[Cite as *State v. Wiggins*, 2010-Ohio-5959.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-09-119
	:	O P I N I O N
- vs -		12/6/2010
	:	
JOSEPH LESTER WIGGINS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CR25717

Rachel A. Hutzel, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

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RINGLAND, J.

{¶1} On April 20, 2009, the Warren County Grand Jury returned a 17-count indictment against Joseph Lester Wiggins for illegal manufacture of drugs and other crimes. On July 1, 2009, Wiggins was convicted of all charges, including: Count 1, illegal manufacture of drugs, R.C. 2925.04(A); Count 2, endangering children, R.C. 2919.22(B)(6); Count 4, aggravated trafficking in drugs, R.C. 2925.03(A)(2); Count 14, illegal assembly or possession of chemicals for the manufacture of drugs, R.C. 2925.041(A); and Count 17, possession of criminal tools, R.C. 2923.24(A). On August

3, 2009, the trial court sentenced Wiggins to serve a total prison term of 16 years. In imposing sentence, the trial court stated Wiggins was to "serve a term of sixteen (16) years in prison, of which seven (7) years is a mandatory term pursuant to R.C. §2929.13(F), §2929.14(D)(3), or Chapter 2925. (Counts 1 & 14 – 3 years mandatory on each to be served concurrently, Count 2 – 2 years mandatory, and Count 4 – 2 years mandatory[.])"

{¶2} In addition, the trial court ordered Counts 14 and 17 to be served concurrently to Count 1, and Counts 2 and 4 to be served consecutively to the other sentences.

{¶3} It is from this sentence that Wiggins now appeals, raising two assignments of error for review.

{¶4} Assignment of Error No. 1:

{¶5} "THE COURT ERRERED [sic] WHEN IT SENTENCED DEFENDANT/APPELLANT TO A SEVEN-YEAR CONCURRENT SENTENCE IN VIOLATION OF R.C. 2925.04(A), F-1 AND R.C. 2925,041(A), F-2." [sic]

{¶6} In his first assignment of error, Wiggins argues his sentence is contrary to law because the trial court "ordered a concurrent sentence of seven years on the combined counts [1 and 14] and then said it was mandatory seven years."

{¶7} Appellate review of felony sentencing is controlled by the two-step procedure outlined by the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. Under *Kalish*, this court must (1) examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law, and, if the first prong is satisfied, (2) review the sentencing court's decision for an abuse of discretion. Id. at ¶4; *State v. Blanton*, Butler App. No. CA2008-09-235, 2009-Ohio-3311, ¶18.

{¶8} In imposing sentence, the "court must be guided by statutes that are specific to the case itself." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶38. In reviewing whether a sentence is clearly and convincingly contrary to law, "the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence." *Kalish* at ¶14.

{¶9} Wiggins' first assignment of error is based on his misinterpretation of the trial court's use of the word "mandatory" in the sentencing entry. Upon review, it is clear the trial court was merely assembling the total "mandatory" years in prison associated with Counts 1, 2, 4, and 14. Thus, to the extent Wiggins misinterprets the sentencing entry, we overrule his argument. However, we agree that Wiggins' sentence is contrary to law because the trial court misstated the number of "mandatory" years in prison associated with Count 1, illegal manufacture of drugs, a first-degree felony under R.C. 2925.04(A).

{¶10} In imposing sentence for Count 1, the trial court sentenced Wiggins to a total seven-year prison term. However, of these seven years, the trial court stated only *three* years were "mandatory." In so stating, the trial court did not strictly comply with the language of the statute, R.C. 2925.04(C)(3)(b), which states, in pertinent part: "If the drug involved in the violation is methamphetamine and if the offense was committed in the vicinity of a juvenile * * * illegal manufacture of drugs is a felony of the first degree, and, subject to division (E) of this section, the court shall impose a mandatory prison term on the offender determined in accordance with this division. Except as otherwise provided in this division, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree that is *not less than four years.* If the offender previously has been convicted of or pleaded guilty to a violation of division (A) of this section, a violation of division (B)(6) of section 2919.22 of the Revised Code,

or a violation of division (A) of section 2925.041 of the Revised Code, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree that is *not less than five years*."[1] (Emphasis added.)

{¶11} "It is well established that a sentence which does not comply with the letter of the criminal statute which authorizes it is so erroneous that it may be set aside on appeal[.]" *Bozza v. United States* (1947), 330 U.S. 160, 166, 67 S.Ct. 645. See, also, R.C. 2901.04(A). Although Wiggins' seven-year sentence for Count 1 was clearly within the permissible statutory range, the trial court's misstatement regarding the number of "mandatory" years in prison associated with Count 1 creates confusion. It is for this reason we vacate Wiggins' sentence and remand for resentencing in accordance with the precise language of the sentencing statute.

{¶12} Assignment of Error No. 2:

{¶13} "THE COURT ERRED WHEN IT STATED TO DEFENDANT/APPELLANT THAT POSTRELEASE CONTROL WAS AN OPTIONAL THREE YEARS ON A CONVICTION FOR R.C. 2925.041(A), F-2, AS CONVICTED."

{¶14} In his second assignment of error, Wiggins argues the trial court erred in failing to properly notify him of postrelease control during his sentencing hearing. Specifically, Wiggins argues the trial court erred in advising him that postrelease control for his second-degree felonies was "optional," rather than mandatory. See R.C. 2967.28(B)(2). While this statement is clearly erroneous, we find no merit to Wiggins' argument.

{¶15} Wiggins argues because the trial court erroneously advised him of

1. The record does not indicate whether Wiggins was previously convicted or pleaded guilty to a violation of R.C. 2925.04(A), or a violation of R.C. 2191.22(B)(6), or a violation of R.C. 2925.041(A), in which case, a "mandatory prison term * * * for a felony of the first degree that is not less than *five* years" would be required. R.C. 2925.04(C)(3)(b). (Emphasis added.) However, such a distinction at the appellate level is

postrelease control for several lesser-included felony convictions, his entire sentence must be remanded for resentencing. However, we reject Wiggins' argument due to the unnecessary consequences associated therewith. Accepting Wiggins' argument would require trial courts to advise offenders convicted of multiple felonies of postrelease control terms for each class of felony convictions associated with their case.[2] Wiggins was also convicted of a first-degree felony, for which the trial court properly advised Wiggins he was subject to "five years of post release control, which is mandatory[.]" As a result, we find the trial court's erroneous statement regarding the nature of postrelease control for his second-degree felonies had no practical effect. Accordingly, we overrule Wiggins' argument.

{¶16} However, because Wiggins brought sentencing within the purview of this court, our prior conclusion does not end our sentencing inquiry. Our review of the sentencing entry reveals the trial court erred in attempting to impose mandatory postrelease control when it wrote, "[i]n addition a period of control or supervision by the Adult Parole Authority after release from prison is mandatory in this case. The control period *may be a maximum* term of 5 years." (Emphasis added.) This language does not adequately indicate that the five-year term of postrelease control for Wiggins' first-degree felony conviction was mandatory. Instead, we find this language analogous to the equally erroneous statements regarding postrelease control of "up to" five years (for a first-degree felony or felony sex offense) or three years (for a second-degree felony that is not a felony sex offense), all of which indicate an offender may be subject to less than five (or three) years, possibly even no years, of postrelease control. See *State v.*

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unnecessary because the trial court made only *three* years "mandatory," which fails to satisfy either criteria of the statute.

2. Cf. *State v. Maag*, Hancock App. No. 5-08-35, 2009-Ohio-90, ¶18 ("R.C. 2929.14[F][[1] and R.C. 2967.28[B] do not permit the trial court to order a term of postrelease control for each separate felony conviction. One term of postrelease control for multiple convictions is proper[.]").

Williams, Belmont App. No. 09 BE 11, 2010-Ohio-2702, ¶10. But, see, *State v. Keese*, Marion App. No. 9-06-47, 2007-Ohio-3836.

{¶17} Because the trial court's statement that Wiggins' postrelease control period "may be a maximum term of 5 years" was not definite on the mandatory nature and duration of postrelease control, this advisement was inadequate. Thus, while we find no merit in Wiggins' second assignment of error, we find additional grounds to vacate and reverse his sentence.

{¶18} Accordingly, this matter is remanded for resentencing in accordance with the procedures set forth in R.C. 2929.191. See, also, *State v. Bloomer*, 122 Ohio St.3d 200, 2010-Ohio-2462, ¶69 ("the most basic requirement of R.C. 2929.191 and our existing precedent [is] that [the trial court] notify the offender of the mandatory nature of the term of postrelease control and the length of that mandatory term and incorporate that notification into its entry[.]").

{¶19} Judgment reversed as to sentencing only and cause remanded for resentencing.

YOUNG, P.J., and POWELL, J., concur.