[Cite as *State v. Welch*, 2021-Ohio-2487.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

FRANKLIN DALE WELCH,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 BE 0029

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case Nos. 18 CR 86; 18 CR 109

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Reversed and Remanded.

Atty. Dan Fry, Belmont County Prosecuting Attorney and *Atty. J. Kevin Flanagan*, Chief Assistant Prosecuting Attorney, 147-A West Main Street, St. Clairsville, Ohio 43950, for Plaintiff-Appellee

Atty. John M. Jurco, P.O. Box 783, St. Clairsville, Ohio 43950, for Defendant-Appellant.

Dated: July 6, 2021

WAITE, J.

{¶1} Appellant Franklin Dale Welch appeals two October 11, 2018 Belmont County Common Pleas Court judgment entries convicting him of various offenses stemming from two separate incidents. Appellant's sole argument is that the trial court improperly imposed a mandatory postrelease control term on sentencing. For the reasons provided, Appellant's argument has merit and the judgment of the trial court is reversed and remanded for a limited resentencing hearing for the sole purpose of imposing an appropriate term of postrelease control.

Factual and Procedural History

{¶2} Appellant was indicted in two separate cases that were merged into one at the trial court level. In case number 18 CR 86, Appellant was indicted on one count of possession of drugs, a felony of the second degree in violation of R.C. 2925.11(A), (C)(2)(a) and two counts of possession of drugs, felonies of the fifth degree in violation of R.C. 2925.11(A), (C)(1)(a), (c). In case number 18 CR 109, Appellant was indicted on one count of failure to comply with the order or signal of police, a felony of the third degree in violation of R.C. 2921.331(B), (C)(5)(a)(ii); one count of assault, a felony of the fourth degree in violation of R.C. 2903.13(A), (C)(5), and one count of driving while under the influence, a misdemeanor of the first degree in violation of R.C. 4511.19(A)(1)(a).

{¶3} On September 24, 2018, Appellant pleaded guilty to one count of possession of drugs, a felony of the third degree (case number 18 CR 0086); attempted failure to comply, a felony of the fourth degree (case number 18 CR 0109); and assault,

a felony of the fourth degree (case number 18 CR 0109). The remaining charges were dismissed in accordance with the plea agreement.

{¶4} On October 11, 2018, the trial court sentenced Appellant to three years of incarceration for possession of drugs, eighteen months for attempted failure to comply, and eighteen months for assault. The court ordered the sentences to run consecutively for an aggregate total of six years of incarceration. The court also imposed a three-year mandatory term of postrelease control for each offense. It is from this entry that Appellant timely appeals.

ASSIGNMENT OF ERROR

> The trial court committed reversible error when it imposed a mandatory post-release control sentence upon the Defendnat-Appellant [sic], Franklin Dale Welch, whose convictions before that court did not qualify for such a sanction following his release from the penitentiary.

{¶5} Appellant argues that the trial court erroneously imposed a mandatory postrelease control term where none of the offenses for which he was sentenced carries a mandatory term. Appellant explains that he was convicted of a third-degree felony that was not a crime of violence or a sex offense, and two fourth-degree felonies. He asserts that none of these offenses carries a mandatory term of postrelease control. As such, Appellant argues that he is entitled to be resentenced.

{¶6} The state concedes that the trial court's imposition of a mandatory term of postrelease control was erroneous. However, the state argues Appellant is not entitled

to a complete resentencing hearing. Instead, he is entitled to a limited resentencing hearing for the sole purpose of properly imposing postrelease control.

{¶7} The parties agree that the trial court's imposition of a mandatory term of postrelease control was improper. Pursuant to R.C. 2967.28(C):

> Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender.

{¶8} R.C. 2967.28(B)(1) and (3) provide that a felony of the third degree requires mandatory postrelease control only if it involves an offense of violence or a sex offense. All other felonies of the third degree are subject only to a discretionary term.

{¶9} Appellant pleaded guilty to two felonies of the fourth degree and one third degree felony. Pursuant to R.C. 2967.28(C), both of Appellant's fourth-degree felony convictions were subject to discretionary postrelease control. Pursuant to R.C. 2967.28(B)(1), (3), because his third-degree possession conviction is not an offense of violence or a sex offense, it is also subject to a three-year discretionary term of postrelease control.

{¶10} At Appellant's sentencing hearing, the trial court addressed both cases and stated: "defendant will be also, upon release from prison, be subject to a further period of supervision under post release control for up to three years." (10/9/18 Sentencing Hrg.,

p. 9.) Although Appellant's two cases were combined for purposes of the sentencing hearing, the court entered separate sentencing entries for each under separate case numbers. As to case number 18 CR 109, the court stated: "**offender shall be subject to a further period of supervision under Post-Release Control for up to Three (3) Years**." (10/11/18 J.E., p. 3.) In case number 18 CR 86, the court stated: "**offender shall be subject to a further period of supervision under Post-Release Control for up to Three (3) Years**." (10/11/18 J.E., p. 3.) As the court used the word "shall," the parties are correct that the court improperly imposed mandatory postrelease control.

{¶11} As to the remedy for this error, R.C. 2929.191(C) provides:

> On and after July 11, 2006, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division. Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing, the prosecuting attorney of the county, and the department of rehabilitation and correction. The offender has the right to be physically present at the hearing, except that, upon the court's own motion or the motion of the offender or the prosecuting attorney, the court may permit the offender to appear at the hearing by video conferencing equipment if available and compatible. An appearance by video conferencing equipment pursuant to this division has the same force and effect as if the offender were physically present at the hearing. At the hearing, the offender and the

prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction.

{¶12} Thus, Appellant is entitled only to a limited resentencing hearing on the sole issue of postrelease control. As noted by the state, it is unclear what remedy Appellant seeks. However, he does request that his sentence be "set aside," indicating that he seeks a complete resentencing hearing.

{¶13} We recently addressed this issue in *State v. Barnette,* 7th Dist. Mahoning No. 19 MA 0114, 2020-Ohio-6817. In *Barnette,* we held that the failure to provide proper postrelease control renders a sentence voidable, not void. *Id.* at ¶ 14-15, citing *State v. Harper,* 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248. As such, when a defendant remains incarcerated, he or she is limited to resentencing for the sole purpose of imposing an appropriate term of postrelease control to correct the error. *Id.* at ¶ 20, 24.

{¶14} As such, Appellant is entitled only to a limited resentencing hearing in this matter for the sole purpose of allowing the trial court to impose a term of postrelease control. Accordingly, Appellant's sole assignment of error has merit and is sustained.

Conclusion

{¶15} Appellant's sole argument in this matter is that the trial court erroneously imposed a mandatory term of postrelease control. For the reasons provided, Appellant's argument has merit and the judgment of the trial court is reversed and remanded for a resentencing hearing only for the limited purpose of imposing an appropriate term of postrelease control.

Donofrio, P.J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is reversed. We hereby remand this matter to the trial court for a resentencing hearing only for the limited purpose of imposing the correct term of postrelease control according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

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.