
* Case Number 3-10-07

Amended Merit Brief of Relator/Appellant Kyle L. Clutter

Kyle L. Clutter
#503-058 Mansfield Corr. Inst.
P.O. Box 788
Mansfield, Ohio 44901
Relator/Appellant *Pro Se*

Stanley Flegm
Crawford County Prosecutor
112 East Mansfield St.
Bucyrus, Ohio 44820
Counsel for Respondent/Appellees

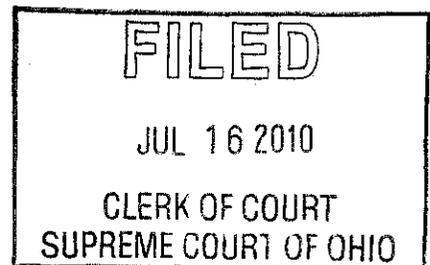
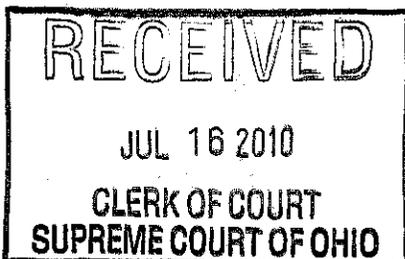


Table of Contents

Table of Authorities.....ii

Statement of Case and Facts.....1

Law and Argument.....2

Proposition of Law 1:.....2

 Must the Trial Court resentence a criminal defendant when the sentence imposed
 dose not comport with mandatory statutory provisions regarding Post Release
 Control and is void, as a matter of law.

Conclusion.....5

Certificate of Service.....5

Appendixes:

Appendix 1 - Notice of Appeal to Supreme Court dated May 24, 2010..... A-1

Appendix A – Judgment Entry on Motion to Resentence from the
Third District Court of Appeals, dated April 14, 2010.....A1

Appendix B – Judgment Entry on Application for Reconsideration
from the Third District Court of Appeals, dated April 28, 2010.....A3

Appendix C – Courts Decision on *State v. Robertson*, 2009-Ohio-5250,
Unreported.....A5

Appendix D – Courts Decision on *Sate v. Lester*, 2007 WL 2350759,
Unreported.....A7

Appendix E – Courts Decision on *State v. Bedford*, 2009-Ohio-3972,
Unreported.....A9

Appendix F – Ohio Revised Code Section 2967.28.....A14

Appendix G – Ohio Rule of Criminal Procedure 43.....A16

Table of Authorities

<u>Judicial Authority:</u>	<u>Page #</u>
Fraternal Order of Police v. City of Cleveland (2001), 749 N.E.2d 840.....	2
State ex rel Kudrick v. Meredith (1922), 24 Ohio N.P. (N.S.) 120, 124, 1922 WL..... 2015*3	4
State v. Beasley (1984), 14 Ohio St.3d 74.....	4
State v. Bedford (9 th Dist.) 2009-Ohio-3972.....	3
State v Bezak (2007), 14 Ohio St.3d 94.....	4
State v. Bloomer 122 Ohio St.3d 200.....	3
State v. Boswell, 121 Ohio St.3d 575, 906 N.E.2d 422.....	5
State v. Jordan (2004), 104 Ohio St.3d 21.....	4
State v. Lester @007 WL 2350759.....	3
State v. Payne, 114 Ohio St.3d 502.....	4
State v. Robertson, 2009-Ohio 5052 (9 th Dist.) 2009 WL 3068749.....	3
State v. Simpkins 117 Ohio St.3d 420.....	3
State v. Watt, 175 Ohio App.3d 613, 888 N.E.2d 489 Holding #3.....	3
<u>Statutory Authority:</u>	
Ohio Revised Code Section 2967.28.....	2
<u>Miscellaneous Law:</u>	
Ohio Rule of Criminal Procedure 43.....	5

Statement of the Case and Facts

The Relator/Appellant, Kyle L. Clutter, is serving a sentence that is void for failure to comply with statutorily mandated provisions. The Trial Court failed to impose the mandatory sentence of (3) three years and instead imposed a discretionary term of up to three years for a felony two.

The Relator/Appellant pled guilty to one count of Aggravated Vehicular Homicide R.C. 2903.06 on January 25, 2006. The Court imposed a sentence on March 27, 2006 of five years.

The Relator/Appellant filed a Mandamus after filing a Motion to Resentence, which was denied, on November 6, 2009 for the lack of a Final Appealable Order. The Trial Court issued a Nunc Pro Tunc order to correct the original journal entry. To date there are two orders that comprise the final judgment:

On March 3, 2010 the Relator/Appellant filed the current Mandamus for failure to properly impose Post Release Control after filing a motion in the Trial Court on November 6, 2009 that was later denied on November 13, 2009.

The Court of Appeals dismissed the Relator/Appellants petition erroneously. The Courts reasoning was that this was a successive petition and barred by Res Judicata when clearly this issue has never been previously raised. It is from this dismissal that the Relator/Appellant is appealing. The Relator/Appellant's sentence is void as is the judgment of conviction.

Law and Argument

Proposition of Law 1:

Must the Trial Court resentence a criminal defendant when the sentence imposed dose not comport with mandatory statutory provisions regarding Post Release Control and is void, as a matter of law.

The sentence imposed in the Relator/Appellant's Criminal Case, *State of Ohio v. Kyle L. Clutter*, Crawford County Court of Common Pleas Case No. 05-CR-0080, does not comply with mandatory statutory provisions, therefore, the sentence is void.

The Relator/Appellant was found guilty of Aggravated Vehicular Homicide, O.R.C. §2903.06, a Second Degree Felony. The Relator/Appellant was sentenced to five (5) years in prison. The court then imposed the following term of post-release control;

“...the offender shall be subject to a period of post-release control “up to” three years as determined by the parole board pursuant to R.C. 2967.28” (Emphasis Added)

Clearly the sentence imposed allows discretion in the period of post-release control, this is simply not the case, the proper period of post-release control pursuant to O.R.C. §2967.28(B) (2) is “For a felony of the second degree ..., three years.” There is no discretion allowed in this instance. The use of the word “shall” in Division (B) of O.R.C. §2967.28 makes the provision mandatory; [W]hen a statute contains the word “shall”, it will be construed as mandatory, non compliance will render the proceedings to which it relates illegal and void ...,” *Fraternal Order of Police v. City of Cleveland* (2001), 749 N.E.2d 840.

The trial court incorrectly imposed a discretionary period of post-release control when it should have imposed a definite period of three years. The language in the sentencing entry

about a term of "up to" three years incorrectly implies that the Relator/Appellant could serve less than three years. See *State v. Robertson*, 2009-Ohio-5052 (9th Dist.) 2009 WL 3068749.

The Third District Court of Appeals held in *State v. Lester* 2007 WL 2350759;

"Similarly we hold that since the sentencing entry notified Lester that he was subject to a mandatory term of five years of post-release control, when the statute provides for a mandatory three year term of post-release control for the 3rd degree felonies, and up to three years for the 5th degree felony, Lester's sentence as to the offence is void." (Emphasis Added)

The Third District Court of Appeals also held that a;

'[N]ew, complete sentencing hearing was required for the imposition of post-release control following the trial courts failure to give "proper" notice of PRC at original sentencing hearing." *State v. Watt*, 175 Ohio APP.3d 613, 888 N.E.2d 489 Holding #3. (Emphasis Added)

This Court concluded that;

'No court has the authority to substitute a different sentence for that which is required by law." *Id.* @ ¶20.

This Court also held that;

"... a sentence that does not conform to statutory mandates requiring the imposition of post-release control is a nullity and void [and] must be vacated." *Id.* @ ¶22. (Emphasis Added)

in *State v. Bedford*, (9th Dist.) 2009-Ohio-3972 @ ¶11, the Court held that;

"... [a] journal entry is void because it includes a mistake regarding post-release control ... there is no final, appealable order."

and;

"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 has been no judgment." See *State v. Bloomer*, 122 Ohio St.3d 200. (Emphasis Added)

In addition this Court held in *Simpkins*, supra @ ¶21;

"Therefore, in circumstances in which the judge disregards what the law clearly commands, such as when a judge fails to impose a non-discretionary sanction required by a sentencing

statute, the judge acts without authority.” *State v. Beasley*, 14 Ohio St.3d @ ¶78, 14 O.B.R. 511, 471 N.E.2d 774.

Such actions are not mere errors that render a sentence voidable rather than void. If a judge imposes a sentence that is unauthorized by law, the sentence is unlawful.

‘If an act is unlawful, it is not erroneous or voidable, but it is wholly unauthorized and void.” *State ex rel. Kudrick v. Meredith* (1922), 24 Ohio N.P. (N.S.) 120, 124, 1922 WL 2015*3. (Emphasis Added).

Again this Court held in *State v. Beasley* (1984), 14 OhioSt.3d 74;

“Any attempt by a court to disregard statutory requirements imposing a sentence renders The attempted sentence a nullity or void.”

Twenty years later, this Court applied this principle to post-release control in *State v. Jordan* (2004), 104 Ohio St.3d 21. Three years later, this Court held in *State v. Bezak* (2007), 14 Ohio St.3d 94;

“[W]hen a defendant is convicted to one or more offences and post-release control is not properly included in a sentence for a particular offence, the sentence for that offence is void. The offender is entitled to a new sentencing hearing for that particular offence.” *Id.* @ Syllabus (Emphasis Added).

The effect of a void sentence or any portion thereof, renders the final judgment of conviction void as well.

In *State v. Payne*, 114 Ohio St.3d 502, in footnote3, ¶29, the court stated;

“It is axiomatic that imposing a sentence outside the statutory range, contrary to statute, is outside a courts jurisdiction, thereby rendering the sentence void ab initio.”(Emphasis Added).

Clearly the trial court failed to properly impose mandatory post-release control in its journal entry. The Relator/Appellant’s sentence is void, it is a nullity and must be vacated. It is as though such proceedings has never occurred; the judgment is a mere nullity and the parties

are in the same position as if there had been no judgment. See *State v. Boswell*, 121 Ohio St.3d 575, 906 N.E.2d 422.

Pursuant to Criminal Rule 43, the Relator/Appellant must be physically present at every stage of the proceedings, including sentencing.

Conclusion

Wherefore, this Court should reverse the decision of the Court of Appeals, vacate the Relator/Appellants void sentence and remand this cause to the trial court for further proceedings.

Respectfully Submitted,



Kyle L. Clutter
Relator/Appellant in *Pro Se*
Mansfield Corr. Inst.
P.O. Box 788 #503-058
Mansfield, Ohio 44901

Certificate of Service

I certify that a true copy of the same was sent by U.S. Mail to the address listed in the caption on this 13th day of July, 2010.



Sender

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-0931

STATE OF OHIO, IN THE RELATION OF *
KYLE L. CLUTTER,
Relator-Appellant,

CASE NO.

ON APPEAL FROM THE CRAWFORD
COUNTY COURT OF APPEALS, THIRD
APPELLATE DISTRICT.

-VS- *

CASE NO. 3-10-07

CRAWFORD COUNTY COURT OF COMMON PLEAS &
JUDGE RUSSELL D. WISEMAN, *
Respondent-Appellees.

NOTICE OF APPEAL OF RIGHT OF KYLE L. CLUTTER

KYLE L. CLUTTER
#503-058 MANSFIELD C.I.
POST OFFICE BOX 788
MANSFIELD, OHIO - 44901
RELATOR-APPELLANT-PRO SE

Stanley Flegm
Crawford County Prosecutor
112 E. Mansfield Street
Bucyrus, Ohio 44820
COUNSEL FOR RESPONDENT-APPELLEES

RECEIVED
MAY 24 2010
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
MAY 24 2010
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF RELATOR-APPELLANT KYLE L. CLUTTER

Relator-Appellant, Kyle L. Clutter-Pro Se, hereby gives Notice of Appeal of Right to the Supreme Court of Ohio from the judgment of the Crawford County Court of Appeals, Third Appellate District, entered in the Court of Appeals Case No. 3-10-07 on April 14, 2010.

This case raises a substantial constitutional question, involves a felony, and is an appeal of right from the original action in mandamus.

Kyle L. Clutter
#503-058 Mansfield C.I.
Post Office Box 788
Mansfield, Ohio - 44901
Relator-Appellant-Pro Se

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal has been sent via regular U.S. Mail to, Stanley Flegm, Prosecuting Attorney, Crawford County, Ohio - 44620, on this 20th day of May, 2010.

Kyle L. Clutter
SENDER

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
CRAWFORD COUNTY

FILED IN THE COURT OF APPEALS

APR 14 2010
SUE SEEVERS
CRAWFORD COUNTY CLERK

STATE OF OHIO,
EX REL KYLE L. CLUTTER,

CASE NO. 3-10-07

RELATOR,

v.

RUSSELL B. WISEMAN, JUDGE,
CRAWFORD COUNTY COURT
OF COMMON PLEAS,

J U D G M E N T
E N T R Y

RESPONDENT.

This cause comes on for determination of Relator's complaint for writ of mandamus and/or procedendo, Respondent's motion to dismiss, and Relator's memorandum contra the motion to dismiss.

Upon consideration the court finds that Relator filed a previous complaint for writ of mandamus and/or procedendo which argued that he must be resentenced and a final order issued, and the complaint was dismissed. *State ex rel. Clutter v. Wiseman*, 3rd Dist.No. 3-09-01, unreported; appeal dismissed, *State ex rel. Clutter v. Wiseman*, 122 Ohio St.3d 1518, 2009-Ohio-4776, reconsideration denied, 123 Ohio St.3d 1498, 2009-Ohio-6015.

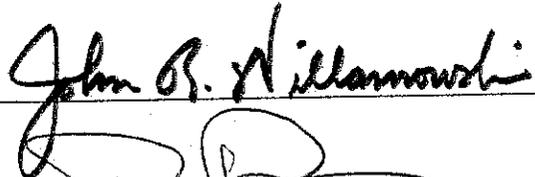
The instant complaint similarly argues that Relator must be resentenced and a final order issued. It is well settled that res judicata bars a party from instituting

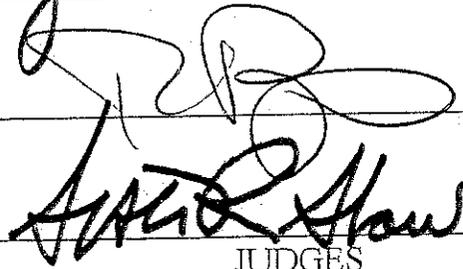
Case No. 3-10-07

a successive writ action for the same relief. *State ex rel. Tate v. Calabrese* (April 7, 2010), Slip Opinion No. 2010-Ohio-1431, citing *State ex rel. Essig v. Blackwell*, 103 Ohio St.3d 481, 2004-Ohio-5586; *State ex rel. Carroll v. Corrigan* (2001), 91 Ohio St.3d 331.

Accordingly, the successive writ action is barred by res judicata and must be dismissed, and Respondent's motion is well taken.

It is therefore **ORDERED** that Relator's complaint for writ of mandamus and/or procedendo be, and hereby is, dismissed at the costs of Relator for which judgment is rendered.





JUDGES

DATED: April 14, 2010
/jnc

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
CRAWFORD COUNTY

FILED IN THE COURT OF APPEALS

APR 28 2010

SUE SEEVERS
CRAWFORD COUNTY CLERK

STATE OF OHIO,
EX REL KYLE L. CLUTTER,

CASE NO. 3-10-07

RELATOR,

v.

RUSSELL B. WISEMAN, JUDGE,
CRAWFORD COUNTY COURT
OF COMMON PLEAS,

J U D G M E N T
E N T R Y

RESPONDENT.

This cause comes before the court upon Relator's application for reconsideration of this Court's judgment dismissing his second petition for writ of mandamus and/or procedendo.

Upon consideration the Court finds that there is no provision for seeking reconsideration of a final judgment in a proceeding instituted under the court's original jurisdiction. *State ex rel. Pajestka v. Faulhaber* (1977), 50 Ohio St.2d 41; *State ex rel. Pendell v. Adams Cty. Bd. of Elections* (1988), 40 Ohio St.3d 58. Accordingly, the application is not well taken.

Case No. 3-10-07

It is therefore **ORDERED** that Relator's application for reconsideration be,
and the same hereby is, denied.

John B. Dillanowol
[Signature]
[Signature]
JUDGES

DATED: April 28, 2010
/jnc

Court of Appeals of Ohio,
Ninth District, Medina County.

STATE of Ohio, Appellee
v.
Leonard E. ROBERTSON, Appellant.

No. 07CA0120-M.
Decided Sept. 28, 2009.

Appeal from Judgment Entered in the Court of Common Pleas County of Medina, Ohio, Case No. 05-CR-0539.
Joseph F. Salzgeber, Attorney at Law, for appellant.

Dean Holman, Prosecuting Attorney, and Russel A. Hopkins, Assistant Prosecuting Attorney, for appellee.

DICKINSON, Judge.

INTRODUCTION

*1 {¶ 1} 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 subject 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 judgment and remands for a new sentencing hearing.

POST-RELEASE CONTROL

{¶ 2} 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.

{¶ 3} 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..."

{¶ 4} 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." 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.

{¶ 5} 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 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).

*2 {¶ 6} 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.

{¶ 7} In State v. Simpkins, 117 Ohio St.3d 420, 2008-Ohio-1197, 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 ¶ 20. 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 ¶ 22.

{¶ 8} In *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972, at ¶ 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 Mr. Robertson’s appeal. *Id.* at ¶ 14. It does have limited inherent authority, however, to recognize that the journal entry is a nullity and vacate the void judgment. *Id.* at ¶ 12 (quoting Van DeRyt v. Van DeRyt, 6 Ohio St.2d 31, 36 (1966)).

CONCLUSION

{¶ 9} 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, 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.

MOORE, P.J., and WHITMORE, J., concur.

Ohio App. 9 Dist., 2009.
State v. Robertson
Slip Copy, 2009 WL 3068749 (Ohio App. 9 Dist.), 2009 -Ohio- 5052

END OF DOCUMENT

(c) 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Court of Appeals of Ohio,
Third District, Auglaize County.

STATE of Ohio, Plaintiff-Appellee,
v.
Stephen M. LESTER, Defendant-Appellant.

No. 2-06-31.
Decided Aug. 20, 2007.

Criminal Appeal from Common Pleas Court.

David H. Bodiker, Ohio Public Defender, Kenneth R. Spiert, Columbus, OH, for Appellant.

Amy Otley Fox, Assistant Prosecuting Attorney, Wapakoneta, OH, for Appellee.

PRESTON, J.

*1 ¶ 1 Defendant-appellant, Stephen Lester, appeals the sentence imposed by the Auglaize County Court of Common Pleas. For the following reasons, we affirm the sentence on the misdemeanor offense but vacate the sentence as to the felony offenses and remand to the trial court for further proceedings consistent with this opinion.

¶ 2 On January 24, 2006, Lester waited in a parking lot for his former girlfriend, Angela Gierhart, at her place of employment. After Angela arrived, Lester approached her parked car and tried to force Angela into his car. Angela resisted Lester's attempts. According to Angela's testimony, Lester threatened to kill Gierhart with a knife if she screamed. At some point, Anita Byrne, one of Gierhart's co-workers, drove into the parking lot and Angela ran to Byrne's vehicle. Lester then picked up Angela's purse and left the parking lot.

¶ 3 The Auglaize County Grand Jury indicted Lester on the following: count one of robbery, in violation of R.C. 2911.02(A)(2), and a second degree felony; count two of abduction, in violation of R.C. 2905.02(A)(1), and a third degree felony; count three of theft, in violation of R.C. 2913.02(A)(1), and a fifth degree felony; count four of attempted felonious assault, in violation of R.C. 2923.02(A)/2903.11(A)(1), and a third degree felony; and count five of aggravated menacing, in violation of R.C. 2903.21(A), and a first degree misdemeanor.

¶ 4 A jury trial was held on May 15 and 16. The jury found Lester not guilty of the robbery charge but found him guilty of the remaining charges.

¶ 5 The trial court subsequently sentenced Lester to five years imprisonment on count two, six months imprisonment on count three, three years imprisonment on count four, and six months imprisonment on count five. The trial court ordered that counts two and four be served consecutive to each other. The trial court also ordered that counts three and five be served concurrent to each other and concurrent to count two for an aggregate prison sentence of eight years. The trial court also ordered Lester to pay restitution in the amount of \$1,328.98, court costs, costs of prosecution, and any fees permitted under R.C. 2929.18(A)(4). In the sentencing entry, the trial court further stated,

[t]he Court has further notified the Defendant that Post Release Control in this case is MANDATORY for FIVE (5) YEARS, as well as the consequences for violating conditions of Post Release Control imposed by the Parole Board under Ohio Revised Code § 2967.28. The Defendant is ORDERED to serve as part of this sentence any term of Post Release Control imposed by the Parole Board, and any prison term for violation of that Post Release Control.

¶ 6 It is from this sentence that Lester appeals and asserts four assignments of error for our review. We will address Lester's second assignment of error first.

ASSIGNMENT OF ERROR NO. II

The trial court violated Mr. Lester's rights to due process under the Ohio and United States Constitutions, as well as his rights under R.C. 2967.28, when it ordered him to serve an illegal, mandatory term of post-release control of five years for a third-degree felony. (7/10/06 Entry, 2.)

*2 ¶ 7 Lester argues, in his second assignment of error, that the trial court's sentencing entry erroneously stated that Lester was subject to a mandatory five year term of post release control instead of the three year term of post release control required for a third degree felony under R.C. 2967.28(B)(3).

¶ 8 R.C. 2967.28(B) provides in part, " * * * a period of post release control required by this division for an offender *shall* be one

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

{¶ 9} Lester was convicted of abduction, a third degree felony; theft, a fifth degree felony; attempted felonious assault, a third degree felony; and aggravated menacing, a first degree misdemeanor. Since Lester was convicted of two felonies of the third degree that were not felony sex offenses and Lester caused or threatened physical harm to a person, Lester was subject to a mandatory three year term of post release control. See R.C. 2967.28(B)(3). In addition, Lester was convicted of a fifth degree felony, which was subject to post release control of “up to three years”. See R.C. 2967.28(C).

{¶ 10} The trial court notified Lester regarding post release control at both the sentencing hearing and in the sentencing entry, but the notifications were inconsistent. At the sentencing hearing, the trial court notified Lester that he was subject to a mandatory term of *three* years post release control; however, in the sentencing entry, the trial court notified Lester that he was subject to a mandatory term of *five* years of post release control.

{¶ 11} The Ohio Supreme Court has recently held,

[w]hen a 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; the sentence must be vacated and the matter remanded to the trial court for resentencing. The trial court must resentence the offender as if there had been no original sentence. 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.

State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250, at ¶ 16 (trial court failed to notify the offender of post release control at the sentencing hearing).

{¶ 12} Similarly, we hold that since the sentencing entry notified Lester that he was subject to a mandatory term of five years of post release control, when the statute provides for a mandatory three year term of post release control for the third degree felonies and up to three years of post release control for a fifth degree felony, Lester's sentence as to the felony offenses is void. Thus, we vacate the sentence as to the felony offenses and remand to the trial court for resentencing. However, we affirm the sentence imposed by the trial court as to the misdemeanor offense in that post release control is not applicable.

ASSIGNMENT OF ERROR NO. I

***3 When the trial court ordered Mr. Lester, who was subject to a mandatory term of post-release control, to serve as part of his sentence “any term” of post-release control imposed by the Parole Board, it violated the separation of powers doctrine and deprived Mr. Lester of his rights to due process under the Ohio And United States Constitutions and his statutory rights under R.C. 2967.28. (7/10/06 Entry, 2.)**

ASSIGNMENT OF ERROR NO. III

The trial court violated Mr. Lester's rights to due process and equal protection under the Ohio and United States Constitutions and abused its discretion by sentencing him to pay restitution under R.C. 2929.18(A)(1) and fines and costs under R.C. 2929.18(A)(4) without considering Mr. Lester's present or future ability to pay those sanctions, as required by R.C. 2929.19(B). (Sent. Tr. Pp. 3, 5-6, 25.)

ASSIGNMENT OF ERROR NO. IV

When the trial court sentenced Mr. Lester to non-minimum, maximum, and consecutive prison terms based on facts not found by the jury or admitted by Mr. Lester, it violated his rights guaranteed by the Sixth Amendment to the United States Constitution and by Article One, Sections Five and Ten of the Ohio Constitution. (Sent. Tr. p. 25; 7/10/06 Entry.)

{¶ 13} Based on our disposition of Lester's second assignment of error, we find that Lester's first, third, and fourth assignments of error are now moot.

{¶ 14} The sentence imposed by the Auglaize County Court of Common Pleas is affirmed as to the misdemeanor offense; however, the sentence is vacated as to the felony offenses and the cause is remanded for further proceedings consistent with this opinion.
Judgment Affirmed in part; Sentence Vacated in part and cause Remanded.
ROGERS, P.J., and SHAW, J., concur.

Court of Appeals of Ohio,
Ninth District, Summit County.

STATE of Ohio, Appellee
v.
Joseph R. BEDFORD, Appellant.

No. 24431.
Decided Aug. 12, 2009.

Background: Defendant was convicted by jury in the Court of Common Pleas, Summit County, No. CR 08 05 1623, of domestic violence and disrupting public services. Defendant appealed.

Holdings: The Court of Appeals, Clair E. Dickinson, P.J., held that:

- (1) mandatory three-year post-release control provision did not apply to defendant;
- (2) journal entry erroneously imposing mandatory three-year post-release control on defendant was void;
- (3) void journal entry was not a final, appealable order; overruling, State v. Vu, 2009 WL 1743200; and
- (4) Court of Appeals had inherent authority to vacate void, non-final journal entry, but not to consider merits of defendant's appeal.

Judgment vacated; cause remanded.

Whitmore, J. concurred, with opinion.

Belfance, J. concurred, with opinion.

West Headnotes

[1] KeyCite Citing References for this Headnote

350H Sentencing and Punishment

350HIX Probation and Related Dispositions

350HIX(C) Factors Related to Offense

350Hk1843 k. Assault and Battery.

350H Sentencing and Punishment KeyCite Citing References for this Headnote

350HIX Probation and Related Dispositions

350HIX(C) Factors Related to Offense

350Hk1865 k. Other Particular Offenses.

Statute providing that three-year post-release control was mandatory for third degree felony that was not a felony sex offense and in commission of which offender caused or threatened physical harm to a person did not apply to defendant, who had been convicted of domestic violence and disrupting public services and sentenced to two years in prison, as these offenses were fourth degree felonies. R.C. §§ 2929.14(F)(2), 2967.28(B)(3), (C).

[2] KeyCite Citing References for this Headnote

110 Criminal Law

110XXIII Judgment

110k990 Requisites and Sufficiency of Judgment

110k990.1 k. In General.

Defendant's sentence on his convictions for domestic violence and disrupting public services of two years in prison, followed by three-year period of mandatory post-release control, was void, as was the journal entry in which trial court attempted to impose this sentence, where trial

court erroneously imposed mandatory post-release control on defendant in violation of post-release control statutes. R.C. §§ 2929.14(F)(2), 2967.28(B)(3), (C).

[3] KeyCite Citing References for this Headnote

110 Criminal Law

110XXIV Review

110XXIV(C) Decisions Reviewable

110k1021 Decisions Reviewable

110k1023 Appealable Judgments and Orders

110k1023(11) k. Requisites and Sufficiency of Judgment or Sentence.

Void journal entry erroneously imposing mandatory three-year period of post-release control on defendant who had been convicted of domestic violence and disrupting public services and sentenced to two years in prison was not a final, appealable order, as effect of void journal entry was that it was a mere nullity and parties were in same position as if there had been no journal entry; overruling, State v. Vu, 2009 WL 1743200, Const. Art. 4, § 3(B)(2); R.C. §§ 2929.14(F)(2), 2967.28(B)(3), (C).

[4] KeyCite Citing References for this Headnote

110 Criminal Law

110XXIV Review

110XXIV(U) Determination and Disposition of Cause

110k1181.5 Remand in General; Vacation

110k1181.5(1) k. In General.

110 Criminal Law KeyCite Citing References for this Headnote

110XXIV Review

110XXIV(U) Determination and Disposition of Cause

110k1181.5 Remand in General; Vacation

110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters

110k1181.5(8) k. Sentence.

Court of Appeals had inherent authority to vacate void, non-final journal entry erroneously imposing mandatory three-year period of post-release control on defendant who had been convicted of domestic violence and disrupting public services and sentenced to two years in prison, but not to consider merits of defendant's appeal, and, thus, would remand matter to trial court for new sentencing hearing. Const. Art. 4, § 3(B)(2); R.C. §§ 2929.14(F)(2), 2967.28(B)(3), (C).

Appeal from Judgment Entered in the Court of Common Pleas County of Summit, Ohio, No. CR 08 05 1623.
Susan E. Poulos, attorney at law, for appellant.

Sherri Bevan Walsh, prosecuting attorney, and Heaven R. Dimartino, assistant prosecuting attorney, for appellee.

DICKINSON, Presiding Judge.

INTRODUCTION

*1 {¶ 1} 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. This Court, therefore, exercises its inherent power to vacate the void judgment and remands for a new sentencing hearing.

FINAL APPEALABLE ORDER

{¶ 2} 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, 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).

{¶ 3} 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, 893 N.E.2d 163, 2008-Ohio-3330, at ¶ 9. It has further held that "[a] judgment of conviction is a final appealable order under R.C. 2505.02 [if] it sets forth (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

[1] [2] {¶ 4} 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 post-release 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 [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...."

*2 {¶ 5} 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 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."

{¶ 6} 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.

{¶ 7} In State v. Simpkins, 117 Ohio St.3d 420, 884 N.E.2d 568, 2008-Ohio-1197, 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 ¶ 20, 884 N.E.2d 568. 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 ¶ 22, 884 N.E.2d 568.

{¶ 8} Because the trial court made a mistake 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

[3] {¶ 9} 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.

{¶ 10} "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, 909 N.E.2d 1254, 2009-Ohio-2462, at ¶ 27 (quoting State v. Bezak, 114 Ohio St.3d 94, 868 N.E.2d 961, 2007-Ohio-3250, at ¶ 12). Taking the Supreme Court 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, 2007-Ohio-3250, at ¶ 12, 114 Ohio St.3d 94, 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, 2007-Ohio-3250, at ¶ 12, 114 Ohio St.3d 94, 868 N.E.2d 961).

*3 {¶ 11} 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, 893 N.E.2d 163, 2008-Ohio-3330, 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

{¶ 12} Although the trial court's 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, 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, 215 N.E.2d 698 (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 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 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.").

{¶ 13} Exercising this Court's inherent 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, 817 N.E.2d 864, 2004-Ohio-6085, 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, 884 N.E.2d 568, 2008-Ohio-1197, 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 ¶ 22, 884 N.E.2d 568. Furthermore, in State v. Foster, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, 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 ¶ 103, 845 N.E.2d 470 (citing Jordan, 2004-Ohio-6085, at ¶ 23, 104 Ohio St.3d 21, 817 N.E.2d 864).

*4 {¶ 14} 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 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

{¶ 15} 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 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.

WHITMORE, J. concurs, saying,

{¶ 16} 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, according 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.

{¶ 17} Unfortunately, in *Vu*, as in this case, the trial court's improper post-release control notification "leads 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, 893 N.E.2d 163, 2008-Ohio-3330, at ¶ 16. *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.

*5 ¶ 18} 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 *Yu* 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 be "caught in limbo" applies with equal force here. *Baker* at ¶ 16.

¶ 19} 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 ¶ 20.
BELFANCE, J. concurs, Saying.

¶ 20} I concur. I write separately to note that I also share the concerns expressed by Judge Whitmore in her concurring opinion.

Baldwin's Ohio Revised Code Annotated CurrentnessTitle XXIX. Crimes--Procedure (Refs & Annos)Chapter 2967 Pardon; Parole; Probation (Refs & Annos)

2967.28 Post-release control

(A) As used in this section:

(1) "Monitored time" means the monitored time sanction specified in section 2929.17 of the Revised Code.(2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

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

(B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. If a court imposes a sentence including a prison term of a type described in this division on or after 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 statementthat the offender's sentence includes this requirement does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under this division. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(c) of section 2929.19 of the Revised Code regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of section 2929.14 of the Revised Code a statement regarding post-release control. Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of post-release control required by this division for an offender shall be of one of the following periods:

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

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

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

(C) Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(d) of section 2929.19 of the Revised Code regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(2) of section 2929.14 of the Revised Code a statement regarding post-release control. Pursuant to an agreement entered into under section 2967.29 of the Revised Code, a court of common pleas or parole board may impose sanctions or conditions on an offender who is placed on post-release control under this division.(D)(1) Before the prisoner is released from imprisonment, the parole board or, pursuant to an agreement under section 2967.29 of the Revised Code, the court shall impose upon a prisoner described in division (B)(2)(b) of section 5120.031 or in division (B)(1) of section 5120.032 of the Revised Code, one or more post-release control sanctions to apply during the prisoner's period of post-release control. Whenever the board or court imposes one or more post-release control sanctions upon a prisoner, the board or court, in addition to imposing the sanctions, also shall include as a condition of the post-release control that the offender not leave the state without permission of the court or the offender's parole or probation officer and that the offender abide by the law. The board or court may impose any other conditions of release under a post-release control sanction that the board or court considers appropriate, and the conditions of release may include any community residential sanction, community nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to sections 2929.16, 2929.17, and 2929.18 of the Revised Code. Prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under this division, the parole board or court shall review the prisoner's criminal history, all juvenile court adjudications finding the prisoner, while a juvenile, to be a delinquent child, and the record of the prisoner's conduct while imprisoned. The parole board or court shall consider any recommendation regarding post-release control sanctions for the prisoner made by the office of victims' services. After considering those materials, the board or court shall determine, for a prisoner described in division (B) of this section, division (B)(2)(b) of section 5120.031, or division (B)(1) of section 5120.032 of the Revised Code, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances or, for a prisoner described in division (C) of this section, whether a post-release control sanction is necessary and, if so, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances. In the case of a prisoner convicted of a felony of the fourth or fifth degree other than a felony sex offense, the board or court shall presume that monitored time is the appropriate post-release control sanction unless the board or court determines that a more restrictive sanction is warranted. A post-release control sanction imposed under this division takes effect upon the prisoner's release from imprisonment.Regardless of whether the prisoner was sentenced to the prison term prior to, on, or after July 11, 2006, prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under this division, the parole board shall notify the prisoner that, if the prisoner violates any sanction so imposed or any condition of post-release control described in division (B) of section 2967.131 of the Revised Code that is imposed on the prisoner, the parole board may impose a prison term of up to one-half of the stated prison term originally imposed upon the prisoner.(2) At any time after a prisoner is released from imprisonment and during the period of post-release control applicable to the releasee, the adult parole authority or, pursuant to an agreement under section 2967.29 of the Revised Code, the court may review the releasee's behavior under the post-release control sanctions imposed upon the releasee under this section. The authority or court may determine, based upon the review and in accordance with the standards established under division (E) of this section, that a more restrictive or a less restrictive sanction is appropriate and may impose a different sanction. The authority also may recommend that the parole board or court increase or reduce the duration of the period of post-release control imposed by the court. If the authority recommends that the board or court increase the duration of post-release control, the board or court shall review the releasee's behavior and may increase the duration of the period of post-release control imposed by the court up to eight years. If the authority recommends that the board or court reduce the duration of control for an offense described in division (B) or (C) of this section, the board or court shall review the releasee's behavior and may reduce the duration of the period of control imposed by the court. In no case shall the board or court reduce the duration of the period of control imposed for an offense described in division (B)(1) of this section to a period less than the length of the stated prison term originally imposed, and in no case shall the board or court permit the releasee to leave the state without permission of the court or the releasee's parole or probation officer.

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

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

2929.11 of the Revised Code and that are appropriate to the needs of releasees;

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

(3) Establish standards to be used by the parole board in reducing the duration of the period of post-release control imposed by the court when authorized under division (D) of this section, in imposing a more restrictive post-release control sanction than monitored time upon a prisoner convicted of a felony of the fourth or fifth degree other than a felony sex offense, or in imposing a less restrictive control sanction upon a releasee based on the releasee's activities including, but not limited to, remaining free from criminal activity and from the abuse of alcohol or other drugs, successfully participating in approved rehabilitation programs, maintaining employment, and paying restitution to the victim or meeting the terms of other financial sanctions:

(4) Establish standards to be used by the adult parole authority in modifying a releasee's post-release control sanctions pursuant to division (D)(2) of this section:

(5) Establish standards to be used by the adult parole authority or parole board in imposing further sanctions under division (F) of this section on releasees who violate post-release control sanctions, including standards that do the following:

(a) Classify violations according to the degree of seriousness;

(b) Define the circumstances under which formal action by the parole board is warranted;

(c) Govern the use of evidence at violation hearings;

(d) Ensure procedural due process to an alleged violator;

(e) Prescribe nonresidential community control sanctions for most misdemeanor and technical violations;

(f) Provide procedures for the return of a releasee to imprisonment for violations of post-release control.

(F)(1) Whenever the parole board imposes one or more post-release control sanctions upon an offender under this section, the offender upon release from imprisonment shall be under the general jurisdiction of the adult parole authority and generally shall be supervised by the field services section through its staff of parole and field officers as described in section 5149.04 of the Revised Code, as if the offender had been placed on parole. If the offender upon release from imprisonment violates the post-release control sanction or any conditions described in division (A) of section 2967.131 of the Revised Code that are imposed on the offender, the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction shall report the violation directly to the adult parole authority or to the officer of the authority who supervises the offender. The authority's officers may treat the offender as if the offender were on parole and in violation of the parole, and otherwise shall comply with this section.

(2) If the adult parole authority or, pursuant to an agreement under section 2967.29 of the Revised Code, the court determines that a releasee has violated a post-release control sanction or any conditions described in division (A) of section 2967.131 of the Revised Code imposed upon the releasee and that a more restrictive sanction is appropriate, the authority or court may impose a more restrictive sanction upon the releasee, in accordance with the standards established under division (E) of this section or in accordance with the agreement made under section 2967.29 of the Revised Code, or may report the violation to the parole board for a hearing pursuant to division (F)(3) of this section. The authority or court may not, pursuant to this division, increase the duration of the releasee's post-release control or impose as a post-release control sanction a residential sanction that includes a prison term, but the authority or court may impose on the releasee any other residential sanction, nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to sections 2929.16, 2929.17, and 2929.18 of the Revised Code.

(3) The parole board or, pursuant to an agreement under section 2967.29 of the Revised Code, the court may hold a hearing on any alleged violation by a releasee of a post-release control sanction or any conditions described in division (A) of section 2967.131 of the Revised Code that are imposed upon the releasee. If after the hearing the board or court finds that the releasee violated the sanction or condition, the board or court may increase the duration of the releasee's post-release control up to the maximum duration authorized by division (B) or (C) of this section or impose a more restrictive post-release control sanction. When appropriate, the board or court may impose as a post-release control sanction a residential sanction that includes a prison term. The board or court shall consider a prison term as a post-release control sanction imposed for a violation of post-release control when the violation involves a deadly weapon or dangerous ordnance, physical harm or attempted serious physical harm to a person, or sexual misconduct, or when the releasee committed repeated violations of post-release control sanctions. Unless a releasee's stated prison term was reduced pursuant to section 5120.032 of the Revised Code, the period of a prison term that is imposed as a post-release control sanction under this division shall not exceed nine months, and the maximum cumulative prison term for all violations under this division shall not exceed one-half of the stated prison term originally imposed upon the offender as part of this sentence. If a releasee's stated prison term was reduced pursuant to section 5120.032 of the Revised Code, the period of a prison term that is imposed as a post-release control sanction under this division and the maximum cumulative prison term for all violations under this division shall not exceed the period of time not served in prison under the sentence imposed by the court. The period of a prison term that is imposed as a post-release control sanction under this division shall not count as, or be credited toward, the remaining period of post-release control.

If an offender is imprisoned for a felony committed while under post-release control supervision and is again released on post-release control for a period of time determined by division (F)(4)(d) of this section, the maximum cumulative prison term for all violations under this division shall not exceed one-half of the total stated prison terms of the earlier felony, reduced by any prison term administratively imposed by the parole board or court, plus one-half of the total stated prison term of the new felony.

(4) Any period of post-release control shall commence upon an offender's actual release from prison. If an offender is serving an indefinite prison term or a life sentence in addition to a stated prison term, the offender shall serve the period of post-release control in the following manner:

(a) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under a life sentence or an indefinite sentence, and if the period of post-release control ends prior to the period of parole, the offender shall be supervised on parole. The offender shall receive credit for post-release control supervision during the period of parole. The offender is not eligible for final release under section 2967.16 of the Revised Code until the post-release control period otherwise would have ended.

(b) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under an indefinite sentence, and if the period of parole ends prior to the period of post-release control, the offender shall be supervised on post-release control. The requirements of parole supervision shall be satisfied during the post-release control period.

(c) If an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last, as determined by the parole board or court. Periods of post-release control shall be served concurrently and shall not be imposed consecutively to each other.

(d) The period of post-release control for a releasee who commits a felony while under post-release control for an earlier felony shall be the longer of the period of post-release control specified for the new felony under division (B) or (C) of this section or the time remaining under the period of post-release control imposed for the earlier felony as determined by the parole board or court.

CREDIT(S)

2008 H 130, eff. 4-7-09; 2006 H 137, eff. 7-11-06; 2002 H 510, eff. 3-31-03; 2002 H 327, eff. 7-8-02; 1999 S 107, eff. 3-23-00; 1997 S 111, eff. 3-17-98; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96)

substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant (Illinois v. Gates [1983], 462 US 213, followed): (decided under former analogous section) State v. George, 45 Ohio St. 3d 325, 544 N.E.2d 640 (1989).

Surrounding curtilage

A warrant to search a dwelling "and surrounding curtilage" includes the right to search an automobile parked on the driveway next to the residence: (decided under former analogous section) State v. Tewell, 9 Ohio App. 3d 330, 9 Ohio B. 597, 460 N.E.2d 285 (1983).

Terry frisk for weapons

Although the search warrant did not specifically authorize a search for weapons, the trial court could have concluded that it was reasonable for the police, out of concern for their own safety, to perform a Terry frisk for weapons upon anyone present in a suspected crack house. The affidavit for the warrant was more than a conclusory "bare bones" affidavit where it stated the basis of the informant's information and vouched for his reliability: (decided under former analogous section) State v. Taylor, 82 Ohio App. 3d 434, 612 N.E.2d 728 (1992).

Two search warrants

Where two search warrants concerning the same defendant were issued a few hours apart by the same judge, the affidavits could be considered together in determining the lawfulness of the second warrant: (decided under former analogous section) State v. Hillegas, 144 Ohio App. 3d 108, 759 N.E.2d 803 (2001).

Unreasonable searches and seizures

United States Constitution amend IV's protection against unreasonable searches and seizures is implicated by a claim that the landlord of a mobile home park and law enforcement officers dispossessed a tenant by physically tearing the tenant's trailer home from its foundation and towing it to another lot: (decided under former analogous section) Soldal v. Cook County, 506 U.S. 56, 113 S. Ct. 538, 121 L. Ed. 2d 450, 61 USLW 4019 (1992).

Unsigned search warrant

A search warrant is void ab initio if not signed by a judge prior to the search: (decided under former analogous section) State v. Williams, 57 Ohio St. 3d 24, 565 N.E.2d 563 (1991).

Validity of search warrant

— Police officer voluntarily admitted for controlled buy

Where a police informant is voluntarily admitted to an apartment as a buyer of illegal drugs and he effects a "controlled buy" in the ordinary course of the defendants' drug-selling business, a search warrant based upon an affidavit containing the informant's first-hand observations is valid (Maryland v. Macon [1985], 472 US 463, followed): (decided under former analogous section) State v. Freeman, 32 Ohio App. 3d 42, 513 N.E.2d 1354 (1986).

Warrant authorizing search of all persons found at particular house

A warrant authorizing a search of all persons found at a particular house and their vehicles is invalid: (decided under former analogous section) State v. Tucker, 98 Ohio App. 3d 308, 648 N.E.2d 557 (1994).

Warrant authorizing search of anyone found in residence

A warrant authorizing a search for drugs of anyone found in a residence extended to a resident who was approaching the premises in order to reenter: (decided under former analogous section) State v. Forts, 107 Ohio App. 3d 403, 665 N.E.2d 1007 (1995).

Warrantless search

— Constitutionality

Where an accused is removed from one part of a house, suspected of harboring law breakers, to another room and arrested, a warrantless search of an area, as well as closed containers found therein, separate and apart from the room in which he was found or arrested, under the facts of this case, violates his rights protected by USConst amend IV and XIV: (decided under former analogous section) Centerville v. Smith, 43 Ohio App. 2d 3, 72 Ohio Op. 2d 155, 332 N.E.2d 69 (1973).

Warrantless search of baggage

Where the facts surrounding a warrantless search of baggage, and seizure of evidence discovered therein, indicate that the search in question was instigated by private individuals, for private purposes, and that the minimal police participation which did occur was done for purposes of protection of the public safety and not with the intent of gathering evidence to be used in a criminal prosecution or otherwise evading constitutional protections, then the search is a private undertaking for purposes of USConst amend IV and contraband evidence, thereby coming within the "plain view" of police officers having a legitimate right to be present, is not subject to exclusion at trial under USConst amend IV: (decided under former analogous section) State v. Morris, 42 Ohio St. 2d 307, 71 Ohio Op. 2d 294, 329 N.E.2d 85 (1975).

Who may execute search warrant

A search warrant must be executed by the officer or officers to whom it is directed. Articles seized in an invalid execution of a search warrant should be suppressed: (decided under former analogous section) State v. Porter, 53 Ohio Misc. 25, 7 Ohio Op. 3d 343, 373 N.E.2d 1296 (CP 1977).

RULE 42 Reserved.

RULE 43. Presence of the Defendant

(A) **Defendant's presence.** The defendant shall be present at the arraignment and every stage of the trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes.

(B) **Defendant excluded because of disruptive conduct.** Where a defendant's conduct in the courtroom is so disruptive that the hearing or trial cannot reasonably be conducted with his continued presence, the hearing or trial may proceed in his absence, and judgment and sentence may be pronounced as if he were present. Where the court determines that it may be essential to the preservation of the constitutional rights of the defendant, it may take such steps as are required for the communication of the courtroom proceedings to the defendant.

Cross-Refere
(When accused
2945.12.

Text Discussi
Defendant's p:
Exceptions.
Generally, C
Removal for
§ 24.301
Wearing pr
§ 24.301.
View of the pre
Ohio Cri

Forms
Defendant rep:

Research Aids
Presence of de
O-Jur3d: Cr
3251, 3374
Am-Jur2d: C

ALR
Absence of acc
ALR2d 456
Absence of conv
of motion
ALR2d 835
Disruptive cond
for mistrial
Exclusion or abs
case, from c
and attorne
ALR2d 111

Giving, in accus
after submi
Power to try, in
68 ALR2d 6
Propriety and p
otherwise pl
state crimin
Right of accused
640.

Right of accused
other hearing
concerning
sufficiency of sh
trial for purp
rizing contin
21 ALRFed
Validity of jury sei
conducting o
final jury par
Voluntary absence
59 ALR5th 1

Law Review
State v. Abrams: R
— additional
N.U.L. Rev.

CA

Presence of defendan
Priority of the con
Normalizing sente

Cross-References to Related Sections

When accused may be tried in his absence, RC §§ 2938.12, 2945.12.

Text Discussion

Defendant's presence —

Exceptions. **Ohio Crim. Prac. & Pro.** § 24.301.2

Generally. **Ohio Crim. Prac. & Pro.** § 24.301

Removal for disruptive conduct. **Ohio Crim. Prac. & Pro.** § 24.301.3

Wearing prison clothes. **Ohio Crim. Prac. & Pro.** § 24.301.4

View of the premises — procedure — presence of defendant. **Ohio Crim. Prac. & Pro.** § 47.201

Forms

Defendant represents himself. 4 OJI 402.11

Research Aids

Presence of defendant:

O-Jur3d: Crim L §§ 379, 384, 385, 387, 392, 2651, 2812, 2851, 3374

Am-Jur2d: Crim L § 1098 et seq; Trial § 226

ALR

Absence of accused at return of verdict in felony case. 23 ALR2d 456.

Absence of convicted defendant during hearing or argument of motion for new trial or in arrest of judgment. 69 ALR2d 835.

Disruptive conduct of accused in presence of jury as ground for mistrial or discharge of jury. 89 ALR3d 960.

Exclusion or absence of defendant, pending trial of criminal case, from courtroom, or from conference between court and attorneys, during argument on question of law. 85 ALR2d 1111.

Giving, in accused's absence, additional instruction to jury after submission in felony case. 94 ALR2d 270.

Power to try, in his absence, one charged with misdemeanor. 68 ALR2d 638.

Propriety and prejudicial effect of gagging, shackling, or otherwise physically restraining accused during course of state criminal trial. 90 ALR3d 17.

Right of accused to be present at polling of jury. 49 ALR2d 640.

Right of accused to be present at suppression hearing or at other hearing or conference between court and attorneys concerning evidentiary questions. 23 ALR4th 955.

Efficiency of showing defendant's "voluntary absence" from trial for purposes of Criminal Procedure Rule 43, authorizing continuance of trial notwithstanding such absence. 21 ALRFed 906.

Ability of jury selection as affected by accused's absence from conducting or procedures for selection and impaneling of final jury panel for specific case. 33 ALR4th 429.

Voluntary absence of accused when sentence is pronounced. 59 ALR5th 135.

Review

v. Abrams: harmless error in the absence of the accused — additional instructions. William H. Harriger. 2 Ohio N.U.L. Rev. 596 (1975).

CASE NOTES AND OAG**INDEX**

Absence of defendant voluntary
Authority of the court
Journalizing sentence

Court giving instructions to jury in absence of accused

Court journalizes different sentences

Court reporter sent in jury deliberation room

Defendant placed under physical restraint during trial

Defendant required to be present at every stage of the proceedings

Defendant's right to be present at every stage of trial

Error

— Presence of defendant

In-person arraignment

Nunc pro tunc correction to defendant's sentence

Presence of defendant

— Amending terms of probation

— Forfeiture hearing

— Forfeiture proceedings

— Increasing sentence

— Judge communicating with jury

— Motion for joinder

— Resentencing

— Waiver

Requirements of trial court

— Defendant incapable of conducting a proper defense

Right to appear without physical restraints

Right to be present at an in camera hearing

Trial and sentencing in absentia

Voluntary absence, what constitutes

Waiver of right to final argument

When jury trial commences

Absence of defendant voluntary

The court must determine that defendant's absence is voluntary before it may proceed with the trial. If counsel has no explanation, the presumption that defendant knows of his obligation to attend is un rebutted: *State v. Carr*, 104 Ohio App. 3d 699, 663 N.E.2d 341 (1995).

Authority of the court**— Journalizing sentence**

Court may not pronounce one sentence in open court and then journalize a different sentence after the sentencing hearing is concluded: *State v. Stevenson*, 1995 Ohio App. LEXIS 3482 (8th Dist. 1995).

Court giving instructions to jury in absence of accused

While it is error for the trial court to give instructions to the jury in the absence of the accused, the record must affirmatively reveal defendant's absence. However, certain communications with the jury during the deliberation stage may be harmless, notwithstanding the absence of the accused, where his counsel was present during the giving of the additional instructions and the instructions given were not erroneous: *State v. Blackwell*, 16 Ohio App. 3d 100, 16 Ohio B. 106, 474 N.E.2d 671 (1984).

Court journalizes different sentences

It is a violation of CrimR 43(A) where the court announces one sentence in open court and then journalizes a different sentence: *State v. Thomas*, 1990 Ohio App. LEXIS 5969 (3rd Dist. 1990).

Court reporter sent in jury deliberation room

It is highly prejudicial to defendant for the trial court to send the court reporter into the jury deliberation room, out of the presence of the defendant, defendant's counsel and the trial judge himself, for the purpose of responding to a question posed by the jury: *State v. Motley*, 21 Ohio App. 3d 240, 21 Ohio B. 256, 486 N.E.2d 1259 (1985).

Defendant placed under physical restraint during trial

When the court determines a defendant should be placed under physical restraint during trial, the factors upon which