

[Cite as *State v. Persinger*, 2018-Ohio-4816.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

GERRY A. PERSINGER

Defendant-Appellant

JUDGES:

Hon. John W. Wise, P. J.
Hon. William B. Hoffman, J.
Hon. Earle E. Wise, Jr., J.

Case No. 2018 CA 0005

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. 2008 CR 0086

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 27, 2018

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Wise, John, P. J.

{¶1} Appellant Gerry A. Persinger appeals from the April 10, 2018 judgment entry of resentencing in the Court of Common Pleas, Morrow County, following a remand from this Court upon his prior appeal. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2} In 2008, appellant was convicted of four counts of unlawful sexual conduct with a minor, R.C. 2907.04, all felonies of the second degree. The trial court thereafter imposed an aggregate prison term of twenty years, consisting of terms of eight years (count 1), six years (count 2), six years (count 3), and six years (count 4), with counts 3 and 4 to be served concurrently with each other. Appellant directly appealed from his convictions and sentence, challenging the sufficiency of the indictment and the imposition of court costs, and alleging ineffective assistance of counsel. On November 3, 2009, we overruled appellant's three assigned errors and affirmed the convictions and sentence. See *State v. Persinger*, 5th Dist. Morrow No. 08-CA-14, 2009-Ohio-5849. Appellant was thereafter unsuccessful in pursuing an appeal to the Ohio Supreme Court.

{¶3} In 2012, appellant filed a petition for post-conviction relief, which was overruled by the trial court. We dismissed appellant's subsequent appeal for want of an appellant's brief. *State v. Persinger*, 5th Dist. Morrow No. 12-CA-11.

{¶4} In 2013, appellant filed a motion to correct sentence, which was also overruled. We dismissed appellant's subsequent appeal as untimely. *State v. Persinger*, 5th Dist. Morrow No. 14 CA 0001.

{¶5} Appellant also filed a petition for a writ of habeas corpus in federal court, which was dismissed on October 15, 2015. See *Persinger v. Marion Correctional Institution*, S.D. Ohio No. 2:15–CV–02653, 2015 WL 5999321.

{¶6} On May 3, 2017, appellant filed a “Motion to Arrest Judgment, Pursuant to R.C. 2947.02(a)(b).” In addition, on August 28, 2017, appellant filed a “Motion to Vacate Void Judgment,” arguing the trial court had failed to properly notify him of post-release control in 2008. Both motions were overruled by the trial court on October 5, 2017.

{¶7} Appellant thereupon appealed to this Court, raising one assigned error. Upon review, we noted that the 2008 sentencing entry utilized PRC notification language of “up to a maximum of (5) years,” which the State conceded was incorrect. See *State v. Persinger*, 5th Dist. Morrow No. 2017CA0007, 2018-Ohio-1076, ¶ 16; R.C. 2967.28(B)(1). But we specifically determined that there would be “no need” for a new sentencing hearing in the matter. *Id.* at ¶ 17. We proceeded to sustain appellant's sole assignment of error “to the extent that we remand[ed] [the] matter to the trial court for preparation of a nunc pro tunc entry reflecting that the mandatory duration of post release control is five years.” *Id.* at ¶ 18.

{¶8} Following the aforesaid remand, the trial court issued a judgment entry *nunc pro tunc*, stating therein that it had notified appellant that his PRC was “mandatory in this case for five (5) years ***.” Judgment Entry of Sentencing, April 10, 2018 at 2.

{¶9} Appellant filed a *pro se* notice of appeal on May 4, 2018. He herein raises the following two Assignments of Error:

{¶10} “I. THE TRIAL COURT ERRED BY CHANGING THE NATURE OF POST RELEASE CONTROL WITHOUT A HEARING PURSUANT TO R.C. 2929.191 THUS

VIOLATING THE APPELLANT'S PROCEDURAL DUE PROCESS UNDER OHIO CONSTITUTION ART. I SECT. 16.

{¶11} “II. THE TRIAL COURT LACK [SIC] JURISDICTION TO ADD A CRIMINAL PUNISHMENT TO AN OFFENSE WHICH THE PRISON TERM HAS BEEN COMPLETED THUS DENYING THE APPELLANT PROTECTION FROM DOUBLE JEOPARDY AND DUE PROCESS UNDER THE U.S. CONSTITUTION 5TH AND 14TH AMENDMENT[S] AND OHIO CONSTITUTION ART. I SECT. 10 AND SECT. 16.”

I.

{¶12} In his First Assignment of Error, appellant essentially contends the trial court erred and violated his right to due process under the Ohio Constitution by correcting his 2008 post-release control notification upon our March 22, 2018 remand without conducting a hearing under R.C. 2929.191. We disagree.

{¶13} Appellant directs us *inter alia* to R.C. 2929.191(C), which states in pertinent part as follows: “On and after July 11, 2006, 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. ***.”

{¶14} However, the law of the case doctrine provides that a decision of a reviewing court in a case remains the law of the case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *U.S. Bank v. Detweiler*, 5th Dist. Stark No. 2011 CA00095, 2012–Ohio–73, ¶ 26, citing *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 462 N.E.2d 410. Furthermore, “[a] trial court is without authority to extend or vary the mandate given by the appellate court.” *Scott v. Ohio Dept.*

of Rehab. & Corr., 10th Dist. Franklin No. 14AP-105, 2014-Ohio-2796, ¶ 12, citing *State v. Harper*, 10th Dist. No. 06AP-733, 2007-Ohio-2590, ¶ 13.

{¶15} Our review of the procedural history of this matter reveals appellant did not request reconsideration or seek further appeal following our decision in appellate case number 2017CA0007 to remand for the issuance of a *nunc pro tunc* sentencing entry. Therefore, pursuant to the doctrine of law of the case, appellant's present claim that he was improperly denied a hearing by the trial court upon our remand in his prior appeal is without merit.

{¶16} Appellant's First Assignment of Error is overruled.

II.

{¶17} In his Second Assignment of Error, appellant argues the trial court erred and violated his constitutional rights upon our prior remand by effectively adding a criminal punishment without jurisdiction to do so. We disagree.

{¶18} Appellant first directs us to *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382 (2013), wherein the Ohio Supreme Court held in pertinent part: "A trial court does not have the authority to resentence a defendant for the purpose of adding a term of postrelease control as a sanction for a particular offense after the defendant has already served the prison term for that offense." *Id.*, at paragraph three of the syllabus.

{¶19} Appellant points out that at the time of his PRC correction in 2018, he had served roughly ten years in prison, indicating that at least one of his prison terms was therefore completed. However, it is well-established that periods of post-release control shall be served concurrently and shall not be imposed consecutively to each other. *State*

v. Blankenship, 5th Dist. Delaware No. 16 CAA 0024, 2017-Ohio-7267, ¶ 56, citing R.C. 2967.28(F)(4)(c). Under the circumstances presented, and in light of his multiple convictions (all felonies of the second degree), we find appellant cannot establish prejudicial error under *Holdcroft* as a result of the trial court's correction of his PRC via a *nunc pro tunc* judgment entry.

{¶20} Appellant also suggests that the judgment entry under appeal violated his constitutional protection against double jeopardy. In support he cites *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684 (2012). However, the issue in *Raber* was not post-release control; it was whether the trial court retained authority to classify the defendant as a Tier I sex offender more than a year after his conviction for a sexually oriented offense. See *id.* at ¶ 1. Moreover, "Ohio courts have rejected the assertion that correcting a statutorily deficient sentence on remand violates the constitutional protections against double jeopardy." *State v. June*, 10th Dist. Franklin No. 12AP-901, 2013-Ohio-2775, ¶ 9.

{¶21} Finally, we reiterate that appellant, in his prior appeal, challenged the denial of his motion to vacate his sentence for improper imposition of post-release control. We sustained his assigned error in that case and remanded the matter for a *nunc pro tunc* correction entry. Appellant took no further action in said appeal. Assuming, *arguendo*, an appellate remand without directing a hearing was in error, we would find the doctrine of invited error applicable. This doctrine specifies that a litigant may not take advantage of an error which he himself invited or induced. See *Hal Artz Lincoln–Mercury, Inc. v. Ford Motor Co., Lincoln–Mercury Div.*, 28 Ohio St.3d 20, 502 N.E.2d 590 (1986), paragraph one of the syllabus.

{¶22} Appellant's Second Assignment of Error is therefore overruled.

{¶23} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Morrow County, Ohio, is hereby affirmed.

By: Wise, John, P. J.

Wise, Earle, J., concurs.

Hoffman, J., concurs separately.

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JWW/d 1106

Hoffman, J., concurring

{¶24} I concur in the majority's analysis and disposition of Appellants first assignment of error.

{¶25} I further concur in the majority's analysis and disposition of Appellant's second assignment of error with the singular exception I don't find Appellant has invited his claimed error of being resentenced without his presence.