

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
TIMOTHY MILLER	:	Case No. 2010CA00175
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of
Common Pleas, Case No. 1997CR1052

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: November 29, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Delaney, J.

{¶1} Defendant-Appellant, Timothy L. Miller, appeals the June 4, 2010 judgment entry of the Stark County Court of Common Pleas denying Appellant's Motion to Vacate a Void Judgment.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant was indicted on October 7, 1997, for two counts of aggravated robbery with a firearm specification, a first-degree felony in violation of R.C. 2911.01. Appellant pleaded not guilty to the charges and the case proceeded before the Stark County Court of Common Pleas.

{¶3} On November 13, 1997, Appellant changed his plea to guilty. A hearing was held on that day and on November 20, 1997, the trial court journalized the change of plea and sentencing hearing. The trial court sentenced Appellant to nine years on each count of aggravated robbery, to be served concurrently. The trial court sentenced Appellant to an additional three years for the firearms specification, to also be served concurrently.

{¶4} The judgment entry of conviction set forth the terms of post release control:

{¶5} "The Court has further notified the defendant that post release control is mandatory in this case up to a maximum of 5 years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code Section 2967.28. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control."

{¶6} The plea agreement, also filed on November 20, 1997, stated that,

{¶7} “I have been advised by my attorney and the court that in addition to my sentence, a period of control or supervision by the Adult Parole Authority after my release from prison is mandatory in this case. The control period may be a maximum term of five years.”

{¶8} Appellant did not appeal his conviction or sentence.

{¶9} Appellant completed his prison term on September 26, 2009.

{¶10} On June 1, 2010, Appellant filed a pro se Motion to Vacate a Void Judgment. In his motion, he argued that the post release control imposed by the trial court was contrary to law and the judgment therefore void. Because Appellant had already served a void prison sentence, Appellant argued that the only remedy was to vacate the judgment.

{¶11} The trial court denied the motion on June 4, 2010. Appellant filed a pro se appeal of the judgment entry with this Court. The matter was set on the accelerated calendar.

{¶12} On August 30, 2010, counsel for Appellant filed Notice of Representation. Appellant also filed a reply brief. Because this matter is set on the accelerated calendar, no reply briefs are permitted to be filed unless ordered by the Court pursuant to App.R.11.1(C). No such order has been issued in this case; therefore, we strike Appellant’s reply brief.

{¶13} Appellant raises one Assignment of Error:

{¶14} “I. THE ORIGINAL JOURNAL ENTRY IS VOID AS IT DOES NOT CONTAIN PROPER NOTICE OF POST-RELEASE CONTROL AND IS CONTRARY TO LAW.”

{¶15} This case comes to us on the accelerated calendar. App. R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

{¶16} “(E) Determination and judgment on appeal. The appeal will be determined as provided by App. R. 11.1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusory form. The decision may be by judgment entry in which case it will not be published in any form.”

{¶17} One of the important purposes of accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts, and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Assn.* (1983), 11 Ohio App.3d 158, 463 N.E.2d 655.

{¶18} This appeal shall be considered in accordance with the aforementioned rules.

I.

{¶19} Appellant argues the November 20, 2007 Sentencing Entry is void because it does not contain proper notice of post release control and it is contrary to law. We disagree.

{¶20} As an initial matter, Appellant failed to file with his appeal a transcript of the 1997 sentencing hearing. On October 5, 2010, this Court granted Appellant's

motion for leave to file a transcript within two weeks of the date of the Court's judgment entry. As of this date, Appellant has not filed a transcript.

{¶21} Appellant, however, does not argue that the trial court did not inform him of post release control during sentencing. Appellant argues on appeal that his sentence is void because Appellant was convicted of a first-degree felony. R.C. 2967.28(B)(1) mandates a mandatory period of post release control of five years, unless reduced by the parole board. The November 20, 1997 Sentencing Entry and plea agreement state that Appellant is subject to mandatory post release control "up to a maximum of five years."

{¶22} This argument has been analyzed by the Second District Court of Appeals in *State v. Harrington*, Greene App. No. 06-CA-29, 2007-Ohio-1335, and *State v. Sulek*, Greene App. No. 09CA75, 2010-Ohio-3919. In *State v. Harrington*, the trial court denied the defendant's motion to vacate his sentence for his conviction on a first-degree felony. At sentencing, the defendant was notified that he would be subject to a term of post release control "up to a maximum of five years." *Id.* at ¶32. On appeal, the defendant argued that a first-degree felony is subject to a mandatory five year period of post release control pursuant to R.C. 2967.28(B)(1). The Second District Court of Appeals found the error, if any, to be harmless. It stated:

{¶23} "The defendant in *Harrington* argued on appeal that his sentence was void because a full five-year period is mandated by R.C. 2967.28(B)(1). It is not, when the term is reduced by the parole board. Nevertheless, we found that any error in that respect could only be harmless because '[i]f the error has any legal effect at all, it would

be to shorten Harrington's period of post-release control, which would be to his advantage, not to his detriment.' *Harrington*, at ¶ 34." *Sulek* at ¶14.¹

{¶24} In this case, we likewise find that any error in the statement of the trial court to be harmless because the trial court correctly stated the terms of Appellant's post release control pursuant to R.C. 2967.28(B)(1) and the parole board's authority to reduce the duration.

{¶25} Accordingly, Appellant's sole Assignment of Error is overruled.

{¶26} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.

Edwards, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. JOHN W. WISE

¹ In *Sulek*, the court found that the trial court erred in stating that the defendant was subject to a term of post release control "up to a maximum of five years" because the defendant was convicted of a second-degree felony. A second-degree felony is subject to a post release control term of three years. "Unlike in *Harrington*, the court's erroneous pronouncement of a greater term could not work to Defendant Sulek's advantage." *Sulek* at ¶15.

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
TIMOTHY MILLER	:	
	:	
Defendant-Appellant	:	Case No. 2010CA00175

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is affirmed. Costs to be taxed to Appellant.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. JOHN W. WISE