

[Cite as *State v. Stewart*, 2011-Ohio-2211.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-08-215
- vs -	:	<u>OPINION</u> 5/9/2011
DALE EDWARD STEWART,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2000-08-1090

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POWELL, P.J.

{¶1} Defendant-Appellant, Dale Edward Stewart, appeals a decision of the Butler County Court of Common Pleas denying his motion to declare his sentence void. For the reasons outlined below, we reverse the decision of the trial court.

{¶2} In August 2000, appellant pleaded guilty to two counts of sexual battery in violation of R.C. 2907.03(A)(9), a third-degree felony. Appellant, who had never

before been imprisoned, was sentenced to two four-year prison terms to be served consecutively. Appellant appealed, and this court vacated his sentence on the ground that the trial court failed to comply with R.C. 2929.14(B) in sentencing appellant to more than the minimum prison term. Appellant was remanded to the trial court for resentencing. *State v. Stewart* (June 25, 2001), Butler App. No. CA2000-11-220.

{¶3} Appellant was resentenced in August 2001 to two consecutive four-year prison terms. At his sentencing hearing, he was advised of his postrelease control obligations as follows:

{¶4} "* * * Sir, you are notified that upon release, from prison, you will be subjected to a five-year period of post release control, as to both counts. As a consequence of violating the conditions of your post release control imposed by the parole board, under Revised Control [sic] Section 2967.02(A) [sic].

{¶5} "The defendant's 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 post release control.

{¶6} "Sir, upon your release from prison, if you violate the terms and conditions of your post release control, your parole authority can return [you] to prison and require that you serve additional time.

{¶7} "Furthermore, while you're on post release control, if you commit a new felony offense, in addition to the sentence on the new felony offense, the court can sentence you up to one year, or the time remaining on post release control whichever is greater, as an additional penalty in addition to the sentence on the new felony. * *

*"

{¶18} The court stated in its August 21, 2001 "Amended Entry of Conviction Entry," in pertinent part, the following:

{¶19} "The Court has notified the defendant that post release control is mandatory in this case up to a maximum of 5 years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code Section 2967.28. 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."

{¶10} Appellant again appealed to this court, arguing that the trial court erred by imposing consecutive prison terms and erred by denying him the opportunity to read and rebut sentencing evidence contained in victim impact statements. We overruled appellant's assignments of error and affirmed. *State v. Stewart*, Butler App. No. CA2001-09-217, 2002-Ohio-4124.

{¶11} Appellant completed his prison term, and in July 2008, he was released and placed on postrelease control. Almost two years later, on June 17, 2010, appellant filed a motion to declare his sentence void. Appellant argued that his sentence was void because the trial court's sentencing entry did not state that postrelease control was mandatory for a full five-year period, and because the trial court failed to notify him that a postrelease control violation could result in additional incarceration of up to one-half the time of his originally stated prison term. Furthermore, appellant argued that because he had already completed his stated prison term, he could not be resentenced. The trial court denied appellant's motion, holding that "the judgment of conviction entry coupled with the statements at the sentencing hearing * * * does include the notification of the consequences of violating

post-release control pursuant to R.C. 2967.28 and R.C. 2929.19." The trial court ordered that a nunc pro tunc entry be filed to clarify the record so that the sentencing entry more precisely reflects the mandatory period of postrelease control. Appellant timely appealed, alleging a sole assignment of error.

{¶12} Assignment of Error No.1:

{¶13} "[APPELLANT'S] SENTENCE WAS VOID BECAUSE [POSTRELEASE CONTROL] WAS NOT LAWFULLY IMPOSED."

{¶14} Appellant contends that the trial court erred by overruling his motion to declare his sentence void. Appellant argues that his sentence is void for two reasons. First, appellant contends that his sentence is void because the sentencing entry refers to an indeterminate amount of postrelease control. Second, appellant contends that his sentence is void because the trial court failed, both at the sentencing hearing and within its sentencing entry, to advise him that violating his postrelease control could result in additional incarceration of up to one-half the time of his originally stated prison term. He further contends that the court lacked jurisdiction to order a nunc pro tunc entry to correct the August 2001 sentencing entry since his prison term had already expired.

{¶15} "R.C. 2929.19 mandates that a court, when imposing sentence, must notify the offender at the hearing that he will be supervised pursuant to R.C. 2967.28 and that upon violating supervision or a condition of postrelease control, the parole board may impose a prison term of up to one-half of the prison term originally imposed upon the offender. See, e.g., R.C. 2929.19(B)(3)(c) and (e)." *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶2. Failure to do so renders that part of the sentence void and it must be set aside. *State v. Fischer*, 128 Ohio St.3d 92,

2010-Ohio-6238, ¶26. For those sentences imposed prior to July 11, 2006, where the trial court has failed to properly impose postrelease control, the proper remedy to correct a void sentence is to conduct de novo sentencing. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, ¶26. However, where a defendant was properly notified of postrelease control at the sentencing hearing, and the judgment entry is not silent, but rather is an inaccurate reflection of the notification, a resentencing hearing is not necessary. *State v. Harrison*, Butler App. No. CA2009-10-272, 2010-Ohio-2709, ¶20. Rather, a nunc pro tunc entry may be issued to correct clerical mistakes so that the sentencing entry accurately reflects what the court actually decided. *State ex rel. Womack v. Marsh*, 128 Ohio St.3d 303, 2011-Ohio-229, ¶13. The nunc pro tunc entry relates back to the date of the original sentencing entry it is correcting. *Id.* at ¶15.

{¶16} In the case sub judice, the record demonstrates that the trial court unequivocally informed appellant at his sentencing hearing that "upon release, from prison, *you will be* subjected to a five-year period of post release control." (Emphasis added.) The sentencing entry incorrectly indicated an optional or discretionary term of "up to" five years. The sentencing entry, therefore, did not accurately reflect the notification that appellant received at his sentencing hearing. Accordingly, a nunc pro tunc entry is the appropriate remedy for correcting this clerical mistake.

{¶17} Although the nunc pro tunc entry remedies appellant's challenge to his sentence with regards to the mandatory nature of postrelease control, it does not remedy the trial court's failure to advise appellant that the parole board may impose additional incarceration for as much as one-half the time of his originally stated prison term for violating conditions of postrelease control. The trial court had an affirmative

obligation under R.C. 2929.19(B)(3)(e) to inform appellant that he could face up to four years in prison (one-half of his originally stated eight-year prison term) for violating his postrelease control. A general warning that the "parole authority can return you to prison and require you serve additional time" for violating postrelease control is insufficient. The trial court's failure to provide the required notice under R.C. 2929.19(B)(3)(e) results in a void judgment that cannot be corrected by a nunc pro tunc entry as "[n]unc pro tunc entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided." (Internal quotation marks omitted.) *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, ¶19.

{¶18} "Because a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void, it must be vacated. The effect of vacating the sentence places the parties in the same position that they would have been in had there been no sentence." *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶22. The trial court retains jurisdiction to correct a void sentence; *id.* at 23; by conducting de novo sentencing for those sentences imposed prior to July 11, 2006 or by holding a R.C. 2929.191 hearing for those sentences imposed on or after July 11, 2006. *State v. Singleton*, 2009-Ohio-6434 at paragraphs one and two of the syllabus. However, "once an offender has completed the prison term imposed in his original sentence, he cannot be subjected to another sentencing to correct the trial court's flawed imposition of postrelease control." *Bloomer*, 2009-Ohio-2462 at ¶70. Moreover, "in the absence of a proper sentencing entry imposing postrelease control, the parole board's imposition of postrelease control cannot be enforced." *Id.* at ¶71.

{¶19} Appellant was released from prison in July 2008 after serving an eight-year prison term. Pursuant to *Bloomer*, appellant cannot be subjected to another sentencing to correct the trial court's failure to advise appellant that violating his postrelease control could result in additional incarceration of up to one-half the time of his originally stated prison term. Because the trial court failed to comply with R.C. 2929.19(B)(3), that portion of appellant's sentence purporting to establish postrelease control is void.

{¶20} Based on the foregoing, we find that the trial court erred in denying appellant's motion to declare his sentence void. Postrelease control was not properly imposed prior to appellant completing his stated term of imprisonment. Accordingly, appellant is discharged from postrelease control, and the trial court is instructed to note on the record that because appellant has completed his prison sentence, he will not be subject to resentencing pursuant to law. This matter is remanded for further proceedings according to law and consistent with this opinion.

{¶21} Judgment reversed and remanded.

BRESSLER and RINGLAND, JJ., concur.