

**IN 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. 2010-P-0048
THOMAS MORRIS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 0174.

Judgment: Affirmed.

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

Michael T. Callahan, Callahan, Greven, Riley & Sinn, L.L.C., 137 South Main Street, #300, Akron, OH 44308 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Thomas Morris, appeals from the judgment of the Portage County Court of Common Pleas overruling his motion to withdraw his guilty plea. For the reasons that follow, we affirm.

{¶2} On March 13, 2008, the Portage County Grand Jury indicted appellant on five counts: rape in violation of R.C. 2907.02(A)(1); attempted rape in violation of R.C. 2907.02(A)(1)(b) and 2923.02; and three counts of gross sexual imposition in violation

of R.C. 2907.05(A)(4). The indictment alleged that the victim of the alleged offenses was under the age of ten.

{¶3} Appellant entered a guilty plea to count one only. The remaining counts of the indictment were dismissed.

{¶4} Paragraph two of the written plea reads as follows:

{¶5} “I have been informed that if I am imprisoned that after my release from prison I [May ____ or Will √] be supervised under post-release control R.C. 2967.28. I understand that if I violate the terms of my post-release control I could receive an additional prison term not to exceed 50% of my original term in prison. I also understand that if I am granted community control at any point, I will have conditions to follow and if I violate any of those conditions, I could be given a longer period under court control and/or greater restrictions, or a prison term of LIFE.”

{¶6} As evidenced above, the written plea does not state the duration of post-release control.

{¶7} The written plea of guilty was signed by appellant. It was referenced during his oral plea before the court. During the oral plea, the court informed appellant regarding post-release control as follows:

{¶8} “THE COURT: Do you understand that if you are released from prison, you will be placed on post-release control for a period of five years, and if you violate the terms of that post-release control, your sentence could be increased by one half?

{¶9} “MR. MORRIS: I do.”

{¶10} After so informing appellant, and after additional colloquy, the court accepted appellant's guilty plea and dismissed the remaining counts of the indictment.

{¶11} The court proceeded to sentencing. The court orally entered sentence as follows: “[t]he court, upon construing the Ohio sentencing statute, the sentence is mandatory. It will be the sentence of this Court that you be confined by the Ohio Department of Corrections for the rest of your life; that you not be eligible with parole eligibility until after the first 15 years.” The court then gave appellant credit for time served but did not make any mention of the post-release control requirements at the sentencing.

{¶12} Consistent therewith, the sentencing entry sentences appellant to life in prison, with parole eligibility after 15 years. Regarding post-release control, the judgment entry states as follows:

{¶13} “The Court thereupon notified [appellant] after release from prison [appellant] will be supervised under post-release control R.C. 2967.28 and that if [appellant] violates the terms of the post-release control, [appellant] could receive an additional prison term not to exceed 50 percent of his original prison term.” The judgment entry does not state the duration of post-release control.

{¶14} Twenty-two months later, appellant filed a motion to withdraw plea. In his memorandum in support, appellant argued that he is entitled to withdraw his plea because, prior to entering his plea, he was not informed that he was subject to five years mandatory post-release control. Appellant also argued that his sentence is void because although the sentencing entry sentences him to post-release control, it does not state the duration of post-release control.

{¶15} At the hearing on his motion, appellant’s counsel reiterated the arguments he made in his brief and supplemented his written pleading as follows:

{¶16} “Additionally, I would ask the court to allow me to supplement things that I have not placed on the record. I know the prosecutor is not aware of it but I will tell the court that I was made aware at some point in time that Mr. Morris has a lengthy mental health, psychological history that was not brought forth at all, no suggestion of it whatsoever was brought forth by trial counsel, there was no mention of it in the record, no mention of any request or even any consideration of competency and/or sanity for the time of the offense. I think, Judge, that there is, there is no way possible without at least exploring that, based upon his lengthy mental health history which included times of hospitalization, that he could have made a knowing and intelligent plea. For those reasons I would ask the Court to consider allowing Mr. Morris to withdraw his plea, to set a bond and to place this on the trial -- on the Court’s trial docket.”

{¶17} After supplementing his argument at the hearing, the trial court asked appellant’s counsel whether he wanted to offer any evidence at all or just argument. Counsel responded, “Just argument, Judge.”¹

{¶18} In its response to appellant’s motion to withdraw guilty plea, appellee argued that because appellant was sentenced to life imprisonment with parole eligibility after 15 years, appellant was not subject to post-release control and, therefore, the court was not required to inform appellant of post-release control prior to accepting his plea; and resultantly, failure to include the duration of post-release control in the sentencing entry did not render the sentence void. Appellee also argued that appellant

1. On appeal, appellant does not argue that the trial court erred in overruling his motion to vacate based upon his mental health, competency, or sanity or that these factors prevented him from making his plea “knowingly, intelligently, and voluntarily.”

failed to establish that a manifest injustice occurred and, therefore, his motion to withdraw plea should be overruled.

{¶19} The trial court, apparently persuaded by appellee's argument that appellant was not subject to post-release control because he is subject to parole, entered a nunc pro tunc judgment entry eliminating appellant's sentence regarding post-release control. Ultimately, the trial court overruled appellant's motion to vacate his plea:

{¶20} "This matter came on for hearing on [appellant's] motion to vacate his previous plea. The court upon considering the motion, the briefs and arguments of counsel, and the transcript of proceedings finds that rape is an unclassified felony that carries a sentence of life imprisonment with parole eligibility after 15 years. The court would find that post-release control and advising of post-release control is not necessary because this matter is controlled by the parole board.

{¶21} "The court further finds no showing of a manifest injustice."

{¶22} Appellant appeals assigning the following as error:

{¶23} "The trial court erred as a matter of law in denying appellant's motion to vacate his guilty plea."

{¶24} In his brief, appellant argues that even though he received a life sentence, post-release control is mandatory pursuant to law; because the trial court failed to include the duration of post-release control in his sentencing entry, his sentence is void; resultantly, his motion to withdraw plea should have been considered under the presentence standard rather than the post-sentence standard; and, last, it was error not to grant his motion to vacate.

{¶25} Post-Release Control

{¶26} R.C. 2967.28 provides:

{¶27} “(B) Each sentence to a prison term for felony of the first degree, *** [or] for a felony sex offense *** 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:

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

{¶29} In *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, the court concluded that post-release control is required to be imposed upon a defendant who receives an indefinite sentence of life in prison with parole eligibility for a conviction of rape in violation of R.C. 2907.02. *Id.* at ¶14. Of paramount concern to the court was the legislative intent in enacting R.C. 2967.28. The *McCormick* court found that the statute’s plain, unambiguous language expressly requires the inclusion of a mandatory post-release control term of five years for each prison sentence for felonies of the first degree and felony sex offenses. *Id.*

{¶30} Because, in our case, appellant was sentenced on both a first-degree felony and a sex offense, five years post-release control is mandatory. *McCormick* at ¶14.

{¶31} Sentence is not Void

{¶32} Despite the fact that the trial court informed appellant that he would be subject to mandatory post-release control for a period of five years prior to accepting his

plea, it did not inform him of this orally during the sentencing hearing. Moreover, although the sentencing entry itself imposes post-release control, it does not state the duration.

{¶33} R.C. 2929.19(B), the statutory subsection that sets forth what a court must do at a sentencing hearing, provides, in relevant part:

{¶34} “(3) *** [I]f the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

{¶35} “***

{¶36} “(c) Notify the offender that the offender will be supervised under section 2967.28 of the Revised Code [regarding post-release control] after the offender leaves prison if the offender is being sentenced for a felony of the first degree or *** for a felony sex offense ***.”

{¶37} However, the court’s failure to notify the offender of mandatory post-release control or state the duration of post-release control in the sentencing entry does not render appellant’s judgment void. *State v. McKinney*, 11th Dist. No. 2010-T-0011, 2010-Ohio-6445; R.C. 2929.191.

{¶38} Appellant was sentenced on April 17, 2008, well after the July 11, 2006 effective date of R.C. 2929.191, and, therefore, it applies.

{¶39} “R.C. 2929.191 applies to sentenced offenders who have not yet been released from prison and who fall into at least one of three categories: (1) those who did not receive notice at the sentencing hearing that they would be subject to post-release control, (2) those who did not receive notice that the parole board could impose a prison term for a violation of post-release control, or (3) those who did not have both of these

statutorily-mandated notices incorporated into their sentencing entries. R.C. 2929.191(A) and (B).

{¶40} “For such offenders, R.C. 2929.191 provides that trial courts may, after holding a hearing with notice to the offender, the prosecuting attorney, and the department of rehabilitation and correction, prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction a statement that the offender will be supervised under post-release control after the offender leaves prison and that the parole board may impose a prison term of up to one-half of the stated prison term originally imposed if the offender violates post-release control. R.C. 2929.191(A)(1). If the court prepares such a correction, the court shall place upon its journal an entry nunc pro tunc to record the correction to the judgment of conviction. R.C. 2929.191(A)(2). The court’s placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the sentence and the judgment of conviction entered on the journal and had notified the offender that the offender would be subject to post-release control. *Id.* The offender has the right to be present at the hearing, but the court on its own motion or on the motion of the state or the defense, may permit the offender to appear at the hearing by video conferencing equipment if available and compatible. R.C. 2929.191(C). At the hearing, the state and the offender may make a statement as to whether the court should issue a correction to the judgment of conviction.” *McKinney* at ¶18 & 19.

{¶41} In *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the Supreme Court of Ohio considered the effect of R.C. 2929.191 and whether it could be applied retroactively or prospectively. The *Singleton* court held that the statute could not be applied retroactively. Accordingly, trial courts are required to conduct a complete de novo sentencing hearing for those sentenced before the effective date. *Id.* at ¶1. However, the *Singleton* court held that sentences imposed without the post-release control notification after the effective date of R.C. 2929.191 remain in effect, but are subject to the correction procedure set forth in the statute and, therefore, are not void. *Id.* at ¶24.

{¶42} Accordingly, appellant's sentence is not void. It is subject to correction pursuant to R.C. 2929.191.²

{¶43} Withdrawal of Guilty Plea

{¶44} Crim.R. 32.1 Withdrawal of Guilty Plea states: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

{¶45} Because appellant's sentence is not void, his motion to withdraw plea is a post-sentencing motion. Thus, the manifest injustice standard is the appropriate standard to apply. Crim.R. 32.1; *State v. Walker*, 11th Dist. No. 2009-L-170, 2011-Ohio-401. The phrase manifest injustice has been variously defined; however, it is clear that under such standard, a post-sentence withdrawal motion is allowable only in extraordinary cases. *State v. Clark*, 11th Dist. No. 2009-A-0038, 2010-Ohio-1491, at

2. Appellee can move to correct the sentence without a remand from this court.

¶13. In his written motion to withdraw his plea, appellant's only basis for stating that he was entitled to do so was that the trial court failed to inform him that he would be subject to five years mandatory post-release control. However, prior to accepting appellant's plea, appellant was informed that he was subject to five years of mandatory post-release control and that a violation could lead to an increase in his sentence. Accordingly, appellant has failed to establish a manifest injustice.

{¶46} Based on the foregoing, appellant's assignment of error is without merit. The judgment of the Portage County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.