[Cite as *State v. Davis*, 2010-Ohio-6418.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. CT2010-0017
GARY LEE DAVIS	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Muskingum County Court of Common Pleas Case No. CR2004-0135
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	December 10, 2010

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

GARY LEE DAVIS, #476-778
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Delaney, J.

{¶1} Defendant-Appellant Gary Lee Davis appeals the April 2, 2010 Resentencing Entry of the Muskingum County Court of Common Pleas on the issue of the proper imposition of postrelease control.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 28, 2004, Appellant appeared before the trial court and pleaded guilty to two counts of Sexual Battery, third degree felonies in violation of R.C. 2907.03(A)(5). A pre-sentence investigation was ordered to be conducted and the matter was set for sentencing.

{¶3} On July 26, 2004, the trial court conducted a classification hearing pursuant to R.C. 2950.09 and a sentencing hearing. The trial court found there was clear and convincing evidence to establish that Appellant was a sexual predator. The hearing then proceeded to the sentencing phase. The trial court sentenced Appellant to a prison term of four years for each count of Sexual Battery, to be served consecutively. The findings of the trial court were journalized in the trial court's sentencing entry filed on July 30, 2004.

{¶4} The July 30, 2004 Sentencing Entry further stated that the trial court notified Appellant that postrelease control was mandatory in the case "up to a maximum of five years".

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

{¶6} On March 24, 2010, the trial court ordered that Appellant be returned to court for resentencing Appellant on the issue of postrelease control pursuant to the Ohio Supreme Court decision of *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909

N.E.2d 1254 (affirming its decision in *State v. Jordan,* 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, that "a sentence is void if the court fails to follow the statutory mandates to impose postrelease control.")

{¶7} The trial court filed its resentencing entry on April 2, 2010. The entry states that the trial court notified Appellant that post release control was mandatory in the case for five years. All other provisions of the original sentencing entry remained the same.

{¶8} It is from this judgment entry Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶9} Appellant raises two Assignments of Error:

{¶10} "I. THE STATE OF OHIO AND TRIAL COURT VIOLATED THE DEFENDANT'S CONSTITUTIONAL AND DUE PROCESS RIGHTS WHEN, AFTER ALMOST SIX YEARS SINCE THE IMPOSITION OF THE ORIGINAL SENTENCE, AND WITHOUT AN APPEAL, THEY RE-SENTENCED HIM CAUSING A LIBERTY INTEREST LOSS.

{¶11} "II. THE STATE OF OHIO AND TRIAL COURT HAVE ENGAGED IN A PATTERN OF CORRUPT ACTIVITY TO THWART THE LAWS OF THE UNITED STATES AND ITS CONSTITUTIONAL LIMITS IN IMPOSING UNLAWFUL SENTENCES ON THIS AND OTHER CRIMINAL DEFENDANTS (IN VIOLATION OF THE SIXTH AMENDMENT, AS PER APPRENDI, BALKELY [SIC], BOOKER), AND REFUSED TO CORRECT SUCH AND DENIED MEANINGFUL ACCESS TO THE COURTS WHILE ENACTED AND PRACTICING NEW LAWS TO ALLOW UNEQUAL

ACCESS TO THE COURTS FOR THE STATE TO ALLOW MODIFICATION OF SENTENCES IN THEIR FAVOR ONLY."

I.

{¶12} Appellant argues in his first Assignment of Error that the trial court violated his due process and constitutional rights by resentencing Appellant. We disagree.

{¶13} A review of the original sentencing entry filed on July 30, 2004 stated that Appellant would be subject to mandatory post release control "up to five years." However, R.C. 2967.28(B)(1) requires a mandatory five-year period of postrelease control for a felony sex offense. The trial court resentenced Appellant on April 2, 2010 stating that postrelease control was mandatory for five years.

{¶14} Appellant argues that the resentencing violated the principals of due process, double jeopardy, and separation of powers. Pursuant to *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, "[f]or criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose post release control, trial courts shall conduct a de novo sentencing hearing in accordance with decisions of the Supreme Court of Ohio." Paragraph one of the syllabus. Further, the Ohio Supreme Court recently held in *Bloomer,* 122 Ohio St.3d 200, 2009-Ohio-2462, that postrelease control resentencing does not offend the principles of double jeopardy, due process, or separation of powers.

{¶15} Appellant also argues that the trial court was barred from resentencing Appellant by res judicata. "Because a sentence that does not conform to statutory mandates requiring the imposition of post-release control is a nullity and void, it must be vacated. The effect of vacating the sentence places the parties in the same position as

they were had there been no sentence" *State v. Simpkins,* 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, *State v*. *Bezak,* 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 13 citing *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267, 227 N.E.2d 223.

{¶16} "A trial court retains jurisdiction to correct a void sentence and is authorized to do so when its error is apparent." *State v. Simpkins,* supra, citing *State v. Cruzado,* 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263 at ¶ 19; *State v. Jordan,* 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864 at ¶ 23. Res judicata does not act to bar a trial court from correcting the error. *State v. Simpkins,* supra, citing *State v. Ramey,* 10th Dist. No. 06AP-245, 2006-Ohio-6429, at ¶ 12; *State v. Rodriguez* (1989), 65 Ohio App.3d 151, 154, 583 N.E.2d 347.

{¶17} Therefore, Appellant's first Assignment of Error is overruled.

II.

{¶18} Appellant argues in the body of his second Assignment of Error that the trial court erred in not imposing the minimum term of incarceration because he had no prior prison record and the record does not demonstrate the shortest term would demean the seriousness the offenses. We disagree.

{¶19} R.C. 2929.14(B) provides:

{¶20} "(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(5), (D)(6), (D)(7), (D)(8), (G), (I), (J), or (L) of this section, in section 2907.02, 2907.05, or 2919.25 of the Revised Code, or in Chapter 2925 of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on

the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

{¶21} "(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.

{¶22} "(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others."

{¶23} This Court recently analyzed arguments similar to Appellant's in *State v. Hodge*, 5th Dist. No. 09CA23, 2010-Ohio-2717. We stated:

{¶24} "The judicial fact-finding portions of R.C. 2929.14(B) were found unconstitutional and excised from the statute by *State v. Foster,* 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856. As discussed earlier, in [*State v.*] *Kalish,* [120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124], the Ohio Supreme Court discussed the effect of the *Foster* decision on felony sentencing. The Court stated that, in *Foster,* the Ohio Supreme Court severed the judicial fact-finding portions of R.C. 2929.14, holding that 'trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.' *Kalish* at paragraphs 1 and 11, citing *Foster* at paragraph 100, See also, *State v. Payne,* 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306. 'Thus, a record after *Foster* may be silent as to the judicial findings that appellate courts were originally meant to review under 2953.08(G)(2).' *Kalish* at paragraph 12. However, although *Foster* eliminated mandatory judicial fact finding, it left intact R.C. 2929.11 and 2929.12, and the trial court

must still consider these statutes. *Kalish* at paragraph 13, see also *State v. Mathis,* 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1." Id. at ¶27.

{¶25} Appellant has not provided a transcript of the July 26, 2004 sentencing hearing or the April 2, 2010 resentencing hearing. Appellant's failure to file the sentencing transcript prohibits our review to determine whether the trial court abused its discretion in determining the length of Appellant's prison term pursuant to the above-stated standard. See App.R. 9(B); *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384.

{¶26} Accordingly, Appellant's second Assignment of Error is overruled.

{¶27} The judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

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FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
GARY LEE DAVIS	:	
	:	Case No. CT2010-0017
Defendant-Appellant	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Muskingum County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE