

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2011-01-008
	:	CA2011-02-017
- vs -	:	<u>OPINION</u>
	:	7/25/2011
JAMIE BRIAN PERRY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2007-02-0211

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamdawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011-6057, for plaintiff-appellee

Neal Schuett, 121 West High Street, Oxford, Ohio 45056, for defendant-appellant

HUTZEL, J.

{¶1} Defendant-appellant, Jamie Perry, appeals a decision of the Butler County Court of Common Pleas denying his motion to declare his sentence void. Appellant also appeals his conviction for escape. For the reasons outlined below, we reverse the trial court's decision and appellant's escape conviction.

{¶2} In March 2007, appellant pled guilty to one count of failure to verify a current

residence, school, institution of higher education, or place of employment address in violation of R.C. 2950.06, a third-degree felony. In May 2007, appellant was sentenced to three years in prison. At his sentencing hearing, he was advised of his postrelease control obligations as follows:

{¶3} "[W]ell, there is post-release control issues [sic]. Once you get out of prison, the Ohio Adult Parole Authority may put you on what is called post-release control, or PRC. You will have certain rules, conditions, and procedures, and policies you must abide by. If you violate those terms of PRC, they can violate you and send you back to one half of the original stated prison term in increments of nine months a piece [sic]."

{¶4} The trial court's May 27, 2007 sentencing entry subsequently stated, "The Court has notified the defendant that post release control is optional in this case up to a maximum of three (3) years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under [R.C.] 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."

{¶5} In February 2010, appellant completed his prison sentence, was released from prison, and was placed on postrelease control. In November 2010, appellant moved to declare his sentence void. Appellant argued his sentence was void because the 2007 sentencing entry failed to notify him that a postrelease control violation could result in additional incarceration of up to one-half the time of his original stated prison term. Appellant also argued he could not be resentenced because he had completed his stated prison term.

{¶6} Following a hearing on the motion, the trial court overruled appellant's motion on January 5, 2011. That same day, the trial court issued a nunc pro tunc entry

which stated in part, "The Court has notified the defendant that post release control is optional in this case up to a maximum of three (3) years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under [R.C.] 2967.28. * * * If Defendant violates the conditions of supervision while under post-release control, the Parole Board can return Defendant to prison for up to 9 months for each violation up to a maximum of one half of Defendant's original stated prison term even though Defendant has already served the entire stated prison term imposed by this Court."

{¶17} In January 2011, appellant pled no contest to one count of escape in violation of R.C. 2921.34(A), a third-degree felony. Appellant's escape charge stemmed from his failure to comply with the conditions of his postrelease control following his release from prison in February 2010. The trial court accepted appellant's plea and sentenced him to one year in prison.

{¶18} Appellant appeals, raising two assignments of error.

{¶19} Assignment of Error No. 1:

{¶110} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT DENIED DEFENDANT-APPELLANT'S MOTION TO DECLARE SENTENCE VOID AND ISSUED A NUNC PRO TUNC ENTRY CORRECTING THE SENTENCING ENTRY."

{¶111} Assignment of Error No. 2:

{¶112} "THERE WAS INSUFFICIENT EVIDENCE TO CONVICT DEFENDANT-APPELLANT OF ESCAPE."

{¶113} In his first assignment of error, appellant argues his 2007 sentence is void because the 2007 sentencing entry failed to advise him that violating his postrelease

control could result in additional incarceration of up to one-half the time of his original stated prison term. Appellant also argues the trial court lacked jurisdiction to issue the 2011 nunc pro tunc entry to correct the 2007 sentencing entry because he had already completed his prison term. In his second assignment of error, appellant argues that because his 2007 sentence was void, the parole board lacked authority to impose postrelease control on him following his release from prison in February 2010; thus, "there was no judicial order imposing post-release control on [him]."

{¶14} We decline to address the trial court's failure to advise appellant of the consequences of violating postrelease control in its 2007 sentencing entry. Instead, because it affects appellant's substantial rights, we sua sponte address the trial court's failure to notify appellant at the 2007 sentencing hearing of the length of the term of discretionary postrelease control, even though neither party raised the issue on appeal. See *State v. Coats*, Mercer App. Nos. 10-09-04 and 10-09-05, 2009-Ohio-3534; *State v. Hartson*, Cuyahoga App. No. 91610, 2009-Ohio-1603.

{¶15} "A trial court is required to notify the offender at the sentencing hearing about post-release control, and is further required to incorporate the specifics of that notice into its judgment of conviction setting forth the sentence the court imposed." *State v. Terry*, Darke App. No. 09CA0005, 2010-Ohio-5391, ¶14.

{¶16} "[A]mong the most basic requirements of postrelease control notifications per R.C. 2967.28 and the Ohio Supreme Court's existing precedent is that the [trial] court must both notify the offender of the length of the term of post-release control that applies to his conviction(s) and incorporate that notification into its journalized judgment of conviction[.]" *Id.* at ¶15, citing *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462; R.C. 2967.28(C). Failure to do so renders that part of the sentence void and it must be

set aside. *Terry* at ¶16. "Both [notifications] are necessary in order to authorize the parole board to exercise the authority that R.C. 2967.28 confers on that agency." *Id.* at ¶15.

{¶17} At the 2007 sentencing hearing, the trial court failed to notify appellant that the length of the term of postrelease control that could be imposed upon his release from prison was for up to three years. By contrast, the trial court's 2007 sentencing entry stated that the court had "notified the defendant that post release control is optional in this case up to a maximum of three (3) years." As a result, that portion of appellant's sentence purporting to establish postrelease control is void.

{¶18} The trial court's failure at the 2007 sentencing hearing to identify the term of postrelease control that could be imposed on appellant upon his release from prison triggers the following consequences. First, the trial court's failure to provide the required notice under R.C. 2967.28(C) at the 2007 sentencing hearing 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." *State v. Stewart*, Butler App. No. CA2010-08-215, 2011-Ohio-2211, ¶17, quoting *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, ¶19.

{¶19} Second, a trial court retains jurisdiction to correct a void sentence by holding a R.C. 2929.191 hearing for those sentences imposed on or after July 11, 2006. *Stewart* at ¶18. 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; *Stewart* at ¶18. Appellant was released from prison in February 2010 after completing his original stated prison term. In light of the foregoing, the trial court erred in subjecting appellant to a

sentencing hearing in December 2010 to correct its failure at the 2007 sentencing hearing to advise appellant of the term of discretionary postrelease control.

{¶20} Finally, because that portion of appellant's sentence purporting to establish postrelease control is void, the parole board's imposition of postrelease control in 2010 cannot be enforced. See *Bloomer*, 2009-Ohio-2462 at ¶71. That is, the parole board lacked authority to impose postrelease control on appellant following his release from prison in February 2010, and appellant was not legally under detention at the time the alleged escape was committed. "[A] void post-release control supervision cannot support a charge of escape." *State v. Robinson*, Champaign App. No. 2010 CA 30, 2011-Ohio-1737, ¶18; *State v. Cash*, Cuyahoga App. No. 95158, 2011-Ohio-938, ¶9, citing *Hernandez v. Kelley*, 108 Ohio St.3d 395, 2006-Ohio-126 (nothing in R.C. 2967.28 authorizes the Adult Parole Authority to exercise its postrelease control authority if postrelease control is not imposed by the trial court in its sentence).

{¶21} In light of all of 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 on appellant prior to his completing his stated prison term. As a result, the trial court erred in conducting a R.C. 2929.191 hearing in December 2010 and in issuing its 2011 nunc pro tunc entry. Accordingly, appellant is discharged from postrelease control. Appellant's first assignment of error is well-taken and sustained.

{¶22} Further, because postrelease control was not properly imposed, the trial court also erred in convicting appellant of escape in 2011 for his failure to comply with the conditions of his postrelease control following his release from prison in February 2010. Accordingly, appellant's escape conviction is vacated and appellant is discharged. Appellant's second assignment of error is well-taken and sustained.

{¶23} Judgment reversed, conviction vacated, and appellant discharged.

POWELL, P.J., and RINGLAND, J., concur.