**[Cite as *State v. Harrison*, 2010-Ohio-2709.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NOS. CA2009-10-272<br>CA2010-01-019 |
| - vs - | : | O P I N I O N |
| | : | 6/14/2010 |
| SAMUEL LEE HARRISON, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-06-1052

Robin N. Piper III, Butler County Prosecuting Attorney, Daniel G. Eichel, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45012-0515, for plaintiff-appellee

Scott N. Blauvelt, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

**POWELL, J.**

**{¶1}** Defendant-appellant, Samuel Lee Harrison, appeals his sentence by arguing that the Butler County Court of Common Pleas committed errors when it imposed a fine, notified him of postrelease control, and held a second sentencing hearing after an appeal was filed.

**{¶2}** Appellant pled guilty in 2009 to the first-degree felony offense of

aggravated robbery, with an accompanying firearm specification. In October, the trial court imposed a prison term and a $10,000 fine. The trial court told appellant at the sentencing hearing that he would be subject to a mandatory five-year term of postrelease control, and outlined the consequences should he violate postrelease control. The judgment entry incorrectly indicated that appellant was subject to an "optional" postrelease control term "up to a maximum of three (3) years."

**{¶3}** Appellant filed an appeal. In December 2009, the trial court brought appellant back and held a second sentencing hearing, wherein the trial court again informed appellant that he was subject to a mandatory five years of postrelease control, and re-imposed his prison term and financial sanction. The trial court issued a judgment entry as a result of the second sentencing hearing, which was captioned as a "RE-SENTENCING ENTRY," and in which it stated that appellant was subject to "mandatory" postrelease control "up to a maximum of five (5) years."

**{¶4}** Appellant filed a second appeal, challenging the resentencing. Both cases were consolidated for purposes of appeal. Appellant presents three assignments of error for our review. For ease of discussion, we address some of appellant's assignments of error out of order.

**{¶5}** Assignment of Error No. 2:

**{¶6}** "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT IMPOSED A FINE IN THE AMOUNT OF $10,000 UPON APPELLANT."

**{¶7}** Appellant argues that the record does not support the trial court's determination that he possessed the present and future ability to pay the fine and the trial court abused its discretion in imposing that financial sanction.

**{¶8}** R.C. 2929.18 authorizes a trial court to impose financial sanctions, including a fine, upon an offender. Before imposing a financial sanction under R.C. 2929.18, a trial court must consider the offender's present and future ability to pay the amount of the sanction or fine. R.C. 2929.19(B)(6); *State v. Moore*, Butler App. No. CA2006-09-242, 2007-Ohio-3472, ¶9. However, there are no express factors that must be considered or specific findings that must be made. Id; see *State v. Martin,* 140 Ohio App.3d 326, 338-339, 2000-Ohio-1942.

**{¶9}** Compliance with R.C. 2929.19(B)(6) can be shown when a trial court considers a presentence investigation report (PSI) that details pertinent financial information, or when a transcript shows that the court at least considered the defendant's ability to pay. *Moore* at ¶9; see *State v. Loving*, 180 Ohio App.3d 424, 2009-Ohio-15, ¶9 (need only be some evidence in the record the trial court considered defendant's present and future ability to pay).

**{¶10}** The record in the case at bar indicates that appellant was found to be indigent for purposes of obtaining appointed counsel. A determination that a criminal defendant is indigent for purposes of receiving appointed counsel does not prohibit the trial court from imposing a financial sanction. See *State v. Rice*, Butler App. No. CA2006-04-091, 2007-Ohio-1367, ¶7 (ability to pay a fine over a period of time is not equivalent to ability to pay legal counsel a retainer fee at the onset of criminal proceedings); cf. *State v. Gipson*, 80 Ohio St.3d 626, 1998-Ohio-659.

**{¶11}** The trial court stated at the hearing and in the judgment entry that it reviewed appellant's PSI, and considered appellant's resources and his present and future ability to pay financial sanctions. We have reviewed the PSI and further note

there was some discussion at the hearing that provided additional information about appellant's level of education and work experience. See *Loving*, 2009-Ohio-15 at ¶10.

**{¶12}** We are aware that appellant's criminal history may have some bearing on his future ability to gain employment, but we find nothing in the record indicating any health or other issues that would prohibit appellant, who was 26 years of age, from obtaining employment upon his release from prison. See *State v. Collier*, 184 Ohio App.3d 247, 252-253, 2009-Ohio-4652.

**{¶13}** Accordingly, the record lacks clear and convincing evidence that the fine imposed on appellant is contrary to law and, no indication that the trial court abused its discretion in imposing it. Cf. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. Appellant's second assignment of error is overruled.

**{¶14}** Assignment of Error No. 1:

**{¶15}** "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN IMPOSING A SENTENCE WHICH WAS CONTRARY TO LAW AND VOID."

**{¶16}** Appellant argues that the trial court failed to provide accurate notification of postrelease control in the judgment entry and, therefore, his case should be remanded for resentencing.

**{¶17}** As we previously noted, the trial court correctly notified appellant at the sentencing hearing that he was subject to a mandatory term of five years postrelease control and the consequences of a violation. However, the judgment entry incorrectly indicated an optional term of up to three years.

**{¶18}** R.C. 2929.191 states in pertinent part that where a "court * * * failed to

notify the offender * * * 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 * * * 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 * * * the statement that the offender will be supervised under R.C. 2967.28 * * *." See, also, *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434 (R.C. 2929.191 applies to criminal sentences imposed after effective date of July 11, 2006, wherein the court failed to properly impose postrelease control).

**{¶19}** We are aware that this court previously remanded cases for resentencing under the same or similar circumstances as presented here. See, e.g., *State v. Stevens*, Butler App. No. CA2009-01-031, 2009-Ohio-6045 (correctly told of mandatory five years postrelease control at hearing, but entry indicated optional three years); *State v. Addis*, Brown App. No. CA2009-05-019, 2010-Ohio-1008 (correctly told of mandatory five years postrelease control at hearing, but entry indicated "up to" a maximum of five years; remanded for R.C. 2929.191 procedures).

**{¶20}** However, this court will rely on the trend we perceive in more recent Supreme Court cases to find that under these facts – where proper notification was given and the judgment entry is not silent, but is an inaccurate reflection of the notification – a resentencing hearing is not necessary. Cf. *State ex rel. Pruitt v. Cuyahoga Cty Court of Common Pleas*, Slip Opinion No. 2010-Ohio-1808, citing *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082 (habeas corpus not available when sentencing entries, while incorrect, are sufficient to afford notice to a

reasonable person that the court was authorizing postrelease control and any challenge to the imposition of postrelease control could have been raised on appeal; conclusion is consistent with the preeminent purpose of R.C. 2967.28 that offenders subject to postrelease control know at sentencing that their liberty could continue to be restrained after serving their initial sentences); cf. *State v. Payne,* 114 Ohio St.3d 502, 2007-Ohio-4642, ¶28 (where trial court has jurisdiction but erroneously exercises jurisdiction, the sentence is not void and can be set aside only if successfully challenged on direct appeal).

**{¶21}** See *Singleton*, 2009-Ohio-6434 at ¶23 (R.C. 2929.191 applies to offenders who have not yet been released from prison and who fall into at least one of these categories: those who did not receive notice at the sentencing hearing that they would be subject to postrelease control, those who did not receive notice that the parole board could impose a prison term for a violation of postrelease control, or those who did not have both of these statutorily mandated notices incorporated into their sentencing entries).

**{¶22}** We do not find that the factual situation presented by the instant case requires a R.C. 2929.191 hearing because appellant was properly notified of his postrelease control obligations at the 2009 sentencing hearing. The judgment entry did not reflect the notification that appellant received and, therefore, we find that the error in the original entry was clerical. See *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, ¶19 (term clerical mistake refers to a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment).

**{¶23}** A nunc pro tunc entry is the appropriate remedy to correct a clerical mistake. *State v. Battle*, Summit App. No. 23404, 2007-Ohio-2475; *State v. Gruelich* (1988), 61 Ohio App.3d 22, 24-25. A nunc pro tunc entry or order is limited to memorializing what the trial court actually did at an earlier point in time, such as correcting a previously issued order that fails to reflect the trial court's true action. *State v. Spears,* Cuyahoga App. No. 94089, 2010-Ohio-2229, ¶10.

**{¶24}** A nunc pro tunc entry may be used to correct a sentencing entry to reflect the sentence the trial court imposed upon a defendant at a sentencing hearing. *Battle* at ¶6 (generally, nunc pro tunc entry relates back to the date of the journal entry it corrects); Crim.R. 36 (trial court may correct clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission * * * at any time).

**{¶25}** Therefore, we overrule appellant's second assignment of error to the extent that we do not find the sentence is void and requires resentencing. However, we recognize the clerical error in the original entry and will remand this cause to the trial court with instructions to correct the entry to conform to the sentence pronounced at the sentencing hearing, to wit: a mandatory postrelease control term of five years. *State v. Sneed*, Cuyahoga App. No. 91414, 2008-Ohio-5247; see *State v. Hollingsworth*, Franklin App. Nos. 07AP-863, 07AP-864, 07AP-865, 2008-Ohio-2424; see R.C. 2967.28(B) (mandatory five years for felony of the first degree); R.C. 2929.19; R.C. 2911.01 (aggravated robbery).

**{¶26}** Assignment of Error No. 3:

**{¶27}** "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT

AND ACTED WITHOUT JURISDICTION WHEN IT CONDUCTED A RESENTENCING HEARING AND ISSUED A SECOND JUDGMENT ENTRY IMPOSING SENTENCE UPON APPELLANT AFTER PERFECTION OF AN APPEAL FROM THE ORIGINAL JUDGMENT IN THIS MATTER."

**{¶28}** Under this assignment of error, appellant argues that the trial court was without jurisdiction to hold a second sentencing hearing after he had filed an appeal and, as a result, the second judgment entry should be vacated as void.

**{¶29}** Under the circumstances presented in this case, we agree with appellant's argument. As we previously noted, appellant had already filed his first appeal when the trial court brought appellant back and held a second sentencing hearing and issued a resentencing entry.

**{¶30}** When a case is appealed, the trial court is divested of jurisdiction over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment. See *State ex rel. Sullivan v. Ramsey*, 124 Ohio St.3d 355, 2010-Ohio-252, ¶17; *Howard v. Catholic Social Serv. of Cuyahoga Cty., Inc.*, 70 Ohio St.3d 141, 146, 1994-Ohio-219; *State v. Southerland* (Dec. 30, 1999), Butler App. No. CA99-01-013, 1999 WL 1279304.[1]

**{¶31}** The trial court in the case at bar was clearly not operating under the assumption that it was simply correcting a clerical error. The trial court brought appellant back to court for a sentencing hearing and resentenced him after an appeal of the judgment had been filed. Cf. *Ramsey* at ¶23 (by not issuing nunc pro tunc

1. The record indicates that the trial court was aware that a notice of appeal had been filed and that with a guilty plea, the sentence would likely be an appellate issue, but apparently no information was available to the trial court on the specific issues appealed.

order, trial court effectively acknowledged that the original order was being modified or amended rather than merely corrected to rectify a clerical error). Accordingly, we find it appropriate to sustain appellant's third assignment of error and vacate the resentencing entry. [2]

**{¶32}** Judgment affirmed in part, reversed in part, and remanded to the trial court to vacate the December 18, 2009, sentencing entry and with instructions to correct the clerical error in the October 20, 2009 sentencing entry, nunc pro tunc, to conform to the mandatory postrelease control term of five years pronounced at the sentencing hearing.

YOUNG, P.J., and HENDRICKSON, J., concur.

2. We observe that the postrelease control notification that occurred at the resentencing or second sentencing hearing was again not accurately reflected in the resentencing entry as that entry indicated that appellant was subject to a mandatory term "up to a maximum" of five years. Language involving "up to" a stated term is not contained in the statute with regard to mandatory postrelease control terms and incorrectly implies that appellant could potentially receive less than five years of postrelease control for a felony of the first degree. See R.C. 2967.28.