[Cite as *State v. Young*, 2011-Ohio-4018.]

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. 2009-T-0130**
- vs -	:	
DEVON L. YOUNG,	:	8-12-11
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 09 CR 27.

Judgment: Affirmed in part, reversed in part, 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).

J. Dean Carro, Appellate Review Office, University of Akron School of Law, Akron, OH 44325-2901 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, Devon L. Young, appeals from the April 6, 2009 judgment of the Trumbull County Court of Common Pleas, entered after Mr. Young signed a written plea agreement disposing of charges for felonious assault and having weapons while under disability.

{¶2} Mr. Young's guilty plea was made knowingly, intelligently, and voluntarily, specifically with respect to waiving his constitutional right to a jury trial. The record

establishes the trial court met the "tempered" strict compliance standard of Crim.R. 11(C)(2)(c). However, Mr. Young's sentence must be corrected to include a mandatory postrelease control period of three years, not "up to" three years as stated by the trial court at the sentencing hearing and in its sentencing entry, and state that the parole board may impose a prison term of up to one-half of his prison sentence for any violation. Thus, we affirm in part, reverse in part, and remand.

{¶3} **Substantive Facts and Procedural History**

{¶4} Mr. Young was indicted by the Trumbull County Grand Jury on two counts of felonious assault, felonies of the second degree, each with a firearm specification, and one count of having weapons while under disability, a felony of the third degree. Repeat violent offender specifications were subsequently added to the felonious assault counts, based on a prior conviction in Montgomery County of felonious assault, a felony of the second degree. He pleaded not guilty at his arraignment.

{¶5} Mr. Young later appeared with counsel at a combined change of plea and sentencing hearing. He withdrew his former not guilty plea and entered an oral and written plea of guilty to all charges. Before accepting the plea, the trial court informed Mr. Young at the hearing that he was subject to a mandatory period of postrelease control of up to three years. The signed plea agreement also stated he would be subject to mandatory postrelease control once released from prison of up to a maximum of three years.

{¶6} During the course of sentencing, the trial court referenced the Notice for Prison Imposition, which provides that after Mr. Young is released from prison, he will have a period of postrelease control for three years. Mr. Young and his counsel both

signed that form. The trial court again informed Mr. Young at the hearing that he was subject to postrelease control for up to three years. The trial court accepted Mr. Young's guilty plea and sentenced him in accordance with the agreement reached between him and the prosecutor.

{¶7} Mr. Young received a total term of imprisonment of nine years: six years for each count of felonious assault, to run concurrently; three years on each firearm specification, which were merged; and one year on the count of having weapons while under disability, to be served concurrently to the two counts of felonious assault. The trial court's sentencing entry states that Mr. Young was further notified that "post release control is Mandatory in this case *up to a maximum* of 3 years." (Italics added.)

{¶8} Mr. Young did not file a direct appeal from his convictions and sentence. However, he subsequently filed pro se motions for delayed appeal and for appointment of counsel, which we granted.

{¶9} Mr. Young's appointed appellate counsel thereafter filed a motion to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738. In response, Mr. Young filed a pro se brief claiming that his counsel failed to address the issue regarding postrelease control. He referred this court to the Supreme Court of Ohio's decision in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434.

{¶10} After an independent review of the record, we found Mr. Young's claim involving postrelease control "arguable on its merit." Therefore, this court held that he should be afforded the assistance of new counsel to argue his appeal. We appointed new counsel for Mr. Young, who filed an appellate brief on his behalf asserting the following assignments of error for our review:

{¶11} "[1.] The trial court erred in accepting Appellant Young's plea of guilty when it failed to properly inform him of his Sixth Amendment right to a jury trial in a reasonably intelligible manner rendering the plea involuntary in violation of the Due Process Clause of the Fourteenth Amendment.

{¶12} "[2.] The trial court erred when it failed to comply with R.C. 2967.28 and R.C. 2929.19 by not notifying Appellant Young at both his sentencing hearing and in his sentencing entry that the imposition of post release control was mandatory and that the parole board may impose a prison term of up to one-half of his prison term for any violation."

{¶13} **Strict Compliance with Crim.R. 11 (C)(2)(c)**

{¶14} In his first assignment of error, Mr. Young argues that the trial court erred in accepting his guilty plea because it failed to properly inform him of his Sixth Amendment right to a jury trial in a reasonably intelligible manner rendering the plea involuntary in violation of the Due Process Clause of the Fourteenth Amendment. He stresses the trial court failed to specifically and adequately inform him that he was waiving his constitutional right to a jury trial because the court omitted the word "jury" when inquiring whether he knew he was waiving his right to a "trial," and although the trial court did employ the word "jury" during the Crim.R. 11 colloquy, the colloquy was a "convoluted exchange" which at times "merged two distinct categories - constitutional rights and privileges."

{¶15} "A criminal defendant's choice to enter a plea of guilty or no contest is a serious decision. The benefit to a defendant of agreeing to plead guilty is the elimination of the risk of receiving a longer sentence after trial. But, by agreeing to

plead guilty, the defendant loses several constitutional rights." *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, at ¶25, citing *Boykin v. Alabama* (1969), 395 U.S. 238, 243; *State v. Nero* (1990), 56 Ohio St.3d 106, 107. "The exchange of certainty for some of the most fundamental protections in the criminal justice system will not be permitted unless the defendant is fully informed of the consequences of his or her plea. Thus, unless a plea is knowingly, intelligently, and voluntarily made, it is invalid." Id., citing *State v. Engle* (1996), 74 Ohio St.3d 525, 527.

{¶16} "To ensure that pleas conform to these high standards, the trial judge must engage the defendant in a colloquy before accepting his or her plea." Id. at ¶26, citing *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph one of the syllabus; Crim.R. 11 (C), (D), and (E). "It follows that, in conducting this colloquy, the trial judge must convey accurate information to the defendant so that the defendant can understand the consequences of his or her decision and enter a valid plea." Id.

{¶17} Crim.R. 11(C)(2) sets forth the requirements for guilty pleas. It provides:

{¶18} "(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶19} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶20} "(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶21} "(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

{¶22} The matters subject of Crim.R. 11(C)(2)(c) are constitutional, and strict compliance by the trial court with the rule is required in presenting them to a defendant. *State v. Woodliff,* 11th Dist. No. 2004-P-0006, 2005-Ohio-2257, at ¶51. However, the requirements of Crim.R. 11(C)(2)(a) and (b) are not constitutional. Thus, substantial compliance by the trial court in presenting the matters subject of these portions of the rule is sufficient. Id.

{¶23} "If a trial court fails to literally comply with Crim.R. 11, reviewing courts must engage in a multitiered analysis to determine whether the trial judge failed to explain the defendant's constitutional or nonconstitutional rights and, if there was a failure, to determine the significance of the failure and the appropriate remedy." *Clark*, supra, at ¶30.

{¶24} "When a trial judge fails to explain the constitutional rights set forth in Crim.R. 11(C)(2)(c), the guilty or no-contest plea is invalid 'under a presumption that it was entered involuntarily and unknowingly.'" Id. at ¶31, quoting *State v. Griggs,* 103

Ohio St.3d 85, 2004-Ohio-4415, at ¶12; see, also, *Nero,* supra, at 107, citing *Boykin,* supra, at 242-243.

{¶25} "The failure to comply literally with the provisions of subsection (c) does not automatically invalidate a guilty plea. *Ballard*, 66 Ohio St.2d at 479. Failure to use the exact language contained in Crim.R. 11(C), in informing a criminal defendant of his constitutional right to a trial and the constitutional rights related to such trial, including the right to trial by jury, is not grounds for vacating a plea as long as the record shows that the trial court explained these rights in a manner reasonably intelligible to that defendant.' Id. at syllabus. The Ohio Supreme Court has reaffirmed that 'a trial court can still convey the requisite information on constitutional rights to the defendant even when the court does not provide a word-for-word recitation of the criminal rule, so long as the trial court actually explains the rights to the defendant.' [*State v.*] *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, at ¶27 ***." *State v. McKenna*, 11th Dist. No. 2009-T-0034, 2009-Ohio-6154, at ¶62. (Parallel citation omitted.)

{¶26} At the combined plea and sentencing hearing, the trial court first inquired about Mr. Young's educational background and whether he was under the influence of any drugs or alcohol to ensure that he understood the proceedings. Mr. Young replied that he has a tenth grade education, has no problem reading or writing the English language, and was not under the influence of drugs or alcohol.

{¶27} The trial judge recited the Ohio Revised Code sections for felonious assault and the attendant specifications before informing Mr. Young that "[t]he State of Ohio would have to prove the following elements by proof beyond a reasonable doubt to the unanimous satisfaction of a jury[.]" The trial judge went on to recite the Ohio

Revised Code sections for having weapons while under disability before informing Mr. Young that "[t]he State of Ohio would have to prove the following elements by proof beyond a reasonable doubt to the unanimous satisfaction of a jury[.]"

{¶28} The trial court then launched a point-by-point inquiry of whether Mr. Young understood his Crim.R. 11(C)(2)(c) rights. The following colloquy took place between the trial judge and Mr. Young:

{¶29} "THE COURT: Nobody has to plead to any charge. You have the right to go forward with a trial and have the State of Ohio prove its case by proof beyond a reasonable doubt. Do you understand that?

{¶30} "THE DEFENDANT: Yes, Your Honor.

{¶31} "THE COURT: At that trial, you have the right to have an attorney represent you and if you couldn't afford one, one would be appointed at State's expense. Do you understand that?

{¶32} "THE DEFENDANT: Yes, Your Honor.

{¶33} "THE COURT: Also, at that trial, you have the right to confront and cross examine any witnesses that testify against you. Do you understand that?

{¶34} "THE DEFENDANT: Yes, sir.

{¶35} "THE COURT: You also have the right to subpoena witnesses to testify on your own behalf. Do you understand that?

{¶36} "THE DEFENDANT: Yes, sir.

{¶37} "THE COURT: You have a Fifth Amendment right under the Constitution. For trial purposes, that means you don't have to take the stand and nobody can force

you to testify. If you chose not to testify, nobody could comment about it. Do you understand that?

{¶38} "THE DEFENDANT: Yes, Your Honor."

{¶39} While the trial judge did not specifically use the adjective "jury" each time when referencing "trial," appellant was advised on two separate occasions that "[t]he State of Ohio would have to prove the following elements by proof beyond a reasonable doubt to the unanimous satisfaction of a jury[.]" The issue then becomes whether this is sufficient.

{¶40} While the trial court did not ask Mr. Young whether he understood that he had a right to a jury trial and by pleading guilty he was waiving that right (such word-by-word, rote colloquy would certainly be in literal compliance with Crim.R. 11(C)(2)(c)), the trial court's colloquy met the "tempered" strict compliance standard of Crim.R. 11(C)(2)(c) because Mr. Young was advised before each recitation of the elements of each offense that the state would have to "prove the *** elements of proof beyond a reasonable doubt to the *unanimous satisfaction of a jury****." (Italics added.) The same information was conveyed to Mr. Young, and we do not find it to be too vague or "convoluted," as Mr. Young argues. See *Veney* at ¶27.

{¶41} This court stated in *McKenna*, supra, at ¶67:

{¶42} "'[I]n determining whether a trial court has informed a criminal defendant of his *Boykin* rights,' the Ohio Supreme Court has acknowledged that '[m]atters of reality, and not mere ritual, should be controlling.' *Ballard*, 66 Ohio St.2d at 480, quoting *McCarthy v. United States* (1969), 394 U.S. 459, 468 fn. 20, *** (citation omitted). *** [A Crim.R. 11(C)] colloquy *may be looked to in the totality of the matter*.' Id. at 481

(emphasis added). In *Ballard*, the plea was upheld 'even though the trial court failed to specifically mention the right to a jury trial by name, because the trial court did inform Ballard that "neither the Judge nor the jury" could draw any inference if Ballard refused to testify and that he "was entitled to a completely fair and impartial trial under the law."' *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, at ¶28, ***, quoting *Ballard*, 66 Ohio St.2d at 479, fn. 7, and 481." (Parallel citations omitted.)

{¶43} Although after *Veney* it is clear that obtaining a signed written waiver is insufficient when the trial court completely omits an explanation of a constitutional right, it still may be argued that a reviewing court may also consider other factors in the record, such as written materials reviewed by counsel and a defendant when determining whether the oral explanation was "reasonably intelligible."

{¶44} Since *McKenna,* one of our sister districts has questioned the continuing validity of the *Ballard* proposition that a trial court may look to other portions of the record for additional evidence of an adequate explanation of a defendant's constitutional rights in light of the decision in *Veney*.

{¶45} The Fourth District recognized, and we agree, that "[t]he Supreme Court of Ohio has never explicitly overruled or limited this aspect of *Ballard*." However, we observe that subsequent cases seem to have limited any "totality of the circumstances" inquiry only when determining if the trial court substantially complied with Crim.R. 11(C)'s nonconstitutional provisions. See, e.g., *Veney*. Moreover, *Veney* distinguished *Ballard* and stated that "the court cannot simply rely on other sources to convey these rights to the defendant" and that it would not "'presume a waiver of these (***) important [constitutional] rights from a silent record.'" Id. at ¶29, quoting *Boykin v. Alabama*

(1969), 395 U.S. 238, 243. It is not clear whether this statement is intended to be a repudiation of the *Ballard* totality of the circumstances approach as it pertains to the constitutional rights outlined in Crim.R. 11(C)(2)(c), or whether this statement simply means that it will not allow "other sources" to substitute for the court's duty to convey the information when the court completely fails to convey the information. Unlike *Ballard*, *Veney* involved a situation where the trial court completely failed to mention a certain right. In contrast, in *Ballard* the court explained the constitutional rights, just not in the exact terms of Crim.R. 11(C). *Veney* does not seem to reject any idea that a court may look to "other sources" as additional evidence that a court adequately advised a defendant of his constitutional rights. Thus, although the continuing validity of this proposition from *Ballard* may be in question, we do not believe that it has clearly been invalidated such that we are unjustified in following it." *State v. Pigge*, 4th Dist. No. 09CA3136, 2010-Ohio-6541, fn 2.

{¶46} Here, the written guilty plea, signed by Mr. Young and his counsel, shows that he was advised of his constitutional rights and that he agreed to waive them. The written plea states the following:

{¶47} "The Court and my Attorney have advised me that by entering this Plea of Guilty I am waiving (giving up) the following Constitutional Rights:

{¶48} "My right to a jury trial or trial to the Court;

{¶49} "My right to confront and cross-examine the witnesses against me;

{¶50} "My right to have compulsory process for obtaining witnesses in my favor;

{¶51} "My right to require the State to prove my guilt beyond a reasonable doubt at a trial;

{¶52} "My right not to be compelled to testify against myself; and

{¶53} "My right to appeal upon conviction after a trial.

{¶54} "I specifically acknowledge that I understand all of the above, and I expressly waive all of those rights, including my right to a trial by jury, as to each and every count."

{¶55} Thus, the written guilty plea, signed by Mr. Young and his counsel, clearly states that he was advised that by pleading guilty, he was "waiving (giving up)" certain constitutional rights, including his right to a jury trial.

{¶56} At the change of plea hearing, Mr. Young acknowledged that he reviewed the written guilty plea with his counsel; indicated that he understood it; had no questions; signed it freely and voluntarily without any threats or promises; and was satisfied with the services of his attorney.

{¶57} This additional evidence from the written plea agreement specifically reviewed by the trial court during the colloquy only reinforces our conclusion that Mr. Young's plea was knowingly, intelligently and voluntarily made.

{¶58} Mr. Young's first assignment of error is without merit.

{¶59} **Postrelease Control**

{¶60} In his second assignment of error, Mr. Young contends the trial court erred by failing to comply with R.C. 2967.28 and R.C. 2929.19 by not notifying him at both his sentencing hearing and in the sentencing entry that the imposition of postrelease control was mandatory and that the parole board may impose a prison term of up to one-half of his prison term for any violation.

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

{¶62} "(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:

{¶63} "***

{¶64} "(c) Notify the offender that the offender will be supervised under section 2967.28 of the Revised Code [regarding postrelease control] after the offender leaves prison if the offender is being sentenced for a felony of the *** second degree ***.

{¶65} "***

{¶66} "(e) Notify the offender that *** the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender."

{¶67} In addition, R.C. 2967.28 provides:

{¶68} "(B) Each sentence to a prison term for a felony of the *** second degree *** 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. *** [A] period of post-release control required by this division for an offender shall be one of the following periods:

{¶69} "***

{¶70} "(2) For a felony of the second degree *** three years[.]"

{¶71} Mr. Young pleaded guilty to and was sentenced on one count of having weapons while under disability, a felony of the third degree. In addition, Mr. Young pleaded guilty to and was sentenced on two counts of felonious assault, felonies of the

second degree, and as a result, was subject to a mandatory postrelease control period of three years pursuant to R.C. 2967.28(B)(2).

{¶72} The General Assembly enacted R.C. 2929.191, effective July 11, 2006, in which the legislature sought to establish a simple procedure to correct a trial court's judgment of conviction that omitted proper notification regarding postrelease control. We note that an error in sentencing made after the effective date of R.C. 2929.191 does not render a sentence void. See *State v. McKinney*, 11th Dist. No. 2010-T-0011, 2010-Ohio-6445, at ¶30.

{¶73} Mr. Young was sentenced on April 6, 2009, well after the enactment of R.C. 2929.191. Therefore, R.C. 2929.191 applies to his case.

{¶74} "R.C. 2929.191 applies to sentenced offenders who have not yet been released from prison and who fall into at least one of the 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).

{¶75} "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 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*, supra, at ¶18 & 19.

{¶76} In *Singleton*, the Supreme Court of Ohio considered the effect of R.C. 2929.191 and whether it could be applied retroactively or only prospectively. The *Singleton* court held that the statute could not be applied retroactively to those sentenced before its enactment. Accordingly, trial courts are required to conduct a complete de novo sentencing hearing for those sentenced before the effective date. *Singleton*, supra, at ¶1. However, the *Singleton* court held that sentences imposed without the postrelease control sanction 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.

{¶77} Following *Singleton*, the Supreme Court of Ohio decided *State v. Fischer*, Slip Opinion No. 2009-0897, 2010-Ohio-6238. We note that the appellant in *Fischer* was sentenced prior to the enactment of R.C. 2929.191; Mr. Young was sentenced after the enactment of the statute. The Supreme Court in *Fischer* held that "when a judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, [it is] that *part* of the sentence that is void and must be set aside." Id. at ¶26. In modifying *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, the *Fischer* court held that "the new sentencing hearing to which an offender is entitled under *Bezak* is limited to proper imposition of postrelease control." Id. at ¶29.

{¶78} In the instant matter, the trial court failed to properly notify Mr. Young at his sentencing hearing and in its judgment entry that he was subject to a mandatory three-year period of postrelease control and that if he were to violate the provisions of postrelease control, the parole board could impose an additional prison term of up to one-half of his prison sentence.

{¶79} Instead, at the sentencing hearing, the trial court stated the following:

{¶80} "THE COURT: And in a case like this, you will be placed on post-release control for *up to* three years. Do you understand that?

{¶81} "THE DEFENDANT: I do.

{¶82} "THE COURT: While you are on post-release control, you have to abide by the Parole Board's rules and regulations. Do you understand that?

{¶83} "THE DEFENDANT: Yes, sir.

{¶84} "THE COURT: And if you fail to abide by their rules and regulations, you will be placed on more restrictive post-release control. Do you understand that?

{¶85} "THE DEFENDANT: Yes, sir.

{¶86} "THE COURT: And if the violation is deemed significant enough, you can be sent back to the penitentiary. Do you understand that?

{¶87} "THE DEFENDANT: Yes, sir." (Emphasis added.)

{¶88} At no point during the sentencing portion of the colloquy did the trial court state that postrelease control was mandatory and that the parole board could impose a prison term of up to one-half of the prison sentence for a violation of postrelease control pursuant to R.C. 2929.19(B)(3)(c) and (e). See *Singleton*, supra, at ¶4 (holding that the trial court only referred to the possibility of postrelease control and failed to notify the appellant, who pleaded guilty in 2000 to a first degree felony, that for a violation of postrelease control, the parole board could impose a prison term as part of his sentence of up to one-half of the stated prison term originally imposed on him).

{¶89} The trial court's use of the phrase "up to" three years with respect to postrelease control, similar to the reference in *Singleton* regarding the *possibility* of postrelease control, connotes that the period is discretionary rather than mandatory.

{¶90} In addition, in its sentencing entry, the trial court stated the following:

{¶91} "The Court has further notified the Defendant that post release control is Mandatory in this case *up to* a maximum of 3 years, as well as the consequences for violating conditions of post release 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 post release control imposed by the Parole Board, and any prison term for violation of that post release control." (Emphasis added.)

{¶92} Although the trial court used the term "mandatory" in its sentencing entry, it again used the "up to" three years language regarding postrelease control. The language used at both the sentencing hearing and in the trial court's judgment entry does not adequately indicate that a three-year term of postrelease control was mandatory. See *State v. Hagens*, 7th Dist. Nos. 09-MA-2 and 09-MA-3, 2009-Ohio-6526, at ¶12 (holding that an advisement of "up to" three years is not adequate as it does not sufficiently advise an offender of the mandatory nature or period of postrelease control.)

{¶93} This court recently reversed and remanded a matter where the trial court failed to properly impose postrelease control in *State v. Gaut*, 11th Dist. No. 2010-T-0059, 2011-Ohio-1300. In *Gaut*, the appellant was convicted of multiple counts of rape, for which he received multiple (concurrent) terms of life imprisonment, with parole eligibility after 15 years. Id. at ¶4. The appellant was sentenced in 2008, after the enactment of R.C. 2929.191. Id. In its sentencing entry, the trial court notified the appellant that postrelease control was mandatory "up to" a maximum of five years. Id. at ¶5. The appellant appealed, contending that the trial court failed to properly impose postrelease control because the sentencing entry stated that postrelease control was mandatory "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 is a definite term of five years. Id. at ¶8. This court determined that R.C. 2967.28(B)(1) required that the appellant's sentence include a mandatory five-year term of postrelease control, as he 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. Id. at ¶14. We

indicated that although the appellant will be on parole if he is released from prison after serving 15 years of his prison term, his mandatory postrelease control is not affected since it cannot be reduced under R.C. 2967.28(D)(2). Id. at ¶15. This court held that the trial court failed to properly impose postrelease control on the appellant in its sentencing entry, as appellant's sentence on his conviction of nine rape charges was required to include a mandatory five-year term of postrelease control. Id. at ¶18, 21.

{¶94} Although R.C. 2967.28(B)(1) was applicable to the appellant in *Gaut*, and R.C. 2967.28(B)(2) applies to Mr. Young in our case, this is a distinction without a difference as both cases involve the "up to" language regarding postrelease control and the predicate statutory language is the same: "[u]nless 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 one of the following periods: (1) For a felony of the first degree or for a felony sex offense, five years; (2) For a felony of the second degree that is not a felony sex offense, three years***" In addition, and unlike *Gaut*, also at issue is the trial court's failure to state that the parole board may impose a prison term of up to one-half of Mr. Young's prison sentence for any violation.

{¶95} We note that the state, in its appellate brief, acknowledged the trial court made "some minor deviations from the statutory language during sentencing." But the state indicated Mr. Young was aware from his signed Notice for Prison Imposition "that he was subject to a mandatory period of postrelease control for three years, and that if he violated the terms of his postrelease control he could be re-imprisoned for one half of the stated prison term." However, we stress that regardless what that written form

stated, the notifications were not properly given at either the sentencing hearing or in the trial court's sentencing entry. See *State v. O'Neil*, 11th Dist. No. 2008-P-0090, 2009-Ohio-7000, at ¶63 (holding that a trial court must properly advise a defendant regarding postrelease control at the sentencing hearing and in its judgment entry on sentence).

{¶96} Mr. Young's sentence of conviction must be corrected to include a mandatory postrelease control period of three years, not "up to" three years, and state that the parole board may impose a prison term of up to one-half of his prison sentence for any violation. R.C. 2929.19(B)(3)(c) and (e). Pursuant to R.C. 2929.191, *Singleton*, and *McKinney*, we remand this matter to the trial court for the sole purpose of preparing and issuing a correction to the judgment of conviction after conducting a limited hearing for this purpose. As noted above, upon motion of the court or either party, the court may order Mr. Young to appear at this hearing "by video conferencing equipment if available and compatible." R.C. 2929.191(C).

{¶97} Mr. Young's second assignment of error is with merit.

{¶98} For the foregoing reasons, Mr. Young's first assignment of error is without merit and his second assignment of error is well-taken. The judgment of the Trumbull County Court of Common Pleas is affirmed in part, reversed in part, and the matter is remanded for further proceedings consistent with this opinion.

THOMAS R. WRIGHT, J., concurs,

TIMOTHY P. CANNON, P.J., concurs in part and dissents in part, with Concurring/Dissenting Opinion.

TIMOTHY P. CANNON, P.J., concurring and dissenting.

{¶99} I respectfully concur in part and dissent in part from the opinion of the majority.

{¶100} The majority determines that appellant's judgment on sentence of conviction must be corrected and, thus, pursuant to R.C. 2929.191, remanded to the trial court to conduct a hearing for the purpose of correcting the improper imposition of post-release control. I believe it is only necessary to correct the sentencing entry, versus correction of improper notification to appellant. As a result, I believe this court could correct the defect by modification of the entry under R.C. 2953.08(G), or the matter may be remanded to the trial court for the purpose of having it enter a nunc pro tunc entry pursuant to R.C. 2929.191(B)(2).

{¶101} The record reflects that although the trial court issued an incorrect sentencing entry, it properly notified appellant about post-release control during the sentencing hearing. On March 30, 2009, a joint plea and sentencing hearing was held with regard to the indictment in this case. The state and appellant, through counsel, reached an agreement on the plea and disposition. There are several pertinent documents that apply to this joint hearing. The first document is entitled "Finding on Guilty Plea to the Indictment." This document fully and completely explains all issues with regard to post-release control, including the consequences of violating post-release control. It was signed by appellant on March 30, 2009, as part of the joint plea and sentencing hearing. During the hearing, the trial court directly inquired into whether appellant read the document, whether he understood the document, and whether he voluntarily signed the document. Appellant responded in the affirmative to all questions.

{¶102} The second document is a notice to appellant entitled "Notice (Prison Imposed)." This document, which was also signed by appellant as part of the hearing on March 30, 2009, fully and completely explained post-release control. The document stated that appellant "will have a period of post-release control for 3 years following your release from prison." During the hearing, the trial court inquired into whether appellant read this document, whether he understood it, and whether he voluntarily signed the document. Appellant responded affirmatively to all questions. In addition, the trial court inquired into whether appellant's counsel was satisfied that appellant knew and understood what was contained in the documents. Appellant's attorney responded in the affirmative.

{¶103} Appellant was also advised at the hearing that he was going to serve a mandatory period of post-release control "up to a maximum of 3 years." The majority notes that the phrase "up to" three years "connotes that the period is discretionary rather than mandatory." The majority then cites this court's recent decision in *State v. Gaut*, 11th Dist. No. 2010-T-0059, 2011-Ohio-1300, where the trial court notified the appellant, who was convicted of a felony of the first degree and a felony sex offense, that post-release control was mandatory "up to" a maximum of five years. Unlike the majority, I believe the distinction between *Gaut* and this case is a distinction *with* a difference. The language used by the trial court in *Gaut*, i.e., that the post-release control period was mandatory "up to" five years, is an incorrect statement of the law. Under the statutory scheme, the imposition of post-release control for a felony of the first degree cannot be reduced.

{¶104} In the instant matter, however, appellant was convicted of two felonies of the second degree and one felony of the third degree. Therefore, the language in the sentencing entry for appellant, i.e., that post-release control was "mandatory, up to three years," is actually a correct statement of the law. This is because R.C. 2967.28(D)(2) authorizes the parole board to reduce the period of post-release control:

{¶105} "If the authority recommends that the board or court reduce the duration of control for an offense described in division (B) or (C) of this section, the board or court shall review the releasee's behavior and may reduce the duration of the period of control imposed by the court. In no case shall the board or court reduce the duration of the period of control imposed for an offense described in division (B)(1) of this section to a period less than the length of the stated prison term originally imposed ***"

{¶106} The first sentence above applies to appellant in this case in that the board may reduce the period of post-release control. The reference to (B)(1), prohibiting reduction, applies to *Gaut.* As a result, I would find the language used by the trial court to be an acceptable imposition of post-release control.

{¶107} When taken as a whole, I believe the trial court satisfied the requirement that appellant be given proper notification of post-release control and the consequences for violating it at his joint plea and sentencing hearing.

{¶108} The next issue is the language in the "Entry on Sentence" signed by the trial court. In the entry on sentence, the trial court reiterated its statement that "post release control is Mandatory, in this case up to a maximum of 3 years ***."

{¶109} In addition to stating the term of post-release control, the trial court is obligated under R.C. 2929.19(B)(3)(e) to inform appellant that a violation of post-release

control could result in a maximum prison term of up to one-half of the prison term originally imposed. However, while the sentencing entry explains there are consequences for violation of post-release control conditions and appellant would have to serve "any prison term for violation of the post release control," there is no recitation that the violation could result in a term of imprisonment of up to one-half the original prison term.

{¶110} As the trial court properly advised appellant about post-release control at the sentencing hearing yet failed to issue a correct sentencing entry, I would favor either a correction by this court, pursuant to R.C. 2953.08(G)(2)(b), or a remand to the trial court to issue a nunc pro tunc entry correcting the error.