

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-T-0011
JERMAINE MCKINNEY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 05 CR 948.

Judgment: Affirmed in part, reversed in part, and remanded.

Dennis Watkins, Trumbull County Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Jermaine McKinney, pro se, Mansfield Correctional Institution, P.O. Box 788, Mansfield, OH 44901 (Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Jermaine McKinney, appeals the judgment of the Trumbull County Court of Common Pleas denying his motion to vacate void judgment and order new sentencing hearing. Appellant was convicted of two counts of aggravated murder and multiple first-degree felonies. At issue is whether appellant is entitled to a de novo sentencing hearing due to the trial court’s failure to impose post-release control at his

sentencing with respect to the first-degree felonies. For the reasons that follow, we affirm in part, reverse in part, and remand.

{¶2} Following a jury trial, on November 6, 2006, appellant was found guilty of aggravated murder of his girlfriend Rebecca Cliburn in the commission of a felony, in violation of R.C. 2903.01(B) and (F), with specifications of aggravating circumstances of multiple murders, in violation of R.C. 2929.04(A)(5), aggravated burglary, in violation of R.C. 2929.04(A)(7), aggravated robbery, in violation of R.C. 2929.04(A)(7), kidnapping, in violation of R.C. 2929.04(A)(7), and aggravated arson, in violation of R.C. 2929.04(A)(7); aggravated murder of Rebecca's mother Wanda Rollyson in the commission of a felony, in violation of R.C. 2903.01(B) and (F), with the same specifications of aggravating circumstances, except for the kidnapping specification; aggravated burglary, a felony of the first degree, in violation of R.C. 2911.11(A)(1)(2) and (B); aggravated robbery, a felony of the first degree, in violation of R.C. 2911.01(A)(1),(3), and (C); kidnapping of Rebecca, a felony of the first degree, in violation of R.C. 2905.01(A)(2)/(3) and (C); and aggravated arson, a felony of the second degree, in violation of R.C. 2909.02(A)(2) and (B)(3).

{¶3} On November 29, 2006, the trial court held a sentencing hearing, and on December 11, 2006, sentenced appellant to serve two terms of life imprisonment without parole on the two counts of aggravated murder; ten years for aggravated burglary; ten years for aggravated robbery; ten years for kidnapping; and eight years for aggravated arson, all sentences to be served consecutively. The trial court did not advise appellant regarding post-release control at the sentencing hearing or in the court's judgment on sentence.

{¶4} Appellant filed a direct appeal, and this court affirmed his conviction on June 27, 2008, in *State v. McKinney*, 11th Dist. No. 2007-T-0004, 2008-Ohio-3256.

{¶5} Thereafter, on October 23, 2009, appellant filed a motion to vacate void judgment and order new sentencing hearing, arguing his sentence was void because the trial court did not impose the mandatory term of post-release control with respect to the first-degree felonies of which he was convicted. On January 12, 2010, the trial court denied the motion. Appellant appeals the trial court's ruling on this motion, asserting the following for his sole assignment of error:

{¶6} "The trial court committed plain error to the prejudice of the appellant by denying appellant's 'motion to vacate void judgment.'"

{¶7} Appellant argues that since the trial court did not impose the mandatory five-year term of post-release control at his sentencing and in the court's sentencing entry with regard to the three first-degree felonies of which he was convicted, i.e., aggravated burglary, aggravated robbery, and kidnapping, his sentence is void and this court must remand the matter for resentencing. We do not agree.

{¶8} R.C. 2929.19(B), the statutory subsection that sets forth what a trial court must do at a sentencing hearing, provides, in relevant part:

{¶9} "(3) *** [I]f the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

{¶10} "***

{¶11} "(c) Notify the offender that the offender will be supervised under section 2967.28 of the Revised Code [regarding post-release control] after the offender leaves prison if the offender is being sentenced for a felony of the first degree ***."

{¶12} Further, R.C. 2967.28 provides, in relevant part:

{¶13} “(B) Each sentence to a prison term for a felony of the first degree *** shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender’s release from imprisonment. *** [A] period of post-release control required by this division for an offender shall be one of the following periods:

{¶14} “(1) For a felony of the first degree ***, five years ***.”

{¶15} In the last decade, the Supreme Court of Ohio has considered on several occasions the consequences of a trial court’s failure to inform a defendant concerning post-release control at his sentencing. In *State v. Biondo*, 11th Dist. No. 2008-P-0028, 2008-Ohio-6560, this court summarized this jurisprudence, as follows:

{¶16} “The following conclusions can be drawn from the [Supreme Court of Ohio] authority discussed above. First, a court must advise a defendant that post-release control sanctions will be a part of his or her sentence at the sentencing hearing and journalize a similar notification in its judgment entry on sentence. [*State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085]. The failure to do so renders a defendant’s sentence a nullity or void. [*State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 357, 2006-Ohio-5795]; [*State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197]. If a defendant is still incarcerated, the state may move the trial court to resentence the defendant because the trial court retains continuing jurisdiction over a criminal matter for purposes of correcting a void judgment. *Jordan*, supra; [*Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126]; *Cruzado*, supra; *Simpkins*, supra. However, where a defendant has served his term of incarceration on the underlying sentence, the parole

authority lacks the authority to impose post-release control upon a defendant and there can be no remand for resentencing. *Hernandez, supra; Cruzado, supra.* Under such circumstances, the defendant who has served his prison term is entitled to release from post-release control. *Id.*” *Biondo, supra,* at ¶28.

{¶17} Meanwhile, the General Assembly enacted R.C. 2929.191, effective July 11, 2006, in which the legislature sought to abrogate the foregoing decisions of the Supreme Court of Ohio requiring a full resentencing, and to establish a simple procedure to correct a trial court’s judgment of conviction that omitted notification regarding post-release control. We note that the state has not filed a brief on appeal, and that in their briefs filed in the trial court, neither of the parties addressed the applicability of R.C. 2929.191 as a remedy in this case.

{¶18} R.C. 2929.191 applies to sentenced offenders who have not yet been released from prison and who fall into at least one of three categories: (1) those who did not receive notice at the sentencing hearing that they would be subject to post-release control, (2) those who did not receive notice that the parole board could impose a prison term for a violation of post-release control, or (3) those who did not have both of these statutorily-mandated notices incorporated into their sentencing entries. R.C. 2929.191(A) and (B).

{¶19} For such offenders, R.C. 2929.191 provides that trial courts may, after holding a hearing with notice to the offender, the prosecuting attorney, and the department of rehabilitation and correction, prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction a statement that the offender will be supervised under post-release control after the offender leaves prison

and that the parole board may impose a prison term of up to one-half of the stated prison term originally imposed if the offender violates post-release control. R.C. 2929.191(A)(1). If the court prepares such a correction, the court shall place upon its journal an entry nunc pro tunc to record the correction to the judgment of conviction. R.C. 2929.191(A)(2). The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the sentence and the judgment of conviction entered on the journal and had notified the offender that the offender would be subject to post-release control. *Id.* The offender has the right to be present at the hearing, but the court on its own motion or on the motion of the state or the defense, may permit the offender to appear at the hearing by video conferencing equipment if available and compatible. R.C. 2929.191(C). At the hearing, the state and the offender may make a statement as to whether the court should issue a correction to the judgment of conviction.

{¶20} In *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the Supreme Court of Ohio considered the effect of R.C. 2929.191 and whether it could be applied retroactively or prospectively. First, the Court held that sentences imposed without the post-release control notification after the effective date of R.C. 2929.191 remain in effect, but are subject to the correction procedure set forth in the statute, thus implying that such sentences are not void. *Id.* at 179-180. The Court held:

{¶21} "R.C. 2929.191(C) prescribes the type of hearing that must occur to make such a correction to a judgment entry 'on and after the effective date of this section.' The 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 which are unaffected by the court's failure to properly impose postrelease control at the original sentencing.* (Emphasis added.) *Singleton*, supra.

{¶22} Next, in *Singleton*, the Court held that R.C. 2929.191 could not be applied retroactively. *Id.* at 180. The Court held: “For criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall conduct a de novo sentencing hearing in accordance with decisions of the Supreme Court of Ohio.” *Id.* at paragraph one of the syllabus. In explaining its holding, the Court reiterated that sentences imposed after the effective date of the statute without the required post-release control notification are not void:

{¶23} “R.C. 2929.191 purports to authorize application of the remedial procedure set forth therein to add postrelease control to sentences imposed before its effective date. *We recognize the General Assembly's authority to alter our caselaw's characterization of a sentence lacking postrelease control as a nullity and to provide a mechanism to correct the procedural defect by adding postrelease control at any time before the defendant is released from prison.* However, for sentences imposed prior to the effective date of the statute, there is no existing judgment for a sentencing court to correct. H.B. 137 [R.C. 2929.191] cannot retrospectively alter the character of sentencing entries issued prior to its effective date that were nullities at their inception,

in order to render them valid judgments subject to correction. ***” (Emphasis added.)
Singleton, supra, at 180.

{¶24} The Court in *Singleton* further held that R.C. 2929.191 could be applied prospectively in all situations. Id. at 181. The Court held: “[B]ecause R.C. 2929.191 applies prospectively to sentences entered on or after July 11, 2006 *** that lack proper imposition of postrelease control, a trial court may correct such sentences in accordance with the procedures set forth in that statute.” Id. at 182. In explaining its holding, the Court noted that in enacting R.C. 2929.191, the General Assembly had altered the Court’s previous characterization of sentences imposed without the necessary post-release control notification as void. The Court held: “Although our caselaw has previously characterized a sentence lacking postrelease control as a nullity, H.B. 137 demonstrates a legislative intent to apply the sentence-correction mechanism of R.C. 2929.191 to sentences imposed after the act’s effective date.” Id. at 180.

{¶25} While the Court in *Singleton* acknowledged throughout its opinion that a sentence imposed on or after July 11, 2006 that omitted post-release control notification is not void, the Court stated that, until corrected, such sentence is not a final judgment. The Court held: “On or after the effective date of R.C. 2929.191, an offender can have no legitimate expectation of finality in a sentence rendered defective by the trial court’s failure to properly impose a mandatory term of postrelease control, because an offender is charged with knowledge of the fact that his sentence is legally incomplete and that R.C. 2929.191 provides a statutory mechanism to correct it.” Id. at 182.

{¶26} The Supreme Court of Ohio applied its holding in *Singleton* in *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831. In *Ketterer*, the defendant pled guilty to capital murder and various noncapital felonies, including aggravated burglary and aggravated robbery. The trial court sentenced the defendant to death plus 22 years in prison, but failed to properly advise him regarding post-release control as to the noncapital felonies. The Supreme Court expressly held that Ketterer’s noncapital sentences, which were imposed after the effective date of R.C. 2929.191, are “not void,” and that “the procedures set forth in R.C. 2929.191 apply to remedy any defects in imposing postrelease control.” *Id.* at 460. *Ketterer* is also pertinent to the instant case because the Court in that case held that, although the defendant was convicted of capital murder and sentenced to death and it was unlikely he would ever be placed on post-release control, the case had to be remanded so he could be given the proper terms of post-release control pursuant to R.C. 2929.191. *Id.* at 464. We therefore cannot agree with the state’s argument in its brief filed below that because appellant was convicted of two counts of aggravated murder and most likely will never be released from prison, the trial court had no duty to properly impose post-release control on the first degree felonies of which he was also convicted.

{¶27} This court adopted the holding in *Singleton* in *State v. Masterson*, 11th Dist. No. 2009-P-0064, 2010-Ohio-4939. This court held that the sole purpose of a remand pursuant to R.C. 2929.191 is to correct the court’s original sentence on conviction regarding post-release control by issuing a nunc pro tunc entry of sentence that includes the requirement of post-release control. *Id.* at ¶30.

{¶28} Further, in *State v. Staley*, 12th Dist. No. CA2006-10-045, 2007-Ohio-3154, the Twelfth District held: “Under the provisions of [R.C. 2929.191], the trial court was not required to hold a resentencing hearing. Rather, it was simply required to hold a hearing at which appellant was present and to allow him to make a statement.” *Id.* at ¶24.

{¶29} The principles that follow can be gleaned from *Singleton*. First, a sentence imposed prior to July 11, 2006, that did not advise a defendant regarding post-release control is void and can only be corrected at a de novo sentencing hearing. Second, such a sentence imposed after the effective date of the statute is not void, but rather is subject to correction pursuant to the procedure set forth in R.C. 2929.191. Third, although a sentence imposed on or after July 11, 2006 without the required post-release control notification is not void, it is incomplete and not final.

{¶30} Turning to the facts of the instant case, in addition to two counts of aggravated murder, appellant was convicted of three first-degree felonies, and was sentenced after the effective date of R.C. 2929.191. As a result, this statute applied to him. Therefore, although the trial court did not advise him regarding post-release control as to the first-degree felonies of which he was convicted, his sentence is not void. Instead, it is subject to correction pursuant to the procedure set forth in R.C. 2929.191.

{¶31} Because appellant’s original sentence is not void and he is not entitled to a de novo sentencing, we hold the trial court did not err in denying appellant’s motion to vacate void judgment and order new sentencing hearing. However, his sentence of conviction must be corrected to include post-release control. Accordingly, pursuant to

the directive from the Supreme Court of Ohio in *Singleton*, we remand this matter to the trial court for the sole purpose of preparing and issuing a correction to the judgment of conviction that includes in the nunc pro tunc judgment of conviction post-release control after conducting a limited hearing for this purpose. As noted above, upon motion of the court or either party, the court may order appellant to appear at this hearing “by video conferencing equipment if available and compatible.” R.C. 2929.191(C).

{¶32} For the reasons stated in the Opinion of this court, it is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed in part; reversed in part, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.