[Cite as *State v. Wolters*, 2014-Ohio-5515.]

STATE OF OHIO, NOBLE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 14 NO 417
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
ANTHONY W. WOLTERS,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 213-2115.
JUDGMENT:	Conviction Affirmed. Reversed and Remanded for Limited Resentencing.
APPEARANCES:	
For Plaintiff-Appellee:	Attorney Kelly A. Riddle Prosecuting Attorney 406 North Street Caldwell, OH 43724
For Defendant-Appellant:	Attorney Chandra L. Ontko 665 Southgate Parkway Cambridge, OH 43725

JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 12, 2014

[Cite as *State v. Wolters,* 2014-Ohio-5515.]
DeGENARO, P.J.

{¶1} Defendant-Appellant, Anthony W. Wolters, appeals the March 25, 2014 judgment of the Noble County Court of Common Pleas convicting him of one count of attempted gross sexual imposition and sentencing him accordingly. On appeal, he contends the sentence was an abuse of discretion. Although the trial court did not abuse its discretion regarding the sentence it imposed, the trial court erred by failing to properly notify Wolters about post-release control in the sentencing entry. Accordingly, the judgment of the trial court is affirmed in part, reversed in part and this matter is remanded pursuant to R.C. 2929.191.

Facts and Procedural History

{¶2} On September 10, 2013, the grand jury indicted Wolters on two counts of rape of a child under thirteen years of age, R.C. 2907.02(A)(1)(b) and (B), first-degree felonies; and two counts of gross sexual imposition of a child under thirteen years of age, R.C. 2907.05(A)(4) and (C)(2), third-degree felonies. Wolters was accused of molesting his girlfriend/neighbor's 10-year-old daughter, AG. Wolters was arraigned, pled not guilty and counsel was appointed.

{¶3} Wolters later entered into a Crim.R. 11 plea agreement with the State. Pursuant to the agreement, the State agreed to amend Count Two of the Indictment from gross sexual imposition, to the lesser included offense of attempted gross sexual imposition, R.C. 2907.05(A)(4) and R.C. 2923.02(A) and (E)(1), a fourth-degree felony, and dismiss the remaining three counts. In exchange, Wolters agreed to enter an *Alford* guilty plea to the amended charge. *See generally N. Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The State requested that a presentence investigation be prepared but agreed not to make a recommendation at sentencing. During the plea hearing the trial court engaged in a colloquy with Wolters concerning the rights he would give up by pleading guilty, accepted Wolters' plea as knowingly, voluntarily and intelligently made and continued sentencing so that the PSI could be prepared.

{¶4} A sentencing hearing was held on March 20, 2014, at which the State kept its promise to stand silent. The defense argued a six-month sentence should be imposed, claiming the victim had recanted her statements, indicating she fabricated a

story based on a television show episode, and that she had sent the defendant at least three letters saying she was sorry she had previously lied. One of the letters was read into the record, wherein the victim stated she "was truly sorry for making you have to go through this and waste over 4 months of your life," and "I hope you forgive me."

{¶5} The defense further argued that none of the seriousness and recidivism factors of R.C. 2929.12 applied because of the victim's recantation and because Wolters' last prior felony charge was from 1984; he had responded favorably to sanctions in the past; and even though he consumed alcohol and drugs in the past, there was no indication that they played any role in this offense. Counsel also argued that Wolters has been punished already by spending 209 days in jail and would continue to be punished because he has to register as a Tier II sex offender, while minimizing that Wolters had scored "high" on the Ohio Department of Rehabilitation and Correction's recidivism scale, noting that Wolters was at the "bottom" of the high risk range. The trial court asked Wolters if he had anything to say in mitigation of punishment. Wolters stated he did not commit the crime, and that he was a good father, but admitted to being an alcoholic and needed treatment.

{¶6} After considering the information presented at the hearing and in the PSI, the principles and purposes of sentencing along with the serious and recidivism factors, and thoroughly laying out its reasoning, the trial court sentenced Wolters to a definite term of 17 months in prison, with jail-time credit of 213 days, and he was classified as a Tier II sex offender and notified of the corresponding duties. The trial court imposed a 5 year term of mandatory post-release control during the hearing, and explained the ramifications of violating post-release control, however, the court failed to include the precise term of post-release control in the sentencing entry.

Sentence

{¶7} In his sole assignment of error, Wolters asserts:

{¶8} "The Appellant alleges that the trial court abused its discretion in sentencing the defendant, as said sentence was unreasonable."

{¶9} When reviewing a felony sentence, an appellate court first examines the

sentence to ensure that the sentencing court clearly and convincingly complied with the applicable laws. *State v. Kalish*, 120 Ohio St.3d 23, 2008–Ohio–4912, 896 N.E.2d 124, ¶4. A trial court's sentence would be contrary to law if, for example, it were outside the statutory range, in contravention to a statute, or decided pursuant to an unconstitutional statute. *Id*. at ¶15. An appellate court then reviews the trial court's sentencing decision for abuse of discretion. *Kalish* at ¶17, 19-20. "Abuse of discretion means an error in judgment involving a decision that is unreasonable based upon the record; that the appellate court merely may have reached a different result is not enough." *State v. Dixon*, 7th Dist. No. 10 MA 185, 2013–Ohio–2951, ¶21. This court has continued to apply the two-part *Kalish* test following the effective date of H.B. 86. *See, e.g., State v. Hill*, 7th Dist. No. 13 MA 1, 2014–Ohio–919, ¶20; *State v. Widdershaim*, 7th Dist. No. 13 MA 141, 2014-Ohio-4165, ¶22.

{¶10} Wolters' arguments are mainly focused on the abuse-of-discretion prong. He concedes, for example, that his sentence was within the statutory range and he is correct. *See* R.C. 2929.14(A)(4). To determine the appropriate sentence of a defendant, the trial court must consider the principles and purposes of sentencing as laid out in R.C. 2929.11 and the seriousness and recidivism factors as laid out in R.C. 2929.12. *State v. Morgan*, 7th Dist. No. 13 MA 126, 2014-Ohio-2625 at ¶10. However, the sentencing court is not required to use any specific language or note any specific findings on the record as part of his or her consideration of the principles and purposes and the seriousness and recidivism factors. *Id*.

{¶11} The trial court herein sentenced Wolters to 17 months in prison, which placed the sentence at the higher end of the possible 6 to 18 months for a fourth-degree felony. R.C. 2929.14(A)(4). The trial court expressly stated it considered the principles and purposes of sentencing as laid out in R.C. 2929.11 and the seriousness and recidivism factors as laid out in R.C. 2929.12 and it thoroughly laid out its reasoning for the chosen sentence during the hearing.

I've considered principles and purposes of sentencing, weights, serious and

recidivism factors. Um, under the serious factors, the more serious factors, the Court's going to find that the offenders [sic] relationship with the victim facilitated this offense. I find no factors in the Defendant's conduct that would indicate that this was a less serious offense. Under recidivism factors this offender has a history of criminal convictions, one felony and some misdemeanors. He shows no genuine remorse as far as I'm concerned. Under the recidivism less likely factors I don't find there to be any of them. Sentencing factors under felonies of the fourth degree, the Court's going to find that this offense was a sex offense. With all those in mind the Court feels that the imposition of community control sanctions at this time would demean the seriousness of this offense but rather a prison sentence would be appropriate. I'm going to make a couple remarks here. I have the benefit of the pre-sentence report, the statements that were made to the police and entries' in a diary prepared by the victim and with that in mind, well let me say this. I was a former prosecutor, and you know domestic cases which involved husbands and wives would frequently involve a situation where a spouse was the victim of domestic violence and within days would recant. As I say, I have read the pre-sentence report, victim statements, her diary and it would appear to the Court that this little girl had every reason to say what she said. Now, I'm told that she's recanting. I guess I'm not impressed with that. And, I have a plea to a felony sex offense and I'm going to treat it like that. We're not going to say it didn't happen, that is contrary to why we're here today. And, when you have a felony sex offense that deals with an individual under the age of 13 perpetrated by an individual who the child would look to for protection I would think, I can't think of anything that is more egregious than that.

{¶12} Based on the above, and consistent with the information in the PSI, the trial court's sentencing decision was reasonable. A lack of remorse, something that indicates

the offender is more likely to commit future crimes, *see* R.C. 2929.12(D)(5), may be considered by the trial court in sentencing even where the defendant enters an *Alford* plea and maintains his innocence. *State v. Black*, 5th Dist. No. 2005CA00041, 2005-Ohio-6063, ¶11-16; *State v. House*, 9th Dist. No. 04CA0065-M, 2005-Ohio-2397, ¶12-14; *State v. Wilson*, 6th Dist. No. OT-02-037, 2003-Ohio-3090, ¶5-6. Accordingly, Wolters' argument that the length of the sentence imposed by the trial court was an abuse of discretion is meritless.

Post-Release Control Notification

{¶13} Although not discussed by Wolters, we must nonetheless review the trial court's post-release control notification. R.C. 2967.28(B) requires that a sentencing court imposing a "sentence to a prison term for a felony of the first 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." Felony sex offenses, such as attempted gross sexual imposition, require a five-year mandatory post-release control term. R.C. 2967.28(B)(1). Additionally, R.C. 2929.19(B)(3)(e) mandates that a trial court notify a defendant at sentencing that if he violates a condition of post-release control, as a consequence, 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 defendant.

{¶14} Here, the trial court adequately notified Wolters about post-release control during the hearing, but the sentencing entry was deficient. During the sentencing hearing, the trial court stated the following:

> * * * [Upon your release] you'll be placed on post release control for a period of five years. And under those terms and conditions they'll be certain things you're allowed to do, certain things you're not allowed to do. And if when you're released you violate any of those terms you could actually be sent back to prison to serve additional time, The maximum amount of additional time that you can be ordered to serve for violating

> terms and conditions for post release control is one half of your original sentence, The original sentence is 17 month, half of that would be 8 and a half months. So you could get another 8 1/2 months in prison if you violate terms and conditions of post release control.

{¶15} However, the sentencing entry provides:

> The Court notified the Defendant that *post release control could be imposed upon the Defendant* following any term of imprisonment, and that failure to abide by terms of any post release control could result in the imposition of up to 50% of the original sentence as additional imprisonment, and the Defendant acknowledged that he understood post release control. The Court explained the concept of days of credit, and the Defendant acknowledged the same. (Emphasis added.)

{¶16} Thus, the trial court erred by failing to properly notify Wolters about post-release control in the sentencing entry. Because Wolters was sentenced after July 11, 2006, the sentence correction mechanism in R.C. 2929.191(C) applies. *See State v. Singleton*, 124 Ohio St.3d 173, 2009–Ohio–6434, 920 N.E.2d 958, ¶1; *State v. Whitted*, 7th Dist. No. 11 MA 25, 2012–Ohio–1695, ¶14. R.C. 2929.191(C) provides: "On or after July 11, 2006, 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."

{¶17} Division (A)(1) concerns the trial court's failure to notify the offender that he will be subject to post-release control after the offender leaves prison or the trial court's failure to include a statement to that effect in the sentencing entry. Division (B)(1) concerns the trial court's failure to notify the offender "regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of postrelease control or to include in the judgment of conviction entered on the journal a statement to that effect." In other words, it deals with the trial court's failure to notify the

offender about the consequences of violating post-release control.

{¶18} Here, the trial court failed to notify Wolters about the precise term of post-release control and that the term was mandatory, in the sentencing entry. Neither modification of the sentencing entry by this court to include the required language, nor a remand with direction for the trial court to issue a nunc pro tunc without a hearing, will provide an adequate remedy here, however. *See State v. Holsinger*, 7th Dist. No. 13 CO 38, 2014-Ohio-2523, ¶17.

{¶19} In *Holsinger*, the notification at the defendant's sentencing hearing—conducted well after July 11, 2006—was proper, but the sentencing entry was deficient. This court explained that a modification or a remand for a nunc pro tunc entry without a hearing was not sufficient:

> While there is a line of cases allowing for those remedies, those cases are distinguishable because the defendants were sentenced prior to July 11, 2006, thus rendering R.C. 2929.191(C) inapplicable. See *State v. Qualls*, 131 Ohio St.3d 499, 2012–Ohio–1111, 967 N.E.2d 718, at syllabus (when defendant, who was sentenced prior to the effective date of R.C. 2929.191, "is notified about post-release control at the sentencing hearing, but notification is inadvertently omitted from the sentencing entry, the omission can be corrected with a nunc pro tunc entry and the defendant is not entitled to a new sentencing hearing."); *State v. Davis*, 7th Dist. No. 10 MA 160, 2011–Ohio–6025, ¶ 11–14 (where this court remanded the case for the trial court to correct the sentencing entry to include the omitted post-release control advisement without requiring a hearing, since the defendant was sentenced prior to July 11, 2006.)

Holsinger at ¶17.

{¶20} Thus, pursuant to the statutory procedure set forth in R.C. 2929.191(C), this matter is remanded to the trial court to conduct a limited resentencing hearing on the issue of post-release control and to then issue a sentencing entry.

{¶21} In sum, the trial court did not abuse its discretion by imposing a 17 month sentence. However, the trial court erred by failing to properly notify Wolters about post-release control. Accordingly, Wolters' conviction is affirmed, and his sentence is affirmed in part and reversed in part, and pursuant to R.C. 2929.191(C) this matter is remanded to the trial court to conduct a limited resentencing hearing on the issue of post-release control.

Donofrio, J., concurs.

Waite, J., concurs.