[Cite as *State v. Hearn*, 2012-Ohio-1792.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-T-0065**
- vs -	:	
MARK HEARN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2003 CR 70.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annon*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, 112 South Water Street, Suite C., Kent, OH 44240 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Mark Hearn appeals from a sentencing judgment entry of the Trumbull County Court of Common Pleas, through which the trial court corrected its prior sentence in this case. In the earlier entry, the trial court failed to properly advise him regarding postrelease control. Mr. Hearn claims the trial court did not have jurisdiction

to modify his sentence. For the following reasons, we affirm the judgment of the trial court.

Substantive Facts and Procedural History

{¶2} On October 8, 2003, Mr. Hearn pled guilty to four counts of rape, which stemmed from his sexual conduct with two different girls, both younger than 13 years of age. After a sentencing hearing, he was sentenced to nine years in prison on each count, to run concurrently. The sentence entry, issued on December 26, 2003, made no reference to postrelease control. On February 4, 2004, the trial court amended the sentencing entry, notifying Mr. Hearn that he would be subject to postrelease control upon his release from the prison; however, the trial court stated his postrelease control would be "up to a maximum of 5 years," when in fact he would be subject to a mandatory five-year term of postrelease control.

{¶3} The docket then reflects that on March 30, 2011, the trial court scheduled this case for re-sentencing. Mr. Hearn's counsel filed a motion questioning the propriety of the re-sentencing. At the re-sentencing hearing, the trial court stated it was for the limited purposes of postrelease control notification. Mr. Hearn was advised that he would be subject to a mandatory five-year term of postrelease control, and the court issued an "Amended Entry on Sentence," incorporating the proper period of postrelease control.

{¶4} Mr. Hearn now appeals, raising the following assignment of error for our review:

{¶5} "The trial court lacked jurisdiction to modify appellant's sentence."

Jurisdiction

{¶6} As an initial matter, we note that Mr. Hearn correctly asserts that a trial court lacks authority to reconsider its own valid final judgments in criminal cases. *State ex rel. White v. Junkin*, 80 Ohio St.3d 335, 338 (1997); *State ex rel. Hansen v. Reed*, 63 Ohio St.3d 597, 599 (1992). However, as the Supreme Court of Ohio pointed out in *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, an exception to this general rule is that a trial court is authorized to correct a void sentence. *Id*. at ¶19, citing. *State v. Garretson*, 140 Ohio App.3d 554, 559 (2000).

Postrelease Control Law

{¶7} Pursuant to R.C. 2929.19(B) and R.C. 2967.28(B)(1), a defendant sentenced for a felony of the first degree, such as Mr. Hearn, must be notified by the trial court at the sentencing hearing and in the sentencing entry that he is subject to a period of postrelease control of five years upon release from prison.

{¶8} In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, the Supreme Court of Ohio held that when postrelease control is required but not properly included in the sentence, the sentence is "void." *Id.* at syllabus. The Supreme Court of Ohio decided that an offender who was not properly advised of the postrelease control would be entitled to a de novo sentencing hearing in its entirety. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, ¶6.

{¶9} Meanwhile, on July 11, 2006, the General Assembly enacted R.C. 2929.191 to remedy situations where postrelease control is not properly imposed. Under the statute, the General Assembly established a simple procedure to correct a

trial court's judgment of conviction that omitted proper notification regarding postrelease control.[1]

{¶10} Thereafter, in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the Supreme Court of Ohio addressed the effect of R.C. 2929.191 on *Simpkins* and its progeny. The court explained that before the enactment of R.C. 2929.191, there was no statutory mechanism to correct a sentence not in compliance with the statutory postrelease requirements. *Id*. at ¶22. However, through the enactment of R.C. 2929.191, the legislature provided a statutory remedy to correct such an improperly imposed sentence. The court, however, held that the statutory remedy for the correction of a sentence which did not include the proper advisement of postrelease control applies *only* to sentences imposed on or after July 11, 2006. *Id.* at paragraph two of the syllabus. "For criminal sentences imposed prior to July 11, 2006, in which a

1. R.C. 2929.191 states, in pertinent part:

"(A)(1) If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) [first- or second-degree felony, felony sex offense, and third-degree felony where offender threatened or caused physical harm] of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of section 2929.14 of the Revised Code, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison.

"* * *.

"(C) On and after the effective date of this section, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division. * * * The offender has the right to be physically present at the hearing, except that, upon the court's own motion or the motion of the offender or the prosecuting attorney, the court may permit the offender to appear at the hearing by video conferencing equipment if available and compatible. * * * At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction."

trial court failed to properly impose postrelease control, trial courts shall conduct a de novo sentencing hearing." *Id*. at paragraph one of the syllabus.

{¶11} Pursuant to *Singleton*, therefore, an offender who was sentenced *before* the effective date of the statute, such as Mr. Hearn, would be entitled to a de novo sentencing hearing. The court, however, decided in a later decision, *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, that the de novo hearing would be limited to the portion of the prior sentence that is void, i.e., the part concerning postrelease control.

{¶12} In *Fischer*, the court held that "when a judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, that *part* of the sentence is void and must be set aside. Neither the Constitution nor common sense commands anything more." (Emphasis original.) (Footnote omitted.) *Id*. at ¶26. As a result, the court modified its *Bezak* decision, concluding that the de novo sentencing hearing to which an offender was entitled under *Bezak* "is limited to proper imposition of postrelease control." *Id*. at paragraph two of the syllabus.

{¶13} Thus, although the statute cannot be applied retroactively to sentences imposed prior to the effective date of the statute, *Fischer* allows the trial court to conduct a limited re-sentencing hearing to correct an improperly imposed postrelease control.

The Trial Court Properly Corrected Defendant's Sentence

{¶14} Here, Mr. Hearn was convicted of four counts of rape, each a felony of the first degree. Thus, he is subject to a mandatory term of five years of postrelease control. R.C. 2967.28(B)(1). The trial court's statement on the February 4, 2004 entry that he would be subject to "up to a maximum of five years" was erroneous. *See State*

v. Gaut, 11th Dist. No. 2009-T-0059, 2011-Ohio-1300, ¶20. The improperly imposed postrelease control renders that part of the sentence void.

{¶15} Pursuant to *Fischer*, a trial court is authorized to hold a sentencing hearing to correct the part of a defendant's sentence which is void due to a failure to properly incorporate postrelease control. The trial court did just that in this case.

{¶16} The trial court scheduled a hearing for the limited purpose of proper advisement of postrelease control. It provided notice to Mr. Hearn for the re-sentencing hearing. Mr. Hearn was represented by counsel and appeared at the hearing via video conferencing (by consent of the parties). At the re-sentencing hearing, the trial court stated the hearing was conducted for the purposes of properly notifying the defendant regarding postrelease control. It advised Mr. Hearn that he will be subject to a mandatory five-year period of postrelease control, and also advised him as to the consequences of the violation of the postrelease control conditions.

{¶17} After a review of the case law and the record, therefore, we conclude the trial court's conduct in correcting Mr. Hearn's sentence regarding postrelease control was proper. The assignment of error is without merit.

{¶18} Judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.