

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

STATE OF OHIO,	:	<b>OPINION</b>
Plaintiff-Appellee,	:	<b>CASE NO. 2010-L-048</b>
- vs -	:	
DONALD R. HOWARD, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 05 CR 000687.

Judgment: Affirmed.

*Charles E. Coulson*, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*Michael D. Murray*, Murray & Black, 38109 Euclid Avenue, Willoughby, OH 44094 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} The instant appeal stems from a final judgment of the Lake County Court of Common Pleas. Appellant, Donald R. Howard, Jr., seeks to contest the merits of the trial court’s decision denying his motion to vacate the entire sentencing judgment in the underlying criminal proceeding. Essentially, he submits that, since he was not properly informed that he would be subject to mandatory post-release control before the completion of his prison term, the trial court was obligated to declare his entire

conviction void.

{¶2} In November 2005, appellant entered a plea of “guilty” to a single count of attempted robbery, a third-degree felony under R.C. 2923.02 and 2911.02(A)(1). Upon accepting this plea and receiving a pre-sentence report from the county adult probation department, the trial court determined that appellant was not amenable to a community control sanction. Accordingly, the court sentenced him to a term of two years in a state prison.

{¶3} As part of its final sentencing judgment of March 21, 2006, the trial court incorrectly stated that, following appellant’s release from prison, the Ohio Parole Board had the discretionary authority to impose upon him post-release control for up to three years, when in fact the court was required to impose a mandatory three-year term of post-release control. Furthermore, during the prior oral sentencing hearing, the court did not afford appellant any notice regarding post-release control.

{¶4} While appellant was imprisoned, no steps were taken to correct the improper “post-release control” portion of the sentence. Nearly two years after the completion of his term, appellant moved the trial court to vacate the final sentencing judgment based upon the “post-release control” error. In addition to the lack of any oral notification during the sentencing hearing, the motion alleged that the trial court’s statement in the final judgment as to the extent of his “post-release control” obligation had been erroneous. In support of his request to vacate, appellant asserted that, because he had already served the imposed term, the trial court’s error could not be corrected through re-sentencing.

{¶5} In responding to the motion to vacate, the state simply contended that the

underlying conviction should not be declared void because, once the jail term had been completed, there was an expectation of finality. In his reply brief, appellant argued that legal propriety of his guilty plea had been adversely affected by the lack of any proper notification.

{¶6} In its separate judgment overruling the motion to vacate, the trial court did note that, since the “post-release control” error was not corrected while appellant was in prison, he could not be subject to such control under this particular conviction. As a result, the trial court ordered the Ohio Adult Parole Authority that it could not impose any post-release control in the instant case. Nevertheless, as to appellant’s request that his entire conviction be declared void, the trial court concluded that such relief could not be granted when the imposed jail term had already been fully served.

{¶7} In now seeking the reversal of the foregoing determination, appellant has assigned the following as error:

{¶8} “The trial court erred when it denied Defendant-Appellant’s Motion to Vacate Void Judgment, where the Defendant-Appellant was not correctly notified of post-release control but had already served his entire sentence.”

{¶9} In asserting that he was entitled to have his entire conviction for attempted robbery vacated, appellant emphasizes that, under the controlling precedent of the Ohio Supreme Court, the failure of the trial court to inform the defendant of the application of post-release control has the effect of rendering the sentence void. He further contends that if this type of error is detected before the defendant has served his entire jail term, the lack of notification can be remedied through the issuance of a new final sentencing judgment after a new sentencing hearing has been conducted. However, according to

appellant, it is not possible to cure the trial court's original error in this instance because he had already been released from prison before the lack of adequate notification was discovered.

{¶10} As was previously noted, appellant was convicted of a third-degree felony. Pursuant to the version of R.C. 2967.28 which was effective as of the date of his final sentencing judgment, his conviction subjected him to three years of mandatory post-release control. In turn, this meant that, under R.C. 2929.19(B)(3)(d), the trial court had a statutory duty to notify appellant at his oral sentencing hearing that he would be required to serve three years of mandatory post-release control upon the completion of his prison term. In interpreting the latter statute, the Ohio Supreme Court has indicated that a trial court must provide the required notification both during the oral sentencing hearing and as part of the final sentencing judgment. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph two of the syllabus.

{¶11} Following the release of the *Jordan* opinion, the Ohio Supreme Court has rendered a series of decisions concerning the legal effect of the failure to abide by the notification requirements of R.C. 2929.19(B)(3). See, e.g., *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547. In applying the Supreme Court precedent to issues raised in appeals before us, this court has summarized the various holdings in this manner:

{¶12} "A trial 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. \*\*\* The failure to do so renders a defendant's sentence void. \*\*\* To the extent a defendant is still incarcerated, the state may move the trial court to resentence the defendant because the trial court retains

limited jurisdiction over a criminal matter for purposes of correcting a void judgment. \*\*\*”  
(Citations omitted.) *State v. O’Neil*, 11th Dist. No. 2008-P-0090, 2009-Ohio-7000, ¶63.

{¶13} In submitting their respective brief in the instant appeal, neither side was able to cite a Supreme Court decision which expressly addressed the specific question raised by appellant; i.e., if it is too late to “cure” a lack of proper notification by means of a new sentencing hearing before the trial court, does the underlying conviction become invalid and unenforceable? In attempting to answer this query, the parties have had to interpret the meaning of the Supreme Court’s use of the term “void” in regard to an error in sentencing. Fortunately, subsequent to the filing of the parties’ briefs, the Supreme Court released a new opinion which provides considerable guidance as to the extent to which a criminal judgment is rendered void as a result of the failure to follow the duty to notify under R.C. 2929.19(B)(3).

{¶14} In *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, the defendant did not assert any assignments of error in his first direct appeal relating to the imposition of post-release control. After the appellate court had affirmed his basic conviction in all respects, the defendant submitted a post-judgment motion for re-sentencing as to post-release control. Once the trial court had provided proper notification and issued a new final judgment which reimposed the same prison term, the defendant brought a second appeal in which he again tried to raise issues concerning the validity of the underlying conviction. In doing so, he argued that, since the trial court’s original final judgment had been “void” in light of the lack of proper notification, his first appeal had been invalid and he was entitled to again challenge the propriety of his conviction.

{¶15} The appellate court in *Fischer* held that any further review of the merits of

the defendant's conviction in the second appeal was barred under the law-of-the-case doctrine. In upholding the decision to limit the scope of the review in the second appeal, the Supreme Court first focused its legal analysis upon whether the term "void" should be given the same broad interpretation in regard to "sentencing errors" as it is in cases which involve a complete lack of jurisdiction. Upon considering the holdings of federal courts and other state courts on that issue, the *Fischer* court specifically concluded that a narrow application of the "voidness" doctrine should be employed as to errors in the notification of post-release control:

{¶16} "A motion to correct an illegal sentence "presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence." *Edwards v. State* (1996), 112 Nev. 704, 708, \*\*\*, quoting *Allen v. United States* (D.C.1985), 495 A.2d 1145, 1149. It is, however, an appropriate vehicle for raising the claim that a sentence is facially illegal at any time. *Id.* The scope of relief based on a rule, like Fed.R.Crim.P. 35, is likewise constrained to the narrow function of correcting only the illegal sentence. It does not permit reexamination of all perceived errors at trial or in other proceedings prior to sentencing. See, e.g., *Hill v. United States* (1968), 368 U.S. 424, 430, \*\*\*.

{¶17} "We similarly hold that when a judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, that *part* of the sentence that is void and must be set aside. Neither the Constitution nor common sense commands anything more." (Emphasis sic.) (Footnote omitted.) (Parallel citations omitted.) *Fischer*, at ¶25-26.

{¶18} Building upon the foregoing holding, the *Fischer* court then considered the

application of the doctrines of res judicata and law-of-the-case to a partially “void” final judgment. As to that aspect of the criminal judgment which was void, i.e., post-release control, the court held that the doctrines had no application. As to the remaining parts of such a judgment, the court reached the opposite conclusion. In summarizing the last portion of its analysis, the *Fischer* court stated:

{¶19} “Our intention today is to provide a clear, simple, and more workable solution to a vexing issue without compromising the interests of fairness. In balancing those interests here, we have carefully considered the law in a combined effort to craft the most equitable solution. We therefore hold that void sentences are not precluded from appellate review by principles of res judicata and may be reviewed at any time, on direct appeal or by collateral attack. We further hold that although the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence.” *Id.* at ¶40.

{¶20} Despite the fact that the precise issue considered by the *Fischer* court is not identical to the question in the instant appeal, the *Fischer* analysis is pertinent. First, *Fischer* stands for the proposition that when the “post-release control” part of a criminal judgment is rendered void due to improper notification under the statute, only that part of the judgment is affected; i.e., the remaining aspects of the judgment are still valid. Thus, appellant cannot justifiably assert that his conviction for attempted robbery is no longer enforceable.

{¶21} Second, *Fischer* indicated that, once a defendant has had one opportunity to contest the merits of his actual conviction, the fact that an error was made regarding

the imposition of post-release control will not have the effect of allowing him to reopen the matter in a subsequent appeal. In the instant case, appellant could only challenge the merits of his conviction in a direct appeal from the original sentencing judgment of March 16, 2006. A review of the trial record before us readily shows that appellant did not pursue a direct appeal at that time. Under such circumstances, the doctrine of res judicata dictates that the validity of his conviction cannot be subject to any further review regardless of the status of his post-release control.

{¶22} In conjunction with the foregoing, this court would also emphasize that the basic outcome in the instant matter, as now dictated by *Fischer*, was foreshadowed by the lead opinion in *State v. Biondo*, 11th Dist. No. 2009-P-0009, 2009-Ohio-7005. The facts of *Biondo* are somewhat similar to those in this action, in that *Biondo* did not raise any challenge to the trial court's failure to provide adequate notice of post-release control until after he had completed his entire six-year term. After this court had rendered a separate decision holding that the defendant's sentence could not be altered to allow for post-release control, he moved the trial court to vacate the mandatory fines and court costs which were still owed under the original sentencing judgment. As the basis for the motion to vacate, *Biondo* maintained that the fines and court costs were no longer enforceable because the original sentencing judgment was void due to the "post-release control" error.

{¶23} When the trial court overruled his motion to vacate, *Biondo* filed his fourth appeal before this court. In upholding the trial court's determination, the lead opinion in *Biondo* began its discussion by reviewing the existing Supreme Court precedent regarding the void-voidable distinction in criminal matters and the application of that

distinction in cases involving improper notification of post-release control. At the close of this discussion, the lead opinion noted that the logical extension of the recent Supreme Court precedent as to post-release control could lead to an absurd result; i.e., a criminal defendant's entire sentence could be declared void despite the fact that he has already completed his prison term. However, upon reviewing the nature of the final order of the Supreme Court in *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, the lead opinion concluded that the Supreme Court did not intend such an illogical outcome:

{¶24} “Towards this end, the order set forth in *Bezak* implies that a conviction (guilt plus sentence) *can* withstand a court's determination that a felon was not provided adequate statutory notice of post-release control. Such a conclusion can only be drawn by treating, at the very least, the completion of a term of imprisonment (following a valid finding of guilt), as sufficient to meet the definition of a sentence under the unique circumstances created by the facts in *Bezak* and, by implication, the facts in the case sub judice.

{¶25} “That is, notwithstanding the court's regular conclusion that improper post-release control notification functions to void the sentence, it appears that a prison term served can be seen, in light of *Bezak*, as a sentence upon itself. Under such circumstances, a court need not ‘throw out the baby with the bathwater.’ The sentence (and, perhaps, more importantly, the conviction) survives and all sanctions *properly* imposed will survive a successful notification challenge and, much like the remedy in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, \*\*\* only the tainted portion need be excised. We believe this analysis to be both necessary and proper.” (Emphasis sic.) (Parallel citation omitted.) *Biondo*, 2009-Ohio-7005, at ¶48-49.

{¶26} At the time it was released in December 2009, the foregoing analysis only garnered one vote of the three-judge panel. As a result, the legal analysis in *Biondo* never became binding authority in this appellate district. However, in light of the specific conclusions in *Fischer*, this court holds that the lead opinion in *Biondo* is hereby adopted as the controlling precedent.

{¶27} As an aside, this court would further indicate that, since *Fischer* primarily involved the question of whether a criminal defendant could challenge the validity of his basic conviction in an appeal from his re-sentencing for post-release control, the legal analysis in *Biondo* is more directly on point to the precise argument which appellant has asserted in the present appeal. Nevertheless, regardless of whether it is by inference under *Fischer* or directly under *Biondo*, the state of the controlling law in Ohio is clear: an error in the imposition of post-release control does not have the effect of rendering the entire sentence or conviction void.

{¶28} Under the facts of this case, there is no dispute that the trial court failed to provide proper notification of post-release control at the sentencing stage of the criminal proceeding, and that this error was never rectified prior to the completion of appellant's two-year term. Nevertheless, given the analysis in *Fischer* and *Biondo* as to the narrow application of the "voidness" doctrine when the requirements of R.C. 2929.19(B)(3) are not satisfied, it follows that appellant is not entitled to have his entire conviction vacated. Instead, he is only entitled not to be required to serve any post-release control. See *State v. Pesci*, 8th Dist. No. 94904, 2011-Ohio-476, ¶7. Since the trial court expressly ordered as part of the appealed judgment that the Ohio Parole Board could not subject appellant to any post-release control, it did not commit any error in disposing of the

motion to vacate.

{¶29} As appellant failed to demonstrate the existence of any justifiable reason to vacate his underlying conviction for attempted robbery, the sole assignment of error in this appeal does not have merit. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.