

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-07-153
 :
 - vs - : OPINION
 : 2/28/2011
 :
 GEORGE E. GANN, :
 :
 Defendant-Appellant. :

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2001-07-093

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RINGLAND, J.

{¶1} Defendant-appellant, George E. Gann, appeals from the Butler County
Court of Common Pleas decision denying his motion to declare his sentence void, as
well as its decision to issue a nunc pro tunc entry correcting its sentencing entry. For
the reasons outlined below, we affirm.

{¶2} In February of 2002, appellant was found guilty following a bench trial for
four counts of illegal use of a minor in nudity-oriented material in violation of R.C.

2907.323(A)(3), a fifth-degree felony, two counts of attempted unlawful sexual conduct with a minor in violation of R.C. 2923.02(A), also a fifth-degree felony, two counts of compelling prostitution in violation of R.C. 2907.21(A)(3), a third-degree felony, and one count of disseminating matter harmful to juveniles in violation of R.C. 2907.31(A)(1), a fifth-degree felony.

{¶3} On April 12, 2002, the trial court held a sentencing hearing where appellant was sentenced to serve a total of five years and eight months in prison, advised of his postrelease control obligations, and ordered to pay a fine of \$5,000. The record does not contain a transcript of this sentencing hearing. However, in its April 18, 2002 "Judgment of Conviction Entry," the trial court stated, in pertinent part, the following:

{¶4} "The Court has notified the Defendant that post release control is *mandatory* in this case up to a maximum of *five (5) years*, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code Section 2976.28. 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." (Emphasis sic.)

{¶5} On direct appeal, this court affirmed appellant's conviction for illegal use of a minor in nudity-oriented material, attempted unlawful sexual conduct with a minor, and disseminating matter harmful to juveniles. See *State v. Gann*, 154 Ohio App.3d 170, 2003-Ohio-4000. This court, however, reversed appellant's conviction for compelling prostitution after finding the state failed to provide sufficient evidence to support the conviction. *Id.* at ¶36. This court then remanded the matter for resentencing. *Id.* at ¶78.

{¶6} On January 9, 2004, the trial court held another sentencing hearing where

appellant was sentenced to serve a total of three years and eight months in prison, again advised of his postrelease control obligations, and ordered to pay a fine of \$3,000.

The record also does not contain a transcript of this hearing. However, just as it had done in its April 18, 2002 entry, the trial court stated in its January 12, 2004 "Judgment of Conviction Entry," in pertinent part, the following:

{¶7} "The Court has notified the Defendant that post release control is *mandatory* in this case up to a maximum of *five (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 his sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control." (Emphasis sic.)

{¶8} This court later affirmed appellant's sentence on appeal. See *State v. Gann*, Butler App. No. CA2004-01-028, 2005-Ohio-678.

{¶9} In 2007, upon expiration of his original prison sentence, appellant was released from prison and placed on postrelease control. Thereafter, although the record is devoid of any supporting documentation, appellant was apparently found to have violated the terms of his postrelease control and resentenced to prison.

{¶10} On June 2, 2010, over three years after his original sentence had expired, and while still incarcerated for his postrelease control violation, appellant filed a "Motion to Declare [His] Sentence Void." In support of his motion, appellant argued that his sentence was void because his "sentencing entry improperly sentenced him to an indeterminate amount of post-release control."

{¶11} On July 2, 2010, after holding a hearing on the matter, the trial court denied appellant's motion. In so holding, the trial court found that although its April 18, 2002 and January 12, 2004 sentencing entries incorrectly stated that appellant was

subject to mandatory term of postrelease control of "up to" five years, appellant received adequate notice of his postrelease control obligation when he was properly advised of his postrelease control obligations during his prior sentencing hearings. As stated by the trial court:

{¶12} "[T]he Court hereby overrules the defendant's motion to declare [his] sentence void. The Court hereby orders that a nunc pro tunc entry be filed correctly reflecting the notification of five years mandatory post-release control that was originally given to the defendant and further notifying him of the consequences of a violation of post-release control including the possibility of serving prison term * * * of up to one-half the original sentence up to 22 months be included in the sentencing entry also correcting the entry so that it correctly reflects what was said at the hearing. All of those are clerical errors in that the notice was properly given."

{¶13} That same day, the trial court issued a nunc pro tunc entry that stated, in pertinent part, the following:

{¶14} "The Court has notified the Defendant that post release control is *mandatory* in this case for *five (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. If the Defendant violates the conditions of supervision while under post release control, the Parole Board can return Defendant for up to nine months for each violation for up to a maximum of one half of the Defendant's original sentence for a total of twenty-two months even though Defendant has already served the entire stated prison term by this Court. If the violation is a new felony, Defendant could receive a prison term of the greater of one year or the time remaining on post release control, in

addition to any other prison term imposed for the new offense." (Emphasis sic.)

{¶15} Appellant now appeals from the trial court's July 2, 2010 entry denying his motion to declare his sentence void, as well as its decision to issue a nunc pro tunc entry correcting its January 12, 2004 sentencing entry, raising one assignment of error for review.

{¶16} "[APPELLANT'S] SENTENCE WAS VOID BECAUSE THE JUDGMENT ENTRY FAILED TO IMPOSE THE MANDATORY [POSTRELEASE CONTROL] TERMS."

{¶17} In his single assignment of error, appellant argues that the trial court erred by overruling his motion to declare his sentence void, as well as its decision to issue a nunc pro tunc to correct its sentencing entry. We disagree.

{¶18} Initially, and as noted above, appellant has failed to provide this court with the transcript of his April 12, 2002 or his January 9, 2004 sentencing hearings. Without the transcripts of these hearings, we must presume the trial court properly notified appellant of his postrelease control obligations. *State v. Hernandez*, Warren App. No. CA2009-09-123, 2010-Ohio-2056, ¶12; see, also, *State v. Brown*, Cuyahoga App. No. 95086, 2011-Ohio-345, ¶9 (finding court must presume defendant properly notified of postrelease control obligations when not provided with transcript of sentencing hearing).

{¶19} That being said, appellant's January 12, 2004 sentencing entry, which indicates he was subject to a mandatory term of postrelease control "*up to*" a maximum of five years, improperly implies that he could be subject to something less than the statutorily required term. (Emphasis added.) See R.C. 2967.28(B)(1); *State v. Addis*, Brown App. No. CA2009-05-019, 2010-Ohio-1008, ¶22-23; *State v. Wiggins*, Warren App. No. CA2009-09-119, 2010-Ohio-5959, ¶16-18. Yet, despite the improper implication, because we must presume appellant was properly notified of his

postrelease control obligations at both of his sentencing hearings, we find the error in the trial court's January 12, 2004 sentencing entry manifestly clerical in that it could be corrected by the issuance of a nunc pro tunc entry. See *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, ¶¶18-19 (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); see, also, Crim.R. 36; *State ex rel. Womack v. Marsh*, Slip Opinion No. 2011-Ohio-229, ¶¶13-14; *State v. Harrison*, Butler App. Nos. CA2009-10-272, CA2010-01-019, 2010-Ohio-2709, ¶22.¹

{¶20} Appellant, however, argues that because his original prison sentence expired in 2007, the trial court lacked jurisdiction to issue the nunc pro tunc entry. In support of his argument, appellant directs our attention to the Ohio Supreme Court's decision in *Adkins v. Wilson*, 110 Ohio St.3d 1454, 2006-Ohio-4275. However, after a thorough review, and although arguably similar, we find *Adkins* distinguishable from the case at bar.

{¶21} In *Adkins*, a case in which the sentencing entry at issue "did not contain *any reference* to postrelease control," the court, "in effect, held that the trial court lacked jurisdiction to issue a nunc pro tunc entry *adding* postrelease control to the sentence after [the defendant's] original sentence had expired." (Emphasis added.) *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, ¶48 (discussing *Adkins*, in which the court did not issue a full opinion).

{¶22} In this case, however, and unlike in *Adkins*, the trial court's January 12,

1. Appellant claims that this court "expressly overruled" *Harrison* in *State v. Moore*, Clinton App. No. CA2010-02-003, 2010-Ohio-6082. However, while this court did indicate *Harrison* was "supersede[d]" by the Ohio Supreme Court's decision in *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, such decision was never overruled, either expressly or implicitly. *Moore* at ¶13. Therefore, in light of the Ohio Supreme Court's most recent decisions regarding postrelease control, we find our rationale in *Harrison* once again applicable.

2004 sentencing entry explicitly stated that appellant would be subject to a mandatory term of postrelease control after his original sentence had expired. In turn, unlike *Adkins*, the trial court was not *adding* a previously omitted postrelease control term to appellant's sentence, but instead, simply correcting an error in its January 12, 2004 sentencing entry.

{¶23} As this court has previously stated, 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." *Harrison* at ¶24. Contrary to appellant's claim, the trial court's issuance of the nunc pro tunc entry did not extend or modify his sentence. See *State v. Battle*, Summit App. No. 23404, 2007-Ohio-2475, ¶8; *State v. Wooten*, Lucas App. No. L-08-1448, 2009-Ohio-3798, ¶11; see, also, *State v. Spears*, Cuyahoga App. No. 94089, 2010-Ohio-2229, ¶12 (finding sentence not modified by nunc pro tunc entry when issued to accurately reflect original sentence). Instead, by issuing a nunc pro tunc entry, the trial court was simply correcting a clerical error in its sentencing entry to accurately reflect what the court had actually decided. *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 164 ("nunc pro tunc entries are limited in proper use to reflecting what the court actually decided").

{¶24} In light of the foregoing, we find the trial court retained jurisdiction to correct a clerical mistake in its January 12, 2004 sentencing entry by issuing a nunc pro tunc entry even after appellant's original sentence had expired. See *Battle* at ¶9; *State v. Clark*, Stark App. No. 2010CA00006, 2010-Ohio-4649, ¶25-26; see, also, *Womack* at ¶13 (stating "trial courts retain continuing jurisdiction to correct clerical errors in judgment by nunc pro tunc entry to reflect what the court actually decided"); Crim.R. 36 ("[c]lerical mistakes in judgments, orders, or other parts of the record * * * may be corrected by the court at any time"). Accordingly, appellant's sole assignment of error is

overruled.

{¶25} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.