

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
MERCER COUNTY**

The STATE OF OHIO,

APPELLEE,

**CASES NO. 10-07-14
and 10-07-15**

v.

WATT,

O P I N I O N

APPELLANT.

CHARACTER OF PROCEEDINGS: An Appeal from Common Pleas Court

**JUDGMENT: Judgments Affirmed in Part, Reversed in Part and Causes
Remanded**

DATE OF JUDGMENT ENTRY: March 10, 2008

ATTORNEYS:

**Andrew J. Hinders, Mercer County Prosecuting Attorney, and
Matthew K. Fox, Assistant Prosecuting Attorney, for appellee.**

James A. Tesno, for appellant.

ROGERS, Judge.

{¶1} In cases 10-07-14 and 10-07-15, defendant-appellant, Andrew T. Watt Jr., appeals the judgments of the Mercer County Court of Common Pleas resentencing him to notify him of postrelease control. In this consolidated appeal, Watt asserts that the trial court could not impose postrelease control at a later date;

that when postrelease control is not imposed during the original sentencing, a defendant is not subject to postrelease control; that if postrelease control may be imposed at a later date, the trial court must conduct a new sentencing hearing; that the state waived the issue of postrelease control by failing to appeal it; and that R.C. 2929.191 violates the one-subject rule. Based on the following, we affirm in part and reverse in part, and we remand the cause to the trial court.

{¶2} In April 2002, in case 10-07-14,¹ the Mercer County Grand Jury indicted Watt for two counts of rape in violation of R.C. 2907.02(A)(1)(b), felonies of the first degree, and one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), a felony of the third degree. In case 10-07-15,² the Mercer County Grand Jury indicted Watt for one count of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A), a felony of the third degree. Watt entered pleas of not guilty to both indictments.

{¶3} In June 2002, in case 10-07-14, the state amended the first rape count to gross sexual imposition, and Watt withdrew his plea of not guilty and entered a negotiated plea of no contest to two counts of gross sexual imposition in exchange for a dismissal of the second rape count. In case 10-07-15, Watt withdrew his plea of not guilty and entered a negotiated plea of no contest to the

¹ The corresponding common pleas court case number is 02-CRM-043.

² The corresponding common pleas court case number is 02-CR-044.

Case Nos. 10-07-14 & 10-07-15

count as charged in the indictment. The trial court accepted Watt's no-contest pleas and convicted him.

{¶4} In August 2002, in case 10-07-14, the trial court sentenced Watt to a three-year prison term on each conviction, to be served consecutively for an aggregate of six years, and classified him as a habitual sex offender. The trial court also ordered that Watt's sentence be served consecutively to and prior to his sentence in case 10-07-15. In case 10-07-15, the trial court sentenced Watt to a three-year prison term, classified him as a habitual sex offender, and ordered that the sentence be served consecutively to his sentence in case 10-07-14. The trial court failed to include any information about postrelease control in either judgment entry of sentencing.

{¶5} In June 2007, in both cases, the state moved for a correction to the judgments of conviction concerning postrelease control pursuant to R.C. 2929.191. Additionally, Watt moved to withdraw his no-contest pleas. Subsequently, the trial court held a resentencing hearing, denied Watt's motion to withdraw his no-contest pleas, and advised him that he was required to serve a period of five years of postrelease control in each case.

{¶6} In July 2007, the trial court issued judgment entries in each case, correcting the judgments of conviction concerning postrelease control.

{¶7} It is from these judgments that Watt appeals, presenting the following assignments of error for our review.

Assignment of Error No. I

If a trial court does not advise a defendant at sentencing that post release control is or may be imposed, it may not do so at a later date.

Assignment of Error No. II

When a trial court does not impose post release control at sentencing, the appropriate action is to rule that the defendant is not subject to post release control.

Assignment of Error No. III

If a trial court is authorized to impose post release control at a later time when it failed to do so at the original sentencing, the proper procedure is a new, complete sentencing hearing.

Assignment of Error No. IV

If no direct appeal of the original sentencing of appellant was taken by the state, it may not now ask the court to impose post release control.

Assignment of Error No. V

ORC 2929.191 is unconstitutional for violation of the single subject Rule 11 [sic] of the Ohio Constitution and in violation of the Due Process and Double Jeopardy clauses of the United States and Ohio Constitutions.

{¶8} Due to the nature of Watt’s assignments of error, we elect to address his assignments of error out of order and his first and second assignments of error together.

Assignments of Error Nos. I and II

{¶9} In his first assignment of error, Watt asserts that if a trial court fails to notify a defendant about postrelease control at the time of the original sentencing, it may not do so at a later date. In his second assignment of error, Watt asserts that when a trial court fails to notify a defendant of postrelease control during the original sentencing, the appropriate action is to rule that the defendant is not subject to postrelease control. Essentially, Watt argues that the trial court’s imposition of postrelease control at a later date violated finality-of-sentencing and double-jeopardy principles and that resentencing him post-*Foster* violated his due-process rights. We disagree.

{¶10} Generally, “[o]nce a sentence has been executed, the trial court loses jurisdiction to amend or modify the sentence.” *State v. Carr*, 3d Dist. Nos. 14-05-48 to 14-05-50, 2006-Ohio-3073, ¶3, citing *State v. Garretson* (2000), 140 Ohio App.3d 554; see also *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶18. However, trial courts do retain jurisdiction over their own final judgments in criminal cases under the following exceptions: (1) to

correct a void sentence, see *Cruzado*, 111 Ohio St.3d at ¶19, and *Garretson*, 140 Ohio App.3d at 559, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, and (2) to correct clerical errors in judgment. *Cruzado*, 111 Ohio St.3d at ¶19; *Garretson*, 140 Ohio App.3d at 559; Crim.R. 36.

{¶11} R.C. 2929.14(F)(1) provides that if a court imposes a prison term for a felony, the sentence shall include a requirement that the offender be subject to a period of postrelease control after the offender's release from imprisonment. R.C. 2929.19(B)(3) requires that the sentencing court notify the offender that the offender will be supervised under R.C. 2967.28 after the offender leaves prison. The Supreme Court of Ohio has interpreted these provisions as requiring a trial court to give notice of postrelease control both at the sentencing hearing and by incorporating it into the sentencing entry. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph one of the syllabus. The trial court must do so regardless of whether the term of postrelease control is mandatory or discretionary. *Id.* at paragraph two of the syllabus; *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, ¶18.

{¶12} Further, the court has held that a trial court's failure to properly notify an offender about postrelease control is contrary to law and constitutes a void sentence and, therefore, falls under the first exception noted above. *Jordan*,

104 Ohio St.3d at ¶25; *Cruzado*, 111 Ohio St.3d, at ¶20. Consequently, “where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is * * * to resentence the defendant.” *Jordan*, 104 Ohio St.3d at ¶23. However, a trial court’s authority to resentence an offender to give the required notice of postrelease control is limited to situations where the offender’s sentence has not yet expired. *Cruzado*, 111 Ohio St.3d at ¶28; *Hernandez*, 108 Ohio St.3d at ¶31-32.

{¶13} Moreover, such a resentencing does not violate finality or double-jeopardy restraints, because jeopardy does not attach to a void sentence. *Jordan*, 104 Ohio St.3d at ¶25, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 76 (“trial court’s correction of a statutorily incorrect sentence did not violate appellant’s right to be free from double jeopardy”). Thus, “ ‘an invalid sentence for which there is no statutory authority is * * * a circumstance under which there can be no expectation of finality’ to trigger the protections of the Double Jeopardy Clause.” *State v. Ramey*, 10th Dist. No. 06AP-245, 2006-Ohio-6429, at ¶16, quoting *State v. McColloch* (1991), 78 Ohio App.3d 42, 46.

{¶14} In response to the Supreme Court of Ohio’s holdings above, the General Assembly enacted R.C. 2929.191,³ which applies in cases where the

³ We note that the General Assembly also amended R.C. 2967.28, 2929.14(F), and 2929.19(B)(3)(c) through (e), to provide that on or after July 11, 2006, a trial court’s failure to notify an offender about

original sentencing occurred prior to the statute's effective date, July 11, 2006, and where the trial court failed to properly notify the offender of postrelease control at the time of the original sentencing. R.C. 2929.191 provides:

(A)(1) If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type [requiring mandatory post-release control] and failed to notify the offender pursuant to that division that the offender will be supervised under [R.C. 2967.28] after the offender leaves prison or to include a statement of that effect in the judgment of conviction entered on the journal or in the sentence pursuant to [R.C. 2929.14(F)(1)], 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 [R.C. 2967.28] after the offender leaves prison.⁴

* * *

(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 tunc⁵ 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

postrelease control at sentencing or in the sentencing entry “does not negate, limit, or otherwise affect” either a mandatory period of postrelease control or the parole board’s authority to impose a prison term where postrelease control is discretionary. However, these amendments do not apply here given Watt’s original sentencing in both cases was prior to July 11, 2006.

⁴ R.C. 2929.191(A)(1) also includes a nearly identical paragraph pertaining to discretionary postrelease control.

⁵ We note that the requirement under R.C. 2929.191(A)(2) that a trial court issue an entry nunc pro tunc is technically incorrect because “nunc pro tunc entries ‘are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided.’” *Cruzado*, 11 Ohio St.3d at ¶19, citing *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, ¶14, quoting *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 164.

physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender.⁶ * * * The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the sentence and the judgment of conviction entered on the journal and had notified the offender that the offender will be so supervised regarding a sentence [requiring mandatory postrelease control] or that the offender may be so supervised regarding a sentence [requiring discretionary post-release control].

* * *

(C) On and after the effective date of this section, 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. Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing * * *. At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction.

Thus, under R.C. 2929.191, a court retains its authority to conduct a resentencing hearing and issue a corrective entry before the offender is released from prison in order to correct a sentence that is void for failing to appropriately notify an offender about postrelease control. Additionally, R.C. 2929.191 authorizes a court

⁶ Although not pertinent here, Crim.R. 43(A) requires that defendants be present at every stage of their criminal proceedings, including imposition of their sentences. See, e.g., *State v. Haymon*, 5th Dist. No. 2005CA00163, 2006-Ohio-3296; *State v. Caudill*, 5th Dist. No. 04COA58, 2005-Ohio-970; *Columbus v. Rowland* (1981), 2 Ohio App.3d 144. Additionally, at least one court has found that sentencing via videoconferencing does not constitute sufficient presence under Crim.R. 43(A). See *State v. Moore*, 8th Dist. No. 86244, 2006-Ohio-816.

to resentence an offender “at any time before the offender is released from imprisonment” and, therefore, is not limited to doing so only on direct appeal by the state. See, e.g., *State v. Sharpless*, 11th Dist. No. 2006-P-0088, 2007-Ohio-1922, at ¶40.

{¶15} Here, Watt was convicted of two felony sex offenses in case 10-07-14 and one felony sex offense in case 10-07-15⁷ and was sentenced to a prison term for each offense. Accordingly, the trial court was required to impose a mandatory five-year period of postrelease control in each case. R.C. 2967.28(B)(1). The trial court originally sentenced Watt in both cases prior to July 11, 2006, failed to incorporate notice of postrelease control in either judgment entry,⁸ and conducted a resentencing hearing before his prison terms expired. Thus, based on R.C. 2929.191 and Supreme Court of Ohio precedent, we find that the trial court had the authority to conduct the June 2007 hearing to impose postrelease control and to issue its subsequent corrective entries. We also find that doing so did not violate finality-of-sentencing or double-jeopardy principles.

⁷ A “felony sex offense” is any “violation of a section contained in Chapter 2907. of the Revised Code that is a felony.” R.C. 2967.28(A)(3).

⁸ We note that Watt also contends that the trial court failed to inform him of postrelease control during the original sentencing hearings. However, given that Watt did not include transcripts of these hearings, we must presume regularity in the trial court proceedings. *State v. West*, 3d Dist. No. 2-06-04, 2006-Ohio-5834, ¶53, citing *State v. Estrada* (1998), 126 Ohio App.3d 553, 556, and App.R. 9(B). Even if the trial court also failed to notify Watt of postrelease control at the original sentencing hearings, it would not change our disposition.

{¶16} Alternatively, Watt argues that resentencing him after *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, would violate his due-process rights and that he may withdraw his guilty plea if he so chooses. *Foster* addressed constitutional issues concerning felony sentencing and held that portions of Ohio's felony sentencing framework requiring judicial findings before imposition of more than the minimum, maximum, and consecutive sentences were unconstitutional and void. 109 Ohio St.3d at ¶100. However, this court has held on numerous occasions that applying *Foster* on a remand for resentencing does not violate due process. See *State v. McGhee*, 3d Dist. No. 17-06-05, 2006-Ohio-5162, ¶14-20, and subsequent cases citing it. Moreover, the statutory sentencing range for third-degree felonies has not changed, see R.C. 2929.14(A)(3), and the presumption of vindictiveness principles regarding increased sentences still apply to cases on remand for resentencing. See *State v. Troglin*, 3d Dist. No. 14-06-57, 2007-Ohio-4368, at ¶21. Also, Watt's assertion that he could withdraw his guilty plea if he so chooses is purely speculative at this juncture.

{¶17} Accordingly, we overrule Watt's first and second assignments of error.

Assignment of Error No. IV

{¶18} In his fourth assignment of error, Watt asserts that the trial court may not impose postrelease control at a later date unless the state directly appeals the original sentence. Specifically, Watt contends that the state waived the issue by failing to raise it on direct appeal pursuant to *Foster*, supra. We disagree.

{¶19} We note at the outset that *Foster* is inapplicable to Watt's argument because it only briefly addressed the issue of waiver and rejected the state's argument that *Foster* had waived an issue. See 109 Ohio St.3d at ¶30-33. Presumably, Watt meant to cite the Supreme Court of Ohio's recent decision in *State v. Payne*, wherein the court explained that in certain situations, a sentence cannot be set aside unless successfully challenged on direct appeal. 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶28. However, Watt's reliance on this principle is misplaced. *Payne* held that a defendant's failure to object at trial to a sentence that violates *Blakely v. Washington* (2004), 542 U.S. 296, forfeits the issue on appeal.⁹ *Payne*, 114 Ohio St.3d at paragraph one of the syllabus. In doing so, the court explained that the defendant's sentence was merely voidable, not void, and that voidable sentences can be set aside only if successfully challenged on direct appeal. *Id.* at ¶28. Conversely, a sentence imposed contrary to a statute is void ab initio. *Id.* at ¶29, fn.3.

{¶20} In the case sub judice, it is clear that a trial court’s failure to notify a defendant about postrelease control at the time of the original sentencing as statutorily mandated renders the sentence void. See *Jordan*, 104 Ohio St.3d at ¶25, and its progeny. Thus, the state’s failure to appeal an illegal or void sentence does not negate the trial court’s duty to impose sentences according to law or to resentence a defendant to correct a void sentence. *Ramey*, 2006-Ohio-6429 at ¶12, citing *State v. Thomas* (1996), 111 Ohio App.3d 510, 512, appeal not allowed, 77 Ohio St.3d 1469; see also *State v. Creager*, 12th Dist. No. 2007-01-007, 2007-Ohio-5188, at ¶12; *State v. Phillips*, 3d Dist. No. 8-06-14, 2007-Ohio-686, at ¶28. Additionally, R.C. 2929.191 authorizes a court to resentence an offender “at any time before the offender is released from imprisonment” and, therefore, is not limited to doing so only on direct appeal by the state. See, e.g., *State v. Sharpless*, 11th Dist. No. 2006-P-0088, 2007-Ohio-1922, at ¶40. Because the trial court’s failure to notify Watt about postrelease control at the time of his original sentencing was void, we find that the state did not forfeit the issue by failing to raise it on direct appeal.

{¶21} Accordingly, we overrule Watt’s fourth assignment of error.

Assignment of Error No. III

⁹ The court also emphasized that a waiver and a forfeiture are not interchangeable and that a waiver is an “intentional relinquishment or abandonment of a right,” whereas a forfeiture is “a failure to preserve an

{¶22} In his third assignment of error, Watt asserts that if the trial court is authorized to impose postrelease control at a later date when it failed to do so at the original sentencing, the proper procedure is a new, complete sentencing hearing. We agree.

{¶23} As noted above, R.C. 2929.191(C) requires a trial court to conduct a resentencing hearing in order to notify felony offenders about postrelease control before their prison terms expire. However, in doing so, the General Assembly did not specify whether the resentencing hearing was to be a de novo resentencing or whether addressing the sole issue of postrelease control would suffice. Thereafter, the Supreme Court of Ohio clarified the issue by holding that “when a trial court fails to notify an offender that he may be subject to post release control at a sentencing hearing * * *, the sentence is void; the sentence must be vacated and the matter remanded to the trial court for resentencing. The trial court must resentence the offender as if there had been no original sentence.” *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at ¶16.

{¶24} Here, the trial court conducted a resentencing hearing pursuant to R.C. 2929.191(C) before issuing its corrective judgment entries. However, the trial court failed to conduct a new and complete resentencing hearing as required

objection.” *Payne*, 114 Ohio St.3d at ¶23. Forfeiture is the appropriate term in this case.

under *Bezak*. Instead, the trial court merely advised Watt that he would be subject to postrelease control and memorialized it in the subsequent July 2007 corrective entries. Thus, we find that the trial court was required to conduct a new, complete resentencing hearing and erred in failing to do so.

{¶25} Accordingly, we sustain Watt's third assignment of error, vacate the July 2007 corrective entries, and remand the cause to the trial court with instructions to conduct a de novo resentencing hearing before Watt's prison terms expire¹⁰ in order to impose the proper sentence for each offense and notify Watt of the mandatory five-year period of postrelease control in each case.

Assignment of Error No. V

{¶26} In his fifth assignment of error, Watt asserts that R.C. 2929.191 is unconstitutional because it violates the one-subject rule, the Due Process Clause, and the Double Jeopardy Clause of the United States and Ohio Constitutions. Specifically, Watt contends that R.C. 2929.191 violates the one-subject rule because it was added onto a bill involving the sealing of juvenile records and that it violates the Due Process and Double Jeopardy Clauses because it increases the punishment for a defendant after the time for appeal has run. We disagree.

¹⁰ We note that Watt was arrested on April 5, 2002, and that his prison term in case 10-07-14 is presumably set to expire sometime in mid-March.

{¶27} Statutes are presumed to be constitutional. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, at ¶7. Thus, a court may not declare a statute to be unconstitutional unless it appears beyond a reasonable doubt that “the legislation and constitutional provisions are clearly incompatible.” *Id.*, citing *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus.

{¶28} The one-subject rule is set forth in Section 15(D), Article II of the Ohio Constitution, which provides that “[n]o bill shall contain more than one subject, which shall be clearly expressed in its title * * *.” The purpose of the one-subject rule is to prevent the tactic of “logrolling,” which occurs when legislators combine several distinct proposals into a single bill in order to gain passage, even though no single proposal may have obtained majority approval separately. *State ex rel. Ohio Civ. Serv. Emps. Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, at ¶26.

{¶29} However, to avoid interference with the legislative process, a court’s role in enforcing the one-subject rule is limited. *Id.* at ¶27. Thus, “ ‘[t]he mere fact that a bill embraces more than one topic is not fatal, as long as a common purpose or relationship exists between the topics.’ ” *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 496, quoting *Hoover v. Franklin Cty. Bd. of Commrs.* (1985), 19 Ohio St.3d 1, 6. Accordingly, only “a

manifestly gross and fraudulent violation of the one-subject provision * * * will cause an enactment to be invalidated.” *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, at ¶54. To determine whether a manifestly gross and fraudulent violation has occurred, courts need not look beyond the unnatural combinations themselves. Instead, “ ‘an analysis of any particular enactment is dependent upon the particular language and subject matter of the proposal,’ rather than upon extrinsic evidence of logrolling, and thus ‘an act which contains such unrelated provisions must necessarily be held to be invalid in order to effectuate the purpose of the rule.’ ” *Id.* at ¶71, quoting *State ex rel. Dix v. Celeste* (1984), 11 Ohio St.3d 141, 143, 145.

{¶30} Here, Watt first argues that R.C. 2929.191 violates the one-subject rule because it was added onto a bill involving the sealing of juvenile records. The General Assembly enacted R.C. 2929.191 under Am.Sub.H.B. 137, which was titled “Delinquent and Unruly Children – Sealed Records – Post-Release Control Law.” The bill contained several procedural and remedial provisions regarding both juvenile and adult criminal-justice issues. Upon reviewing the language of Am.Sub.H.B. 137, we cannot find that the provisions are so unrelated as to constitute a manifestly gross or fraudulent violation of the one-subject rule. Although the bill contains provisions regarding both juvenile delinquency matters

and adult criminal matters, they involve a common theme – criminal-justice matters – and are all procedural or remedial in nature. Thus, we find that R.C. 2929.191 does not violate the one-subject rule.

{¶31} Next, Watt argues that R.C. 2929.191 violates the Due Process and Double Jeopardy Clauses because it increases the punishment for a defendant after the time for appeal has run. Basically, Watt reiterates the same argument that we rejected in his first and second assignments of error, and we reject it here for the same reasons. Notice of postrelease control is a statutorily mandated term of a sentence, and correction of a void sentence for failure to include such a statutory notice does not somehow enhance the punishment or violate the Constitution. *Sharpless*, 2007-Ohio-1922 at ¶36. Nor was such a resentencing unforeseeable after *Jordan* and its progeny. *State v. Ryan*, 172 Ohio App.3d 281, 2007-Ohio-3092, at ¶19. Indeed, the procedure set forth in R.C. 2929.191 codified, and is basically consistent with, Supreme Court of Ohio precedent on this issue, as recognized with approval in *Cruzado*, 111 Ohio St.3d at ¶29. See also *Bezak*, *supra*.

{¶32} Accordingly, we overrule Watt’s fifth assignment of error.

{¶33} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued in his first, second, fourth, and fifth assignments

Case Nos. 10-07-14 & 10-07-15

of error, but having found error prejudicial to the appellant herein, in the particulars assigned and argued in his third assignment of error, we affirm in part and reverse in part, and remand the causes to the trial court for further proceedings consistent with this opinion.

Judgments affirmed in part
and reversed in part,
and causes remanded.

SHAW, P.J. and PRESTON, J., concur.