**[Cite as *State v. Cline*, 2011-Ohio-3890.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**GEAUGA COUNTY, OHIO**

| | | |
|---|---|---|
| STATE OF OHIO, | : | **O P I N I O N** |
| Plaintiff-Appellee, | : | |
| - vs - | : | **CASE NOS. 2010-G-2981 and 2010-G-3000** |
| JAMES D. CLINE, | : | |
| Defendant-Appellant. | : | |

Criminal Appeals from the Court of Common Pleas, Case No. 06 C 000035.

Judgment: Reversed and remanded.

*David P. Joyce*, Geauga County Prosecutor, and *Craig A. Swenson*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

*James D. Cline*, pro se, PID: 512-664, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, OH 44430 (Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

**{¶1}** Appellant, James D. Cline, appeals the judgment entered by the Geauga County Court of Common Pleas denying his motion for a full de novo resentencing hearing due to what he claims is a void sentence as a result of improper post-release control notification. He also appeals from the subsequent decision of the Geauga County Court of Common Pleas denying a previously-scheduled resentencing hearing to correct a void sentence. This court consolidated these appeals sua sponte.

**{¶2}** On March 2, 2006, appellant was driving a pick-up truck on State Route 700 in Burton Township. His vehicle went left-of-center while attempting to evade an officer, striking a vehicle occupied by three college students. Two of the students died as a result of the accident, and the third student was severely injured.

**{¶3}** After entering his guilty plea, appellant was sentenced to an aggregate prison term of 38 years on five counts: two counts of aggravated vehicular homicide, first-degree felonies in violation of R.C. 2903.06(A)(1)(a) and (B)(2)(b)(i); aggravated vehicular assault, a second-degree felony in violation of R.C. 2903.08(A)(1)(a) and (B)(1)(a); operating a motor vehicle under the influence of alcohol ("OVI"), a fourth-degree felony due to appellant's history in violation of R.C. 4511.19(A)(1)(a); and failure to comply with an order or signal of a police officer, a third-degree felony in violation of R.C. 2921.331(B) and (C)(5)(a)(i).

**{¶4}** During the plea hearing and sentencing hearing, the trial court did not fully advise appellant of his post-release control terms. Additionally, the judgment entry did not correctly state the exact terms of appellant's post-release control. However, the court did advise appellant of the consequences of violating post-release control, which is not at issue.

**{¶5}** In June 2010, appellant filed a motion for a de novo resentencing, which was opposed by appellee, the state of Ohio, and denied by the trial court. Appellant appealed, alleging that his sentence was void due to improper post-release control notification and that the trial court exceeded its authority in denying his motion (case No. 2010-G-2981). The state then filed "State's Motion to Correct a Void Sentence" in the

Geauga County Court of Common Pleas, recognizing that appellant's sentence needed to be corrected.

**{¶6}** On November 8, 2010, the trial court vacated appellant's sentence, declaring it void, and set a resentencing hearing for November 23, 2010. On November 18, 2010, the trial court issued a corrective judgment entry and vacated its November 8th order voiding and vacating appellant's sentence: "[w]herefore, the portion of this Court's order of November 8, 2010 holding that the sentences imposed on Defendant, James D. Cline are void and vacated, are hereby ordered vacated and set aside." The trial court, relying on *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, ruled that because appellant was sentenced after July 11, 2006, R.C. 2929.191(C) controls. The trial court maintained that a resentencing hearing would still be held on November 23, 2010.

**{¶7}** On November 19, 2010, on request by the state and in the interest of judicial economy, this court remanded the case to the trial court for a period of 30 days "for the sole purpose of the trial court conducting its November 23, 2010 de novo sentencing hearing and issuing a new sentencing judgment entry in accordance with R.C. 2929.191." On November 22, 2010, the trial court cancelled the resentencing hearing, asserting that a de novo sentencing hearing is not necessary and "perhaps inappropriate." The trial court elected to wait for this court's decision.

**{¶8}** Appellant again appealed, maintaining his sentence was void and that the trial court exceeded its authority in denying his motion and cancelling the hearing (case No. 2010-G-3000). This court consolidated the appeals sua sponte on January 10,

2011. After the consolidation, appellant timely filed an appellate brief, wherein he asserts the following assignment of error:

**{¶9}** "The trial court exceeded its authority in denying the Appellant's motion for re-sentencing with proper post-release control notification, because his sentences are void in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 16 and Article IV, Section 4 of the Ohio Constitution."

**{¶10}** Specifically, appellant contends that each sentence in its entirety must be vacated and the case remanded for resentencing. He further contends that the trial court erred in denying his motion for resentencing and in cancelling his previously-scheduled sentencing hearing against the remand order of this court.

**{¶11}** It is acknowledged by both parties that appellant's sentence needs to be corrected: the trial court did not completely advise appellant on the post-release control terms during his plea and sentencing hearings, and the subsequent judgment entry (filed September 12, 2006) improperly states the post-release control terms.

**{¶12}** However, the parties disagree on how the error should be corrected—appellant argues that the sentences are completely void and should be corrected through a de novo sentencing hearing; appellee argues the sentences are not completely void and a de novo sentencing hearing is not warranted, especially because appellant was sentenced after the enactment date of R.C. 2929.191.

**{¶13}** The statutory requirements for correcting improperly-imposed post-release control are laid out in R.C. 2929.191. In enacting this statute, effective July 11, 2006, the General Assembly has provided "a statutory remedy to correct a failure to properly impose postrelease control." *State v. Singleton*, supra, at ¶23. *Singleton* further states

that only those defendants sentenced prior to the statute's enactment date will be entitled to a de novo resentencing hearing; those sentenced after July 11, 2006, should be resentenced pursuant to R.C. 2929.191(C). Id. at ¶35.

**{¶14}** More recently, in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, the Supreme Court of Ohio held when a trial court is required to revisit a conviction due to improper post-release control notification, only "the offending portion of the sentence is subject to review and correction." Id. at ¶27. Thus, only the post-release control portion of the sentence is considered void.

**{¶15}** This court recently discussed the effects of *Fischer* and "partial voidness" in *State v. Turner*, 11th Dist. Nos. 2010-A-0034, 2010-A-0039, and 2010-A-0040, 2011-Ohio-2993:

**{¶16}** "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.

**{¶17}** "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.' [Emphasis sic.] 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 ***. Id., paragraph three of the syllabus." *Turner*, supra, at ¶17-18.

**{¶18}** Thus, only the post-release portions of appellant's sentence and judgment entry can be considered void and only those portions need to be addressed by the trial court on remand.

**{¶19}** Appellant additionally raises issues concerning the trial court's cancellation of the resentencing hearing, even though there was a remand for a de novo hearing from this court filed November 19, 2010. However, *Fischer*, which was decided December 23, 2010, specified the scope of voidness for resentencing purposes, crystallizing the issue to leave little room for interpretation. In light of *Fischer*, it can now be stated unequivocally that the only portions of appellant's sentence that need to be addressed at the hearing and in the judgment of conviction are the proper advisement and the proper imposition of post-release control.

**{¶20}** Essentially, "*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." *State v. Howard*, 11th Dist. No. 2010-L-048, 2011-Ohio-2840, at ¶20. *Fischer* states, "[n]either the Constitution nor common sense commands anything more." *Fischer*, supra, at ¶26. Indeed, to consider appellant's entire sentence afresh is not logical when only the post-release portion of the sentence is incorrect.

Appellant is therefore entitled to a resentencing hearing pursuant to R.C. 2929.191(C), but not a de novo sentencing hearing.

**{¶21}** For the reasons discussed above, the judgment of the Geauga County Court of Common Pleas is reversed, and this matter is remanded to the trial court for a resentencing hearing consistent with this opinion.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.