ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	CASE NOS. 2013-743 AND 2013-1046
PLAINTIFF-APPELLEE,	:	
	:	ON DISCRETIONARY APPEAL AND CERTIFIED
v.	:	CONFLICT FROM THE PREBLE COUNTY
	:	COURT OF APPEALS,
CURTIS SCHLEIGER,	:	TWELFTH APPELLATE DISTRICT,
	:	CASE NO. CA2011-11-012
DEFENDANT-APPELLANT.	:	

MERIT BRIEF OF APPELLANT CURTIS SCHLEIGER

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FILED
DEC 17 2013
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Table of Contents

Page No.

Introduction 1

Statement of the Case and the Facts 2

Argument 5

Proposition of Law:

A defendant has the right to counsel at a felony resentencing hearing regardless of the scope of the hearing. 5

A. A resentencing hearing is a critical stage at which the right to counsel attaches. 5

B. Proceedings related to postrelease control are complicated 7

1. Postrelease control is complicated and requires a lawyer to understand. 8

a) Many trial courts failed to properly impose the sanction for years. 8

b) A criminal defendant cannot be expected to understand a statute in which "after" means "before." 10

c) Criminal defendants need the advice of counsel to understand their postrelease control and to know whether to object. 11

2. Because only res judicata, which is waivable, limits a defendant's arguments, a defendant has the opportunity to raise issues other than postrelease control. 12

3. Defendants need counsel for advice concerning potential appeals. 13

Table of Contents

Page No.

Conclusion 13

Certificate of Service 15

Appendix:

Notice of Appeal (May 10, 2013) A-1

Notice of Certified Conflict (June 29, 2013) A-4

Opinion (March 25, 2013) A-31

Sixth Amendment, United States Constitution A-40

Article I, Section 10, Ohio Constitution A-41

R.C. 2921.34 ..... A-42

R.C. 2929.191 ..... A-45

Crim.R. 44 ..... A-48

Table of Authorities

Page No.

Cases:

Alabama v. Shelton, 535 U.S. 654, 152 L.Ed.2d 888, 122 S.Ct. 1764 (2002).....6

Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).....2

Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).....6

In re J.S., 136 Ohio St.3d 8, 2013-Ohio-1721, 989 N.E.2d 978.....8

Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967).....6

Penson v. Ohio, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988).....2

Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).....6,7

Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).....13

Schleiger v. State, United States Supreme Court Case No. 2011-6533, Brief in Opposition (Dec. 22, 2011).....3

Smith v. Robbins, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).....2,13

State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961.....9

State v. Billiter, 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960.....9,11

State v. Bloomer, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254.....8,9

State v. Bregen, 12th Dist. Clermont No. 2010-06-039, 2011-Ohio-1872.....10

State v. Cline, 11th Dist. Geauga No. 2010-G-2981, 2011-Ohio-3890.....10

State v. Cottrill, 4th Dist. Pickaway No. 10 CA 38, 2011-Ohio-2122.....10

State v. Fischer, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332.....9,12

State v. Gaut, 7th Dist. Trumbull No. 2010-T-0059, 2011-Ohio-1300.....10

Table of Authorities

Page No.

Cases:

State v. Gonzalez, 193 Ohio App.3d 385, 2011-Ohio-1542, 952 N.E.2d 502 (10th Dist.) 9

State v. Hines, 193 Ohio App.3d 660, 2011-Ohio-3125, 953 N.E.2d 387 (3rd Dist. Allen) 10

State v. Jones, 8th Dist. Cuyahoga No. 94216, 2010-Ohio-4136 10

State v. Jones, 9th Dist. Wayne No. 10 CA 0022, 2011-Ohio-1450 10

State v. Jordan, 124 Ohio St.3d 397, 2010-Ohio-281, 922 N.E.2d 951 11

State v. Joseph, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278 9,11

State v. Ketterer, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9 9

State v. Peace, 3d Dist. Hancock No. 5-12-04, 2012-Ohio-6118 3,4

State v. Robinson, 2d Dist. Champaign No. 2010 CA 30, 2011-Ohio-1737, State's discretionary appeal not allowed, 129 Ohio St.3d 1453, 2011-Ohio-4217; 951 N.E.2d 1048, 2011-Ohio-4217, 951 N.E.2d 1048 9,10

State v. Schleiger, 127 Ohio St.3d 1504, 2011-Ohio-19, 939 N.E.2d 1266 2

State v. Schleiger, 128 Ohio St.3d 1557, 2011-Ohio-2905, 949 N.E.2d 43 3

State v. Schleiger, 136 Ohio St.3d 1490, 2013-Ohio-4140, 994 N.E.2d 461 4

State v. Schleiger, 12th Dist. Preble No. CA2009-09-026, Entry Denying Application to Reopen (Feb. 3, 2011) 2,3

State v. Schleiger, 12th Dist. Preble No. CA2009-09-026, 2010-Ohio-4080 2

State v. Singleton, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958 9,10

Table of Authorities

Page No.

Cases:

State v. Thomas, 1st Dist. Hamilton Nos. C-100411, C-100412, 2011-Ohio-1331 9

State v. Townsend, 10th Dist. Franklin No. 10AP-983, 2011-Ohio-5056 9

State v. Tucker, 5th Dist. Stark No. 2011CA00084, 2011-Ohio-4620 10

State ex rel. Deiter v. McGuire, 119 Ohio St.3d 384, 2008-Ohio-4536, 894 N.E.2d 680 12

State ex rel. Pruitt v. Cuyahoga Cty. Court of Common Pleas, 125 Ohio St.3d 402, 2010-Ohio-1808, 928 N.E.2d 722 9

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 2

United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed. 2d 657 (1984) 2,7

United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) 5

Watkins v. Collins, 111 Ohio St. 3d 425, 2006-Ohio-5082, 857 N.E.2d 78 9

Woods v. Telb, 89 Ohio St.3d 504, 733 N.E.2d 1103 (2000) 6

Constitutional Provisions:

Sixth Amendment, United States Constitution 6

Article I, Section 10, Ohio Constitution 6

Statutes:

R.C. 2921.34 11

R.C. 2929.191 2,10,11

Table of Authorities

Page No.

Rule:

Crim.R. 44 3,7

Other Provisions:

Coolidge, *Convicts freed without parole (sic)*, Cincinnati Enquirer (Nov. 1, 2009) 8

E-Mail correspondence to Counsel from Debra Hearns, Ohio Department of Rehabilitation and Correction, to Counsel (Jun. 18, 2010) 8

INTRODUCTION

This presents a simple question—is the law governing postrelease control resentencing hearings so simple and so settled that defendants don't need attorneys to understand it? This Court has spent the last fifteen years sorting through a problem with at least four sources. First, the General Assembly failed to understand that, due to Ohio's constitutional separation of powers, an additional punishment like postrelease control had to be judicially imposed. Second, for years trial courts confused postrelease control with parole, and therefore failed to properly impose the sanction. Third, this Court issued decisions in its extraordinary writ cases that appeared to conflict with decisions issued in signed opinions. And finally, prosecutors failed to notice and timely appeal the trial court errors.

Without counsel, defendants cannot navigate the confusion over the imposition, appeal, and enforcement of postrelease control. This Court should reverse the decision of the court of appeals and remand this case to the trial court for resentencing or, in the alternative, to the court of appeals so that Mr. Schleiger can have his first appeal of right with counsel from his jury trial.

STATEMENT OF THE CASE AND THE FACTS

Over a claim of self-defense, a jury convicted Curtis Schleiger of felonious assault and carrying a concealed weapon. Judgment Entry of Sentence (Sept. 17, 2009). He was sentenced to nine years and six months in prison. *Id.* His appointed appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. *State v. Schleiger*, 12th Dist. Preble No. CA2009-09-026, Motion (Dec. 28, 2009). In response, Mr. Schleiger filed a pro se brief pursuant to *Anders*, and asked for new counsel. *Id.*, Brief of Appellant (May 24, 2010). The court of appeals found a non-frivolous issue in Mr. Schleiger's case, an 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. Preble No. CA2009-09-026, 2010-Ohio-4080. Over a dissent, this Court declined to hear the appeal. *State v. Schleiger*, 127 Ohio St.3d 1504, 2011-Ohio-19, 939 N.E.2d 1266 (O'Connor, CJ., dissenting).

Mr. Schleiger also filed a timely application to reopen his appeal. But the court of appeals denied the motion, applying the standard for ineffective assistance of counsel of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), instead of the denial-of-counsel standard of *Smith v. Robbins*, 528 U.S. 259, 286, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000), *Penson v. Ohio*, 488 U.S. 75, 88, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988), and *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed. 2d 657 (1984). *State v.*

Schleiger, 12th Dist. Preble No. CA2009-09-026, Entry Denying Application to Reopen (Feb. 3, 2011). Again over a dissent, this Court declined to hear the case. *State v. Schleiger*, 128 Ohio St.3d 1557, 2011-Ohio-2905, 949 N.E.2d 43 (O'Connor, CJ., dissenting).

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, the Preble County Prosecuting Attorney and the Ohio Solicitor General 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. *Schleiger v. State*, United States Supreme Court Case No. 2011-6533, Brief in Opposition (Dec. 22, 2011) at 24-25.

The trial court then resentenced Mr. Schleiger to add proper postrelease control to his sentence. T.p. 1-8 (Oct. 11, 2011). 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. *Id.* at 1-2; Crim.R. 44(A) (right to counsel from "initial appearance before a court through appeal as of right").

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. A35-A36 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. Hancock No. 5-12-04, 2012-Ohio-6118. Opinion at ¶ 15,

Apx. A34-A35. The court also held that, despite the express waiver by the prosecuting attorney and Solicitor General, the court had no authority to decide issues outside the scope of the postrelease control issues. *State v. Schleiger*, 12th Dist. Preble No. CA2011-11-012, Entry Clarifying Scope of Appeal, (Jun. 11, 2012) The Twelfth District subsequently certified a conflict with *Peace*. Apx. A-7. Mr. Schleiger filed a timely discretionary appeal. This Court acknowledged the conflict and accepted Mr. Schleiger's appeal on the right-to-counsel issue. *State v. Schleiger*, 136 Ohio St.3d 1490, 2013-Ohio-4140, 994 N.E.2d 461; *Id.*, 136 Ohio St.3d 1491.

ARGUMENT

Proposition of Law:

A defendant has the right to counsel at a felony resentencing hearing regardless of the scope of the hearing.

In this case, the Twelfth District held that because only postrelease control was at issue, Mr. Schleiger had no right to counsel at his resentencing hearing. Opinion at ¶ 13-17. Both the premise and conclusion of that holding are incorrect.

A. A resentencing hearing is a critical stage at which the right to counsel attaches.

Resentencing is a critical stage of criminal litigation to which the right to counsel attaches. A critical stage exists only 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." *United States v. Wade*, 388 U.S. 218, 226, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

The right to counsel is a basic precept of due process and is at the core of the constitutional rights guaranteed to a criminal defendant:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both

> the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Powell v. Alabama, 287 U.S. 45, 64, 53 S.Ct. 55, 68-69, 77 L.Ed. 158, 170 (1932).

The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution guarantee a defendant counsel at each critical stage of a criminal proceeding. *Gardner v. Florida,* 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Sentencing is a critical stage. *Id.* And because a resentencing hearing is still a sentencing hearing, it remains a critical stage. Further, postrelease control is part of a criminal defendant's sentence. *Woods v. Telb,* 89 Ohio St.3d 504, 513, 733 N.E.2d 1103 (2000). Accordingly, a hearing to address problems with postrelease control is a resentencing hearing.

Further, a criminal defendant has a right to counsel whenever the conviction results in a period of incarceration. *Alabama v. Shelton,* 535 U.S. 654, 657, 152 L.Ed.2d 888, 122 S.Ct. 1764 (2002). For that same reason, a defendant is also entitled to counsel when the court imposes a suspended jail sentence because the suspended sentence has the potential to result in incarceration. *Mempa v. Rhay,* 389 U.S. 128, 136-37, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967).

At a resentencing hearing, the defendant has the same protections that exist at a sentencing hearing: the right to be heard; the right to present mitigating evidence; the

right to have counsel explain the law and effects of the proceeding; and the right to present any objections. *See Powell* at 64. Those rights belong to the defendant and are for the defendant's benefit. *Id.*. at 64. The criminal rules recognize that a defendant is not entitled to less protection because he has been convicted of a crime or because there are limits on the court's discretion to impose a particular sentence. *See* Crim.R. 44(A) (right to counsel from "initial appearance before a court through appeal as of right").

As in this case, when there is a complete denial of counsel at a critical stage, prejudice is presumed. *United States v. Cronic*, 466 U.S. 648, 668, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The defendant need not establish how he was harmed by the court's failure to appoint counsel. When counsel is denied, courts must presume that the proceedings were fundamentally unfair and the conviction or sentence must be vacated. *Id.*

B. Proceedings related to postrelease control are complicated.

A sentencing hearing to impose postrelease control raises numerous procedural and substantive issues that a criminal defendant cannot reasonably be expected to face without counsel.

1. Postrelease control is complicated and requires a lawyer to understand.

a) Many trial courts failed to properly impose the sanction for years.

While postrelease control may appear simple on paper, more than fifteen years of experience shows otherwise. First, many trial courts failed to properly impose postrelease control for about a decade. The problem became most evident after this Court expressly held that a court must properly impose postrelease in *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254. In that case, this Court held that, to be enforceable, a court must impose the proper term of years and correctly state whether the term is mandatory or discretionary. *Id.* at ¶ 69-71. Because so many trial courts had failed to properly impose the sanction in nearly every case before them, *Bloomer* prompted the Ohio Department of Rehabilitation and Correction to discharge more than 5,500 defendants from postrelease control. E-Mail correspondence to Counsel from Debra Hearns, Ohio Department of Rehabilitation and Correction, to Counsel (Jun. 18, 2010); Coolidge, *Convicts freed without parole (sic)*, Cincinnati Enquirer (Nov. 1, 2009).

This Court has also struggled with the issue. As one justice recently explained, "[r]ecent history has shown that the court's decisions in this area have been confusing and inconsistent." *In re J.S.*, 136 Ohio St.3d 8, 2013-Ohio-1721, 989 N.E.2d 978, ¶ 7 (Lanzinger J., dissenting). Much of the confusion has come from the different rules of law contained in signed opinions and in earlier per curium extraordinary writ cases.

Although *Bloomer*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, *State v. Billiter*, 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960 and other cases were clear that a judge had to properly impose postrelease for the sanction to be enforceable,[1] at least one court of appeals continued to rely on the standard found only in this Court's per curium extraordinary writ cases. *See State v. Gonzalez*, 193 Ohio App.3d 385, 2011-Ohio-1542, 952 N.E.2d 502 (10th Dist.), ¶ 28 (holding postrelease control valid based on oral notification); *State v. Townsend*, 10th Dist. Franklin No. 10AP-983, 2011-Ohio-5056, ¶8-12 (listing other cases in which the court vacated valid postrelease control and reinstated entries that did not properly impose the sanction or did not impose the sanction at all"); attempting to follow *State ex rel. Pruitt v. Cuyahoga Cty. Court of Common Pleas*, 125 Ohio St.3d 402, 2010-Ohio-1808, ¶ 4, 928 N.E.2d 722; and *Watkins v. Collins*, 111 Ohio St. 3d 425, 2006-Ohio-5082, ¶ 51, 857 N.E.2d 78.

Almost all other courts of appeals disagreed. See, *State v. Thomas*, 1st Dist. Hamilton Nos. C-100411, C-100412, 2011-Ohio-1331, ¶7; *State v. Robinson*, 2d Dist.

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[1] *See also State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph one of the syllabus ("[f]or criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly *impose* postrelease control"), *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶69 ("R.C. 2929.191 establishes a procedure to remedy a sentence that fails to properly impose a term of postrelease control"), *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶16 ("without the trial court's proper *imposition* of postrelease control, the Adult Parole Authority remains powerless to implement it"), and *Fischer* at ¶ 26 (citing to *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961) ("[W]hen a judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, that part of the sentence that is void.").

Champaign No. 2010 CA 30, 2011-Ohio-1737, State's discretionary appeal not allowed, 129 Ohio St.3d 1453, 2011-Ohio-4217; 951 N.E.2d 1048, 2011-Ohio-4217, 951 N.E.2d 1048; *State v. Hines*, 193 Ohio App.3d 660, 2011-Ohio-3125, 953 N.E.2d 387 (3rd Dist. Allen), ¶12; *State v. Cottrill*, 4th Dist. Pickaway No. 10 CA 38, 2011-Ohio-2122, ¶ 9; *State v. Tucker*, 5th Dist. Stark No. 2011CA00084, 2011-Ohio-4620, ¶30; *State v. Gaut*, 7th Dist. Trumbull No.2010-T-0059, 2011-Ohio-1300, ¶ 20-24; *State v. Jones*, 8th Dist. Cuyahoga No. 94216, 2010-Ohio-4136, ¶ 4-5; *State v. Jones*, 9th Dist. Wayne No. 10 CA 0022, 2011-Ohio-1450, ¶ 11-13; *State v. Cline*, 11th Dist. Geauga No. 2010-G-2981, 2011-Ohio-3890, ¶18; *State v. Bregen*, 12th Dist. Clermont No.2010-06-039, 2011-Ohio-1872, ¶ 25.

Either the Tenth District has been wrong, or nearly every other appellate district has been wrong. Either way, a criminal defendant should not have to fend for himself where appellate judges can't agree.

b) A criminal defendant cannot be expected to understand a statute in which "after" means "before."

To avoid a separations of powers bar to applying R.C. 2929.191, this Court interpreted "prior to" to mean "after" and "after" to mean "prior to" as used in R.C. 2929.191. *See Singleton*, 2009-Ohio-6434 at ¶ 48 (Pfeifer, J. concurring in part and dissenting in part). More specifically, even though R.C. 2929.191, by its express language, applied only to entries issued before its enactment, the lead opinion in *Singleton* applied it only to entries issued *after* its enactment. *Id.* at ¶ 28-34. Defendants

cannot be expected to understand how R.C. 2929.191 operates without the assistance of counsel.

c) Criminal defendants need the advice of counsel to understand their postrelease control and to know whether to object.

A defendant retains the right to object to the imposition of postrelease control based upon the facts and circumstances of his or her case, to present any defenses that may apply, and the right to have counsel explain the effects of a sentence that includes postrelease control. *See Joseph,* 2010-Ohio-954 at ¶ 13 (stating that a defendant must be given the opportunity to object to a sentence).

Given the conflict over what language is sufficient to impose postrelease control described *supra,* a defendant needs counsel's advice to understand his duties under the sanction. This is especially true because the failure to follow postrelease control can result in an escape conviction. R.C. 2921.34; *Billiter; State v. Jordan,* 124 Ohio St.3d 397, 2010-Ohio-281, 922 N.E.2d 951. An advocate's explanation of a defendant's duties under postrelease control is critical. A trial court will naturally believe that it properly imposed the sanction, so the judge will not be in an position to advise a defendant about whether any aspect of the resentencing was incorrect.

2. Because only res judicata, which is waivable, limits a defendant's arguments, a defendant has the opportunity to raise issues other than postrelease control.

This Court could not have been clearer: "Although the doctrine of res judicata does not preclude review of a void sentence, *res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence*." (Emphasis added.) *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, paragraph three of the syllabus. As the State correctly explained to the United States Supreme Court earlier in the litigation in this case,

> [U]nder the terms of the appeals court's remand, under R.C. 2929.191 , and under *Fischer*, [Mr. Schleiger's] resentencing, and thus the appeal, should be limited to PRC issues. Res judicata has already closed off issues regarding guilt or any non-PRC sentencing issues. *Fischer*, 942 N.E.2d at 341. But res judicata is waivable . . . .

Brief in Opposition at 24-5. The State is correct. *Fischer* held that res judicata, not subject matter jurisdiction, barred consideration of issues outside the scope of the resentencing. And res judicata can be waived. *See, e.g., State ex rel. Deiter v. McGuire*, 119 Ohio St.3d 384, 2008-Ohio-4536, ¶ 28, 894 N.E.2d 680 (finding waiver).

Fischer creates a waivable res judicata barrier to the consideration of additional issues at a postrelease control resentencing hearing. Accordingly, defendants like Mr. Schleiger can raise any claim they could have raised at trial such as improper jury instructions or the length of the prison term imposed, and the trial court has jurisdiction to rule. Of course, the State, which is almost always represented by counsel at these

resentencing hearings, can raise res judicata as an affirmative defense. But as this case shows, the State may not always choose to raise the issue.

3. Defendants need counsel for advice concerning potential appeals.

Because a defendant needs counsel to understand his responsibilities under postrelease control, the right to advice concerning an appeal is also critical. The United States Supreme Court has held that trial lawyers have a duty to advise their clients about whether an appeal should be filed when the clients may have non-frivolous issues to raise. *Roe v. Flores-Ortega*, 528 U.S. 470, 479-80, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). A pro se defendant who does not understand his postrelease control responsibilities cannot make a thoughtful decision as to whether an appeal would be wise.

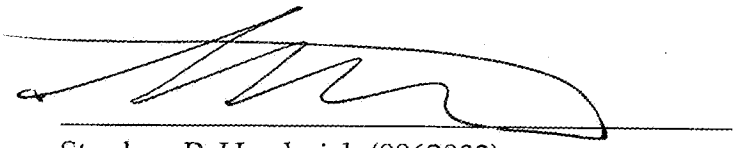
CONCLUSION

Postrelease control is far from simple in practice, and a criminal defendant cannot be expected to understand the imposition, appeal, and enforcement of the sanction without the assistance of counsel. And, as Justice Thomas wrote for the majority in *Smith v. Robbins*, 528 US 259, 120 S. Ct. 746; 145 L.Ed. 2d 756, criminal defendants have a right to an attorney who is "zealous for the indigent's interests[.]" *Id.* at 278. This is especially true when a defendant must navigate a procedural and substantive minefield that has confounded Ohio's courts for the last fifteen years.

This Court should reverse the Twelfth District's decision, vacate Mr. Schleiger's sentence, and remand for a resentencing hearing. In the alternative, this Court should remand this case to the Twelfth District to permit Mr. Schleiger to have his first plenary appeal—the one the Ohio Solicitor General and prosecuting attorney told the United States Supreme Court he would have.

Respectfully submitted,

Office of the Ohio Public Defender



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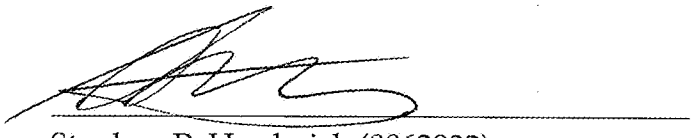
Certificate of Service

I hereby certify that a true copy of the foregoing was forwarded via email to the office of Kathryn West, kwest@prebco.org; and Stephen Camey, stephen.camey@ohioattorneygeneral.gov, deputy solicitor on this 17th of December 2013.



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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
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	:	COURT OF APPEALS,
CURTIS SCHLEIGER,	:	TWELFTH APPELLATE DISTRICT,
	:	CASE NO. CA2011-11-012
DEFENDANT-APPELLANT.	:	

APPENDIX TO

MERIT BRIEF OF APPELLANT CURTIS SCHLEIGER

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.	:	

NOTICE OF APPEAL OF APPELLANT CURTIS SCHLEIGER

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Counsel for Appellant Curtis Schleiger

FILED
MAY 10 2013
CLERK OF COURT
SUPREME COURT OF OHIO

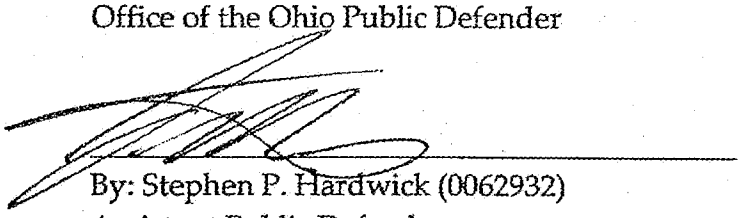
NOTICE OF APPEAL OF APPELLANT CURTIS SCHLEIGER

Appellant Curtis Schleiger, hereby gives notice of appeal to the Supreme Court of Ohio from the Journal Entry of the Preble County Court of Appeals, Twelfth Appellate District, entered in Court of Appeals Case No. CA2011-11-012 on March 25, 2013.

This case raises a substantial constitutional question, involves a felony, and is of public or great general interest.

Respectfully submitted,

Office of the Ohio Public Defender



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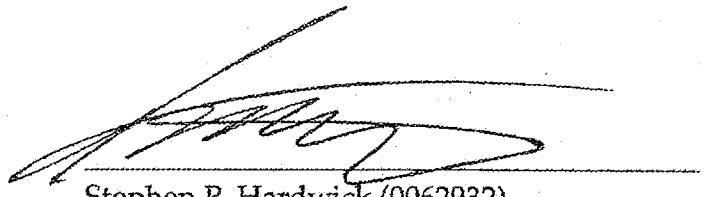
CERTIFICATE OF SERVICE

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)
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#393265

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	CASE NO. 13-1046
PLAINTIFF-APPELLEE,	:	
	:	ON CERTIFIED CONFLICT FROM THE
V.	:	PREBLE COUNTY COURT OF APPEALS,
	:	TWELFTH APPELLATE DISTRICT,
CURTIS SCHLEIGER,	:	CASE NO. CA2011-11-012
	:	
DEFENDANT-APPELLANT.	:	

APPELLANT CURTIS SCHLEIGER'S NOTICE OF CERTIFIED CONFLICT

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Counsel for Appellant Curtis Schleiger

FILED
JUN 28 2013
CLERK OF COURT
SUPREME COURT OF OHIO

APPELLANT CURTIS SCHLEIGER'S NOTICE OF CERTIFIED CONFLICT

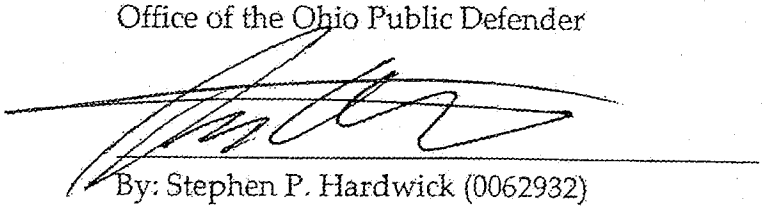
Appellant Curtis Schleiger, hereby gives notice of appeal to the Supreme Court of Ohio that, in an entry dated May 31, 2013, the Preble County Court of Appeals, Twelfth Appellate District has certified a conflict with its March 25, 2013 judgment issued in Court of Appeals Case No. CA2011-11-012 on March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



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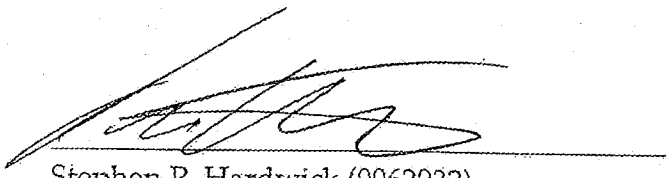
Counsel for Appellant Curtis Schleiger

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
MAY 3 1 2013
Christopher B. Washington
CLERK OF COURT OF APPEALS

STATE OF OHIO, PREBLE COUNTY, OHIO CASE NO. CA2011-11-012

Appellee, : ENTRY GRANTING MOTION TO CERTIFY CONFLICT

vs.

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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141 – 142

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

142

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,

- 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. Schlejger*, 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-5118, ¶ 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 Schlelger* 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.

[Cite as *State v. Peace*, 2012-Ohio-6118.]

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.

[Cite as *State v. Schleiger*, 2013-Ohio-1110.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

STATE OF OHIO,	:	
		CASE NO. CA2011-11-012
Plaintiff-Appellee,	:	
		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.

{¶ 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*, 3rd 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.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 10 [Trial of accused persons and their rights; depositions by state and comment on failure to testify in criminal cases.]

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

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Current through Legislation passed by the 130th Ohio General Assembly
and filed with the Secretary of State through File 38
*** Annotations current through October 21, 2013 ***

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 (2013)

§ 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. 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.

Page's Ohio Revised Code Annotated:
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Current through Legislation passed by the 130th Ohio General Assembly
and filed with the Secretary of State through File 38
*** Annotations current through October 21, 2013 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR FELONY

Go to the Ohio Code Archive Directory

ORC Ann. 2929.191 (2013)

§ 2929.191. Correction to judgment of conviction concerning post-release control

(A) (1) If, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(2)(c) of *section 2929.19 of the Revised Code* and failed to notify the offender pursuant to that division that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison or to include a statement to that effect 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*, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison.

If, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(2)(d) of *section 2929.19 of the Revised Code* and failed to notify the offender pursuant to that division that the offender may be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison or to include a statement to that effect 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*, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender may be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison.

(2) If a court prepares and issues a correction to a judgment of conviction as described in division (A)(1) of this section before the offender is released from imprisonment under the prison term the court imposed prior to July 11, 2006, the court shall place upon the journal of the court an

entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. If the court sends a copy of the entry to the department, the department promptly shall deliver a copy of the entry to the offender. The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the sentence and the judgment of conviction entered on the journal and had notified the offender that the offender will be so supervised regarding a sentence including a prison term of a type described in division (B)(2)(c) of *section 2929.19 of the Revised Code* or that the offender may be so supervised regarding a sentence including a prison term of a type described in division (B)(2)(d) of that section.

(B) (1) If, prior to July 11, 2006, a court imposed a sentence including a prison term and failed to notify the offender pursuant to division (B)(2)(e) of *section 2929.19 of the Revised Code* regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control or to include in the judgment of conviction entered on the journal a statement to that effect, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that if a period of supervision is imposed following the offender's release from prison, as described in division (B)(2)(c) or (d) of *section 2929.19 of the Revised Code*, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of *section 2967.131 of the Revised Code* 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.

(2) If the court prepares and issues a correction to a judgment of conviction as described in division (B)(1) of this section before the offender is released from imprisonment under the term, the court shall place upon the journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. If the court sends a copy of the entry to the department, the department promptly shall deliver a copy of the entry to the offender. The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the judgment of conviction entered on the journal and had notified the offender pursuant to division (B)(2)(e) of *section 2929.19 of the Revised Code* regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control.

(C) On and after July 11, 2006, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division. Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing, the prosecuting attorney of the county, and the department of rehabilitation and correction. The offender has the right to be physically present at the hearing, except that, upon the court's own motion or the motion of the offender or the prosecuting attorney, the court may permit the offender to appear at the hearing by

video conferencing equipment if available and compatible. An appearance by video conferencing equipment pursuant to this division has the same force and effect as if the offender were physically present at the hearing. At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction.

HISTORY:

151 v H 137, § 1, eff. 7-11-06; 2011 HB 86, § 1, eff. Sept. 30, 2011.

OHIO RULES OF COURT SERVICE
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*** Rules current through rule amendments received through November 1, 2013 ***
*** Annotations current through October 21, 2013 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R 44 (2013)

Review Court Orders which may amend this Rule.

Rule 44. Assignment of counsel

(A) Counsel in serious offenses.

Where a defendant charged with a serious offense is unable to obtain counsel, counsel shall be assigned to represent him at every stage of the proceedings from his initial appearance before a court through appeal as of right, unless the defendant, after being fully advised of his right to assigned counsel, knowingly, intelligently, and voluntarily waives his right to counsel.

(B) Counsel in petty offenses.

Where a defendant charged with a petty offense is unable to obtain counsel, the court may assign counsel to represent him. When a defendant charged with a petty offense is unable to obtain counsel, no sentence of confinement may be imposed upon him, unless after being fully advised by the court, he knowingly, intelligently, and voluntarily waives assignment of counsel.

(C) Waiver of counsel.

Waiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22. In addition, in serious offense cases the waiver shall be in writing.

(D) Assignment procedure.

The determination of whether a defendant is able or unable to obtain counsel shall be made in a recorded proceeding in open court.