

APPELLANT CURTIS SCHLEIGER'S NOTICE OF CERTIFIED CONFLICT

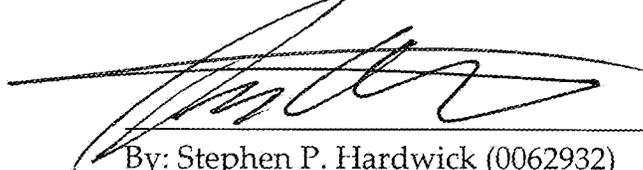
Appellant Curtis Schleiger, hereby gives notice of appeal to the Supreme Court of Ohio that, in an entry dated May 31, 2013, the Preble County Court of Appeals, Twelfth Appellate District has certified a conflict with its March 25, 2013 judgment issued in Court of Appeals Case No. CA2011-11-012 on March 25, 2013.

The issue certified is "whether a defendant is entitled to counsel when a trial court conducts a resentencing hearing for the purpose of imposing statutorily mandated post-release control." Apx. A-2.

This case relates to the same judgment pending as a discretionary appeal in *State v. Schleiger*, Ohio Supreme Court No. 2013-0743.

Respectfully submitted,

Office of the Ohio Public Defender



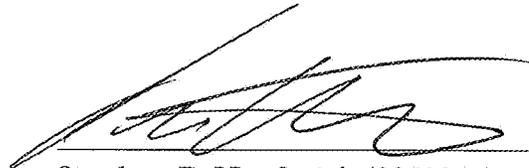
By: Stephen P. Hardwick (0062932)
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Counsel for Appellant Curtis Schleiger

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 offices of Kathryn M. West, Assistant Prosecuting Attorney, Preble County Prosecutor's Office, 101 E. Main Street, Eaton, Ohio 45320; and Solicitor General Alexandra Schimmer, Solicitor General Office, Ohio Attorney General's Office, 30 E. Broad Street, 17th Floor, Columbus, OH 43215, on this 28th Day of June, 2013.



Stephen P. Hardwick (0062932)
Assistant Public Defender

Counsel for Appellant Curtis Schleiger

#396725

IN THE COURT OF APPEALS OF PREBLE COUNTY, OHIO

FILED

STATE OF OHIO, PREBLE COUNTY, OHIO

CASE NO. CA2011-11-012

Appellee,

MAY 3 1 2013 :

ENTRY GRANTING MOTION TO
CERTIFY CONFLICT

vs.

Christopher B. Washington
CLERK OF COURT OF APPEALS

CURTIS SCHLEIGER,

Appellant.

The above cause is before the court pursuant to a motion to certify a conflict to the Supreme Court of Ohio filed by counsel for appellant, Curtis Schleiger, on April 4, 2013 pursuant to App.R. 25 and Article IV, Section 3(B)(4) of the Ohio Constitution. The constitution provides that whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by another court of appeals of the state, the court shall certify the cases to the Ohio Supreme Court for review and final determination.

In the present case, appellant represented himself during a limited resentencing hearing held for the purpose of properly imposing post-release control. On appeal, appellant argued that his right to counsel was violated when he was permitted to represent himself at the post-release control resentencing hearing. This court held that appellant's right to counsel was not violated.

When addressing appellant's argument, this court noted that Ohio appellate courts are divided with respect to whether a defendant has the right to counsel at a resentencing hearing for the purpose of imposing mandatory post-release control. Appellant contends that this court's decision is in conflict with a decision by the

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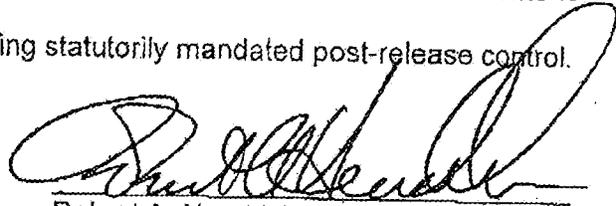
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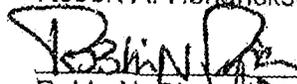
Third District Court of Appeals, *State v. Peace*, 3rd Dist. No. 5-12-04, 2012-Ohio-6118.

Upon consideration of the foregoing, the court finds that the motion to certify conflict is with merit and is hereby GRANTED. The issue for certification is whether a defendant is entitled to counsel when a trial court conducts a resentencing hearing for the purpose of imposing statutorily mandated post-release control.

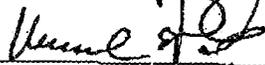
IT IS SO ORDERED.



Robert A. Hendrickson, Presiding Judge



Robin N. Piper, Judge



Mike Powell, Judge

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IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
PREBLE COUNTY

FILED
PREBLE COUNTY, OHIO

MAR 25 2013

Christopher B. Washington
CLERK OF COURT OF APPEALS

STATE OF OHIO,
Plaintiff-Appellee,

CASE NO. CA2011-11-012

OPINION
3/25/2013

- vs -

CURTIS D. SCHLEIGER,
Defendant-Appellant.

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.

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{¶ 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. Schelger*, 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

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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.*

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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

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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

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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*, 128 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

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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

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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." *Schleifer*, 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

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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 *Schielger* 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 OF OHIO
THIRD APPELLATE DISTRICT
HANCOCK COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 5-12-04

v.

TODD E. PEACE,

OPINION

DEFENDANT-APPELLANT.

Appeal from Hancock County Common Pleas Court
Trial Court No. 1997 CR 29

Judgment Reversed, Sentence Vacated and Cause Remanded

Date of Decision: December 26, 2012

APPEARANCES:

E. Kelly Mihocik for Appellant

Mark C. Miller for Appellee

ROGERS, J.

{¶1} Defendant-Appellant, Todd Peace, appeals the judgment of the Court of Common Pleas of Hancock County imposing postrelease control. On appeal, Peace argues that the trial court erred by conducting the resentencing hearing via videoconference, refusing to appoint counsel to represent him during the resentencing hearing, and failing to conduct a *de novo* sentencing hearing. For the reasons that follow, we reverse the trial court's judgment.

{¶2} On February 6, 1997, the Grand Jury of Hancock County indicted Peace on the following counts: (1) Count I – aggravated murder in violation of R.C. 2903.01(A), an unspecified felony, with specifications that the murder was committed to avoid punishment and that the victim was a witness to another offense committed by Peace; (2) Count II – conspiracy to commit murder in violation of R.C. 2923.01(A)(1), a felony of the first degree; (3) Count III – aggravated arson in violation of R.C. 2909.02(A)(1), a felony of the first degree; and (4) Count IV - tampering with evidence in violation of R.C. 2921.12, a felony of the third degree.

{¶3} The State voluntarily dismissed Count II and the specifications included in Count I. On November 9, 1998, the trial court accepted Peace's change of plea to guilty on the remaining counts. The matter then proceeded to sentencing. On February 11, 1999, the trial court sentenced Peace to a life prison

term with parole eligibility after 20 years on Count I, a nine year term on count II, and a four year term on Count IV. The trial court further ordered that Peace serve the terms consecutively. As a result, Peace's total prison term is life with parole eligibility after 33 years.

{¶4} In April 2011, Peace moved to withdraw his guilty plea. The trial court denied Peace's motion and Peace appealed to this court, asserting a variety of assignments of error. By summary judgment entry, we remanded this matter to the trial court because it had failed to properly impose postrelease control.

{¶5} After we remanded this matter, the trial court conducted a limited resentencing hearing for the purpose of properly imposing postrelease control on January 9, 2012. The hearing was conducted via videoconference. There is no indication in the record that Peace agreed to not being physically present for the hearing. During the hearing, Peace requested that he have counsel, but the trial court denied his request on the basis that the hearing "was an administrative proceeding" that did not require the presence of counsel for Peace. Tr., p. 4. Peace also challenged the limited nature of the resentencing hearing, which the trial court likewise rejected.

{¶6} In regard to the imposition of postrelease control, the trial court stated the following during the hearing:

[U]nder 2929.14, and 2929.18,¹ upon completion of your sentence you will have to serve a period of post-release control as part of your sentence for a mandatory 5 years.

If you are placed on post-release control the adult parole authority is authorized to return you to prison for up to 9 months for any single violation, up to a maximum of 50 percent of your prison sentence for all violations. And if you are convicted of a new felony while on post-release control, that, in addition for being punished for the new offense, the Judge could add an additional consecutive prison term of 1 year or what time remains on your post-release control term, whichever is greater. That in compliance with 2929.141. *Id.* at p. 7.

After this statement, the trial court denied a variety of other motions filed by Peace during the course of the proceedings. The trial court journalized the imposition of postrelease control and the denial of Peace's motions in a judgment entry filed on January 9, 2012.

{¶7} Peace filed this timely appeal of the trial court's judgment, presenting the following assignments of error for our review.

Assignment of Error No. I

THE TRIAL COURT ERRED WHEN IT CONDUCTED MR. PEACE'S JANUARY 9, 2012 RESENTENCING HEARING VIA VIDEOCONFERENCING WITHOUT MR. PEACE WAIVING HIS RIGHT TO BE PHYSICALLY PRESENT.

Assignment of Error No. II

THE TRIAL COURT ERRED WHEN IT REFUSED TO APPOINT MR. PEACE COUNSEL TO REPRESENT HIM AT THE JANUARY 9, 2012 RESENTENCING HEARING.

¹ The trial court cited to R. C. 2929.14, and 2929.18, however, R.C. 2929.19(B)(2) requires that trial courts notify defendants that they will be subject to postrelease control under R.C. 2967.28.

Assignment of Error No. III

THE TRIAL COURT ERRED WHEN IT RULED MR. PEACE WAS ENTITLED TO A LIMITED RESENTENCING HEARING AND NOT A DE NOVO RESENTENCING HEARING.

{¶8} Due to the nature of the assignments of error, we elect to address them out of order.

Assignment of Error No. II

{¶9} In his second assignment of error, Peace argues that the trial court erred in denying him counsel for the resentencing hearing. We agree.

{¶10} Both the United States Constitution and the Ohio Constitution guarantee that a defendant has the right to counsel during the critical stages of criminal proceedings. Sixth and Fourteenth Amendments to the United States Constitution; Ohio Constitution, Article I, Section 10. Thus, our disposition of this matter is dependent on our determination of whether a resentencing hearing for the purpose of properly imposing postrelease control is a critical stage of criminal proceedings. In our analysis, we are guided by the following statement from the United States Supreme Court regarding the definition of “critical stage”:

[I]n addition to counsel’s presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial. * * * The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused’s interests will be protected consistently with our adversary theory of criminal prosecution. *United States v. Wade*, 388 U.S. 218, 226-27, 87 S.Ct. 1926 (1967).

We can find no federal case law interpreting the Sixth Amendment's guarantee of the right to counsel as requiring that the defendant demonstrate prejudice from the denial of counsel during critical stages of criminal proceedings.

{¶11} Sentencing is a critical stage in which a criminal defendant has the right to counsel. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197 (1977). The First District Court of Appeals has expounded on this principle in the context of resentencing by stating the following:

[A] resentencing hearing is just as important and pivotal an aspect of the criminal proceedings as the original sentencing hearing. The hearing is not "only a resentencing." It is an opportunity for the trial court to correct its prior sentencing error and to sentence a defendant as mandated by the legislature, with all his constitutional and statutory rights intact. It is not to be treated as a pro forma rubberstamping of the original sentence. It is process by which the defendant is to be sentenced anew, with the trial court following the instructions provided by a reviewing court. *State v. Clark*, 1st Dist. No. C-020550, 2003-Ohio-2669, ¶ 6.

Further, the Supreme Court of Ohio has stated that postrelease control is a part of a defendant's sentence. *E.g.*, *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 23 (We * * * reiterate that a judge must conform to the General Assembly's mandate in imposing postrelease-control sanctions *as part of a criminal sentence.*").

{¶12} A review of these principles reveals two critical propositions. First, criminal defendants have the right to counsel during the critical stages of the proceedings against them, including during sentencing and resentencing. Second,

since postrelease control is part of sentencing, its imposition, even in a limited sentencing hearing, is part of a critical stage during criminal proceedings. Based on these premises, we find that criminal defendants have the right to counsel when trial courts conduct limited resentencing hearings for the purpose of properly imposing postrelease control. The trial court here denied Peace's request for an attorney and consequently denied him the right to counsel guaranteed under the United States and Ohio constitutions.

{¶13} The State argues that a limited resentencing hearing for the purpose of imposing postrelease control is merely "administrative," that the presence of counsel is unnecessary, and that the absence of counsel in this matter did not result in prejudice to Peace. It further relies on authority from the Fourth, Ninth, and Eleventh Districts to support these contentions. *See State v. Davis*, 4th Dist. No. 10CA9, 2011-Ohio-6776, ¶ 1 (stating that resentencing hearing to impose postrelease control is "purely ministerial in nature because the [trial] court [is] limited to imposing a statutorily required term of postrelease control"); *State v. Stallworth*, 9th Dist. No. 25461, 2011-Ohio-4492, ¶ 29 ("Post-release control defects do not affect the merits of a defendant's underlying conviction or the lawful elements of his existing sentence."); *State v. Walker*, 11th Dist. No. 2009-L-170, 2011-Ohio-401, ¶ 28 (finding that the defendant was not entitled to attorney in resentencing hearing for purpose of imposing postrelease control); *see also State v. Griffis*, 5th Dist. No. CT2010-57, 2011-Ohio-2955, ¶ 29-32 (finding

that the defendant was not entitled to counsel during resentencing hearing because there was no substantial risk of prejudice to his fair trial rights). Although we acknowledge the conflict in decisions, we reject the State's contentions and decline to follow the foregoing authority.

{¶14} As noted above, postrelease control is part of the defendant's sentence and it has serious consequences in that it restricts the defendant's rights upon his release from imprisonment. *Davis*, 2011-Ohio-6776, at ¶ 10 ("Undoubtedly, the imposition of postrelease control has serious consequences."). Consequently, a limited hearing for the purpose of imposing postrelease control serves the critical function of properly handing down a criminal sentence that is in accord with the General Assembly's and the courts' directives. *See Clark*, 2003-Ohio-2669, at ¶ 6. A defendant is entitled to counsel in such a critical stage, whether or not the lack of counsel prejudices him. Accordingly, we disagree with other courts' descriptions of limited resentencing hearings as administrative and their focus on prejudice to the defendant when he is denied counsel in such hearings.

{¶15} Even if we were to focus on the prejudice that results from a denial of counsel in limited resentencing hearings, we would still disagree with other courts' findings that counsel is unnecessary in such hearings. We can think of the following four ways in which counsel's presence affects the outcome of the hearing and the rights of the defendant:

- (1) It ensures that the General Assembly's and the courts' directives are followed;
- (2) It ensures that the defendant understands the nature and import of the hearing;
- (3) It ensures that the defendant proceeds in a way that properly preserves issues for appellate review; and
- (4) It safeguards the defendant's interests if the trial court proceeds to address issues besides the imposition of postrelease control.

{¶16} Indeed, a review of the hearing transcript in this matter reveals some of the dangers that naturally follow from the absence of counsel during limited resentencing hearings.² Without counsel, Peace was left confused and lacking an appropriate understanding of the hearing's purpose. He understood neither the procedural history that led to the hearing nor what purpose the hearing served.

Consider the following exchange:

THE DEFENDANT: Your Honor, I was under the impression, according to what District Court – the Third District Court of Hancock County, the ruling was that if it was a – either it was going to be a nunc pro tunc enunciation where they could give me PRC [postrelease control], or it was suppose[d] to be a de novo according to which would have been State versus Singleton, or it may have been just give me a nunc pro tunc hearing.

I'm not sure how this pronouncement came about. But I do know that whatever the Third District stated was it was, it suppose[d] to be in compliance with the previous – give me one second, Your Honor.

² In addition to the deficiencies discussed here, we note that the State was afforded the opportunity to have counsel present during the resentencing hearing.

THE COURT: Let me just say this, Mr. Peace, you may have one idea of what the mandate of the Court of Appeals is in this case, and I may have another.

THE DEFENDANT: Yes, sir.

THE COURT: And apparently I have another. And it's my prerogative to proceed in light of my understanding of the entry of the Court of Appeals rather than your understanding of it. Tr., p. 5.

{¶17} Peace's statements after the trial court imposed postrelease control further reveal confusion on his part and a trial court that was unable to correct it:

THE DEFENDANT: Your Honor, if I may. Am I permitted to speak?

THE COURT: Yes.

THE DEFENDANT: Okay. I have three questions. First of all, Your Honor, I'm serving an aggravated murder count which would incline me -- I belong to the parole board as it is anyway.

Second, also, I served my 13 years, Your Honor. I'm already [past] the point for post-release control. State versus Singleton, same thing I brought a little while ago. I've already served that time.

Second [sic], has the state reviewed the record, because that was clearly what the Third District said. They said to review the record to pronounce a de novo or a nunc pro tunc. It's right here in front of me, Your Honor. It states that if they find themselves they properly advised me of post-release control all those years ago, then it was suppose[d] to be a nunc pro tunc entry. However, my questions remains is, has the State reviewed the record? The record being the transcripts, Your Honor. Because I was aware of transcripts have not been transcribed.

THE COURT: I don't know that. All I -- my only mandate was as I've described it. And I don't intend to further expand this hearing beyond what the Court of Appeals has mandated, and I have complied with that mandate.

THE DEFENDANT: Your Honor, respectfully, I don't believe that you responded to what the Third District asked of you. I would like to know am I able to appeal this hearing?

THE COURT: I can't give you legal advice. *Id.* at p. 8-9.

With counsel, Peace would not have been in the position of having to ask the trial court about his appellate rights. He would not have been in the unenviable position of having no legal background and being forced to argue about the interpretation of our previous ruling in this matter. And, he would not have been in the position of being confused as to the legal terms being used by the trial court while it imposed serious restrictions on his postrelease freedom.

{¶18} Further, we note that the hearing in this matter was not simply limited to the imposition of postrelease control. The trial court denied other motions that Peace had filed. It also denied Peace's request for the expedited production of the hearing transcript so that he could file an appeal. Again, Peace was left without counsel to ably argue these issues. In light of these effects from the denial of counsel in this matter, we find that the presence of counsel is not superfluous in limited resentencing hearings conducted to properly impose postrelease control.

{¶19} In sum, the right to counsel is among the most precious rights that our Constitution provides. *See Miranda v. Arizona*, 384 U.S. 436, 442, 86 S.Ct. 602 (1966), quoting *Cohens v. Commonwealth of Virginia*, 19 U.S. (6 Wheat.) 264, 387 (1821) ("These precious rights [including the right to counsel] were fixed

in our Constitution only after years of persecution and struggle. And in the words of Chief Justice Marshall, ‘they were secured for ages to come, and * * * designed to approach immortality as nearly as human institutions can approach it.’”). The United States Supreme Court has conferred this right during all critical stages of criminal proceedings, including sentencing, and under Ohio law, postrelease control is part of criminal sentences. As a result, 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. As such, the trial court improperly denied Peace’s request for counsel in this matter.

{¶20} Accordingly, we sustain Peace’s second assignment of error.

Assignments of Error Nos. I & III

{¶21} Our disposition of Peace’s second assignment of error renders his first and third assignments of error moot and we decline to address them. *See* App.R. 12(A)(1)(c).

{¶22} Having found error in the particulars assigned and argued in the second assignment of error, we reverse the trial court’s judgment denying Peace’s right to counsel, vacate the portion of its sentence imposing postrelease control, and remand the matter for further proceedings.

*Judgment Reversed , Sentence
Vacated and Cause Remanded*

SHAW, P.J., concur.

WILLAMOWSKI, J., Dissents.

I dissent from the majority. I would follow the reasoning of the fourth, ninth, and eleventh districts and find that the resentencing was merely ministerial in nature. See *Davis, supra*; *Walker, supra*, and *Stallworth, supra*. Thus, there was no need for Peace to be provided counsel. For this reason, I would affirm the judgment of the trial court.