

[Cite as *State v. Holloway*, 2010-Ohio-3315.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93809

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

ADAM HOLLOWAY

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-459859 and CR-460371

BEFORE: Rocco, P.J., Jones, J., and Celebrezze, J.

RELEASED: July 15, 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).

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant, Adam Holloway, appeals from common pleas court orders resentencing him in the underlying criminal cases pursuant to an order of remand from this court. Appellant urges that the court erred when it failed to impose a three-year term of postrelease control as directed by this court, that this error rendered his sentences void, and that to remand for a fourth sentencing hearing would constitute cruel and unusual punishment.

{¶ 2} We find no error in the proceedings below and affirm the trial court's judgments. Although the court exceeded the scope of our remand order by conducting a complete resentencing hearing, it accepted and applied the law as stated in our previous opinions. Moreover, the court properly dismissed one count on which it had previously imposed a sentence, because appellant had not actually pled guilty to that count.

{¶ 3} Even though we affirm the trial court's judgment, we must nevertheless remand pursuant to R.C. 2929.191 for the court to conduct a limited hearing and issue a correction of the judgments of conviction in these cases before the appellant is released from prison. The hearing and corrected judgment entry are necessary to correct omissions in the journal entry in imposing postrelease control. Though we are reluctant to remand

these cases again, we do so in an abundance of caution because, although the omissions do not void the sentences, they must be corrected before appellant is released from prison. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶24; *State v. Billi*, Cuyahoga App. No. 93190, 2010-Ohio-2345; *State v. Lombardo*, Cuyahoga App. No. 93390, 2010-Ohio-2099.

{¶ 4} Although these cases have been consolidated in this appeal, their complicated procedural history will be more manageable and comprehensible if we consider them separately.

Case No. CR-459859

Procedural History

{¶ 5} Appellant was charged in a three-count indictment filed December 9, 2004. Two counts charged that appellant committed felonious assault with firearm and peace officer specifications; the remaining count charged that appellant had a weapon while under disability. The indictment was amended to remove a seven-year firearm specification from the two felonious assault counts. Appellant then entered a plea of guilty to all three charges as amended.

{¶ 6} On April 20, 2005, the court entered a judgment of conviction that sentenced appellant to a total of nine years of imprisonment, specifically, three years of imprisonment as to the firearm specifications, to be served

prior and consecutive to a sentence of six years on each of the felonious assault charges. The court also sentenced appellant to a term of one year of imprisonment on the weapons charge. All sentences were concurrent with one another but consecutive to the sentences imposed in Case No. CR-460371; all firearm specifications were merged. The court further stated that “post release [sic] control is part of this prison sentence for the maximum time allowed for the above felony(s) under R.C. 2967.28.”

{¶ 7} Appellant appealed to this court. This court initially decided that the trial court failed to comply with Crim.R. 11(C)(2)(a) because it did not advise appellant before it accepted his guilty plea that he would be subject to a mandatory five-year period of postrelease control. However, the Ohio Supreme Court reversed our ruling on the authority of *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d 78, and remanded for us to consider additional issues. On remand, we held that the trial court had relied on unconstitutional parts of the Revised Code in imposing sentence and therefore vacated the sentences and remanded for resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. See *State v. Holloway*, Cuyahoga App. Nos. 86426 and 86427, 2007-Ohio-2221.

{¶ 8} On remand from this court, the trial court sentenced appellant “to the same sentence that was imposed on 4-13-05.” The court further stated that “post release [sic] control is part of this prison sentence for 5 years for

the above felony(s) under R.C. 2967.28.” Appellant appealed to this court again. This court determined that the trial court erred by imposing five years of mandatory postrelease control even though one of the counts (having a weapon while under disability) was only subject to three years of postrelease control. We otherwise affirmed appellant’s convictions and sentences, but “remanded for a limited resentencing hearing at which the trial court is instructed to apprise Holloway of the appropriate periods of post-release [sic] control applicable to each of his convictions.”

{¶ 9} On the second remand, the trial court conducted a sentencing hearing on July 23, 2009, after which it entered the following judgment:

“The court considered all required factors of the law.

“The court finds that prison is consistent with the purpose of R.C. 2929.11.

“The court imposes a prison sentence at the Lorain Correctional Institution of 9 year(s).

“3 years as to the gun specs on counts 1 and 2 (gun specs merge for sentencing) to run prior to and consecutive to base charge of 6 years on each of counts 1 and 2; and 1 year on Count 3, counts to run concurrent to one another for a total of 9 years.

“Mandatory 3 years PRC [post release control] on count 3; 5 years on counts 1 and 2.

“* * *

“Post release [sic] control is part of this prison sentence for 5 years for the above felony(s) under R.C. 2967.28.”

Law and Analysis

{¶ 10} Appellant now complains that the trial court did not follow our instructions on remand, which he claims to have required the trial court to

impose a three-year period of postrelease control. We disagree with appellant's construction of our previous opinion. In our previous opinion, we found error in the court's imposition of five years of postrelease control in this case because one of the charges, the charge of having a weapon while under disability, carried only a three-year mandatory period of postrelease control. The other two felonious assault charges were first-degree felonies for which R.C. 2967.28 required a mandatory term of five years of postrelease control. The court must impose postrelease control on each sentence. R.C. 2967.28(B). Therefore, the trial court correctly included five years of postrelease control as to counts one and two, and three years of postrelease control as to count three in its judgment on remand.

{¶ 11} We note that “[i]f an offender is subject to more than one period of post-release [sic] control, the period of post-release [sic] control for all of the sentences shall be the period of post-release [sic] control that expires last, as determined by the parole board or court. Periods of post-release [sic] control shall be served concurrently and shall not be imposed consecutively to each other.” R.C. 2967.28(F)(4)(c). Thus, appellant will serve all periods of postrelease control concurrently.

{¶ 12} Although we find no error, we remand for the court to conduct a hearing and correct its failure to include in its journal entry a notice that the parole board could impose a prison term on appellant for a violation of

postrelease control. R.C. 2929.191(B). The court's failure to include this statement does not affect the remainder of appellant's sentence. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶24.

{¶ 13} Appellant's remaining argument — that a third resentencing would be a cruel and unusual punishment — assumes that we find error in the court's judgment. We find no error, so this argument necessarily fails.

Case No. CR-460371

Procedural History

{¶ 14} Appellant and two co-defendants were charged in a 14-count indictment filed December 21, 2004. Appellant was charged in 12 of the 14 counts, specifically, four counts of drug possession, seven counts of drug trafficking, and one count of possessing criminal tools. On March 16, 2005, he entered a plea of guilty to one count of cocaine trafficking, a second-degree felony, and three counts of trafficking in other controlled substances, all third-degree felonies. All four of the charges to which appellant pleaded guilty contained firearm specifications. The remaining charges were to be dismissed.

{¶ 15} Appellant was sentenced on April 20, 2005 to a term of three years' imprisonment on the merged firearms specifications, to be served prior and consecutive to a mandatory term of imprisonment of four years on the cocaine trafficking count. The court further sentenced appellant to three

years' imprisonment on each of the other trafficking counts. The court also (incorrectly) sentenced appellant to a term of nine months' imprisonment on the charge of possessing criminal tools. All sentences were to be served concurrently with one another but consecutively to the sentence imposed in Case No. CR-459859. Finally, the sentencing entry stated that "post release [sic] control is part of this prison sentence for the maximum time allowed for the above felonies under R.C. 2967.28."

{¶ 16} Appellant appealed to this court. This court initially decided that the trial court failed to comply with Crim.R. 11(C)(2)(a) because it did not advise appellant that he was subject to a mandatory five-year period of postrelease control before it accepted his guilty plea. However, the Ohio Supreme Court reversed our ruling on the authority of *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d 78, and remanded for us to consider additional issues. On remand, we held that the trial court had relied on unconstitutional parts of the Revised Code in imposing sentence and therefore vacated the sentence and remanded for resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. See *State v. Holloway*, Cuyahoga App. Nos. 86426 and 86427, 2007-Ohio-2221.

{¶ 17} On remand from this court, the trial court resentenced appellant "to the same sentence that was imposed on 4-13-05." The court also stated that "post release [sic] control is part of this prison sentence for 5 years for

the above felony(s) under R.C. 2967.28.” Appellant appealed to this court again. This court held that the trial court erred by imposing five years of mandatory postrelease control in this case because only the cocaine trafficking charge was subject to a mandatory period of postrelease control, and that was for only three years. The other charges were subject to the potential of up to three years of postrelease control. We affirmed appellant’s convictions and sentences, but “remanded for a limited resentencing hearing at which the trial court is instructed to apprise Holloway of the appropriate periods of post-release [sic] control applicable to each of his convictions.”

{¶ 18} On remand, the trial court conducted an oral resentencing hearing on July 23, 2009. At that hearing, the court stated:

“And then on Case No. 460371, we have — we have mandatory time of four years on Count 10 [cocaine trafficking], three years on Counts 11, 12, 13, with mandatory time being only on Counts 12 and 13, and nine months on Count 14 [possession of criminal tools]. All of these will run concurrent with each other but consecutive to Case No. 459859, for a total of 13 years, four on 460371 and the nine I already spoke about on 459859.

“On this case, 460371, the only mandatory period of post-release [sic] control will apply to sentence for – let’s see which one.

“MR. FREEMAN [prosecuting attorney]: Count 10.

“THE COURT: * * * To Count 10. All the others carry three years post-release [sic] control but not mandatory.”

{¶ 19} The court’s sentencing entry was filed July 29, 2009. Contrary to

what it said at the sentencing hearing, the court correctly noted that Count 14 was “nolled,” and did not impose sentence on that count. The court sentenced appellant as follows:

“The court considered all required factors of the law.

“The court finds that prison is consistent with the purpose of R.C. 2929.11.

“The court imposes a prison sentence at the Lorain Correctional Institution of 7 year(s).

“3 years as to gun specs on Count 10 (1 year and 3 years gun specs merge for sentencing) to run prior to and consecutive to base charge of mandatory 4 years on Count 10; 3 years as to gun specs on Counts 11, 12, and 13 (1 year and 3 years gun specs merge for sentencing) to run prior to and consecutive to base charge of 3 years on Counts 11, 12, and 13; all counts to run concurrent to each other; all firearm specs merge for sentencing purposes; for a total of 7 years.

“Mandatory 3 years on Counts 12, [sic] and 13.

“Cases CR 459859 and CR 460371 to run consecutive to each another; firearms specs in both cases merge for a total of 13 years.”

“ * * *

“Post release [sic] control is part of this prison sentence for three years for the above felony(s) under R.C. 2967.28.”

Law and Analysis

{¶ 20} Appellant’s sole assignment of error contends that:

“The trial court’s failure to impose a three year [sic] sentence of post-release [sic] control upon the third remand from the Eighth District Court of Appelas [sic] rendered the defendant/appellant’s entire sentence [i.e., 13 years in prison and any term of post-release control] null and void as a matter of law.”

{¶ 21} This assignment of error does not claim that any error was made in the judgment in this case. The trial court’s judgment correctly stated that

appellant is subject to a three-year term of postrelease control. The fact that the sentence in Case No. CR-459859 included a mandatory five-year term of postrelease control does not in any way affect the sentence in this case. Therefore, the appellant's assignment of error is overruled with respect to Case No. CR-460371.

{¶ 22} The trial court's judgment entry did not specifically state the term of postrelease control applicable to each offense, nor did it include an explanation of the possibility that the parole board could impose a prison term if he violates a term of supervision. See R.C. 2967.28(B) and (C) (requiring that each sentence to a prison term include a requirement that the offender be subject to a period of postrelease control) and R.C. 2929.19(B)(3)(e) (requiring court to provide the defendant with notice regarding penalties for postrelease control violations). R.C. 2929.191 allows the court to correct the judgment entry at any time before the appellant is released from prison to correct errors in the imposition of postrelease control. The court may, therefore, conduct a hearing pursuant to R.C. 2929.191(C) at any time before the appellant is released from prison and correct the judgment entry to include statements that (1) following his release from prison with respect to count 10, the appellant shall be subject to postrelease control supervision for three years, (2) following his release from prison with respect to each of counts 11, 12, and 13, the appellant may be subject to

postrelease control supervision for up to three years, in the discretion of the parole board, and (3) the parole board may impose a prison term for a violation of supervision or a condition of postrelease control. We remand for the court to conduct such a hearing. The court's failure to include these statements in its journal entry does not affect the remainder of appellant's sentence, which is affirmed. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶24.

Law of the Case

{¶ 23} Our decision in the last appeal affirmed the “total sentence” imposed. We reversed only “those portions of the journal entries of sentence purporting to impose inapplicable periods of post-release [sic] control,” and “remanded for a limited resentencing hearing at which the trial court is instructed to apprise Holloway of the appropriate periods of post-release [sic] control applicable to each of his convictions in the underlying cases.”

{¶ 24} The trial court had no discretion to disregard our mandate. *State ex rel. Smith v. O'Connor* (1995), 71 Ohio St.3d 660, 662, 646 N.E.2d 1115. The doctrine of “the law of the case” required the trial court to accept and apply all legal rulings of this court in all subsequent proceedings. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410. To the extent that the court reimposed the same sentences it imposed previously, the court did accept and apply our previous ruling, albeit with unnecessary (and

potentially error-inducing) repetition. R.C. 2929.191 provided the appropriate procedures by which the court could have corrected its judgment on postrelease control issues alone.

{¶ 25} The one point on which the court varied from the judgment affirmed by this court was when the court found Count 14 had been “nolled,” (that is, dismissed) and did not reimpose the nine-month sentence on that charge.

{¶ 26} Neither we nor the trial court previously recognized that the trial court had imposed a sentence on a charge to which appellant had not plead guilty, specifically, Count 14 in Case No. CR-460371. Appellant did not raise this issue in either of his previous appeals, so we never explicitly decided that the conviction on that charge was proper. We will not construe our reversal of the prior judgment solely on the issue of postrelease control to preclude the trial court from correcting this error. The law of the case doctrine is “a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results.” *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410. “A reversal upon one ground alone does not necessarily amount to an implied approval of everything else done in the trial to the extent of establishing the law of the case. *Thomas v. Viering* (1934), 18 Ohio Law Abs. 343.” *Hann v. Perkins Twp.*, Erie App. No. E-03-025, 2004-Ohio-3445, ¶8. Therefore, we find that the trial court did not exceed

the scope of our order of remand when it corrected this error sua sponte. We affirm that ruling.

{¶ 27} Affirmed and remanded for further proceedings consistent with this opinion and for correction of the journal entries regarding postrelease control, pursuant to R.C. 2929.191.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

KENNETH A. ROCCO, PRESIDING JUDGE

LARRY A. JONES, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR