

[Cite as *State v. Kuhn*, 2017-Ohio-4193.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105391

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT KUHN

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND VACATED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-03-433543-ZA

BEFORE: Keough, A.J., E.A. Gallagher, J., and Boyle, J.

RELEASED AND JOURNALIZED: June 8, 2017

ATTORNEYS FOR APPELLANT

Mark Stanton
Cuyahoga County Public Defender
By: Cullen Sweeney
Deputy Public Defender
310 Lakeside Ave, Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Frank Romeo Zeleznikar
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

KATHLEEN ANN KEOUGH, A.J.:

{¶1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1.

{¶2} Defendant-appellant, Robert Kuhn, appeals the trial court's decision denying his motion to terminate postrelease control. For the reasons that follow, we reverse and vacate the improperly imposed term of postrelease control.

{¶3} In 2003 and after pleading guilty to sexual battery and kidnapping, Kuhn was sentenced to nine years in prison. The sentencing journal entry stated that "post release control is part of this prison sentence for the maximum period allowed for the above felony(s) under R.C. 2967.28."

{¶4} In 2012, Kuhn was released from prison after serving his entire prison sentence and placed on postrelease control. In December 2016 and while serving a prison sentence for violating postrelease control, Kuhn filed a motion to terminate postrelease control, contending that the term was improperly imposed because the sentencing journal entry failed to state the length of the postrelease control term, including whether it was discretionary or mandatory, and the consequences of violating postrelease control. Additionally, because he served his prison sentence, Kuhn argues that the trial court could not correct this error; leaving the court with no option but to terminate postrelease control. The trial court summarily denied his motion.

{¶5} Kuhn appeals, raising as his sole assignment of error that the trial court erred in failing vacate or terminate his term of postrelease control that was improperly imposed.

Specifically, Kuhn argues that his postrelease control is void because the trial court failed to advise him in the sentencing entry the length of postrelease control and the consequences for violating postrelease control. He further contends that because he has completed his prison sentence, the trial court can no longer resentence him to remedy this error. We agree.¹

{¶6} In *State v. Grimes*, Slip Opinion No. 2017-Ohio-2927, the Ohio Supreme Court recently considered what information a trial court must include in a sentencing entry to validly impose a postrelease control sanction on an offender when the court orally provides all the required advisements to the offender at the sentencing hearing. The court held:

[t]o validly impose postrelease control when the court orally provides all the required advisements at the sentencing hearing, the sentencing entry must contain the following information: (1) whether postrelease control is discretionary or mandatory, (2) the duration of the postrelease-control period, and (3) a statement to the effect that the Adult Parole Authority (“APA”) will administer the postrelease control pursuant to R.C. 2967.28 and that any violation by the offender of the conditions of postrelease control will subject the offender to the consequences set forth in that statute.

Id. at ¶ 1. The court concluded, “to validly impose postrelease control, a minimally compliant entry must provide the APA the information it needs to execute the postrelease-control portion of the sentence.” *Id.* at ¶ 13.

¹At oral argument, the parties advised the court that Kuhn has since served the entire term of postrelease control. While this may moot the assignment of error on appeal, we find it necessary to decide the matter on the merits because Kuhn served a term of imprisonment based on a violation of postrelease control — a period that was improperly imposed.

{¶7} In this case, Kuhn failed to file a sentencing hearing transcript, therefore we must presume that Kuhn was properly advised at the sentencing hearing regarding postrelease control. However, and consistent with *Grimes*, even if the trial court orally provided the proper advisements, the sentencing entry must contain those advisements. *Grimes* at ¶ 1; *see also Bryant* at ¶ 12; *State v. Martin*, 8th Dist. Cuyahoga No. 102336, 2015-Ohio-2865.

{¶8} In this case, Kuhn was convicted of kidnapping, a first-degree felony, and a felony sex offense; thus he was subject to five years mandatory postrelease control pursuant to R.C. 2967.28(B)(1). In the sentencing journal entry, the trial court did not state an actual length of the postrelease term and did not state whether it was mandatory or discretionary; rather the trial court merely stated that Kuhn was subject to the “maximum period allowed for the above felony(s) under R.C. 2967.28.” Additionally, the trial court did not make any statement in the sentencing journal entry that violating postrelease control could result in consequences set forth in R.C. 2967.28.

{¶9} Accordingly, Kuhn’s term of postrelease control was improperly imposed because the sentencing journal entry failed to (1) state whether postrelease control is discretionary or mandatory, (2) state the duration of postrelease control, and (2) provide a statement that violating postrelease control could result in consequences set forth in R.C. 2967.28. Moreover, because Kuhn has served his prison sentence, the trial court can no longer remedy this error. *See State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958; *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718,

State v. Cockrell, 8th Dist. Cuyahoga No. 104207, 2017-Ohio-1358; *State v. Mace*, 8th Dist. Cuyahoga No. 100779, 2014-Ohio-5144, ¶ 1. Pursuant to the controlling precedent set forth in our district and now the subsequent decision in *Grimes*, the trial court erred by not terminating Kuhn's term of postrelease control. Accordingly, the assignment of error is sustained.

{¶10} Judgment reversed and the term of postrelease control is vacated.

It is ordered that appellant recover from appellee 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.

KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE

EILEEN A. GALLAGHER, J., and
MARY J. BOYLE, J., CONCUR