

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-A-0052
ORLANDO SHEPHERD,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 02 CR 40.

Judgment: Reversed and remanded.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

Orlando Shepherd, pro se, PID# 292-250, Richland Correctional Institution, P.O. Box 8107, Mansfield, OH 44901 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Orlando Shepherd, appeals the Judgment of the Ashtabula County Court of Common Pleas, denying his Motion to Vacate Void *Nunc pro Tunc* Judgment Entry and Terminate Void Post-Release Control. For the following reasons, we reverse the Judgment of the lower court and remand this matter for further proceedings consistent with this opinion.

{¶2} On February 21, 2002, Shepherd was indicted by the Ashtabula Grand Jury for one count of Felonious Assault, a felony of the second degree in violation of R.C. 2903.11, and one count of Assault, a felony of the fifth degree in violation of R.C. 2903.13. The charges arose out of Shepherd's assault on a correctional officer of the Lake Erie Correctional Institution, where he was serving a prison sentence for crimes committed in Summit County.

{¶3} On February 5, 2003, Shepherd entered a plea of No Contest to third degree Felonious Assault. The Assault charge was dismissed pursuant to the terms of a negotiated plea agreement. At the time of Shepherd's sentencing, a second degree felony carried a mandatory three-year period of post-release control. R.C. 2967.28(B)(3).

{¶4} On February 7, 2003, a sentencing hearing was held. At the hearing, the trial court read to Shepherd from a written document, captioned Notice (Prison Imposed), as follows: "The Court hereby notifies the defendant that after you're released from prison you will have a period of post-release control for a period of up to three years following your release from prison." The actual text of the document reads: "After you are released from prison, you (will, may) have a period of post-release control for 3 years following your release from prison." The written Notice was signed by Shepherd and filed with the court on the same day as the sentencing hearing.

{¶5} On February 10, 2003, the trial court's Judgment Entry of Sentence was journalized. The Judgment failed to include any mention of post-release control.

Shepherd was sentenced to serve a six-year term of imprisonment, consecutive to the sentence he was currently serving.¹

{¶6} On August 18, 2009, Shepherd filed a Motion for New Sentencing Hearing under ORC. 2929.191. Shepherd asserted his sentence was void in that, at his sentencing hearing, the trial court advised him that post-release control would be discretionary “up to” three years, rather than mandatory as provided in R.C. 2967.28(B)(3).

{¶7} On January 19, 2010, the trial court entered a *Nunc pro Tunc* Judgment Entry, providing as follows:

{¶8} **IT IS ORDERED THAT** Defendant’s original sentencing entry dated February 10, 2003, is amended *nunc pro tunc* to add the following paragraph:

{¶9} “The Court has notified the Defendant that the sentence imposed automatically includes any extension of the stated prison term by the parole board, pursuant to R.C. 2929.19(B)(3). In addition, the offender will be subject to a period of post-release control pursuant to R.C. 2929.14(F) and R.C. 2967.28(B) & (C).”

{¶10} The Court finds that the Defendant was given formal notice of the fact that he was subject to post release control and signed a copy thereof, *** which was previously filed with the Clerk of Courts. Further, the Court finds that the original sentencing entry did not contain a reference to Defendant being subject to post release control, due to a clerical error.

{¶11} On August 19, 2010, Shepherd filed a Motion to Vacate Void *Nunc pro Tunc* Judgment Entry and Terminate Void Post-Release Control. Shepherd argued the trial court was without “authority and jurisdiction” to correct its failure to impose the mandatory three-year term of post-release control as he completed the original six-year prison term “on or about February 2009.”

1. Shepherd’s sentence and conviction were affirmed on direct appeal. See *State v. Shepherd*, 11th Dist. No. 2003-A-0031, 2004-Ohio-5306.

{¶12} On September 30, 2010, the trial court issued a Judgment Entry, denying Shepherd's Motion to Vacate and Terminate Void Post-Release Control. The court observed that Shepherd's six-year prison term was imposed consecutively to the prison term he was serving at the time of sentencing in February 2003, which originated from Summit County in 1994. "Since the sentence imposed by this Court was ordered to be served consecutively to the Summit County sentence, Defendant would have to serve the entire Summit County sentence before he even began serving the sentence imposed in the case at bar. As evidenced by the fact that Defendant is still in prison, it is clear Defendant is still serving either the Summit County prison term or the term imposed in the case at bar."

{¶13} Alternately, the trial court noted that clerical mistakes, such as the failure to include a term of post-release control in the Judgment Entry of Sentence, "may be corrected at any time." Crim.R. 36.

{¶14} On October 27, 2010, Shepherd filed his Notice of Appeal. On appeal, Shepherd raises the following assignments of error:

{¶15} "[1.] The trial court abused its discretion when it denied Shepherd's "Motion to Vacate Void *Nunc pro Tunc* Judgment Entry and Terminate Void Post-Release Control," thereby denying him due process and equal protection of the law in violation of Article I, Section 16 and the 14th Amendment to the U.S. Constitution."

{¶16} "[2.] The trial court acted without authority and jurisdiction when it issued a *nunc pro tunc* judgment entry in an attempt to correct its failure to impose the mandatory three-year term of post-release control where Mr. Shepherd had already completed the prison term."

{¶17} We shall jointly consider Shepherd's assignments of error.

{¶18} As an initial matter, both parties claim that the proper standard of review to be applied in this matter is whether the trial court abused its discretion. E.g., *State v. Butcher*, 11th Dist. No. 2003-A-0024, 2004-Ohio-5305, at ¶10. The Ohio Supreme Court has since held that, pursuant to R.C. 2953.08(G)(2), an appellate court "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." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶4. The Supreme Court has also held that sentencing judgments where the court failed to advise an offender regarding post-release control at the sentencing hearing or to include post-release control sanctions in the sentencing entry are contrary to law. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, at ¶22. Accordingly, we must review the validity of Shepherd's sentence to determine whether it is clearly and convincingly contrary to law.

{¶19} We begin our analysis by considering the original February 10, 2003 Judgment Entry of Sentence, to determine whether it was a void sentence, and so requires a resentencing hearing, or whether it was a clerical error, such as could be corrected by a nunc pro tunc entry.

{¶20} "For 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." *Singleton*, 2009-Ohio-6434, at paragraph one of the syllabus; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at the syllabus. "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*, 128 Ohio St.3d 92, 2010-Ohio-6238, at paragraph one of the syllabus. “The new sentencing hearing to which an offender is entitled *** is limited to proper imposition of postrelease control.” *Id.* at paragraph two of the syllabus, modifying *Bezak*, 2007-Ohio-3250, at the syllabus. “The scope of an appeal from a resentencing hearing in which a mandatory term of postrelease control is imposed is limited to issues arising at the resentencing hearing.” *Id.* at paragraph four of the syllabus.

{¶21} Applying these precedents to the present case, Shepherd’s February 10, 2003 sentence is void with respect to the imposition of post-release control. At the sentencing hearing, the trial court incorrectly advised Shepherd that the length of the term of post-release control was discretionary, i.e., “a period of up to three years.” The sentencing Entry, moreover, failed to include any mention of post-release control. Accordingly, Shepherd is entitled to a resentencing hearing to impose post-release control.

{¶22} The State contends that the omission of post-release control in the sentencing Entry is a clerical error, such as may be corrected by a nunc pro tunc judgment entry. Crim.R. 36 (“[c]lerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time”). This court has previously held that a trial court may correct the omission of a term of post-release control in a Judgment Entry of Sentence by issuing a nunc pro tunc Entry. *State v. Johnson*, 11th Dist. No. 2007-A-0047, 2008-

Ohio-2004, at ¶18 (“[t]he omission of this notice in the May 18, 2001 Judgment Entry of Sentence was merely a clerical error which the trial court had the authority to correct through a nunc pro tunc entry”). The Ohio Supreme Court has likewise sanctioned the practice of using a nunc pro tunc entry to correct a prior sentencing entry failing to properly impose post-release control without holding a resentencing hearing (at least for sentences imposed prior to July 11, 2006). *State ex rel. Womack v. Marsh*, 128 Ohio St.3d 303, 2011-Ohio-229, at ¶14.

{¶23} The remedy of issuing a nunc pro tunc entry is not available in the present case, however, since the trial court failed to properly advise Shepherd of post-release control at the sentencing hearing. A court’s authority to correct a sentencing entry nunc pro tunc derives from its “continuing jurisdiction to correct clerical errors in judgments by nunc pro tunc entry to reflect what the court actually decided.” *Womack*, 2011-Ohio-229, at ¶13, citing *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, at ¶¶18-19. In this case, the court did not actually impose a mandatory three-year period of post-release control, but, rather, a period of post-release control “of up to three years.” The nunc pro tunc entry would not merely be supplying a missing term of post-release control, but correcting the term that was improperly imposed at the sentencing hearing.

{¶24} This distinction distinguishes the cases of *Johnson* and *Womack*, in both of which post-release control was properly imposed at the sentencing hearing. *Johnson*, 2008-Ohio-2004, at ¶17 (“the trial court’s April 20, 2007 Nunc Pro Tunc Judgment Entry properly amended the record to reflect the sentence actually imposed on Johnson at the May 18, 2001 sentencing hearing”); *Womack*, 2011-Ohio-229, at ¶14

("[b]ecause appellant was notified of the proper term of postrelease control at his sentencing hearing and the error was merely clerical in nature, Judge Marsh was authorized to correct the mistake by nunc pro tunc entry"). The point was reiterated in a recent decision of this court, that, "*where the trial court correctly advises the offender at a sentencing hearing of the mandatory nature of post-release control but fails to indicate as much in its sentencing entry, the result is a clerical error which may be corrected through a nunc pro tunc entry.*" *State v. McKenna*, 11th Dist. No. 2010-T-0001, 2011-Ohio-770, at ¶21 (emphasis added); see, also, the cases cited therein.

{¶25} Assuming, arguendo, that the nature of the error was clerical and could be corrected by a nunc pro tunc entry, the trial court's January 19, 2010 Nunc pro Tunc Judgment Entry failed to correct the error. Significantly, the Nunc pro Tunc Entry failed to state the length of the term of post-release control. Instead, the Entry advised that Shepherd was subject to post-release control "pursuant to R.C. 2929.14(F) and R.C. 2967.28(B) & (C)." The Ohio Supreme Court has held that such notice fails "to satisfy the most basic requirement of *** our existing precedent -- that it notify the offender of *** the length of that mandatory term and incorporate that notification into its entry." *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, at ¶69 (the trial court's nunc pro tunc entry provided the offender "*will now be subject to Post Release Control pursuant to Ohio Revised Code 2967.28*") (emphasis sic).

{¶26} We must next address the issue of whether the trial court lacks authority to resentence Shepherd with respect to post-release control in that he has completed his prison term for the underlying crime of Felonious Assault.

{¶27} A trial court’s ability to correct a sentence that failed to properly impose a term of post-release control terminates when the offender has completed his or her sentence. “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.” *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at the syllabus; *Bloomer*, 2009-Ohio-2462, at ¶72 (citations omitted); *Bezak*, 2007-Ohio-3250, at ¶18.

{¶28} The trial court summarily dismissed this argument, noting “it is clear Defendant is still serving either the Summit County prison term or the term imposed in the case at bar.” On appeal, the State refers us to the following provision of the Ohio Administrative Code to support its position that Shepherd has not yet completed his prison term for Felonious Assault: “When a prison term for a crime committed on or after July 1, 1996, is imposed to run consecutively to a sentence for a crime committed before July 1, 1996, the sentence shall be served first, then the prison term.” Ohio Adm.Code 5120-2-03.2.

{¶29} Shepherd has attached to his Reply Brief, documents purportedly from the Ohio Department of Rehabilitation and Correction indicating that February 4, 2009, was the expiration date for his “stated prison term” of six years. These documents, however, are not properly authenticated and were not before the trial court when it ruled on Shepherd’s Motion to Vacate. Accordingly, we will not consider them. *State v. Ishmail* (1978), 54 Ohio St.2d 402, at the syllabus (“[a] reviewing court cannot add matter to the

record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter").

{¶30} The determination of whether Shepherd has actually completed his prison term for Felonious Assault ultimately rests with the Department of Rehabilitation and Correction. "The department of rehabilitation and correction shall regulate the admission and discharge of inmates in *** institutions," which are established "for the custody, control, training, and rehabilitation of persons convicted of crime and sentenced to correctional institutions." R.C. 5120.15 and R.C. 5120.05.

{¶31} The present case must be remanded for the reason that, as demonstrated above, the trial court's January 19, 2010 *Nunc pro Tunc* Judgment Entry failed to incorporate the required term of post-release control into Shepherd's sentence, and, thus, is clearly and convincingly contrary to law. It is appropriate, on remand, for the court to receive testimony on the issue of whether Shepherd has completed his prison term for Felonious Assault.

{¶32} Shepherd's assignments of error are with merit.

{¶33} For the foregoing reasons, the Judgment of the Ashtabula County Court of Common Pleas, denying Shepherd's Motion to Vacate Void *Nunc pro Tunc* Judgment Entry and Terminate Void Post-Release Control, is reversed, and this case is remanded for further proceedings consistent with this opinion. Costs to be taxed against appellee.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.