

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23062
v.	:	T.C. NO. 1999 CR 0984
	:	
GREGORY J. GIMBRONE	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 25th day of November, 2009.

MICHELE D. PHIPPS, Atty. Reg. No. 0069829, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

JAMES S. ARMSTRONG, Atty. Reg. No. 0020638, 131 N. Ludlow Street, Suite 1311 Talbott Tower, Dayton, Ohio 45402
Attorney for Defendant-Appellant

FROELICH, J.

{¶ 1} Gregory J. Gimbrone appeals from a judgment on the Montgomery County Court of Common Pleas, which, pursuant to R.C. 2929.191, resentenced him in order to properly notify him of post-release control. Gimbrone claims that the trial court erred in imposing post-release control and in notifying that “bad time” may be added to his sentence.

For the following reasons, the judgment will be affirmed, as modified, and the matter will be returned to the trial court for the limited purpose of notifying the Adult Parole Authority of the modified sentence.

I

{¶ 2} In 1999, Gimbrone pled guilty by a bill of information to one count of rape, in violation of R.C. 2907.02(A)(2), an aggravated felony of the first degree. The bill of information stated that the offense occurred between September 29, 1995, and June 30, 1996. In accordance with the sentencing statute in effect prior to July 1, 1996, the trial court sentenced Gimbrone to an indefinite term of imprisonment of eight to twenty-five years. The court also advised him that “bad time” may be added to his sentence by the parole board and that, following his release from prison, he “will/may serve a period of post-release control under the supervision of the parole board[.]” Gimbrone was designated a sexually oriented offender.

{¶ 3} In October 2008, Gimbrone was brought before the trial court for resentencing, pursuant to R.C. 2929.191. The court re-imposed the same indefinite sentence of eight to twenty-years, designated him a sexually oriented offender, and informed him about “bad time.” With regard to post-release control, the new sentencing entry stated: “Pursuant to ORC 2929.191, the defendant was brought before the court on October 21, 2008, at which time the Court notified the defendant that, as a part of this sentence, the defendant WILL be supervised by the Parole Board for a period of FIVE (5) years Post-Release Control after the defendant’s release from imprisonment.”

{¶ 4} Gimbrone appeals from his sentence, arguing that the court’s addition of “bad

time” and a mandatory period of post-release control was contrary to law and beyond the court’s authority. He asserts that Am.Sub.S.B. 2, which added provisions concerning post-release control and bad time, did not apply to him, because his offense occurred prior to July 1, 1996, the effective date of S.B. 2. The State agrees with Gimbrone that the provisions of S.B. 2 concerning bad time and post-release control do not apply to him, because his offense occurred before the effective date of S.B. 2. The State asserts that “the portions of the judgment entry that refer to bad time and post-release control are void and should be stricken.” We agree with both parties that the trial court’s resentencing was erroneous.

{¶ 5} With the enactment of S.B. 2, the General Assembly made significant changes to Ohio’s criminal sentencing scheme, effective July 1, 1996. In *State v. Rush*, 83 Ohio St.3d 53, 1998-Ohio-423, the Supreme Court made clear that the amended sentencing provisions of S.B. 2 applied only to those crimes committed on or after July 1, 1996. *Id.* at paragraph two of the syllabus.

{¶ 6} Both Gimbrone’s original and 2008 sentence appear to include “bad time.” Bad time was not part of the pre-S.B. 2 sentencing scheme, and it should not have been included in the original sentence. See *State v. Bailey* (May 18, 1999), Franklin App. No. 97-APA06-754. Moreover, the Supreme Court of Ohio has held that the “bad time” statute, R.C. 2967.11, is unconstitutional as violative of the separation of powers doctrine. *State ex rel. Bray v. Russell* (2000), 89 Ohio St.3d 132. The Court reasoned that “[t]he determination of guilt in a criminal matter and the sentencing of a defendant convicted of a crime are solely the province of the judiciary.” *Id.* at 136. While “[p]rison discipline is an

exercise of executive power ***, trying, convicting, and sentencing inmates for crimes committed while in prison is not an [appropriate] exercise of executive power.” Id. Accordingly, the trial court did not properly include “bad time” in its resentencing entry.

{¶ 7} “Post-release control,” in its current form, also did not exist prior to S.B. 2. Before S.B. 2, certain offenders, including those who committed first-degree felonies, were subject to post-release supervision, called parole. See *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171. “In place of parole, SB 2 introduced the concept of postrelease control, which is mandatory for some offenders and is imposed at the discretion of the Parole Board for others. Id.; R.C. 2967.28.” *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, at ¶11. “Post-release control” involves a period of supervision by the Adult Parole Authority after an offender’s release from prison that includes one or more post-release control sanctions imposed under R.C. 2967.28. R.C. 2967.01(N).

{¶ 8} As with “bad time,” the trial court’s original sentence stated that Gimbrone would be subject to post-release control upon his release from prison, even though post-release control did not exist under the pre-S.B. 2 sentencing scheme. As reflected in the 2008 sentencing entry, the trial court clarified at the resentencing hearing that Gimbrone would be subject to five years of post-release control after his release from prison. Because Gimbrone’s offense occurred prior to the effective date of S.B. 2, he was not subject to the post-release control provisions of S.B. 2, and the trial court erred in imposing post-release control at resentencing.

{¶ 9} The assignment of error is sustained.

{¶ 10} The portions of the sentencing entry that informed Gimbrone that “bad time” may be added to his sentence and that he is subject to post-release control will be vacated. The sentence will be modified by vacating its provisions concerning “bad time” and post-release control and, as modified, the judgment will be affirmed. The case will be returned to the trial court on our special mandate to notify the Adult Parole Authority of the modified sentence.

.....

FAIN, J. and GRADY, J., concur.

Copies mailed to:

Michele D. Phipps
James S. Armstrong
Adult Parole Authority
Hon. Frances E. McGee