

[Cite as *State v. Baird*, 2016-Ohio-8211.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	
PLAINTIFF-APPELLEE,)	
)	CASE NO. 15 MA 0155
V.)	
)	OPINION
JOSHUA BAIRD,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 02 CR 1180
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JUDGMENT:	Reversed
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APPEARANCES:	
For Plaintiff-Appellee	Paul Gains Prosecutor Ralph Rivera Assistant Prosecutor 21 West Boardman Street, 6 th Floor Youngstown, Ohio 44503-1426

For Defendant-Appellant	Attorney Rhys Cartwright-Jones 42 North Phelps Street Youngstown, Ohio 44503-1130
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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Carol Ann Robb

Dated: December 12, 2016

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DONOFRIO, P.J.

{¶1} Defendant-appellant, Joshua Baird, appeals from a Mahoning County Common Pleas Court judgment denying his motion to vacate his postrelease control and terminate his supervision.

{¶2} In August 2004, appellant pleaded guilty to one count of rape pursuant to a plea agreement with plaintiff-appellee, the State of Ohio. The parties jointly recommended that the trial court sentence appellant to the maximum ten-year sentence for the rape count, to be served concurrent to a sentence that had already been imposed against him in Columbiana County. The trial court accepted the plea and sentenced appellant in accordance with the recommendation.

{¶3} Appellant filed a direct appeal from his conviction and sentence challenging the validity of his sentence and his counsel's effectiveness. *State v. Baird*, 7th Dist. No. 06 MA 53, 2007-Ohio-4991. This court affirmed the trial court's judgment.

{¶4} On August 8, 2014, appellant was released from prison and placed on postrelease control for a mandatory term of five years. Appellant then filed a petition for a writ of habeas corpus alleging that he was in the custody of the Mahoning County Justice Center on a purported violation of postrelease control. He asserted the sentencing courts in both the present case and the case from Columbiana County never validly sentenced him to postrelease control. He further argued the Adult Parol Authority (APA) could not lawfully subject him to postrelease control upon his release from prison because he had effectively completed his term upon release.

{¶5} This court denied appellant's petition. *Baird v. Greene*, 7th Dist. No. 14 MA 158, 2015-Ohio-1366. We found,

the sentencing courts in both cases advised Petitioner [appellant] at the sentencing hearings that he would be subject to a period of postrelease control by the APA upon his release from prison. While Petitioner challenges the adequacy of those advisements, the advisements were nonetheless sufficient to allow the APA to exercise postrelease control. Additionally, Petitioner had an adequate remedy by way of appeal to

challenge the adequacy of those advisements through direct appeal.

Id. at ¶ 7.

{¶6} On May 28, 2015, appellant filed a motion in the trial court to vacate postrelease control and terminate supervision. Appellant argued the trial court failed to properly impose postrelease control in the judgment entry of sentence. He stated he completed his prison term and was being supervised under a void postrelease control order. The trial court overruled appellant's motion.

{¶7} Appellant filed a timely notice of appeal on September 9, 2015. He now raises a single assignment of error. Appellant's assignment of error states:

THE TRIAL COURT ERRED IN NOT VACATING APPELLANT-BAIRD'S POSTRELEASE SENTENCE.

{¶8} Appellant argues the trial court was required to, and failed to, advise him regarding postrelease control in his judgment entry of sentence. He asserts the court did not notify him of the mandatory nature of the postrelease control term or its length. Additionally, he asserts the court did not notify him that if he violated the conditions of postrelease control the parole board could impose a prison term of up to one-half of the original prison term. Appellant argues the trial court's failure to provide him with proper notices renders the postrelease control portion of his sentence void. He further argues that because he has completed his prison term, he cannot be resentenced to correct postrelease control errors. Therefore, appellant asks this court to vacate his postrelease control and order his release from supervision.

{¶9} A trial court must provide proper advice to a defendant regarding postrelease control at the time of sentencing, including notifying the defendant of the details of the postrelease control and the consequences of violation. *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 18. Additionally, the trial court must include the postrelease control advice in the sentencing entry to reflect the

notification it gave at the sentencing hearing. *Id.* at ¶ 19.

{¶10} “A sentence that does not include the statutorily mandated term of postrelease control is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack.” *State v. Billiter*, 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960, ¶ 7, quoting *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, paragraph one of the syllabus.

{¶11} In this case, appellant does not take issue with the postrelease control advisements the trial court gave at his sentencing hearing. His only contention is that the trial court did not include the proper postrelease control advice in his sentencing judgment entry. As to postrelease control, the judgment entry states only: “The Defendant has been given notice under R.C. 2929.13(B)(3) and of appellate rights under R.C. 2953.08.” At the time of appellant’s sentencing, R.C. 2929.13(B)(3) contained the required postrelease control advisements. Thus, the court’s only reference to postrelease control in the sentencing entry was to state that it gave appellant the notice required by the postrelease control statute.

{¶12} In support of its position, the state relies on our findings in *Baird v. Green*, 2015-Ohio-1366. But that case involved a habeas corpus petition, so our review was different than it is here. In *Baird v. Green*, we prefaced our findings by referring to the standards regarding postrelease control claims that come up in habeas petitions:

The Ohio Supreme Court has previously explained that petitioners claiming that they did not receive proper notification about postrelease control at the sentencing hearing have an adequate remedy by way of a direct appeal from the sentence. *Patterson v. Ohio Adult Parole Auth.*, 120 Ohio St.3d 311, 2008-Ohio-6147, 898 N.E.2d 950, ¶ 8. Moreover, when a petitioner has been advised that they would be subject to some term of postrelease control, habeas is not an available remedy. *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-

5082, 857 N.E.2d 78.

Id. at ¶ 6. And we noted that appellant had an adequate remedy by way of appeal to challenge the adequacy of the advisements through direct appeal. *Id.* at ¶ 7. Thus, on appellant's habeas petition, we were simply looking at whether appellant had been advised of some period of postrelease control, which he was at his sentencing hearing.

{¶13} Moreover, in his habeas petition, appellant challenged the postrelease control advisements given at his sentencing hearing in both this case and in his Columbiana case. He did not actually challenge his sentencing judgment entry. Appellant argued "the sentencing courts * * * never validly sentenced him to postrelease control since they did not provide him the proper advisements about postrelease control." *Id.* at ¶ 4. We found the sentencing courts in both cases advised appellant "at the sentencing hearings that he would be subject to a period of postrelease control by the APA upon his release from prison. While Petitioner challenges the adequacy of those advisements, the advisements were nonetheless sufficient to allow the APA to exercise postrelease control." *Id.* at ¶ 7. Neither this court nor appellant ever mentioned the sentencing judgment entry or whether it contained the proper postrelease control advisements.

{¶14} Thus, *Baird v. Green* is not controlling here as the state asserts.

{¶15} This court faced the identical issue we are faced with in this case in *State v. Bundy*, 7th Dist. No. 12 MA 86, 2013-Ohio-2501. In that case, Bundy was released from prison after serving a ten-year term and was placed on five years of postrelease control. Shortly thereafter, Bundy filed a motion to terminate postrelease control arguing that the trial court failed to properly notify him of postrelease control in his judgment entry of sentence or at his sentencing hearing. Because he had already completed his prison term, Bundy argued the error could not now be corrected. The trial court denied Bundy's motion and entered a nunc pro tunc judgment entry of sentence that included the proper postrelease control advice. The trial court noted that Bundy's original judgment entry of sentence did include

language that Bundy “was advised” pursuant to the postrelease control statute. Bundy appealed.

{¶16} On appeal, we found that the trial court properly advised Bundy of postrelease control at his sentencing hearing. *Id.* at ¶ 11. But we found the only mention of postrelease control in the original sentencing judgment entry was that Bundy “was also advised pursuant to [the postrelease control statute.]” *Id.* at ¶ 12.

{¶17} We then examined the Ohio Supreme Court’s decision in *Qualls*, 131 Ohio St.3d 499. We cited to one of the principals set out by the Court, which we found to be extremely relevant:

That principle is, “unless a sentencing entry that did not include notification of the imposition of postrelease control is corrected *before the defendant completed the prison term for the offense for which postrelease control was to be imposed*, postrelease control cannot be imposed.” (Emphasis sic.)

Id. at ¶ 16, quoting *Qualls*, at ¶ 16. Relying on this principle along with other factually similar cases from the First and Ninth Districts, we found that the trial court must correct any error regarding postrelease control in the sentencing judgment entry before the offender is released from prison. *Id.* at ¶ 30. Therefore, we held the trial court had no authority to enter the nunc pro tunc judgment entry and we ordered that Bundy was to be released from his term of postrelease control. *Id.*

{¶18} This case is almost identical to *Bundy*. Therefore, we conclude that the trial court erred in overruling appellant’s motion to vacate his postrelease control and terminate his supervision. His sentencing judgment entry does not contain either of the two required postrelease control advisements. It does not advise appellant of the details of the postrelease control nor does it advise him of the consequences of violation. A judgment entry of sentence that includes a term of postrelease control *must* advise the defendant of the details of the postrelease control and the consequences of violation. *Qualls*, 131 Ohio St.3d at ¶ 18-19; *State v. Smith*, 9th

Dist. No. 15CA010778, 2016-Ohio-4688, ¶ 7; *State v. Duncan* 1st Dist. No. C-120324, 2013-Ohio-381, ¶ 8; *Bundy*, 2013-Ohio-2501, ¶ 29-30. And because appellant has already completed his prison term, a nunc pro tunc entry is not a proper remedy here.

{¶19} Accordingly, appellant's sole assignment of error has merit and is sustained.

{¶20} For the reasons stated above, the trial court's judgment is hereby reversed. Appellant is discharged from postrelease control supervision.

Waite, J., concurs.

Robb, J., concurs.