[Cite as *State v. Gaut*, 2011-Ohio-1300.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-T-0059**
- vs -	:	
TIMOTHY M. GAUT,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2007 CR 00100.

Judgment: Reversed and remanded.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Timothy M. Gaut, pro se, PID: 553-917, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, OH 45601-5500 (Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Timothy M. Gaut appeals from a judgment of the Trumbull County Court of Common Pleas which denied his motion for resentencing. He claims the trial court failed to properly impose postrelease control and therefore he is entitled to be resentenced. We agree, and reverse and remand this matter for further proceedings consistent with this opinion.

{¶2} **Procedural History**

{¶3} On February 7, 2007, Mr. Gaut was indicted by the grand jury on 21 counts of sex offenses, which included nine counts of rape, one count of gross sexual imposition, one count of importuning, and ten counts of pandering obscenity involving a minor. He entered a not-guilty plea and challenged his competency to stand trial, but subsequently pled guilty to all charges.

{¶4} On September 12, 2008, the court held a sentencing hearing, and on September 23, 2008, journalized a sentence entry.[1] For each count in counts one through eight, the court imposed a term of life imprisonment with parole eligibility after ten years; for count nine, a term of life imprisonment with parole eligibility after 15 years; for count ten, five years; for count eleven, 18 months; and for each count in counts 12 through 21, two years. The court ordered all sentences to be served concurrently, for an aggregate sentence of life imprisonment with parole eligibility after 15 years. Regarding the postrelease control, the sentence entry states the following:

{¶5} "The Court has further notified the Defendant that postrelease control is mandatory in this case *up to a maximum of five (5) years*, as well as the consequences for violating conditions of postrelease control imposed by the Parole Board under Revised Code Section 2967.28. The Defendant is ordered to serve as part of this sentence any term of postrelease control imposed by the Parole Board, and any prison term for violating that postrelease control."[2] (Emphasis added.)

1. On appeal, appellant did not file a transcript of the sentencing hearing.
2. We note that similar language was employed in the plea agreement. Regarding postrelease control, the plea agreement stated: "I understand that if I am sent to prison, a period of postrelease control or supervision ("Parole") by the Adult Parole Authority after release from prison is mandatory in this case. The control period *may be* a maximum of five (5) years." (Emphasis added.)

{¶6} Mr. Gaut did not appeal his convictions or sentence. However, on March 11, 2010, he filed a motion for resentencing alleging the trial court had improperly imposed postrelease control. The trial court denied the motion and this appeal followed. Mr. Gaut raises the following error:

{¶7} "The trial court erred in denying the appellant's motion for re-sentencing."

{¶8} Mr. Gaut contends that the trial court failed to properly impose postrelease control because the sentencing entry states that postrelease control is mandatory in this case "up to" a maximum of five years, which implies he is subject to postrelease control for between one and five years, when in fact the mandatory period of postrelease control in his case is a definite term of five years.

{¶9} **Whether Postrelease Control is Required**

{¶10} The state claims, without citing any case law authority in support, that Mr. Gaut "will never be subject to postrelease control, only parole, if he is ever released from prison." The state makes this claim presumably because Mr. Gaut was convicted of multiple counts of rape, for which he received multiple (concurrent) terms of life imprisonment, with parole eligibility after 15 years.

{¶11} R.C. 2967.28 states, in pertinent part:

{¶12} "(B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. *** Unless reduced by the parole board

pursuant to division (D) of this section when authorized under that division, a period of post-release control required by this division for an offender shall be of one of the following periods:

{¶13} "(1) For a felony of the first degree or for a felony sex offense, five years[.]"

{¶14} Mr. Gaut was convicted of rape in violation of R.C. 2907.02, which is both a felony of the first degree and a felony sex offense. R.C. 2907.02(B) and 2967.28(A)(3). Therefore, R.C. 2967.28(B) requires that his sentence include a five-year term of postrelease control.

{¶15} The fact that Mr. Gaut will be on parole if he is released from prison after serving 15 years of his prison term does not affect his mandatory postrelease control. In *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, the defendant was convicted of two counts of rape and sentenced to two concurrent life terms with parole eligibility after ten years. The trial court failed to properly include the postrelease control in the sentencing entry, in the belief that the defendant was sentenced to a mandatory life sentence for rape, which is an indefinite sentence. The court addressed the question of whether postrelease control is required for such a defendant. In answering the question, the Supreme Court of Ohio focused on the plain language of R.C. 2967.28, and concluded the following:

{¶16} "After applying the rules of grammar and common usage to R.C. 2967.28(B)(1), we find that the statute's plain, unambiguous language expressly requires the inclusion of a mandatory postrelease-control term of five years for each prison sentence for felonies of the first degree and felony sex offenses." Id. at ¶14.

{¶17} The Supreme Court of Ohio therefore concluded R.C. 2967.28 required a five-year term of postrelease control be included in the sentence of the defendant, who, like Mr. Gaut, received a life sentence for his conviction of rape, a felony of the first degree. Because the trial court failed to properly impose postrelease control, it was required to correct the sentence. Id. at ¶31.

{¶18} Pursuant to *McCormick*, therefore, Mr. Gaut's sentence on his conviction of nine rape charges was required to include a five-year term of postrelease control.

{¶19} **Whether Postrelease Control was Properly Imposed**

{¶20} The next issue before us concerns whether the trial court properly imposed the postrelease control. The trial court's statement that "postrelease is mandatory in this case up to a maximum of five years" implies Mr. Gaut could be subjected to *less than* five years of postrelease control, when in fact he is required to serve a definite term of five years. Therefore, the court did not properly impose the postrelease control. See *State v. O'Neal*, 9th Dist. No. 09CA0045-M, 2010-Ohio-1252, ¶6 (the trial court's statement that "postrelease control is mandatory up to a maximum of 5 years" does not conform to the statutory requirement); *State v. Ingram*, 9th Dist. No. 09CA0020-M, 2009-Ohio-6371,¶6 (the trial court did not properly notify the defendant when it stated "postrelease control is mandatory in this case up to a maximum of 5 years"); *State v. Ericson*, 7th Dist. No. 09 MA 109, 2010-Ohio-4315 (statement that the defendant is subject to a postrelease control of "up to five years" is incorrect because it implies the term is not mandatory).

{¶21} Therefore, the trial court failed to properly impose postrelease control on Mr. Gaut in its sentencing entry.

{¶22} **Remedy for Improperly Imposed Postrelease Control**

{¶23} Finally, we turn to the issue of proper remedy for improperly imposed postrelease control.

{¶24} In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, the Supreme Court of Ohio held that when postrelease control is required but not properly included in the sentence, the sentence is "void." *Simpkins*, id. at syllabus. Effective July 11, 2006, R.C. 2929.191 establishes a comprehensive statutory scheme for correcting improperly imposed postrelease control.[3]

{¶25} In *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the Supreme Court of Ohio addressed the effect of R.C. 2929.191 on *Simpkins* and its progeny. The court explained that before the enactment of R.C. 2929.191, there was no statutory mechanism to correct a sentence not in compliance with the statutory postrelease requirements. Id. at ¶22. However, through the enactment of R.C. 2929.191, the legislature has provided a statutory remedy to correct such an improperly imposed

3. {**¶a**} R.C. 2929.191 states, in pertinent part:

{**¶b**} "(A)(1) If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) [first- or second-degree felony, felony sex offense, and third-degree felony where offender threatened or caused physical harm] 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 (F)(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.

{**¶c**} "***

{**¶d**} "(C) On and after the effective date of this section, 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. *** 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. *** 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."

sentence. Therefore, "[f]or criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall conduct a de novo sentencing hearing ***." Id. at paragraph one of the syllabus.

{¶26} "For criminal sentences imposed on and 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." Id. at paragraph two of the syllabus. The court noted, however, that the correction contemplated by R.C. 2929.191(A) pertains only to the flawed imposition of postrelease control and that the General Assembly appears to have intended to leave undisturbed the punishment upon the offenders which are unaffected by the court's failure to properly impose postrelease control at the original sentencing. Id. at ¶24.

{¶27} In *State v. McKinney*, 11th Dist. No. 2010-T-0011, 2010-Ohio-6445, ¶29, this court summarized the rules to be gleaned from *Singleton* as follows:

{¶28} "First, a sentence imposed prior to July 11, 2006, that did not advise a defendant regarding post-release control is void and can only be corrected at a de novo sentencing hearing. Second, such a sentence imposed after the effective date of the statute is not void, but rather is subject to correction pursuant to the procedure set forth in R.C. 2929.191. Third, although a sentence imposed on or after July 11, 2006 without the required post-release control notification is not void, it is incomplete and not final."

{¶29} Here, because the trial court imposed the sentence after July 11, 2006, the judgment of sentence is not void, but it is incomplete and subject to correction pursuant to the procedure set forth in R.C. 2929.191. Further, inasmuch as the record before us gives us no evidence that the correct term of postrelease control was

articulated at the hearing and that the incorrectly imposed term of postrelease control in the judgment entry was merely a clerical error, we must remand for a new hearing, pursuant to R.C. 2919.191 and *State ex rel. Womack v. Marsh*, Slip Opinion No. 2010-1157, 2011-Ohio-229.

{¶30} In *State v. Masterson*, 11th Dist. No. 2009-P-0064, 2010-Ohio-4939, where the trial court improperly imposed the postrelease control after the effective date of R.C. 2929.191, we remanded the case to the trial court for the sole purpose of correcting the postrelease control. We instructed the trial court to conduct a hearing pursuant to R.C. 2929.191(C) and to issue a nunc pro tunc judgment entry of sentence for the correct term of postrelease control.[4] The same procedure should be followed in this case upon remand of this sentencing matter.

{¶31} The assignment of error is sustained. The judgment of the Trumbull County Court of Common Pleas is reversed, and this case is remanded for the limited purpose of resentencing to correct the postrelease control part of Mr. Gaut's sentence in accordance with the procedure set forth in R.C. 2929.191.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.

4. {**¶a**} We use the term "nunc pro tunc" because that is the terminology utilized in R.C. 2919.291. Paragraph (A)(2) of the statute states:

{**¶b**} "If a court prepares and issues a correction to a judgment of conviction as described in division (A)(1) of this section ***, the court shall place upon the journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction ***."