

[Cite as *State v. Atkinson*, 2010-Ohio-2783.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93855

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LASHAWN ATKINSON

DEFENDANT-APPELLANT

**JUDGMENT:
VACATED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-456940

BEFORE: Cooney, J., Rocco, P.J., and Jones, J.

RELEASED: June 17, 2010

**JOURNALIZED:
FOR APPELLANT**

Lashawn Atkinson, pro se
11308 Durant Avenue
Cleveland, Ohio 44108

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Thorin Freeman
Assistant County Prosecutor
9th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Lashawn Atkinson (“Atkinson”), pro se, appeals the trial court’s imposition of postrelease control. Finding merit to the appeal, we vacate the order of postrelease control.

{¶ 2} In October 2004, Atkinson was charged with the illegal conveyance of prohibited items into a detention facility, drug trafficking, and drug possession. Pursuant to a plea agreement, he pled guilty to drug trafficking and the remaining counts were nolle. In January 2005, the trial court sentenced him to an agreed minimum sentence of three years in prison.¹

The trial court advised Atkinson that when he is released from prison, he would be on parole, and if he violated his parole terms and conditions, he could receive additional administrative time. The corresponding journal entry indicated that “[p]ost release control is part of this prison sentence for the maximum time allowed for the above felony(s) under R.C. 2967.28.”

{¶ 3} In January 2008, Atkinson was released from prison and placed on five years of postrelease control. In June 2009, he filed a motion requesting that the trial court vacate his void sentence because he was not

¹At the plea hearing, Atkinson also acknowledged that by pleading guilty, he gave up his right to appeal.

properly notified of postrelease control at the time of sentencing. The court then held a hearing in July 2009, at which it resentenced Atkinson to three years in prison and advised him that he is subject to five years of postrelease control. The court noted that Atkinson had already served his prison term for this case.

{¶ 4} Atkinson now appeals, raising one assignment of error claiming that his sentence is void. He essentially argues that the court erred when it resentenced him and imposed five years of postrelease control after he had already served his three-year sentence. The State concedes this assignment of error and requests that the order of postrelease control be vacated.

{¶ 5} In *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph one of the syllabus, the Ohio Supreme Court recently held that “[f]or criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall conduct a de novo sentencing hearing in accordance with decisions of the Supreme Court of Ohio.” Thus, the trial court in the instant case was required to conduct a de novo sentencing hearing because Atkinson was sentenced in 2005.

{¶ 6} In reviewing decisions where postrelease control was lacking, the *Singleton* court noted:

“In *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, this court considered the consequences of a trial court’s failure to

advise an offender about postrelease control at the sentencing hearing. Id. at ¶1. Applying [*State v. Beasley* (1984), 14 Ohio St.3d 74, 471 N.E.2d 774], we held that '[b]ecause a trial court has a statutory duty to provide notice of postrelease control at the sentencing hearing, any sentence imposed without such notification is contrary to law' and void, and the cause must be remanded for resentencing. Id. at ¶23, 27.

"We again confronted a sentencing court's failure to notify or incorporate postrelease control into its sentencing entry in *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301; however, in that case, discovery of the sentencing error did not occur until after the offender had been released from prison, placed on postrelease control by the parole board, and reimprisoned for violating the terms of postrelease control. Id. at ¶4-7. There, we granted a writ of habeas corpus in conformity with our decisions in *Jordan* and [*Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171, 733 N.E.2d 1103], holding that the parole board lacked authority to impose postrelease control because the trial court had failed to notify the offender of postrelease control or to incorporate it into the sentencing entry and because *Hernandez* had completed serving that sentence when the error was discovered. Id. at ¶32.

* *

"In *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, we concluded that an offender is entitled to a de novo sentencing hearing for the trial court to correct a sentence that omitted notice of postrelease control. * * * Importantly, because *Bezak* had already completed his term of imprisonment, the trial court could not, consistent with our decision in *Hernandez* * * * conduct a resentencing.

"* * *

"Most recently, in *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, we * * * held that when a court fails to impose postrelease control before an offender completes the stated term of imprisonment, under either our caselaw or R.C. 2929.191, the offender must be discharged, ¶69-71." Id. at ¶14-18, 20.

{¶ 7} In the instant case, a review of the record reveals that Atkinson was not properly advised of postrelease control at his original sentencing in 2005. The trial court merely advised Atkinson that when he is released from prison, he would be on parole and if he violated his parole terms, he could receive additional administrative time. The corresponding journal entry merely indicated that “[p]ost release control is part of this prison sentence for the maximum time allowed for the above felony(s) under R.C. 2967.28.” When Atkinson was released from prison in January 2008, he was placed on five years of postrelease control. Then in July 2009, the trial court conducted a resentencing hearing and imposed five years of postrelease control, noting that “[Atkinson] has already served all time.”

{¶ 8} Although the trial court conducted a de novo sentencing hearing, we note that “[o]nce an offender has served the prison term ordered by the trial court, he or she cannot be subject to resentencing in order to correct the trial court’s failure to impose postrelease control at the original sentencing hearing.” *State v. Marsh*, Cuyahoga App. No. 89281, 2007-Ohio-6491, ¶9, citing *Bezak* at ¶18. See, also, *State v. Schneider*, Cuyahoga App. No. 89033, 2007-Ohio-5536; *State v. Harris*, Cuyahoga App. No. 89128, 2007-Ohio-6850; *State v. Fletcher*, Cuyahoga App. No. 89458, 2008-Ohio-320. Thus, the trial

court erred when it resentenced Atkinson and imposed five years of postrelease control after Atkinson had served his prison term.

{¶ 9} Accordingly, the sole assignment of error is sustained.

{¶ 10} The order of postrelease control is vacated, and the matter is remanded for the court to order termination of postrelease control.

It is ordered that appellant recover of said 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.

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

COLLEEN CONWAY COONEY, JUDGE

KENNETH A. ROCCO, P.J., and
LARRY A. JONES, J., CONCUR