

[Cite as *State v. McCornell*, 2010-Ohio-3086.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93274

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VOLTAIRE MCCORNELL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-520113

BEFORE: Gallagher, A.J., Rocco, J., and Blackmon, J.

RELEASED: July 1, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, Voltaire McCornell, appeals the sentence imposed by the Cuyahoga County Court of Common Pleas. For the reasons stated herein, we uphold the prison sentence imposed by the trial court, but remand for the trial court to correct the error in postrelease control by applying the procedures set forth in R.C. 2929.191.

{¶ 2} Appellant was charged under a multi-count indictment with felonious assault, domestic violence, two counts of endangering children, and intimidation. He pled guilty to the charges, and the trial court sentenced him to a total aggregate prison term of 13 years.

{¶ 3} Appellant has appealed his sentence and has raised two assignments of error for our review. His first assignment of error provides as follows: “I: Appellant is entitled to a de novo sentencing hearing as the court did not properly impose a specific term or period of postrelease control at the sentencing hearing.”

{¶ 4} Trial courts have a duty to notify a felony offender at the sentencing hearing about postrelease control. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 17. The failure to do so results in a sentence that is contrary to law and void, and the cause must be remanded for resentencing. *Id.* at ¶ 23, 27.

{¶ 5} In this case, appellant’s plea and sentencing occurred together at the same hearing. Before taking appellant’s plea, the court informed appellant of the charges against him, the maximum penalty for the charges, and postrelease control.

{¶ 6} The trial court indicated that the charges against appellant included one felony of the second degree, two felonies of the first degree, and two misdemeanors. The trial court advised appellant that “[b]ecause this is a crime of violence, postrelease control will be part of your sentence” and that “upon your release from prison, the Ohio Parole Board can impose a period of postrelease control not to exceed 3 years.”

{¶ 7} The problem in this case is not that the court failed to mention postrelease control at the sentencing hearing, but that the court did not properly advise appellant of postrelease control. Because of his convictions, appellant is subject to postrelease control for a mandatory term of three years. R.C. 2967.28(B)(2) and (3).

{¶ 8} Accordingly, appellant must be resentenced pursuant to the sentence-correction mechanism of R.C. 2929.191 to the correct term of postrelease control. See *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph two of the syllabus. Notably, appellant is not entitled to a de novo sentencing hearing. As the Ohio Supreme Court recognized in *Singleton*: “[t]he hearing contemplated by R.C.

2929.191(C) and the correction contemplated by R.C. 2929.191(A) and (B) pertain only to the flawed imposition of postrelease control. R.C. 2929.191 does not address the remainder of an offender's sentence. Thus, the General Assembly appears to have intended to leave undisturbed the sanctions imposed upon the offender that are unaffected by the court's failure to properly impose postrelease control at the original sentencing." *Id.* at ¶ 24.

{¶ 9} Accordingly, we sustain appellant's first assignment of error in part, and remand the case for a R.C. 2929.191 hearing.

{¶ 10} Appellant's second assignment of error provides as follows: "Appellant's consecutive sentences are contrary to law and violative of due process because the trial court failed to make and articulate findings and reasons to justify it."

{¶ 11} In his second assignment of error, appellant argues that his sentence is contrary to law because the trial court imposed consecutive sentences without making the findings required by R.C. 2929.14(E)(4). He acknowledges that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, specifically held that such findings were not required, but he relies on *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517, for the proposition that *Foster* was wrongly decided and should be overturned.

{¶ 12} This court has consistently chosen to follow the holding in *Foster* and to reserve any reconsideration in light of the decision in *Ice* for the Ohio

Supreme Court. E.g., *State v. Sturgill*, Cuyahoga App. No. 93158, 2010-Ohio-2090, ¶ 17; *State v. Moore*, 185 Ohio App.3d 772, 2010-Ohio-770, 925 N.E.2d 692, ¶ 14.¹

{¶ 13} In accordance with this court's precedent, we overrule appellant's second assignment of error.

Judgment affirmed in part, reversed in part, and case remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

KENNETH A. ROCCO, J., and
PATRICIA A. BLACKMON, J., CONCUR

¹ We note that the Ohio Supreme Court has accepted jurisdiction to decide this exact issue and that the case is currently pending before the court in *State v. Hodge*, Ohio Supreme Court Case No. 2009-1997.