

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Julie A. Edwards, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2007-CA-00085
JACOB G. JOHNSON	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Licking County Court of Common Pleas, Case No. 2001-CR-0081

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: April 28, 2008

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

KENNETH W. OSWALT  
Licking County Assistant Prosecutor  
20 S. Second Street  
Newark, OH 43055

CHRISTOPHER M. SHOOK  
33 W. Main Street  
Box 4190  
Newark, OH 43058-4190

*Gwin, P.J.*

{¶1} Defendant-appellant Jacob G. Johnson appeals the June 18, 2007, judgment entry of the trial court in which the court re-sentenced appellant in order to advise him of his post-release control obligations. Plaintiff-appellee is the State of Ohio.

#### STATEMENT OF THE FACTS AND CASE

{¶2} On March 2, 2001, appellant was indicted in the Licking County Court of Common Pleas, Case No. 2001-CR-0081, on one count of Aggravated Robbery, in violation of R.C. 2911.01 (A)(3), a felony of the first degree.

{¶3} On June 26, 2001, the State of Ohio amended the sole count of the indictment to Robbery, in violation of R.C. 2911.02(A) (2), a felony of the second degree. The appellant entered a plea of Guilty to the sole count of the indictment as amended. The appellant was found guilty and sentenced to four (4) years in prison, to be served consecutively to the sentence from Licking County Court of Common Pleas, Case No. 2000-CR-403. The Judgment Entry did not contain any reference to the post-release control provision set forth by R.C. 2967.28.

{¶4} On May 18, 2007, the State of Ohio filed a motion for a "Corrected Judgment Entry" pursuant to R.C. Section 2929.191 noting that the original judgment entry failed to set forth a term of post-release control. The appellant, through counsel, filed a memorandum objecting to the motion.

{¶5} The Trial Court held a hearing on the motion June 15, 2007. At the hearing, counsel for appellant argued additionally that the motion should be denied because the prior sentences in Licking County Court of Common Pleas, Case Nos. 2000-CR-403-and 2001-CR-0081 were void for failure to incorporate post-release

control. The Trial Court granted the State's motion at the hearing, imposing "five years of post-release control on a nunc pro tunc judgment entry in 01 CR 081." (T. at 7). By Judgment Entry filed June 18, 2007, appellant was sentenced to a post-release control period of three (3) years pursuant to the mandatory period set forth by R.C. 2929.191.

{¶16} Appellant has timely appealed setting forth the following three assignments of error:

{¶17} "I. THE TRIAL COURT ERRED BY ISSUING AN ORDER OF A CORRECTED SENTENCE FOR POST-RELEASE CONTROL RATHER THAN RE-SENTENCING THE APPELLANT BECAUSE THE ORIGINAL SENTENCE WAS VOID.

{¶18} "II. THE TRIAL COURT ERRED BY SENTENCING THE APPELLANT CONSECUTIVE TO A VOID SENTENCE.

{¶19} "III. THE TRIAL COURT ERRED BY CONDUCTING AN AFTER-THE-FACT CORRECTED SENTENCING HEARING FOR POST-RELEASE CONTROL PURPOSES IN VIOLATION OF THE DEFENDANT APPELLANT'S RIGHTS TO DUE PROCESS, DOUBLE, JEOPARDY, AND EX POST FACTO CLAUSES OF THE OHIO AND UNITED STATES CONSTITUTIONS."

I.

{¶110} In his first assignment of error appellant argues that the trial court erred because it failed to conduct a new sentencing hearing before ordering a period of post-release control. We agree.

{¶111} In *State v. Bezac*, 114 Ohio St.3d 94, 868 N.E. 2d 961, 2007-Ohio-3250, the Ohio Supreme Court held, "[w]hen a defendant is convicted of or pleads guilty to one or more offenses and post-release control is not properly included in a sentence

for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense.”

{¶12} More recently, in *State v. Simpkins*, 117 Ohio St. 3d \_\_\_, 2008-Ohio-1197, the State moved to resentence the defendant prior to his release from incarceration for convictions of rape and gross sexual imposition. Following a hearing, the Court of Common Pleas, Cuyahoga County, resentedenced defendant to the same period of imprisonment but adding five years of post-release control. The defendant appealed arguing that the decision in *Hernandez v. Kelley*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, did not support the after-the-fact resentencing of a defendant who has nearly completed his sentence. The Ohio Supreme Court affirmed the Eighth District Court of Appeals and held, “[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which post-release control is required, but not properly included in the sentence, the sentence is void and the state is entitled to a new sentencing hearing in order to have post-release control imposed on the defendant unless the defendant has completed his sentence.” *Id.* at paragraph one of the syllabus.

{¶13} In the case at bar, the State of Ohio properly concedes that appellant’s case must be remanded to the trial court for resentencing.

{¶14} Accordingly, appellant’s first assignment of error is sustained.

{¶15} Section 3(B) (2), Article IV of the Ohio Constitution and R.C. 2953.07, gives an appellate court the power to affirm, reverse, or modify the judgment of an inferior court. R.C. 2953.07 specifically provides that “[t]he appellate court may remand the accused for the sole purpose of correcting a sentence imposed contrary to law....” On the authority contained in Section 3(B) (2), Article IV of the Ohio Constitution and

R.C. 2953.07 appellant's sentence is vacated and this case is remanded to the trial court for a new sentencing hearing.

II.

{¶16} In his second assignment of error appellant argues that the trial court cannot order the sentence in this case to run consecutively to a sentence in a previous case that is also void for failing to include a period of post release controls.

{¶17} In light of the fact that the appellant will receive a new sentencing hearing, we find appellant's second assignment of error to be premature. This question will not be ripe for review unless and until the trial court orders the sentence in this case to run consecutively to a sentence in another case.

III.

{¶18} In his third assignment of error, appellant maintains that resentencing him violates the double jeopardy provisions of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. We disagree.

{¶19} In *Simpkins*, supra, the Ohio Supreme Court further noted that since *Simpkins* did not have a legitimate expectation of finality in his sentence, he could be resentenced without offending the Double Jeopardy or Due Process Clauses. *Id.* at ¶ 37. Accordingly, appellant's third assignment of error is overruled.

{¶20} For the foregoing reasons, the judgment of the Court of Common Pleas of Licking County, Ohio, is reversed, and on the authority contained in Section 3(B) (2), Article IV of the Ohio Constitution and R.C. 2953.07 appellant's sentence is vacated, and this case is remanded to the trial court for a new sentencing hearing in accordance with the Ohio Supreme Court's dictates in *Bezac* and *Simpkins*, supra.

By Gwin, P.J.,

Edwards, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY

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