ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	CASE NO. 13-0743
PLAINTIFF-APPELLEE,	:	
	:	ON DISCRETIONARY APPEAL FROM THE
V.	:	PREBLE COUNTY COURT OF APPEALS,
	:	TWELFTH APPELLATE DISTRICT,
CURTIS SCHLEIGER,	:	CASE NO. CA2011-11-012
	:	
DEFENDANT-APPELLANT.	:	

MOTION OF APPELLANT CURTIS SCHLEIGER FOR DELAYED APPEAL PURSUANT TO S.CT.PRAC.R. 7.01(A)(4)

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Assistant Prosecuting Attorney

Preble County Prosecutor's Office
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Office of the Ohio Public Defender

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Counsel for Appellant Curtis Schleiger

FILED
MAY 10 2013
CLERK OF COURT
SUPREME COURT OF OHIO

INTRODUCTION

Mr. Schleiger timely filed an appeal from his jury trial, but has still not had his one appeal of right with counsel. This is all he wants.[1] And on May 10, 2013, undersigned counsel made an error that made this more difficult. Counsel miscalculated the due date of his discretionary appeal to this Court by one day. Apx. A-1 (affidavit of counsel). The appeal was due on May 9, 2013, and counsel tendered the notice of appeal and jurisdictional memorandum on May 10, 2013. Counsel files this motion for delayed the same day. This was entirely counsel's fault. Mr. Schleiger promptly returned the indigency affidavit counsel sent him, and Mr. Schleiger relied on counsel to properly file this document.

REASONS TO GRANT A DELAYED APPEAL

Mr. Schleiger has struggled with access to counsel problems throughout this appeal. Curtis Schleiger filed a timely appeal after a jury rejected his self-defense claim and convicted him of felonious assault and carrying a concealed weapon. His appointed appellate counsel filed a brief pursuant to *Anders v. California*, 386 US 738 (1967). In response, Mr. Schleiger filed a pro se "brief" pursuant to *Anders*, and asked for new counsel. The court of appeals found a non-frivolous issue in Mr. Schleiger's case (an

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[1] This is the third time that Mr. Schleiger has sought review from this Court. *See State v. Schleiger*, 127 Ohio St.3d 1504, 2011-Ohio-19; *State v. Schleiger*, 128 Ohio St.3d 1557, 2011-Ohio-2905. All of his issues were properly filed and preserved each time. *See infra* text at 4-6.

error in the imposition of postrelease control), but instead of appointing new counsel for a full review of the record, it summarily reversed the trial court's decision and remanded for a hearing pursuant to R.C. 2929.191. *State v. Schleiger*, 12th Dist. No. CA2009-09-026, 2010-Ohio-4080. Apx. A-16. Over a dissent, this Court declined to hear the appeal. *State v. Schleiger*, 127 Ohio St.3d 1504, 2011-Ohio-19 (O'Connor, CJ., dissenting).

Mr. Schleiger also filed a timely application to reopen his appeal. But the court of appeals denied the motion, mistakenly applying the standard for ineffective assistance of counsel of *Strickland v. Washington*, 466 U.S. 668 (1984), instead of the denial-of-counsel standard of *Smith v. Robbins*, 528 U.S. 259, 286 (2000), *Penson v. Ohio*, 488 U.S. 75, 88 (1988), and *U.S. v. Cronic*, 466 U.S. 648 (1984). "Entry Denying Application to Reopen" filed in *State v. Schleiger*, 12th Dist. No. CA2009-09-026 (Feb. 3, 2011), Apx. A-13. Again over a dissent, this Court declined to hear the case. *State v. Schleiger*, 128 Ohio St.3d 1557, 2011-Ohio-2905 (O'Connor, CJ., dissenting).

Based on this Court's clear language in* Fischer, *the State of Ohio tells the United States Supreme Court that Mr. Schleiger can have a full appeal on remand.

Mr. Schleiger filed a petition for certiorari in the United States Supreme Court, arguing that he was denied his right to counsel on a non-frivolous appeal. In response, Ohio Solicitor General, representing the State of Ohio, informed the United States Supreme Court that the State would waive the affirmative defense of res judicata so that

Mr. Schleiger could appeal issues from his original trial in a new appeal from his postrelease control resentencing. Brief in Opposition at 24-25.

***On remand, the Twelfth District declines to follow this Court's clear language in* Fischer.**

Pursuant to the Twelfth District's decision, the trial court resentenced Mr. Schleiger to add proper postrelease control to his sentence. The trial court asked Mr. Schleiger if he wanted a lawyer and provided stand-by counsel, but did not seek a knowing and voluntary waiver of counsel.

On appeal, the Twelfth District held that postrelease control was so simple that Mr. Schleiger had no right to counsel. Opinion at ¶ 16-18, Apx. 8-9. In the opinion, the court noted that its decision was in conflict with the decision of the Third Appellate District in *State v. Peace*, 3d Dist. No. 5-12-04, 2012-Ohio-6118. *Schleiger* at ¶ 15, Apx. 7-8. The court also held that, despite the express waiver by the Solicitor General, the court had no authority to decide issues outside the scope of the postrelease control issues. "Entry Clarifying Scope of Appeal," Apx. A-2.

Due to counsel's miscalculation, the jurisdictional memorandum was tendered to this Court for filing one day late. Apx. A-1.

CONCLUSION

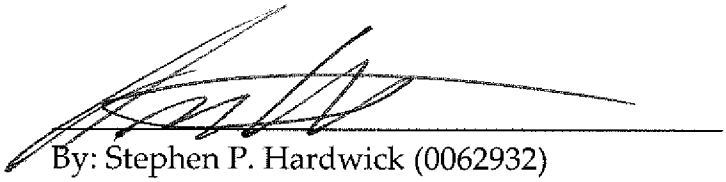
On his first appeal, Mr. Schleiger could have raised any non-frivolous issue, but the Twelfth District denied him counsel. On his second appeal, Mr. Schleiger had

counsel, but he was prohibited from raising issues other than postrelease control. And on this appeal, undersigned counsel failed to correctly calculate the due date of his jurisdictional memorandum. He asks only to have one plenary appeal with counsel

Curtis Schleiger comes to this Court one day past the deadline for filing a jurisdictional memorandum. He has done what he can to secure an appeal, but counsel has let him down, again. He asks that this Court grant him leave to file a delayed appeal.

Respectfully submitted,

Office of the Ohio Public Defender



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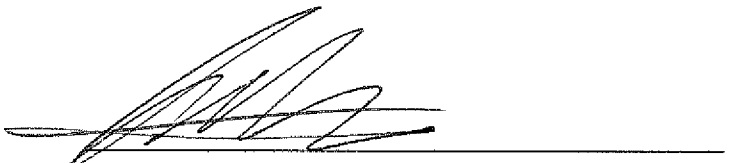
Counsel for Appellant Curtis Schleiger

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was forwarded by regular U.S. Mail, postage pre-paid to the office of Kathryn M. Worthington, Assistant Prosecuting Attorney, Preble County Prosecutor's Office, 101 E. Main Street, Eaton, Ohio 45320, on this 10th of May, 2013.



Stephen P. Hardwick (0062932)
Assistant Public Defender

Counsel for Appellant Curtis Schleiger

#393080

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	CASE NO.
PLAINTIFF-APPELLEE,	:	
	:	ON DISCRETIONARY APPEAL FROM THE
V.	:	PREBLE COUNTY COURT OF APPEALS,
	:	TWELFTH APPELLATE DISTRICT,
CURTIS SCHLEIGER,	:	CASE NO. CA2011-11-012
	:	
DEFENDANT-APPELLANT.	:	

APPENDIX TO

MOTION FOR DELAYED APPEAL OF APPELLANT CURTIS SCHLEIGER

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	AFFIDAVIT OF
PLAINTIFF-APPELLEE,	:	ATTORNEY STEPHEN P. HARDWICK
	:	
V.	:	
	:	
CURTIS SCHLEIGER,	:	
	:	
DEFENDANT-APPELLANT.	:	

1. On March 27, 2013, two days after the court of appeals rendered its decision in this case, I entered May 10, 2013 as the deadline for the jurisdictional memorandum on his office's deadline log.
2. Also on March 27, 2013, I sent Mr. Schleiger an indigency affidavit to be used to file his jurisdictional appeal.
3. Mr. Schleiger promptly returned the executed affidavit. I received it by April 3, 2013.
4. On April 3, 2013, I wrote Mr. Schleiger a letter promising to file a jurisdictional memorandum for him in this Court.
5. On May 10, 2013, I tendered a jurisdictional memorandum to the clerk of this Court, but it was rejected because it was one day late.
6. It was my responsibility to correctly calculate the deadline and I simply miscalculated the deadline.
7. Mr. Schleiger reasonably relied on me to timely file the jurisdictional memorandum.
8. I apologize to this Court and to Mr. Schleiger for his error.

Further affiant sayeth naught.

Stephen P. Hardwick, 0062932

Signed and sworn before me this 10th day of May, 2013.

Sheana Mershon
Notary Public
Sheana Mershon
Notary Public
State of Ohio
My commission expires on 7/11/15

urgent

IN THE COURT OF APPEALS OF PREBLE COUNTY, OHIO

FILED
PREBLE COUNTY, OHIO
JUN 11 2012
Christopher D. Washington
CLERK OF COURT OF APPEALS

STATE OF OHIO,

Appellee,

vs.

CURTIS D. SCHLEIGER,

Appellant.

CASE NO. CA2011-11-012

ENTRY CLARIFYING SCOPE OF APPEAL

The above cause is before the court pursuant to a motion to clarify scope of appeal and motion for extension of time to file the appellant's brief filed by counsel for appellant, Curtis D. Schleiger, on April 18, 2012, and a responsive memorandum filed by counsel for appellee, the state of Ohio, on April 30, 3012.

Upon consideration of the foregoing, the motion to clarify is decided as follows: Pursuant to the decisions of the Ohio Supreme Court in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, and *State v. Perry*, 10 Ohio St.2d 175 (1967), appellant is precluded from raising issues on appeal from his resentencing that were raised or could have been raised during his initial appeal. Accordingly, notwithstanding the representations made by the Ohio Attorney General, appellant will only be permitted to raise issues related to his resentencing.

The motion for extension of time to file appellant's brief is GRANTED as follows: Appellant's brief shall be filed on or before **July 6, 2012**.

IT IS SO ORDERED.

Robert A. Hendrickson,
Administrative Judge

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-11-012
	:	JUDGMENT ENTRY
- vs -	:	
CURTIS D. SCHLEIGER,	:	
Defendant-Appellant.	:	

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Preble County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

Robert A. Hendrickson, Presiding Judge

Robin N. Piper, Judge

Michael E. Powell, Judge

FILED
PREBLE COUNTY, OHIO

MAR 25 2013

Christopher B. Washington
CLERK OF COURT OF APPEALS

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IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

FILED
PREBLE COUNTY, OHIO

MAR 2 5 2013

Christopher B. Washington
CLERK OF COURT OF APPEALS

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

CURTIS D. SCHLEIGER,

Defendant-Appellant.

CASE NO. CA2011-11-012

OPINION
3/25/2013

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 09CR010286

Martin P. Votel, Preble County Prosecuting Attorney, Kathryn M. Worthington, Preble County Courthouse, 101 East Main Street, Eaton, Ohio 45320, for plaintiff-appellee

James Vanzant, P.O. Box 161, Eaton, Ohio 45320, for defendant-appellant

M. POWELL, J.

{¶ 1} Defendant-appellant, Curtis Schleiger, appeals a decision of the Preble County Court of Common Pleas imposing postrelease control following a resentencing hearing.

{¶ 2} In August 2009, a jury found appellant guilty of felonious assault (a felony of the second degree) and carrying a concealed weapon (a felony of the fourth degree). Appellant was subsequently sentenced to 8 years in prison on the felonious assault charge and to 18 months in prison on the concealed weapon charge, to be served consecutively.

{¶ 3} Appellant appealed his conviction. Counsel for appellant filed a brief with this court pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967). Appellant filed a pro se brief raising assignments of error pertaining to dismissal of the indictment, denial of a continuance, failure to find a lesser included offense, ineffective assistance of trial counsel, prejudicial use of a prior offense, intoxication of the victim, and new witnesses and statements regarding the incident.

{¶ 4} On August 30, 2010, this court found that the trial court had failed to properly impose postrelease control for the following reasons. First, the sentencing entry stated appellant was subject to mandatory postrelease control "up to a maximum of five years," when in fact his felonious assault conviction required a mandatory term of three years postrelease control. In addition, the trial court stated at the sentencing hearing there were consequences for violating postrelease control, but did not explain those consequences to appellant. *State v. Schleiger*, 12th Dist. No. CA2009-09-026, 2010-Ohio-4080, ¶ 4. We remanded the matter to the trial court "with instructions * * * to correct the improper imposition of postrelease control pursuant to the procedures outlined in R.C. 2929.191." *Id.* at ¶ 6.

{¶ 5} On October 20, 2011, the trial court conducted a limited resentencing hearing for the purpose of properly imposing postrelease control. Appellant represented himself during the hearing. The trial court denied appellant's request that his prison terms be served concurrently rather than consecutively. The trial court then re-imposed the original sentence and told appellant he would be subject to a mandatory term of three years postrelease control.

{¶ 6} The trial court also advised appellant that any violation of the terms or conditions of postrelease control would authorize the Ohio Adult Parole Authority to impose additional prison time, "up to one half of the total amount of time that you receive as a

sentence." Further, if appellant committed another felony while on postrelease control, he could receive "up to one-half of the total stated term of [his] sentence."

{¶ 7} Appellant appeals, raising three assignments of error.

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY NOT OBTAINING A VALID WAIVER OF APPELLANT'S RIGHT TO COUNSEL BEFORE PROCEEDING WITH THE RESENTENCING HEARING.

{¶ 10} Appellant argues his right to counsel was violated at the postrelease control resentencing hearing because the trial court failed to obtain a valid waiver of his right to counsel before allowing him to represent himself. We disagree.

{¶ 11} The Sixth Amendment to the United States Constitution and Ohio Constitution, Article I, Section 10, both guarantee a defendant a right to counsel during the critical stages of criminal proceedings. "Normally, sentencing is a 'critical stage.'" *State v. Davis*, 4th Dist. No. 10CA9, 2011-Ohio-6776, ¶ 7, citing *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197 (1977). "A 'critical stage' only exists in situations where there is a potential risk of substantial prejudice to a defendant's rights and counsel is required to avoid that result; in other words, counsel must be present 'where counsel's absence might derogate from the accused's right to a fair trial.'" *State v. Griffis*, 5th Dist. No. CT2010-57, 2011-Ohio-2955, ¶ 28, quoting *United States v. Wade*, 388 U.S. 218, 226, 87 S.Ct. 1926 (1967).

{¶ 12} Ohio appellate courts are divided as to whether a defendant has a right to counsel at a resentencing hearing for purposes of imposing mandatory postrelease control. The Fourth, Fifth, Ninth, and Eleventh Appellate Districts held that a trial court is not required to appoint (or allow) counsel for purposes of a postrelease control resentencing hearing. *See Davis* (defendant had no right to counsel at postrelease control resentencing hearing); *Griffis* (same); *State v. Stallworth*, 9th Dist. No. 25461, 2011-Ohio-4492 (same); and *State v.*

Walker, 11th Dist. No. 2009-L-170, 2011-Ohio-401 (defendant was not entitled to consult with his attorney at postrelease control resentencing hearing).

{¶ 13} The Ninth and Eleventh Appellate Districts generally noted that R.C. 2929.191, the applicable statute to remedy postrelease control error in a sentence imposed on or after July 11, 2006 (the effective date of the statute), does not provide a right of counsel at such a hearing. *Stallworth* at ¶ 27; *Walker* at ¶ 28. The Ninth Appellate District further held that "postrelease control defects do not affect the merits of a defendant's underlying conviction or the lawful elements of his existing sentence." *Stallworth* at ¶ 29.

{¶ 14} The Fourth, Fifth, and Eleventh Appellate Districts held that because the mandatory nature and the length of a defendant's postrelease control are governed by statute, and thus, because a trial court has no discretion as to whether to impose postrelease control, a resentencing hearing for purposes of imposing mandatory postrelease control is purely ministerial in nature and does not constitute a critical stage of the proceedings. As a result, a defendant has no right to counsel at such a hearing. *Griffis*, 2011-Ohio-2955 at ¶ 29, 31-32 (defendant did not face a substantial risk of prejudice because the trial court is limited to do what it was required to do in the first place, i.e., the court did not have the authority to make any other substantive changes to the already-imposed sentence); *Davis*, 2011-Ohio-6776 at ¶ 10 (same); and *Walker*, 2011-Ohio-401 at ¶ 29.

{¶ 15} By contrast, the Third Appellate District held that "a defendant is entitled to counsel whenever a trial court conducts a hearing for the purpose of imposing postrelease control, even if the hearing is for the sole purpose of imposing statutorily-mandated postrelease control." *State v. Peace*, 3d Dist. No. 5-12-04, 2012-Ohio-6118, ¶ 19. The appellate court based its holding on the fact that (1) defendants have a right to counsel during the critical stages of criminal proceedings, including during sentencing and resentencing; and (2) because postrelease control is part of sentencing and "has serious

consequences in that it restricts the defendant's rights upon his release from imprisonment," "its imposition, even in a limited sentencing hearing, is part of a critical stage during criminal proceedings." *Id.* at ¶ 12, 14. As a result, "[a] defendant is entitled to counsel in such a critical stage, whether or not the lack of counsel prejudices him." *Id.* at ¶ 14. The appellate court acknowledged the conflicting decisions of the Fourth, Fifth, Ninth, and Eleventh Appellate Districts but declined to follow them.

{¶ 16} Upon reviewing the foregoing decisions, we are persuaded by and choose to follow the reasoning and holdings of the Fourth, Fifth, Ninth, and Eleventh Appellate Districts. As the Ohio Supreme Court held in *State v. Fisher*, 128 Ohio St.3d 92, 2010-Ohio-6238, a sentence that does not include the statutorily mandated term of postrelease control is void, and the new sentencing hearing to which a defendant is accordingly entitled is limited to proper imposition of postrelease control. *Id.* at ¶ 1, 29. In other words, the resentencing hearing is not a de novo sentencing hearing. Thus, in a resentencing hearing held for the purpose of properly imposing mandatory postrelease control, a trial court has no discretion and is required and limited to imposing postrelease control the way it was required to do in the first place. The trial court has no authority to make any other changes to the already-imposed sentence. As a result, such a hearing is purely ministerial and a defendant does not face a substantial risk of prejudice.

{¶ 17} We note that in the case at bar, the trial court began the resentencing hearing by asking appellant if he wanted to represent himself or have the court appoint an attorney for him. The trial court had an attorney present for appellant to confer with. The trial court allowed appellant time to discuss the decision with counsel. After conferring with counsel, appellant told the trial court he wanted to represent himself. The trial court asked that counsel remain so that she could answer any questions appellant may have.

{¶ 18} In light of the foregoing, we find that appellant's right to counsel was not

violated when he was allowed to represent himself at the postrelease control resentencing hearing. Appellant's first assignment is overruled.

{¶ 19} Assignment of Error No. 2:

{¶ 20} THE TRIAL COURT ERRED AS A MATTER OF LAW IN ITS IMPOSITION OF POST RELEASE CONTROL BY NOT FULLY AND ACCURATELY INFORMING APPELLANT OF THE CONSEQUENCES OF THE COMMISSION OF A NEW FELONY WHILE UNDER POST RELEASE CONTROL OR OF THE PENALTIES FOR VIOLATIONS OF POST RELEASE CONTROL.

{¶ 21} Appellant argues postrelease control was not properly imposed on remand because during the resentencing hearing and in its entry, the trial court failed to advise appellant that if he were to violate postrelease control sanctions or commit a new felony while under postrelease control, prison time could be imposed in successive nine-month increments, as set forth in R.C. 2967.28(F)(3). Appellant also argues the trial court failed to advise him both during the resentencing hearing and in its entry that if he were to commit a new felony while under postrelease control, he could be "sent back to prison for at least twelve months up to a maximum of the time remaining which would have been served on post release control had the entire period of post release control been served out."

{¶ 22} "Effective July 11, 2006, R.C. 2929.191 establishes a procedure to remedy a sentence that fails to properly impose a term of postrelease control." *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, ¶ 69. "For criminal sentences imposed on or after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191." *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, paragraph two of the syllabus; *Ketterer* at ¶ 69. Because appellant was first sentenced in this case after July 11, 2006, R.C. 2929.191 applies.

{¶ 23} R.C. 2929.191(C) prescribes the type of resentencing hearing that must occur

in order to properly impose postrelease control, and R.C. 2929.191(A) and (B) describe the corrections to be made to a judgment of conviction in order to remedy the flawed imposition of postrelease control. *Singleton* at ¶ 24. Specifically, under R.C. 2929.191(A)(1), a corrected judgment of conviction will include the statement that the offender will be supervised under R.C. 2967.28 after he leaves prison. Under R.C. 2929.191(B)(1), a corrected judgment of conviction will include the statement that:

> [I]f a period of supervision is imposed following the offender's release from prison, * * * and if the offender violates that supervision or a condition of post-release control * * *, the parole board may impose as part of the sentence a prison term of up to one-half of the stated prison term originally imposed upon the offender.

{¶ 24} While R.C. 2929.191 refers to R.C. 2967.28, it does not require a trial court to advise an offender in the manner asserted by appellant. In the case at bar, the trial court's October 20, 2011 entry advises appellant that he is subject to R.C. 2967.28 (that is, to be supervised by the Ohio Adult Parole Authority) and that any violation of his postrelease control could subject him to a prison term of up to one-half of the prison term originally imposed. The trial court similarly advised appellant of the above during the resentencing hearing.

{¶ 25} We find the trial court imposed postrelease control in compliance with R.C. 2929.191 both during the resentencing hearing and in its entry. Postrelease control was therefore properly imposed on October 20, 2011. Appellant's second assignment of error is overruled.

{¶ 26} Assignment of Error No. 3:

{¶ 27} THE TRIAL COURT ERRED TO THE PREJUDICE OF WHEN IT REFUSED TO CONSIDER APPELLANT'S REQUEST TO REVISIT THE PREVIOUSLY IMPOSED PRISON SENTENCE AND ORDER PRISON TERM FOR THE FOURTH DEGREE FELONY

CHARGE TO RUN CONCURRENT TO THE SECOND DEGREE FELONY CHARGE. (sic)

{¶ 28} Appellant argues the trial court erred when it denied his request that his prison terms be served concurrently rather than consecutively. We disagree.

{¶ 29} As stated earlier, the Ohio Supreme Court held in *Fisher* that when a trial court fails to properly impose statutorily mandated postrelease control, "that *part* of the sentence * * * is void and must be set aside." (Emphasis sic.) *Fisher*, 2010-Ohio-6238 at ¶ 26. The defendant is not entitled to be resentenced on the entire sentence – "only the portion that is void may be vacated and otherwise amended." *Id.* at ¶ 28; *State v. Jackson*, 12th Dist. No. CA2011-08-154, 2012-Ohio-993, ¶ 9. Further, the new sentencing hearing a defendant is entitled to under R.C. 2929.191(C) "is limited to proper imposition of postrelease control." *Fisher* at ¶ 29.

{¶ 30} In 2010, we remanded the matter to the trial court "to correct the improper imposition of postrelease control pursuant to the procedures outlined in R.C. 2929.191." *Schleiger*, 2010-Ohio-4080 at ¶ 6. Hence, during the resentencing hearing, the trial court was limited to imposing the proper statutorily mandated postrelease control, which it did. All other aspects of appellant's original sentence were valid, remained in effect, and could not be revisited by the trial court. *See State v. Taylor*, 4th Dist. No. 10CA7, 2011-Ohio-1391. Our remand ordering the trial court to correct postrelease control errors did not open the door for appellant to attack his underlying conviction or other sentencing matters. *See Jackson*. Had the trial court ordered appellant's prison terms to run concurrently, it would have erred, since doing so would have been outside the scope of its mandate which was merely to correct postrelease control errors.

{¶ 31} Appellant laments the fact that given the supreme court's decision in *Fisher* and the fact the original appeal was disposed of by the filing of an *Anders* brief, he is effectively denied of his right to appeal his sentence. However, we note that appellant filed a pro se

brief in the original appeal. Appellant could have challenged his consecutive prison terms then, but did not. In addition, in reviewing the record following the filing of the *Anders* brief and appellant's pro se brief, we clearly found no error prejudicial to appellant, including in the imposition of the consecutive prison terms. *See Schleiger* at ¶ 3.

{¶ 32} The trial court did not err in denying appellant's request that his prison terms be served concurrently rather than consecutively. Appellant's third assignment of error is overruled.

{¶ 33} Judgment affirmed.

HENDRICKSON, P.J. and PIPER, J., concur.

IN THE COURT OF APPEALS FOR PREBLE COUNTY, OHIO

STATE OF OHIO,	:	
Appellee,	:	CASE NO. CA2009-09-026
- vs -	:	
	:	ENTRY DENYING APPLICATION TO REOPEN APPEAL
CURTIS SCHLEIGER	:	
Appellant.		

This matter came on to be considered upon an application to reopen appeal pursuant to App.R. 26(B) by counsel for appellant, Curtis Schleiger, on November 24, 2010, and a memorandum in opposition filed by counsel for appellee, the state of Ohio, on December 23, 2010.

Appellant was tried and convicted for one count of felonious assault. On appeal, counsel for appellant filed a brief pursuant to *Anders v. California*, (1967), 386 U.S. 738, 87 S. Ct. 1396 and appellant subsequently filed a pro se brief. After an independent review, this court found no error prejudicial to appellant's rights with one exception: that the trial court failed to correctly impose the statutorily required term of postrelease control. The case was remanded for the court to correct the improper imposition of postrelease control pursuant to R.C. 2929.191.

Appellant claims he was denied the effective assistance of counsel as this court erred in failing to appoint counsel after finding an error in our review pursuant to *Anders*.

FILED
PREBLE COUNTY, OHIO

FEB 03 2011

Christopher G. Washington
CLERK OF COURT OF APPEALS

J1 fap 641 643

An application of this nature shall be granted only if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, ¶5. See, also, App.R. 26(B)(5). As used in this analysis, ineffective assistance of counsel is intended to comprise the two elements set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, namely, a deficiency in the representation of appellant and prejudice resulting from such deficient representation. *Tenace*; *State v. Sheppard*, 91 Ohio St.3d 329, 2001-Ohio-52. Appellant bears the burden of demonstrating a genuine issue as to whether he was denied the effective assistance of appellate counsel. *Tenace*, 2006-Ohio-2987 at ¶6, citing *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, certiorari denied (1999), 526 U.S. 1091, 119 S.Ct. 1506; *State v. Myers*, 102 Ohio St.3d 318, 2004-Ohio-3075, ¶9.

The issues appellant presents in his application to reopen do not raise a *genuine issue* as to whether appellate counsel was ineffective since his arguments relate to the remedy provided in this court's decision, not ineffective assistance of appellate counsel in filing an *Anders* brief. Moreover, appellant cannot establish any prejudice resulting from appellate counsel's failure to raise the postrelease control issue in a merit brief to this court.

Upon due consideration of the foregoing, and it appearing to the court that there is no genuine issue as to whether appellant was deprived of the effective assistance of counsel on appeal under App.R. 26(B)(5), appellant's application for reopening is hereby DENIED. Costs to be taxed to appellant.

Preble CA2009-09-026

IT IS SO ORDERED.

M.J. Bressler, Judge

Robert P. Ringland, Judge

Stephen W. Powell, Judge

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-09-026
	:	DECISION
- vs -		8/30/2010
	:	
CURTIS D. SCHLEIGER,	:	FILED PREBLE COUNTY, OHIO
Defendant-Appellant.	:	AUG 30 2010

Christopher B. Washington
CLERK OF COURT OF APPEALS

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 09-CR-10286

Martin P. Votel, Preble County Prosecuting Attorney, 101 East Main Street, Eaton, Ohio 45320, for plaintiff-appellee

Roger L. Hurley, 6625 Woodbriar Lane, Greenville, Ohio 45331, for defendant-appellant

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Per Curiam.

{¶1} This cause came on to be considered upon a notice of appeal, the transcript of the docket and journal entries, the transcript of proceedings and original papers from the Preble County Court of Common Pleas, the brief filed by appellant's counsel and appellant's pro se brief, oral argument having been waived.

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{¶2} Counsel for defendant-appellant, Curtis D. Schleiger, has filed a brief with this court pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, which (1) indicates that a careful review of the record from the proceedings below fails to disclose any errors by the trial court prejudicial to the rights of appellant upon which an assignment of error may be predicated; (2) lists three potential errors "that might arguably support the appeal," *Anders* at 744, 87 S.Ct. at 1400; (3) requests that this court review the record independently to determine whether the proceedings are free from prejudicial error and without infringement of appellant's constitutional rights; (4) requests permission to withdraw as counsel for appellant on the basis that the appeal is wholly frivolous; and (5) certifies that a copy of both the brief and motion to withdraw have been served upon appellant.

{¶3} Appellant has filed a pro se brief raising assignments of error pertaining to dismissal of the indictment, denial of a continuance, failure to find a lesser included offense, ineffective assistance of counsel, prejudicial use of a prior offense, intoxication of the victim and new witnesses and statements regarding the incident. We have accordingly examined the record and find no error prejudicial to appellant's rights in the proceedings in the trial court except as set forth below.

{¶4} Appellant was sentenced on September 17, 2009 for one count of felonious assault, a second-degree felony. As such, appellant was subject to a mandatory three-year period of postrelease control. See R.C. 2967.28. At the sentencing hearing, the trial court informed appellant that "there will be a mandatory period of postrelease control after his release from the penitentiary of five years." The sentencing entry states that appellant is subject to mandatory postrelease control, "up to a maximum of five years." However, a second degree felony requires a mandatory term of three years postrelease control. R.C. 2967.28. Moreover, the court stated at the hearing that there were consequences for

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violating postrelease control, but did not explain those consequences to appellant. See R.C. 2929.19(B)(3)(e).

{¶5} Accordingly, postrelease control was not properly imposed in this case. The Ohio Supreme Court has held that in cases where a defendant is sentenced after July 11, 2006, R.C. 2929.191 provides a mechanism for a trial court to correct the improper imposition of postrelease control. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434.

{¶6} Therefore, it is the order of this court that the motion of counsel for appellant requesting to withdraw as counsel is granted. This cause is reversed and the matter remanded with instructions to the trial court to correct the improper imposition of postrelease control pursuant to the procedures outlined in R.C. 2929.191.

YOUNG, P.J., BRESSLER and POWELL, JJ., concur.

NOTICE TO CLERK:

Serve a copy of this Decision upon appellant at: Curtis D. Schleiger, #A615794, Noble Correctional Institution, 15708 McConnelsville Rd., Caldwell, Ohio 43724.

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