[Cite as *State v. Oneil*, 2009-Ohio-7000.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-P-0090**
- vs -	:	
CURTIS L. ONEIL,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2008 CR 0177.

Judgment: Affirmed in part; reversed in part; and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Michael E. Grueschow, 409 South Prospect Street, P.O. Box 447, Ravenna, OH 44266 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Curtis L. ONeil, whose true name is Curtis D. O'Neil, appeals his conviction, following a jury trial, in the Portage County Court of Common Pleas of rape, aggravated robbery, aggravated burglary, kidnapping, and intimidation during a home invasion. At issue is whether appellant's trial counsel provided effective assistance and whether appellant's sentence must be vacated due to the trial court's failure to properly notify him regarding post-release control. For the reasons that follow,

we affirm in part; reverse in part; and remand this case to the trial court for resentencing.

{¶2} Appellant was indicted for rape, a felony of the first degree, in violation of R.C. 2907.02(A)(2); aggravated robbery, a felony of the first degree, in violation of R.C. 2911.01(A)(1) and (C); aggravated burglary, a felony of the first degree, in violation of R.C. 2911.01(A)(2)(B); kidnapping, a felony of the first degree, in violation of R.C. 2905.01(A)(2)(4) and (C); and intimidation, a felony of the third degree, in violation of R.C. 2921.04(B) and (D). Each offense included a firearm specification. The case went to trial in July 2008. After the jury was unable to reach a verdict, the court declared a mistrial and reset the case for a second jury trial in August 2008.

{¶3} Sharicka Starks testified that on March 1, 2008, at about 1:30 a.m., appellant, David Jackson, and Tom Morris visited her at her sister's apartment in Kent, Ohio. Ms. Starks has been friends with these men for years. During this visit appellant asked her questions about the male who lived in the apartment next door, Brock BeBee. Appellant asked her if he has any money and she said, "no." Shortly thereafter, the three males left the apartment, went in the hall, and stood outside the door to BeBee's apartment. Through her peephole Ms. Starks saw appellant was holding a black 9 mm. handgun. Appellant and Jackson opened the door to BeBee's apartment, went inside, and yelled, "Get the F__ down!" After they were in the apartment for about 15 minutes, Ms. Starks heard a girl screaming inside the apartment. Ms. Starks tried to go next door to help, but Morris, who was standing in the hall, said she "couldn't go over there because his boys were doing something."

{¶4} Ms. Starks testified that on a prior occasion, when she was with appellant and Morris, appellant said he "needed a lick," which is street slang for a robbery, and Morris said "he had one." Morris was referring to BeBee's roommate Donnell West, who held card games in their apartment involving large amounts of money.

{¶5} Brock BeBee testified that at the time his girlfriend Lorlisa Clinger and his friend, Tank, were visiting him. BeBee and Tank were playing video games in the living room, while Ms. Clinger was in BeBee's bedroom in his bed watching television.

{¶6} While playing video games, BeBee heard a loud knock at the door. He opened the door and appellant and Jackson burst into his apartment, both holding guns and aiming them at him. Appellant said, "you know what it is," which, according to BeBee, meant this was a robbery. Jackson took BeBee into the kitchen, while appellant stayed with Tank in the living room. While holding BeBee at gunpoint, Jackson took $200 from his wallet. Appellant stole $400 from Tank.

{¶7} Appellant asked BeBee where all the money was. Appellant started going through the closet in the living room, but did not find anything. He and Jackson then took BeBee and Tank into the bedroom of BeBee's roommate and forced them to search his closet. When they did not find any money, appellant became agitated and said he was going to "pop someone off" if they did not find the money. According to BeBee, this is street slang meaning he would shoot someone.

{¶8} Meanwhile, appellant's attention was drawn to BeBee's bedroom, in which Ms. Clinger was watching television in bed. Appellant went in that room, while Jackson stayed with the others in the kitchen. Appellant pointed his gun at Ms. Clinger and told her to tell him where the money was. She thought it was a joke. Appellant said it was

no joke and cocked his gun. Appellant had BeBee come into the room, and he told her it was not a game and she needed to do whatever he told her to do. Appellant then told BeBee to get back in the kitchen. After BeBee left the room, appellant slammed the door and BeBee heard Ms. Clinger screaming.

{¶9} Lorlisa Clinger testified that when she saw the second assailant was also holding a gun, she started crying. Appellant looked through BeBee's closet and said, "you're his girl, where's his money?" She said she did not know. Appellant then told her to get out of bed and he looked under the bed. Then, when Ms. Clinger was about to get back in bed, appellant pulled his pants down and said, "put this in your mouth." While he was holding his gun on her, appellant forced her to give him oral sex. He then got up and locked the bedroom door. He laid on the bed and told her to get on top of him. Appellant forced her to submit to vaginal intercourse while pointing his gun at her side.

{¶10} Suddenly, Jackson started banging on the door, yelling, "come on, we gotta get out of here." A few minutes later appellant got up, opened the bedroom door, and went into the living room. As they left the apartment, appellant said, "if you call the police ***, we will be back."

{¶11} Following the trial, the jury returned a verdict finding appellant guilty of each offense and firearm specification as charged in the indictment.

{¶12} Thereafter, the court conducted a sentencing hearing. The prosecutor informed the court that appellant was previously convicted of robbery and sentenced to two years. Shortly after his release, he committed the instant offenses. In light of the serious nature of his crimes, the prosecutor asked the court to impose the maximum

sentence, i.e., 60 years. The victim testified she lives in constant fear for her life and the life of her family. She is terrified appellant will send one of his associates to find her and kill her. She also asked the court to impose the maximum sentence. The trial court sentenced appellant to nine years in prison for rape, eight years for aggravated robbery, eight years for aggravated burglary, eight years for kidnapping, and four years for intimidation. The court also sentenced appellant to three years for each of the five firearm specifications. The sentences for all offenses and firearm specifications were ordered to be served consecutively for a total sentence of 49 years in prison. The trial court advised appellant at the hearing that post-release control was mandatory; however, in its sentencing entry, the court stated that post-release control was discretionary. In addition, the trial court did not advise appellant either at the hearing or in its sentencing entry concerning the applicable term of post-release control, i.e., five years.

{¶13} Appellant appeals his conviction and sentence, asserting three assignments of error. For his first assigned error, appellant alleges:

{¶14} "Trial counsel for appellant failed to provide effective assistance at trial because there were substantial breaches or violations of defense counsel's duties to his client, and the appellant's defense was prejudiced by counsel's ineffectiveness."

{¶15} The standard of review for ineffective assistance of counsel was stated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 687, and has been repeatedly followed by this court. *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *30-*31; *State v. McKinney*, 11th Dist. No. 2007-T-0004, 2008-Ohio-3256, at ¶187.

{¶16} In order to support a claim of ineffective assistance of counsel, the defendant must satisfy a two-prong test. First, he must show that counsel's performance was deficient. *Strickland*, supra. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Id. A properly licensed attorney is presumed to be competent. Id. at 688. In order to rebut this presumption, the defendant must show the actions of counsel did not fall within a range of reasonable assistance. Id. at 689. The Court in *Strickland* stated, "[t]here are countless ways to provide effective assistance in any given case. ***" Id. at 689. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential. ***" Id. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. In addition, "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ***." Id.

{¶17} Second, the defendant must show the deficient performance prejudiced the defense. In order to satisfy this prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's *** errors, the result of the [trial] would have been different." Id. at 694; accord *State v. Bradley* (1989), 42 Ohio St.3d 136, at paragraph three of the syllabus.

{¶18} The Court in *Strickland* held that a court does not have to consider the two prongs of the test of ineffective assistance in any particular order. Thus, the Court held that if the defendant makes an insufficient showing of prejudice, a court need not

determine whether counsel's performance was deficient before disposing of the claim of ineffective assistance. Id. at 697.

{¶19} It is well settled that strategic and tactical decisions do not constitute a deprivation of the effective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. Errors of judgment regarding tactical matters do not substantiate a claim of ineffective assistance of counsel. Id.; accord *State v. Lundgren* (Apr. 22, 1994) 11th Dist. No. 90-L-15-125,1994 Ohio App. LEXIS 1722, *53-*54; *State v. Vinson*, 11th Dist. No. 2006-L-238, 2007-Ohio-5199, at ¶31.

{¶20} In *Clayton*, supra, the Court held: "*** the fact that there was another and better strategy available [to counsel] does not amount to a breach of an essential duty to his client." Id. A reviewing court must not second-guess trial strategy decisions. Id.

{¶21} Appellant argues that his trial counsel was ineffective in seven particulars. First, he challenges his counsel's failure to call Ryan Whitacre as a witness at trial. Ms. Whitacre had testified in the first trial that she had driven Ms. Clinger to the hospital after the rape to be examined. She testified that Ms. Clinger said that appellant had a tattoo between his thumb and index finger that she thought was an SQ or an SW.

{¶22} Appellant argues that in fact he does not have a tattoo between these fingers, and that trial counsel should have called Ms. Whitacre to testify to this fact at the second trial. However, Sergeant Robert Treeharn of the Kent Police Department testified that appellant was previously photographed at the Kent Police Department, and that one of these photographs shows appellant has a tattoo on his hand depicting the letters SQ. Sergeant Treeharn testified that "SQ" refers to the "Squad Up" gang. This photograph was admitted in evidence. Thus, even if this tattoo was not between

appellant's fingers, the presence of this tattoo on his hand and its correct description by Ms. Clinger would likely have been damaging to him.

{¶23} In *State v. Wolf* (Dec. 30, 1994), 11th Dist. No. 93-L-151, 1994 Ohio App. LEXIS 5993, this court held, "the calling of *** a witness can best be viewed as a tactical decision ***." Id. at *27. Thus, the decision to call, or not to call, a certain witness to the stand is subject to the strong presumption that the decision might be considered sound trial strategy. Id. at *28. Other appellate districts have reached the same conclusion. *State v. Jenkins*, 2d Dist. No. 2003-CA-1, 2003-Ohio-4428, at ¶7; *State v. Rutter*, 4th Dist. No. 02CA17, 2003-Ohio-373, at ¶27.

{¶24} Trial counsel obviously decided that, despite the fact that Ms. Whitacre's testimony would show Ms. Clinger was incorrect about the exact location of appellant's tattoo on his hand, Ms. Whitacre's testimony would also show the victim was correct about appellant having a tattoo on his hand and about its description. Trial counsel's decision not to call Ms. Whitacre as a witness was a tactical decision, which appears eminently reasonable and which we will not second-guess. However, even if not calling her as a witness represented deficient performance, appellant was not prejudiced because the court admitted into evidence two photographs depicting appellant's hands. Appellant does not challenge the admissibility of these photographs on appeal, nor does he dispute their accuracy.

{¶25} Second, appellant argues that his trial counsel should have asked the trial court to allow him to show his hands to the jury to demonstrate that he did not have a tattoo between his fingers. Trial counsel's decision not to draw the jury's attention to his client's hand was a tactical decision, which we will not second-guess. In these

circumstances, drawing the jury's attention to his hand would likely have been damaging to appellant's defense. We therefore fail to see how counsel's tactical decision represented deficient performance. However, even if it did, appellant has not shown he was prejudiced due to the admission into evidence of the photographs of his hands. Further, appellant concedes in his brief that showing his hands to the jury would have merely corroborated these photographs.

{¶26} Third, appellant argues that because he "provided to police at the time of his arrest *** an alibi, including an alibi witness," in failing to file a notice of alibi and to call the alibi witness to testify, appellant's trial counsel was ineffective. However, appellant does not cite the record in support. Further, appellant does not cite the record concerning what, if anything, appellant's alleged alibi witness would have said if called to testify. As a result, appellant has failed to support his argument by citation to the record as required by App.R. 16(A)(7). For this reason alone, this argument lacks merit. In addition, since there is no evidence concerning this witness' proposed testimony, we cannot determine whether trial counsel's decision not to call him constituted deficient performance or whether appellant was prejudiced as a result.

{¶27} Further, appellant concedes on appeal that he was aware as early as the time of his arrest in March 2008 of the name of his alleged alibi witness. He also concedes the state provided to his trial counsel the name and address of this witness in its discovery response and on its witness list. We note that after the trial court denied appellant's motion for acquittal, trial counsel advised the court that, with the agreement of appellant, he had decided not to call any witnesses to the stand. The court personally addressed appellant and asked him if that was correct and appellant said

"yes." We must therefore presume that appellant's trial counsel was aware of the existence of the witness, as well as the content of his testimony, and, based on that knowledge, he, with appellant's express agreement, made a conscious decision not to put the witness on the stand. This action suggests that the witness was not called to testify because appellant's trial counsel desired to preserve or enhance appellant's case in some manner and believed that if the witness was called, he might adversely affect it. Based on the lack of proof concerning the content of the proposed alibi testimony viewed in conjunction with trial counsel's explicitly stated tactical decision not to call the witness at trial, we cannot say that the decision represented deficient performance or was prejudicial.

{¶28} Fourth, appellant argues his trial counsel was deficient in failing to adequately cross-examine certain witnesses concerning alleged inconsistencies in their trial testimony. This court has held that "counsel's decision to cross-examine a witness and the extent of such cross-examination are matters of trial strategy, which generally do not show ineffective assistance of counsel." *State v. Jones*, 11th Dist. No. 2008-L-028, 2008-Ohio-6559, at ¶93.

{¶29} Appellant argues his trial counsel should have cross-examined Ms. Clinger in greater depth concerning a comment she made to Nurse Christy Lapraire at the hospital on the day she was raped. Nurse Lapraire testified that when she asked Ms, Clinger if she knew her assailant's name, Ms. Clinger said he was a "stranger." Ms. Clinger testified she had met appellant once about one year earlier, although she had forgotten his name. Ms. Clinger testified she was reminded of appellant's name the day after she went to the hospital. Ms. Clinger's comment to the nurse that appellant was a

"stranger" was her way of saying she did not know his name, which at that time was accurate. In any event, we note that Ms. Clinger admitted on cross-examination that she told the nurse her assailant was a stranger. She also admitted she had met him once before, but had forgotten his name. The point was therefore made to the jury. Counsel's decision not to further probe this issue was a tactical, strategic decision that we will not second-guess. We also note that appellant does not suggest on appeal how trial counsel's cross-examination should have been amplified. Counsel's performance was not deficient and there was no showing of prejudice.

{¶30} Next, appellant argues that trial counsel should have cross-examined Ms. Clinger regarding various comments she made to Detective Karen Travis. The detective, in filling out a Bureau of Criminal Identification and Investigation form, based on a brief conversation with Ms. Clinger, indicated "no" to the question whether the victim had any "prior physical contact" with the assailant and "none" in response to the question whether the victim had a relationship with the perpetrator. We observe no inconsistency between these comments and the victim's trial testimony. In any event, appellant's trial counsel introduced this BCI form as an exhibit. Consequently, there was no showing of deficient performance or prejudice.

{¶31} Appellant next argues trial counsel should have cross-examined Ms. Clinger due to alleged inconsistencies between her police interview and her trial testimony. Appellant argues Ms. Clinger's testimony was inconsistent with her police statement where she stated the assailant looked familiar to her; she knew who did this to her; and that his name is Curtis O'Neil. Because this interview is not in evidence, the argument is not well taken. In any event, we perceive no inconsistency between any of

these statements and Ms. Clinger's trial testimony. Thus, trial counsel was not deficient and no prejudice was shown.

{¶32} Next, appellant argues trial counsel's cross-examination of Detective Travis was inadequate. On cross-examination, Detective Travis admitted that in filling out a BCI form, based on her initial phone conversation with Ms. Clinger and her review of the nurse's notes, Detective Travis wrote "yes" to the question whether the assailant ejaculated. The detective testified that she misunderstood what Ms. Clinger had said on the phone, as opposed to her written police statement in which she said appellant did not ejaculate. The detective also said she misunderstood Nurse Lapraire's shorthand note on the chart wherein the nurse indicated there was no ejaculation.

{¶33} During cross-examination, Detective Travis also admitted that she noted on this BCI form that the victim had not had sex within three days of the rape. Appellant argues this was inconsistent with evidence showing the presence of DNA from three males on the victim's underwear. Appellant argues this proves the victim had sex during the previous three days. However, there is no evidence as to the length of time DNA will remain on clothing; when the three DNA profiles were deposited; whether cleaning will remove DNA; or when the underwear had last been washed. As a result, the DNA evidence was not necessarily inconsistent with the detective's response on the BCI report.

{¶34} Appellant concedes that trial counsel cross-examined Detective Travis on these issues, but argues the amount of cross-examination was not "adequate." Appellant does not suggest how it was inadequate or how it should have been further developed. Instead, appellant argues that while trial counsel introduced the BCI form as

a trial exhibit, he should have "marked or highlighted" these alleged inconsistencies on the BCI form. However, counsel had no such obligation. Since trial counsel cross-examined Detective Travis on these issues and introduced the BCI form as evidence, there was no showing of deficient performance or prejudice.

{¶35} Appellant also argues trial counsel should have cross-examined Ms. Clinger concerning the BCI form Detective Travis prepared. However, since the detective admitted the form reflected her misunderstanding of Ms. Clinger's comment and the nurse's note concerning whether appellant ejaculated, it would have been improper for trial counsel to cross-examine Ms. Clinger concerning the BCI form. In any event, counsel's decision not to repeat this cross-examination with Ms. Clinger was a tactical decision that we will not second-guess. There was no showing of deficient performance or prejudice.

{¶36} Fifth, appellant argues his trial counsel was ineffective because he failed to file a pretrial motion to suppress the photo array identification of Ms. Clinger and BeBee. Appellant argues the array shown to Ms. Clinger was suggestive because appellant's head size was slightly smaller than the other males in the array. He argues the array shown to BeBee was suggestive because in this array appellant's head was slightly larger than the others.

{¶37} "When a witness has been confronted with a suspect before trial, due process requires a court to suppress her identification of the suspect if the confrontation was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under all the circumstances." *State v. Waddy* (1992), 63 Ohio St.3d 424, 438, citing *Neil v. Biggers* (1972), 409 U.S. 188.

{¶38} The *Waddy* Court set forth a two-step inquiry to determine whether to suppress an in-court identification. The first issue is whether the prior identification procedure was unnecessarily suggestive. Id. at 438. The second issue is "whether, under all the circumstances, the identification was reliable, i.e., whether suggestive procedures created 'a very substantial likelihood of irreparable misidentification.'" (Emphasis omitted) Id. at 439, quoting *Simmons v. United States* (1968), 390 U.S. 377, 384.

{¶39} In determining whether the photo array was impermissibly suggestive in this case, we are persuaded by the analysis of the court in *State v. Buggs* (Nov. 8, 1988), 7th Dist. No. 87 C.A. 75, 1988 Ohio App. LEXIS 4470. In *Buggs*, the defendant argued that the photographic array was unduly suggestive because his photo was "a close facial view which 'jumps out' at the viewer of the photograph." Id. at *3. The Seventh District held:

{¶40} "The size of the photograph itself is not necessarily unduly suggestive since it is the same size photograph as the others in the array. [The defendant]'s photograph was merely taken closer to the subject than the other photographs." Id. at *3-*4.

{¶41} Likewise, in the instant case, in the array shown to Ms. Clinger, appellant's photograph was the same size as the others. His photograph differed only in that his photograph was taken slightly further away than the others; thus, appellant's head appeared somewhat smaller than those in the other photographs. In the array shown to BeBee, the only difference in appellant's photograph was that it was taken from slightly closer range. As the court held in *Buggs*, this factor does not mandate the conclusion

that a photographic array is unduly suggestive. In other respects the photographs were substantially similar, as all were black males of similar ages with similar complexions. Despite the subtle difference created by the proximity of the camera to appellant, the arrays were not "unduly suggestive."

{¶42} However, even if the arrays were unduly suggestive, the totality of the circumstances does not indicate a "substantial likelihood of irreparable misidentification" because both BeBee and Ms. Clinger had ample opportunity to observe appellant to enable them to properly identify him at trial. BeBee testified he had seen appellant with Jackson the previous evening at about 5:00 p.m. on February 28, 2008, entering the apartment building. Ms. Clinger testified that she had actually gone out with appellant and her girlfriend one year earlier and was at close range to him in a car for a few hours. Further, both BeBee and Ms. Clinger observed appellant for an extended period and at close range in the apartment. BeBee was able to observe appellant face-to-face when appellant pointed the gun at his face. Also, Ms. Clinger was face-to-face with appellant when he was raping her. Thus, both BeBee and Ms. Clinger had a lengthy and up-close confrontation with appellant during his attack.

{¶43} Further, in viewing the photographic arrays, Ms. Clinger and BeBee quickly identified appellant as the assailant. The photographic arrays shown to Ms. Clinger and BeBee took place at the Kent Police Department just three and four days, respectively, after appellant's crimes. On March 4, 2008, Detective Travis showed the array to Ms. Clinger. She looked at each photograph and, without hesitation, pointed to appellant's photograph, saying that was the person who raped her. On March 5, 2008, Detective Travis showed the array to BeBee. According to the detective, he looked

intently at each photograph and after about ten seconds, pointed at appellant's photograph and said, "that's him."

{¶44} As a result, there would have been no merit to a motion to suppress their identification. Trial counsel's performance was therefore not deficient and appellant was not prejudiced.

{¶45} Moreover, based on our review of the evidence, identification was not a real issue because, in addition to the positive identification of both victims, Ms. Starks, a longtime friend of appellant, implicated him. She has known appellant for years and went to high school with him. She said that he, along with Jackson and Morris came to visit her just prior to the home invasion. Appellant asked her if BeBee had any money. She saw appellant holding a 9 mm. firearm outside BeBee's apartment. She saw appellant and Jackson enter BeBee's apartment; heard them yelling "get the F down;" and, 15 minutes later, heard a girl screaming from inside the apartment. Further, appellant had recently told Ms. Starks he wanted to commit a robbery and his accomplice Morris told him he had one for him, referring to BeBee's apartment.

{¶46} Sixth, appellant argues his trial counsel was ineffective at sentencing because he failed to provide the court with sentences imposed by the court in other cases to show what would have been a consistent sentence for appellant.

{¶47} R.C. 2929.11(B) requires consistency when applying Ohio's sentencing guidelines. However, this court has held that sentencing consistency is not derived from the trial court's comparison of the current case to prior sentences for similar offenders and similar offenses. *State v. Spellman*, 160 Ohio App.3d 718, 722, 2005-Ohio-2065. Rather, it is the trial court's proper application of the statutory sentencing

guidelines that ensures consistency. *State v. Swiderski*, 11th Dist. No. 2004-L-112, 2005-Ohio-6705, at ¶58. Thus, in order to show a sentence is inconsistent, a defendant must show the trial court failed to consider the statutory guidelines. Appellant does not dispute that the trial court considered these guidelines in imposing its sentence. As a result, appellant has failed to show trial counsel was deficient or that he was prejudiced.

{¶48} Seventh, appellant argues his trial counsel was deficient because he failed to object and instead stipulated to the chain of custody of the rape kit and DNA evidence. When the prosecutor was about to present its police officers to testify concerning the chain of custody, he advised court and counsel that while the police were present, he was still waiting for the BCI representative, who was on his way but had not yet arrived, to testify concerning his role in the chain of custody. At that point, appellant's trial counsel told the court the evidence involved was "favorable to our case and our theory of the case. I have discussed this with Mr. O'Neil and he understands what *** we're trying to do here, and *** we will stipulate" to the chain of custody.

{¶49} Based on our review of the record, the evidence at issue was arguably favorable to appellant and, by stipulating to the chain of evidence, his trial counsel made sure this evidence was before the jury. Trial counsel made a reasonable tactical decision and we will not second-guess it. Moreover, appellant has failed to show how trial counsel's stipulation – to which he personally agreed – resulted in his prejudice.

{¶50} In summary, none of the so-called errors of trial counsel resulted in deficient performance or prejudice. In any event, in light of the overwhelming evidence of appellant's guilt, if there had been any error, it would have been harmless beyond a reasonable doubt. See *State v. Lytle* (1976), 48 Ohio St.2d 391, 403.

{¶51} Appellant's first assignment of error lacks merit.

{¶52} Appellant's second and third assigned errors are interrelated and are therefore considered together. For these assignments of error, appellant maintains:

{¶53} "[2.] The trial court erred in sentencing appellant to consecutive sentences for multiple offenses, and including five (5) consecutive firearm specifications, totaling forty-nine (49) years, which for practical purposes constitutes life imprisonment without parole, which is contrary to law, including Ohio's statutory sentencing law guidelines and requirements.

{¶54} "[2.] The Ohio sentencing law, including that a trial judge may with full discretion, without a jury verdict or admission by offender, impose consecutive sentences for multiple sentences exceeding the statutory maximum for the most serious conviction, determined by the jury, is unconstitutional, based on the separation of powers principle embodied in due process of law and by deriving [sic] appellant of his right to jury trial."

{¶55} Prior to addressing appellant's second and third assigned errors, we consider an issue not briefed by the parties. At the oral argument in this case, counsel for the state indicated for the first time that the trial court had not properly advised appellant concerning post-release control, and asked us to reverse and remand the matter on this issue only for a new sentencing hearing. Upon our review of the transcript of the sentencing and the trial court's judgment on sentencing, we agree with the state's counsel and grant the state's request.

{¶56} In *State v. Beasley* (1984), 14 Ohio St.3d 74, the Supreme Court of Ohio held: "Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." Id. at 75.

{¶57} In *State v. Jordan,* 104 Ohio St.3d 21, 2004-Ohio-6085, the Court held:

{¶58} "When sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about postrelease control and is further required to incorporate that notice into its journal entry imposing sentence.

{¶59} "When a trial court fails to notify an offender about postrelease control at the sentencing hearing but incorporates that notice into its journal entry imposing sentence, it fails to comply with the mandatory provisions of R.C. 2929.19(B)(3)(c) and (d), and, therefore, the sentence must be vacated and the matter remanded to the trial court for resentencing." Id at paragraphs one and two of the syllabus.

{¶60} Relying on *Beasley,* supra, the Court in *Jordan* held the trial court has "a statutory duty to provide notice of postrelease control at the sentencing hearing." Id. at 27. Thus, the Court held that the trial "court's duty to include a notice to the offender about postrelease control at the sentencing hearing is the same as any other statutorily mandated term of a sentence. And based on the reasoning in *Beasley,* a trial court's failure to notify an offender at the sentencing hearing about postrelease control is error." Id. at 28.

{¶61} In *State v. Bezak,* 114 Ohio St.3d 94, 2007-Ohio-3250, the Court held: "When a defendant is convicted of *** one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense

is void. The offender is entitled to a new sentencing hearing for that particular offense." Id. at syllabus.

{¶62} Likewise, in *State v. Simpkins,* 117 Ohio St.3d 420, 2008-Ohio-1197, the Court held: "In cases in which a defendant is convicted of *** an offense for which postrelease control is required but not properly included in the sentence, the sentence is void and the state is entitled to a new sentencing hearing in order to have postrelease control imposed on the defendant unless the defendant has completed his sentence." Id. at syllabus.

{¶63} The conclusions that follow can be drawn from the foregoing authority. A trial court must advise a defendant that post-release control sanctions will be a part of his or her sentence at the sentencing hearing and journalize a similar notification in its judgment entry on sentence. *Jordan,* supra. The failure to do so renders a defendant's sentence void. Id.; *Beasley,* supra; *Bezak,* supra; *Simpkins,* supra. To the extent a defendant is still incarcerated, the state may move the trial court to resentence the defendant because the trial court retains limited jurisdiction over a criminal matter for purposes of correcting a void judgment. *Jordan,* supra; *Bezak,* supra; *Simpkins,* supra.

{¶64} In the instant case, appellant was subject to mandatory post-release control for a period of five years. R.C. 2967.28. However, while the trial court advised appellant at his sentencing hearing and in the court's sentencing entry concerning post-release control, the information provided by the court was incomplete.

{¶65} In *State v. McKenna*, 11th Dist. No. 2009-T-0034, 2009-Ohio-6154, this court recently considered a case in which the trial court's advice to the defendant concerning post-release control was partially incorrect. The trial court correctly advised

the defendant at the sentencing hearing and in its sentencing entry that he was subject to mandatory post-release control; however, the court incorrectly advised him that the term of post-release control was three years when, in fact, pursuant to statute, the defendant was subject to a mandatory five-year period of post-release control. This court held that because the defendant was advised that post-release control was mandatory, *Simpkins* and *Bezak* did not apply. As such, the sentence was voidable rather than void, and this court had the power to correct the sentence. Id. at ¶84.

{¶66} However, the instant case is distinguishable from *McKenna* because, here, in the trial court's sentencing entry, the court advised appellant that post-release control was discretionary when, in fact, it is mandatory. R.C. 2967.28. Further, the trial court did not advise appellant that he was subject to any particular term of post-release control at either the sentencing hearing or in the court's sentencing entry.

{¶67} Based solely on the incomplete information provided by the trial court concerning post-release control, we hold that appellant's sentence is void and must be vacated.

{¶68} Since we hold that appellant's first assignment of error lacks merit, his convictions for each of the offenses of which he was found guilty are affirmed.

{¶69} However, for the reasons stated above, the instant matter is hereby remanded to the trial court for resentencing.

{¶70} As a result of our holding, appellant's second and third assignments of error are moot.

{¶71} For the reasons stated in the Opinion of this court, it is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is

affirmed in part; reversed in part, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs with Concurring Opinion.

COLLEEN MARY O'TOOLE, J., concurs with Concurring Opinion.

{¶72} I concur with the majority that based solely on the incomplete information provided by the trial court concerning post-release control, appellant's sentence is void and must be vacated.

{¶73} When reviewing an alleged sentencing error, Ohio's appellate courts must apply the two-pronged test set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. First, the appellate court determines if the sentencing court "has adhered to all applicable rules and statutes in imposing the sentence." Id. at ¶14. The standard for this determination is whether the trial court's application of the appropriate rules and statutes is "clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." Id. If the sentence passes this prong of the test, the appellate court then reviews for abuse of discretion. Id. at ¶17.

{¶74} In the case sub judice, a review of the transcript of the sentencing and the trial court's judgment on sentencing reveals that the trial court did not properly advise appellant concerning post-release control. In fact, at the oral argument in this case, counsel for the state indicated the foregoing for the first time, asking this court to

reverse and remand the matter on this issue for a new sentencing hearing. I agree with the state's counsel, and the majority, to grant the state's request, as the trial court rendered an invalid judgment with respect to post-release control. The trial court's judgment does not pass the first prong of the *Kalish* test, making appellant's sentence void. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, at ¶27; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at the syllabus. As such, the "trial court must resentence the offender as if there had been no original sentence." *Bezak* at ¶16.

{¶75} For the foregoing reasons, I concur.