[Cite as *State v. Miller,* 2011-Ohio-1161.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-P-0090**
- vs -	:	
KEITH S. MILLER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2009 CR 0408.

Judgment: Affirmed in part, reversed in part, and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Gregory T. Stralka, 600-30 Crown Centre, 5005 Rockside Road, Cleveland, OH 44131 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, Keith S. Miller, appeals from the judgment of conviction entered by the Portage County Court of Common Pleas. For the reasons discussed below, the judgment of the trial court is affirmed in part, reversed in part, and remanded.

{¶2} **Statement of Facts and Procedural History**

{¶3} In late July 2009, the Portage County Grand Jury issued a four-count indictment charging Mr. Miller with: (1) illegal manufacture of drugs, a felony of the second degree, in violation of R.C. 2925.04; (2) assembly or possession of chemicals to

manufacture a controlled substance, a felony of the third degree, in violation of R.C. 2924.041(A) and (C); (3) aggravated possession of drugs, a felony of the fifth degree, in violation of R.C. 2925.11(A) and (C)(1)(a), with a forfeiture specification; and (4) possession of criminal tools, a felony of the fifth degree, in violation of R.C. 2923.24(A). The matter came for pretrial on September 4, 2009, during which the state offered to dismiss counts two, three, and four if Mr. Miller agreed to plead guilty to count one. Mr. Miller rejected the offer and subsequently pleaded guilty to counts one, two, and three.

{¶4} After a thorough and detailed Crim.R. 11 colloquy, the trial court accepted Mr. Miller's plea of guilty and nolled count four. The matter was referred to the Adult Probation Department for a presentence investigation report. In light of the plea, the state recommended the court set a personal recognizance bond on Mr. Miller and place him on electronically monitored house arrest. The state further indicated that, although it had made no promises in terms of sentencing, Mr. Miller desired to assist the Portage County Drug Task Force while awaiting sentence. Prior to sentencing, Mr. Miller moved the trial court to vacate his plea of guilty, alleging it was not entered knowingly, intelligently, and voluntarily. On November 13, 2009, the matter proceeded to hearing after which the trial court overruled the motion. Mr. Miller was subsequently sentenced to six years imprisonment on count one; three years imprisonment on count two; and one year imprisonment on count three. The court ordered Mr. Miller to serve these sentences consecutively and further ordered a forfeiture of the property subject to the specification attached to count three.

{¶5} Mr. Miller now appeals assigning four errors for this court's review.

{¶6} **Presentence Motion to Withdraw Guilty Plea**

{¶7} For his first assignment of error, Mr. Miller alleges:

{¶8} "The trial court abused its discretion and committed reversible error when it denied Miller's presentence motion to withdraw his guilty plea."

{¶9} Crim.R. 32.1 provides:

{¶10} "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct a manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her guilty plea."

{¶11} **Standard of Review**

{¶12} As indicated above, Mr. Miller's motion to withdraw was filed before sentence was pronounced. It is accepted that presentence motions to withdraw a plea should be granted liberally. *State v. Xie* (1992), 62 Ohio St.3d 521, 527. The Supreme Court has also recognized, however, "[a] defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. [Rather], [a] trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." Id., paragraph one of the syllabus.

{¶13} Appellate review of a motion to withdraw a plea of guilty is limited to whether the trial court abused its discretion. Id., paragraph two of the syllabus. An abuse of discretion generally occurs when a court's judgment neither comports with the record, nor reason. *State v. Johnson*, 11th Dist. No. 2007-L-195, 2008-Ohio-6980, at ¶20, citing *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. In the context of a presentence motion to withdraw a guilty plea, an appellate court will not reverse a trial court's judgment unless the record indicates it acted unjustly or unfairly in denying the

motion. *State v. Peterseim* (1980), 68 Ohio App.2d 211, 213-214; accord *State v. Ready*, 11th Dist. No. 2001-L-150, 2002-Ohio-7138, at ¶34.

{¶14} In evaluating presentence motions to withdraw guilty pleas, this court has generally applied the four-prong test set forth in *Peterseim*, supra. *State v. Holin*, 174 Ohio App.3d 1, 5, 2007-Ohio-6255. In *Peterseim*, the Eighth Appellate District held:

{¶15} "A trial court does not abuse its discretion in overruling a motion to withdraw: (1) where the accused is represented by highly competent counsel, (2) where the accused was afforded a full hearing, pursuant to Crim.R. 11, before he entered the plea, (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion, and (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request." Id., paragraph three of the syllabus.

{¶16} **Analysis of *Peterseim* Factors**

{¶17} Under his first assignment of error, Mr. Miller argues the trial court abused its discretion in overruling his presentence motion to withdraw because the record demonstrates he was misled into believing his charges would eventually be amended if he pleaded to the indictment. A review of the record and a considered application of the *Peterseim* factors demonstrate the trial court did not abuse its discretion.

{¶18} **Effectiveness of Defense Counsel**

{¶19} The first factor requires this court to consider whether Mr. Miller was represented by "highly competent" counsel. Mr. Miller argues his attorney did not meet this standard because, he asserts, counsel led him to falsely believe that the charges or sentence would be "amended" if Mr. Miller entered a plea to counts one through three.

Mr. Miller further asserts counsel failed to discuss other plea options with him. And upon agreeing to the plea, Mr. Miller finally alleges, counsel failed to review the written plea form before he signed it. The record does not support these allegations.

{¶20} The transcript of the plea hearing indicates that defense counsel assisted in negotiating a plea in which Mr. Miller would be released on a personal recognizance bond pending his sentence. Mr. Miller eventually admitted that avoiding incarceration during the period between pleading and sentencing was his sole motive in entering his plea of guilty. Avoiding jail was not part of the state's previous offer for Mr. Miller to plead to a felony of the second degree. In this regard, it appears defense counsel was not only attuned to Mr. Miller's desires, but was able to help him achieve his goal of avoiding incarceration in negotiating the plea.

{¶21} The record further reveals that the PR bond was entered so Mr. Miller could assist the Portage County Task Force while awaiting sentence. The record is devoid, however, of any evidence that defense counsel made any representations, let alone promises, that Mr. Miller's charges or sentence would eventually be "amended" if he accepted the plea and assisted the task force. Mr. Miller's allegation that counsel gave him misinformation upon which he relied in accepting the plea is thus unsupported by the record.

{¶22} Mr. Miller was fully apprised of the details of the plea he accepted; he represented he understood these details as well as their consequences; and further stated he had not been promised anything in exchange for entering the plea. Mr. Miller expressed no qualms, reservations, or problems with counsel's representation at the hearing and stated he was satisfied with the plea he entered at the time the court

accepted the agreement. It is well-settled that "*** a properly licensed attorney practicing in this state is presumed to be competent." *State v. Brandon*, 11th Dist. No. 2009-P-0071, 2010-Ohio-6251, at ¶19, citing *State v. Lytle* (1976), 48 Ohio St.2d 391, 397. Without some evidence confirming Mr. Miller's post-plea hearing allegations regarding counsel's purported deficiencies, we hold he has not rebutted the presumption of counsel's competence. We therefore hold defense counsel met the standard of effectiveness required by *Peterseim*.

{¶23} **A Complete and Thorough Hearing**

{¶24} We next examine whether Mr. Miller was afforded a complete and thorough hearing on his plea. The record demonstrates a plea hearing was held at which the trial court advised Mr. Miller of both his constitutional and statutory rights. The court ensured Mr. Miller understood the nature of these rights and that he knowingly and voluntarily waived those rights. The record therefore indicates he was afforded a full plea hearing under the law at which the trial court engaged him in a legally sufficient Crim.R. 11 colloquy. We consequently hold the second *Peterseim* factor was met.

{¶25} **A Complete Hearing with Full and Fair Consideration of the Merits**

{¶26} With respect to the third and fourth factors, Mr. Miller asserts the court failed to fully and fairly consider the merits of his motion. At the hearing on the motion, Mr. Miller testified that, on the day he accepted the plea, his attorney was "over four hours" late and never had time to speak with him. Mr. Miller claimed he told his attorney he "wanted out on bond" at which point his attorney allegedly advised him to "plea to the whole indictment and they would amend it when [he] got out if [he] did what [he] was

supposed to do ***." Mr. Miller essentially claimed that, pursuant to the agreement, if he worked for the Portage County Task Force, his sentence would be "amended." Since entering the plea agreement, Mr. Miller stated, "what I've now come to learn, that once you plead guilty, it can't be amended, so I was mislead and misrepresented."

{¶27} As previously discussed, nothing in the record of the plea hearing supports Mr. Miller's allegations that his counsel provided him with misleading information such that his plea was not knowing, voluntary, and intelligent. At the hearing, Mr. Miller conceded the trial court engaged him in a complete and punctilious plea colloquy after which he acknowledged he understood the full thrust of the rights he was waiving and the potential consequences of entering the plea. While, at the hearing on his motion to withdraw, Mr. Miller remained steadfast in his claim that defense counsel misled him, he admitted counsel reviewed the details of the plea agreement with him at the time the plea was entered and no promises were made regarding his sentence.

{¶28} Finally, this court has frequently stated that a mere "change of heart" is an insufficient basis for permitting a defendant to withdraw his or her guilty plea. Here, Mr. Miller testified his motive for entering a plea of guilty to counts one, two, and three was "to get out of jail," an option not available had he accepted the state's original offer to plead solely to count one. Although he represented he wanted to work for the Portage County Drug Task Force, it was established that he never met with that unit. Instead, while out on bond, Mr. Miller was arrested in Summit County allegedly possessing chemicals used in the manufacturing of methamphetamine. Given these circumstances, the trial court could have drawn the reasonable inference that Mr.

Miller's decision to withdraw his plea was based less upon his allegation that he was misled, and more upon a simple change of heart due to the unfavorable position in which he eventually found himself after his release on the PR bond.

{¶29} Mr. Miller was given a full and impartial hearing on his motion at which the trial court heard his allegations and considered them in light of the existing record. The allegations upon which Mr. Miller premised his motion to withdraw did not match the representations made on record during his plea hearing. We therefore believe the trial court's ultimate decision to overrule appellant's motion was based upon a full, fair, and informed decision given the evidence and testimony. As each of the *Peterseim* factors were met, we hold the trial court did not abuse its discretion in overruling Mr. Miller's presentence motion to withdraw his guilty plea.

{¶30} Mr. Miller's first assignment of error is overruled.

{¶31} **Allied Offenses of Similar Import**

{¶32} Mr. Miller's second assignment of error provides:

{¶33} "The trial court violated Miller's rights under the United States and Ohio Constitutions and committed reversible error when it imposed consecutive sentences that exceeded the maximum penalty for the most serious of Miller's offenses, when at least two of the crimes were allied offenses of similar import."

{¶34} Under his second assignment of error, Mr. Miller argues the crimes of illegal manufacturing of drugs and possession or assembly of chemicals to manufacture a controlled substance, both of which he was convicted, are allied offenses of similar import. Therefore, he concludes, the convictions must merge for purposes of sentencing.

{¶35} The concept of merger originates in the prohibition against cumulative punishments as established by the Double Jeopardy clauses of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. *State v. Williams*, 124 Ohio St.3d 381, 384, 2010-Ohio-147. R.C. 2941.25, Ohio's merger statute, provides:

{¶36} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶37} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶38} Accordingly, when a defendant's conduct constitutes two or more "allied offenses of similar import," and the offenses are committed with the same animus, the defendant may only be punished for one offense. Id.; see, also, *State v. Jones*, 78 Ohio St.3d 12, 13-14, 1997-Ohio-38.

{¶39} **The Evolution of Merger Analysis**

{¶40} Until very recently, the analysis of whether two offenses should be merged pursuant to R.C. 2941.25 was based upon the Supreme Court's interpretation of R.C. 2941.25 in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291. In *Rance*, the court held that offenses are of similar import if they "correspond to such a degree that the commission of one crime will result in the commission of the other." Id. at 636. To

determine whether two offenses met this test, the court determined that the statutory elements of the offenses should be objectively compared in the abstract. Id. If the elements of the crime so correspond that the offenses are of similar import, the defendant may be convicted of both to the extent the offenses were committed separately or with a separate animus. Id. at 638-39.

{¶41} Since its release, the decision in *Rance* has gone through various modifications and revisions. First, in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, the court acknowledged that inconsistent and sometimes absurd results follow from a strict application of the "abstraction" methodology set forth in *Rance*. *Cabrales*, supra, at 59. The court consequently determined that, in considering whether offenses are of similar import under R.C. 2941.25(A), courts need not exactly align the elements of the offenses. Rather, the court held: "*** if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import." *Cabrales*, supra, paragraph one of the syllabus. If the offenses met this test, the court then proceeds to the second step and determines whether the two offenses were committed separately or with a separate animus. Id. at 57.

{¶42} Subsequent to *Cabrales*, the court revisited the allied-offense issue in *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569. In *Brown*, the court formulated what was later described as a "preemptive exception" to the *Rance*/*Cabrales* standard. The court observed the *Rance*/*Cabrales* test for allied offenses of similar import is essentially a rule of statutory construction designed to assist a court in gleaning the intent of the General Assembly. *Brown*, supra, at 454. That is, "'by asking whether two

separate statutes each include an element the other does not, a court is really asking whether the legislature manifested an intention to serve two different interests in enacting the two statutes.'" Id., quoting *Whalen v. United States* (1980), 445 U.S. 684, 714. With this in mind, the court in *Brown* concluded that a court need not resort to comparing crimes when the legislative intent and societal interests protected by each are manifested in the clear language of the statutes under consideration. Id. The court consequently held that while the two offenses of felonious assault of which the defendant in *Brown* was convicted would *not* be allied offenses analyzed under the *Rance*/*Cabrales* framework, the societal interests protected in criminalizing each offense were the same. *Brown*, supra, at 455. Thus, the offenses were allied and should be merged for sentencing without need for further analysis.

{¶43} Later, in *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, the court again considered the analysis of merger under R.C. 2941.25. In *Winn*, the court held that kidnapping and aggravated robbery were allied offenses, even though it was possible to imagine hypothetical scenarios in which aggravated robbery would not necessarily constitute a kidnapping. The court reasoned that exploring all potential hypotheticals represented a regression into a strict textual application of the allied-offenses test previously rejected in *Cabrales*. Still, the court found that the two offenses are so similar that the commission of one necessarily results in the commission of the other. Id. at 417. Notwithstanding the dissent's criticism that the majority was essentially ignoring the rule announced in *Cabrales*, the majority observed, "[w]e would be hard pressed to find any offenses allied if we had to find that there is no conceivable situation in which one crime can be committed without the other." *Winn*, supra, at 417.

{¶44} ***Rance* Overruled**

{¶45} In *State v. Johnson*, ____ Ohio St.3d ____, 2010-Ohio-6314, the court recognized that the law of merger, post-*Rance*, had devolved into an unfortunately unpredictable quagmire of exceptions and absurdities. The court commented:

{¶46} "Our cases currently (1) require that a trial court align the elements of the offenses in the abstract – but not too exactly (*Cabrales*), (2) permit trial courts to make subjective determinations about the probability that two crimes will occur from the same conduct (*Winn*), (3) instruct trial courts to determine preemptively the intent of the General Assembly outside the method provided by R.C. 2941.25 (*Brown*), and (4) require that courts ignore the commonsense mandate of the statute to determine whether the same conduct of the defendant can be construed to constitute two or more offenses (*Rance*). The current allied-offense standard is so subjective and divorced from the language of R.C. 2941.25 that it provides virtually no guidance to trial courts and requires constant ad hoc review by this court." *Johnson*, supra at ¶40.

{¶47} In departing from the former test, the court developed a new, more context-based test for analyzing whether two offenses are allied thereby necessitating a merger. In doing so, the court focused upon the unambiguous language of R.C. 2941.25, requiring the allied-offense analysis to center upon the defendant's conduct, rather than the elements of the crimes which are charged as a result of the defendant's conduct. See *Johnson*, at ¶48-52. The court held:

{¶48} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one

without committing the other. *** If the offenses correspond to such a degree that the conduct of the defendant constituting the commission of one offense constitutes [the] commission of the other, then the offenses are of similar import.

{¶49} "If the multiple offenses can be committed by the same conduct, the court must determine whether the offenses were committed by the same conduct, i.e. 'a single act, committed with a single state of mind.'" ***

{¶50} "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

{¶51} "Conversely if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has a separate animus for each offense, then according to R.C. 2941.25(B), the offenses will not merge." *Johnson*, supra, at ¶48-51.

{¶52} The court acknowledged the results of the above analysis will vary on a case-by-case basis. Hence, while two crimes in one case may merge, the same crimes in another may not. Given the statutory language, however, this is not a problem. The court observed that inconsistencies in outcome are both necessary and permissible "*** given that the statute instructs courts to examine a defendant's conduct – an inherently subjective determination." Id. at ¶52.

{¶53} **Analysis**

{¶54} Applying the new standard to the instant case, Mr. Miller was indicted on one count of illegal manufacture of drugs, to wit: methamphetamine, in violation of R.C. 2925.04; and one count of possession or assembly of chemicals to manufacture a controlled substance, to wit: methamphetamine, in violation of R.C. 2925.041.

{¶55} With respect to the first prong of the *Johnson* test, it is possible for both offenses to be committed with the same conduct. After all, in any circumstance in which an offender has illegally manufactured methamphetamine, he or she, by necessary implication, will have possessed the chemicals to effectuate the production of the drug.

{¶56} With respect to the second prong, while it is clear that each charge arose from Mr. Miller's conduct occurring on June 25, 2009, the record contains insufficient facts regarding the circumstances of appellant's arrest for this court to draw a firm conclusion on whether the two offenses were, in fact, *committed* by the same conduct. Because the *Johnson* test requires a court to consider the specific details of the conduct which precipitated the charges, we are unable, at this time, to determine whether appellant's convictions for illegal manufacturing of methamphetamine and possession of chemicals to produce methamphetamine should have merged. Given the new test set forth in *Johnson*, we hold this matter must be remanded to the trial court for the limited purpose of establishing the facts underlying the charges. Once the facts are established, the trial court shall analyze appellant's conduct under *Johnson* and rule whether the crimes at issue should be merged for sentencing.

{¶57} We recognize defense counsel did not raise this issue at sentencing. As a result, the trial court did not have the opportunity to address whether the convictions should merge. Even had counsel argued the point to the trial court, however, the sentencing judge did not have the benefit of *Johnson* to guide its analysis. That is, the trial court would have been compelled to apply the now-defunct *Rance* standard, which

would have still necessitated a remand to establish a record and apply the facts to the *Johnson* test as just discussed.[1]

{¶58} We accordingly hold Mr. Miller's second assignment of error is sustained, but only to the extent a remand is necessary to establish the facts of his conduct and for the trial court to determine whether, under the new *Johnson* standard, his crimes should merge.

{¶59} **Consecutive Sentences and *State v. Hodge***

{¶60} For his third assignment of error, Mr. Miller alleges:

{¶61} "The trial court's imposition of consecutive sentences is contrary to law."

{¶62} Under this assignment of error, Mr. Miller contends the trial court erred in sentencing him to consecutive terms of imprisonment. Specifically, he argues the United States Supreme Court's decision in *Oregon v. Ice* (2009), 129 S.Ct. 711, holding states may constitutionally require a judge to engage in fact-finding as a precondition to imposing consecutive sentences, functioned to partially overrule the Supreme Court of Ohio's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Pursuant to the Supreme Court of Ohio's recent release of *State v. Hodge*, ____ Ohio St.3d ____, 2010-Ohio-6320, Mr. Miller's argument is not well-taken.

{¶63} In *Hodge*, the Supreme Court addressed a variation of the issue Mr. Miller asks this court to consider; namely, "whether, as a consequence of the decision in *Ice*, Ohio trial courts imposing consecutive sentences must first make the findings specified in R.C. 2929.14(E)(4) in order to overcome the presumption for concurrent sentences in

1. Also, it is worth noting that waiver is not an issue under these circumstances. The Supreme Court of Ohio has held that the failure to merge allied offenses of similar import rises to the level of plain error. See *State v. Yarbraugh*, 104 Ohio St.3d 1, 16-17, 2004-Ohio-6087; see, also, *State v. Underwood*, 124 Ohio St.3d 365, 372, 2010-Ohio-1.

R.C. 2929.41(A)." *Hodge*, supra, at ¶9. In answering the question in the negative, the court held:

{¶64} "1. The jury-trial guarantee of the Sixth Amendment to the United States Constitution does not preclude states from requiring trial court judges to engage in judicial fact-finding prior to imposing consecutive sentences. ***

{¶65} "2. The United States Supreme Court's decision in *Oregon v. Ice* *** does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and R.C. 2929.41(A), which were held unconstitutional in *State v. Foster* ***.

{¶66} "3. Trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made." *Hodge*, supra, paragraphs one, two, and three of the syllabus.

{¶67} As the Supreme Court has considered the issue and concluded *Ice* has no necessary effect on Ohio's felony sentencing laws post-*Foster*, Mr. Miller's argument is not well-taken.[2]

{¶68} Mr. Miller's third assignment of error is overruled.

{¶69} **Post-release Control**

{¶70} Appellant's fourth assignment of error asserts:

{¶71} "The trial court's sentence is void."

2. In *State v. Jordan*, 11th Dist. No. 2009-T-0110, 2010-Ohio-5183, this court held that the April 7, 2009 post-*Ice* amendment to R.C. 2929.14, which retained subsection (E)(4), acted to revive the requirement that a judge find certain facts prior to imposing consecutive sentences. In light of *Hodge*, this aspect of *Jordan* is overruled. See *State v. Jordan*, ____ Ohio St.3d ____, 2011-Ohio-737.

{¶72} Under this assigned error, Mr. Miller claims the trial court failed to properly impose post-release control thereby rendering his entire sentence void. We disagree.

{¶73} Mr. Miller was convicted of, inter alia, a felony of the second degree. For a felony-two conviction, R.C. 2967.28(B) requires a mandatory term of three years post-release control. When sentencing an offender to a term of imprisonment, a trial court is required to notify an offender of his or her term of post-release control both at the sentencing hearing and incorporate that notice into its judgment entry on sentence. See *State v. Biondo*, 11th Dist. No. 2009-P-0009, 2009-Ohio-7005, at ¶40, citing *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph one of the syllabus.

{¶74} At his plea hearing, the trial court mistakenly explained that Mr. Miller "could" be subject to a period of five years post-release control. During the sentencing hearing, however, the trial court properly notified Mr. Miller that his "*** [p]ost [r]elease [c]ontrol period is a period of three years." Contrary to Mr. Miller's claim, the judgment entry also reflects the proper three-year term of post-release control. Even though the trial court provided Mr. Miller with an inaccurate notification at his plea hearing, any error was cured by the notices the court provided at the sentencing hearing and in its judgment entry.

{¶75} Mr. Miller's fourth assignment of error is therefore overruled.

{¶76} For the reasons discussed in this opinion, Mr. Miller's first, third, and fourth assignments of error are overruled. The argument set forth under Mr. Miller's second assignment of error, however, requires additional findings to be placed on record before the issue can be properly ruled upon. Appellant's second assignment of error is sustained to this limited extent.

{¶77} The judgment of the Portage County Court of Common Pleas is hereby affirmed in part, reversed in part, and remanded.

TIMOTHY P. CANNON, P.J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only.