

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-P-0009
RUSSELL J. BIONDO,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2001 CR 0292.

Judgment: Affirmed.

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

Russell J. Biondo, pro se, 1536 Seminola Avenue, Akron, OH 44305 (Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Appellant, Russell J. Biondo, appeals from the judgment entry overruling his “Motion to Vacate and Dismiss Court Imposed Fines and Court Costs.” At issue is whether our recent judgment in *State v. Biondo*, 2008-P-0028, 2008-Ohio-6560, in which this court vacated Mr. Biondo’s post release control due to the trial court’s original failure to properly notify him that he would be subject to such sanctions, acted to nullify the otherwise properly imposed mandatory fine and court costs originally imposed after his conviction. For the reasons discussed in this opinion, we hold the trial court’s failure

to adequately notify Mr. Biondo of post-release control does not act to negate the properly imposed mandatory fine and costs. The judgment of the trial court is therefore affirmed.

{¶2} Factual Background and Procedural Posture

{¶3} On November 6, 2001, Mr. Biondo entered a plea of guilty to aggravated possession of methamphetamine. After engaging Mr. Biondo in a thorough Crim.R. 11 colloquy, the trial court accepted his plea of guilty and ordered him to serve a term of six years imprisonment at the Ohio Department of Rehabilitation; the court additionally imposed a \$7,500 mandatory fine and assessed appellant court costs. At no point during the sentencing hearing did the trial court advise Mr. Biondo that he would be subject to post-release control sanctions upon his release from prison. On January 25, 2002, the trial court journalized its sentence which was modified via a nunc pro tunc entry on January 28, 2002. Each judgment entry incorrectly reflected Mr. Biondo was advised at the sentencing hearing that, upon his release from prison, he “may be supervised under post-release control” pursuant to R.C. 2967.28.

{¶4} Approximately one year after his sentence, Mr. Biondo filed a motion to pursue a delayed appeal, pursuant to App.R. 5(A), which this court granted. On appeal, Mr. Biondo challenged the validity of the trial court’s acceptance of his guilty plea. In *State v. Biondo*, 11th Dist. No. 2003-P-0015, 2004-Ohio-528 (*Biondo I*), this court affirmed Mr. Biondo’s conviction, holding the trial court substantially complied with the non-constitutional requirements of Crim.R. 11(C)(2)(b). *Biondo I*, at ¶12. On May 12, 2004, the Supreme Court of Ohio declined to hear Mr. Biondo’s appeal. *State v. Biondo*, 102 Ohio St.3d 1448, 2004-Ohio-2263.

{¶5} On November 29, 2004, Mr. Biondo moved the trial court to vacate the court imposed fines and court costs. The trial court overruled the motion without a hearing. On appeal, this court affirmed the trial court's imposition of the mandatory fines and court costs. *State v. Biondo* (Dec. 19, 2005), 11th Dist. No. 2004-P-112, _____. (*Biondo II*).

{¶6} On December 7, 2007, Mr. Biondo completed his prison term, was released, and placed on three years of post-release control under the supervision of the Adult Parole Authority. On February 1, 2008, Mr. Biondo moved the trial court to terminate the post-release control portion of his sentence, arguing the trial court failed to give him sufficient notice of post-release control in violation of both statutory and case law. Mr. Biondo maintained the omission rendered the original sentencing entry void and thus post-release control was improper. On March 5, 2008, following a hearing on the motion, the trial court denied Mr. Biondo's motion ruling it "had no jurisdiction to terminate post release control."

{¶7} On March 28, 2008, Mr. Biondo appealed the trial court's judgment. See *State v. Biondo*, 11th Dist. No. 2008-P-0028, 2008-Ohio-6560 (*Biondo III*). However, on August 5, 2008, while *Biondo III* was pending, Mr. Biondo filed a "Motion for Correction of Journal Entry for Judgment of Conviction." In that motion, Mr. Biondo requested the trial court to issue a nunc pro tunc entry removing any reference to post-release control from the 2002 sentencing entry. The state did not file a response to this request. Nevertheless (and despite its March 5, 2008 judgment entry denying Mr. Biondo's motion to terminate post-release control for want of subject matter jurisdiction), the trial

court granted the motion and removed post-release control notification from its original judgment on sentence on September 18, 2008.

{¶8} On December 12, 2008, this court issued its judgment and opinion in *Biondo III* reversing the trial court's March 5, 2008 judgment. In support of the disposition, this court reasoned the trial court failed to comply with R.C. 2929.19(B)(3)(c), which *requires* a trial court to notify a defendant of post-release control at the sentencing hearing, thereby rendering the original 2002 sentencing entry void. *Biondo III*, *supra*, at ¶29-¶30. As a result, the original sentence had no binding legal effect and Mr. Biondo was "entitled to release of any post-release control as it relates to the sentencing judgment entered on January 28, 2002." *Id.* at ¶29.

{¶9} Finally, on January 20, 2009, Mr. Biondo filed a motion to vacate and dismiss the mandatory court imposed fines and court costs it imposed in its original 2002 sentencing entry. Mr. Biondo claimed that this court's decision in *Biondo III* prevented the enforcement of the mandatory fine because the now-void entry had the effect of placing the parties "in the same position as they were had there been no sentence." *Id.* at ¶27, quoting *State v. Simpkins*, 117 Ohio St.3d 420, 425, 2008-Ohio-1197. The trial court overruled Mr. Biondo's motion without a hearing. He now appeals the trial court's order assigning the following error for our consideration:

{¶10} "[The] trial court committed reversible error by overruling defendant-appellant's motion to vacate and dismiss court imposed fines and court costs, without a hearing, when it had full knowledge that the Eleventh District Court of Appeals ruled and determined that the defendant-appellant's sentence is void."

{¶11} Under his sole assignment of error, Mr. Biondo claims this court's ruling in *Biondo III*, which he claims rendered his original sentence void, acted to terminate not only his improperly imposed post-release control, but also to nullify the mandatory fine and court costs. Put simply, Mr. Biondo maintains any remaining obligations he had under the 2002 sentencing order were functionally deleted when that order was declared legally void: Without a valid order, no obligations attach.

{¶12} In response, the state argues the trial court's September 18, 2008 nunc pro tunc entry effectively removed any reference of post-release control from the 2002 judgment entry. Consequently, the state contends, the nunc pro tunc entry cured any defect in the subject sentencing entry, thereby negating the conclusion that the entry is void. We disagree with the state's argument.

{¶13} Impact of September 18, 2008 Nunc Pro Tunc Entry

{¶14} On March 28, 2008, Mr. Biondo filed his notice of appeal, which was the subject of this court's opinion and judgment in *Biondo III*. At issue was whether the trial court lacked jurisdiction to consider Mr. Biondo's motion to terminate post-release control and, if so, whether Mr. Biondo was entitled to have the previously-imposed sanctions vacated. While that appeal was pending, Mr. Biondo filed a motion to "correct" the original 2002 sentencing entry by eliminating any reference of post-release control. In the motion, Mr. Biondo argued the trial court should enter a nunc pro tunc judgment, erasing all mention of post-release control in order to accomplish the "true intent" of the 2002 entry on sentence. Mr. Biondo's motion and the trial court's subsequent entry are problematic for two reasons.

{¶15} First, nunc pro tunc judgments are employed so that the record speaks the truth. *State v. Coleman* (1959), 110 Ohio App. 475, 478-479. The function of such an entry is to correct a judgment improperly recorded due to a clerical error. *In re Guardianship of Peck*, 11th Dist. No. 2003-L-175, 2005-Ohio-2072, at ¶7. While a nunc pro tunc order may alter a prior order to reflect the court's true judgment, the amendment may not alter the substance of the previous decision. *Id.*

{¶16} Even though Mr. Biondo designated his September 18, 2008 pleading as a motion for correction of judgment via nunc pro tunc entry, it is clear the motion was merely a “back door” attempt at substantively modifying the original order. Mr. Biondo had been placed on post-release control upon his release from prison and the trial court had previously declined jurisdiction to lift the sanctions by way of the March 28, 2008 final, appealable order. By filing this motion to correct judgment, Mr. Biondo was hedging his bet in the event his appeal in *Biondo III* failed. Via this separate, somewhat surreptitious motion, Mr. Biondo was seeking removal of any reference to post-release control from the record, i.e., he was attempting to substantively modify the original sentencing entry. Nunc pro tunc orders may not be used for such maneuvering.

{¶17} Because the September 18, 2008 motion cannot be reasonably construed as a permissible vehicle for a nunc pro tunc corrective order, it can only be construed as a duplicative motion to vacate post-release control. The trial court had previously overruled the same on March 28, 2008. Based upon settled principles of appellate law and practice, the trial court lacked jurisdiction to rule upon the motion.

{¶18} Although filing a direct appeal from a final order does not deprive a trial court of all jurisdiction over the subject case, a trial court does not have jurisdiction over

matters which are inconsistent with an appellate court's ability to reverse, modify, or affirm the subject judgment. *Nemeth v. Nemeth*, 11th Dist. No. 2008-G-2831, 2008-Ohio-4675, at ¶3; see, also, *Yee v. Erie Cty. Sheriff's Dept.* (1990), 51 Ohio St.3d 43, 44. As just discussed, Mr. Biondo's motion sought a "correction" of the original judgment as a means of having his post-release control vacated. Not only did such a request have substantive implications, it was completely inconsistent with this court's ability to reverse, modify, or affirm the March 28, 2008 judgment which denied the same relief. Accordingly, the nunc pro tunc entry issued on September 18, 2008, is void as the trial court lacked subject matter jurisdiction over Mr. Biondo's motion.

{¶19} We now turn our attention to Mr. Biondo's substantive argument. Prior to doing so, it will be helpful to illuminate the conceptual and historical context of the issue before us. Towards that end, we begin with brief outline of the legal meaning of the terms "void" and "voidable."

{¶20} Is it Void or Voidable?

{¶21} Generally, the legal term "void" is understood as that which has "no legal effect; null[;]" whereas the term "voidable" denotes a situation which is "[v]alid until annulled[.]" Black's Law Dictionary (8 Ed.Rev. 2004) 1604-1605. As it pertains to criminal judgments, the Supreme Court has observed "a judgment of conviction is void if rendered by a court having either no jurisdiction over the person of the defendant or no jurisdiction of the subject matter, *i.e.*, jurisdiction to try the defendant for the crime for which he was convicted." (Emphasis sic.) *State v. Perry* (1967), 10 Ohio St.2d 175, 178; see, also, *State v. Payne*, 114 Ohio St.3d 502, 507, 2007-Ohio-4642. Such a

judgment therefore is a legal nullity and may be challenged at any time without preclusion. *State v. Wilson*, 73 Ohio St.3d 40, 45-46, 1995-Ohio-217.

{¶22} Alternatively, “a voidable sentence is one that a court has jurisdiction to impose, but was imposed irregularly or erroneously.” *Payne*, supra. A judgment is voidable where a court possesses jurisdiction, there is an error or mistake internal to that judgment, and it is successfully challenged on direct appeal. *Id.* “Although a void judgment may be subject to collateral attack, a judgment that is merely voidable is not.” *State v. Montgomery*, 6th Dist. No. H-02-039, 2003-Ohio-4095, at ¶8. Consequently, the doctrine of res judicata applies to the latter, but not the former. See, e.g., *Biondo III*, at ¶30.

{¶23} Void Versus Voidable: A Volatile History

{¶24} In the context of criminal sentencing, the Supreme Court of Ohio has grappled with the “void” / “voidable” dichotomy for quite some time. For over one hundred years, the court maintained that the failure of a sentencing court to comply with statutory mandates did not render a sentence void, but merely erroneous and voidable. *Ex Parte Shaw* (1857), 7 Ohio St. 81 (where a trial court’s sentence fell below that required by statute, the court still had jurisdiction over the matter, but merely committed “a manifest error and mistake in the award of the number of years of the punishment. The sentence was [therefore] not void, but erroneous.” *Id.* at 82.) *Ex Parte Van Hagan* (1874), 25 Ohio St. 426 (holding “[t]he punishment inflicted by the sentence, in excess of that prescribed by the law in force, was erroneous and voidable, but not absolutely void.” *Id.* at 432.) *Hamilton v. State* (1908), 78 Ohio St. 76 (trial court sentenced a defendant to “the workhouse,” but failed to notify him, pursuant to law, of the amount of

money he would be credited against his fine for each day spent working; the Court determined the sentence was not void, but “incomplete and erroneous.” *Id.* at 78.) *In re Winslow* (1915), 91 Ohio St. 328 (holding a trial court’s indefinite sentence, which exceeded that prescribed by law, was not a jurisdictional error and was thus “erroneous and voidable but not void.” *Id.* at 330.) *In re Allen* (1915), 91 Ohio St. 315 (where indeterminate sentence was inapplicable and contrary to statute, its imposition was erroneous and voidable. *Id.* at 326-327.) *Ex Parte Fenwick* (1924), 110 Ohio St. 350 (pointing out that a sentence is voidable when a court sentences a defendant to an indeterminate period but the applicable statute prescribes a definite term of imprisonment. *Id.* at 357.) *Stahl v. Currey* (1939), 135 Ohio St. 253 (holding “when a court has jurisdiction of the person and of the offense, the imposition by mistake of a sentence in excess of what the law permits is within the jurisdiction and does not render the sentence void, but only voidable ***.” *Id.* at 262, quoting *Sennot v. Swan* (1888), 146 Mass. 489.) *Carmelo v. Maxwell* (1962), 173 Ohio St. 569 (holding a sentence imposed contrary to statute is voidable, not void. *Id.* at 570.)

{¶25} Most of these cases originated from prisoners filing improper writs of habeas corpus, which the court denied because the errors identified by the petitioning parties could have been remedied by direct appellate review. In declining to issue these writs, the court consistently and explicitly held the failure to comply with statutory sentencing requirements did not imply the court did not have jurisdiction to impose the sentence; instead, the Supreme Court reasoned, any such error occurred in the proper exercise of a sentencing court’s jurisdiction, thereby rendering the judgment voidable.

{¶26} Some years later, however, in *State v. Beasley* (1984), 14 Ohio St.3d 74, the Supreme Court shifted its treatment of such sentencing errors. Although *Beasley* is a very short, per curiam (and arguably “outcome-oriented”) opinion, its conclusion represented a tectonic shift in the legal application of the terms “void” and “voidable” as they pertained to judgments in a criminal context.

{¶27} **Beasley’s Impact**

{¶28} The issue in *Beasley* was whether a trial court’s erroneous imposition of a sentence less severe than the statutory minimum, and eventual correction of that sentence, violated a defendant’s constitutional right to be free from double jeopardy. The court answered this question in the negative, holding:

{¶29} “Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void. The applicable sentencing statute in this case, R.C. 2929.11, mandates a two to fifteen year prison term and an optional fine for felonious assault. The trial court disregarded the statute and imposed only a fine. In doing so the trial court exceeded its authority and this sentence must be considered void.” *Beasley*, supra, at 75.

{¶30} As the sentence was void, the court reasoned jeopardy did not attach and the court’s correction of the erroneous sentence was constitutional. In arriving at its decision, the court analogized the issue to the United States Supreme Court’s holding in *Ex parte United States* (1916), 242 U.S. 27. In that case, the U.S. Supreme Court held a sentencing court’s ultra vires order suspending a mandatory prison term was tantamount to a violation of the doctrine of separation of powers because clemency may only be granted via executive order. The court in *Beasley* recognized that “the

suspension of a correctly imposed sentence is different from the failure to impose the required sentence; however the end results are the same. Both actions circumvent statutory sentencing requirements.” *Id.* at 76.

{¶31} Conspicuously absent from the *Beasley* opinion is any citation to the court’s previous, and seemingly well-established, precedent standing for the opposite principle, viz., that the circumvention of statutory sentencing requirements instantiates a “manifest error” and is thus merely voidable. In effect, the sole authority for the court’s taxonomical evolution was the analogy it found with *Ex parte United States*. Interestingly, although there is a general similarity between the themes of the holdings in *Ex parte United States* and *Beasley*, upon closer inspection, there is a meaningful dissimilarity between a judge properly imposing sentence, but later “pardoning” a defendant and a judge failing to impose a statutorily-required sentence. The former action completely transcends judicial authority, while the latter, particularly in Ohio prior to *Beasley*, was a non-jurisdictional error that rendered a criminal sentence voidable. So, what accounts for the change? Such a question can only be answered by reference to the way in which *Beasley* would have been decided had the erstwhile principles on the issue been applied. A brief review of the procedural history of both *Ex parte United States* and *Beasley* underscores the point.

{¶32} The holding in *Ex parte United States* was premised upon a mandamus action brought by the United States to compel imposition of a federal sentence indefinitely suspended by a trial judge. The United States argued the sentencing court’s order was void as it was equivalent to issuing a pardon, reprieve, or commutation, powers belonging exclusively to the Executive. The court agreed with this position;

however, prior to issuing its substantive ruling, the court first considered the propriety of the extraordinary writ, holding:

{¶33} “The remedial appropriateness of the writ of mandamus is at the threshold questioned, but we dispose of the subject by a mere reference to adjudged cases conclusively establishing the want of foundation for the contention. *Ex parte Bradley*, 7 Wall. 364; *Life & Fire Insurance Company v. Wilson*, 8 Pet. 291; *In re Winn*, 213 U.S. 458; *In re Metropolitan Trust Co.*, 218 U.S. 312; *Ex parte Metropolitan Water Company*, 220 U.S. 539.” *Ex parte United States*, *supra*, at 39-40.

{¶34} Because proceedings in mandamus were necessary given federal procedures in place at the time the case was decided, the court concluded the United States utilized the proper procedural means to obtain relief.

{¶35} In *Beasley*, after the sentencing court failed to adhere to Ohio’s statutory sentencing requirements, the state of Ohio, similar to the United States in *Ex parte United States*, filed a writ of mandamus. After the court of appeals issued the writ, the trial judge resentenced the defendant in accordance with Ohio law. On the same day the sentence was issued, the trial judge appealed to the Supreme Court, alleging the state’s mandamus action was improper. The defendant also appealed her sentence on double jeopardy grounds to the First Appellate District. While that appeal was pending, the Supreme Court reversed the appellate court’s ruling in mandamus, holding “the state had an adequate remedy at law by way of appeal pursuant to R.C. 2945.67(A).” *Beasley*, *supra*, at 74.

{¶36} Had the *Beasley* court followed prior precedent, it would have been constrained to find a violation of the defendant’s guarantee against double jeopardy due

to the trial court's imposition of multiple punishments. That is, when the state failed to perfect a direct appeal of the trial court's sentence pursuant to R.C. 2945.67(A), the voidable, yet erroneous sentencing entry would have become *res judicata*. However, the court clearly did not desire such a result; instead, it based its holding upon a 68-year-old United States Supreme Court case, which decided an admittedly different issue *without* providing any guidance as to how the matter was distinguishable from controlling precedent in Ohio. In so doing, the Supreme Court provided a framework from which the jurisprudence surrounding post-release control notification cases has developed.

{¶37} Law Relating to Post-Release Control Notification

{¶38} Although this appeal does not directly relate to procedures a trial court is required to follow in notifying a defendant that he or she will (or may be) subject to post-release control sanctions, this matter does precipitate from the trial court's original failure to follow such procedures. Due to this pivotal fact, we believe it useful to provide a brief sketch of the law in this area.

{¶39} The court first addressed post-release control notification requirements in *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085. In *Jordan*, the Supreme Court confronted, *inter alia*, the specific issue of whether a trial court must notify an offender of post-release control at the time of the sentencing hearing. The court answered the question in the affirmative, holding:

{¶40} "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.” *Id.* at paragraph one of the syllabus.

{¶41} Relying on *Beasley*, *supra*, the court observed that the trial court has “a statutory duty [pursuant to R.C. 2929.19(B)(3)(c)] to provide notice of postrelease control at the sentencing hearing.” *Jordan*, *supra*, 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.

{¶42} The court has decided a series of cases since *Jordan*, all of which lend some “clarity” to the procedural nuances surrounding post-release control notification. The law as it currently stands may be summarized as follows: a court must advise a defendant that post-release control sanctions will be part of his or her sentence at the sentencing hearing and journalize a similar notification in its judgment entry on sentence. *Id.*; see, also, *Hernandez v. Kelly* (2006), 108 Ohio St.3d 395, 2006-Ohio-126. The failure to do so renders a defendant’s sentence void. *Jordan*, *supra*; see, also, *Beasley*, *supra*; *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250; *Simpkins*, *supra*. However, where a defendant has served his term of incarceration on the underlying sentence, there can be no remand for resentencing and the parole authority lacks the power to impose post-release control upon that defendant. *Bezak*, *supra*; *Hernandez*, *supra*; *Zaleski*, *supra*.¹

1. The state asserts that this court should remand the matter sub judice because the prohibition against resentencing to correct post-release control notification errors after a completed prison term does not

{¶43} From these points of law it arguably follows that a defendant who has served his prison term, but was never adequately informed of post-release control, is necessarily entitled to have his or her post-release control, as well as any attendant obligations attached to the void sentence, vacated. Thus, applying the logic of the “notification” cases to the instant matter, it would appear Mr. Biondo’s argument is correct, i.e., because there is no extant, valid sentencing entry that would obligate him to pay the mandatory fine and costs, he is legally and practically “off the hook.”

{¶44} Furthermore, it is well-established that the term “conviction” embraces both the finding of guilt *and* the imposition of sentence. See Crim.R. 32(C) (“A judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence.”) See, also, *State v. Carter* (1992), 64 Ohio St.3d 218, 222; *State v. Poindexter* (1988), 36 Ohio St.3d 1, 5. Here, Mr. Biondo has served a six-year term of imprisonment, but, as a result of the analytic structure set forth in *Jordan* and its progeny, he will have no record of conviction for the crime to which he admitted guilt in 2001. After all, without a valid sentence, there can be no valid conviction. The strangeness of this arguable outcome is exceeded only by its absurdity.

{¶45} As a court of law, we must be careful to avoid obtaining results that are absurd or unreasonable whenever possible. A punctilious review of the holding in *Bezak*, *supra*, provides such an avenue. The defendant in *Bezak*, like Mr. Biondo, had already served his term of imprisonment and thus, at the time of the court’s holding,

extend to prohibit resentencing for other purposes. We cannot agree with this assertion. Given the express language of R.C. 2929.191, the relief afforded the offender in *Hernandez*, and the holding in *Zaleski*, we conclude that resentencing can only occur *prior to an offender’s release from prison*. After an offender’s release, the trial court has lost all jurisdiction to hold a resentencing hearing.

could not be resentenced. In light of this, the Supreme Court remanded the matter to the trial court with the following instructions:

{¶46} “In order that its record may be complete, the trial court is instructed to note on the record of Bezak’s sentence that because he has *completed his sentence*, Bezak will not be subject to resentencing pursuant to our decision.” (Emphasis added.)

{¶47} The foregoing instruction has odd conceptual implications: Bezak’s sentence was void and therefore a legal nullity because he was not properly notified of the possibility of post-release control; however, the court made a point to emphasize that he had already served his sentence. This begs the question: How can one have served a sentence that does not exist? Much like a Zen Koan, such a paradox cannot be resolved by deductively following the concepts which created the entanglement, but must be *dissolved* by following a different course.

{¶48} Towards this end, the order set forth in *Bezak* implies that a conviction (guilt plus sentence) *can* withstand a court’s determination that a felon was not provided adequate statutory notice of post-release control. Such a conclusion can only be drawn by treating, at the very least, the completion of a term of imprisonment (following a valid finding of guilt), as sufficient to meet the definition of a sentence under the unique circumstances created by the facts in *Bezak* and, by implication, the facts in the case sub judice.

{¶49} That is, notwithstanding the court’s regular conclusion that improper post-release control notification functions to void the sentence, it appears that a prison term served can be seen, in light of *Bezak*, as a sentence unto itself. Under such circumstances, a court need not “throw out the baby with the bathwater.” The sentence

(and, perhaps, more importantly, the conviction) survives and all sanctions *properly* imposed will survive a successful notification challenge and, much like the remedy in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, only the tainted portion need be excised. We believe this analysis to be both necessary and proper.

{¶50} Accordingly, we hold that even though the trial court originally failed to adequately notify Mr. Biondo that he would be subject to post-release control after his release, he is still obligated to pay the properly-imposed mandatory fine and court costs that eventuated from his plea of guilty in 2001. In other words, our holding in *Biondo III* does not negate the otherwise valid sanctions imposed upon Mr. Biondo due to his admission of guilt.

{¶51} Mr. Biondo's sole assignment of error is overruled and the judgment of the Portage County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDALL, J., concurs in judgment only,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶52} I respectfully dissent.

{¶53} The majority holds that even though the trial court originally failed to adequately notify Mr. Biondo that he would be subject to post-release control after his release, he is still obligated to pay the imposed mandatory fine and court costs that eventuated from his plea of guilty in 2001. I disagree.

{¶54} 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.

{¶55} This court determined, in *State v. Biondo*, 11th Dist. No. 2008-P-0028, 2008-Ohio-6560, that the trial court rendered an invalid judgment with respect to post-release control. Here, although the majority holds that Mr. Biondo's sentence regarding post-release control is void, they believe the aspect of his sentence regarding the imposition of fines and court costs is not void. I disagree.

{¶56} The trial court's judgment did 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.

{¶57} Because Mr. Biondo's sentence was void, this writer believes that the fines and court costs assessed to him should be vacated and dismissed.

{¶58} Thus, I respectfully dissent.