

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:
	:
Plaintiff-Appellee,	: Case No. 2011-1501
	:
v.	: On certified conflict from the Stark
	: County Court of Appeals,
Donald Billiter (aka Billeter),	: Fifth Appellate District
	: Case No. 2010C400292
Defendant-Appellant.	:

Merit Brief of Appellant Donald Billiter

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Table of Contents

Page No.

Introduction.....	1
Statement of the Law and the Case	1
Argument.....	4
Proposition of Law:	
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?.....	4
I. Res judicata does not bar a claim that postrelease control was not properly imposed.	4
A. This Court has specifically and unequivocally held that the doctrines of res judicata and law of the case cannot bar a claim that an entry with improper postrelease control is void. <i>Fischer</i> at ¶30.....	4
II. The continued incarceration of an actually innocent defendant is an “injustice” that meets an exception to the doctrine of res judicata.	5
A. This Court has repeatedly applied the “injustice” exception in criminal and civil cases.	5
B. Donald Billiter affirmatively proved that he is not guilty of escape.....	6
1. Standard for “actual innocence.”	6
2. Mr. Billiter met his burden to prove that he was actually innocent of “escape” from non-existent postrelease control.....	7
III. This Court’s “intervening decision” in <i>State v. Bloomer</i> creates an exception to res judicata..	10
IV. Holding that res judicata bars a demonstrated claim of actual innocence would lead to absurd results.	11
Conclusion.....	12
Certificate of Service.....	13

Table of Contents

Page No.

Appendix:

<i>State v. Billiter</i> , Notice of Certified Conflict, Ohio Sup. Ct. Case No. 2011-1501 (September 1, 2011)	A-1
<i>State v. Billiter</i> , Stark County Court of Appeals Case No. 2010CA00292 (August 3, 2011) Entry	A-42
<i>State v. Billiter</i> , Stark County Court of Appeals Case No. 2010CA00292 (May 9, 2011) Opinion	A-45
<i>State v. Billiter</i> , Stark County Court of Appeals Case No. 2010CA00292 (May 9, 2011) Entry	A-53
R.C. 2901.03.....	A-54
R.C. 2921.01.....	A-55
R.C. 2921.34.....	A-57
R.C. 2967.28.....	A-60
Ohio Rules of Criminal Procedure 32.1.....	A-65

Table of Authorities

Page No.

Cases:

<i>Beach v. State</i> , 2009 MT 398, 353 Mont. 411, 220 P.3d 667 (2009)	6
<i>Gould v. Comm'r of Corr.</i> , 301 Conn. 544 (2011).....	7
<i>Grava v. Parkman Twp.</i> , 73 Ohio St.3d 379 (1995).....	5
<i>In re D.B.</i> , 129 Ohio St.3d 104, 2011-Ohio-2671, <i>Cert. denied</i> , <i>Ohio v. D. B.</i> , --- U.S. ---, 132 S.Ct. 846 (2011)	12
<i>Sawyer v. Whitley</i> , 505 U.S. 333 (1992).....	6
<i>State v. Billeter</i> , Stark CP No. 1998CR651 (Dec. 9, 1998).....	1
<i>State v. Billeter</i> , Stark App. No. 2008-CA-00198, 2009-Ohio-2709	3,10
<i>State v. Billiter</i> , Stark App. No. 2010-CA-00292, 2011-Ohio-2230.....	2,11
<i>State v. Billiter</i> , 130 Ohio St. 3d 1440, 2011-Ohio-5883.....	3,9
<i>State v. Bloomer</i> , 122 Ohio St.3d 200, 2009-Ohio-2462	3,9,10,11
<i>State v. Bush</i> , 96 Ohio St.3d 235, 2002-Ohio-3993	7
<i>State v. Dawkins</i> , 2d Dist. No. 21127, 2006-Ohio-307	7
<i>State v. Dillon</i> , 74 Ohio St.3d 166, 1995-Ohio-169.....	5,6
<i>State v. Fischer</i> , 128 Ohio St.3d 92, 2010-Ohio-6238.....	4,11
<i>State v. Gatchel</i> , Lake App. No. 2007-L-212, 2008-Ohio-4667.....	6
<i>State v. Jenks</i> , 61 Ohio St. 3d 259, 574 N.E.2d 492 (1990)	7
<i>State v. Joseph</i> , 125 Ohio St.3d 76, 2010-Ohio-954.....	9
<i>State v. King</i> , 2d Dist. No. 19814, 2004-Ohio-262.....	8
<i>State v. Larson</i> , 3d Dist. No. 1-05-07, 2005-Ohio-2241	8
<i>State v. Simpkins</i> , 117 Ohio St. 3d 420, 2008-Ohio-1197	5
<i>State ex rel. Cordray v. Marshall</i> , 123 Ohio St.3d 229, 2009-Ohio-4986	10

Table of Authorities

Page No.

Cases:

<i>State ex rel. Estate of Miles v. Village of Piketon</i> , 121 Ohio St.3d 231, 2009-Ohio-786.....	5
<i>United States v. Groll</i> , 992 F.2d 755 (7 th Cir. 1993)	8
<i>United States v. Mendoza-Mata</i> , 322 F.3d 829 (5 th Cir. 2003)	8
<i>United States v. Padilla-Galarza</i> , 351 F.3d 594 (1 st Cir. 2003)	8
<i>United States v. United States Coin & Currency</i> , 401 U.S. 715 (1971)	11
<i>Watkins v. Collins</i> , 111 Ohio St. 3d 425, 2006-Ohio-5082.....	2,3

Statutes:

R.C. 2901.03.....	11
R.C. 2921.01.....	10
R.C. 2921.34.....	10
R.C. 2967.28.....	9

Rule:

Ohio Rules of Criminal Procedure 32.1	8
---	---

Other Authority:

129th General Assembly File No. 29, HB 86	10
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Introduction

Donald Billiter has affirmatively demonstrated that he is not guilty of “escape” from his void postrelease control. A defendant who proves actual innocence has demonstrated a manifest injustice that permits the withdrawal of a guilty plea. A defendant who proves actual innocence also falls within the “injustice” exception to the doctrine of res judicata.

Finally, this Court has clearly and unequivocally held that void postrelease control can be raised without regard to res judicata at any time, even in a collateral attack. Because Mr. Billiter’s claim is that the postrelease control underlying his plea to “escape” is void, the affirmative defense of res judicata does not prevent him from demonstrating that he is actually innocent of the charge for which he sits in prison.

Statement of the Law and the Case

The entry for Donald Billiter’s 1998 conviction for aggravated burglary states that “postrelease control is mandatory in this case up to a maximum of three (3) years. . . .” *State v. Billeter*,¹ Stark CP No. 1998CR651 (Dec. 9, 1998), Exhibit 1 to Motion to Withdraw Plea, Mar. 1, 2011. As the court of appeals in this case recognized, the postrelease control portion of that sentence is void because all first-degree felonies require five full years of postrelease control, not

¹ Appellant’s last name is properly “Billeter,” and the previous appeal was decided under that spelling. The State originally and incorrectly captioned the trial court case as “State v. Billiter” in the trial court, and to avoid confusion, counsel now uses the name as spelled in the official caption.

“up to” three years. *State v. Billiter*, Stark App. No. 2010-CA-00292, 2011-Ohio-2230, ¶13.

Despite the fact that the entry did not contain enforceable postrelease control, the State did not appeal the judgment. The State also did not file a collateral challenge. The State made no effort whatsoever to obtain a lawful entry that would permit the Adult Parole Authority (“APA”) to enforce postrelease control.

After Mr. Billiter’s release from prison, the APA purported to place him on postrelease control. In 2004, in this case, the State charged Mr. Billiter with “escape” from his purported term of postrelease control. Indictment, Apr. 9, 2004. Mr. Billiter pleaded guilty to escape, and the trial court imposed community control. Entry, June 6, 2004. The trial court later revoked his community control and imposed a prison term, which Mr. Billiter is currently serving. Entry, Aug. 26, 2004. While in prison, Mr. Billiter filed a pro se motion to “suspend” his sentence arguing that his sentence was void. Motion, July 21, 2008. In response to Mr. Billiter’s pro se motion, the State conceded that the charge in this case was based on postrelease control purportedly imposed on the authority of a 1998 aggravated burglary conviction. Response at pp. 2-4, 6, July 31, 2008. The trial court overruled Mr. Billiter’s motion, Entry, Aug. 22, 2008, and on appeal the Fifth District affirmed, based on this Court’s determination in *Watkins v. Collins*, 111 Ohio St. 3d 425, 2006-Ohio-5082. Specifically, that court held that “notice of post-release control during [a] sentencing [was] sufficient where post-release control was mandatory and

the entry contained some discretionary language[.]” *State v. Billeter*, Stark App. No. 2008-CA-00198, 2009-Ohio-2709, ¶13 (paraphrasing *Watkins* at ¶50).

One day after the court of appeals issued its 2009 decision, this Court issued *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, which changed how the Fifth District and the APA treated entries that mention postrelease control but fail to properly impose the sanction. In *Bloomer*, this Court specifically held a sentence including a term of postrelease control is void where the trial court failed to “notify the offender of the mandatory nature of the term of postrelease control and the length of that mandatory term and incorporate that notification into its entry.” *Bloomer* at ¶69. Mr. Billiter, who remained pro se, did not appeal the Fifth District’s decision.

Mr. Billiter obtained counsel and, in accordance with *Bloomer*, filed a new motion to withdraw his plea to “escape.” Motion, Mar. 1, 2010. The trial court adopted the State’s law of the case argument and denied the motion. Entry, Sep. 14, 2010. On appeal, Mr. Billiter raised the same arguments, and the Fifth District affirmed. Apx. at A-8. The court denied a motion to reconsider but granted a motion to certify a conflict. Apx. at A-1.

This Court declined to hear a discretionary appeal, *State v. Billiter*, 130 Ohio St. 3d 1440, 2011-Ohio-5883 (over dissent of Lanzinger, Cupp , and McGee Brown, JJ.), but accepted the certified conflict. Apx. A-1.

Argument

Proposition of Law:

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?

Res judicata does not bar a claim that a defendant is actually innocent of escape from non-existent postrelease control.

The Fifth District's certified question reflects its confusion. Mr. Billiter does not argue that his plea to a crime he did not commit was "void." He argues the postrelease control in his previous case was void, and that under *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, that claim can be raised at any time, even collaterally, and is therefore not precluded by res judicata. Mr. Billiter is actually innocent, and his continuing imprisonment is a manifest injustice that both permits him to withdraw his plea and falls squarely within the "injustice" exception to res judicata. In a criminal case, nothing could be more unjust than leaving someone in prison for a crime that they did not commit and could not have committed.

- I. **Res judicata does not bar a claim that postrelease control was not properly imposed.**
 - A. **This Court has specifically and unequivocally held that the doctrines of res judicata and law of the case cannot bar a claim that an entry with improper postrelease control is void. *Fischer* at ¶30.**

Mr. Billiter need not prove, and does not try to prove, that his plea to "escape" was void. He argues that he was not actually on postrelease control when he "escaped," because that that part of his sentence was void. And

because this Court has held that the invalidity of postrelease control can be raised at any time regardless of res judicata, that *argument* is not barred by res judicata. As this Court has explained:

[I]n cases in which a trial judge does not impose postrelease control in accordance with statutorily mandated terms. . . the sentence is void. *Principles 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.

Id. (emphasis added) The affirmative defense of res judicata simply does not apply to the argument that an improperly imposed postrelease control term is void.

II. The continued incarceration of an actually innocent defendant is an “injustice” that meets an exception to the doctrine of res judicata.

A. This Court has repeatedly applied the “injustice” exception in criminal and civil cases.

Even if the affirmative defense of res judicata applied to Mr. Billiter’s argument the State does not prevail, because courts routinely apply the injustice exception to claims of res judicata. *See State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197, ¶25 (“Res judicata is a rule of fundamental and substantial justice, that is to be applied in particular situations as fairness and justice require, and that . . . is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice.” (Internal quotation omitted) (citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 386-387 (1995) (Douglas, J., dissenting.))) *See also State ex rel. Estate of Miles v. Village of Piketon*, 121 Ohio St.3d 231, 2009-Ohio-786 at ¶30 (“[t]he binding effect of res judicata has been held not to apply when fairness and justice would not support it”), *State*

v. Dillon, 74 Ohio St.3d 166, 171, 1995-Ohio-169 (court can grant relief where “where the circumstances render a claim of res judicata unjust”), *State v. Gatchel*, 11th Dist. No. 2007-L-212, 2008-Ohio-4667, ¶24 (“appellant has had prior opportunities to challenge the claims he raises, and provides no explanation as to why the application of res judicata is unjust”) (emphasis added).

As the Montana Supreme Court explained, a defendant who demonstrates “actual innocence” has proven “the ‘fundamental miscarriage of justice’ exception to the general rule of res judicata.” *Beach v. State*, 2009 MT 398, 353 Mont. 411, 220 P.3d 667, ¶31 (2009), quoting *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). It is difficult to imagine a case where the “results” are more “unjust” than holding a person in prison for a crime it was legally impossible for him to have committed.

B. Donald Billiter affirmatively proved that he is not guilty of escape.

1. Standard for “actual innocence.”

In surveying the use of the term actual innocence across numerous jurisdictions, the Connecticut Supreme Court noted that the term refers to a defendant who has affirmatively proven that he did not commit the offense charges:

Our use of the term “actual innocence” is of paramount significance. Actual innocence, also referred to as factual innocence; *Bousley v. United States*, 523 U.S. 614, 623 (1998); is different than legal innocence. Actual innocence is not demonstrated merely by showing that there was insufficient evidence to prove guilt beyond a reasonable doubt. See *Ankerman v. Commissioner of Correction*, 122 Conn. App. 246, 252, 999 A.2d

789 (petitioner's claim that state failed to prove element of specific intent "is essentially one of sufficiency of the evidence and not one of actual innocence"), cert. denied, 298 Conn. 922, 4 A.3d 1225 (2010); *People v. Barnslater*, 373 Ill. App. 3d 512, 520, 869 N.E.2d 293, 311 Ill. Dec. 619 ("actual innocence [does] not concern whether a defendant had been proved guilty beyond a reasonable doubt" [internal quotation marks omitted]), appeal denied, 225 Ill. 2d 641, 875 N.E.2d 1115, 314 Ill. Dec. 828 (2007); *Ex parte Franklin*, 72 S.W.3d 671, 678 (Tex. Crim. App. 2002) (petitioner asserting freestanding actual innocence "must establish his innocence of the crime by clear and convincing evidence and not merely that he would be found not guilty by a subsequent jury").

Gould v. Comm'r of Corr., 301 Conn. 544, 560-561 (2011). Thus, Mr. Billiter's burden is not simply to prove that there was no "evidence presented, which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." Cf. *State v. Jenks*, 61 Ohio St. 3d 259, 574 N.E.2d 492 (1990), paragraph two of the syllabus. Instead, Mr. Billiter's burden in this posture is to demonstrate that he is actually innocent of the crime by clear and convincing evidence.

2. Mr. Billiter met his burden to prove that he was actually innocent of "escape" from non-existent postrelease control.

The defendant bears the burden of proving a "manifest injustice" that would permit him to withdraw his plea. See *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, ¶8. And when the manifest injustice is actual innocence, the lower courts have held defendants to that standard by requiring them to prove their innocence with credible evidence. Those courts also have no difficulty rejecting unsupported claims. See *State v. Dawkins*, 2d Dist. No. 21127, 2006-Ohio-307, ¶29 (quoting the trial judge addressing the defendant at the plea withdrawal hearing: "the fact that you make the bare bones allegation without

providing any meat to those bones leads to the conclusion that the claim of actual innocence is not credible and should not be a basis for allowing you to withdraw your plea under Ohio Rules of Criminal Procedure 32.1”), *State v. King*, 2d Dist. No. 19814, 2004-Ohio-262, ¶10 (reviewing the credibility of the defendant’s evidence), and *State v. Larson*, 3d Dist. No. 1-05-07, 2005-Ohio-2241, at ¶8-14 (rejecting claim of innocence because the defendant did not actually prove innocence). See also *United States v. Padilla-Galarza*, 351 F.3d 594, 598 (1st Cir.2003) (“Even now, Padilla’s brief offers no straightforward and plausible claim of actual innocence”) and *United States v. Mendoza-Mata*, 322 F.3d 829, 834 (5th Cir.2003) (evidence “does not prove that Mendoza-Mata is actually innocent”).

Even though courts frequently find that defendants have failed to meet their burden, “when assertions of innocence are substantiated by evidence, the district court must do more than simply deny the motion out of hand: a court must either permit the defendant to withdraw her plea and go to trial, conduct an evidentiary hearing on the matter or deny the motion with an explanation as to why the evidence is insufficient or incredible.” *United States v. Groll*, 992 F.2d 755, 758 (7th Cir.1993).

In his plea withdrawal motion, Mr. Billiter affirmatively demonstrated that his escape conviction was based on his previous conviction for aggravated burglary. State’s Reply to Motion to Suspend Sentence, pp. 2-4, 6, filed July 31, 2008. He also attached a copy of that entry. Entry, Dec. 9, 1998, attached as Exhibit 1 to Motion to Withdraw Plea, Feb. 27, 2010. That entry imposed

postrelease control that was “mandatory . . . up to a maximum of three (3) years. . . .” That entry incorrectly states the duration of postrelease control because it states that the time is “up to” three years instead of the mandatory five full years for a first degree felony, R.C. 2967.28(B)(1).

The State did not contest any of Mr. Billiter’s factual allegations. Response, May, 27, 2010. The court of appeals then correctly found that the “postrelease control” that the Adult Parole Authority (“APA”) purported to impose was void. *Billiter*, at ¶13 (“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”), Apx. 11.

The executive branch has no authority to enforce a legally non-existent sanction—so even though the APA purported to place him on postrelease control, Mr. Billiter had no legal duty to comply with the APA’s directives because no trial court had properly imposed the sanction. Without a proper court order, the APA has as much authority to place someone on postrelease control as does the Office of the Ohio Public Defender. See *Bloomer* at ¶71 (“in the absence of a *proper* sentencing entry imposing postrelease control, the parole board’s imposition of post-release control cannot be enforced) (emphasis added), and *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954 at ¶16 (“without the trial court’s *proper* imposition of postrelease control, the Adult Parole Authority remains powerless to implement it”) (emphasis added).

Because Mr. Billiter conclusively demonstrated that the Adult Parole Authority had no power to place him on postrelease control, he affirmatively demonstrated that he was not under “detention,” and is therefore actually innocent of “escape” under R.C. 2921.34(A)(1) (“detention” an element of “escape”) and R.C. 2921.01(E) (definition of “detention”).²

The bar to withdrawing a plea is both wide and high. The standard is wide enough to prevent “injustice,” but the defendant bears a high burden of proof. Here, Mr. Billiter met that burden because he affirmatively demonstrated that he was not under “detention” when he “escaped.” If innocence isn’t a manifest injustice that allows a defendant to withdraw a guilty plea, nothing is. “I’m not guilty, and I have proven it” should always be a valid basis to withdraw a guilty plea.

III. This Court’s “intervening decision” in *State v. Bloomer* creates an exception to *res judicata*.

This Court has explained that “an intervening decision by the Supreme Court” is an exception to the law-of-the-case doctrine. *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, ¶27 (internal citations omitted). The day after the court of appeals issued its decision in Mr. Billiter’s previous appeal, this Court issued *State v. Bloomer*, which changed the Fifth District’s holding as to what constitutes void postrelease control. Compare, *Billeter*, 2009-Ohio-2709 at ¶13 (“notice of post-release control during

² The escape statute has subsequently been amended to lower to the penalty for “escaping” from supervision, 129th General Assembly File No. 29, HB 86, but that amendment has no practical impact on this case.

sentencing sufficient where post-release control was mandatory and entry contained some discretionary language”) to *Billiter*, 2011-Ohio-2230 at ¶13 (“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”). Further, in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶27, this Court reaffirmed the central holding of *Bloomer* and its cases that required a “proper” entry to impose postrelease control:

[W]e reaffirm the portion of the syllabus in [*State v.*] *Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250,] that states “[w]hen a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void. . . .”

IV. Holding that res judicata bars a demonstrated claim of actual innocence would lead to absurd results.

Under the State’s theory, defendants who can affirmatively prove their innocence must remain in prison. But the State “has no legitimate interest in punishing those innocent of wrongdoing[.]” *United States v. United States Coin & Currency*, 401 U.S. 715, 726 (1971). Mr. Billiter doubtlessly committed a crime in his past, but he has proven that he did not commit “escape” as defined by the Ohio General Assembly. Because “[n]o conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code[.]” R.C. 2901.03(A), he has demonstrated actual innocence.

The State’s doctrine would also require defendants who are actually innocent based on changes in case law to remain in prison. For example, this Court recently ruled that Ohio’s statutory rape statute did not apply to

consensual sex between two children both under the age of 13. *In re D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671, *cert. denied*, *Ohio v. D. B.*, --- U.S. ---, 132 S.Ct. 846 (2011). Under the State's theory, a child would have to remain in juvenile prison and live with a rape adjudication for the rest of his or her life, even if that child could prove beyond a shadow of a doubt the conduct was both consensual and lawful. That is absurd.

Mr. Billiter has demonstrated that he is actually innocent of the crime charged. If actual innocence is not a "manifest injustice," nothing is. If actual innocence does not justify an "injustice" exception to the doctrine of *res judicata*, nothing does.

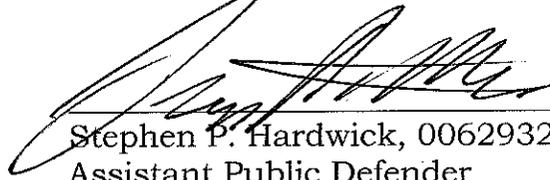
Conclusion

Mr. Billiter has affirmatively demonstrated that he was not under "detention" because the Adult Parole Authority was "powerless" and "without authority" to supervise him. *Res judicata* does not require that the State keep him in prison when he is actually innocent of the charge against him.

This Court should reverse the decision of the court of appeals, vacate his plea, and discharge him.

Respectfully submitted,

Office of the Ohio Public Defender



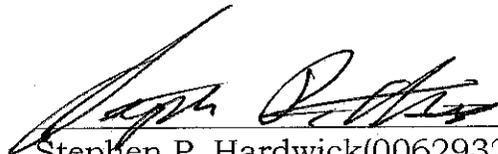
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Certificate of Service

I certify that on February 13, 2012, 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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Appendix to
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APPELLANT DONALD BILLITER'S NOTICE OF CERTIFIED CONFLICT

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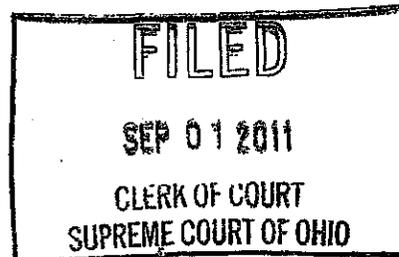
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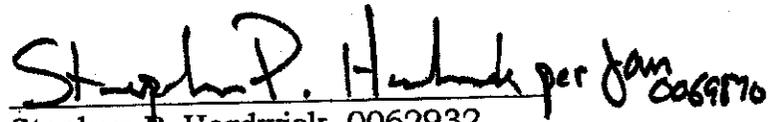
Appellant Donald Billiter hereby gives notice that on August 3, 2011, the Stark County Court of Appeals, Fifth Appellate District certified the following question in *State v. Billiter*, Court of Appeals Case No. 2010C400292:

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

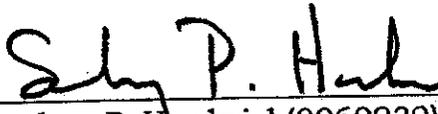

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CERTIFICATE OF SERVICE

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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IN THE SUPREME COURT OF OHIO

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 Plaintiff-Appellee, : Case No.
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 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

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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

3

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

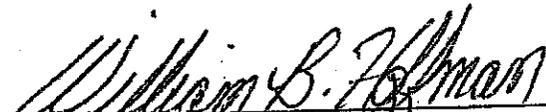
or opinion of the court of appeals so certifying must clearly set forth the rule of law upon which the alleged conflict exists."

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.

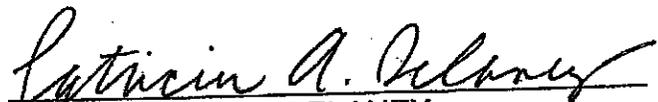
IT IS SO ORDERED.



HON. WILLIAM B. HOFFMAN



HON. W. SCOTT GWIN



HON. PATRICIA A. DELANEY

WBH/ag 7/18/11

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

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

JOHN D. FERRERO,
PROSECUTING ATTORNEY,
STARK COUNTY, OHIO

STEPHEN P. HARDWICK
Assistant Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215

BY: RONALD MARK CALDWELL
Assistant Prosecuting Attorney
Appellate Section
110 Central Plaza, South - Suite 510
Canton, Ohio 44702-1413

A TRUE COPY TESTE:
NANCY S. REINBOLD, CLERK
By *J. E. ...* Deputy
Date *5/10/11*

ENTERED FOR

Hoffman, J.

{¶1} 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

{¶2} 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.

{¶3} 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.

{¶4} 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.) *Blondo* 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.

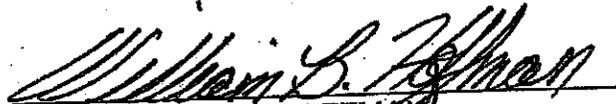
{¶22} We find Appellant’s conviction on the escape charge and subsequent sentence do not constitute a manifest injustice under the circumstances of this case. Accordingly, the sole assignment of error is overruled.

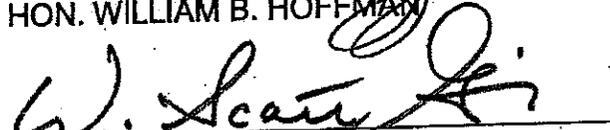
{123} The judgment of the Stark County Court of Common Pleas is affirmed.

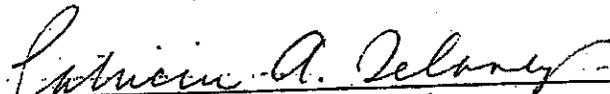
By: Hoffman, J.

Gwin, P.J. and

Delaney, J. concur


HON. WILLIAM B. HOFFMAN


HON. W. SCOTT GWIN


HON. PATRICIA A. DELANEY

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

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

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STATE OF OHIO

Plaintiff-Appellee

-vs-

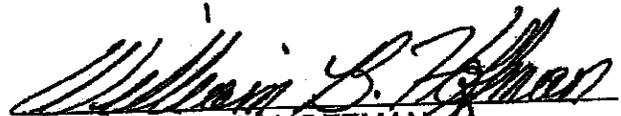
DONALD BILLITER

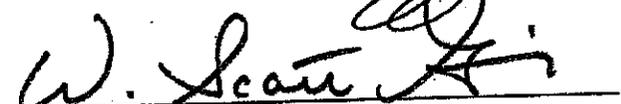
Defendant-Appellant

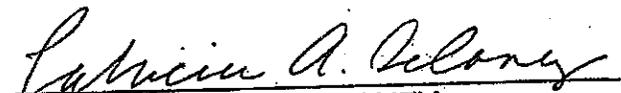
JUDGMENT ENTRY

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[.]"¹ 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.

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).' *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.

.....

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

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

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

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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

3

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

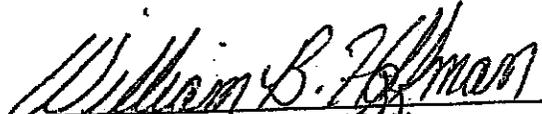
or opinion of the court of appeals so certifying must clearly set forth the rule of law upon which the alleged conflict exists."

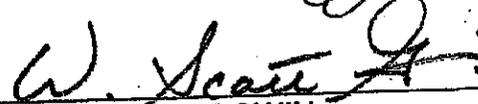
Upon review of the Second District's opinions in *Pointer*, *Robinson* and *Renner*, we find the opinions are in actual conflict with this Court's Judgment Entry upon the following question:

"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

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

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

JOHN D. FERRERO,
PROSECUTING ATTORNEY,
STARK COUNTY, OHIO

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BY: RONALD MARK CALDWELL
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Appellate Section
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Canton, Ohio 44702-1413

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

ENTERED FILED

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.

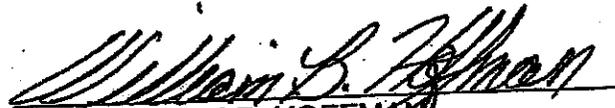
{¶22} We find Appellant’s conviction on the escape charge and subsequent sentence do not constitute a manifest injustice under the circumstances of this case. Accordingly, the sole assignment of error is overruled.

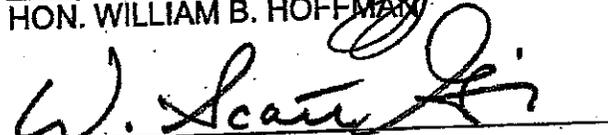
{123} The judgment of the Stark County Court of Common Pleas is affirmed.

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

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

11 MAY -9 PM 2: 32

STATE OF OHIO

Plaintiff-Appellee

-vs-

DONALD BILLITER

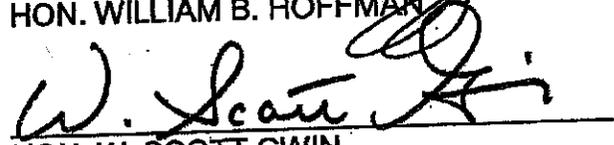
Defendant-Appellant

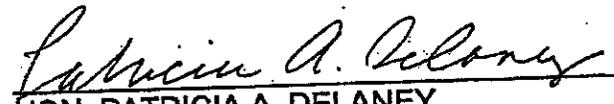
JUDGMENT ENTRY

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

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
IN GENERAL

Go to the Ohio Code Archive Directory

ORC Ann. 2901.03 (2012)

§ 2901.03. Common law offenses abrogated

(A) No conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code.

(B) An offense is defined when one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, and provide a penalty for violation of such prohibition or failure to meet such duty.

(C) This section does not affect any power of the general assembly under section 8 of Article II, Ohio Constitution, nor does it affect the power of a court to punish for contempt or to employ any sanction authorized by law to enforce an order, civil judgment, or decree.

HISTORY:

134 v H 511. Eff 1-1-74.

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2921. OFFENSES AGAINST JUSTICE AND PUBLIC ADMINISTRATION
 IN GENERAL

Go to the Ohio Code Archive Directory

ORC Ann. 2921.01 (2012)

§ 2921.01. Definitions

As used in *sections 2921.01 to 2921.45 of the Revised Code*:

(A) "Public official" means any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity, and includes, but is not limited to, legislators, judges, and law enforcement officers. "Public official" does not include an employee, officer, or governor-appointed member of the board of directors of the nonprofit corporation formed under *section 187.01 of the Revised Code*.

(B) "Public servant" means any of the following:

(1) Any public official;

(2) Any person performing ad hoc a governmental function, including, but not limited to, a juror, member of a temporary commission, master, arbitrator, advisor, or consultant;

(3) A person who is a candidate for public office, whether or not the person is elected or appointed to the office for which the person is a candidate. A person is a candidate for purposes of this division if the person has been nominated according to law for election or appointment to public office, or if the person has filed a petition or petitions as required by law to have the person's name placed on the ballot in a primary, general, or special election, or if the person campaigns as a write-in candidate in any primary, general, or special election.

"Public servant" does not include an employee, officer, or governor-appointed member of the board of directors of the nonprofit corporation formed under *section 187.01 of the Revised Code*.

(C) "Party official" means any person who holds an elective or appointive post in a political party in the United States or this state, by virtue of which the person directs, conducts, or participates in directing or conducting party affairs at any level of responsibility.

(D) "Official proceeding" means any proceeding before a legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, and includes any proceeding before a referee, hearing examiner, commissioner, notary, or other person taking testimony or a deposition in connection with an official proceeding.

ORC Ann. 2921.01

(E) "Detention" means arrest; confinement in any vehicle subsequent to an arrest; confinement in any public or private facility for custody of persons charged with or convicted of crime in this state or another state or under the laws of the United States or alleged or found to be a delinquent child or unruly child in this state or another state or under the laws of the United States; hospitalization, institutionalization, or confinement in any public or private facility that is ordered pursuant to or under the authority of *section 2945.37, 2945.371 [2945.37.1], 2945.38, 2945.39, 2945.40, 2945.401 [2945.40.1], or 2945.402 [2945.40.2] of the Revised Code*; confinement in any vehicle for transportation to or from any facility of any of those natures; detention for extradition or deportation; except as provided in this division, supervision by any employee of any facility of any of those natures that is incidental to hospitalization, institutionalization, or confinement in the facility but that occurs outside the facility; supervision by an employee of the department of rehabilitation and correction of a person on any type of release from a state correctional institution; or confinement in any vehicle, airplane, or place while being returned from outside of this state into this state by a private person or entity pursuant to a contract entered into under division (E) of *section 311.29 of the Revised Code* or division (B) of *section 5149.03 of the Revised Code*. For a person confined in a county jail who participates in a county jail industry program pursuant to *section 5147.30 of the Revised Code*, "detention" includes time spent at an assigned work site and going to and from the work site.

(F) "Detention facility" means any public or private place used for the confinement of a person charged with or convicted of any crime in this state or another state or under the laws of the United States or alleged or found to be a delinquent child or unruly child in this state or another state or under the laws of the United States.

(G) "Valuable thing or valuable benefit" includes, but is not limited to, a contribution. This inclusion does not indicate or imply that a contribution was not included in those terms before September 17, 1986.

(H) "Campaign committee," "contribution," "political action committee," "legislative campaign fund," "political party," and "political contributing entity" have the same meanings as in *section 3517.01 of the Revised Code*.

(I) "Provider agreement" and "medical assistance program" have the same meanings as in *section 2913.40 of the Revised Code*.

HISTORY:

134 v H 511 (Eff 1-1-74); 141 v H 340 (Eff 5-20-86); 141 v H 300 (Eff 9-17-86); 141 v H 428 (Eff 12-23-86); 142 v H 708 (Eff 4-19-88); 143 v H 51 (Eff 11-8-90); 144 v S 37 (Eff 7-31-92); 145 v H 42 (Eff 2-9-94); 145 v H 571 (Eff 10-6-94); 146 v S 8 (Eff 8-23-95); 146 v S 2 (Eff 7-1-96); 146 v H 154 (Eff 10-4-96); 146 v S 285 (Eff 7-1-97); 147 v H 293 (Eff 3-17-98); 147 v S 134 (Eff 7-13-98); 148 v H 661 (Eff 3-15-2001); 150 v H 1, § 1, eff. 3-31-05; 151 v S 115, § 1, eff. 4-26-05; 2011 HB 1, § 1, eff. Feb. 18, 2011.

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2921. OFFENSES AGAINST JUSTICE AND PUBLIC ADMINISTRATION
 OBSTRUCTING AND ESCAPE

Go to the Ohio Code Archive Directory

ORC Ann. 2921.34 (2012)

§ 2921.34. Escape

(A) (1) No person, knowing the person is under detention, other than supervised release detention, or being reckless in that regard, shall purposely break or attempt to break the detention, or purposely fail to return to detention, either following temporary leave granted for a specific purpose or limited period, or at the time required when serving a sentence in intermittent confinement.

(2) (a) Division (A)(2)(b) of this section applies to any person who is sentenced to a prison term pursuant to division (A)(3) or (B) of *section 2971.03 of the Revised Code*.

(b) No person to whom this division applies, for whom the requirement that the entire prison term imposed upon the person pursuant to division (A)(3) or (B) of *section 2971.03 of the Revised Code* be served in a state correctional institution has been modified pursuant to *section 2971.05 of the Revised Code*, and who, pursuant to that modification, is restricted to a geographic area, knowing that the person is under a geographic restriction or being reckless in that regard, shall purposely leave the geographic area to which the restriction applies or purposely fail to return to that geographic area following a temporary leave granted for a specific purpose or for a limited period of time.

(3) No person, knowing the person is under supervised release detention or being reckless in that regard, shall purposely break or attempt to break the supervised release detention or purposely fail to return to the supervised release detention, either following temporary leave granted for a specific purpose or limited period, or at the time required when serving a sentence in intermittent confinement.

(B) Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority, is not a defense to a charge under this section if the detention is pursuant to judicial order or in a detention facility. In the case of any other detention, irregularity or lack of jurisdiction is an affirmative defense only if either of the following occurs:

(1) The escape involved no substantial risk of harm to the person or property of another.

(2) The detaining authority knew or should have known there was no legal basis or authority for the detention.

(C) Whoever violates this section is guilty of escape.

(1) If the offender violates division (A)(1) or (2) of this section, if the offender, at the time of the commission of the offense, was under detention as an alleged or adjudicated delinquent child or unruly child, and if the act for which the offender was under detention would not be a felony if committed by an adult, escape is a misdemeanor of the first degree.

(2) If the offender violates division (A)(1) or (2) of this section and if either the offender, at the time of the commission of the offense, was under detention in any other manner or the offender is a person for whom the requirement that the entire prison term imposed upon the person pursuant to division (A)(3) or (B) of *section 2971.03 of the Revised Code* be served in a state correctional institution has been modified pursuant to *section 2971.05 of the Revised Code*, escape is one of the following:

(a) A felony of the second degree, when the most serious offense for which the person was under detention or for which the person had been sentenced to the prison term under division (A)(3), (B)(1)(a), (b), or (c), (B)(2)(a), (b), or (c), or (B)(3)(a), (b), (c), or (d) of *section 2971.03 of the Revised Code* is aggravated murder, murder, or a felony of the first or second degree or, if the person was under detention as an alleged or adjudicated delinquent child, when the most serious act for which the person was under detention would be aggravated murder, murder, or a felony of the first or second degree if committed by an adult;

(b) A felony of the third degree, when the most serious offense for which the person was under detention or for which the person had been sentenced to the prison term under division (A)(3), (B)(1)(a), (b), or (c), (B)(2)(a), (b), or (c), or (B)(3)(a), (b), (c), or (d) of *section 2971.03 of the Revised Code* is a felony of the third, fourth, or fifth degree or an unclassified felony or, if the person was under detention as an alleged or adjudicated delinquent child, when the most serious act for which the person was under detention would be a felony of the third, fourth, or fifth degree or an unclassified felony if committed by an adult;

(c) A felony of the fifth degree, when any of the following applies:

(i) The most serious offense for which the person was under detention is a misdemeanor.

(ii) The person was found not guilty by reason of insanity, and the person's detention consisted of hospitalization, institutionalization, or confinement in a facility under an order made pursuant to or under authority of *section 2945.40, 2945.401, or 2945.402 of the Revised Code*.

(d) A misdemeanor of the first degree, when the most serious offense for which the person was under detention is a misdemeanor and when the person fails to return to detention at a specified time following temporary leave granted for a specific purpose or limited period or at the time required when serving a sentence in intermittent confinement.

(3) If the offender violates division (A)(3) of this section, except as otherwise provided in this division, escape is a felony of the fifth degree. If the offender violates division (A)(3) of this section and if, at the time of the commission of the offense, the most serious offense for which the offender was under supervised release detention was aggravated murder, murder, any other offense for which a sentence of life imprisonment was imposed, or a felony of the first or second degree, escape is a felony of the fourth degree.

(D) As used in this section, "supervised release detention" means detention that is supervision of a person by an employee of the department of rehabilitation and correction while the person is on any type of release from a state correctional institution, other than transitional control under *section 2967.26 of the Revised Code* or placement in a community-based correctional facility by the parole board under *section 2967.28 of the Revised Code*.

HISTORY:

134 v H 511 (Eff 1-1-74); 144 v H 298 (Eff 7-26-91); 144 v S 37 (Eff 7-31-92); 144 v H 725 (Eff 4-16-93); 145 v H 42 (Eff 2-9-94); 146 v S 2 (Eff 7-1-96); 146 v H 180 (Eff 1-1-97); 146 v S 285. Eff 7-1-97; 150 v H 473, § 1, eff.

ORC Ann. 2921.34

4-29-05; 151 v S 260, § 1, eff. 1-2-07; 152 v S 10, § 1, eff. 1-1-08; 2011 HB 86, § 1, eff. Sept. 30, 2011.

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2967. PARDON; PAROLE; PROBATION

Go to the Ohio Code Archive Directory

ORC Ann. 2967.28 (2012)

§ 2967.28. Period of post-release control for certain offenders; sanctions; proceedings upon violation

(A) As used in this section:

- (1) "Monitored time" means the monitored time sanction specified in *section 2929.17 of the Revised Code*.
- (2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in *section 2923.11 of the Revised Code*.
- (3) "Felony sex offense" means a violation of a section contained in Chapter 2907. of the Revised Code that is a felony.

(B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a sentencing court to notify the offender pursuant to division (B)(2)(c) of *section 2929.19 of the Revised Code* of this requirement or to include in the judgment of conviction entered on the journal a statement that the offender's sentence includes this requirement does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under this division. *Section 2929.191 of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(2)(c) of *section 2929.19 of the Revised Code* regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (D)(1) of *section 2929.14 of the Revised Code* a statement regarding post-release control. Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of post-release control required by this division for an offender shall be of one of the following periods:

- (1) For a felony of the first degree or for a felony sex offense, five years;
- (2) For a felony of the second degree that is not a felony sex offense, three years;
- (3) For a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years.

(C) Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender. *Section 2929.191 of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(2)(d) of *section 2929.19 of the Revised Code* regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (D)(2) of *section 2929.14 of the Revised Code* a statement regarding post-release control. Pursuant to an agreement entered into under *section 2967.29 of the Revised Code*, a court of common pleas or parole board may impose sanctions or conditions on an offender who is placed on post-release control under this division.

(D) (1) Before the prisoner is released from imprisonment, the parole board or, pursuant to an agreement under *section 2967.29 of the Revised Code*, the court shall impose upon a prisoner described in division (B) of this section, may impose upon a prisoner described in division (C) of this section, and shall impose upon a prisoner described in division (B)(2)(b) of *section 5120.031* or in division (B)(1) of *section 5120.032 of the Revised Code*, one or more post-release control sanctions to apply during the prisoner's period of post-release control. Whenever the board or court imposes one or more post-release control sanctions upon a prisoner, the board or court, in addition to imposing the sanctions, also shall include as a condition of the post-release control that the offender not leave the state without permission of the court or the offender's parole or probation officer and that the offender abide by the law. The board or court may impose any other conditions of release under a post-release control sanction that the board or court considers appropriate, and the conditions of release may include any community residential sanction, community nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to *sections 2929.16, 2929.17, and 2929.18 of the Revised Code*. Prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under this division, the parole board or court shall review the prisoner's criminal history, results from the single validated risk assessment tool selected by the department of rehabilitation and correction under *section 5120.114 of the Revised Code*, all juvenile court adjudications finding the prisoner, while a juvenile, to be a delinquent child, and the record of the prisoner's conduct while imprisoned. The parole board or court shall consider any recommendation regarding post-release control sanctions for the prisoner made by the office of victims' services. After considering those materials, the board or court shall determine, for a prisoner described in division (B) of this section, division (B)(2)(b) of *section 5120.031*, or division (B)(1) of *section 5120.032 of the Revised Code*, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances or, for a prisoner described in division (C) of this section, whether a post-release control sanction is necessary and, if so, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances. In the case of a prisoner convicted of a felony of the fourth or fifth degree other than a felony sex offense, the board or court shall presume that monitored time is the appropriate post-release control sanction unless the board or court determines that a more restrictive sanction is warranted. A post-release control sanction imposed under this division takes effect upon the prisoner's release from imprisonment.

Regardless of whether the prisoner was sentenced to the prison term prior to, on, or after July 11, 2006, prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under this division, the parole board shall notify the prisoner that, if the prisoner violates any sanction so imposed or any condition of post-release control described in division (B) of *section 2967.131 of the Revised Code* that is imposed on the prisoner, the parole board may impose a prison term of up to one-half of the stated prison term originally imposed upon the prisoner.

(2) If a prisoner who is placed on post-release control under this section is released before the expiration of the prisoner's stated prison term by reason of credit earned under *section 2967.193 of the Revised Code* and if the prisoner earned sixty or more days of credit, the adult parole authority shall supervise the offender with an active global positioning system device for the first fourteen days after the offender's release from imprisonment. This division does not prohibit or limit the imposition of any post-release control sanction otherwise authorized by this section.

(3) At any time after a prisoner is released from imprisonment and during the period of post-release control applicable to the releasee, the adult parole authority or, pursuant to an agreement under *section 2967.29 of the Revised Code*, the court may review the releasee's behavior under the post-release control sanctions imposed upon the releasee under this section. The authority or court may determine, based upon the review and in accordance with the standards established under division (E) of this section, that a more restrictive or a less restrictive sanction is appropriate and may impose a different sanction. The authority also may recommend that the parole board or court increase or reduce the duration of the period of post-release control imposed by the court. If the authority recommends that the board or court increase the duration of post-release control, the board or court shall review the releasee's behavior and may increase the duration of the period of post-release control imposed by the court up to eight years. If the authority recommends that the board or court reduce the duration of control for an offense described in division (B) or (C) of this section, the board or court shall review the releasee's behavior and may reduce the duration of the period of control imposed by the court. In no case shall the board or court reduce the duration of the period of control imposed for an offense described in division (B)(1) of this section to a period less than the length of the stated prison term originally imposed, and in no case shall the board or court permit the releasee to leave the state without permission of the court or the releasee's parole or probation officer.

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

(1) Establish standards for the imposition by the parole board of post-release control sanctions under this section that are consistent with the overriding purposes and sentencing principles set forth in *section 2929.11 of the Revised Code* and that are appropriate to the needs of releasees;

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

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

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

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

- (a) Classify violations according to the degree of seriousness;
- (b) Define the circumstances under which formal action by the parole board is warranted;
- (c) Govern the use of evidence at violation hearings;
- (d) Ensure procedural due process to an alleged violator;
- (e) Prescribe nonresidential community control sanctions for most misdemeanor and technical violations;
- (f) Provide procedures for the return of a releasee to imprisonment for violations of post-release control.

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

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

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

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

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

(a) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period

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

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

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

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

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 147 v S 111 (Eff 3-17-98); 148 v S 107 (Eff 3-23-2000); 149 v H 327 (Eff 7-8-2002); 149 v H 510; Eff 3-31-2003; 151 v H 137, § 1, eff. 7-11-06; 152 v H 130, § 1, eff. 4-7-09; 2011 HB 86, § 1, eff. Sept. 30, 2011.

OHIO RULES OF COURT SERVICE
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*** Rules current through rule amendments received through January 9, 2012 ***
*** Annotations current through November 7, 2011 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 32.1 (2012)

Review Court Orders which may amend this Rule.

Rule 32.1. Withdrawal of Guilty Plea

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.

HISTORY: Amended, eff 7-1-98.