

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2014-03-049
 :
 - vs - : OPINION
 : 2/23/2015
 :
 KYLE BARNES, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 06 CR 23747

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Kyle Barnes, #A596880, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601, defendant-appellant, pro se

RINGLAND, J.

{¶ 1} Defendant-appellant, Kyle Barnes, appeals from the Warren County Common Pleas Court's judgment denying his motion for resentencing based on a void judgment entry.

{¶ 2} Barnes was charged with two counts of felonious assault, two counts of having weapons while under disability and one count of improperly discharging a firearm at or into habitation. Each offense included two firearm specifications.

{¶ 3} On January 12, 2009, Barnes pled guilty to two counts of felonious assault and one count of improperly discharging a firearm at or into habitation, each with a five-year firearm specification. The one-year firearm specifications as to each count were dismissed, along with all remaining counts in their entirety. Barnes was sentenced to seven years in prison and three years of postrelease control.

{¶ 4} On December 19, 2013, Barnes filed a motion for resentencing based on a void judgment entry, arguing that (1) the trial court failed to advise him that he would be subject to community service if he failed to pay court costs, (2) he was improperly advised as to postrelease control, (3) the trial court failed to merge the firearm specifications as allied offenses, (4) the trial court failed to advise him of his right to appeal, and (5) the trial court failed to dismiss two counts in the judgment entry, rendering that entry void and not final and appealable. The trial court denied Barnes' motion.

{¶ 5} Barnes now appeals, raising four assignments of error for review.

Standard of Review

{¶ 6} Postconviction relief petitions are governed by R.C. 2953.21, which states, in pertinent part:

(A)(1)(a) Any person who has been convicted of a criminal offense * * * who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

{¶ 7} A postconviction proceeding is not an appeal of a criminal conviction, but rather, is a collateral civil attack on a criminal judgment. *State v. Dillingham*, 12th Dist. Butler Nos. CA2012-02-037 and CA2012-02-042, 2012-Ohio-5841, ¶ 8, citing *State v. Calhoun*, 86

Ohio St.3d 279, 281 (1999). "In reviewing an appeal of postconviction relief proceedings, this court applies an abuse of discretion standard." *State v. Wilson*, 12th Dist. Madison No. CA2013-10-034, 2014-Ohio-2342, ¶ 15. A reviewing court will not overrule the trial court's finding on a petition for postconviction relief where the finding is supported by competent and credible evidence. *State v. Mathes*, 12th Dist. Clermont No. CA2013-02-014, 2013-Ohio-4128, ¶ 11.

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE TRIAL COURT ERRED AS A MATTER OF LAW AND ENTERED A VOID JUDGMENT, WHEN THE TRIAL COURT FAILED TO COMPLY WITH THE STATUTORY REQUIREMENTS OF R.C. 2947.23(A)(1)(a) AND NOTIFY THE APPELLANT THAT HE COULD BE ORDERED TO PERFORM COMMUNITY SERVICE IN LIEU OF COURT COST[S].

{¶ 10} The state concedes that the trial court improperly failed to inform Barnes of the possibility that he could be ordered to perform community service if he failed to pay court costs. However, the state argues that because Barnes failed to timely appeal that error, he is now barred from raising the issue.

{¶ 11} While a void judgment may be challenged at any time, a trial court's failure to properly advise a defendant as to court costs does not render a judgment void. This court has previously misstated that a trial court's failure to advise a defendant of mandatory court cost issues can render a portion of the sentence void. *State v. Collins*, 12th Dist. Warren No. CA2012-11-115, 2013-Ohio-3485. In *Collins*, this court was asked to determine whether a defendant who was entitled to resentencing pursuant to R.C. 2947.23(A)(1) should be resentenced according to the changes made effective by H.B. 86. Within *Collins*, in which we held that the defendant was not subject to H.B. 86's changes, we noted that a trial court's failure to inform of the possibility of community service did not render the entire sentence

void, but rather "only the portion of [appellant's] sentence related to the court costs was rendered void as a result of the trial court's error." *Collins* at ¶ 19. This statement, while not requiring us to overturn *Collins*, is incorrect. We therefore take this opportunity to correct that misstatement and reiterate that a failure to properly advise of mandatory court costs does not render a sentence, even a portion of it, void.

{¶ 12} According to R.C. 2953.21(A)(2), a convicted defendant who does not file a direct appeal has 180 days after the expiration of the time for filing an appeal to file a timely petition for postconviction relief. In the present case, Barnes' petition for postconviction relief is well outside the 180-day window. Accordingly, Barnes' petition is untimely.

{¶ 13} In light of the foregoing, having found that Barnes' petition for postconviction relief is untimely, Barnes' first assignment of error is overruled.

{¶ 14} Assignment of Error No. 2:

{¶ 15} THE TRIAL COURT ERRED AS A MATTER OF LAW AND ENTERED A VOID JUDGMENT, WHEN THE TRIAL COURT FAILED TO STATE THAT THE APPELLANT HAD A MANDATORY THREE YEARS INSTEAD OF "MAY BE" A MAXIMUM TERM OF THREE YEARS AND FAILED TO ADDRESS P.R.C. AS TO "EACH OTHER" LESSOR FELONY DEGREE CONVICTED. [SIC]

{¶ 16} In his second assignment of error, Barnes argues the trial court erred in advising him that his mandatory postrelease control term "may be" for a maximum of three years when he was, in fact, required to serve a three year term of postrelease control. Barnes further argues that the trial court erred in failing to advise him of postrelease control as to each offense.

{¶ 17} While Barnes' petition for postconviction relief is untimely, we recognize that void judgments may be challenged at any time. *State v. Waltz*, 12th Dist. Clermont No. CA2013-10-077, 2014-Ohio-2474, ¶ 26. Because a trial court's failure to properly impose

postrelease control renders that portion of a defendant's sentence void, Barnes' argument as it relates to postrelease control is not untimely. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 26.

{¶ 18} The agreed judgment entry of sentence in the present case erroneously stated that Barnes' postrelease "control period may be a maximum term of 3 years." Pursuant to R.C. 2967.28(B)(2), Barnes was subject to a *mandatory* three year term of postrelease control. However, at the sentencing hearing, the trial court properly advised Barnes that, "[p]art of your prison sentence will include the requirement that upon completion of your sentence you *will be* supervised for three years on post release control." (Emphasis added.)

{¶ 19} Thus, while the entry itself misstated Barnes' postrelease control requirement, Barnes was advised of the correct term at the sentencing hearing. Accordingly, we remand this case and direct the trial court to issue a nunc pro tunc entry correctly reflecting that Barnes is subject to a *mandatory* three year term of postrelease control.

{¶ 20} Typically, a court is required to conduct a new hearing "before a nunc pro tunc entry is journalized to correct a sentence that fails to properly impose a term of postrelease control." *State v. Ketterer*, 126 Ohio St.3d 448, ¶ 76 (2010). However, the Ohio Supreme Court has subsequently held that no new sentencing hearing is required where "the trial court's failure to include the postrelease-control term in the original sentencing entry was manifestly a clerical error." Such is the case here, where the trial court had properly imposed the correct postrelease control term at the sentencing hearing. *State ex rel. Womack v. Marsh*, 128 Ohio St.3d 303, 2011-Ohio-229, ¶13.

{¶ 21} With respect to Barnes' argument that the trial court erred in failing to advise him of postrelease control as to each offense, we agree. However, this court has previously held that such an error has no practical effect where the additional terms of postrelease control would be no greater than that which was imposed. *State v. Wiggins*, 12th Dist.

Warren No. CA2009-09-119, 2010-Ohio-5959, ¶ 15. Here, each of Barnes' convictions are second-degree felonies, and each are subject to the same mandatory three-year term of postrelease control. Accordingly, the trial court's failure to advise Barnes of the three-year term of postrelease control on each offense had no practical effect, and that portion of his second assignment of error is not well-taken.

{¶ 22} Finally, Barnes asks that if we overrule his second assignment of error, that the court certify a conflict with the First District's decision in *State v. Smith*, 1st Dist. Hamilton No. C-120163, 2012-Ohio-5965. Barnes asserts that the *Smith* case held that a trial court is required to include postrelease control notifications as to each offense. However, while the First District's decision in *Smith* references a requirement that postrelease control notification be included as to each offense, that case was not decided on that basis. Instead, that court found that the trial court's notification as to postrelease control was insufficient in its entirety as it "concerned only the first-degree felony of aggravated robbery, and with respect to that offense, did not specify the duration of his postrelease-control supervision, was less than clear about the mandatory nature of the supervision, and did not specify the length of confinement that could be imposed for a postrelease-control violation." *Id.* at ¶ 12. Accordingly, because the First District did not hold that a failure to advise a defendant of postrelease control as to each offense is reversible error, we find that the decision in *Smith* is not in conflict with our decision in the present case.

{¶ 23} In light of the foregoing, having found that Barnes was correctly advised at his sentencing hearing that he would serve a three-year term of postrelease control, and the trial court's failure to advise Barnes of postrelease control as to each offense had no practical effect, Barnes' second assignment of error is sustained to the extent indicated and the case is remanded for the limited purpose of allowing the trial court to issue a nunc pro tunc entry correctly reflecting that he is subject to a mandatory three year term of postrelease control.

{¶ 24} Assignment of Error No. 3:

{¶ 25} THE TRIAL COURT ERRED AS A MATTER OF LAW AND ENTERED A VOID JUDGMENT, WHEN THE TRIAL COURT FAILED TO GIVE THE APPELLANT HIS NOTICE OF APPEAL RIGHTS AND RULED, THAT THE COURT HAD NO DUTY TO DO SO WHEN A DEFENDANT PLEADS GUILTY.

{¶ 26} Barnes argues that the trial court was required to advise him of his right to appeal. In turn, the state argues that notification is only required where the case went to trial, citing Crim.R. 32(B)(1). While the state is correct with regard to Crim.R. 32(B)(1), Barnes does not argue he entitled to a notification under that rule. Instead, he cites Crim.R. 32(B)(2), which provides that a trial court "shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed," after imposing sentence in a serious offense.

{¶ 27} While the trial court failed to advise Barnes of his right to appeal under Crim.R. 32(B)(2), such an error does not render Barnes' conviction void. Therefore, Barnes' postconviction relief petition on this issue is untimely. Furthermore, Barnes never filed a direct appeal, nor did he request leave to file a delayed appeal from his conviction. Accordingly, Barnes' petition for postconviction relief on the basis of the trial court's failure to advise him of his right to appeal is barred by res judicata. *State v. Wagers*, 12th Dist. Preble No. CA2011-08-007, 2012-Ohio-2258, ¶ 10.

{¶ 28} In light of the foregoing, having found that Barnes' argument is barred by res judicata, Barnes' third assignment of error is overruled.¹

1. We note that Barnes raises the issue of the trial court's failure to merge allied offenses in a single sentence within this assignment of error. Having failed to argue which offenses he believes should merged and why, we decline to address this argument as Barnes has failed to allege that error with sufficient specificity for our review. See App.R. 12(A)(2); App.R. 16(A)(7). Even if we were to assume that Barnes' argument regarding the trial court's failure to merge allied offenses would be the same as the argument he made in his motion for

{¶ 29} Assignment of Error No. 4:

{¶ 30} THE TRIAL COURT ERRED AS A MATTER OF LAW, WHEN THE TRIAL COURT FAILED TO RESOLVE COUNT THREE AND FOUR RENDERING THE JUDGMENT VOID AND A NON FINAL APPEALABLE ORDER.

{¶ 31} Barnes argues that the trial court erred in failing to properly dismiss counts three and four of the indictment. Barnes asserts that the trial court's failure to dismiss those charges in the judgment entry renders his judgment a void, nonfinal appealable order.

{¶ 32} While we agree with Barnes that the trial court did not properly dismiss two of the counts in the judgment entry, we disagree as to the proper resolution of that error. Here again we find that the error can be corrected via a nunc pro tunc entry issued by the trial court. As this court has previously held, the "purpose of a nunc pro tunc entry is to have the judgment of the court reflect its true action." *State v. Waltz*, 12th Dist. Clermont No. CA2013-10-077, 2014-Ohio-2474, ¶ 16, quoting *Miller v. Short*, 6th Dist. Lucas No. L-96-162, 1997 WL 22602, *2 (Jan. 17, 1997). A review of the record reveals that the trial court specifically dismissed counts three and four at the plea hearing. Specifically, the court stated that, "[t]he specifications in Counts 1, 2 and 5 are dismissed as well as Counts 3 and 4 of the indictment in their entirety." Accordingly, a nunc pro tunc entry is the proper remedy to reflect the true action of the trial court in dismissing counts three and four.

{¶ 33} Barnes cites to the Fourth District's decision in *State v. Wyant* as support for the argument that his case must be remanded for resentencing because his judgment is void and a nonfinal appealable order. 4th Dist. Scioto No. 08CA3264, 2009-Ohio-5200. However, the *Wyant* case is distinguishable from the present case because that court found that there was "no mention of a dismissal of that charge at the * * * plea hearing." *Id.* at ¶ 9.

resentencing, that argument would be overruled on the basis of *State v. Ayers*, 12th Dist. Warren No. CA2011-11-123, 2013-Ohio-2641, ¶ 24.

In that case, the record was entirely devoid of any resolution as to one of the charges. As discussed above, the trial court in the present case expressly stated that counts three and four were dismissed at the plea hearing.

{¶ 34} In light of the foregoing, having found that the trial court failed to properly dismiss counts three and four in the judgment entry, but properly discussed the dismissal of those charges at the plea hearing, Barnes' fourth assignment of error is sustained to the extent indicated and the case is remanded for the trial court to issue a nunc pro tunc entry reflecting that counts three and four of the indictment were dismissed.

{¶ 35} Judgment is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

PIPER, P.J., and M. POWELL, J., concur.