

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

STATE OF OHIO,	:	<b>OPINION</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NOS. 2010-A-0034,</b>
	:	<b>2010-A-0039,</b>
	:	<b>and 2010-A-0040</b>
ROBERT LEE TURNER,	:	
Defendant-Appellant.	:	

Criminal Appeals from the Court of Common Pleas, Case Nos. 1996 CR 118, 2000 CR 124, and 2000 CR 17.

Judgment: Affirmed.

*Thomas L. Sartini*, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092. (For Plaintiff-Appellee).

*Wendi L. Overmyer* and *Carlos Warner*, Office of the Federal Public Defender, 50 South Main Street, #700, Akron, OH 44308 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Robert Lee Turner, appeals from three judgments of the Ashtabula County Court of Common Pleas overruling his three motions to vacate separate convictions. Because the issues raised in each separate appeal are identical, the matters were consolidated. For the reasons discussed below, we affirm the trial court’s judgment entries.

{¶2} The facts precipitating the underlying appeals are not in dispute.

{¶3} **Case No. 2010-A-0034 (C.P. No. 1996 CR 118)**

{¶4} In October 1996, appellant pleaded guilty to one count of assault, in violation of R.C. 2903.13, a misdemeanor; and one count of aggravated burglary, in violation of R.C. 2911.11(A)(2), a felony of the first degree. On December 31, 1996, the trial court sentenced appellant to a prison term of four years for the aggravated burglary; the court, however failed to impose post-release control as part of the sentence and there is no mention of post-release control in the judgment entry. The trial court later, via a nunc pro tunc judgment entry, corrected the original judgment to reflect a concurrent six-month sentence for the misdemeanor assault. The nunc pro tunc entry does not mention post-release control.

{¶5} On December 7, 1998, appellant was granted judicial release. After violating judicial release, the trial court reinstated its original sentence. There was no mention of post-release control in the judgment reinstating the sentence. Appellant served his prison term and was not placed on post-release control; instead, on April 3, 2001, he began serving a prison term for a separate conviction (see, infra. C.P. No. 2000 CR 17).

**{¶6} Case No. 2010-A-0039 (C.P. No. 2000 CR 124)**

{¶7} In December 2000, appellant pleaded guilty to one count of possession of less than one gram of cocaine, in violation of R.C. 2925.11, a felony of the fifth degree. Appellant was sentenced to a prison term of eleven months. In its sentencing entry, the trial court failed to include a notification of the applicable discretionary term of post-release control.<sup>1</sup> In 2006, the trial court filed a nunc pro tunc judgment, indicating

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1. In the judgment entry at the basis of this appeal, the trial court attached copies of appellant's plea agreement as well as the "notice of prison imposed." While each of these documents references post-release control, they are insufficient to meet the statutory notification requirements. Proper notification occurs when the trial court notifies the offender at the sentencing hearing and incorporates the notice into the judgment entry imposing sentence. See, e.g., *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph one of the syllabus.

appellant would be subject to a mandatory term of post-release control.<sup>2</sup> Appellant completed his prison term and was released from post-release control on January 18, 2007.

**{¶8} Case No. 2010-A-0040 (C.P. No. 2000 CR 17)**

{¶9} In June 2000, appellant pleaded guilty to one count of trafficking 2.84 grams of crack cocaine, in violation of R.C. 2925.03(A) and (C)(4)(c), a felony of the fourth degree; and one count of trafficking 5.63 grams of crack cocaine, in violation of R.C. 2925.03(a) and (C)(4)(d), a felony of the third degree. Appellant was sentenced in August 2000 to an aggregate term of three years. In its sentencing entry, the trial court failed to include the applicable post-release control notification.<sup>3</sup> In 2006, the trial court filed a nunc pro tunc entry indicating appellant would be subject to a term of post-release control of three years following his release from prison. (See footnote 2.) Appellant completed his sentence and, on January 18, 2007, he was released from post-release control.

**{¶10} Motions to Vacate**

{¶11} On March 26, 2010, appellant filed a pro se motion to vacate his guilty plea and sentence from C.P. No. 2000 CR 17, which the trial court denied on April 26, 2010. Later, on April 28, 2010, appellant, through counsel, filed motions to vacate the

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2. The record suggests appellant had been released from prison at the time of the nunc pro tunc entry. To the extent this is true, the trial court did not have jurisdiction to impose post-release control in 2006, regardless of the method it employed. See, e.g., *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-26. Even if it had jurisdiction, however, the nunc pro tunc entry was insufficient to meet the notification requirements established by the Supreme Court of Ohio. To wit, pursuant to *Jordan*, supra, and its progeny, a trial court that fails to properly impose post-release control in cases disposed of prior to July 11, 2006, must conduct a de novo sentencing hearing to correct the error in accordance with the relevant decisions of the Supreme Court. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, paragraph one of the syllabus. Essentially, the nunc pro tunc entry was a nullity.

3. Similar to the judgment overruling appellant's motion in case No. 2000 CR 124, the trial court attached copies of appellant's written guilty plea and the notice of imposition of prison. Again, these documents provide notice of post-release control. The judgment imposing sentence, however, fails to provide proper notice. Pursuant to *Jordan*, supra, and its progeny, the trial court failed to meet the statutory requirements for notification.

judgments of conviction in all three cases asserting the original judgments were void for failing to properly impose post-release control. The trial court overruled each motion. This consolidated appeal follows.

{¶12} Although three cases are being appealed, and therefore six assignments of error are actually alleged (two in each case), each appeal includes the same two assigned errors. To avoid repetition, therefore, we will state them only once and, for ease of discussion, shall address the assigned errors together. They provide:

{¶13} “[1.] The trial court committed prejudicial error in denying Mr. Turner’s motions to vacate judgment because the original judgments failed to impose post-release control resulting in void judgments under R.C. 2967.28(B) and R.C. 2929.19, thus violating his due process and equal protection rights under the Fourteenth Amendment of the United States Constitution and corresponding Ohio Constitution provisions.”

{¶14} “[2.] The trial court committed prejudicial error in denying Mr. Turner’s motions to vacate judgment because Mr. Turner’s motions are not barred by the doctrine of *res judicata*, thus violating his due process and equal protection rights pursuant to the Fourteenth Amendment of the United States Constitution and corresponding Ohio Constitution provisions.”

{¶15} Appellant asserts various arguments under his two assignments of error; to summarize, appellant claims the judgments of conviction are void because the trial court failed to comply with statutory mandates relating to post-release control notification. Because a void judgment is a legal nullity, appellant asserts, his claims are not subject to time limitations, the doctrine of *res judicata*, or the doctrine of mootness.

Thus, appellant concludes, the trial court erred in denying his motions to vacate his three convictions. We disagree.

{¶16} In *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, the Supreme Court of Ohio recently held that if and when a trial court is required to revisit a conviction due to improper post-release control notification, the court's jurisdiction is limited to addressing *only* post-release control. *Fischer*, paragraph two of the syllabus. In so ruling, the court established an ostensibly new legal concept: the doctrine of partial voidness.

{¶17} Traditionally, a void judgment is a legal nullity: "It is as though such proceedings had never occurred." *Romito v. Maxwell* (1967) 10 Ohio St.2d 266, 267. In light of *Fischer*, however, the failure to adhere to the statutory requirements for imposing post-release control only renders that component of the sentence void. Such an "error" does not, as the court previously ruled, place a defendant in the same position as if there had been no judgment. See, e.g., *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at ¶12. Instead, only the infected portion of the judgment is considered void and subject to the court's jurisdiction.

{¶18} Post-*Fischer*, therefore, a sentence may be "dissected" so as to separate the "void" or "illegal" portion from the untainted and otherwise valid portion. In its own words, the court held: "\*\*\*\* when a judge fails to impose statutorily mandated post-release control as part of a defendant's sentence, that *part* of the sentence is void and must be set aside." *Id.* at ¶26. Because, however, the judgment is only "partially" void, the other "valid" aspects of the judgment, e.g., the merits of a conviction and other lawful elements of the ultimate sentence, remain intact and subject to the principles of *res judicata* as well as the law-of-the-case doctrine. *Id.*, paragraph three of the syllabus.

{¶19} In *State v. Howard*, 11th Dist. No. 2010-L-048, 2011-Ohio-2840, this court recently applied *Fischer* to arguments similar to those raised in the instant case. While acknowledging that *Fischer* did not specifically address these arguments, this court reasoned the Supreme Court's analysis in *Fischer* was pertinent for the following reasons:

{¶20} "First, *Fischer* stands for the proposition that when the 'post-release control' part of a criminal judgment is rendered void due to improper notification under the statute, only that part of the judgment is affected; i.e., the remaining aspects of the judgment are still valid. Thus, appellant cannot justifiably assert that his conviction \*\*\* is no longer enforceable.

{¶21} "Second, *Fischer* indicated that, once a defendant had one opportunity to contest the merits of his actual conviction, the fact that an error was made regarding the imposition of post-release control will not have the effect of allowing him to reopen the matter in a subsequent appeal. In the instant case, appellant could only challenge the merits of his conviction in a direct appeal from the original sentencing judgment \*\*\*. A review of the trial record before us readily shows that appellant did not pursue a direct appeal at that time. Under such circumstances, the doctrine of res judicata dictates that the validity of his conviction cannot be subject to any further review regardless of the status of his post-release control." *Howard*, supra, at ¶20-21.

{¶22} In this case, appellant did not appeal his convictions and has already served his prison terms. Pursuant to *Fischer*, therefore, res judicata precludes a collateral attack to his conviction irrespective of the defects in the trial court's imposition of post-release control.

{¶23} It is also worth pointing out that the above result was foreshadowed by this court in *State v. Biondo*, 11th Dist. No. 2009-P-0009, 2009-Ohio-7005 (“*Biondo II*”).<sup>4</sup> The appellant, Biondo, filed a series of appeals relating to his 2002 conviction for aggravated possession of methamphetamine. After his release from prison, Biondo sought to terminate the Adult Parole Authority’s imposition of post-release control, which the trial court overruled. In reversing the trial court’s decision, this court, relying upon the authority of the Supreme Court of Ohio, determined the trial court’s failure to comply with R.C. 2929.19(B)(3)(c), which requires a trial court to notify a defendant of post-release control at the sentencing hearing, rendered the sentencing entry void. This court therefore determined Biondo was entitled to release from any post-release control as it related to the underlying conviction. See *State v. Biondo*, 11th Dist. No. 2008-P-0028, 2008-Ohio-6560 (“*Biondo I*”).

{¶24} In light of this ruling, Biondo subsequently moved the trial court to vacate the fines and court costs imposed in its 2002 sentencing entry. To the extent that the sentencing entry was a legal nullity, Biondo reasoned, all legal obligations under the entry were void. Recognizing Biondo’s position would have the effect of vacating his entire conviction, the lead opinion held that the Supreme Court’s decision in *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, did not demand such a result.

{¶25} In *Bezak*, the trial court failed to properly notify Bezak of post-release control. As a result, the Supreme Court vacated his post-release control, declaring the sentence void. Because Bezak had been released, he, like Biondo, could not be resentenced. Given this, the Supreme Court remanded the matter to the trial court with instructions to note on the record that Bezak had *completed his sentence* and would not

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4. Although *Biondo* was a plurality opinion, the panel in *Howard* adopted the analysis of the lead opinion as precedent for this court.

be subject to resentencing. *Id.* at ¶18. The lead opinion in *Biondo* underscored the quizzical implications of the supreme court's order:

{¶26} “Bezak’s sentence was void and therefore a legal nullity because he was not properly notified of the possibility of post-release control; however, the court made a point to emphasize that he had already served his sentence. This begs the question: How can one have served a sentence that does not exist? Much like a Zen Koan, such a paradox cannot be resolved by deductively following the concepts which created the entanglement, but must be *dissolved* by following a different course.” (Emphasis sic.) *Id.* at ¶47.

{¶27} To this end, the lead opinion determined that the Supreme Court, in its post-release control jurisprudence, was using the term “sentence” in a manner somewhat different than typically employed. Instead of treating a conviction as the totality of a finding of guilt plus the imposition of a sentence, the lead opinion observed: “\*\*\* it appears that a prison term served can be seen, in light of *Bezak*, as a sentence unto itself.” *Biondo II*, *supra*, at ¶49. Thus, “[t]he sentence (and, perhaps, more importantly, the conviction) survives and all sanctions *properly* imposed will survive a successful notification challenge and, much like the remedy in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, only the tainted portion need be excised.” (Emphasis sic.) *Biondo II*, *supra*.

{¶28} Thus, utilizing *Bezak*, this court in *Biondo* effectively arrived at the same conclusion as the Supreme Court in *Fischer*, namely, that a criminal defendant who has been released from prison *may not* collaterally attack his underlying conviction by means of the Supreme Court’s jurisprudence relating to post-release control. With the release of *Fischer* and the advent of the doctrine of “partial voidness,” such challenges

are now formally precluded by operation of res judicata and the law-of-the-case doctrine.

{¶29} Appellant's two assignments of error are therefore overruled.

{¶30} For the reasons set forth in this opinion, the assignments of error alleged in this consolidated appeal are overruled and the judgment of the Ashtabula County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDALL, J.,

concur.