

ORIGINAL

IN THE SUPREME COURT OF OHIO

ERIC QUALLS
APPELLANT,
VS
STATE OF OHIO
APPELLEE.

:
:
:
:

S.Ct. NO. 11-0202
APA NO. 10 CA 8
TIAL Ct NO. 02-CR-020

NOTICE OF CERTIFICATION OF CONFLICT
(PURSUANT TO S. Ct. Prac. R. 4.1)

Comes now the Appellant, Mr. Eric Qualls who while acting in Pro Se, do hereby give Notice of his intention to file for the Certification Of Conflict in the above captioned case.

The Appellant asserts that this case did not originate in the Court of Appeals and does involve a substantial Constitutional question.

RESPECTFULLY SUBMITTED

Eric A. Qualls
429625 J-Dorm

ROSS CORRECTIONAL INST.
P.O. BOX 7010
CHILlicothe, OHIO 45601

FILED
FEB 03 2011
CLERK OF COURT
SUPREME COURT OF OHIO

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FEB 03 2011
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SUPREME COURT OF OHIO

CERTIFICATE OF SERVICE

I, Eric Qualls, do hereby certify that a true and correct copy of the foregoing "NOTICE OF CERTIFICATION OF CONFLICT" was delivered to the R.C.I. Mailroom, addressed to the Prosecutor for Meigs County, Ohio on this the 27th day of JAN. 2011.

Eric A. Qualls

ORIGINAL

COURT OF APPEALS

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

2011 JAN 13 AM 9:01

FILED
Diane Lynch
CLERK OF COURTS
MEIGS COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 10CA8
vs.	:	
ERIC QUALLS,	:	<u>ENTRY ON MOTION TO CERTIFY</u>
Defendant-Appellant.	:	<u>RECORD TO THE SUPREME COURT</u>

ORIGINAL

This matter comes on for consideration of the motion filed by Eric Qualls, defendant below and appellant herein, to certify our decision to the Ohio Supreme Court for review and final determination. On October 28, 2010, we affirmed the trial court's judgment that overruled appellant's motion for "De Novo Sentencing Hearing." See State v. Qualls, Meigs App. No. 10CA8, 2010-Ohio-5316.

On November 3, 2010, appellant filed a motion pursuant to App.R. 25 and asked us to certify this case to Ohio Supreme Court for review and final determination. Appellant argues that our judgment conflicts with the Ohio Supreme Court in State v. Singleton, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, and the Sixth District in State v. Lee, Lucas App. No. L-09-1279, 2010-Ohio- 1704.

Section 3(B)(4), Article IV, Ohio Constitution states that "[w]henver the judges of a court of appeals find that a judgment

upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." (Emphasis added.) As the appellee correctly points out in its memorandum contra, appellate courts do not certify alleged conflicts between its decisions and decisions of the Ohio Supreme Court. If a litigant believes an appellate court's ruling conflicts with a pronouncement of the Ohio Supreme Court, the proper remedy is to appeal that judgment to the Ohio Supreme Court.

In view of our ultimate disposition of the motion to certify, however, we believe it beneficial to explain why we find no conflict between our decision and either Singleton, supra, or its progenitor, State v. Jordan, 104 Ohio St.3d 21, 817 N.E.2d 864, 2004-Ohio-6085. Singleton and Jordan both involved situations in which the sentencing court failed to alert a defendant at a sentencing hearing to either (1) the imposition of post-release control, or (2) the ramifications of breaking post-release control. See respectively, 2004-Ohio-6985, at ¶¶2-3; 2009-Ohio-6434, at ¶4. The trial court in Jordan tried to correct those omissions in its sentencing entry, 2004-Ohio-6985, at ¶4, and the trial court in Singleton set out an erroneous notification in its sentencing entry. 2009-Ohio-6434, at ¶4.

The facts in this case, however, are almost the polar opposite. There is no question that appellant was notified of post-release control at his sentencing hearing. Indeed, he freely admitted as much. That notification was simply omitted from the sentencing entry. Does this make a difference? We believe that it does.

It is well-settled that trial courts possess the inherent authority to issue nunc pro tunc judgments to modify judgments to correctly reflect events in the record. See State v. Leone, Cuyahoga App. No. 94275, 2010-Ohio-5358, at ¶5; State v. Johnson, Scioto App. Nos. 07CA3135 & 07CA3136, 2009-Ohio-7173, at ¶11; State v. Dugan (May 28, 1998), Scioto App. No. 97CA2534. In light of appellant's admission that he was informed of post-release control at sentencing, a nunc pro tunc judgment would be an appropriate method to correct a sentencing entry to reflect that fact.

By contrast, a nunc pro tunc judgment entry would not have been appropriate in either Jordan or Singleton in which notification was absent altogether or there was a mis-notification. Nunc pro tunc judgments cannot be used to correct a mistake or to add something that was never done in the first place. See generally Johnson, supra at ¶11; State v. Jama,

Franklin App. Nos. 09AP-872 & 09AP-878, 2010-Ohio-4739, at ¶16.¹

There is no doubt that this intermediate appellate Court is bound by Ohio Supreme Court decisions, but we are reluctant to extend Jordan or Singleton beyond their specific facts to impose additional burdens on trial courts within this district.²

That said, we must agree with appellant that our decision conflicts with the Lucas County Court of Appeals in Lee. The operative facts in Lee are virtually identical to those in the case sub judice, specifically that the appellant was notified of

¹ We also note that our ruling appears to be buttressed by the Ohio Supreme's Court recent ruling in State ex rel. Carnail v. McCormick, 126 Ohio St.3d 124, 931 N.E.2d 110, 2010-Ohio-2671. Although the facts in that case are unclear as to whether the petitioner was informed of postrelease control at his sentencing hearing, notice of that control was omitted from his sentencing entry. Id. at ¶2. The Ohio Supreme Court ruled that the appellant was entitled to a writ of mandamus to compel the trial court judge to issue a new (presumably, a nunc pro tunc) sentencing entry. Id. at ¶37.

² Our First District Colleagues apparently came to the same conclusion, at least insofar as Jordan was concerned, in their affirmance of a nunc pro tunc entry to correct a sentencing judgment that failed to include the same notification of post release control that was given at sentencing. State v. Gause, 182 Ohio App.3d 143, 911 N.E.2d 977, 2009-Ohio- 2140, at ¶2. Gause, admittedly, was decided almost two months before Singleton, but it came five years after Jordan. That a nunc pro tunc judgment could be used to correct a sentencing entry, after notification of postrelease control have been given at the sentencing hearing, was so obvious to the Hamilton County Court of Appeals that they quickly disposed of the issue without a Jordan analysis.

Our conclusion is further buttressed by a Twelfth District Court of Appeals decision in State v. Harrison, Butler App. Nos. Nos. CA2009-10-272, CA2010-01-019, 2010-Ohio-2709, at ¶¶16-25, which held that a nunc pro tunc entry can be used to correct a judgment that set out erroneous information about postrelease control so that it reflects correct information given at the sentencing hearing.

post release control at the sentencing hearing, that notification was not carried over to the sentencing entry and the trial court attempted to correct that omission with a nunc pro tunc entry. 2010-Ohio-1704, at ¶¶2-3. Our colleagues in the Sixth District held that a nunc pro tunc entry is insufficient to comply with Singleton. 2010-Ohio-1704, at ¶11.

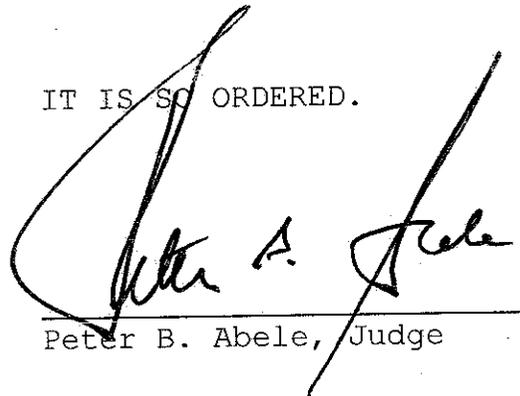
The appellee counters that no conflict exists between this case and Lee because Lee involved arguments advanced pursuant to R.C. 2828.191, whereas the trial court here did not cite that statute. We, however, believe that this is a distinction without substance. Both the appellant in Lee and appellant in this case were sentenced well before the operative date of that statute and, thus, regardless of what was specifically argued, they are in the same position. Both were warned about postrelease control at sentencing, but neither had those warnings carried over into the sentencing entry. We find that a nunc pro tunc entry is sufficient to correct the error, but the Lee court disagreed.

In order for us to certify a conflict to the Ohio Supreme Court, an actual conflict must exist on a rule of law and not just on the facts. See Whitelock v. Gilbane Bldg. Co. (1993), 66 Ohio St.3d 594, 596, 613 N.E.2d 1032, 1034; also see State v. Lewis (Jun. 24, 1998), Lawrence 97CA51. After our review of Lee, supra, we believe that our decision conflicts with the legal principle from that case.

We therefore certify to the Ohio Supreme Court the following question: If a defendant is notified about postrelease control at the sentencing hearing, but that notification is inadvertently omitted from the sentencing entry, can that omission be corrected with a nunc pro tunc entry?

Harsha, P.J. & McFarland, J.: Concur

IT IS SO ORDERED.



Peter B. Abele, Judge

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

OCT 28 AM 9:49

FILED

Diann Lynch
CLERK OF COURTS
MEIGS COUNTY, OHIO

STATE OF OHIO, :
 Plaintiff-Appellee, : Case No. 10CA8
 vs. :
 ERIC QUALLS, : DECISION AND JUDGMENT ENTRY
 Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Eric Qualls, #429-625, Ross Correctional
 Inst., P.O. Box 7010, Chillicothe, Ohio
 45601

COUNSEL FOR APPELLEE: Colleen S. Williams, Meigs County
 Prosecuting Attorney, and Matthew J.
 Donahue, Meigs County Assistant
 Prosecuting Attorney, 117 West Second
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CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:

ABELE, J.

This is an appeal from a Meigs County Common Pleas Court
judgment that denied a motion for "De Novo Sentencing Hearing"
filed by Eric Qualls, defendant below and appellant herein.

Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"WHEN A SENTENCE IS VOID AS A MATTER OF LAW
BECAUSE IT DOES NOT CONTAIN A STATUTORILY
MANDATED TERM OF 'PROPERLY IMPOSED' POST
RELEASE CONTROL, A TRIAL COURT ABUSES ITS
DISCRETION WHEN DENYING A MOTION FOR DE NOV

SENTENCING HEARING."

SECOND ASSIGNMENT OF ERROR:

"THE APPROXIMATELY EIGHT YEAR DELAY FROM THE FINDING [OF] GUILT UNTIL THE COURT IMPOSED SENTENCE CONSTITUTED AN UNNECESSARY, UNJUSTIFIED AND UNREASONABLE DELAY IN SENTENCING AND THEREFORE DIVEST[ED] THE COURT OF ITS JURISDICTION TO IMPOSE SENTENCE IN THIS CASE."

In 2002, appellant pled guilty to kidnapping and aggravated murder with a firearm specification and the trial court sentenced appellant to serve an aggregate prison term of thirty-three years to life. Appellant did not appeal his conviction.

In 2004, appellant filed an action in this Court and sought a writ of mandamus to compel the Meigs County Prosecutor to turn over certain records. We sua sponte dismissed his petition and the Ohio Supreme Court affirmed. See State ex rel. Qualls v. Story, 104 Ohio St.3d 343, 819 N.E.2d 701, 2004- Ohio-6565.

In 2006, appellant filed a petition for postconviction relief and asked to be re-sentenced. Summary judgment was entered against him and we affirmed. See State v. Qualls, Meigs App. No. 06CA7, 2007-Ohio-3938. The Ohio Supreme Court declined to hear any further appeal on appellant's petition. See State v. Qualls, 115 Ohio St.3d 1444, 875 N.E.2d 104, 2007-Ohio-5567.

This latest round of litigation began on January 25, 2010, when appellant filed a motion for a "de novo sentencing hearing." The gist of the motion is that the trial court informed

appellant at sentencing that he is subject to five years of post-release control after he is released from prison. Appellant argued, however, that he was convicted of a "special felony," and, thus, not subject to post-release control under R.C. 2967.28.

Appellee's memorandum contra responded that post-release control was not imposed on the aggravated murder charge but, rather, on the kidnapping charge. Appellee conceded, however, that an error occurred in the sentencing entry that appellant had not raised in his motion. Although appellant was informed of post-release control at the hearing, a provision to indicate that fact was inadvertently omitted from the sentencing entry. The State requested the court issue a nunc pro tunc judgment to correct the entry and to make it conform with the actual events that transpired at the hearing.

Appellant, in turn, promptly filed a motion to dismiss the charges against him reasoning that his original sentence is invalid, and thus void, and should be held for naught. We note that more than eight years elapsed between appellant's original conviction and the new de novo hearing to which he claimed himself entitled and such delay, he asserts, is "unreasonable."

On March 29, 2010, the trial court (1) denied appellant's motion for a de novo hearing, and (2) issued a nunc pro tunc sentencing entry that included language regarding appellant's

post-release control. The court did not expressly rule upon appellant's motion for dismissal of the charges against him, but we will treat it as having been impliedly overruled.¹ This appeal followed.

I

In his first assignment of error, appellant asserts that the trial court erred by overruling his motion for a de novo hearing. Appellant's motion is based on an argument that post-release control was improperly imposed upon his conviction for aggravated murder. However, post-release control was imposed on the kidnapping count, not the aggravated murder count. Thus, the trial court correctly overruled the motion.²

¹Takacs v. Baldwin (1995), 106 Ohio App.3d 196, 209, 665 N.E.2d 736; In re Sites, Lawrence App. No. 05CA39, 2006-Ohio-3787, at ¶18, fn. 6; Kline v. Morgan (Jan. 3, 2001), Scioto App. Nos. 00CA2702 & 00CA2712.

²We note appellant should have been barred from raising this issue based on grounds of res judicata. An alleged failure to comply with Ohio's complex felony sentencing statutes could have been, and should have been, raised on appeal. Appellant, however, did not file an appeal and should be barred from raising the issue at this date. However, in State v. Simpkins, 117 Ohio St.3d 420, 884 N.E.2d 568, 2008-Ohio-1197, a majority of the Ohio Supreme Court held that a failure to impose post-release control renders a judgment void, rather than voidable, and res judicata does not apply. Id. at ¶¶21-22 & 30. Consequently, this Court and the trial court are bound by the majority opinion in Simpkins (rather than Justice Lanzinger's dissenting view). Id. at ¶¶39-52. Furthermore, a separate procedure must now be employed for sentences imposed after 2006. See State v. Singleton, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, and R.C. 2929.191.

Appellant also claims that the trial court failed to provide him with other statutory information at the sentencing hearing. However, this issue was not raised in his motion for a de novo hearing and, thus, the appellee has not had the chance to respond to that allegation. We will not consider such claims raised for the first time on appeal. State v. Musser, Ross App. No. 08CA3077, 2009-Ohio-4979, at ¶6; State v. Stephens, Pike App. No. 08CA776, 2009-Ohio-750, at ¶7.

Appellant also asserts that the trial court erred by issuing the nunc pro tunc entry. At the outset, we note that this argument is not set forth as an assignment of error. See App.R. 12(A)(1)(b). Nevertheless, in view of our policy to afford leniency to pro se litigants, see e.g. Akbar-El v. Muhammed (1995), 105 Ohio App.3d 81, 85, 663 N.E.2d 703; Besser v. Griffey (1993), 88 Ohio App.3d 379, 382, 623 N.E.2d 1326, we will consider the issue.

In his motion for de novo hearing, appellant admitted that he "was also informed that he would be subject to 5 years of Post Release Control upon his release." (Emphasis added.) The appellee also cites a portion of the hearing transcript in which the court not only informed appellant of the control, but also directed defense counsel to make sure that he understood what it meant. After appellant and counsel discussed the matter, the court asked appellant directly if he understood post-release

control" and appellant responded "Yes, sir."

Under circumstances virtually identical to those present here, our First District colleagues held:

"The original sentencing court, during sentencing, informed [defendant] that he would 'be placed on post-release control for a period of five years,' but that notification was not reflected in the sentencing entry. The court below attempted to remedy the omission by resentencing [defendant] . . . The trial court had no authority to resentence [him]. The proper remedy was to add the omitted postrelease-control language in a nunc pro tunc entry after a hearing."

State v. Gause, 182 Ohio App.3d 143, 911 N.E.2d 977, 2009-Ohio-2140, at ¶2. We agree that this is the proper remedy to employ under these circumstances and find no error on the trial court's part.

Thus, for these reasons, we hereby overrule appellant's first assignment of error.

II

In his second assignment of error, appellant asserts that the trial court erred by overruling his motion to dismiss all charges due to the "delay" in sentencing him. Again, we disagree.

In the case sub judice, there was no "delay" in sentencing. The trial court sentenced appellant in 2002. While some errors may have occurred in the sentencing entry, which apparently rendered that sentence "void," the fact remains that sentencing did in fact occur. We also note that although res judicata may

not bar appellant from raising statutory mistakes in sentencing eight years after the fact, it does bar him from challenging his conviction - a conviction entered after his guilty plea to the offenses, thereby completely admitting guilt. See Crim.R. 11(B)(1). Thus, the second assignment of error is without merit and is hereby overruled.

Having reviewed all errors assigned and argued by appellant in his brief, and having found merit in none of them, the trial court's judgment is hereby affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Common Pleas Court to carry this judgment into execution.

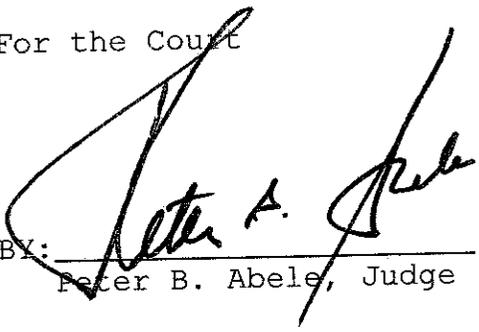
If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY: 

Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Sixth District, Lucas County.

STATE of Ohio, Appellee
v.
Johnny LEE, Jr., Appellant.

ORIGINAL

No. L-09-1279.
Decided April 16, 2010.

West KeySummary

110 Criminal Law

.110XXIII Judgment

.110k996 Amendment or Correction

.110k996(1) k. In General.

350H Sentencing and Punishment

350HII Sentencing Proceedings in General

350HII(G) Hearing

350Hk350 Advice and Warnings

350Hk354 k. Other Particular Issues.

Court's attempt to remedy its failure to include the mandatory postrelease control language in the defendant's sentence, via a nunc pro tunc entry, was improper. The defendant argued that he was entitled to resentencing because the trial court had failed to comply with the statutory sentencing requirement, that his sentence include postrelease control, when it failed to include post release sentencing in his sentencing order. While the defendant had been informed of his postrelease sentence during sentencing, the courts failure to include postrelease terms in his sentencing order could not be remedied by a later nunc pro tunc entry. The defendant was entitled to resentencing. R.C. § 2929.191.

Julia R. Bates, Lucas County Prosecuting Attorney, and Andrew J. Lastra, Assistant Prosecuting Attorney, for appellee.

Johnny Lee, Jr., pro se.

COSME, J.

*1 {¶ 1} This appeal arises from the filing by the Lucas County Court of Common Pleas of a nunc pro tunc entry attempting to correct its omission of the mandatory term of postrelease control in appellant's sentencing order. Because appellant was sentenced before the effective date of R.C. 2929.191, any defects in the mandatory notification of postrelease control require a de novo sentencing hearing consistent with the decisions of the Supreme Court of Ohio. For the reasons that follow, this matter is remanded to the trial court for a new sentencing hearing.

I. BACKGROUND

{¶ 2} Appellant pled guilty to one count of felonious assault, a second degree felony, and was sentenced to seven years of incarceration on September 17, 2003. Appellant was informed of the postrelease control during sentencing pursuant to R.C. 2929.19(B)(3), but the trial court failed to incorporate this notice into the sentencing order filed September 18, 2003.

{¶ 3} On August 12, 2009, appellant moved for resentencing arguing that the trial court had failed to comply with the statutory sentencing requirements. Without hearing, the trial court filed a nunc pro tunc entry on September 22, 2009, which states only: "Entry should reflect: Post Release Control Notice under R.C. 2929.19(B)(3) and R.C. 2967.28 was given at time

of sentencing.” FN1 This appeal followed.

FN1. Our holding in this case should not be construed as questioning the sufficiency of the notice in the nunc pro tunc entry. In *State v. Milazo*, 6th Dist. No. L-07-1264, 2008-Ohio-5137, ¶ 24, 27, citing *State v. Blackwell*, 6th Dist. No. L-06-1296, 2008-Ohio-3268, ¶ 15, this court held that an identically worded original entry of sentencing was satisfactory. Here, no notice was given in the original sentencing entry.

II. PRE-JULY 11, 2006 SENTENCES

{¶ 4} Appellant's first assignment of error asks:

{¶ 5} “Whether a nunc pro tunc order can be used to supply the omitted action of ‘mandatory’ postrelease control, *Norris v. Schotten*, 146 F.3d 314, at: 333-336 (6th Cir.1998), quoting *State v. Gruelich*, --- N.E.2d ---- (citation omitted). *see also: State v. Boswell*, 121 Ohio St.3d 575, 906 N.E.2d 422.”

{¶ 6} At the outset, the trial court is required to order postrelease control as part of the sentence for all offenders convicted of first and second-degree felonies, or violent third-degree felonies. R.C. 2929.19(B)(3). It is undisputed that the trial court notified appellant at his sentencing hearing that he would be subject to mandatory postrelease control. The trial court did not, however, include this notice in the sentencing entry.

{¶ 7} The state asserts that the nunc pro tunc entry was proper because R.C. 2929.191 provides a mechanism for a trial court to correct its own judgment entry. We disagree.

{¶ 8} In *State v. Jordan*, 104 Ohio St.3d 21, 817 N.E.2d 864, 2004-Ohio-6085, paragraph two of the syllabus, superseded by statute, *State v. Singleton*, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, the Supreme Court of Ohio held that the notice of the postrelease control requirement at sentencing is mandatory, and the trial court must also include that notice in its journal entry imposing sentence. The failure to notify a defendant about post-release control requires reversal of the sentence and a remand for resentencing.

{¶ 9} In *State v. Simpkins*, 117 Ohio St.3d 420, 884 N.E.2d 568, 2008-Ohio-1197, ¶ 6, certiorari denied (2008), --- U.S. ---, 129 S.Ct. 463, 172 L.Ed.2d 332, superseded by statute on other grounds as stated in *State v. Singleton*, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, the Supreme Court of Ohio stated: “[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, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence.”

*2 {¶ 10} Most recently, in *State v. Singleton*, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, the Supreme Court of Ohio addressed the statutory remedy to correct a failure to properly impose postrelease control. Am.Sub.H.B. No. 137, effective July 11, 2006, amended R.C. 2929.14, 2929.19, and 2967.28 and enacted R.C. 2929.191. R.C. 2929.191 established a procedure to remedy such a sentence. The court in *Singleton* noted that prior to the enactment of R.C. 2929.191, the state did not have a statutory remedy for sentences that lacked proper postrelease control. *Id.* at ¶ 25, 920 N.E.2d 958. Therefore, for those sentences that were imposed prior to the effective date of R.C. 2929.191, the de novo sentencing procedure set forth in *Singleton* should be followed. *Id.* at ¶ 26, 920 N.E.2d 958.

{¶ 11} Consistent with *Singleton*, we find that the trial court's nunc pro tunc entry was not adequate to remedy its failure to include the mandatory postrelease control language in the original sentencing order. Accordingly, appellant's first assignment of error is well-taken.

III. SENTENCING TRANSCRIPT

{¶ 12} Appellant's second assignment of error sets forth the following question:

{¶ 13} “Where the transcript of the proceedings (plea and sentencing) has been destroyed, may a reviewing court accept a belated nunc pro tunc entry which insufficiently seeks to impose a term of * [sic] undefined postrelease control as controlling as to law and fact, see: *State v. Hofman*, 2004 WL 2848938 (Ohio App. 6 Dist.), 2004-Ohio ----.”

{¶ 14} In his second assignment of error, appellant implies that the sentencing transcript has been destroyed, and the unavailability of the transcript would bar the imposition of postrelease control. The record reflects, however, that a transcript of the sentencing proceedings on September 17, 2003, is part of the record through appellant's own "Motion for 'Sentencing'" filed with the common pleas court on August 12, 2009. As such, we need not reach the question of whether the unavailability of a transcript would bar the imposition of postrelease control. Appellant's second assignment of error is moot.

IV. CONCLUSION

{¶ 15} We hold that for sentences imposed prior to the effective date of R.C. 2929.191, a defect in the postrelease control notification renders the sentence void and such actions are subject to de novo sentencing hearings.

{¶ 16} Here, the trial court failed to notify appellant-in the sentencing entry-of mandatory postrelease control. The nunc pro tunc entry is insufficient to cure the defect in notice. Because appellant was not advised of his mandatory postrelease control in the sentencing entry, the de novo sentencing procedure detailed in the decisions of the Supreme Court of Ohio is the appropriate method to correct appellant's criminal sentence which was imposed in 2003.

{¶ 17} Wherefore, based upon the foregoing, the judgment of the Lucas County Court of Common Pleas is reversed and remanded for resentencing in accordance with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

*3 JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

ARLENE SINGER, J., THOMAS J. OSOWIK, P.J., and KEILA D. COSME, J., concur.

Ohio App. 6 Dist.,2010.

State v. Lee

Slip Copy, 2010 WL 1511708 (Ohio App. 6 Dist.), 2010 -Ohio- 1704

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