[Cite as *State v. Mozingo*, 2016-Ohio-8292.]

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

STATE OF OHIO,	:	Case No. 16CA1025
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
WILLIAM MOZINGO,	:	**RELEASED: 12/9/16**
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio Public Defender, and Katherine R. Ross-Kinzie, Assistant State Public Defender, Columbus, Ohio, for appellant.

C. David Kelly, Adams County Prosecuting Attorney, and Kris D. Blanton, Adams County Assistant Prosecuting Attorney, West Union, Ohio, for appellee.

PER CURIAM

{¶1} The trial court initially sentenced William Mozingo to prison followed by a term of post-release control, but it did not notify him that a violation of his post-release control could result in a prison sentence to be served consecutively to any prison sentence he received for committing a new crime.

{¶2} While on post-release control Mozingo was convicted of a new felony offense and the court sentenced him to a prison term for his post-release control violation. The court ordered the post-release control sanction to be served consecutively to the prison term for his new conviction. After he had served the prison term for his new crime, Mozingo filed a motion to vacate his judicial-sanction sentence.

{¶3} On appeal Mozingo asserts that based on our precedent, the trial court erred in denying his motion. Upon reflection, we overrule that precedent, reject Mozingo's assignment of error, and affirm the judgment of the trial court.

I. FACTS

{¶4} Following his guilty plea to the charge of abduction, a third-degree felony, the Adams County Court of Common Pleas sentenced William Mozingo to three years in prison, to be followed by three years of post-release control. In its sentencing entry the trial court included the following language concerning post-release control:

> The Court has further notified the defendant that post release control is mandatory in this case for a maximum Three (3) years. If the defendant violates a post release control sanction or any condition imposed by the parole board under Revised Code Section 2967.28, the parole board may impose a more restrictive sanction, a prison term not to exceed nine (9) months or a maximum cumulative prison term for all violations not to exceed one-half of the stated prison term originally imposed. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the parole board, and any prison term for violation of that post release control.

{¶5} In November 2013, Mozingo completed his prison term and started the three-year term of post-release control.

{¶6} In June 2014, seven months after Mozingo's release from prison and while he was still on post-release control, the trial court sentenced Mozingo to a nine-month sentence on a new felony abduction conviction. The trial court also imposed an 862-day judicial-sanction sentence for his violation of post-release control, to be served consecutively to his nine-month sentence for the new crime. Mozingo completed his nine-month sentence in November 2014, and is currently incarcerated only on his judicial-sanction sentence.

{¶7} In August 2015 based on our precedent, Mozingo filed a motion in the trial court to vacate his judicial-sanction sentence for failing to properly advise him of the consequences of violating post-release control when it imposed sentence on his first abduction conviction in 2011. *See State v. Adkins*, 4th Dist. Lawrence No. 14CA29, 2015-Ohio-2830, and *State v. Pippen*, 4th Dist. Scioto No. 14CA3595, 2014-Ohio-4454. Mozingo claimed that the judicial-sanction portion of his sentence was void because the

trial court did not inform him that a prison term imposed for the commission of a new felony committed during the period he was on post-release control would be served consecutively to the prison term for the violation of post-release control.

{¶8} The state filed a memorandum in opposition that conceded the court's 2011 sentencing entry lacked the required notification, but claimed it was a clerical error because during the sentencing hearing, the court notified Mozingo that a judicial-sanction sentence would be "in addition to" and "as well as" the sentence for the new crime. The state requested that the trial court issue a nunc pro tunc sentencing entry to rectify the claimed error in the sentencing entry.

{¶9} The trial court denied the motion, "respectfully hold[ing] that the reasoning set forth in the Fourth District's *Adkins* and *Pippin* holdings, was misplaced, and this Court rather follows the reasoning set forth in *State v. Bybee*, 8th Dist. * * *, as Judge Harsha noted in his dissent to the Fourth District's decision in *Adkins*[.]" The trial court also denied the state's motion for nunc pro tunc relief based on mootness. This appeal ensued.

II. ASSIGNMENT OF ERROR

{¶10} Mozingo assigns the following error for our review:

> The trial court committed reversible error when it denied William Mozingo's Motion to Vacate Judicial-Sanction Sentence because Mr. Mozingo was not properly notified in his sentencing entry that any future judicial-sanction sentence for violation of postrelease control would have to be served consecutively to any new felony sentence. *State v. Adkins*, 4th Dist. Lawrence No. 14CA29, 2015-Ohio-2830; *State v. Pippen*, 4th Dist. Scioto No. 14CA3595, 2014-Ohio-4454 (March 30, 2016 Judgment Entry.)

III. STANDARD OF REVIEW

{¶11} Mozingo claims that the trial court's judicial-sanction sentence is void.

{¶12} When reviewing felony sentences we apply the standard of review set forth in R.C. 2953.08(G)(2), which provides that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either that "the record does not support the sentencing court's findings" under the specified statutory provisions or "the sentence is otherwise contrary to law." *State v. Marcum*, 2016-Ohio-1002, __ N.E.3d __, ¶ 1.

IV. LAW AND ANALYSIS

A. Court Precedent

{¶13} Mozingo asserts that the trial court committed reversible error when it denied his motion to vacate his judicial-sanction sentence because he was not properly notified in his original sentencing entry that any future sentence for violation of post-release control would be served consecutively to any new felony sentence.

{¶14} R.C. 2929.141 addresses sentencing for a felony offense committed while on post-release control and provides that the trial court may terminate the post-release control and may impose a prison term for the post-release control violation in addition to any prison term for a new felony. If the trial court imposes a prison term for the post-release control violation, it "shall be served consecutively to any prison term imposed for the new felony." R.C. 2929.141(A)(1).

{¶15} In *State v. Pippen*, 4th Dist. Scioto No. 14CA3595, 2014-Ohio-4454, at ¶ 22-25, we held that the trial court's failure to notify the defendant that a prison term imposed for the commission of a new felony during a term of post-release control will be served consecutively to the prison term imposed for the violation of post-release control rendered that part of the sentence void. *Id.* at ¶ 25 ("Failure to advise of the possible consequences of violating post-release control renders that part of the sentence void and it must be set aside").

{¶16} In *State v. Adkins*, 4th Dist. Lawrence No. 14CA29, 2015-Ohio-2830, at ¶ 16, we acknowledged that "our decision in *Pippen* could arguably be viewed as placing additional, extra-statutory notification requirements on trial courts that go beyond the requirements set forth in the plain language of R.C. 2929.19 or those constitutionally required * * *." Nevertheless, in an extended analysis of the issue we held that there was no special justification to depart from our holding in *Pippen* because: (1) although a number of appellate districts have held otherwise, we could not definitively conclude that *Pippen* was incorrectly decided based on the Supreme Court's decision in *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, at ¶ 18; and (2) our holding did not defy practical workability because—as the Ninth District noted in dicta in *State v. McDowell*, 9th Dist. Summit No. 26697, 2014-Ohio-3900, ¶ 13-15—the judicially created notification requirement provided "a procedural protection" to the offender. *Adkins* at ¶ 17-19. We reaffirmed our holding in *Pippen* by holding that "[b]ecause the trial court did not include the notification of the penalties under R.C. 2929.141(A)(1)-(2) at the re-sentencing hearing as required by *Pippen*, although it was included in the entry, Adkins's first assignment of error is meritorious." *Adkins* at ¶ 20.

{¶17} Then in *State v. Dixon*, 2016-Ohio-1491, __ N.E.3d __, ¶ 35-36 (4th Dist.), we reaffirmed our holdings in *Pippen* and *Adkins* by holding that the trial court's notification at sentencing which included the statement that a prison term for a violation of post-release control would be "in addition to" any other prison term imposed for the new offense, did not notify the offender that the prison term would be served consecutively to the other prison term. We held that this error rendered the post-release control portion of the sentence void. *Id.* at ¶ 36. We noted in *Adkins*, 2015-Ohio-2830, at ¶ 19, any "inconsistency in sentencing hearing requirements is

problematic, but can be resolved by the Supreme Court of Ohio, not by our abandonment of *Pippen*[, 2014-Ohio-4454]."

{¶18} The trial court here acknowledged our holdings in *Pippen* and *Adkins*, but instead of applying those controlling holdings, found them to be "misplaced" and instead agreed with the Eighth District holding in *State v. Bybee*, 2015-Ohio-878, 28 N.E.3d 149 (8th Dist.), and the dissenting opinion in *Adkins*.

{¶19} If we continue to apply *Pippen*, *Adkins*, and *Dixon*, we would sustain Mozingo's sole assignment of error. Nevertheless, we reexamine our precedent and overrule it.

B. *Pippen*, *Adkins*, and *Dixon* were Wrongly Decided

{¶20} In general, " '[s]tare decisis is the bedrock of the American judicial system.' " *Clermont Cty. Transp. Improvement Dist. v. Gator Milford, L.L.C.*, 141 Ohio St.3d 542, 2015-Ohio-241, 26 N.E.3d 806, ¶ 10, quoting *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 1. Based on the fundamental importance of stare decisis to the rule of law, the Supreme Court of Ohio specified that " 'any departure from the doctrine of stare decisis demands special justification.' " *Galatis* at ¶ 44, quoting *Wampler v. Higgins*, 93 Ohio St.3d 111, 120, 752 N.E.2d 962 (2001). The special justification that permits a court to overrule its precedent requires that the court determine the following three elements: (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision; (2) the decision defies practical workability; and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it. *Galatis* at paragraph one of the syllabus; *State v. Certain*, 180 Ohio App.3d 457, 2009-Ohio-148, 905 N.E.2d 1259, ¶ 10 (4th Dist.).

{¶21} In *Adkins*, 2015-Ohio-2830, at ¶ 16-19, we applied the *Galatis* test and determined that our decision in *Pippen*, 2014-Ohio-4454, should not be overruled because it was not wrong and we could not say that *Pippen* defied practical workability.

{¶22} Upon reflection, we erred in so holding, citing the Ninth Distritct's dicta in *McDowell*, 2014-Ohio-3900, at ¶ 15. We emphasized in *Adkins* at ¶ 19, that this judicially created notification requirement should not be overruled under the *Galatis* test because it provided "a *procedural* protection" to the offender. (Emphasis added.) However, when the dispute concerns a procedural, as opposed to a substantive, requirement, courts need not apply the *Galatis* test before overruling precedent. *See Clermont Cty. Transp. Improvement Dist.*, 141 Ohio St.3d 542, 2015-Ohio-241, 26 N.E.3d 806, at ¶ 10, citing *State v. Silverman*, 121 Ohio St.3d 581, 2009-Ohio-1576, 906 N.E.2d 427, ¶ 31-33. Therefore, *Galatis* was arguably inapplicable to our determination whether to overrule this precedent.

{¶23} Moreover, assuming arguendo that the *Galatis* test applies, application of its elements would warrant reversal of our precedent here. First, our precedent was decided incorrectly. As the majority in *Adkins* conceded at ¶ 16, there is no constitutional or statutory requirement that a trial court imposing post-release control must notify the offender that a court sentencing the defendant for a subsequent crime can impose a prison term for a post-release control violation to be served consecutively to a prison term for a new crime. R.C. 2929.141(A), the relevant statutory provision here, does not include this requirement. Because the statute is plain and unambiguous, we must apply it as written. *See State v. J.M.*, __ Ohio St.3d __, 2016-Ohio-2803, __ N.E.3d __, ¶ 7. By imposing a notification requirement that we admitted in *Adkins* has no constitutional or statutory basis, it added language that does not exist. *See Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 40.

{¶24} Our holdings in *Pippen*, 2012-Ohio-4692, *Adkins*, 2015-Ohio-2830, and *Dixon*, 2016-Ohio-1491, __ N.E.3d __, relied on dicta in *Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, at ¶ 18, which in turn cited *Woods v. Telb*, 89 Ohio St.3d 504, 733 N.E.2d 1103 (2000), *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, and *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, for the proposition that to fulfill the requirements of the post-release control sentencing statutes, especially R.C. 2929.19(B) and 2967.28, a trial court must provide statutorily compliant notification to a defendant regarding post-release control at the time of sentencing, including notifying the defendant of the details of the post-release control and the consequences of violating it. *Qualls* and the cases it cites do not involve the specific question raised in our cases—whether the failure to notify a defendant of the potential consequences for violating post-release control (that a term could be imposed for its violation to be served consecutive to the prison term for a new felony). And the cases it cites have been superseded by statute after the enactment of R.C. 2929.191, which provides the statutory procedure for correcting sentencing notification errors concerning post-release control. *See generally State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958.

{¶25} " 'In reading R.C. 2929.141(A) it is clear that there is no provision in that statute requiring the trial court in the original sentencing context to notify a defendant that a court sentencing the defendant for a subsequent crime can impose additional sanctions for the violation of post-conviction relief.' " *Dixon* at ¶ 51 (Harsha, J., dissenting), quoting *Adkins* at ¶ 29 (Harsha, J., dissenting). " 'Unlike R.C 2929.19(B), which expressly requires notifications concerning the parole board's authority to impose sanctions for violations, R.C. 2929.141(A) addresses the trial court's authority to do so, and is silent about notification in the original sentencing context.' " *Id.*

{¶26} This view is supported both by the plain language of R.C. 2929.141(A) and the prevailing weight of authority. The Third, Seventh, Eighth, Ninth, Eleventh, and Twelfth Districts have all held that R.C. 2929.141 does not require that the trial court notify the defendant of the potential penalties at sentencing. *See State v. Burgett*, 3d Dist. Marion No. 9-10-37, 2010-Ohio-5945, ¶ 28 ("the possible consequences of the commission of a felony under R.C. 2929.141 are discretionary options of the trial court, and no notice to a defendant of those options is required"); *State v. Susany*, 7th Dist. Mahoning No. 07 MA 7, 2008-Ohio-1543, ¶ 95 ("Appellant fails to direct our attention to any holding which states that a defendant must be advised that upon the commission of a new offense, a defendant is subject to additional prison time for any felony committed while on postrelease control. There is no such requirement and failure to so advise a defendant will still result in substantial compliance with Crim.R. 11(C)(2)(a)"); *State ex rel. Cornwall v. Sutula*, 8th Dist. Cuyahoga No. 103322, 2015-Ohio-4704, ¶ 7 ("this court and other courts of appeal have rejected the proposition that there is a duty to inform an offender of a possible consecutive sentence under R.C. 2929.141"); *State v. Mundy*, 9th Dist. Medina No. 15CA0001-M, 2016 WL 3570367, *12 (June 30, 2016) ("Unlike R.C. 2929.19(B), R.C. 2929.141(A)(1) does not contain a mandatory notification requirement, and the trial court's failure to discuss R.C. 2929.141(A)(1) does not render [the defendant's] sentence void"); *State v. Chionchio*, 11th Dist. Portage No. 2012-P-0057, 2013-Ohio-4296, ¶ 32 ("Appellant acknowledges that the appellate courts that have addressed this question have all held that trial courts are not required to inform a defendant at the plea hearing of the possibility that it could impose a prison term for committing a new felony while on post-release control"); *State v. Mullins*, 12th Dist. Butler No. CA2007-01-028, 2008-Ohio-1995, ¶ 12 ("While appellant attempts to extend the postrelease notification requirements identified in *Jordan* and codified in R.C.

2929.19, he fails to point to any statutory requirement that the trial court notify an offender of the implications of R.C. 2929.141"). Moreover, the Fifth District has held that the phrase "could be added" is sufficient and tantamount to the phrase "consecutive to," which appears to be in conflict with our decision in *Dixon* at ¶ 31-36, where we held that the language "in addition to" did not satisfy the notification requirements in *Pippen*. *State v. Nicholson*, 5th Dist. Muskingum No. CT2015-0016, 2016-Ohio-50, ¶ 14. Therefore, our holdings in *Pippen*, *Adkins*, and *Dixon* on this issue were wrongly decided.

{¶27} Next, the decision defies practical workability. In *Adkins*, 2015-Ohio-2830, at ¶ 19, we held that this precedent did not defy practical workability because the Ninth District's dicta in *McDowell*, 2014-Ohio-3900, at ¶ 15, observed that notification of the penalties for a new felony under R.C. 2929.141 provided "a procedural protection" to the offender. But not only was this cited passage dicta, the Ninth District has now rejected our construction of its decision in *McDowell* by expressly holding that "[u]nlike R.C. 2929.19(B), R.C. 2929.141(A)(1) does not contain a mandatory notification requirement, and the trial court's failure to discuss R.C. 2929.141(A)(1) does not render [the defendant's] sentence void." *Mundy*, 2016 WL 3570367, at *12. Defendants in our district should not be afforded greater, judicially created rights than those afforded to defendants in every other district that has addressed this issue.

{¶28} Finally, abandoning our precedent would not create an undue hardship for those who have relied upon it. Although it is undoubtedly better practice for trial courts to notify defendants of the potential consequences under R.C. 2929.141, we cannot substitute our personal view for the policy specified by the General Assembly in enacting this statute. *See Raber v. Emeritus of Marietta*, 2016-Ohio-1531, 49 N.E.3d 345, ¶ 26, citing *State ex rel. Cydrus v. Ohio Pub. Employees Retirement Sys.*, 127

Ohio St.3d 257, 2010-Ohio-5770, 938 N.E.2d 1028, ¶ 24 ("the General Assembly is the final arbiter of public policy; it is not the role of courts to second-guess these legislative policy choices").

{¶29} Therefore, upon reflection, we overrule our decisions in *Pippen*, *Adkins*, and *Dixon* insofar as they conflict with our holding here that R.C. 2929.141(A) does not require the trial court in the original sentencing context to notify a defendant that a court sentencing the defendant for a subsequent crime can impose additional sanctions for the violation of post-conviction relief. The trial court properly denied Mozingo's motion to vacate his judicial-sanction sentence. We overrule his assignment of error.

V. CONCLUSION

{¶30} Having overruled Mozingo's sole assignment of error, we affirm the judgment of the trial court denying his motion to vacate his judicial-sanction sentence.

JUDGMENT AFFIRMED.

Hoover, J., Concurs in Judgment and Opinion with Concurring Opinion:

{¶ 31} I concur in the Per Curiam opinion and its conclusion that a "special justification" exists to depart from our prior holdings in *State v. Pippen*, 4th Dist. Scioto No. 14CA3595, 2014-Ohio-4454, *State v. Adkins*, 4th Dist. Lawrence No. 14CA29, 2015-Ohio-2830, and *State v. Dixon*, 2016-Ohio-1491, _____N.E.3d _____ (4th Dist.). However, I write separately to explain my revised position.

{¶ 32} I concurred in *Pippen* and *Adkins*. *Adkins* was a per curiam opinion that relied on the holding in *Pippen*. I did not participate in *Dixon*. Upon further reflection, I find my concurrence in *Pippen* and *Adkins* to be in error.

{¶ 33} As the Per Curiam opinion makes clear in its *Galatis* analysis, the *Pippen*, *Adkins*, and *Dixon* cases were wrongly decided. While I still believe the better practice is to inform defendants of the potential implications of R.C. 2929.141 when sentencing them to post-release control, I concede that neither that statute nor any other statutory provision requires such notification. Moreover, as thoroughly discussed in the Per Curiam opinion, a majority of our sister appellate districts have rejected the proposition that a defendant must be notified of the consequences under R.C. 2929.141. In other words, the greater weight of authority on the issue before us opposes the Fourth District rulings.

{¶ 34} While I do not take the decision to depart from the doctrine of *stare decisis* lightly, I also know that: "It does no violence to the legal doctrine of *stare decisis* to right that which is clearly wrong. It serves no valid public purpose to allow incorrect opinions to remain in the body of our law." *Scott v. News-Herald*, 25 Ohio St.3d 243, 254, 496 N.E.2d 699 (1986) (Holmes, J., concurring). Accordingly, I concur in the Per Curiam opinion.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

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

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J.: Concurs in Judgment and Opinion.
Hoover, J.: Concurs in Judgment and Opinion with Concurring Opinion.
McFarland, J.: Concurs in Judgment Only.

For the Court

BY: _____
William H. Harsha, Judge

BY: _____
Marie M. Hoover, Judge

BY: _____
Matthew W. McFarland, 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.