

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-L-170
LOUIS M. WALKER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 05 CR 000849.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Jesse M. Schmidt, Jesse M. Schmidt Co., L.P.A., 55 Public Square, #1414, Cleveland, OH 44113 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Louis M. Walker, appeals the Judgment Entry of Sentence of the Lake County Court of Common Pleas, sentencing him to a three-year prison term for Attempted Felonious Assault, and notifying him of a mandatory three-year period of post-release control. For the following reasons, we affirm the decision of the court below.

{¶2} On April 4, 2006, Walker was indicted by the Lake County Grand Jury of Felonious Assault (Count One), a felony of the second degree in violation of R.C. 2903.11(A)(2), and Felonious Assault (Count Two), a felony of the second degree in violation of R.C. 2903.11(A)(1).

{¶3} On June 16, 2006, Walker entered a written plea of “guilty” to a lesser included offense of Count Two, Attempted Felonious Assault, a felony of the third degree in violation of R.C. 2923.02 and 2903.11(A)(1). Upon application of the State, the trial court entered a Nolle Prosequi on the first count of the Indictment.

{¶4} On July 18, 2006, the trial court entered its Judgment Entry of Sentence, ordering Walker to serve a prison term of three years, to pay restitution to the victim in the amount of \$2,436, and notifying him “that post release control is optional in this case up to a maximum of 3 years.”

{¶5} On October 16, 2009, Walker filed a Postsentence Motion to Withdraw Guilty Plea in accordance with Ohio Criminal Rule 32.1 and Vacate V[oi]d Indictment and Conv[i]ction. The basis for the Motion was that, due to ineffective assistance of counsel, Walker’s guilty plea was not entered knowingly or intelligently. Specifically, Walker claimed that, by pleading guilty to an Attempt, he should have been offered the opportunity to plead to a fourth-degree felony, such as Assault or Aggravated Assault.¹ Walker also argued that the Nolle entered with respect to Count One rendered the Indictment void, in that Count Two did not contain the essential elements of the charged offense.

1. Walker’s argument, which is difficult to follow, relies on the following provision of R.C. 2923.02(E)(1): “An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted.”

{¶6} On November 10, 2009, the State filed a Motion for Resentencing pursuant to *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, requesting the trial court “to hold a hearing with defendant by video conference, prior to his December 13, 2009 release date, pursuant to R.C. Section 2929.191, for the purpose of correcting an error in the court’s original sentencing judgment entry regarding post release control notification.” The State’s motion was served upon Walker’s trial counsel. The court scheduled a sentencing hearing for November 23, 2009.

{¶7} On November 18, 2009, the trial court entered an Order Denying Motion to Withdraw Guilty Plea. The court held that Walker failed to establish the existence of a manifest injustice, in that the legal arguments on which he based his claim of ineffective assistance of counsel were “mistaken.”

{¶8} On November 23, 2009, Walker’s sentencing hearing was held. Walker participated in the hearing by video conferencing, while remaining at the Lake Erie Correctional Institution. The trial court explained that its “sentencing entry showed that post release control is optional up to a maximum of three years,” but, “because of the aspect of violence, post release control is mandatory for three years in this case.” Defense counsel asked Walker if he understood the purpose of the hearing, to which Walker replied, “no.” Defense counsel then repeated the court’s explanation of the hearing. Walker then engaged the court in a discussion concerning double jeopardy, his motion to withdraw his guilty plea for ineffective assistance of counsel, and whether his sentence was void.

{¶9} At one point, Walker asked the trial court if he was entitled to be represented by counsel and the court replied that he was represented by counsel at the

hearing. Walker protested that he was going to appeal the decision, saying “I don’t want him [defense counsel] representing me.” Walker argued that if his sentence was not stated properly, the court should “void out” the indictment. The court disagreed. Walker claimed to be “lost” with regard to what was happening. The court stated: “I think you’re lost because you want to be lost. Post release control is mandatory. I’m here to tell you it’s mandatory.”

{¶10} The trial court imposed the original three-year sentence and restitution in the amount of \$2,436, and advised Walker that post-release control was mandatory for a period of three years.

{¶11} On December 1, 2009, the trial court journalized its Judgment Entry of Sentence.

{¶12} On December 12, 2009, Walker completed his stated prison term and was released.

{¶13} On December 15, 2009, Walker filed a Notice of Appeal from the trial court’s December 1, 2009 Judgment Entry of Sentence.

{¶14} On appeal, Walker raises the following assignments of error:

{¶15} “[1.] The trial court erred by resentencing appellant via video conference, in a summary hearing, with no prior notice, in violation of his due process rights.”

{¶16} “[2.] The trial court erred when it denied appellant’s motion to withdraw guilty plea without a hearing, applying the manifest injustice standard.”

{¶17} In the first assignment of error, Walker raises two arguments. The first is based on the supposition that his sentence is void because the trial court failed to specify that post-release control was a mandatory part of his sentence. Walker claims

the court failed to correct his void sentence, pursuant to R.C. 2929.191, by not conducting a new, de novo sentencing hearing, or affording the defendant prior notice, the right to be present, the right to counsel, and an opportunity to be heard.

{¶18} As an initial matter, Walker is incorrect in his assertion that his sentence was void. Walker's sentencing hearing was held on July 13, 2006. Prior to that date, significant amendments to Ohio's post-release control statutes went into effect.

{¶19} "For a felony of the third degree *** in the commission of which the offender caused or threatened physical harm to a person," a three-year period of post-release control is mandatory. R.C. 2967.28(B)(3). "If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a sentencing court to notify the offender *** of this requirement or to include in the judgment of conviction entered on the journal a statement that the offender's sentence includes this requirement does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under this division." R.C. 2967.28(B). "If *** a court imposed a sentence including a prison term *** and failed to notify the offender *** 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 ***, at any time before the offender is released from imprisonment under that term ***, 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." R.C. 2929.191(A)(1).

{¶20} Prior to the amendments to R.C. 2967.28 and the enactment of R.C. 2929.191 in July of 2006, no statutory mechanism existed to correct a sentence which failed to comport with requirements for the imposition of post-release control. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, at ¶22. The Ohio Supreme Court “determined such sentencing judgments to be contrary to law, thereby rendering them subject to de novo sentencing.” *Id.* (citations omitted). “But with R.C. 2929.191, the General Assembly has now provided a statutory remedy to correct a failure to properly impose postrelease control.” *Id.* at ¶23.

{¶21} By amending R.C. 2967.28 and enacting R.C. 2929.191, “[t]he General Assembly has *** adopted the position that sentences that lack mandatory postrelease control are not void, because this mistake results from a court’s error in exercising jurisdiction, rather than from a lack of its authority to sentence.” *Singleton*, 2009-Ohio-6434, at ¶61 (Lanzinger, J., concurring in part and dissenting in part). See, also, *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, at ¶69 (where the offender was sentenced after July 11, 2006, the sentence was not rendered void by defects in the imposition of post-release control); accord *State v. Elkins*, 6th Dist. No. S-10-018, 2010-Ohio-5170, at ¶11; *State v. Davis*, 8th Dist. No. 93959, 2010-Ohio-5126, at ¶21; *State v. Jones*, 9th Dist. No. 25254, 2010-Ohio-3850, at ¶7.

{¶22} As Walker was sentenced after July 11, 2006, his sentence was not rendered void by the trial court’s imposition of discretionary, rather than mandatory, post-release control. Accordingly, the sentence was subject to correction pursuant to R.C. 2929.191.

{¶23} As of July 11, 2006, “a court that wishes to prepare and issue a correction to a judgment of conviction [that fails to notify an offender that he will be subject to post-release control after he leaves prison] shall not issue the correction until after the court has conducted a hearing in accordance with this division.” R.C. 2929.191(C).

{¶24} “Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing, the prosecuting attorney of the county, and the department of rehabilitation and correction. 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. An appearance by video conferencing equipment pursuant to this division has the same force and effect as if the offender were physically present at the hearing. 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.” R.C. 2929.191(C).

{¶25} Walker argues that he was not given prior notice of the hearing and, so, was deprived of the opportunity to object to the video teleconference, consult with his attorney, and prepare mitigating evidence before the hearing. The State contends that notice requirement was satisfied by notice being sent to Walker’s defense attorney and/or Walker has waived all but plain error by failing to object to notice at the hearing. The State relies on *State v. Arnold*, 2nd Dist. No. 22856, 2009-Ohio-3636, which suggests that, where the offender appears in court, with counsel, for the express

purpose of sentencing, “there is no basis for concluding that [the offender] did not receive proper notice under the statute.” *Id.* at ¶30.

{¶26} We reject the State’s argument that notice provided to Walker’s trial attorney fulfilled the statutory requirement. The statute specifically states that notice is to be provided to “the offender” and that it is “the offender” who has a right to be present and to make a statement regarding the correction. In the present case, moreover, it had been almost three years since Walker’s defense counsel had appeared as his attorney. Walker’s two Motions for Judicial Release and Motion to Withdraw Guilty Plea were all filed pro-se. Likewise, the court’s orders denying these Motions were all served on Walker rather than his trial attorney. Finally, it is evident that Walker was unaware of the purpose of the hearing until it had begun.

{¶27} Although Walker was not given notice of the hearing as provided in R.C. 2929.191(C), such error may be deemed harmless where the offender fails to demonstrate resulting prejudice. *State v. Miller*, 11th Dist. Nos. 95-P-0029, 95-P-0030 and 95-P-0031, 1997 Ohio App. LEXIS 1221, at *4-*5.

{¶28} Walker claims he was deprived of the opportunity to object to the video teleconference, consult with his attorney, and prepare mitigating evidence before the hearing. None of these claims demonstrate prejudice. Participation in the hearing by video conferencing is expressly provided for by the statute and Walker makes no argument that this was inappropriate in his particular case. The statute does not provide that Walker has a right to be represented by counsel or present mitigating evidence at the hearing. These arguments stem from Walker’s erroneous supposition that he was entitled to a de novo sentencing hearing. As demonstrated above, a de

novo sentencing hearing would only be appropriate if Walker's sentence were void, which it was not in this case. Pursuant to the statutory remedy provided in R.C. 2929.191(C), the purpose of the hearing is solely to determine whether "the court should issue a correction to the judgment of conviction."

{¶29} In Walker's case, a period of post-release control was mandatory. The trial court had no discretion regarding its imposition, only the duty to order its imposition as part of Walker's sentence. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, at ¶72. Walker has raised no argument, at the hearing or on appeal, as to why R.C. 2967.28(B)(3) does not apply to his sentence.

{¶30} Finally, under this assignment of error, Walker argues that trial counsel was constitutionally ineffective for failing to present mitigating evidence or make any argument for the reduction of his sentence at his de novo sentencing hearing. This argument fails for the reason that Walker was not entitled to, and did not receive, a de novo sentencing hearing. The only arguments counsel could have properly raised would have concerned the propriety of correcting Walker's sentence to include a term of mandatory post-release control. As no argument exists as to why it was not appropriate to impose post-release control, trial counsel was not deficient for failing to raise such an argument.

{¶31} The first assignment of error is without merit.

{¶32} Under the second assignment of error, Walker argues the trial court erred by applying the Crim.R. 32.1 manifest injustice standard to deny his Motion to Withdraw Guilty Plea, as this Motion should have been considered a pre-sentence Motion given that his sentence was void. This argument fails for two reasons. First, Walker has not

appealed the trial court's Order Denying Motion to Withdraw Guilty Plea. The only judgment identified in and attached to the Notice of Appeal is the court's Judgment Entry of Sentence. App.R. 3(D); cf. *State v. Fischer*, __ Ohio St.3d __, 2010-Ohio-6238, at paragraph four of the syllabus ("[t]he scope of an appeal from a resentencing hearing in which a mandatory term of postrelease control is imposed is limited to issues arising at the resentencing hearing"). Second, as demonstrated above, Walker's sentence was not void. Thus, the manifest injustice standard was the appropriate standard to apply. Civ.R. 32.1.

{¶33} The second assignment of error is without merit.

{¶34} For the forgoing reasons, the Judgment of the Lake County Court of Common Pleas, imposing a term of post-release control as part of Walker's felony sentence, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.