[Cite as *State v. Zechar*, 2018-Ohio-3731.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

MICHAEL ZECHAR,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0111

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 07-CR-649

BEFORE:
Kathleen Bartlett, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
AFFIRMED; REMANDED IN PART

Atty. Ralph Rivera, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Appellee and

Atty. Stephen Hardwick, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, for Appellant.

Dated: September 10, 2018

BARTLETT, J.

{¶1} Defendant-Appellant, Michael Zechar, appeals the decision of the Mahoning County Court of Common Pleas denying his Motion to Vacate Postrelease Control.

{¶2} For the following reasons, Appellant's sole assignment of error is without merit. Accordingly, the judgment of the trial court is affirmed. However, this matter is remanded to the trial court only to the extent that the trial court is instructed to issue a Nunc Pro Tunc judgment entry to correct the inconsistent language in the sentencing entry.

Facts and Procedural History

{¶3} On February 23, 2009, Appellant was found guilty in a jury trial on Count One with Rape, a violation of Ohio Revised Code Section 2907.02(A)(1)(b)(B), a felony of the first degree; and on Count Two with Rape, a violation of Ohio Revised Code Section 2907.02(A)(1)(b)(B), a felony of the first degree.

{¶4} At the sentencing hearing held on June 17, 2009, Appellant was sentenced to eight years on Count One and eight years on Count Two, with the sentences to be served concurrently. (Tr. at 9-10). At the hearing, the trial court stated:

> I must advise you under Ohio law upon completion of the sentence you must be placed on five years of post-release control. A violation of any term or condition of that supervision could result in an additional four years; and if the violation was a new felony, any sentence on the felony must be served consecutively to any time on post-release control. (Tr. at 10).

{¶5} The trial court's sentencing entry addressed postrelease control, in pertinent part:

> In addition, as part of this sentence, post release control shall be imposed up to a maximum period of five (5) years. Any violation of post release control could result in the Defendant being returned to prison for a period

> of up to nine (9) months, with a maximum period for repeated violations that could equal up to fifty (50) percent of the stated term. If the violation is a new felony, the Defendant may be returned to prison for the remaining period of post release control, or twelve (12) months, whichever is greater, in addition to receiving a consecutive prison term for the new felony offense. (6/24/09 JE at 1).

{¶6} Appellant filed a direct appeal and this Court affirmed the convictions and prison terms. *State v. Zechar*, 7th Dist. No. 09 MA 110, 2011-Ohio-2630. Appellant filed additional motions before the trial court during his prison term including: a Motion to Merge Allied Offenses filed December 1, 2011 (which was overruled by the trial court on December 6, 2011); a Motion for Reclassification filed on December 1, 2011; a motion for judicial release filed on March 15, 2012 which sought judicial release subject to appropriate community control sanctions (overruled by the trial court on April 4, 2012); a motion to modify sentence filed May 8, 2012 (overruled by the trial court on May 30, 2012); a motion for jail time credit filed on June 21, 2013 (order providing 224 days credit filed on March 3, 2014); and another motion for judicial release on July 30, 2014, which sought judicial release and to be placed on an appropriate community control sanction under the supervision of the Mahoning County Probation Department (overruled on August 6, 2014). Appellant subsequently completed his prison terms and was released on December 14, 2016 subject to postrelease control supervision. Appellant filed his Motion to Vacate Postrelease Control on March 10, 2017. On June 1, 2017, the trial court overruled that motion, stating that Appellant was properly advised of post-release control at the sentencing hearing and in the sentencing entry. (6/1/17 JE). The trial court further stated:

> Additionally, even assuming that an error exists in the sentencing entry, that is an issue that should have been raised on direct appeal. A judgment is not void simply because it is or may have been erroneous. Any purported error now claimed by Defendant-Zechar would make his sentence voidable, and not void, and would not be subject to a collateral attack. Because the Defendant-Zechar failed to file a direct appeal raising

> this issue, the principle of res judicata prevents him from now attacking his sentence. (6/1/17 JE).

{¶7} Appellant filed the instant appeal.

Assignment of Error

> Appellant argues the trial court erred when it denied Appellant's motion to vacate his postrelease control.

{¶8} Appellant argues that the use of the term "up to" in the sentencing judgment entry imposed a discretionary, rather than a mandatory postrelease control, and warrants his release from postrelease control since he has completed his prison term. Appellee argues that the trial court properly notified Appellant at the sentencing hearing, and properly incorporated the necessary notifications into the sentencing entry. Appellee further argues that Appellant's claim is barred by *res judicata* because he failed to challenge the entry on appeal. *See Zechar, supra.*

{¶9} A sentence that does not include the statutorily mandated term of postrelease control is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack. *State v. Fischer*, 942 N.E.2d 332, 2010-Ohio-6238, 128 Ohio St.3d 92, ¶1. The *Fischer* Court held that their decision was limited to a discrete vein of cases: those in which a court does not properly impose a statutorily mandated period of postrelease control. *Id.* at ¶30. In order to address the continuing problems with postrelease control notifications, R.C. 2929.191 was enacted on July 11, 2006 as a result of H.B. 137. It provides a correction procedure where a judge fails to impose statutorily mandated postrelease control. *State v. Hall,* 11th Dist. No. 2016-A-0069, 2017-Ohio-4376, 93 N.E.3d 35, ¶11. Since there is a statutory remedy for sentences imposed after July 11, 2006, any improper postrelease control portions of these sentences are not void. *Id.,* citing *State v. Singleton,* 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶25.

{¶10} The Ohio Supreme Court recently reiterated its main focus in interpreting the sentencing statutes regarding postrelease control, which has been on the notification itself and not on the sentencing entry. *State v. Grimes,* 85 N.E.3d 700,

2017-Ohio-2927, 151 Ohio St.3d 19, ¶14, citing *State v. Qualls,* 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶19. It was undisputed in *Grimes* that the trial court properly advised of postrelease control at the sentencing hearing, and the analysis turned to whether the sentencing entry properly notified of the consequences of violating postrelease control. *Id.* at ¶2, 6. The Court held that in order to validly impose postrelease control when the trial 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.

{¶11} The *Grimes* Court stated that the trial court must incorporate into its sentencing entry the notifications it provides to the offender relating to postrelease control at the sentencing hearing but that those notifications do not need to be repeated verbatim in the entry. *Id.* at ¶13. The Court concluded that 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.* The holding of *Grimes* was limited to those cases in which the trial court made the proper advisements to the offender at the sentencing hearing, and no conclusion was reached as to the requirements for sentencing entries in cases in which notice at the sentencing hearing was deficient. *Id.* at ¶20.

{¶12} This Court has recently addressed issues related to postrelease control in sentencing hearings and entries. *See State v. Kozic,* 7th Dist. No. 15 MA 0215, 2016-Ohio-8556 (remanding to correct inconsistency in sentencing entry as to period of postrelease control and to conduct a limited postrelease control hearing to correct notification issues where trial court failed to advise that a violation of post-release control could result in a prison term up to half of the original sentence); *State v. Williams,* 2015-Ohio-4100, 43 N.E.3d 797, ¶38 (7th Dist.) (remanding with instructions to properly advise of postrelease control where trial court properly informed Appellant that he would be subject to a five-year postrelease control period, but clearly failed, at

both the hearing and within the entry, to inform Appellant of the possible sanctions that can be levied if his postrelease control sentence is violated).

{¶13} In *State v. Wells,* 7th Dist. No. 14 JE 5, 2014-Ohio-5504, the Defendant was serving a life sentence and filed a postconviction motion alleging that the postrelease control imposed by the trial court was void and requested a new hearing. In that case, there were allegations of error in both the sentencing hearing and the sentencing judgment entry. *Id.* at ¶5. The sentencing entry stated: "[up]on completion of the prison term, the offender shall be subject to such further period of supervision being under post-release control as the parole board may determine pursuant to law." *Id.* at ¶9. The *Wells* Court acknowledged that the notice of postrelease control provided in the judgment entry conformed to the requirements of R.C. 2929.19(B)(3)(c) as it existed at the time Defendant was sentenced, but most of the information was not delivered to the Defendant at the sentencing hearing. In Ohio, the notices regarding postrelease control must be delivered directly to the defendant at the plea hearing or at the sentencing hearing, as well as in the sentencing judgment entry. *Id.* at ¶10, citing *State v. Qualls,* 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶18; *Woods v. Telb,* 89 Ohio St.3d 504, 733 N.E.2d 1103 (2000), paragraph two of the syllabus; *State v. Mock,* 187 Ohio App.3d 599, 2010-Ohio-2747, 933 N.E.2d 270, ¶45 (7th Dist.). The *Wells* Court stated that the trial court's notice in the sentencing entry correctly stated that Defendant shall be subject to postrelease control, but failed to state that the length of the postrelease control shall be five years. *Wells,* at ¶12. The Court further stated that "[t]he Supreme Court has determined that the notice was insufficient without mentioning the length of postrelease control." *Id.,* citing *State v. Bloomer,* 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶69. The *Wells* Court also noted that the trial court's statement at the sentencing hearing that postrelease control would be "at least" five years, rather than exactly five years was held to be in error by another court, but did not rise to reversible error because it still served the purpose of putting the defendant on notice that, at minimum, there will be five years of postrelease control. *Id.,* citing *State v. Tucker,* 8th Dist. No. 95289, 2011-Ohio-1368. The case was remanded for a new hearing solely on the issue of postrelease control (and based upon the remand, the court advised that use of the term "at least" should be corrected on

remand). *Id.* at ¶12, 15.

{¶14} In *State v. Peck,* 7th Dist. No. 12 MA 205, 2013-Ohio-5526, ¶2, Defendant was sentenced to six years on one count of felonious assault, a second degree felony, and one count of domestic violence, a first degree misdemeanor. At the sentencing hearing, the trial court noted that Defendant would be subject to a mandatory three-year period of postrelease control, but did not give Defendant any other notice about postrelease control at the sentencing hearing. *Id.* Approximately a week after the sentencing hearing, a "document" was filed that was signed by the Defendant which stated that the judge gave him notice that he was subject to a mandatory period of three years of postrelease control, and detailed the consequences for postrelease control violations. *Id.* at ¶3. The document was not signed by the trial judge. The sentencing judgment entry, which was filed the same day as the document, imposed a mandatory three-year period of postrelease control, and stated that the Defendant had been orally advised of and provided written notice of possible postrelease control sanctions for the violation of postrelease control, and that he had been given notice under R.C. 2929.19(B)(3). *Id.* at ¶4. This Court vacated the sentence and remanded for a *de novo* sentencing hearing to include postrelease control language in the entry. *Id.* at ¶6, 20 (also remanded to correct errors with the misdemeanor sentencing and address the issue of allied offenses). This Court noted that R.C. 2929.19(B)(2)(c) and (e) require the trial court to give notice of postrelease control to a defendant at sentencing. Even assuming *arguendo* that the written document used to provide postrelease control contained all the required statutory information, it was not clear from the record if the information was provided to the Defendant at sentencing. Further, not all of the requisite postrelease control notices were in the sentencing judgment entry. *Id.* at ¶9. As a result, the case was remanded for a sentencing hearing.

{¶15} This Court has held that where a defendant is properly advised in the sentencing hearing regarding postrelease control, but the sentencing judgment entry contains only a statement that the defendant was advised pursuant to the postrelease control statute, the postrelease control sanction cannot be imposed if the prison term has been completed. *See State v. Baird,* 7th Dist. No. 15 MA 0155, 2016-Ohio-8211, ¶11, 18 (noting proper advisements at sentencing hearing but only a statement that

defendant had been given under the postrelease control statutes in the sentencing entry); *State v. Bundy,* 7th Dist. No. 12 MA 86, 2013-Ohio-2501, 994 N.E.2d, ¶11-12 (releasing from postrelease control where Defendant was properly advised of postrelease control at the sentencing hearing, but the sentencing judgment entry only stated "Defendant was also advised pursuant to R.C. 2967.28" in terms of postrelease control). This Court has regularly found entries that do not set out the proper postrelease control term and advisements to be insufficient notification of postrelease control. *Id.* at ¶29, *citing State v. Stewart,* 7th Dist. No. 11-MA-195, 2013-Ohio-753; *State v. Robinson,* 7th Dist. No. 10-MA-128, 2012-Ohio-1686. Further, this Court has found that in cases containing the same vague notification that "Defendant was advised pursuant to R.C. 2967.28," that postrelease control notification was improper in those cases. *Id.,* citing *State v. Davis,* 7th Dist. No. 10 MA 160, 2011-Ohio-6025; *State v. Jones,* 7th DIst. No. 06 MA 17, 2009-Ohio-794.

{¶16} In the current case, Appellant was advised of the postrelease control terms at the sentencing hearing and in the sentencing judgment entry. The judgment entry does not contain a vague reference to postrelease control. Rather, the trial court advised Appellant that he would be subject to postrelease control, the consequences for violating postrelease control, and the term and mandatory nature of his postrelease control. Appellant attempts to create ambiguity within the sentencing judgment entry with the use of the terms "up to," stating that those terms provide for a discretionary term of postrelease control rather than a mandatory period. Appellant cites *State v. Ericson,* 7th Dist. No. 09 MA 109, 2010-Ohio-4315, ¶40, for the proposition that imposing postrelease control for "up to" a term of years does not convey the mandatory nature of the sanction. However, the facts of *Ericson* are distinguishable from the instant case. In that case, the language used at the sentencing hearing and in the sentencing entry stated that the defendant "could be subject to a period of postrelease control of up to five years." *Id.* at ¶35. The error was two-fold since it indicated that the term was not mandatory and it also incorrectly stated the term of postrelease control, since the offenses required a mandatory three-year period of postrelease control in that case. *Id.* at ¶40. In the instant case, although this Court acknowledges that the use of the terms "up to" was unnecessary, it does not negate that the trial court informed

Appellant of the mandatory nature of his postrelease control at the sentencing hearing (using the term "mandatory") as well as in the sentencing entry (using the terms "shall be").

{¶17} Other courts have held that although the phrase "up to" has discretionary connotations, the use of such "inartfully stated" language did not render a post-release control notification void, and any claims relating to that language were non-jurisdictional in nature. *State v. Maser,* 10th Dist. No. 15AP-129, 2016-Ohio-211, ¶11-12*;* citing *Surella v. Ohio Adult Parole Auth.,* 10th Dist. No. 11AP-499, 2011-Ohio-6833, ¶27 (finding that the existence of the words "up to" in the sentencing entry did not render the post-release control sentence void, but at most it was voidable error that should have been raised on direct appeal). *See also State v. Gann,* 12th Dist. No. CA2010-07-153, 2011-Ohio-895, ¶19, 24 (holding that the trial court's language of a "mandatory term of postrelease control up to a maximum of five years" was a manifestly clerical error that could be corrected by the issuance of a nunc pro tunc entry even after the defendant's original sentence had expired). The Tenth District utilizes a "totality of the circumstances" test to determine whether or not the defendant was properly notified of post-release control. *Maser* at ¶9, citing *State v. Williams,* 10th Dist. No. 10AP-1135, 2011-Ohio-6231, ¶23. Those courts have determined if the trial court sufficiently fulfilled its statutory obligations, where taken as a whole, through oral and written notifications, the defendant was properly informed of post-release control. *Id.,* citing *State v. Boone,* 10th Dist. No. 11AP-1054, 2012-Ohio-3653, ¶18.

{¶18} The ongoing issues with declaring judgments as void versus voidable with respect to postrelease control notification were detailed by the court in *State v. Adkins,* 2nd Dist. No. 2010-CA-69, 2011-Ohio-2819 ¶11:

> [f]irst, as here, is where a defendant is released from prison and placed on post-release control. He then raises the technical inadequacy issue which, based on the 'void' analysis, will end the post-release control supervision. The second scenario is where a released prisoner is placed under supervision on technically incorrect post-release control and fails to raise the issue until he is charged, or even convicted and sentenced, for a new offense of escape for failure to comply with the terms of supervision.

> The ‘void’ post-release control analysis now extends to evaporate the charge. * * * Finally, a third line of cases will arise where a prisoner is placed on technically incorrect post-release control and then has his premises searched under the APA’s supervisory authority. If felony contraband is found, the ‘void’ post-release control analysis vitiates the APA’s supervision, and the agency’s authority to search, which may result in the suppression of evidence, even if obtained in good faith pursuit of its duties.

{¶19} The trial court informed Appellant at the sentencing hearing and in the sentencing judgment entry that he was subject to a mandatory period of postrelease control. The trial court used the terms “must be placed” and “shall be" which demonstrate the mandatory nature of the sanction. Appellant argues the use of the words “up to five years” in the sentencing judgment entry should be sufficient to undermine the notice that was provided to Appellant at both the sentencing hearing and in the sentencing judgment entry. This is not the case. Appellant was informed that he would be subject to postrelease control, the time period for postrelease control, the mandatory nature of it, and the consequences for violating postrelease control.

{¶20} This Court has emphasized the importance of notice at the sentencing hearing and incorporating the postrelease control provisions within the sentencing entry. Based upon the facts of this case, proper notice was provided to Appellant of the terms of his postrelease control, and the sentencing entry is not void and subject to attack herein. The use of the terms “up to” in the sentencing entry, albeit unnecessary, should not rise to the level of creating a void entry with regard to postrelease control.

{¶21} Thus, based on all of the above, the sole assignment of error is without merit, and the judgment of the trial court is affirmed. However, this matter is remanded to the trial court only to the extent that the trial court is instructed to issue a Nunc Pro Tunc judgment entry to correct the inconsistent language in the sentencing entry.

Donofrio, J., concurs.

Robb, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. However, this matter is remanded to the trial court only to the extent the trial court is instructed to issue a Nunc Pro Tunc judgment entry to correct the inconsistent language in the sentencing entry. Costs are waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.