

[Cite as *State v. White*, 2009-Ohio-4371.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 92056**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**CHARLES WHITE**

DEFENDANT-APPELLANT

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**JUDGMENT:  
REVERSED AND REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-511682

**BEFORE:** Rocco, P.J., Blackmon, J., and Stewart, J.

**RELEASED:** August 27, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Charles White appeals from the six-year prison sentence imposed after he pleaded guilty to committing robbery, a second-degree felony.

{¶ 2} White presents four assignments of error. He claims his sentence should be reversed because, at the sentencing hearing, the trial court failed to comply with all the requirements set forth in R.C. 2929.19(B)(3). White further claims the trial court failed to fully consider mitigating factors, imposed a sentence that was improperly disproportionate to the one received by his co-defendant, and considered an inappropriate “aggravating factor.”

{¶ 3} Upon a review of the record, this court finds that White’s first claim has merit. This renders his other claims moot. Consequently, his sentence is reversed and vacated, and this case is remanded for resentencing.

{¶ 4} White originally was indicted with co-defendant Marcus Gray on one count of aggravated robbery, R.C. 2911.01(A)(3), a first-degree felony. After the state provided discovery in the case, White’s defense counsel arranged a plea bargain for his client.

{¶ 5} In exchange for White's guilty plea, the state amended the charge to robbery, R.C. 2911.02(A)(2). The trial court conducted a Crim.R. 11(C) colloquy in which it stated to White in pertinent part as follows:

{¶ 6} "On the completion of your prison term, you shall be subject to an automatic three year period of Post Release Control, which, if you violate, will subject you to additional prison time.

{¶ 7} "Under the worst case scenario, that additional prison sanction could be as much as either a year or the remaining time left on your three year Post Release Control period, whichever is greater. Do you understand Post Release Control and the consequences of violating it?"

{¶ 8} White responded, "Yes." Subsequently, the trial court accepted White's plea, and referred him to the probation department for a presentence report.

{¶ 9} When White's case was called for sentencing, defense counsel noted for the court that the probation report contained some inaccuracies. Counsel informed the court that, after his arrest on the charge, White provided an oral statement to the detective in which he clarified his part in the incident.

{¶ 10} The trial court proceeded to read the account contained in the police report of the incident. In relevant part, the police were called to the

scene based on a radio broadcast of a “male assaulted.” Upon the officers’ arrival, they found the victim “lying on the ground shaking and his face was covered in blood.”

{¶ 11} The victim indicated two men, later identified as White and Gray, offered to sell him marijuana, the victim informed them he had \$10, the men seemed agreeable, but then White “punched the victim in the head,” Gray “proceeded to punch him in the back,” and when the victim went to the ground, both men “proceeded to punch and kick the victim.” Both men “went through [the victim’s] pockets \* \* \* taking his property.”

{¶ 12} The police report went on to state that White was observed riding in the area of the incident on a bicycle, but when an officer stopped his patrol car to interview White, White “fled through the yards and with the assistance of chopper No. 1 and other officers \* \* \* was found to be hiding at 3045 West 51<sup>st</sup>.” When the detective interviewed White about the crime, he provided information about it and “blamed it on” his co-defendant, who also had fled and had been apprehended.

{¶ 13} White’s defense counsel acknowledged that the information in the police report was accurate. Counsel sought, however, to distinguish White’s “role in the commission of the offense,” claiming that Gray was the “principal offender” in the encounter with the victim.

{¶ 14} Counsel supported his effort with a “sworn statement” from the victim. Therein, the victim indicated that he received the “impression” when the two men were committing the offense that White “was trying to help” the victim and “was concerned about what [Gray] was doing to” him.

{¶ 15} The trial court, however, remained unimpressed. The court stated that it placed “a lot of weight on [White’s] prior [criminal] record in drafting a sentence,” and pointed out that the police required a helicopter to locate White after he and Gray committed the crime.

{¶ 16} In pronouncing sentence, the court noted that, although White was only 24 years old, he already had a lengthy record of criminal convictions, including drug trafficking, drug possession, assault, and domestic violence. The court indicated that it believed a six-year prison sentence for White’s conviction in this case was appropriate, and informed White that upon his release from prison, he would be “placed on three-years of post-release control, which if [he] violate[d] even by jaywalking, it will result in [him] doing more prison time.”

{¶ 17} White now appeals from the sentence imposed with the following assignments of error:

{¶ 18} **“I. Charles White’s sentence is void for the reason that the trial court did not fully explain post-release control to him during the sentencing hearing.**

{¶ 19} **“II. Charles White has been deprived of his liberty without due process of law by the sentences [sic] imposed on him as said sentences [sic] do not comport with Ohio’s sentencing structure for the reason that the trial court did not consider Mr. White’s mitigation properly and fully.**

{¶ 20} **“III. Charles White has been deprived of his liberty without due process of law by the sentences [sic] imposed on him as said sentences [sic] do not comport with Ohio’s sentencing structure for the reason that Mr. White’s sentence is not proportionate with that imposed on the principal offender Marcus Gray.**

{¶ 21} **“IV. Charles White has been deprived of his liberty without due process of law by the sentences [sic] imposed on him as said sentences [sic] do not comport with Ohio’s sentencing structure for the reason that the trial court considered a fact not listed in the statute as an aggravating factor.”**

{¶ 22} The Ohio Supreme Court set forth the applicable standard of appellate review of a felony sentence in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-2372, ¶4:

{¶ 23} “In applying [*State v.*] *Foster* [109 Ohio St.3d 1, 2006-Ohio-856] to the existing statutes, appellate courts must apply a two-step approach. First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard.” (Emphasis added.)

{¶ 24} In his first assignment of error, White argues that the trial court's failure during the sentencing hearing to inform him specifically of the consequences of violating postrelease control renders his sentence void. In making this argument, he relies upon *State v. Craddock*, Cuyahoga App. No. 85175, 2005-Ohio-2839 and *State v. Donahue*, Cuyahoga App. No. 89111, 2007-Ohio-6825.<sup>1</sup>

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<sup>1</sup>*Craddock* was decided prior to the amendment of R.C. 2929.13(B)(3). That section now states, in relevant part, that during the sentencing hearing, the trial court must:

“(c) [n]otify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree \* \* \* . If a court imposes a sentence including a prison term of a type described in division (B)(3)(c) of this section on or after July 11, 2006, the failure of a court to notify the offender pursuant to division



{¶ 25} This court has addressed a nearly identical situation as White's more recently than the cases he cites. In *State v. Edwards*, Cuyahoga App. No. 92128, 2009-Ohio-1890, ¶10-24, this court noted the following:

{¶ 26} "R.C. 2929.19(B)(3) provides in relevant part as follows:

{¶ 27} "Subject to division (B)(4) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

{¶ 28} "\*" \* \*

{¶ 29} "(b) Notify the offender that, as part of the sentence, the parole board may extend the stated prison term for certain violations of prison rules for up to one-half of the stated prison term;

{¶ 30} "(c) Notify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree,

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(B)(3)(c) of this section that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under division (B) of section 2967.28 of the Revised Code. Section 2929.191 [2929.19.1] of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of this section and failed to notify the offender pursuant to division (B)(3)(c) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control." (Emphasis added.) See, e.g., *State v. Witherspoon*, Cuyahoga App. No. 90498, 2008-Ohio-4092.

for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person. \* \* \*.

{¶ 31} “(d) Notify the offender that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the third, fourth, or fifth degree that is not subject to division (B)(3)(c) of this section. \* \* \*

{¶ 32} “(e) Notify the offender that, if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of this section, and if the offender violates that supervision or a condition of postrelease control imposed under division (B) of section 2967.131 [2967.13.1] of the Revised Code, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender. \* \* \*

{¶ 33} “In *State v. Brooks*, 103 Ohio St. 3d 134, 2004-Ohio-4746, 814 N.E.2d 837, the Supreme Court construed the mandatory requirements of R.C. 2929.19(B)(5), and stated, ‘a trial court sentencing an offender to a community control sanction is required to deliver the statutorily detailed notifications at the sentencing hearing.’

{¶ 34} “The Court explained:

{¶ 35} “While we recognize the statutory complexities that have caused some courts to reject a strict-compliance view of R.C. 2929.19(B)(5) as overly literal, we cannot accept a substantial compliance interpretation. The General Assembly has explicitly set forth the ‘specific prison term’ requirement and has used the word ‘shall’ to indicate the mandatory nature of the provision. What the statute requires is clear, although reasonable minds could differ on how important this requirement is in the grand scheme of R.C. Chapter 2929. We will not interpret such a clear statute to mean anything other than what it unmistakably states.’ Id.

{¶ 36} “Similarly, in *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, the Supreme Court held, ‘In cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence.’ Id., syllabus.

{¶ 37} “In light of these decisions, the trial court must properly inform the defendant of postrelease control at the sentencing hearing, even if it has already done so during the plea proceedings. See *State v. Bailey*, Clark App. No. 2007 CA 121, 2008-Ohio-5357. In *Bailey*, the court held that even where

the trial court provided the defendant with notice of postrelease control during the plea proceeding, it could not apply a substantial compliance analysis to the claim of defective notification at the sentencing hearing, in light of the mandatory nature of the required notices.

{¶ 38} “In this matter, the record reflects that the trial court informed the defendant of postrelease control during the plea proceedings. The record reflects that before accepting the guilty plea, the trial court informed defendant that he would be sentenced to five years of postrelease control, that it was like parole, and that if he violated the terms of postrelease control, defendant could be sent back to prison for one-half of the sentence time.

{¶ 39} “The record further reflects, however, that during the sentencing hearing, the trial court simply stated that defendant would be subject to postrelease control, which was reducible at the discretion of the parole board.

This notification has been deemed to insufficiently apprise the defendant of the penalties for violating postrelease control. See *State v. Cook*, Cuyahoga App. No. 90487, 2008-Ohio-4246.

{¶ 40} “In light of the foregoing, the defendant’s sentence is hereby vacated and the matter is remanded for resentencing.”

{¶ 41} This case presents the same facts. The trial court merely told White that if he violated postrelease control, he would be returned to prison.

Based upon *Edwards*, therefore, White's first assignment of error is sustained.

{¶ 42} This renders White's remaining assignments of error moot. App.R. 12(A)(1)(c).

{¶ 43} White's sentence is reversed and vacated, and this case is remanded for resentencing.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for resentencing.

A certified copy of this entry shall constitute the mandate pursuant to

Rule 27 of the Rules of Appellate Procedure.

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KENNETH A. ROCCO, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and  
MELODY J. STEWART, J., CONCUR