[Cite as *State v. Nichols,* 2010-Ohio-3104.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-0111
RYAN W. NICHOLS	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Court of Common Pleas, Case Nos. 2005-CR-290H, 2005-CR-348H, 2006-CR-26H & 2006-CR-27H
JUDGMENT:	Affirmed in part; Reversed in part & Remanded
DATE OF JUDGMENT ENTRY:	June 30, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAMES J. MAYER, JR. PROSECUTING ATTORNEY BY KIRSTEN L. PSCHOLKA-GARTNER 38 South Park Street Mansfield, OH 44902	WILLIAM C. FITHIAN, III 111 North Main Street Mansfield, OH 44902

Gwin, P.J.

{¶1} Defendant-appellant Ryan W. Nichols appeals after resentencing on September 11, 2010 that advised him of post-release control and reissued the same sentences as previously imposed. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 4, 2005, the Richland County Grand Jury indicted appellant on one count of failing to appear on a personal recognizance bond in violation of R.C. 2937.99 (Case No. 2005-CR-290).

{¶3} On June 8, 2005, appellant was indicted on one count of safecracking in violation of R.C. 2911.31, one count of receiving stolen property in violation of R.C. 2913.51, and one count of tampering with evidence in violation of R.C. 2921.12, all involving National Electric Supply (Case No. 2005-CR-348).

{¶4} On January 12, 2006, appellant was indicted on one count of breaking and entering in violation of R.C. 2911.13, and one count of theft in violation of R.C. 2913.02, both involving a CITGO Gas Station (Case No. 2006-CR-26). On same date, appellant was indicted on twenty-four counts, including breaking and entering, theft, safecracking, receiving stolen property, criminal damaging in violation of R.C. 2909.06, and possession of criminal tools in violation of R.C. 2923.24, involving numerous businesses (Case No. 2006-CR-27). All the charges arose from numerous break-ins in the Mansfield, Ohio area.

{¶5} A jury trial commenced on July 10, 2006. The jury found appellant guilty of twenty counts, all the counts in Case Nos. 2005-CR-290, 2005-CR-348, and 2006-CR-26, and fourteen counts in Case No. 2006-CR-27. The fourteen counts involved the

Duke and Duchess Gas Station, Richland Lumber, Washington Floors, the Western Shop, Arby's Restaurant, Hamad Tire, receiving stolen property regarding a Harley motorcycle and possession of criminal tools.

{¶6} By judgment entries filed August 15, 2006, the trial court sentenced appellant to an aggregate term of nine and one-half years in prison. Appellant was informed at his sentencing hearing and in the journal entries that his sentence included five years of post-release control.

{¶7} Appellant appealed his convictions and sentences to this Court, raising five assignments of error. This Court overruled four assignments of error, and affirmed appellant's convictions; however, we sustained appellant's fifth assignment of error. *State v. Nichols,* Richland App. No. 2006CA0077, 2007-Ohio-3257. We found that the trial court erred in sentencing appellant to one additional felony count and one additional misdemeanor count for which appellant had not been convicted. This Court vacated appellant's sentence and remanded the case for resentencing.

{¶8} In accordance with the Court's remand order, appellant was brought back before the trial court on July 31, 2007. At that time, the trial court re-imposed the nine and one half year sentence.

{¶9} Appellant filed a motion to correct illegal sentence on September 18, 2008. In that motion, he argued that the trial court did not advise him at the July 31, 2007 re-sentencing hearing that he was subject to a term of post-release control. The trial court denied appellant's motion on October 3, 2008, noting that appellant was properly advised of his post-release control obligations in his original sentencing hearing.

{¶10} On March 31, 2009, nearly two years after his re-sentencing, appellant filed a motion for leave to file a delayed appeal, challenging the term of post-release control that was imposed by the trial court. By Judgment Entry filed April 23, 2009, this Court found that there was no record that appellant had been served with a copy of the trial court's October 8, 2008 order as required by Civ. R. 58(B) and App.R. 4(A). Accordingly, this Court found that appellant's notice of appeal was timely filed on March 31, 2009. This Court reversed the trial court's decision and found that appellant was not properly advised of the post-release control requirements and remanded the case back to the trial court for resentencing to correct the error. *State v. Nichols,* Richland App. No. 2009-CA-51, 2009-Ohio-3999.

{¶11} On September 11, 2009, the trial court held a hearing and re-sentenced appellant for a second time to the aggregate nine and a half year prison sentence, this time advising him of the appropriate terms of post-release control that were applicable to each case.

{¶12} It if from the trial court's re-sentencing entry filed September 11, 2009 that appellant appeals raising the following two assignments of error:

{¶13} "I. THE JURY FOUND APPELLANT GUILTY OF MISDEMEANORS ON NUMEROUS COUNTS AS REQUIRED BY *STATE V. PELFREY*, 112 OHIO ST.3D 432; 2007 OHIO 256. THE TRIAL COURT IMPROPERLY SENTENCED APPELLANT AS IF THEY WERE FELONIES IN THESE COUNTS.

{¶14} "II. THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT TO PRISON FOR CONVICTION OF MISDEMEANORS."

SCOPE OF REVIEW

{¶15} Appellant argues that a direct appeal from a void sentence is a legal nullity and a defendant's appeal following re-sentencing is actually a defendant's first appeal as of right. Therefore, appellant argues that, even though this Court reviewed the merits of the arguments that he had raised in his first direct appeal relating to his conviction,[1] he now has the right to assert additional arguments relating to his conviction following his resentencing on September 11, 2010. The State disagrees citing *State v. Fischer* (2009), 181 Ohio App.3d 758, 910 N.E.2d 1083.[2] In *Fisher* the Ninth District Court of Appeals held that, despite the fact that the original appeal arose from a void sentence, the law of the case doctrine still applied to the decision reached in that proceeding. Thus, the defendant was precluded from asserting additional arguments relating to his conviction following his resentencing. *Fischer,* 181 Ohio App.3d at 760-761. (Citations omitted). However, we note that in the case at bar, the trial court originally sentenced appellant on August 15, 2006 after the effective date of R.C. 2929.191.

{¶16} "[W]ith R.C. 2929.191, the General Assembly has now provided a statutory remedy to correct a failure to properly impose post release control. Effective July 11, 2006, R.C. 2929.191 establishes a procedure to remedy a sentence that fails to properly impose a term of post-release control. It applies to offenders who have not yet been released from prison and who fall into at least one of three categories: those who did not receive notice at the sentencing hearing that they would be subject to post-release control, those who did not receive notice that the parole board could impose a

[1] *State v. Nichols,* Richland App. No.2006CA0077, 2007-Ohio-3257.

[2] The state further informs us that the Ninth District, which decided *Fischer*, later reversed its holding in *State v. Harmon* (9th Dist.), 2009 Ohio 4512, 2009 Ohio App. LEXIS 3809. Both cases are currently on appeal to the Supreme Court of Ohio. Oral Arguments were held in the *Fischer* case on March 30, 2010.

prison term for a violation of post-release control, or those who did not have both of these statutorily mandated notices incorporated into their sentencing entries. R.C. 2929.191(A) and (B). For those offenders, R.C. 2929.191 provides that trial courts may, after conducting a hearing with notice to the offender, the prosecuting attorney, and the Department of Rehabilitation and Correction, correct an original judgment of conviction by placing on the journal of the court a nunc pro tunc entry that includes a statement that the offender will be supervised under R.C. 2967.28 after the offender leaves prison and that the parole board may impose a prison term of up to one-half of the stated prison term originally imposed if the offender violates post release control." *State v. Singleton*, 124 Ohio St.3d 173, 179, 920 N.E.2d 958, 963, 2009-Ohio-6434 at ¶ 23.

{¶17} The Supreme Court further noted, "R.C. 2929.191(C) prescribes the type of hearing that must occur to make such a correction to a judgment entry "[o]n and after the effective date of this section." The hearing contemplated by R.C. 2929.191(C) and the correction contemplated by R.C. 2929.191(A) and (B) pertain only to the flawed imposition of post release control. R.C. 2929.191 does not address the remainder of an offender's sentence. Thus, the General Assembly appears to have intended to leave undisturbed the sanctions imposed upon the offender that are unaffected by the court's failure to properly impose post-release control at the original sentencing." *State v. Singleton*, supra 124 Ohio St.3d at 179-180, 920 N.E.2d at 964, 2009-Ohio-6434 at ¶ 24.

{¶18} In *Singleton,* the Court recognized that the legislature's enactment of R.C. 2929.191 altered its case law characterization of a sentencing lacking post-release control as a nullity and provided a mechanism to correct the defect in sentences

imposed after the effective date of the statute by adding post release control any time prior to the defendant's release from prison. *Singleton* at 180-181, 920 N.E.2d at 964-965, 2009-Ohio-6434 at ¶ 26-27.

{¶19} Thus, we find that an appeal from a re-sentencing entry for sentences imposed after July 11, 2006, is limited to issues concerning the re-sentencing procedure. Under these circumstances, we find that an appellant may not raise additional arguments relating to his conviction following his resentencing. However, this does not end our inquiry in the case at bar. Appellant cites R.C. 2945.75 in support of his argument that error occurred.

{¶20} R.C. 2945.75 provides:

{¶21} "(A) When the presence of one or more additional elements makes an offense one of more serious degree:

{¶22} "(1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.

{¶23} "(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

{¶24} The Supreme Court of Ohio has interpreted this statute to provide the requirements for what must be included in a jury verdict form. *State v. Pelfrey*, 112 Ohio St.3d 422, 860 N.E.2d 735, 2007-Ohio-256 at ¶ 14. The *Pelfrey* Court held that

"pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense." Id. See also, *State v. Nethers*, Licking App. No. 07 CA 78, 2008-Ohio-2679 at ¶ 51.

{¶25} In *Pelfrey*, the jury found him guilty, and he was sentenced on the third-degree felony conviction to serve four years in prison. The Second District Court of Appeals affirmed Pelfrey's conviction, rejecting a manifest-weight-of-the-evidence argument. *State v. Pelfrey,* Montgomery App. No. 19955, 2004-Ohio-3401. The court of appeals subsequently granted Pelfrey's application to reopen the appeal under App.R. 26(B). Pelfrey argued that the trial court had erred in entering a conviction of a third-degree felony because the verdict form and the trial court's subsequent verdict entry were inadequate to support a conviction of tampering with government records. Instead, Pelfrey argued that he could have been convicted only of the misdemeanor offense of tampering with records. See R.C. 2913.42(B) (2).

{¶26} The Second District Court of Appeals agreed with Pelfrey's argument and stated, "'*Pelfrey's failure to raise this defect at trial did not waive it,* and the fact that the indictment and jury instructions addressed the government-records issue did not cure the non-compliance with R.C. 2945.75(A) (2).'" *State v. Pelfrey,* Montgomery App. No. 19955, 2005-Ohio-5006, 2005 WL 2327123, ¶ 23, quoting *State v. Woullard,* 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964, ¶ 23.(Emphasis added). The court of appeals held that "the trial court was required to enter a conviction for first-degree

misdemeanor tampering with records, which is the least degree of the offense under R.C. § 2913.42." Id.

{¶27} The Ohio Supreme Court in *Pelfrey*, agreed that he did not waive the error by failing to raise it in the trial court, "[b]ecause the language of R.C. 2945.75(A) (2) is clear, this court will not excuse the failure to comply with the statute or uphold Pelfrey's conviction based on additional circumstances such as those present in this case. The express requirement of the statute cannot be fulfilled by demonstrating additional circumstances, such as that the verdict incorporates the language of the indictment, or by presenting evidence to show the presence of the aggravated element at trial or the incorporation of the indictment into the verdict form, *or by showing that the defendant failed to raise the issue of the inadequacy of the verdict form.* 112 Ohio St.3d 425-426, 860 N.E.2d at 735, 2007-Ohio-256 at ¶ 14. (Emphasis added).

{¶28} In the case at bar, appellant could not have known that the trial court would sentence him other than for the lowest degree of the offense until the trial court finally re-sentenced him on September 11, 2009. Appellant is not arguing that his conviction must be reversed or that the verdict forms are wrong; rather he argues that the trial court's *sentence* is invalid because it is not based upon the jury verdict forms. Pursuant to *Pelfrey*, his failure to bring the issue to the trial court's attention cannot be considered as an excuse for the failure to comply with the statute. Thus, we shall address the appellant's assignments of error in the case at bar.

I.

{¶29} Appellant first contends that the verdict forms in appellant's case did not state the degree of the felonies and each element of the crimes that appellant was convicted of committing. We agree, in part.

{¶30} The State concedes that the verdict form in case number 2005-CR-290H was not sufficient under *Pelfrey* to convict appellant of failure to appear as a felony of the fourth degree.

{¶31} The verdict form in case number 2005-CR-290H states that the jury found appellant guilty of "Failure to Appear on a PR Bond as charged in the indictment, a violation of R.C. 2937.99(A)." It did not contain the degree of the offense or the additional finding that the underlying offense was a felony. Therefore, pursuant to *Pelfrey*, appellant could only be convicted of the lowest degree of the offense, a first-degree misdemeanor. Accordingly, the trial court erred in sentencing appellant as if the failure to appear conviction was a felony of the fourth degree.

{¶32} However, we find that the language in the verdict forms for the other challenged offenses was sufficient to convict appellant for the felony level of the offenses.

{¶33} With regard to the receiving stolen property offense in case number 2005-CR-348H and the theft offenses in counts XI, XVII, and XIX of case number 2006-CR-27H, the jury's intent to convict appellant of felonies was clear from their findings on the verdict forms. For each of those counts, the verdict form contained the additional finding that the property or services that were stolen or received were valued at an amount in excess of $500.00, or less than $500.00. On all four counts, the jury checked both

findings. However, they altered the “less than” amount from $500.00 to $5,000.00. Their intent in doing so was not ambiguous. Clearly, they found that the value of the property or services was between $500.00 and $5,000.00.

{¶34} In the case at bar, the jury made additional findings in the form of a written verdict form finding that the value of the property or services was between $500.00 and $5,000.00. These “additional findings” are all that is required pursuant to R.C. 2945.75 to elevate the degree of the offenses.

{¶35} With regard to the receiving stolen property offense in count XXIII of Case Number 2006-CR-27H, the language of the verdict form was sufficient to convict appellant of the offense as a felony of the fourth degree. Although the verdict form did not contain a separate finding that the property was a motor vehicle, it did state that the charge was for “Receiving Stolen Property (*motorcycle* owned by Donald “Joe” Long) as charged in the indictment, in violation of R.C. 2913.51(A).” (Emphasis added). Cleary, the inclusion in the verdict form that the property was a “motorcycle” is “an aggravating element” that the jury found in order to convict appellant of receiving stolen property. This “additional finding” is all that is required pursuant to R.C. 2945.75 to elevate the degree of the offense.

{¶36} Accordingly, appellant’s first assignment of error is sustained in part and reversed in part.

II.

{¶37} In his second assignment of error, appellant contends that the trial court erred in sentencing him to prison for his misdemeanor convictions for theft in Count II of

case number 2006-CR-26H and theft in Count II of case number 2006-CR-27H. We disagree.

{¶38} R.C. 2929.41(A) provides, in relevant part, "…Except as provided in division (B)(3) of this section, a jail term or sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution."

{¶39} In the case at bar, appellant was sentenced to a state penal institution for an aggregate term of nine and one-half years on numerous felony offenses.

{¶40} R.C. 2929.41 (B) (1), provides, "A jail term or sentence of imprisonment for a misdemeanor shall be served consecutively to any other prison term, jail term, or sentence of imprisonment when the trial court specifies that it is to be served consecutively or when it is imposed for a misdemeanor violation of section 2907.322, 2921.34, or 2923.131 of the Revised Code." In the case at bar, the trial court ordered the misdemeanor sentences to run concurrent to the felony sentences.

{¶41} Accordingly, had the trial court ordered the misdemeanor sentences to run consecutively, appellant would begin serving those sentences upon his release from the state penal system. However, appellant receives the benefit of double time by counting the time he spends in a state penal institution toward the misdemeanor convictions. It would therefore appear logical that the trial court would order the concurrent misdemeanor sentences be served in "prison."

{¶42} Appellant's second assignment of error is overruled.

{¶43} The judgment of the Richland County Court of Common Pleas is affirmed in part, reversed in part and this matter is remanded to that court for proceedings in accordance with our opinion and the law.

By Gwin, P.J., and

Farmer, J., concur;

Hoffman, J., dissents

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. SHEILA G. FARMER

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Hoffman, J., dissenting

{¶44} I respectfully dissent from the majority opinion.

{¶45} When applying *State v. Singleton*, 2009-Ohio-6434, to the case sub judice, I believe Appellant's present appeal is limited only to error alleged to have been committed with regard to the imposition of post-release control. Because the *Singleton* Court specifically stated "Thus, the General Assembly appears to have intended to leave undisturbed the sanctions imposed upon the offender that are unaffected by the court's failure to properly impose post-release control at the original sentencing",[3] I believe the majority should decline to address the *Pelfrey* issue raised herein.

{¶46} In so concluding, I am fully aware of the *Pelfrey* court's holding the error in failing to apply R.C. 2945.75(A)(2) was not waived by failing to raise it in the trial court. However, the case sub judice is significantly procedurally different than *Pelfrey*. The issue in *Pelfrey* was raised on direct appeal.[4] The Pelfrey issue herein is not being raised on direct appeal from Appellant's original conviction and sentence. I find this is not a distinction without a difference.

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HON. WILLIAM B. HOFFMAN

[3] Id., at ¶24.

[4] The Second District Court of Appeals addressed the issue after granting *Pelfrey's* application to reopen the appeal under App.R. 26(B).

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IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RYAN W. NICHOLS	:	
Defendant-Appellant	:	CASE NO. 2009-CA-0111

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Richland County Court of Common Pleas is affirmed in part, reversed in part and this matter is remanded to that court for proceedings in accordance with our opinion and the law. Costs to be divided equally between the parties.

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. SHEILA G. FARMER