

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-08-017
- vs -	:	<u>OPINION</u>
	:	10/15/2012
GEORGE HALE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case Nos. 2011-2139 and 2011-2075

Jessica A. Little, Brown County Prosecuting Attorney, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

Julie D. Steddom, 134 North Front Street, Ripley, Ohio 45167, for defendant-appellant

YOUNG, J.

{¶ 1} Defendant-appellant, George Hale, appeals from a Brown County Court of Common Pleas decision convicting him of two charges of gross sexual imposition. Hale challenges the trial court's sentence imposing a condition as a part of a postrelease control sanction.

{¶ 2} Hale was indicted in case number 2011-2075 on one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), where the victim was less than 13 years of age.

He initially entered a plea of not guilty, but later withdrew his not guilty plea and pled guilty to the offense charged in the indictment. At the same time, Hale also entered a guilty plea to a second charge of gross sexual imposition where the child was less than 13 years of age in case number 2011-2139. While Hale had not yet been indicted on the second charge, he signed a waiver of indictment.

{¶ 3} At a sentencing hearing, Hale was sentenced to the statutory maximum of five years in prison on each offense to run consecutively. The trial court considered the purposes and principles of sentencing and classified Hale as a Tier II sex offender. The trial court also notified Hale that he would be subject to a mandatory term of five years of postrelease control, that he would be required to obey the terms and conditions of postrelease control imposed by the Adult Parole Authority or the parole board, and the consequences for violating postrelease control or committing a felony while on postrelease control. In addition to advising Hale of these requirements, the trial court imposed an additional condition which is included in the sentencing entries of both cases: the trial court prohibited Hale from having any unsupervised contact with minors, including cohabitation with any person who has minor children. Each entry stated:

The offender shall not obtain employment at, nor enter into any establishment or area where minors are likely to be present or employed. This includes, but is not limited to, establishments and areas such as parks, playgrounds, schools, amusement parks, video arcades, pool halls, roller rinks, fast food restaurants, and other like facilities.

{¶ 4} While one sentencing entry contains an exception to the above condition for "occupation, education, or other legitimate purposes," the other sentencing entry does not include an exception. Furthermore, the trial court emphasized at the sentencing hearing that no exception was to apply to Hale.

{¶ 5} Hale now appeals, and raises one assignment of error for review.

{¶ 6} THE TRIAL COURT ERRED TO THE PREJUDICE OF [HALE] WHEN IT IMPOSED A POST-RELEASE [sic] CONDITION UPON HIM THAT WAS UNREASONABLY RESTRICTIVE AND OVERBROAD, THEREBY DENYING [HALE] HIS RIGHTS IN VIOLATION OF THE FIRST, FIFTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS ONE, THREE, SEVEN, AND SIXTEEN, OF THE OHIO CONSTITUTION.

{¶ 7} Hale argues that he was prejudiced by the trial court's imposition of a postrelease control condition that was unreasonably restrictive and overbroad. Specifically, he asserts that the trial court's failure to provide exceptions to the order that he "not obtain employment at, nor enter into any establishment or area where minors are likely to be present or employed," prevents him from legitimately attending religious ceremonies, working at business establishments, and shopping for necessities. Hale does not allege any other error regarding sentencing.

{¶ 8} First, we note that while Hale contests the imposition of a postrelease control condition, he only refers to case law regarding community control conditions. The sentencing entries can be read as imposing a community control condition. However, the state points out, and we agree, that because Hale was sentenced to consecutive prison terms, he is not eligible for community control. See *State v. Miller*, 12th Dist. No. CA2010-12-336, 2011-Ohio-3909, ¶ 19-20. Also, at the sentencing hearing the trial court indicated that Hale would be subject to this condition upon release. Consequently, we construe the condition imposed by the trial court as a postrelease control condition. Any reference in the sentencing entries to community control is improper.

{¶ 9} Appellate review of felony sentencing is controlled by the two-step procedure outlined by the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. Under *Kalish*, this court must (1) examine the sentencing court's compliance with all

applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law, and if so, (2) review the sentencing court's decision for an abuse of discretion. *Id.* at ¶ 4; *State v. Blanton*, 12th Dist. No. CA2008-09-235, 2009-Ohio-3311, ¶ 18. When imposing a sentence, the "court must be guided by statutes that are specific to the case itself." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶ 10} The Ohio Supreme Court has stated that the Adult Parole Authority has absolute discretion over matters concerning postrelease control. *Woods v. Telb*, 89 Ohio St.3d 504, 512 (2000). R.C. 2967.28(D)(1) addresses the imposition of postrelease control sanctions and conditions. In addition to the parole board, the statute allows a court to impose postrelease control sanctions "pursuant to an agreement under section 2967.29 of the Revised Code." R.C. 2967.28(D)(1). R.C. 2967.29(A) provides that

A court of common pleas may cooperate with the department of rehabilitation and correction in the supervision of offenders who *return* to the court's territorial jurisdiction *after serving a prison term*. The court, after consultation with the board of county commissioners, may enter into an agreement with the department allowing the court and the parole board to make joint decisions relating to parole and post-release control to the extent permitted by section 2967.28 of the Revised Code.

(Emphasis added.)

{¶ 11} In this case, at the time of sentencing, the judge was required to inform Hale that he would be subject to a mandatory five years of postrelease control and of the consequences for violating postrelease control. See *State v. Prom*, 12th Dist. No. CA2002-01-007, 2003-Ohio-6543, ¶ 17; *State v. Brown*, 8th Dist. No.80725, 2002-Ohio-5468. The judge lacked authority at the time of Hale's sentencing to impose specific conditions of postrelease control. See R.C. 2967.29(A); *Brown*; *State v. Peters*, 5th Dist. No.2011-CA-0098, 2012-Ohio-1116; *State v. Sparks*, 4th Dist. No.03CA21, 2003-Ohio-6300. Consequently, the condition imposed was contrary to law. We accordingly sustain Hale's

sole assignment of error to the extent he argues that the trial court erred when it imposed a postrelease control condition.

{¶ 12} The Ohio Constitution, Article IV, Section 3(B)(2), provides in part that "[c]ourts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district." See *also* R.C. 2953.07; App.R. 12(A)(1)(a). Because the trial court did not have authority to impose a condition regarding postrelease control at the time of sentencing, the language of the condition set out in the sentencing entries has no force or effect. See *State v. Theile*, 2nd Dist. No. CA24898, 2012-Ohio-3837, ¶ 8-9. Additionally, Hale faces no prejudice from a modification of his sentencing entries without a hearing because we are removing language he alleges is overbroad, subjecting him to fewer restrictions. See *State v. Johns*, 11th Dist. No. 2011-A-0003, 2012-Ohio-864, ¶ 42. Consequently, the trial court's sentencing entries in case numbers 2011-2139 and 2011-2075 dated August 1, 2011 are modified as follows: all language referring to community control is stricken, and any language imposing conditions or granting exceptions to postrelease control is stricken.

{¶ 13} Judgment affirmed as modified.

HENDRICKSON, P.J., and PIPER, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.