[Cite as *State v. Hudnall*, 2015-Ohio-3939.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 15CA8
vs.	:	
JOHNATHAN W. HUDNALL,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio Public Defender, and Valerie Kunze, Assistant State Public Defender, Columbus, Ohio, for appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, and Robert C. Anderson, Lawrence County Assistant Prosecuting Attorney, Ironton, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:9-10-15
ABELE, J.

{¶ 1} This is an appeal from a Lawrence County Common Pleas Court judgment that denied a motion by Johnathan W. Hudnall[1], defendant below and appellant herein, to vacate postrelease control. Appellant assigns the following error for review:

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED JONATHAN HUDNALL'S MOTION TO VACATE HIS POSTRELEASE CONTROL."

[1] At the outset of proceedings, appellant's first name was spelled "Jonathan." The parties retained that spelling in the briefs filed in this appeal. However, because the final order appealed herein uses "Johnathan," we retain that spelling to remain consistent with the trial court.

{¶ 2} In 2002, the Lawrence County Grand jury returned an indictment that charged appellant with two counts of aggravated burglary in violation of R.C. 2911.01(A)(1), each with firearm specifications. Appellant eventually pled guilty to both counts. On January 7, 2004, the trial court imposed a five year term of incarceration with three additional years for the firearm specification (on both counts). The court ordered the sentences to be served concurrently to one another for a total of eight years imprisonment. Appellant was also informed "post release control is also assessed on that."

{¶ 3} Judgment was entered the same day and the entry further stated, in pertinent part, that the trial court advised appellant that he "could be subject to post release control by the parole authorities for any violations of felonies of the first or second degrees and for violent F-3s for up to five (5) years and for a period of up to three (3) years on all others." We affirmed the judgment in *State v. Hudnall*, 4th Dist. Lawrence No. 04CA3, 2004-Ohio-5369.

{¶ 4} Apparently, in 2011 the Department of Corrections alerted the trial court that the January 7, 2004 judgment did not adequately address the issue of post release control. Pursuant to R.C. 2929.191, the court purported to enter a Nunc Pro Tunc entry to correct the matter.[2] Apparently, in 2013 appellant filed a motion to vacate post-release control on grounds that the trial court failed to follow proper procedures to implement post release control.[3] The trial court

[2] We are unable to locate a copy of this nunc pro tunc entry in the original papers sent to us on appeal. We take this information from a March 22, 2013 judgment that overruled appellant's first motion to vacate postrelease control.

[3] We are unable to locate the motion in the record, nor do we find any notation of it being filed in the docket. We take this information from a March 22, 2013 entry that overruled the motion.

entered judgment on March 22, 2013 and overruled the motion on grounds that the 2011 nunc pro tunc judgment cured any such deficiency and that R.C. 2929.191 authorized the court to do so.[4]

{¶ 5} Appellant commenced the instant proceedings on February 19, 2015 by filing another motion to vacate post-release control on the grounds that the trial court failed to comply with R.C. 2929.19. In particular, appellant argued that the court failed to inform appellant about the consequences of violating post-release control. The State filed nothing in opposition and, on March 10, 2015, the trial court overruled appellant's second motion. Rather than rely on R.C. 2929.191, as it had previously done, this time the trial court stated that the matter was "moot" as a result of its March 22, 2013 entry that overruled the first motion to vacate. This appeal followed.

I

{¶ 6} Before we consider the merits of the assignment of error, we pause to address several procedural issues. First, as the State suggests in its brief, the trial court erred in its March 10, 2014 decision insofar as it found that the case could be decided on the doctrine of mootness.

{¶ 7} A case is moot when a court's determination on a particular subject matter will have no practical effect on an existing controversy. *State v. Harding*, 10th Dist. Franklin Nos. 13AP–362 & 13AP–459, 2014-Ohio-1187, at ¶50; *In re A.H.*, 9th Dist. Lorain Nos. 13CA010362

[4] The original of this entry does not appear in the record, nor is there any mention of it in the docket. However, a copy of the entry is attached to the trial court's entry of March 10, 2015 that overruled appellant's second motion to vacate.

& 13CA010371, 2013-Ohio-5080, at ¶4; also see *Black's Law Dictionary* 909 (5th Ed.1979). Here, appellant was under the constrictions of post-release control when the trial court filed its entry and decision to vacate that control would have had a practical effect on his case. Thus, the case was not moot. Rather, the proper holding would have been to rule the matter was res judicata in light of its prior ruling.

{¶ 8} Second, the nunc pro tunc entry upon which the trial court relied in its decision is not a part of the record on appeal. Thus, we cannot independently verify whether it purports to bring the case into compliance with R.C. 2929.19(B)(2)(e) as to alerting appellant to the consequences for violating post-release control. However, the court proceeded under that assumption in both its March 10, 2015 judgment and its March 22, 2013 judgment. The State and appellant also make their arguments on the basis that the nunc pro tunc judgment purports to cure the deficiency. Our decision, therefore, will proceed on the assumption that the Nunc Pro Tunc entry purports to satisfy the statutory requirement and to cure the deficiency.

{¶ 9} Finally, the March 10, 2015 and March 22, 2013 judgments both essentially rely on the proper application of R.C. 2929.191. Determining the applicability of that statute to this case is a legal question. Thus, we apply a de novo standard of review to the trial court's determination. *State v. Smith*, 4th Dist. Scioto No. 14CA3657, 2015-Ohio-841, at ¶7; *State v. Carpenter*, 4th Dist. Lawrence No. 14CA13, 2014–Ohio–5698, ¶10. In other words, we afford no deference whatsoever to the trial court's decision and conduct our own, independent review. *Holiday Haven Members Assn. v. Paulson*, 4th Dist. Hocking No. 13CA13, 2014-Ohio-3902, at ¶13; *Wells Fargo Bank, N.A. v. Odita*, 10th Dist. Franklin No. 13AP–663, 2014–Ohio–2540, at ¶8. With these points in mind, we turn our attention to the merits of appellant's assignment of

error.

II

{¶ 10} In his assignment of error, appellant asserts that the trial court erred by denying his motion to vacate post-release control. We agree, albeit on a more limited basis than appellant argues in his brief. We also lament that this case forces us, yet again, into the abyss of Ohio felony sentencing.

{¶ 11} Appellant was sentenced on January 7, 2004. Neither the transcript of that hearing nor the judgment of conviction and sentence appear to have alerted him to the consequences of violating post-release control. As appellant correctly points out in his brief, the Ohio Supreme Court held in *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, at the syllabus, "[w]hen sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about post[-]release control and is further required to incorporate that notice into its journal entry imposing sentence." A failure to comply with this mandate, renders a judgment void (as opposed to voidable). Id. at ¶¶23 & 25. The proper remedy is to remand the case for re-sentencing.

{¶ 12} After *Jordan*, the Ohio General Assembly enacted Am.Sub.H.B. 137, 2006 Ohio Laws File 132, and created an entirely new statute – R.C. 2929.191. This statute provides, in pertinent part:

"(A)(1) If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of section 2929.14 of the Revised Code, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with

division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison. * * *

(2) If a court prepares and issues a correction to a judgment of conviction as described in division (A)(1) of this section before the offender is released from imprisonment under the prison term the court imposed prior to the effective date of this section, the court shall place upon the journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. * * *

(B)(1) If, prior to the effective date of this section, a court imposed a sentence including a prison term and failed to notify the offender pursuant to division (B)(3)(e) of section 2929.19 of the Revised Code regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control or to include in the judgment of conviction entered on the journal a statement to that effect, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of section 2929.19 of the Revised Code, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of section 2967.131 of the Revised Code the parole board may impose as part of the sentence a prison term of up to one-half of the stated prison term originally imposed upon the offender. * * * (Emphasis added.)

{¶ 13} R.C. 2929.191 provides a mechanism whereby a trial court can avoid the waste of resources required by bringing every criminal defendant to court for re-sentencing. In *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, the Ohio Supreme Court held that this statute could be applied prospectively and eliminated the problems with judgments of conviction and sentence entered after the statute became effective. Id. at ¶34. However, the Supreme Court also held that the statute could not be applied retrospectively to judgments entered before 2006. Id. at ¶¶25-26.

{¶ 14} Here, appellant's judgment of conviction and sentence was entered in 2004, two years before enactment of R.C. 2929.191. As the Ohio Supreme Court has held, that statute

should not be used to correct the judgment of conviction and sentence entered against appellant. Therefore, we agree that the Nunc Pro Tunc judgment does not cure the deficiency of having failed to notify appellant of the possible consequences for violating post-release control.

{¶ 15} Consequently, the question now is what is the proper remedy. Appellant asks us to vacate the term of post-release control. It is tempting to do just that. *Jordan* suggests that this is the proper remedy, but the Ohio Supreme Court held in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, at ¶29, that "the proper remedy is a re[-]sentencing hearing 'limited to [the] proper imposition of post[-]release control.'" also see *State v. Carr*, 2nd Dist. Montgomery No. 24438, 2012-Ohio-1850, at ¶14. In *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio- 5014, 1 N.E.3d 382, at paragraph three of the syllabus, the Ohio Supreme Court later ruled that a "trial court does not have the authority to re[-]sentence a defendant for the purpose of adding a term of post[-]release control as a sanction for a particular offense after the defendant has already served the prison term for that offense." (Emphasis added.); *Accord Gregley v. Friedman*, 8th Dist. Cuyahoga No. 100601, 2014-Ohio- 218, at ¶6. Here, it is uncontroverted that appellant served his sentence and was released in 2014. Thus, pursuant to *Holdcroft*, the trial court cannot re-sentence him and add a term of post-release control.

{¶ 16} In sum, R.C. 2929.191 cannot be applied retrospectively to allow a nunc pro tunc entry to correct the trial court's failure to inform appellant of the consequences of violating his post-release control. Ordinarily, this would require a remand to the trial court for re-sentencing. However, because the appellant has completely served his term of incarceration, pursuant to *Holdcroft*, supra, the sentencing entry cannot now be amended. Thus, appellant's assignment of error is well taken for these reasons and we hereby reverse the trial court's judgment and remand

the case for entry of judgment to vacate post-release control.

JUDGMENT REVERSED AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and case remanded for further proceedings consistent with this opinion. Appellant shall recover of appellee the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, A.J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.