

[Cite as *State v. Ortiz*, 2016-Ohio-4813.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 15 MA 0023
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
JONAH ORTIZ)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio
Case No. 06 CR 193

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
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For Defendant-Appellant: Atty. Andrea N. Burton
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JUDGES:

Hon. Cheryl L. Waite
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: June 29, 2016

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WAITE, J.

{¶1} Appellant Jonah Ortiz appeals a January 27, 2015 Mahoning County Common Pleas Court judgment entry denying a Crim.R. 32.1 motion to withdraw his guilty plea. Appellant argues that the trial court improperly issued a *nunc pro tunc* entry to delete an erroneous reference to postrelease control found within the original judgment entry. Appellant argues that the mention of postrelease control, for which he is ineligible, voided his sentence and entitles him to withdraw his plea or, in the alternative, a *de novo* sentence hearing. Appellant additionally argues that the trial court lacked the authority to correct the judgment through a *nunc pro tunc* entry. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On March 9, 2006, Appellant was indicted on one count of aggravated murder, an unclassified felony in violation of R.C. 2903.02(A)(D). Prior to trial, Appellant and the state entered into a Crim.R. 11 plea agreement where Appellant agreed to plead guilty to amended charges of murder and a firearm specification. On January 29, 2007, the trial court held a plea hearing. After a colloquy, the court accepted Appellant's plea and immediately proceeded to sentencing. The trial court sentenced Appellant to fifteen years to life in prison on the murder count and three years on the firearm specification. The sentences were ordered to run consecutive. On January 1, 2012, Appellant filed a *pro se* direct appeal which was *sua sponte* dismissed by this Court as it was not a final appealable order. Appellant failed to file a subsequent appeal.

{¶13} On December 22, 2014, Appellant filed a motion to withdraw his guilty plea with the trial court. The trial court denied his motion but issued a *nunc pro tunc* entry which deleted the improper mention of postrelease control from the original judgment entry. Appellant appeals the trial court's *nunc pro tunc* entry.

First and Second Assignments of Error

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE APPELLANTS [SIC] REQUEST TO WITHDRAW HIS POST SENTENCE PLEA OF GUILTY WHEN THE SENTENCE IMPOSED WAS VOID FOR ERRONEOUSLY INFORMING THE APPELLANT THAT HE WAS SUBJECT TO POST-RELEASE CONTROL (Plea and sentencing transcript, p. 8; Plea of Guilty, p. 00054-55).

THE TRIAL COURT COULD NOT CORRECT ITS VOID SENTENCE BY SIMPLY ISSUING A NON [SIC] PRO TUNC ENTRY DELETING ANY REFERENCE TO POST-RELEASE CONTROL.

{¶14} Appellant contends that the trial court erroneously denied his motion to withdraw his plea. Citing to *State v. West*, 7th Dist. No. 11 MA 33, 2012-Ohio-2758, he argues that, as acknowledged by the trial court, postrelease control does not apply to murder. As a trial court is not authorized to impose postrelease control on a defendant convicted of murder, Appellant contends that his sentence is unlawful and void. Accordingly, Appellant urges that he is entitled to receive a *de novo* resentencing hearing.

{¶5} Appellant also claims that a trial court can only issue a *nunc pro tunc* entry to reflect what the court actually expressed on the record but failed to properly journalize. As the trial court imposed postrelease control at the sentencing hearing, and what was expressed on the record was in fact journalized, Appellant argues a *nunc pro tunc* entry was inappropriate. To correct the error, the trial court is limited to granting Appellant a new trial or resentencing hearing.

{¶6} In response, the state contends that in order to be entitled to withdraw his plea, Appellant must show a manifest injustice. Here, the state argues that this burden was not met as the erroneous reference to postrelease control was removed from the entry. The state further contends that the trial court used the proper remedy, which is removal of the reference to postrelease control.

{¶7} Generally, a motion to withdraw a plea must be made prior to sentencing. *State v. Foose*, 7th Dist. No. 11 MA 206, 2012-Ohio-6273, ¶ 4-6. However, a trial court is permitted to allow a defendant to withdraw his plea to correct a manifest injustice. *Id.* at ¶ 5, citing Crim.R. 32.1. When a defendant seeks to withdraw a guilty plea after a sentence has been imposed, he bears the burden of demonstrating the existence of manifest injustice. *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. “The logic behind this precept is to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdraw the plea if the sentence was unexpectedly severe.” *Foose* at ¶ 6, citing *State v. Caraballo*, 17 Ohio St.3d 66, 67, 47 N.E.2d 627 (1985).

{¶18} Appellant argues that, pursuant to *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, an erroneous reference to postrelease control entitles a defendant to withdraw his plea. However, according to *Clark*, in order to withdraw a plea, a defendant must first demonstrate prejudice. *Id.* at ¶40. The test for prejudice is “whether the plea would have otherwise been made.” *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶19} Appellant does not argue that he would not have entered the plea but for the erroneous reference to postrelease control. At oral argument, Appellant essentially admitted that there is nothing within the record to demonstrate prejudice or a manifest injustice. As such, Appellant is not entitled to withdraw his plea. As Appellant is not permitted to withdraw his plea, the question then becomes whether he is entitled to some form of resentencing hearing.

{¶10} As the Fifth District has noted, R.C. 2929.191 was enacted to correct postrelease control in specified situations. *State v. Brister*, 5th Dist. No. 13 CA 21, 2013-Ohio-5874. However, the situation presented here is not one of those situations. In the absence of a statute, caselaw has addressed this issue. In a factually analogous case, the Fifth District held that an incorrect reference to postrelease control does not render a sentence void, nor does it require a *de novo* sentencing hearing. *Id.* at ¶ 16. As the improper reference to postrelease control was corrected through a *nunc pro tunc* entry, the Court determined that the error had been remedied. See also *State v. Johnston*, 2d Dist. No. 26620, 2015-Ohio-4716 (when a judgment entry contains an incorrect reference to postrelease control, the

only remedy available is to amend the entry); *State v. Rolling*, 8th Dist. No. 95473, 2011-Ohio-121 (the remedy for an improper mention of postrelease control is to correct the sentence and delete the reference to postrelease control).

{¶11} While Appellant cites to *State v. Crockett*, 7th Dist. No. 11 MA 24, 2009-Ohio-2894, *Crockett* was released before *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332. Post-*Fischer*, we have held that there is no need to resentence a defendant as to postrelease control when only that portion of the sentence is erroneous and the remainder of the sentence remains in force. *West, supra*, at ¶ 49, citing *State v. Silguero*, 10th Dist. No. 11 AP-274, 2011-Ohio-6293, ¶ 11, 16; *State v. Evans*, 8th Dist. No. 95692, 2011-Ohio-2153, ¶ 10.

{¶12} As the remedy for an improper reference to postrelease control is to delete the reference and the trial court has already done so, the error has been remedied to the extent allowed by law. Accordingly, Appellant's arguments are without merit and are overruled.

Conclusion

{¶13} Appellant argues that he is entitled to either withdraw his plea, or in the alternative, to be resentenced, due to an improper reference to postrelease control in a judgment entry. However, the trial court has already corrected this error through the appropriate remedy. Accordingly, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

DeGenaro, J., concurs.

Robb, J., concurs.

