

[Cite as *State v. Long*, 2010-Ohio-6115.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-100285
	:	TRIAL NO. B-0402803
Plaintiff-Appellee,	:	
vs.	:	<i>DECISION.</i>
JOHN W. LONG,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Sentence Vacated and Cause Remanded

Date of Judgment Entry on Appeal: December 15, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Ronald W. Springman*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

John W. Long, pro se.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} Defendant-appellant John W. Long presents on appeal a single assignment of error challenging the Hamilton County Common Pleas Court’s judgment overruling his “Motion to Vacate and Correct a Void Sentence.” The challenge is well taken because Long’s sentence contained an unauthorized term of postrelease control.

{¶2} In 2004, a jury found Long guilty of murder. The trial court sentenced him to a prison term of 15 years to life and stated in the judgment of conviction that, “as part of the sentence in this case, the defendant is subject to the postrelease control supervision of R.C. 2967.28.”

{¶3} Long unsuccessfully appealed his conviction to this court and to the Ohio Supreme Court.¹ In April of 2010, he filed with the common pleas court his “Motion to Vacate and Correct a Void Sentence.” By his motion, Long sought resentencing on the ground that his sentence was void because the trial court, without authority to do so, had included in the sentence a requirement that he be subject to a period of postrelease control. The court overruled the motion, and this appeal followed.

{¶4} R.C. 2967.28 provides that a prison sentence imposed for felonies that are classified by degrees must “include a requirement that the offender be subject to a period of post-release control.”² The statute, by its terms, does not apply to unclassified felonies like murder.³ Therefore, R.C. 2967.28 did not authorize the

¹ See *State v. Long* (Oct. 26, 2005), 1st Dist. No. C-040643, discretionary appeal not accepted for review, 108 Ohio St.3d 1489, 2006-Ohio-962, 843 N.E.2d 794.

² See R.C. 2967.28(B) and (C).

³ See *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶36; accord *State v. Baker*, 1st Dist. No. C-050791, 2006-Ohio-4902, ¶4-6.

trial court to include in Long's murder sentence the requirement that he be subject, upon his release from prison, to postrelease control.

{¶5} A sentencing court has no authority to impose a criminal penalty that is not prescribed by statute,⁴ and a sentence that does so is void.⁵ A trial court retains jurisdiction to correct a void sentence.⁶ And a void-sentence claim may properly be submitted in a direct appeal or in a motion to the trial court.⁷ But irrespective of the claim's procedural posture, a court must recognize and vacate a void sentence, and the defendant must be resentenced.⁸ Therefore, when a sentencing court has imposed postrelease control without the statutory authority to do so, and the matter has come to the attention of the trial court or a reviewing court, the sentence is void and must be vacated, and the defendant must be resentenced.⁹

{¶6} Long's murder sentence was void because R.C. 2967.28 did not authorize the trial court to include in his sentence the requirement that he be subject to postrelease control. Therefore, the common pleas court erred when it declined, upon Long's motion, to vacate the sentence and to resentence him.

⁴ See *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶20 (citing *Colegrove v. Burns* [1964], 175 Ohio St. 437, 438, 195 N.E.2d 811).

⁵ See *id.*

⁶ See *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, at ¶18-19.

⁷ See *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, ¶12; accord *State v. Holcomb*, 184 Ohio App.3d 577, 2009-Ohio-3187, 921 N.E.2d 1077, ¶17-20.

⁸ See *Boswell*, 121 Ohio St.3d at ¶12; *Simpkins*, 117 Ohio St.3d at ¶21 (citing *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶13, and *Romito v. Maxwell* [1967], 10 Ohio St.2d 266, 267, 227 N.E.2d 223); accord *Holcomb*, 184 Ohio App.3d at ¶19-20.

⁹ See *State v. Austin*, 8th Dist. No. 93028, 2009-Ohio-6108, ¶4, appeal not accepted for review, 124 Ohio St.3d 1541, 2010-Ohio-1557, 924 N.E.2d 844; *State v. Wright*, 9th Dist. No. 24610, 2009-Ohio-6081, ¶4-7; *State v. Crockett*, 7th Dist. No. 07-MA-233, 2009-Ohio-2894, ¶8-9, appeal not accepted for review, 124 Ohio St.3d 1446, 2010-Ohio-188, 920 N.E.2d 375; see, also, *State v. Clardy*, 1st Dist. No. C-060527, 2007-Ohio-4193, ¶10 (in a pre-*Simpkins* direct appeal, vacating the sentence and remanding to "modify the judgment accordingly"). Cf. *State v. Eberle*, 12th Dist. No. CA2009-10-065, 2010-Ohio-3563, ¶51 (on appeal from the overruling of a postsentence motion to withdraw a guilty plea, vacating that portion of the sentence imposing postrelease control); *State v. Jordan*, 8th Dist. No. 91413, 2009-Ohio-4037, ¶38 (on direct appeal, holding that "*Bezak* [was] not implicated [because] the sentence [was] not void" for lack of postrelease-control notification, but remanding to "correct" the sentencing entry because postrelease control was "erroneously included").

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{¶7} Accordingly, we sustain the assignment of error, vacate the sentence, and remand this case for resentencing in accordance with the law and this decision.

Sentence vacated and cause remanded.

CUNNINGHAM, P.J., HENDON and MALLORY, JJ.

Please Note:

The court has recorded its own entry on the date of the release of this decision.