[Cite as *State v. McKenna*, 2011-Ohio-770.]

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-0001**
- vs -	:	
EVAN A. McKENNA,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 08 CR 196.

Judgment: Affirmed and remanded

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

Mark I. Verkhlin, 839 Southwestern Run, Youngstown, OH 44514 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Evan A. McKenna, appeals the Entry on Sentence of the Trumbull County Court of Common Pleas, notifying him that he is subject to mandatory post-release control "up to a maximum of 5 years." For the following reasons, we affirm the judgment of the court below.

{¶2} On March 19, 2008, McKenna was indicted by the Grand Jury for Trumbull County for one count of Sexual Battery, a felony of the third degree in violation of R.C.

2907.03(A)(5) and (B), and one count of Unlawful Sexual Conduct with a Minor, a felony of the third degree in violation of R.C. 2907.04(A) and (B)(3).

{¶3} On November 3, 2008, a change of plea hearing was held. McKenna pled guilty to Sexual Battery and the State moved the court for leave to enter a Nolle Prosequi on the count of Unlawful Sexual Conduct with a Minor. The trial court accepted McKenna's plea and granted the State's motion for Nolle.

{¶4} On December 1, 2008, a sentencing hearing was held. At the conclusion of the hearing, the trial court sentenced McKenna to imprisonment for one year, ordered him to register as a Tier III sex offender and submit to DNA testing, and notified him that he would be subject to post-release control for a period of three years following his release from prison. Pursuant to R.C. 2967.28(B)(1), McKenna is subject to a mandatory period of post-release control of five years for a felony sex offense. On December 2, 2008, the court's Entry on Sentence was journalized.

{¶5} McKenna appealed his conviction and sentence. On appeal, McKenna argued that the trial court's failure to properly advise him that he would be subject to five years of post-release control rendered his plea less than knowing, intelligent, and voluntary, i.e. invalid. *State v. McKenna*, 11th Dist. No. 2009-T-0034, 2009-Ohio-6154, at ¶75. We rejected this argument on the grounds that McKenna failed to demonstrate prejudice: "Considering the court's misstatement about the length of postrelease control against the dismissal of the felony charge [of Unlawful Sexual Conduct with a Minor], it is not reasonable to conclude that, but for the court's misstatement regarding the period of postrelease control, McKenna would not have entered his plea." Id. at ¶77.

{¶6} McKenna further argued in the prior appeal that his sentence was void, in that it failed to include the correct term of post-release control. Again, we rejected the argument, holding that McKenna's sentence was voidable rather than void. *McKenna*, 2009-Ohio-6154, at ¶84. As such, this court modified McKenna's sentence "to reflect that fact that he will be subject to postrelease control for a period of five years following his release from prison." Id. at ¶87.[1]

{¶7} On November 20, 2009, this court issued its decision in *State v. McKenna*.

{¶8} On November 23, 2009, the trial court conducted a re-sentencing hearing, pursuant to R.C. 2929.191. At the hearing, the court addressed McKenna as follows:

{¶9} There was an appeal of Mr. McKenna's conviction and the conviction was affirmed. The Appellate Court actually already put on entry modifying this, so I am going to say that this is more belt and suspenders. The issue was notification as to whether or not it was three year mandatory post-release control or five year mandatory post-release control. And for this case, it is a five year post-release control. There was no issues [sic] to the explanation, that there was any issue with the explanation of what post-release control is, but simply the number of years. So, even though we may do another entry for purposes of the penitentiary, I am literally going to read the entry of the Court of Appeals. Appellant's sentence is modified to reflect the fact that he will be subject to post-release control for a period of five years following his release from prison, originally it was a three year, and that's a mandatory.

{¶10} On November 24, 2009, the trial court issued an Entry on Sentence, re-imposing the original sentence but specifically stating that it "notified the Defendant that post release control is Mandatory in this case up to a maximum of 5 years."

{¶11} On January 4, 2010, McKenna filed a Motion for Leave to [File a Delayed] Appeal, which this court granted on March 30, 2010.

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1. The Ohio Supreme Court has subsequently observed: "Correcting a defect in a sentence without a remand is an option that has been used in Ohio and elsewhere for years in cases in which the original sentencing court, as here, had no sentencing discretion." *State v. Fischer*, __ Ohio St.3d __, 2010-Ohio-6238, at ¶29; *State ex rel. Womack v. Marsh*, __ Ohio St.3d __, 2011-Ohio-229, at ¶13 ("[n]o new sentencing hearing is required because the trial court's failure to include the postrelease-control term in the original sentencing entry was manifestly a clerical error").

{¶12} On appeal, McKenna raises the following assignments of error:

{¶13} "[1.] The Trial Court committed reversible error when [it] sentenced Appellant to a term of five-years of post-release control, when its promises during the plea colloquy and in Appellant's plea agreement were for a sentence of three-years of post-release control thereby breaching the plea agreement and allowing for specific performance or recission."

{¶14} "[2.] The Trial Court committed reversible error when it incorrectly advised Appellant of the nature of his post release control, when the correct period of post release control is a mandatory period of five years for a felony that is a sex offense pursuant to R.C. 2967.28(B)(1), making Appellant's sentence void."

{¶15} In his first assignment of error, McKenna argues the trial court breached the plea agreement whereby he was promised three years of post-release control and, therefore, he is entitled to rescind the agreement or to specific performance. McKenna acknowledges that the trial court is generally not a party to plea negotiations, but claims that, by "making a promise" regarding post-release control, the court bound itself to the terms of the agreement. *State v. Vari*, 7th Dist. No. 07-MA-142, 2010-Ohio-1300, at ¶24. We disagree.

{¶16} McKenna's argument fails in the first instance because it was this court, not the trial court, which corrected his sentence to include the mandatory five-year period of post-release control. This fact is evident from this court's prior opinion and in the trial court's comments made at the re-sentencing hearing. This court's judgment affirming McKenna's conviction and modifying his sentence was not appealed to the Supreme Court of Ohio. Therefore, these issues have become res judicata and/or the

law of the case. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3 ("the doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels"); *Hawley v. Ritley* (1988), 35 Ohio St.3d 157, 160 ("[s]ince appellant chose not to appeal the first appellate court's disposition on the assignment of error ***, such a disposition *ipso facto* became the 'law of the case,' and the appellant must endure the consequences of not appealing that decision").

{¶17} Alternatively, McKenna's argument fails because there is no evidence that a three-year period of post-release control was an inducement proffered by the trial court in exchange for plea. Both the written plea agreement and transcript of the change of plea hearing demonstrate that McKenna was advised by the trial court that mandatory post-release control would be a part of his sentence. Nowhere in the plea agreement or colloquy was there any mention made of a jointly recommended sentence. The terms on which the "underlying agreement *** is based," however, were that McKenna would undergo a pre-sentence investigation, the State would motion the court to Nolle the count of Unlawful Sexual Conduct with a Minor, and McKenna would register as a Tier III sex offender. The information provided about mandatory post-release control was provided as part of the plea colloquy to ensure that McKenna's plea would be made knowingly, intelligently, and voluntarily. It was not part of the negotiations leading to the agreement nor a promise made by the trial court. Cf. *State v. Lampson*, 10th Dist. No. 09AP-1159, 2010-Ohio-3575, at ¶¶9-10 and 13; *State v. Lewis*, 7th Dist. No. 08 CO 9, 2008-Ohio-6373, at ¶15.

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

{¶19} In his second assignment of error, McKenna argues that the trial court failed to properly impose a period of post-release control in its Entry on Sentence. Although the court correctly advised him at the November 23, 2009 re-sentencing hearing that there would be a mandatory five-year period of post-release control, the November 24, 2009 Entry on Sentence incorrectly states that post-release control is mandatory "up to a maximum of five years." Relying on *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, and *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, McKenna claims his sentence is void. We disagree.

{¶20} As with the first assignment of error, this argument fails because this court modified McKenna's sentence to include a five-year period of post-release control in our disposition of his prior appeal. 2009-Ohio-6154, at ¶87. This judgment was not appealed and is now the settled law of this case. *Nolan*, 11 Ohio St.3d at 3; *State v. Fischer*, __ Ohio St.3d __, 2010-Ohio-6238, at ¶34. As the trial court recognized, its Entry was "for purposes of the penitentiary."

{¶21} In the present situation, where the trial court correctly advises the offender at a sentencing hearing of the mandatory nature of post-release control but fails to indicate as much in its sentencing entry, the result is a clerical error which may be corrected through a nunc pro tunc entry. *State v. Harrison*, 12th Dist. Nos. CA2009-10-272 and CA2010-01-019, 2010-Ohio-2709, at ¶22 (where the "appellant was properly notified of his postrelease control obligations at the *** sentencing hearing," but "[t]he judgment entry did not reflect the notification that appellant received ***, the error in the original entry was clerical"), citing *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, at ¶19; *State ex rel. Womack v. Marsh*, __ Ohio St.3d __, 2011-Ohio-

229, at ¶14 ("[b]ecause appellant was notified of the proper term of postrelease control at his sentencing hearing and the error was merely clerical in nature, [the trial court] was authorized to correct the mistake by nunc pro tunc entry without holding a new sentencing hearing") (footnote omitted).

{¶22} For the forgoing reasons, McKenna's assignments of error are without merit. The prior judgment and opinion of this court, as set forth in *State v. McKenna*, 11th Dist. No. 2009-T-0034, 2009-Ohio-6154, remains the settled law of this case. This matter is remanded for the limited purpose of having the trial court correct the clerical error in its November 24, 2009 Entry on Sentence, remove the words "up to," and clarify that McKenna is subject to a mandatory five-year period of post-release control through the trial court's nunc pro tunc judgment entry. Judgment accordingly. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J., concurs,

MARY JANE TRAPP, J., concurs with a Concurring Opinion.

MARY JANE TRAPP, J., concurring.

{¶23} Although I concur with the majority that this matter may be remanded to correct the entry without holding another hearing, I write separately to emphasize that this disposition is appropriate only in cases such as Mr. McKenna's where it is clear from the record before the reviewing court that the trial court properly imposed and

properly articulated a term of post release control on the record at the hearing but either failed to include that period in the entry or included an incorrect term in the entry.

{¶24} Here, we have a transcript from the hearing from which it is clear that the trial court properly articulated the period of post release control. When the entry is read in light of the hearing transcript, there is no doubt that the use of the term "up to" was manifestly a clerical error.

{¶25} The Supreme Court of Ohio recently established this "manifestly a clerical error" standard in *State ex rel. Womack v. Marsh*, Slip Opinion No. 2010-1157, 2011-Ohio-229. The court held that "[b]ecause appellant was notified of the proper term of postrelease control at his sentencing hearing and the error was merely clerical in nature, [the trial court] was authorized to correct the mistake by nunc pro tunc entry without holding a new sentencing hearing." Id. at ¶14. "No new sentencing hearing is required because the trial court's failure to include the postrelease-control term in the original sentencing entry was manifestly a clerical error." Id. at ¶13.

{¶26} In a case where it is not manifest, for instance, where we are not provided with a transcript from the hearing, we must continue to follow the procedure outlined in *State v. Masterson*, 11th Dist. No. 2009-T-0064, 2010-Ohio-4939, and remand for a hearing and entry correction pursuant to R.C. 2929.191.