

**STATE OF OHIO,**

**Appellee,**

**vs.**

**CHRISTOPHER R. MULLINS,**

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

**Court of Appeals  
Case No. 09AP-1185**

**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT CHRISTOPHER R. MULLINS**

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**MAY 02 2011**  
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**EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The circumstances of Appellant's sentence warrant review by this Court. Specifically, a period of post-release control was imposed upon Appellant in violation of his fundamental rights as guaranteed by the United States and Ohio Constitutions. Appellant was originally sentenced to a term of imprisonment, but was not notified that he would be subject to a mandatory period of post-release control. A resentencing hearing was held on the day before he was released from prison and was carried out via video conference and without the notice and waiver requirements of Rule 43 of the Ohio Rules of Criminal Procedure. This case implicates a defendant's fundamental right to be present during critical stages of proceedings against him, as well as his right to the effective assistance of counsel. Under these circumstances, this case presents a substantial constitutional question and is worthy of further review.

**STATEMENT OF THE CASE AND FACTS**

On March 23, 2004 Appellant entered a plea of guilty to one count of Rape in violation of R.C. 2907.02, a felony of the first degree. Counts two and three of the indictment were dismissed in exchange for this plea of guilty. On May 14, 2004 Appellant was sentenced to a term of six years imprisonment at the Ohio Department of Rehabilitation and Correction. However, Appellant was not notified at this hearing that he was subject to a mandatory five year period of post-release control as a consequence of his conviction.

Appellant was scheduled to be released from prison on November 25, 2009 upon completion of his sentence in this case. On November 24, 2009 a resentencing hearing was held in this matter. During the resentencing hearing Appellant was physically located at the Madison Correctional

Institute and was connected to the proceeding via a teleconferencing hookup of unknown description or capability. The record contains no indication that any party received notice of any type regarding the timing or manner of this hearing. Further, there is no waiver of Appellant's appearance at this hearing either in writing or on the record during the proceeding. Appellant's counsel failed to object to either the lack of appropriate notice given for the hearing, or to Appellant's physical absence for the hearing. The Court advised Appellant of the mandatory five-year period of post-release control and his new classification as a Tier III offender. During the hearing, the Court asked Appellant if he had anything to say regarding his resentencing. Appellant replied by asking, "I'm allowed to appeal it?" When the Court replied he was allowed, the Appellant continued, "Then I'll appeal it." The Court went on to further clarify what Appellant wished to appeal, asking, "do you want to appeal the decision today about the sentence, or do you want to maintain your appeal that they already have for your registration?" Appellant replied, "both."

Appellant is being represented by the Franklin County Public Defender's Office in a separate appellate action concerning the Constitutionality of the change in his reporting status from that of a sexually oriented offender to a Tier III offender.

On March 17, 2011, the Tenth District Court of Appeals overruled Appellant's challenge to the imposition of post-release control.

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

**Proposition of Law No. 1: Where a trial court imposes a period of post-release control in violation of the waiver and video-conference requirements of Ohio. Crim. R. 43, such post-release control is plain error imposed in violation of the defendant's rights under the Sixth Amendment to the United States Constitution, Article I, Section 10, of the Ohio Constitution.**

The United States Supreme Court has characterized the right to be present at every stage of a trial as one of the, "most basic of the rights guaranteed by the [Sixth Amendment] Confrontation Clause." *Illinois v. Allen* (1970), 397 U.S. 337, 90 S. Ct. 1057, 25 L.Ed.2d 353. This right is also enumerated in Article I, Section 10 of the Ohio Constitution and the requirements are detailed in Ohio Criminal Rule 43.

Crim. R. 43(A) requires that a defendant be present for sentencing except in very limited circumstances. When a court imposes additional sanctions in the absence of the defendant, it violates Crim.R. 43(A). The imposition of post-release control is an additional sanction. See *State v. Bryant* (Apr. 17, 2008), Cuyahoga App. No. 79841, unreported, 2002 WL 962687.

This statute grants no discretion to the trial court. The court is required to notify a defendant that post release control will be imposed at either the plea hearing or the sentencing hearing. Placing the required notice in the sentencing entry is insufficient to meet the requirements of R.C. 2929.19(B)(3). *Woods v. Telb* (2001), 89 Ohio St.3d 504, 733 N.E.2d 1103.

When a court fails to provide the required notice, some courts have held that when post release control is not explained at the hearing, but is included in the sentencing entry, as in this case, post release control is not part of the sentence. See e.g., *State v. Hart* (May 31, 2001), Cuyahoga App. No. 78170, unreported, 2001 Ohio App. LEXIS 5963. Other cases have held that the sentence

should be vacated and the matter remanded for resentencing. See also, *State v. Lattimore* (Feb. 22, 2002), Hamilton App. No. C-010488, unreported, 2002 WL 252451.

In this case the resentencing hearing was held the day prior to Appellant's scheduled release from the Department of Rehabilitation and Correction. There is no record of a waiver by Appellant of his right to personally appear at his re-sentencing hearing. Nor is there any discussion of such a waiver during the video-conference proceedings. In fact, Appellant objected to the proceeding himself by making it clear that he intended to appeal the re-sentencing hearing when afforded the opportunity to speak. Although this was not a customary speaking objection, Appellant made it clear he was not in agreement with the proceeding. However, even if he had not objected, a violation of Crim.R. 43 of this nature is plain error. See *State v. Goist* (Dec. 22, 1998) Mahoning App. No. 97 CA 127, unreported, 1998 WL 934643.

Crim.R. 43(A)(2) requires that a valid waiver be obtained either in writing or on the record, before the video-conferencing aspect of the rule may be utilized. Any waiver of this right is governed by the standard espoused in *Gideon v. Wainwright* (1963) 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, that the waiver must be knowing, intelligent and voluntary. In this case there is no waiver; therefore Appellant's physical presence was required at the re-sentencing hearing to impose a valid sentence upon him. Aside from the critical issue of a valid waiver, other important aspects of Crim.R. 43 were ignored in this proceeding. The record is devoid of any indication that any of the parties received appropriate notice of this hearing. Also, there is no indication that there was any accommodation made for Appellant to speak privately with his counsel regarding the hearing itself, or the conduct of it by video-conference. Both of these requirements must be met in order for a defendant to appear via video-conference.

The Court's failure to comply with the requirements of Crim.R. 43 violated Appellant's rights under the confrontation clause of the Sixth Amendment as applied to the states through the Fourteenth Amendment. As a result, the Court's imposition of a period of post-release control is void.

**Proposition of Law No. 2: Where a period of post-release control is imposed on a defendant in violation of the waiver and video-conference requirements of Ohio. Crim. R. 43, and where the defendant's counsel fails to object to such proceeding, the defendant has been deprived of his right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution, Article I, Section 10, of the Ohio Constitution.**

In *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373 this Court adopted the standard established by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674, for reviewing allegations of ineffective assistance of counsel. Under this standard the appellant must show that counsel's conduct fell below an objective standard of reasonableness, and that but for the errors, it is reasonably probable that the outcome of the trial would have been different. *Id.*

In *State v. Williams*, (1983), 6 Ohio St.3d 281, 452 N.E.2d 1323, two potential jurors were questioned in chambers with the judge and counsel present, but without the defendant being present. The Ohio Supreme Court held that, "the trial court's failure to ensure the appellant's presence at the voir dire proceeding was a transparent violation of both his constitutional and statutory rights." *Id.* at 286. In *Williams* the court held that the defendant's absence was harmless error. For error of a constitutional nature to be harmless, it must be "harmless-beyond a reasonable doubt." *Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. The harmless error standard

imposes the burden on the state to show that the error was harmless beyond a reasonable doubt. *United States v. Patterson* (C.A. 7, 1994), 23 F.3d 1239, 1255 (citing *United States v. Silverstein* (C.A. 7, 1984), 732 F.2d 1338, 1348, *cert. denied*, (1985), 469 U.S. 1111, 105 S.Ct. 792, 83 L.Ed.2d 785).

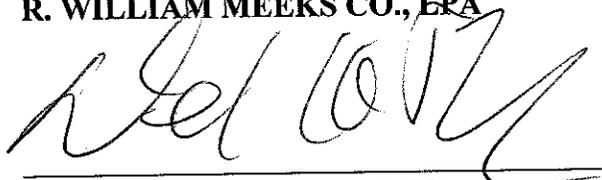
A trial counsel's failure to recognize and object to errors in imposition of post-release control do constitute ineffective assistance of counsel. In *State v. Lamb* (2004), 156 Ohio App.3d 128, 804 N.E.2d 1027, the 6<sup>th</sup> District Court of Appeals held that trial counsel's failure to recognize and object to the improper imposition of post-release control met both requirements of the standard for ineffective assistance established in *Strickland v. Washington*.

Here, Appellant's counsel failed to object to Appellant not receiving appropriate notice of the re-sentencing hearing, not being physically present for the hearing or executing a valid waiver of his appearance, the hearing being conducted by video-conference, and no provision being made for confidential communication between Appellant and his counsel. Given the timing of this hearing, and the Court's loss of jurisdiction over Appellant one day hence, counsel's failure to object in this scenario is especially egregious and fell below the standard of objective reasonableness. Had counsel objected to the haphazard conduct of this hearing, the outcome would have certainly been different. The State would have been unable to rectify the problems in time to re-sentence Appellant prior to the expiration of his sentence. Consequently, his previously imposed void sentence would have run, and he would not have been subject to the five-year period of post-release control.

**CONCLUSION**

For the reasons discussed above, this case involves a felony conviction and a substantial constitutional question. Appellant requests that this Court grant jurisdiction and allow this case so that the important issues presented herein will be reviewed on the merits.

Respectfully submitted,  
**R. WILLIAM MEEKS CO., LPA**

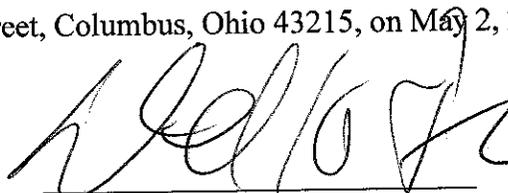


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**PROOF OF SERVICE**

I hereby certify that a true copy of the foregoing was duly served upon the Franklin County Prosecuting Attorney, 373 South High Street, Columbus, Ohio 43215, on May 2, 2011, by hand delivery.



DAVID H. THOMAS

COUNSEL FOR APPELLANT  
CHRISTOPHER R. MULLINS

**APPENDIX**

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,

Plaintiff-Appellee,

v.

Christopher R. Mullins,

Defendant-Appellant.

No. 09AP-1185  
(C.P.C. No. 03CR-11-8030)

(REGULAR CALENDAR)

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D E C I S I O N

Rendered on March 17, 2011

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*Ron O'Brien*, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

*R. William Meeks Co. L.P.A.*, and *David Thomas*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{1} Defendant-appellant, Christopher R. Mullins, appeals from a judgment of the Franklin County Court of Common Pleas pursuant to a re-sentencing hearing held to correct a prior erroneous sentence.

{2} In 2004 appellant entered a plea of guilty to one count of rape as defined in R.C. 2907.02, a felony of the first degree. In exchange for the plea, the prosecution dismissed two additional rape counts found in the indictment. On May 14, 2004, the trial

The court sentenced appellant to a term of six years imprisonment. At the time the trial court did not provide the statutorily required notice to appellant that he was subject to a mandatory five-year period of post-release control as part of his sentence.

{¶3} On November 24, 2009, one day before appellant was to be released from his original term of imprisonment, the record indicates the trial court held a de novo re-sentencing hearing to correct the earlier omission of notice regarding the imposition of post-release control. Appellant was not physically present at the hearing, participating via teleconference from the penal institution where he was held. Counsel for appellant was present at the hearing and did not object to the use of teleconferencing for appellant's participation. Neither defense counsel nor appellant himself expressed at the hearing any objection to the use of teleconferencing or any deficiency in notice either for the hearing itself or the medium by which appellant would be permitted to participate.

{¶4} Contemporaneously with the re-sentencing, the trial court reclassified appellant as a Tier III sex offender; that determination, however, is not at issue here because it is the object of a separate appeal before this court.

{¶5} Appellant brings the following two assignments of error on appeal:

[I.] The Trial Court violated Appellant's rights as Guaranteed by the Sixth Amendment to the United States Constitution, Article I, Section 10 of the Ohio Constitution and by Ohio Crim.R. 43 by resentencing Defendant in absentia to include a five-year period of post-release control. The Court erred by failing to comply with the waiver requirements or the video-conferencing requirements of Ohio Crim.R. 43 over Appellant's objection.

[II.] Appellant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution was violated when counsel failed to object to the hearing

conducted in Appellant's absence to resentence him on the day prior to his release from prison. This hearing was conducted without Appellant physically present, without appropriate notice or a valid waiver of his presence, and failed to conform to the requirements of Crim.R. 43.

{¶6} Appellant's first assignment of error asserts that the trial court erred when appellant was only present via teleconference and when appellant had not explicitly waived his right to be physically present. The record reflects that neither appellant nor his counsel raised this issue at any point during the hearing before the trial court. While appellant argues his indication of an intention to appeal constitutes an objection, the record shows he was only answering the trial court's general question of whether he wanted to appeal. Under most circumstances, failure to object to purported error results in a waiver of such error relating to a defendant's absence from a hearing. *State v. Carr* (1995), 104 Ohio App.3d 699, 703. In the absence of objected error, we review the question under a plain error analysis. "It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Glaros* (1960), 170 Ohio St. 471, paragraph one of the syllabus. "Constitutional rights may be lost as finally as any others by a failure to assert them at the proper time." *State v. Childs* (1968), 14 Ohio St.2d 56, 62.

{¶7} Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." However, an alleged error is plain error only if the error is "obvious," *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, and where, but for the error, the outcome of the proceeding would

clearly have been otherwise. *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus.

{¶8} Appellant contends that the trial court's imposition of post-release control when appellant was present only by video conference violates both Crim.R. 43(A) and his constitutionally guaranteed due process right to be physically present at every stage of his criminal proceeding.

{¶9} For the time in question, Crim.R. 43(A)(2) provides for participation of a defendant via video appearance only when the defendant waived the right to be physically present and did so in writing or on the record under Crim.R. 43(A)(3).

{¶10} It remains axiomatic that a criminal defendant has a fundamental right to be present at all critical stages of his criminal trial. Section 10, Article I of the Ohio Constitution; Crim.R. 43(A) ("defendant must be physically present at every stage of the criminal proceeding and trial"); *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶100. However, on these facts, we agree with the state that appellant has failed to demonstrate plain error because the outcome of the proceeding would not clearly have been otherwise but for the purported error. The presence of a defendant is a condition of due process "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." (Emphasis added.) *Id.*, quoting *Snyder v. Massachusetts* (1934), 291 U.S. 97, 108, 54 S.Ct. 330, 333, overruled on other grounds *Mallory v. Hogan* (1964), 378 U.S. 1, 84 S.Ct. 1489. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶90. "An accused's absence \* \* \* does not necessarily result in prejudicial or constitutional error." *Id.* A defendant's absence, therefore, even where the notice and waiver rules of Crim.R. 43(A)(2) and (3) are not found in the record, may be improper and yet not rise to the level

of plain error where the defendant suffers no prejudice. *State v. Warren*, 10th Dist. No. 10AP-376, 2010-Ohio-5718, ¶7, citing *State v. Williams* (1983), 6 Ohio St.3d 281, 285-87.

{¶11} Appellant cannot demonstrate that the outcome would have been different had he been physically present. Appellant was represented by counsel and had all other due process guarantees fulfilled. Appellant was notified of his right to appeal and responded that he intended to do so, both on the re-sentencing and his Tier III sex offender reclassification. Appellant has not demonstrated plain error because he has not articulated sufficient prejudice arising from either a purported lack of notice or from his participation via a video teleconference from his institution. Appellant's first assignment of error is accordingly overruled.

{¶12} Appellant's second assignment of error asserts that, based upon the failure to object to appellant's physical absence, counsel representing appellant at the re-sentencing hearing was ineffective and appellant was thus denied his right to representation by counsel under the United States and Ohio Constitutions.

{¶13} The United States Supreme Court established a two-pronged test for ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. First, the defendant must show that counsel's performance was outside the range of professionally competent assistance and, therefore, deficient. *Id.* at 687, 104 S.Ct. at 2064. Second, the defendant must show that counsel's deficient performance prejudiced the defense and deprived the defendant of a fair trial. *Id.* A defendant establishes prejudice if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068.

{¶14} Because the standard for finding ineffective assistance of counsel hinges, as does plain error analysis, upon a finding that the outcome of the proceedings ultimately would have been different, we cannot find that counsel was ineffective for failure to object to the purported lack of notice or the use of video conferencing to provide appellant's appearance at the re-sentencing hearing. Again, appellant cannot articulate any reason on appeal for finding that his physical presence at the hearing would have altered the outcome.

{¶15} In addition, given the nature of the proceedings, it is hard to conceive of any other outcome since the intent of the court and the prosecution was to correct an error in prior proceedings in which appellant had not been specifically advised of the imposition of post-release control. The trial court re-sentenced appellant to the same sentence as originally ordered, and the statutorily required period of post-release control was mandatory; the only additional characteristic was the explicit notice to appellant at the re-sentencing of the existence of a post-release control term as a component of his sentence. Appellant cannot argue that his physical presence would have changed the outcome of the proceeding.

{¶16} In accordance with the foregoing, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BRYANT, P.J., and TYACK, J., concur.

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IN THE COURT OF APPEALS OF OHIO

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO

TENTH APPELLATE DISTRICT

2011 MAR 18 AM 10:02

CLERK OF COURTS

State of Ohio,

Plaintiff-Appellee,

v.

Christopher R. Mullins,

Defendant-Appellant.

No. 09AP-1185  
(C.P.C. No. 03CR-11-8030)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on March 17, 2011, appellant's two assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs are assessed against appellant.

BROWN, J., BRYANT, P.J., & TYACK, J.



Judge Susan Brown