

COURT OF APPEALS  
FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

TRAVIS HARDY

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. John W. Wise, J.

Hon. Craig R. Baldwin, J.

Case No. 17 CA 11

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common  
Pleas, Case No. 2009 CR 231

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

December 12, 2017

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Travis Hardy appeals from the decisions by the Court of Common Pleas, Fairfield County, which denied his post-conviction motion to violate a post-release control sanction and issued a *nunc pro tunc* sentencing entry. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2} Via a judgment entry issued on August 13, 2009, following the entry of guilty pleas, the Fairfield County Court of Common Pleas sentenced Appellant Hardy to three years and ten months in prison for the offenses of attempted illegal use of a minor in nudity-oriented material (a felony of the third degree) and importuning (a felony of the fifth degree). The trial court also ordered that appellant be placed on five years of community control. The sentencing entry contained the following post-release control language, in pertinent part:

{¶3} “The Court further notified the Defendant that post-release control is **mandatory** in this case for a period of five (5) years \*\*\*.”

{¶4} Sentencing Entry at 2, emphasis in original.

{¶5} On March 26, 2013, the State of Ohio filed a motion to revoke appellant’s community control, alleging three violations. A hearing was conducted before the trial court on May 6, 2013. At that time, appellant appeared with counsel and entered an admission to two violations. The trial court thereupon granted the State’s request to revoke community control. The court also sentenced appellant to three years in prison on the felony-three count. Furthermore, the revocation entry contained the following post-release control language, in pertinent part:

{¶16} “The Court further notified the Defendant orally and in writing that post-release control is **optional** in this case for a period of **three (3) years**, as well as the consequences for violating conditions of post-release control proposed by the Parole Board. \*\*\*.”

{¶17} Entry Revoking Community Control at 1, March 8, 2013, emphasis in original.<sup>1</sup>

{¶18} It appears undisputed that appellant completed his 2013 prison sentence and was released on February 25, 2016. He was placed on post-release control for five years at that time. See Appellant’s Exhibit C (Ohio Department of Rehabilitation and Correction printout, provided in trial court file).

{¶19} On December 19, 2016, appellant filed a motion to vacate his post-release control. The State filed a memorandum contra on January 13, 2017.

{¶10} On January 17, 2017, the trial court issued (1) a judgment entry denying appellant’s motion to vacate PRC and (2) a “*nunc pro tunc* entry on entry revoking community control.”

{¶11} On January 23, 2017, appellant filed a motion to reconsider the January 17, 2017 judgment entries, essentially maintaining the *nunc pro tunc* entry was not a valid means of correcting the post-release control error once he was released from prison.

{¶12} The trial court denied the motion to reconsider on February 13, 2017.

{¶13} Appellant filed a notice of appeal on March 3, 2017.

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<sup>1</sup> Because appellant was ultimately sentenced for a felony sex offense, he was subject to a five-year mandatory term of post-release control. See R.C. 2967.28(B)(1). Appellant has not provided transcripts of either the sentencing hearing or the revocation hearing, so we will herein presume the trial court’s *ora*/ PRC notifications were proper in both instances.

{¶14} On April 14, 2017, this Court granted appellant's request to file a delayed appeal.

{¶15} Appellant herein raises the following sole Assignment of Error:

{¶16} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED TRAVIS HARDY'S MOTION TO VACATE POSTRELEASE CONTROL BECAUSE MR. HARDY WAS NOT PROPERLY NOTIFIED OF HIS TERM OF POSTRELEASE CONTROL AND IT COULD NOT ISSUE A NUNC PRO TUNC AFTER HE COMPLETED HIS PRISON TERM."

I.

{¶17} In his sole Assignment of Error, appellant contends the trial court erred in denying his motion to vacate post-release control and in issuing a *nunc pro tunc* sentencing/revocation entry. We agree.

{¶18} In *State v. Fischer*, 128 Ohio St.3d 92, 2010–Ohio–6238, the Ohio Supreme Court held in pertinent part that "[a] sentence that does not include the statutorily mandated term of post-release control is void \*\*\* and may be reviewed at any time, on direct appeal or by collateral attack." *Id.*, at paragraph one of the syllabus.

{¶19} We have recognized that the PRC notification requirement applies when the trial court chooses at the original sentencing hearing to impose the sanction of a prison term. See *State v. Parker*, 5th Dist. Stark No. 2010 CA 00148, 2011-Ohio-595, ¶ 30. But "[a]bsent from the relevant statutes is a requirement that a court that chooses to impose community control sanctions as an initial sentence must inform the offender of post-

release control.” *Id.*<sup>2</sup> It follows that in situations where, as in the case *sub judice*, a defendant is sentenced to a prison term subsequent to a revocation of community control, it is error for the trial court to fail at that time to provide the PRC notification required by statute. See *State v. Robinson*, 1st Dist. Hamilton No. C-150602, 2016-Ohio-5114, ¶ 9.

{¶20} The trial court in the case *sub judice*, in its entry denying appellant’s motion to vacate PRC, stated that at appellant’s July 24, 2009 sentencing hearing, it had imposed the mandatory five-year postrelease control term as required by law. Judgment Entry, January 17, 2017, at 1. The trial court further stated that it had advised appellant that his post-release control period was a mandatory five years on the record during the revocation of community control hearing held on May 6, 2013. *Id.* The court concluded appellant’s PRC was not void despite the incorrect language in the May 8, 2013 judgment entry revoking PRC and imposing sentence, “because the proper mandatory term was given to the Defendant orally during the revocation hearing.” *Id.* The court then held that the proper remedy in this matter would be to add the mandatory post-release control in a *nunc pro tunc* entry. *Id.*, referencing *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718.

{¶21} We initially observe the trial court therein failed to acknowledge that in *Qualls*, the Ohio Supreme Court made clear that “[t]he original sentencing entry can be corrected to reflect what actually took place at the sentencing hearing, through a nunc

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<sup>2</sup> As noted in our recitation of facts, the trial court originally sentenced appellant in 2009 to both prison and community control. For all practical purposes, this was treated as a community control sanction. We note the Ohio Supreme Court has concluded that the felony sentencing statutes require imposition of *either* a prison term or community control on each count. See *State v. Anderson*, 143 Ohio St.3d 173, 2015-Ohio-2089, ¶ 23.

pro tunc entry, *as long as the correction is accomplished prior to the defendant's completion of his prison term.*" (Emphasis added). *Qualls* at ¶ 24, 967 N.E.2d 718.

{¶22} The State, in its response brief, nonetheless urges that *Qualls* and its progeny are distinguishable, as they focus on cases where there was a complete failure to originally provide PRC notification. For example, the State notes this Court, in *State v. Ball*, 5th Dist. Licking No. 13-CA-17, 2013-Ohio-3443, emphasized that "[i]n *Qualls*, the trial court failed to include any reference to post-release control in its sentencing entry." *Ball* at ¶ 22.<sup>3</sup> The State thus in essence responds that because appellant was given a proper five-year mandatory PRC notice at the time of his original sentencing to community control, was presumably given proper oral notifications, and was thereafter given a mistaken notification of "three years optional" PRC in the revocation entry, as opposed to no notification at all, the error was indeed curable via a *nunc pro tunc* entry.

{¶23} When a trial court is presented with a revocation motion, the new community control violation hearing in effect is a new sentencing hearing where the defendant is sentenced anew. See *State v. Filous*, 4th Dist. Athens No. 16CA16, 2017-Ohio-7203, ¶ 20, citing *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, ¶ 17. Furthermore, the Ohio Supreme Court has recently ruled as follows: "We hold that to validly impose postrelease control when the court orally provides all the required advisements at the sentencing hearing, the sentencing entry must contain the following

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<sup>3</sup> In *Ball*, the original written PRC notification had consisted merely of the following: " 'After imposition of sentence the Court notified the Defendant orally and in writing .... [of] the applicable periods of post-release control ... .' " We ultimately found the aforesaid language "combined with the presumption of regularity with which we must accord the oral notification at Ball's sentencing hearing," was sufficient to give Ball notice of his PRC sanction. *Id.* at ¶ 25.

information: (1) whether postrelease control is discretionary or mandatory, (2) the duration of the postrelease-control period, and (3) a statement to the effect that the Adult Parole Authority (“APA”) will administer the postrelease control pursuant to R.C. 2967.28 and that any violation by the offender of the conditions of postrelease control will subject the offender to the consequences set forth in that statute.” *State v. Grimes*, --- N.E.3d ---, 2017-Ohio-2927, ¶ 1.

{¶24} In light of the explicit requirements of *Grimes*, we find we cannot presently rely on our rationale in *Ball*, *supra*. Thus, appellant was entitled to a proper PRC notification per *Grimes* in the May 8, 2013 revocation entry, but the trial court’s *nunc pro tunc* judgment entry issued as a remedy after appellant’s completion of sentence in 2016 came too late. *Qualls*, *supra*. We therefore hold the trial court erred in denying appellant’s motion to vacate PRC and in attempting to remedy the flawed PRC sanction via the *nunc pro tunc* judgment entry presently under appeal.

{¶25} Appellant’s sole Assignment of Error is sustained, and the matter will be remanded with directions to the trial court to vacate appellant’s PRC sanction and to henceforth withhold enforcement of said sanction.

{¶26} For the reasons stated in the foregoing, the judgments of the Court of Common Pleas, Fairfield County, Ohio, are hereby reversed and remanded.

By: Wise, J.

Gwin, P. J., and

Baldwin, J., concur.

JWW/1121