

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO,	:	Case No. 16CA24
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
NATHAN L. MURRAY,	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellant.	:	RELEASED: 3/31/2017

APPEARANCES:

Timothy Young, Ohio Public Defender, and Allen Vender, Ohio Assistant Public Defender, Columbus, Ohio, for appellant.

Anneka P. Collins, Highland County Prosecuting Attorney, Hillsboro, Ohio, for appellee.
Harsha, J.

{¶1} The trial court initially sentenced Nathan L. Murray to prison followed by a term of post-release control. However the court did not include notification in its sentencing entry that a violation of post-release control would result in a prison sentence to be served consecutively to any prison sentence Murray received for committing a new crime.

{¶2} While on post-release control Murray was convicted of a new felony offense and the court sentenced him to a prison term for his post-release control violation. The court ordered that the post-release control sanction be served consecutively to the prison term for his new conviction. After he had served the prison term for his new crime, Murray filed a motion to vacate his judicial-sanction sentence, which the trial court denied.

{¶3} On appeal Murray asserts that based on our precedent, the trial court erred in denying his motion. Nevertheless, as he concedes in his reply brief, in *State v. Mozingo*, 2016-Ohio-8292, ___ N.E.3d ___ (4th Dist.) we have recently overruled the cases he relies

upon. Based on *Mozingo*, we overrule his assignment of error and affirm the judgment of the trial court.

I. FACTS

{14} In October 2010, in Case No. 10CR0048, the Highland County Court of Common Pleas sentenced Nathan L. Murray to a prison term of eight months and a mandatory five-year term of post-release control on his felony conviction for importuning. In accordance with R.C. 2929.141(A)(1) the trial court advised Murray at his sentencing hearing that if he was convicted of a new felony while under post-release control, he could be sentenced to serve an additional prison term for his violation of post-release control, and that term would be consecutive to his sentence in the new felony case. But the trial court's sentencing entry only stated that "[i]f the violation is a new felony, the defendant could receive a prison term of the greater of one year or the time remaining on post release control, in addition to any other prison term imposed for the offense." It did not provide notice that the new term would be served consecutively to his sentence for the new felony offense.

{15} After completing his eight-month prison term on March 3, 2011, and while on post-release control, Murray committed a new felony offense, failure to register a change of address as a registered sex offender, thus violating the terms of his supervised release. In September 2011, in Case No. 11 CR 098, the trial court sentenced Murray to 14 months in prison for his new offense and additionally imposed a 1,617-day judicial-sanction sentence for violating his post-release control, to be served consecutively to his 14-month sentence.

{¶16} In May 2016, Murray filed a motion to vacate the judicial-sanction portion of his sentence. (OP37) He claimed that his October 2010 sentencing entry was defective because it did not properly advise him that his judicial-sanction sentence would be served consecutively to any prison term imposed for a new felony, in accordance with R.C. 2929.141(A)(1). Following a hearing where it stated its intent to “challenge the Fourth District, and hopefully the Supreme Court to take this on and address what I think was a result that makes no sense,” the trial court denied the motion. This appeal ensued.

II. ASSIGNMENT OF ERROR

{¶17} Murray assigns the following error for our review:

THE TRIAL COURT ERRED WHEN IT DENIED MR. MURRAY’S MOTION TO VACATE HIS VOID JUDICIAL-SANCTION SENTENCE.

III. STANDARD OF REVIEW

{¶18} Murray claims that the trial court’s judicial-sanction sentence is void. When reviewing felony sentences we apply the standard of review set forth in R.C. 2953.08(G)(2), which provides that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either that “the record does not support the sentencing court’s findings” under the specified statutory provisions or “the sentence is otherwise contrary to law.” *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1.

IV. LAW AND ANALYSIS

{¶19} Murray asserts that the trial court committed reversible error when it denied his motion to vacate his judicial-sanction sentence because he was not properly notified in his original sentencing entry that any future sentence for violation of his post-release control would be served consecutively to any new felony sentence.

{¶10} R.C. 2929.141 governs sentencing for a felony offense committed while on post-release control and provides that the trial court may terminate the post-release control and may impose a prison term for the post-release control violation in addition to any prison term for a new felony. If the trial court imposes a prison term for the post-release control violation, it “shall be served consecutively to any prison term imposed for the new felony.” R.C. 2929.141(A)(1).

{¶11} Murray relies on our prior precedent in support of his claim that his judicial-sanction sentence is void. In *State v. Phippen*, 4th Dist. Scioto No. 14CA3595, 2014-Ohio-4454, at ¶ 22-25,¹ we held that the trial court’s failure to notify the defendant of the consecutive nature of the prison term imposed for a violation of post-release control rendered that part of the sentence void. In *State v. Adkins*, 4th Dist. Lawrence No. 14CA29, 2015-Ohio-2830, at ¶ 20, we reaffirmed our holding in *Phippen* by holding that “[b]ecause the trial court did not include the notification of penalties under R.C. 2929.141(A)(1)-(2) at the resentencing hearing as required by *Phippen*, although it was included in the entry, Adkins’s first assignment of error is meritorious.” And in *State v. Dixon*, 2016-Ohio-1491, 63 N.E.2d 591 (4th Dist.), at ¶ 35-36, we reaffirmed our holdings in *Phippen* and *Adkins* by holding that the trial court’s notification at sentencing, which included the statement that a prison term for a violation of post-release control would be “in addition to” any other prison term imposed for a new offense, did not properly notify the offender that the prison term

¹ In *State v. Brown*, 147 Ohio St.3d 1473, 2016-Ohio-8438, 65 N.E.3d 777, the Supreme Court of Ohio certified a Fifth District Court of Appeals case as being in conflict with our decision in *Phippen* on the issue of “[w]hether the post-release control notification of R.C. 2929.19(B)(2)(e) must include notification of the penalty provisions in R.C. 2929.141(A)(1)-(2), specifically, whether a trial court must inform an offender at the time of sentencing that the commission of a felony during a period of post-release control permits a trial court to impose a new prison term for the violation to be served consecutively with any prison term for the new felony.”

would be served consecutively to the other prison term, rendering the post-release control part of the sentence void.

{¶12} Nevertheless, Murray acknowledges in his reply brief that we recently overruled *Pippen*, *Adkins*, and *Dixon* on this issue in *State v. Mozingo*, 2016-Ohio-8292, ___ N.E.3d ___ (4th Dist.). In *Mozingo* at ¶ 23, we held that “there is no constitutional or statutory requirement that a trial court imposing post-release control must notify the offender that a court sentencing the defendant for a subsequent crime can impose a prison term for a post-release control violation to be served consecutively to a prison term for a new crime.” We concluded that our holding was “supported both by the plain language of R.C. 2929.141(A) and the prevailing weight of authority[,]” including the holdings of the Third, Seventh, Eighth, Ninth, Eleventh, and Twelfth District Courts of Appeals. See *id.* at ¶ 26 and cases cited therein. In sum, “R.C. 2929.141(A) does not require the trial court in the original sentencing context to notify a defendant that a court sentencing the defendant for a subsequent crime can impose additional sanctions for the violation of [post-release control].” *Id.* at ¶ 29.

{¶13} In his reply brief Murray concedes that our holding in *Mozingo* “defeats the arguments presented in his merit brief,” but “requests that this Court reexamine its precedent and reinstate the holding[s] of *Adkins*, *Pippen*, and *Dixon* for the reasons presented in those cases.” For the reasons identified in *Mozingo*, we decline his invitation and reaffirm our holding in *Mozingo* overruling the cases relied on by Murray. Therefore, the trial court did not err in denying Murray’s motion to vacate his judicial-sanction sentence based on a claimed notification defect in his original sentencing entry. We overrule his assignment of error.

V. CONCLUSION

{¶14} The trial court properly denied Murray's motion to vacate the judicial-sanction portion of his sentence.² Having overruled his sole assignment of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

² Although we affirm the trial court's judgment based upon our subsequently decided holding in *Mozingo*, we caution the trial court against ignoring what at the time was binding precedent within our district. Regardless of a trial judge's own belief that we have erred, that determination remains in the domain of the Supreme Court of Ohio, not the Court of Common Pleas.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, J.: Concurs in Judgment and Opinion.
McFarland, J.: Concurs in Judgment Only.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.