

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:
	:
Plaintiff-Appellee,	: Case No. 11-1501
	:
v.	: On certified conflict from the Stark
	: County Court of Appeals,
Donald Billeter (aka Billiter),	: Fifth Appellate District
	: Case No. 2010C400292
Defendant-Appellant.	:

APPELLANT DONALD BILLITER'S NOTICE OF CERTIFIED CONFLICT

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Stark County Prosecutor

Stephen P. Hardwick (0062932)
Assistant Public Defender
(Counsel of Record)

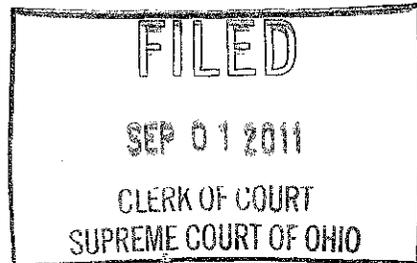
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APPELLANT DONALD BILLITER'S NOTICE OF CERTIFIED CONFLICT

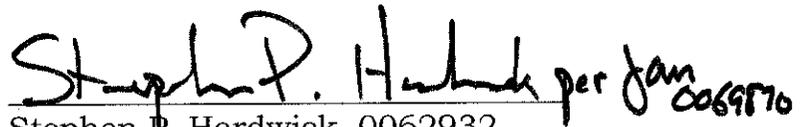
Appellant Donald Billiter hereby gives notice that on August 3, 2011, the Stark County Court of Appeals, Fifth Appellate District certified the following question in *State v. Billiter*, Court of Appeals Case No. 2010C400292:

Where a criminal defendant enters a plea of guilty to escape, does res judicata bar the defendant from arguing his plea is void due to a post release control sentencing violation?

The conflict cases are *State v. Pointer*, Montgomery App. No. 24210, 2011-Ohio-1419; *State v. Robinson*, Champaign App. No. 2010C430, 2011-Ohio-1737; and *State v. Renner*, Montgomery App. No. 24019, 2011-Ohio-502.

Respectfully submitted,

Office of the Ohio Public Defender

 Stephen R. Hardwick per Jan 0069870

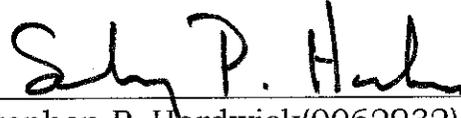
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CERTIFICATE OF SERVICE

I certify that on September 1, 2011, the foregoing was sent via regular U.S. Mail, postage prepaid to Ronald Mark Caldwell, Assistant Stark County Prosecutor, Stark County Prosecutor's Office, 110 Central Plaza South, Suite 510, Canton, Ohio 44702.



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Assistant Public Defender

per Jan 0069870

Counsel for Appellant, Donald Billiter

#351028

IN THE SUPREME COURT OF OHIO

State of Ohio, :
 :
 Plaintiff-Appellee, : Case No.
 :
 v. : On certified conflict from the Stark
 : County Court of Appeals,
 Donald Billeter (aka Billiter), : Fifth Appellate District
 : Case No. 2010C400292
 Defendant-Appellant. :

**APPENDIX TO
APPELLANT DONALD BILLITER'S NOTICE OF CERTIFIED CONFLICT**

State v. Billiter, Stark County Court of Appeals Case No. 2010CA00292
(August 3, 2011) EntryA-1

State v. Billiter, Stark County Court of Appeals Case No. 2010CA00292
(May 9, 2011) OpinionA-4

State v. Billiter, Stark County Court of Appeals Case No. 2010CA00292
(May 9, 2011) EntryA-12

State v. Pointer, Montgomery App. No. 24210, 2011-Ohio-1419A-13

State v. Renner, Montgomery App. No. 24019, 2011-Ohio-502A-24

State v. Robinson, Champaign App. No. 2010C430, 2011-Ohio-1737A-31

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
 FIFTH APPELLATE DISTRICT

NANCY S. REINBOLD
 CLERK OF COURT OF APPEALS
 STARK COUNTY, OHIO

11 AUG -3 PM 3:51

STATE OF OHIO

Plaintiff-Appellee

-vs-

DONALD BILLITER (AKA BILLETER)

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2010CA00292

This matter comes on for consideration upon Appellant Donald Billiter's separate motions filed with this Court. On May 23, 2011, Appellant filed a motion to reconsider this Court's May 9, 2011 Judgment Entry. On the same date, Appellant filed a motion to certify a conflict between this Court's May 23, 2011 Judgment Entry and the decisions of the Second District Court of Appeals in *State v. Pointer*, Montgomery App. No. 24210, 2011-Ohio-1419; *State v. Robinson*, Champaign App. No. 2010CA30, 2011-Ohio-1737; and *State v. Renner*, Montgomery App. No. 24019, 2011-Ohio-502, on the following question:

"Where a criminal defendant enters a plea of guilty to escape, does res judicata bar the defendant from arguing his plea is void due to a post release control sentencing violation?"

Appellee State of Ohio filed a response to both motions.

Appellant also filed a motion for leave to file additional authority on July 7, 2011.

Initially, we address Appellant's motion for leave to file additional authority, and hereby deny the same.

A TRUE COPY TESTE:
 NANCY S. REINBOLD, CLERK

By [Signature] Deputy
 Date 8-3-11

With regard to Appellant's motion to reconsider, the test generally applied to a motion for reconsideration is whether the motion calls the Court's attention to an obvious error in the decision or raises an issue for consideration, which was not considered or not fully considered by the Court. See, e.g., *Erie Insurance Exchange v. Colony Development Corp.* (2000), 136 Ohio App.3d 419, 736 N.E.2d 950.

Upon review of Appellant's motion for reconsideration, the same does not call this Court's attention to an obvious error in rendering the decision, nor does it raise an issue which was not fully considered by this Court. Accordingly, Appellant's motion to reconsider this Court's May 9, 2011 Judgment Entry is denied.

Upon review of Appellant's motion to certify a conflict with the decisions of the Second District Court of Appeals in *State v. Pointer*, supra, *State v. Robinson*, supra, and *State v. Renner*, supra, we find the same well-taken.

The Ohio Supreme Court set forth the requirements necessary to properly certify a conflict in *Whitelock v. Gilbane Building Company* 1993-Ohio-223, 66 Ohio St.3d 594.

The Court held:

"Accordingly, we respectfully urge our sisters and brothers in the courts of appeals to certify to us for final determination only those cases where there is a true and actual conflict on a rule of law. In so urging, we hold that (1) pursuant to Section 3(B)(4), Article IV of the Ohio Constitution and S.Ct.Prac.R. III, there must be an actual conflict between appellate judicial districts on a rule of law before certification of a case to the Supreme Court for review and final determination is proper; and (2) when certifying a case as in conflict with the judgment of another court of appeals, either the journal entry

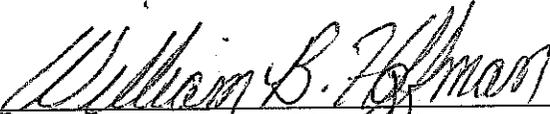
or opinion of the court of appeals so certifying must clearly set forth the rule of law upon which the alleged conflict exists.”

Upon review of the Second District’s opinions in *Pointer*, *Robinson* and *Renner*, we find the opinions are in actual conflict with this Court’s Judgment Entry upon the following question:

“Where a criminal defendant enters a plea of guilty to escape, does res judicata bar the defendant from arguing his plea is void due to a post release control sentencing violation?”

Accordingly, the motion to certify a conflict is granted.

IT IS SO ORDERED.


HON. WILLIAM B. HOFFMAN


HON. W. SCOTT GWIN


HON. PATRICIA A. DELANEY

WBH/ag 7/18/11

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

11 MAY -9 PM 2:32

STATE OF OHIO

Plaintiff-Appellee

-vs-

DONALD BILLITER

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. William B. Hoffman, J.

Hon. Patricia A. Delaney, J.

Case No. 2010CA00292

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas, Case No. 2004CR00452

JUDGMENT:

Affirmed

(B)

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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STARK COUNTY, OHIO

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BY: RONALD MARK CALDWELL
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A TRUE COPY TESTE:
NANCY S. REINBOLD, CLERK
By *T. S. [Signature]* Deputy
Date *5/10/11*

ENTERED 5/10/11

Hoffman, J.

{11} Defendant-appellant Donald Billiter appeals the denial of his motion to withdraw his plea of guilty in the Stark County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE¹

{12} In 1998, Appellant entered a plea of guilty to one count each of aggravated burglary and domestic violence. As a result of his plea and subsequent conviction, Appellant was sentenced to an aggregate prison term of three years. The sentencing judgment entry included an incorrect statement of his post-release control obligations. The trial court's entry noted Appellant would be subject to post-release control for a period of up to three years.

{13} The Court had further notified the defendant post release control is mandatory in this case up to a maximum of three (3) years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code 2967.28. The defendant was 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.

{14} Appellant was released from prison on May 20, 2001. Within the three year period of post release control, Appellant entered a plea of guilty to escape from his post release control detention on April 26, 2004. On June 3, 2004, the trial court sentenced Appellant to a community control sanction on his escape conviction. Appellant did not file an appeal. Subsequently, Appellant violated the terms and

¹ A statement of the facts is unnecessary to our disposition of the within appeal.

conditions of his community control sanction, resulting in the revocation of his probation by the trial court. The trial court then sentenced Appellant to a six year prison term. Appellant did not appeal the revocation or the imposition of the prison sentence.

{15} On July 21, 2008, Appellant filed a motion to suspend further execution of sentence based upon *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126. However, the trial court overruled the motion finding the imposition of the erroneous period of post-release control benefitted Appellant; not prejudiced him as Appellant had committed the escape within the lesser time period.

{16} Appellant filed an appeal of the trial court's judgment entry overruling his motion to suspend execution to this Court. Appellant argued the trial court should have vacated the escape conviction as he was not validly on post-release control. This Court rejected the argument, affirming the judgment of the trial court, citing the Ohio Supreme Court's opinion in *Watkins v. Collins*, 111 Ohio St.3d 425. The next day, the Ohio Supreme Court announced its decision in *State v. Bloomer* 122 Ohio St.3d 200, 2009-Ohio-2462. In *Bloomer*, the Supreme Court held a sentence including a term of post-release control is void where the trial court failed to "notify the offender of the mandatory nature of the term of post-release control and the length of that mandatory term and incorporate that notification into its entry". Appellant did not seek reconsideration or appeal this Court's decision to the Ohio Supreme Court.

{17} In 2010, Appellant filed a motion to withdraw his guilty plea on the ground his conviction for the offense of escape was a nullity. The trial court overruled the motion based, in part, on res judicata.

{18} Appellant now appeals, assigning as error:

{¶9} "I. THE TRIAL COURT ERRED BY DENYING HIS MOTION TO WITHDRAW HIS PLEA."

{¶10} Ohio Criminal Rule 32.1 governs motions to withdraw pleas, and reads:

{¶11} "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

{¶12} Appellant argues the trial court erred in denying his motion to withdraw his plea of guilty to the charge of escape because his conviction of escape was based upon "detention" which resulted from a void sentence. Specifically, Appellant argues the Adult Parole Authority was without authority to enforce his post-release control as the same arose from a void sentence because the imposing court failed to properly impose a mandatory five year term of post release control.

{¶13} Ohio law states that portion of a sentence which does not include the statutorily mandated terms of post-release control is void. *State v. Fischer* 2010-Ohio-6238. Here, Appellant was not properly advised of the terms of post-release control when he was sentenced on the aggravated burglary and domestic violence charges; therefore, that part of his sentence imposing post control release is void. Because Appellant had already served the prison term of the sentence, he could not then be resentenced to properly impose the correct terms of post-release control. *State v. Bezak* 114 Ohio St.3d 94, 2007 Ohio 3250. Nevertheless Appellant plead guilty to the escape charge based upon the improperly imposed post release control. The trial court properly imposed sentence on the escape charge.

{¶14} The issue becomes whether Appellant's conviction for escape is void because it was based on a void post release control order. We hold it is not.

{¶15} In a analogous situation in *State v. Huber*, 2010-Ohio-5598, the Eighth District addressed the issue as to whether a void sentence could lawfully serve as a predicate to a repeat violent offender specification, where, as here, the sentence had already been served and could not be corrected. The court held,

{¶16} "A review of the record reveals that appellant was not advised of postrelease control when he was sentenced in CR-407661, and thus the sentence in that case is void. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 16. A void sentence is a legal nullity and should be treated as if it never occurred. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶ 25. Because a conviction encompasses both a finding of guilt and imposition of a sentence, appellant argues that there was no valid conviction in CR-407661, and therefore CR-407661 could not precipitate a repeat violent offender specification.

{¶17} "In *Bezak*, the defendant was not properly notified of postrelease control when his sentence was imposed, and thus his sentence was void. *Id.* at ¶ 16. Because the defendant in *Bezak* had already served his sentence, the Court held that he could not be resentenced and postrelease control could not be imposed. *Id.* at ¶ 18. Appellant relies on this outcome to argue that his sentence cannot be corrected and will remain void; therefore, it is to be ignored and cannot serve as the basis for a repeat violent offender specification. We find that appellant is construing the holdings in *Bezak* and its progeny too narrowly.

{¶18} “As a court of law, we must be careful to avoid obtaining results that are absurd or unreasonable whenever possible.’ *State v. Biondo*, Portage App. No.2009-P-0009, 2009-Ohio-7005, ¶ 45. As in the instant case, the defendant in *Biondo* had already served his sentence when the court realized that the sentence was void. Biondo sought to avoid his obligation to pay mandatory fines and costs by arguing that the void sentence was a legal nullity. The court in *Biondo* rejected this argument and held that ‘[t]owards this end, the order set forth in *Bezak* implies that a conviction (guilt plus sentence) can withstand a court’s determination that a felon was not provided adequate statutory notice of post-release control. Such a conclusion can only be drawn by treating, at the very least, the completion of a term of imprisonment (following a valid finding of guilt), as sufficient to meet the definition of a sentence under the unique circumstances created by the facts in *Bezak* and, by implication, the facts of the case sub judice.’ *Biondo* at ¶ 48.

{¶19} “In *Bezak*, the court noted that, although a sentence imposed without the defendant being advised of postrelease control is ordinarily void, *Bezak* could not be resentenced because he had already completed his term of imprisonment. *Bezak* at ¶ 18. It is noteworthy, however, that the court in *Bezak* did not vacate the conviction, but merely remanded the case to the trial court with instructions to note on the record that *Bezak* had completed his sentence and would not be subject to resentencing. *Id.* As noted in *Biondo*, this holding “has odd conceptual implications: *Bezak*’s sentence was void and therefore a legal nullity because he was not properly notified of the possibility of post-release control; however, the court made a point to emphasize that he had already served his sentence. This begs the question: How can one have served a

sentence that does not exist? Much like a Zen Koan, such a paradox cannot be resolved by deductively following the concepts which created the entanglement, but must be *dissolved* by following a different course.” (Emphasis in original.) *Biondo* at ¶ 47.

{¶20} “Numerous complications have resulted from the holdings in *Bezak* and its progeny. It is illogical to presume, however, that the Ohio Supreme Court intended *Bezak* to stand for the proposition that an unchallenged sentence that is technically “void” due to an improper postrelease control advisement cannot then serve as the basis for a repeat violent offender specification, especially in a case such as this where the offender has already completed his prison sentence.”

{¶21} Because we find Appellant’s conviction for escape is not void, *res judicata* applies based upon Appellant’s failure to directly appeal his escape conviction and this Court’s prior opinion affirming the trial court’s subsequent denial of his motion to suspend further execution of sentence.

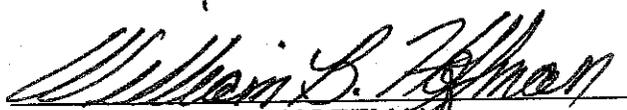
{¶22} We find Appellant’s conviction on the escape charge and subsequent sentence do not constitute a manifest injustice under the circumstances of this case. Accordingly, the sole assignment of error is overruled.

{¶23} The judgment of the Stark County Court of Common Pleas is affirmed.

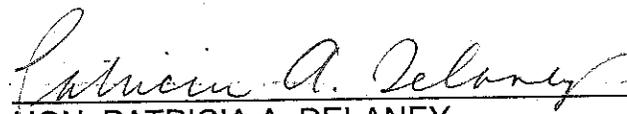
By: Hoffman, J.

Gwin, P.J. and

Delaney, J. concur


HON. WILLIAM B. HOFFMAN


HON. W. SCOTT GWIN


HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

11 MAY -9 PM 2: 32

STATE OF OHIO

Plaintiff-Appellee

-vs-

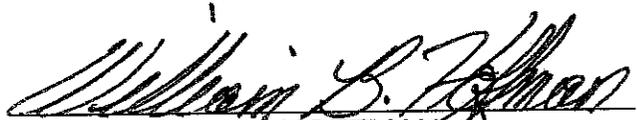
DONALD BILLITER

Defendant-Appellant

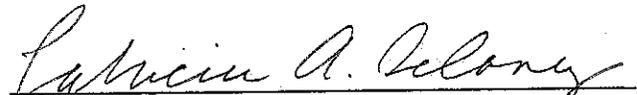
JUDGMENT ENTRY

Case No. 2010CA00292

For the reasons stated in our accompanying Opinion, the judgment of the Stark County Court of Common Pleas is affirmed. Costs to Appellant.


HON. WILLIAM B. HOFFMAN


HON. W. SCOTT GWIN


HON. PATRICIA A. DELANEY



**STATE OF OHIO, Plaintiff-Appellee v. WILLIAM L. POINTER,
Defendant-Appellant**

C.A. CASE NO. 24210

**COURT OF APPEALS OF OHIO, SECOND APPELLATE DIS-
TRICT, MONTGOMERY COUNTY**

2011 Ohio 1419; 2011 Ohio App. LEXIS 1237

March 24, 2011, Rendered

PRIOR HISTORY: [**1]

(Criminal appeal from Common Pleas Court). T.C. NO. 09CR3403.

COUNSEL: CARLEY J. INGRAM, Dayton, Ohio, Attorney for Plaintiff-Appellee.

CHARLES A. MCKINNEY, Dayton, Ohio, Attorney for Defendant-Appellant.

MARK J. MILLER, Columbus, Ohio, Attorney for Defendant-Appellant.

JUDGES: FROELICH, J. FAIN, J. and DONOVAN, J., concur.

OPINION BY: FROELICH

OPINION

FROELICH, J.

[*P1] After the trial court overruled his motion to dismiss, William L. Pointer pled no contest in the Montgomery County Court of Common Pleas to one count of escape, in violation of R.C. 2921.34(A)(1), a second degree felony. The trial court found Pointer guilty and sentenced him to the minimum mandatory term of two years in prison, to be served consecutively with the sentence imposed in another case.

[*P2] Pointer appeals from his conviction, claiming that the trial court erred in overruling his motion to dismiss. For the following reasons, the trial court's judgment will be reversed, the conviction and sentence for escape will be vacated, and Pointer will be ordered discharged as to this offense only.

I

[*P3] In 1997, Pointer was convicted of involuntary manslaughter, a first degree felony, and felonious assault, a second degree felony. *State v. Pointer*, Montgomery C.P. No. 97-CR-449.

[**2] The trial court sentenced him to an aggregate term of nine years in prison, to be served consecutive to the one-year sentence imposed in Case No. 97-CR-1720. The termination entry addressed post-release control, stating: "Following the defendant's release from prison, the defendant will/may serve a period of post-release control under the supervision of the parole board[.]" Under *R.C. 2967.28(B)*, Pointer was subject to a mandatory term of five years of post-release control for the involuntary manslaughter and a mandatory term of three years of post-release control for the felonious assault.

1 Pointer moved to supplement the record with a transcript of sentencing hearing in Case No. 97-CR-449. The transcript reflects that the trial court did not mention post-release control at sentencing. Although this court originally granted Pointer's motion to supplement, we subsequently vacated that decision and denied the motion to supplement the record.

[*P4] On March 4, 2007, Pointer was released from prison under the supervision of the Ohio Department of Rehabilitation and Correction, Adult Parole Authority ("APA"). At the time of his release, Pointer met with his parole officer and signed and initialed [**3] the Conditions of Supervision, which set forth his obligations under post-release control. Paragraph two of that document included notice "that if I am a releasee and abscond supervision, I may be prosecuted for the crime

of escape, under *section 2921.34 of the Revised Code*." On March 5, 2007, Pointer also signed a separate notice informing him that post-release control supervision constitutes detention and that he could be convicted of escape if he absconded from supervision; Pointer re-signed this form on October 27, 2008.

[*P5] Pointer failed to report to his parole officer on May 15, 2009. On December 1, 2009, Pointer was charged with escape due to his failure to report between June 22, 2009, and November 3, 2009. He was arrested for this charge on January 8, 2010.

[*P6] Pointer moved to dismiss the indictment for escape. He claimed that he could not be charged with escape since the APA lacked the authority to supervise him, because the trial court in Case No. 97-CR-449 did not properly impose post-release control. Pointer supported his motion with a copy of the termination entry in Case No. 97-CR-449 and a Termination of Supervision notice, which stated that "[u]nder the Authority of the *Supreme* [**4] *Court decision*, the Ohio Adult Parole Authority hereby issues a Final Release on the above number to take effect on 2/25/2010. ***" (Emphasis in original.)

[*P7] In response, the State argued that *State v. Jordan*, 124 Ohio St.3d 397, 2010 Ohio 281, 922 N.E.2d 951, was controlling, and that *Jordan* permitted the State to prove, without evidence that the sentencing court had properly advised him of post-release control, that Pointer was subject to supervision. Pointer's wife subsequently filed a "Motion to Dismiss Amended [and] Correction of Ohio Supreme Court Case Authority Memorandum," which the trial court struck.

[*P8] The trial court overruled Pointer's motion to dismiss. The court held that *Jordan* governed the circumstances before it, and that the evidence was sufficient, at that stage of the case, to demonstrate that Pointer was under detention and subject to the escape statute. The trial court concluded, saying "As it relates to his Motion to Dismiss, Defendant has failed to meet his burden on

this Motion of demonstrating a lack of authority by the ODRC to supervise him such that this court would be compelled to dismiss the indictment herein."

[*P9] Subsequently, Pointer again moved for an order of dismissal, [**5] arguing that he had obtained additional documents to support the conclusion that the APA lacked authority to impose post-release control sanctions on him. Before the court ruled on that motion, Pointer entered a plea of no contest to the escape charge. The court found him guilty and sentenced him accordingly.

[*P10] Pointer appeals from his conviction, raising one assignment of error.

II

[*P11] In his sole assignment of error, Pointer claims that the court erred in denying his motion to dismiss. He asserts that, because the trial court in his 1997 case failed to properly impose post-release control, the APA was not authorized to supervise him and he was not under detention for purposes of the escape statute. In his reply brief, Pointer cites to our recent opinion in *State v. Renner, Montgomery App. No. 24019, 2011 Ohio 502*.

[*P12] In the indictment, the State charged Pointer with one count of escape, in violation of *R.C. 2921.34(A)(1)*. The indictment alleged that Pointer, between June 22, 2009 and November 3, 2009, "knowing that he was under detention or being reckless in that regard, did purposely break or attempt to break such detention, or purposely fail to return to detention, while being detained" [**6] for the charges of involuntary manslaughter and felonious assault.

[*P13] As a threshold matter, the State asserts that Pointer's no contest plea prevents him from challenging the facts alleged in the indictment, including the fact that he was "under detention" when he failed to report to his parole officer. The State argues that a motion to dismiss under *Crim.R. 12(C)(2)* is limited to whether the language of the indictment alleges the offense. The State thus asserts that Pointer should have raised whether the evidence was sufficient to establish his "de-

tion" in a *Crim.R. 29* motion for acquittal at the conclusion of the State's case at trial, not through a pretrial motion to dismiss.

[*P14] Pointer responds that the issue raised in his motion to dismiss was whether the indictment was legally sufficient to support a charge for escape. He states: "A decision as to whether post-release control was improperly imposed, and thus whether the DRC lacked the authority to supervise the Appellant, is strictly a legal issue for the court to decide. Therefore, a pretrial motion to dismiss pursuant to *Crim.R. 12(C)* is appropriate and may be reviewed on the merits, even after a no contest plea."

[*P15] *Crim.R. 12(C)* [**7] governs pretrial motions. It provides that, "prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue." *Crim.R. 12(C)*. The Rule requires certain issues to be raised before trial, including defenses and objections based on defects in the institution of the prosecution; defenses and objections based on defects in the indictment, information, or complaint (with two exceptions); motions to suppress evidence; requests for discovery under *Crim.R. 16*; and requests for severance of charges or defendants under *Crim.R. 14*. *Id.* A defendant who enters a plea of no contest may raise on appeal that the trial court erred in its ruling on a pretrial motion. *Crim.R. 12(I)*.

[*P16] "A motion to dismiss an indictment tests the legal sufficiency of the indictment, regardless of the quality or quantity of the evidence that may be introduced by either the state or the defendant." *State ex rel. Steffen v. Court of Appeals, First Appellate Dist. 126 Ohio St. 3d 405, 2010 Ohio 2430, ¶34, 934 N.E.2d 906*. Accordingly, in ruling on a motion to dismiss an indictment, the trial court may not examine the sufficiency of the State's [**8] evidence. *State v. Miller (Dec. 4, 1998), Montgomery App. No. 17273, 1998 Ohio App. LEXIS 5738*. Rather, the court must look to

the indictment to determine only whether the charges as set forth describe an offense under the law of the State. Id. "*Crim.R. 12* permits a court to consider evidence beyond the face of an indictment when ruling on a pretrial motion to dismiss an indictment if the matter is capable of determination without trial of the general issue." *State v. Brady*, 119 Ohio St. 3d 375, 2008 Ohio 4493, ¶3, 894 N.E.2d 671. However, whether sufficient evidence exists to convict on an indictment -- that is, to persuade the finder of fact of all of the essential elements of the offense beyond reasonable doubt -- is a matter that must be determined through a trial on charges alleged in the indictment; there is no pre-trial mechanism for this purpose. *State v. Netzley*, Darke App. No. 07-CA-1723, 2008 Ohio 3009, ¶7.

[*P17] It is indeed a thorny procedural issue as to what error was preserved by Pointer's no contest plea. The resolution of that issue depends on whether the motion to dismiss in this case addressed the sufficiency of factual evidence regarding whether Pointer was "under detention" or the legal question as to what constitutes [**9] "detention." In our view, these are two distinct matters. Whether a person is lawfully under post-release control and whether post-release control constitutes a form of "detention" are threshold legal determinations, not matters to be proven at trial. See, e.g., *State v. Boggs*, Montgomery App. No. 22081, 2008 Ohio 1583 (considering the sufficiency of the State's evidence of escape after making the legal determination that a person on post-release control was "under detention" for purposes of the escape statute). Before a jury could consider the factual question of whether Pointer was a person under "supervision by an employee of the department of rehabilitation and correction *** on any type of release from a state correctional institution," R.C. 2921.01(E)(defining "detention"), the court would have to decide whether such supervision, even if it were factually proven, was lawful.

[*P18] Pointer's motion to dismiss raised whether the 1997 sentencing court validly ordered post-release control and, thus, whether the APA had the authority to supervise him upon his release from prison in 2007. The resolution of those questions required a legal determination of whether the portion of the 1997 [**10] judgment entry imposing post-release control was void in light of Ohio Supreme Court precedent. The motion did not involve questions regarding whether Pointer was, in fact, under APA supervision. Accordingly, Pointer's motion to dismiss was capable of determination without the trial of the general issue, in accordance with *Crim.R. 12(C)*, and Pointer's no contest plea permitted him to raise on appeal that the trial court erred in its ruling on his pretrial motion. *Crim.R. 12(I)*.

[*P19] The trial court's decision, which treated Pointer's motion as proper under *Crim.R. 12(C)*, recognized this distinction in addressing ODRC's "lack of authority" as the dispositive issue. Similarly, the editors of 2 *Ohio Jury Instructions 521.34(A)(1)* comment that "questions of irregularity in bringing about or maintaining the detention and of lack of jurisdiction of the detaining authority are also questions of law for the court to decide." We seriously doubt that the interpretation of the relevant Supreme Court authority -- e.g., *State v. Jordan*, 104 Ohio St.3d 21, 2004 Ohio 6085, 817 N.E.2d 864; *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006 Ohio 126, 844 N.E.2d 301; *State v. Bloomer*, 122 Ohio St.3d 200, 2009 Ohio 2462, 909 N.E.2d 1254; *State v. Singleton*, 124 Ohio St.3d 173, 2009 Ohio 6434, 920 N.E.2d 958; [**11] *State v. Jordan*, 124 Ohio St.3d 397, 2010 Ohio 281, 922 N.E.2d 951; and *State v. Fischer*, 128 Ohio St. 3d 92, 942 N.E.2d 332, 2010 Ohio 6238 -- is within the province of the jury.

[*P20] Turning to the merits of Pointer's argument, we find *Renner* to be dispositive. In *Renner*, the State appealed from a decision granting Renner's post-sentencing motion to withdraw his guilty plea to escape on the ground that post-release control had not been properly imposed in his

2002 case. The judgment entry in the 2002 case stated: "The Court advised the defendant that following the defendant's release from prison, the defendant will/may serve a period of post-release control under the supervision of the parole board." When Renner was released from prison in 2007, he met with his parole officer who explained the conditions of his parole. In addition, he signed and initialed a form entitled "Conditions of Supervision" which stated that he could be charged with escape if he violated the terms of his supervision. Renner was later charged with escape when he failed to report to his parole officer, and he pled guilty to the charge.

[*P21] In addressing whether the trial court properly allowed Renner to withdraw his guilty plea, we rejected the State's [**12] argument that it could obtain a valid conviction for escape regardless of whether the underlying termination entry properly imposed post-release control. We reasoned:

[*P22] "In *State v. Jordan*, 124 Ohio St.3d 397, 2010 Ohio 281, 922 N.E.2d 951, the Ohio Supreme Court held that in order 'to obtain a conviction for escape under *R.C. 2921.34(A)(1)*, the state may prove that the defendant was subject to post-release control without proving that during a sentencing hearing the trial court orally notified the defendant that he would be subject to post-release control.' However, the Supreme Court specifically stated in *Jordan* that its holding did not control in a situation similar to the instant case with respect to whether a defendant can be proved to be under detention for purposes of *R.C. 2921.34(A)(1)* if the evidence affirmatively establishes that the trial court failed to meet its duties with respect to the imposition of post-release control. 124 Ohio St.3d at 399.

[*P23] "It is undisputed that in the termination entry filed on April 30, 2002, the trial court failed to inform Renner that he was subject to a mandatory term of five years of post-release control based on his conviction for kidnapping (sexual activity), [**13] a felony of the first degree. *R.C.*

2967.28 provides that every prison sentence for a felony of the first degree or a felony sex offense shall include a mandatory five-year period of post release control. *State v. Shackelford*, *Montgomery App. No. 22891*, 2010 Ohio 845. A trial court is required to notify the offender at the sentencing hearing about post-release control, and is further required to incorporate the specifics of that notice into its judgment of conviction setting forth the sentence the court imposed. *Crim.R. 32(C)*. *State v. Jordan*, 104 Ohio St.3d 21, 2004 Ohio 6085, 817 N.E.2d 864; *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006 Ohio 126, 844 N.E.2d 301.

[*P24] "As we recently stated in *State v. Terry*, *Montgomery App. No. 09CA0005*, 2010 Ohio 5391, among the most basic requirements of post-release control notification per *R.C. 2967.28* and the Ohio Supreme Court's existing precedent is that the court must both notify the offender of the length of the term of post-release control that applies to his conviction(s) and incorporate that notification into its journalized judgment of conviction pursuant to *Crim.R. 32(C)*. *State v. Bloomer*, 122 Ohio St.3d 200, 2009 Ohio 2462, at ¶69, 909 N.E.2d 1254. Both are necessary in order to authorize [**14] the APA to exercise the authority that *R.C. 2967.28* confers on that agency.

[*P25] "In cases in which a trial judge does not impose post-release control in accordance with statutorily mandated terms, that portion of the sentence is void. *State v. Bloomer*, 122 Ohio St. 3d 200, 2009 Ohio 2462, at ¶ 69, 71, 909 N.E.2d 1254; *State v. Fischer*, *Slip Opinion No. 2010 Ohio 6238*, at ¶ 30; *R.C. 2967.28(B)*. This holding only applies to defendants who were sentenced prior to July 11, 2006. *State v. Singleton*, 124 Ohio St.3d 173, 2009 Ohio 6434, 920 N.E.2d 958; *R.C. 2929.191*; *State v. Terry*, 2010 Ohio 5391. *R.C. 2929.191* creates a special procedure to correct defects in notification at the sentencing hearing and/or in the judgment of conviction. *Id.* We also note that "[p]rinciples of res judicata, including the doctrine of the law of the case, do not preclude

appellate review. The sentence may be reviewed at any time, on direct appeal *or by collateral attack.* *State v. Fischer*, 2010 Ohio 6238, at ¶ 30.

[*P26] "The State argues that the language in Renner's sentencing entry was sufficient to subject him to the supervision of the APA upon his release from prison in Case No.2001 CR 768. The State failed to advance this argument before the trial court, and has [**15] therefore, waived it for the purposes of this appeal. Even if the State had preserved this argument for appeal, we find that it lacks merit. Based on his conviction for kidnapping, Renner was subject to a mandatory five-year term of post-release control. The language in Renner's 2002 termination entry failed to reflect that fact. Since the termination entry failed to contain the statutorily mandated term of five years, it was insufficient to notify Renner that he would be subject to the supervision of the APA.

[*P27] "Upon review, we find that the termination entry in Case No.2001 CR 768 did not affirmatively state that Renner would be subject to five years mandatory post-release control following his release in 2007, and that portion of his sentence was, therefore, void. Thus, the APA did not have the authority to enforce post-release control restrictions thereunder, and he was not legally under detention at the time the alleged escape was committed for the kidnapping charge in Case No.2001 CR 768. A void post-release control supervision cannot support a charge of escape. In light of the foregoing, the trial court did not abuse its discretion when it granted Renner's motion to withdraw his [**16] guilty plea." *Renner* at ¶14-19.

[*P28] As in *Renner*, the termination entry in Case No. 97-CR-449 stated that Pointer "will/may serve a period of post-release control under the supervision of the parole board" after his release from prison. The judgment entry did not state that Pointer would be subject to a mandatory term of five years (or three years) of post-release control. Accordingly, the 1997 termination entry affirmatively demonstrates that the trial court failed to properly impose post-release control. As a

result of that failure, the portion of the 1997 judgment entry that imposed post-release control was void, and the APA lacked the authority to enforce that provision by supervising Pointer. Pointer, as a matter of law, was not under detention for purposes of the escape statute. Accordingly, the trial court erred in denying Pointer's motion to dismiss.

[*P29] The assignment of error is sustained.

III

[*P30] The trial court's judgment will be reversed, and Pointer's conviction and sentence for escape will be vacated. Pointer will be ordered discharged as to this offense only.

.....

FAIN, J. and DONOVAN, J., concur.



STATE OF OHIO, Plaintiff-Appellant v. WILLIAM I. RENNER, Defendant-Appellee

C.A. CASE NO. 24019

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, MONTGOMERY COUNTY

2011 Ohio 502; 2011 Ohio App. LEXIS 445

February 4, 2011, Rendered

SUBSEQUENT HISTORY: Discretionary appeal not allowed by *State v. Renner, 2011 Ohio 3244, 2011 Ohio LEXIS 1768 (Ohio, July 6, 2011)*

PRIOR HISTORY: **[**1]**

(Criminal appeal from Common Pleas Court). T.C. NO. 08CR2419.

COUNSEL: CARLEY J. INGRAM, Assistant Prosecuting Attorney, Dayton, Ohio, Attorney for Plaintiff-Appellant.

STEPHEN P. HARDWICK, Assistant Public Defender, Columbus, Ohio, Attorney for Defendant-Appellee.

JUDGES: DONOVAN, J. GRADY, P.J. and FROELICH, J., concur.

OPINION BY: DONOVAN

OPINION

DONOVAN, J.

[*P1] Plaintiff-appellant State of Ohio appeals a decision of the Montgomery County Court of Common Pleas, General Division, granting defendant-appellee William I. Renner's motion to with-

draw his guilty plea. Renner filed his motion to withdraw on January 8, 2010. The trial court issued its written decision granting Renner's motion on March 31, 2010. The State of Ohio filed a timely notice of appeal with this Court on April 30, 2010.

I

[*P2] In early 2002, Renner was convicted of menacing by stalking, kidnapping with sexual activity, and criminal non-support of dependents in Case No. 2001 CR 768. On April 30, 2002, the trial court issued a termination entry sentencing Renner to an aggregate term of five years in prison and designating him as a sexual predator. Additionally, the termination entry stated in pertinent part:

[*P3] "The Court advised the defendant that following the defendant's [**2] release from prison, *the defendant will/may serve a period of post-release control under the supervision of the parole board.*"

[*P4] Renner was released from prison in March of 2007, at which time he met with his parole officer who explained the conditions of his parole. Renner also signed and initialed a form entitled "Conditions of Supervision" which stated that he could be convicted for escape if he violated the terms of his supervision. On November 28, 2007, Renner was convicted of drug trafficking and sentenced to eight months in prison in Case No. 2007 CR 2991. The court also informed Renner that he was subject to three years of post-release control.

[*P5] Renner was released from prison on April 22, 2008, and told to report to his parole officer on April 24, 2008. Renner, however, never reported and was subsequently indicted on July 29, 2008, for escape based on his failure to report while under detention for the kidnapping charge from his 2001 conviction and sentence.

[*P6] On January 7, 2009, Renner pled guilty to one count of escape, and the trial court sentenced him to two years in prison. Approximately one year later on January 8, 2010, Renner filed a motion to withdraw his guilty plea. [**3] Renner argued that the Adult Parole Authority (APA) was without authority to impose post-release control because the termination entry in Case No. 2001 CR 768 did not affirmatively state that he would be subject to post-release control following his release. Accordingly, Renner was not subject to post-release control and detention in Case No. 2001 CR 768. Thus, Renner asserted that he was actually innocent of the charge of escape as set forth in the indictment. In a written decision filed on March 31, 2010, the trial court agreed with Renner and granted his motion to withdraw his guilty plea. ¹

1 In its decision, the trial court specifically noted that "upon his release from prison on April 22, 2008, on his conviction in Case No. 2007 CR 2991, [Renner] signed paperwork that instructed him to report to the APA, which he never did. Thus, the question still remains whether [Renner] is subject to post-release control in Case No. 2007 CR 2991."

[*P7] It is from this decision that the State now appeals.

II

[*P8] The State's sole assignment of error is as follows:

[*P9] "THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING RENNER TO WITHDRAW HIS GUILTY PLEA TO THE CHARGE OF ESCAPE."

[*P10] In its sole assignment, the State [**4] contends that the trial court erred when it granted Renner's motion to withdraw his guilty plea to one count of escape from post release control. Specifically, the State argues that Renner's sentencing entry was sufficient to subject him to the supervision of the APA upon his release from prison in Case No. 2001 CR 768. The State also argues that evidence of actual innocence is not a valid reason to justify the withdrawal of a guilty

plea. Lastly, the State argues that pursuant to the Ohio Supreme Court's holding in *State v. Jordan*, 124 Ohio St. 3d 397, 2010 Ohio 281, 922 N.E.2d 951, it was irrelevant whether the termination entry properly imposed post-release control in order for the State to obtain a valid conviction for escape.

[*P11] "*Crim.R. 32.1* states:

[*P12] "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.'

[*P13] "The distinction between pre-sentence and post-sentence motions to withdraw pleas of guilty or no contest indulges a presumption that post-sentence motions may be motivated by a desire to obtain relief [**5] from a sentence the movant believes is unduly harsh and was unexpected. The presumption is nevertheless rebuttable by showing of a manifest injustice affecting the plea. 'A "manifest injustice" comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her.' (citation omitted). The movant has the burden to demonstrate that a manifest injustice occurred. (Citation omitted)." *State v. Brooks, Montgomery App. No. 23385, 2010 Ohio 1682*, ¶ 6-8.

[*P14] In *State v. Jordan*, 124 Ohio St. 3d 397, 2010 Ohio 281, 922 N.E.2d 951, the Ohio Supreme Court held that in order "to obtain a conviction for escape under *R.C. 2921.34(A)(1)*, the state may prove that the defendant was subject to post-release control without proving that during a sentencing hearing the trial court orally notified the defendant that he would be subject to post-release control." However, the Supreme Court specifically stated in *Jordan* that its holding did not control in a situation similar to the instant case with respect to whether a defendant can be

proved to be under detention for purposes of [**6] *R.C. 2921.34(A)(1)* if the evidence affirmatively establishes that the trial court failed to meet its duties with respect to the imposition of post-release control. *124 Ohio St.3d at 399*.

[*P15] It is undisputed that in the termination entry filed on April 30, 2002, the trial court failed to inform Renner that he was subject to a mandatory term of five years of post-release control based on his conviction for kidnapping (sexual activity), a felony of the first degree. *R.C. 2967.28* provides that every prison sentence for a felony of the first degree or a felony sex offense shall include a mandatory five-year period of post release control. *State v. Shackelford, Montgomery App. No. 22891, 2010 Ohio 845*. A trial court is required to notify the offender at the sentencing hearing about post-release control, and is further required to incorporate the specifics of that notice into its judgment of conviction setting forth the sentence the court imposed. *Crim.R. 32(C). State v. Jordan, 104 Ohio St.3d 21, 2004 Ohio 6085, 817 N.E.2d 864; Hernandez v. Kelly, 108 Ohio St.3d 395, 2006 Ohio 126, 844 N.E.2d 301*.

[*P16] As we recently stated in *State v. Terry, Montgomery App. No. 09CA0005, 2010 Ohio 5391*, among the most basic requirements of post- [**7] release control notification per *R.C. 2967.28* and the Ohio Supreme Court's existing precedent is that the court must both notify the offender of the length of the term of post-release control that applies to his conviction(s) and incorporate that notification into its journalized judgment of conviction pursuant to *Crim.R. 32(C)*. *State v. Bloomer, 122 Ohio St.3d 200, 2009 Ohio 2462, at ¶69, 909 N.E.2d 1254*. Both are necessary in order to authorize the APA to exercise the authority that *R.C. 2967.28* confers on that agency.

[*P17] In cases in which a trial judge does not impose post-release control in accordance with statutorily mandated terms, that portion of the sentence is void. *State v. Bloomer, 2009 Ohio 2462, at ¶69, 71, 122 Ohio St. 3d 200, 909 N.E.2d 1254; State v. Fischer, Slip Opinion No. 128 Ohio St.*

3d 92, 2010 Ohio 6238, at ¶30, 942 N.E.2d 332; R.C. 2967.28(B). This holding only applies to defendants who were sentenced prior to July 11, 2006. *State v. Singleton*, 124 Ohio St.3d 173, 2009 Ohio 6434, 920 N.E.2d 958; R.C. 2929.191; *State v. Terry*, 2010 Ohio 5391. R.C. 2929.191 creates a special procedure to correct defects in notification at the sentencing hearing and/or in the judgment of conviction. *Id.* We also note that "[p]rinciples of res judicata, including the doctrine of the [**8] law of the case, do not preclude appellate review. The sentence may be reviewed at any time, on direct appeal or by collateral attack." *State v. Fischer*, 128 Ohio St. 3d 92, 2010 Ohio 6238, at ¶30, 942 N.E.2d 332.

[*P18] The State argues that the language in Renner's sentencing entry was sufficient to subject him to the supervision of the APA upon his release from prison in Case No. 2001 CR 768. The State failed to advance this argument before the trial court, and has therefore, waived it for the purposes of this appeal. Even if the State had preserved this argument for appeal, we find that it lacks merit. Based on his conviction for kidnapping, Renner was subject to a mandatory five-year term of post-release control. The language in Renner's 2002 termination entry failed to reflect that fact. Since the termination entry failed to contain the statutorily mandated term of five years, it was insufficient to notify Renner that he would be subject to the supervision of the APA.

[*P19] Upon review, we find that the termination entry in Case No. 2001 CR 768 did not affirmatively state that Renner would be subject to five years mandatory post-release control following his release in 2007, and that portion of his sentence was, therefore, [**9] void. Thus, the APA did not have the authority to enforce post-release control restrictions thereunder, and he was not legally under detention at the time the alleged escape was committed for the kidnapping charge in Case No. 2001 CR 768. A void post-release control supervision cannot support a charge of escape.

In light of the foregoing, the trial court did not abuse its discretion when it granted Renner's motion to withdraw his guilty plea.

[*P20] The State's sole assignment of error is overruled.

III

[*P21] The State of Ohio's sole assignment of error having been overruled, the judgment of the trial court is affirmed.

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GRADY, P.J. and FROELICH, J., concur.



STATE OF OHIO, Plaintiff-Appellee v. MARK A. ROBINSON, Defendant-Appellant

C.A. CASE NO. 2010 CA 30

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, CHAMPAIGN COUNTY

2011 Ohio 1737; 2011 Ohio App. LEXIS 1520

April 8, 2011, Rendered

PRIOR HISTORY: [*1]

Criminal appeal from Common Pleas Court. T.C. NO. 08CR205.

State v. Robinson, 2001 Ohio App. LEXIS 18 (Ohio Ct. App., Clark County, Jan. 5, 2001)

COUNSEL: NICK A. SELVAGGIO, Urbana, Ohio, Attorney for Plaintiff-Appellee.

STEPHEN P. HARDWICK, Columbus, Ohio, Attorney for Defendant-Appellant.

JUDGES: DONOVAN, J. GRADY, P.J. and HALL, J., concur.

OPINION BY: DONOVAN

OPINION

DONOVAN, J.

This matter is before the Court on the Notice of Appeal of Mark A. Robinson, filed October 5, 2010. On August 19, 2008, Robinson was indicted on one count of escape, in violation of *R.C. 2921.34(A)(1),(C)(2)(a)*, a felony of the second degree, after Robinson allegedly violated the terms of his post-release control. The post release control purportedly arose as a result of Robinson's 1997 conviction for attempted murder, a felony of the first degree, in case number 1997 CR 212. The

judgment entry in the 1997 matter provided in part, "The Court has further notified the defendant that post release control is optional in this case up to a maximum of three years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under *Revised Code Section 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 [*2] for violation of that post release control." We affirmed Robinson's conviction on direct appeal. *State v. Robinson* (June 12, 1998), *Clark App. No. 97-CA-0073*, 1998 Ohio App. LEXIS 2584.

On October 1, 2008, Robinson pled no contest to escape. The trial court found him guilty and sentenced Robinson to a term of two years. On June 11, 2009, the trial court denied Robinson's motion for judicial release.

On June 30, 2010, Robinson filed a motion to withdraw his no contest plea. According to Robinson, he "is legally not guilty of the offense" of escape; since his judgment entry did not affirmatively state that he would be subject to mandatory post release control for five years following his release from prison, the Adult Parole Authority lacked authority to impose post release control. In other words, Robinson's detention following his release was "legally non-existent," and he accordingly could not "escape" therefrom.

In overruling Robinson's motion, the trial court found "that there is conflicting authority on the issues presented; specifically whether Defendant may be convicted of escape for events occurring while Defendant is on postrelease control when there is an error in the postrelease control notification for [*3] the underlying offense. See, e.g., *State v. North*, 9th Dist. No. 06CA009063, 2007 Ohio 5383 (defendant should have been permitted to withdraw guilty plea to escape charge); *State v. Renner* (Mar. 31, 2010), Montgomery C.P.Ct. No 2008 CR 2419 (granting Renner's motion to withdraw plea) [subsequently affirmed on appeal by *State v. Renner*, Montgomery App. No. 24019,

2011 Ohio 502]. Cf. *State v. Billeter*, 5th Dist. No. 2008 CA 00198, 2009 Ohio 2709 (finding Billeter's conviction for escape was not invalid because his sentencing entry in the underlying 1998 case was not void, even though it misadvised Billeter regarding the terms of his postrelease control). See, also, *Watkins v. Collins*, 111 Ohio St.3d 425, 2006 Ohio 5082, 857 N.E.2d 78."

The trial court further noted that "the Ohio Supreme Court has recently declined to address 'whether a defendant can be convicted of escape when the evidence affirmatively demonstrates that the Department of Rehabilitation and Correction *lacked* the authority to supervise the accused.' *State v. Jordan*, 124 Ohio St.3d 397, 2010 Ohio 281, ¶ 14, 922 N.E.2d 951 (emphasis original). Stated another way, *Jordan* does 'not address the question whether a person can be proved to be under detention [*4] for purposes of R.C. 2921.34(A)(1) if the evidence shows affirmatively that the trial court failed to meet its duties with regard to the imposition of postrelease control.' *Id.*, ¶2 *fn2*.

"The Court notes that *North* is similarly distinguishable from this case. In *North*, there is no evidence that the defendant was advised of postrelease control, as the postrelease control notification in the sentencing entry was struck-through. In Defendant's 1997 case * * * Defendant was advised of postrelease control, albeit with incorrect information concerning total duration and whether postrelease control was mandatory.

"Further, the Court notes that Defendant was released from prison in the 1997 attempted murder case on April 2, 2007 and that the escape charge in the instant case stems from events occurring on or about May 2, 2008 through July 27, 2008, clearly less than three years after Defendant was released from prison and well within the duration of postrelease control stated in the sentencing entry for the 1997 case. See *Billeter*, ¶8, *fn 1* (noting that, in similar circumstances, the defendant was

charged with escape while on postrelease control less than the three year period stated in the underlying [*5] sentencing entry.)

"The Court chooses to follow the reasoning in *Billeter* and therefore declines to grant Defendant's motion to withdraw plea."

Robinson asserts one assignment of error as follows:

"THE TRIAL COURT ERRED BY DENYING HIS MOTION TO WITHDRAW HIS PLEA."

According to Robinson, his "conviction despite legal innocence is a manifest injustice."

"A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." *CrimR. 32.1*.

"The distinction between pre-sentence and post-sentence motions to withdraw pleas of guilty or no contest indulges a presumption that post-sentence motions may be motivated by a desire to obtain relief from a sentence the movant believes is unduly harsh and was unexpected. The presumption is nevertheless rebuttable by showing of a manifest injustice affecting the plea. "A 'manifest injustice' comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably [*6] available to him or her." (Citation omitted) The movant has the burden to demonstrate that a manifest injustice occurred (citation omitted).¹ *State v. Brooks, Montgomery App. No. 23385, 2010 Ohio 1682, ¶ 6-8*.

"In *State v. Jordan, 124 Ohio St.3d 397, 2010 Ohio 281, 922 N.E.2d 951*, the Ohio Supreme Court held that in order to 'obtain a conviction for escape under *R.C. 2921.34(A)(1)*, the state may prove that the defendant was subject to post-release control without proving that during a sentencing hearing the trial court orally notified the defendant that he would be subject to post-release con-

trol.' However, the Supreme court specifically stated in *Jordan* that its holding did not control in a situation similar to the instant case with respect to whether a defendant can be proved to be under detention for purposes of *R.C. 2921.34(A)(1)* if the evidence affirmatively establishes that the trial court failed to meet its duties with respect to the imposition of post-release control. *124 Ohio St.3d at 399.*

"* * * *R.C. 2967.28* provides that every prison sentence for a felony of the first degree or a felony sex offense shall include a mandatory five-year period of post-release control. (Citation omitted). A trial [*7] court is required to notify the offender at the sentencing hearing about post-release control, and is further required to incorporate the specifics of that notice into its judgment of conviction setting forth the sentence the court imposed. *Crim.R. 32(C). State v. Jordan, 104 Ohio St.3d 21, 2004 Ohio 6085, 817 N.E.2d 864; Hernandez v. Kelly, 108 Ohio St. 3d 395, 2006 Ohio 126, 844 N.E.2d 301.*

"As we recently noted in *State v. Terry, Montgomery App. No. 09CA0005, 2010 Ohio 5391*, among the most basic requirements of post-release control notification per *R.C. 2967.28* and the Ohio Supreme Court's existing precedent is that the court must both notify the offender of the length of the term of post-release control that applies to his conviction(s) and incorporate that notification into its journalized judgment of conviction pursuant to *CrimR. 32(C). State v. Bloomer, 122 Ohio St.3d 200, 2009 Ohio 2462, at ¶ 69, 909 N.E.2d 1254.* Both are necessary in order to authorize the APA to exercise the authority that *R.C. 2967.28* confers on that agency.

"In cases in which a trial judge does not impose post-release control in accordance with statutorily mandated terms, that portion of the sentence is void. *State v. Bloomer, 122 Ohio St.3d 200, at ¶ 69, 71; [*8] State v. Fischer, Slip Opinion No. 2010 Ohio 6238, at ¶ 30; R.C. 2967.28(B).* This holding only applies to defendants who were sentenced prior to July 11, 2006. * * * We also note

that '[p]rinciples of res judicata, including the doctrine of the law of the case, do not preclude appellate review. The sentence may be reviewed at any time, on direct appeal or by collateral attack.' *State v. Fischer*, 2010 Ohio 6238, at ¶ 30." *State v. Renner*, Montgomery App. No. 24019, 2011 Ohio 502, ¶ 13-17.

Robinson was subject to a mandatory five-year term of post-release control based upon his conviction for attempted murder, a first degree felony. *R.C. 2967.28(B)(1)*. The language in Robinson's 1997 judgment entry of conviction does not reflect that fact but instead indicates that post-release control is optional for a period of three years. Since the judgment entry failed to contain the statutorily mandated term of five years, it was insufficient to notify Robinson that he would be subject to the supervision of the APA. That portion of Robinson's sentence was, therefore, void. Accordingly, the APA lacked authority to enforce post-release control restrictions, and Robinson was not legally under detention [*9] at the time the alleged escape was committed. As we determined in *Renner*, and more recently in *State v. Pointer*, Montgomery App. No. 24210, 2011 Ohio 1419, a void post-release control supervision cannot support a charge of escape. In light of the forgoing, the trial court abused its discretion when it overruled Robinson's motion to withdraw his no contest plea.

Finally, we find the State's reliance upon *Watkins v. Collins*, 111 Ohio St.3d 425, 2006 Ohio 5082, 857 N.E.2d 78, unpersuasive. The petitioners in *Watkins* sought writs of habeas corpus seeking immediate release from prison because their sentencing entries did not contain adequate notice of mandatory post-release control but rather suggested that post-release control was discretionary. In denying the writs, the Supreme Court of Ohio noted that the "sentencing entries are sufficient to afford notice to a reasonable person that the courts were authorizing post release control as part of each petitioner's sentence." *Id.*, ¶ 51. According to the Supreme Court, since the language in the entries was sufficient to authorize the APA to exercise post release control, "habeas corpus is not

available to contest any error in the sentencing entries, and petitioners [*10] have or had an adequate remedy by way of appeal to challenge the imposition of post-release control." *Watkins* is procedurally distinct in that Robinson, in seeking to withdraw his plea, appropriately pursued a legal remedy and not an equitable one. Consistent with and in reliance upon the the Supreme Court's decision in *Jordan*, Justice Lanzinger in dissent in *Watkins* rejected the majority view that "mere substantial compliance is sufficient." *Id.*, ¶ 57. This position is in line with subsequent Supreme Court decisions regarding post-release control. See *State v. Bloomer*, 122 Ohio St.3d 200, 2009 Ohio 2462, 909 N.E.2d 1254; *State v. Fischer*, 128 Ohio St. 3d 92, 2010 Ohio 6238, 942 N.E.2d 332.

For the foregoing reasons, Robinson's sole assigned error is sustained, and Robinson's conviction and sentence for escape are vacated.

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GRADY, P.J. and HALL, J., concur.