[Cite as *State v. Norris*, 2010-Ohio-6076.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
DERRICK C. NORRIS	:	Case No. CT10-0020
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. CR2003-288A
JUDGMENT:	Sentence Vacated; Remanded
DATE OF JUDGMENT ENTRY:	December 8, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ROBERT L. SMITH 27 North Fifth Street Zanesville, OH 43701	VINCENT C. RUSSO 44 South 6th Street P.O. Box 970 Zanesville, OH 43702-0970

Farmer, J.

{¶1} On September 17, 2004, appellant, Derrick Norris, pled guilty to one count of murder with a firearm specification in violation of R.C. 2903.02 and R.C. 2941.145, one count of aggravated robbery in violation of R.C. 2911.01, and one count of tampering with evidence in violation of R.C. 2921.12. By entry filed September 23, 2004, the trial court sentenced appellant to an aggregate term of thirty-three years to life in prison.

{¶2} On March 5, 2010, appellant filed a motion for sentencing, requesting the vacation of his sentence and a de novo sentencing hearing because the trial court had failed to properly inform him of postrelease control. By entry filed April 2, 2010, the trial court denied the motion.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE TRIAL COURT ERRED BY DENYING MR. NORRIS'S 'MOTION FOR SENTENCING', WHICH REQUESTED THAT THE TRIAL COURT VACATE HIS ORIGINAL SENTENCE AND ACCORD HIM A DE NOVO SENTENCING HEARING."

I

{¶5} Appellant claims the trial court erred in denying him a resentencing hearing because at his original sentencing hearing, he was not notified of his postrelease control obligation. We agree.

{¶6} In *State v. Bezak,* 114 Ohio St.3d 94, 2007-Ohio-3250, syllabus, the Supreme Court of Ohio held the following: "When a defendant is convicted of or pleads

guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense."

{¶7} Thereafter, in *State v. Singleton,* 124 Ohio St.3d 173, 2009-Ohio-6434, the Supreme Court of Ohio held the following at ¶1:

{¶8} "Accordingly, for sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall conduct a de novo sentencing hearing in accordance with decisions of the Supreme Court of Ohio. However, for criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191."

{¶9} R.C. 2929.191, effective July 11, 2006, sets forth the procedures for trial courts to follow when correcting a failure to properly impose postrelease control. Subsection (C) states the following:

{¶10} "(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. Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing, the prosecuting attorney of the county, and the department of rehabilitation and correction. 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.***"

{¶11} In its brief at 1, the state conceded that appellant was entitled to a resentencing hearing under the authority of *State ex rel. Carnail v. McCormick,* 126 Ohio St.3d 124, 2010-Ohio-2671, ¶35-38:

{¶12} "Judge McCormick's 1999 sentencing entry for Carnail failed to include the statutorily required five-year term of postrelease control. R.C. 2967.28(B)(1). 'In cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void***. *State v. Simpkins,* 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, syllabus; *State v. Boswell,* 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, ¶8 ('Our recent line of cases dealing with postrelease control has consistently held that sentences that fail to impose a mandatory term of postrelease control are void'); see also *State v. Singleton,* 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶14, 18-19, and cases cited therein. ' "The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment." ' *State v. Bezak,* 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶12, quoting *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268, 39 O.O.2d 414, 227 N.E.2d 223.

{¶13} "Ohio appellate courts have uniformly recognized that void judgments do not constitute final, appealable orders.***The 1999 sentencing entry was not a final,

appealable order, because it was void for failing to include the statutorily required mandatory term of postrelease control.

{¶14} "Consistent with our holding in *Culgan,* once Judge McCormick denied Carnail's motion to correct the 1999 sentence, Carnail was entitled to the requested extraordinary relief in mandamus to compel the judge to issue a new sentencing entry to comply with R.C. 2967.28(B)(1) to obtain a final, appealable order. Under this precedent, Carnail was not relegated to appealing the judge's order denying his motion to correct the sentence. See *Culgan,* 119 Ohio St.3d 535, 2008-Ohio-4609, 895 N.E.2d 805, ¶8, and cases cited therein. Similarly, in *State v. Clutter,* Crawford App. No. 3-08-27, 2008-Ohio-6576, 2008 WL 5205682, the Third District Court of Appeals dismissed an appeal from a trial court's denial of a defendant's motion for resentencing and held that under *Culgan,* the appropriate remedy was an action in mandamus or procedendo. Id. at ¶13-14.

{¶15} Recently, the Supreme Court of Ohio again addressed the issue of resentencing for postrelease control in *State v. Ketterer,* 126 Ohio St.3d 448, 2010-Ohio-3831. The *Ketterer* court at ¶76 remanded the postrelease control issue to the trial court for failure to follow the procedures set forth in R.C. 2929.191:

{¶16} "In his additional proposition of law, Ketterer challenges the validity of the nunc pro tunc entry. As discussed earlier, R.C. 2929.191(C) requires that a hearing be conducted before a nunc pro tunc entry is journalized to correct a sentence that fails to properly impose a term of postrelease control. Nothing in the record indicates that such a hearing was conducted. Accordingly, the nunc pro tunc entry was ineffective."

{¶17} Upon review, we conclude appellant is entitled to a de novo resentencing hearing.

{¶18} The sole assignment of error is granted.

{¶19} The sentence of the Court of Common Pleas of Muskingum County, Ohio is vacated and the matter is remanded for a resentencing hearing.

By Farmer, J.

Hoffman, P.J. and

Wise, J. concur.

_s/ Sheila G. Farmer_____

_s/ William B. Hoffman_____

_s/ John W. Wise_____

JUDGES

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IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DERRICK C. NORRIS	:	
Defendant-Appellant	:	CASE NO. CT10-0020

For the reasons stated in our accompanying Memorandum-Opinion, the sentence of the Court of Common Pleas of Muskingum County, Ohio is vacated and the matter is remanded to said court for a resentencing hearing consistent with this opinion. Costs to appellee.

_s/ Sheila G. Farmer_____

_s/ William B. Hoffman_____

_s/ John W. Wise_____

JUDGES