[Cite as *State v. Miller*, 2012-Ohio-995.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-04-028
- vs -	:	O P I N I O N
	:	3/12/2012
RICKY D. MILLER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2009CR0864

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellee

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HENDRICKSON, P.J.

{¶ 1} Defendant-appellant, Ricky D. Miller, appeals from his convictions in the Clermont County Court of Common Pleas for three counts of rape. For the reasons outlined below, we affirm in part, reverse in part, and remand for further proceedings regarding the postrelease control provisions of appellant's sentence.

{¶ 2} On November 18, 2009, a Clermont County Grand Jury indicted appellant on

three counts of rape of a person younger than 13 years of age in violation of R.C. 2907.02(A)(1)(b), with a specification that the victim was under 10 years of age. As a result of appellant's indictment, a jury trial was held on February 23 and 24, 2011.

{¶ 3} At trial, Bonna Sue Hutson testified that in October 2009 she allowed appellant, her 30-year-old nephew, to live with her at her residence. Hutson had allowed appellant to live with her earlier in the year in an outbuilding on her property. In October, however, Hutson allowed appellant to stay inside the residence on a couch in the family room. Hutson's husband, 21-year-old daughter, four-year-old L.O., and L.O.'s two-year-old brother also resided inside the residence.

{¶ 4} Hutson had raised L.O.'s biological mother and was awarded custody of L.O. and L.O.'s brother sometime around 2006. When Hutson first gained custody of L.O., L.O. could not communicate due to a lack of human interaction and has several developmental delays.[1] However, after Hutson placed the children in therapy, L.O. began to communicate using sign language and eventually was able to communicate verbally.

{¶ 5} Hutson testified that on the morning of November 9, 2009, she lay awake in her bed with L.O.'s two-year-old brother. Hutson's husband, a truck driver, was gone that day, and Hutson's daughter had already left for school. Hutson heard the door of L.O.'s bedroom open and shut over the baby monitor she kept in L.O.'s bedroom. Hutson assumed L.O. had gotten up to use the bathroom. Later, however, she again heard L.O.'s bedroom door open and shut over the baby monitor and also heard appellant's voice. Hutson then heard the shower turn on and remembered this was the third day in a row appellant had showered. Hutson had encouraged appellant to improve his hygiene, but up until this point appellant failed to heed her advice and infrequently showered.

1. L.O. has been diagnosed with autistic disorder, reactive attachment disorder, mood disorder, post-traumatic stress, and borderline intellectual functioning.

{¶ 6} Due to the circumstances, Hutson testified that she ran into L.O.'s bedroom where she found L.O. curled up in a fetal position and visibly upset. Hutson testified that L.O. indicated appellant had been in her bedroom, and when Hutson asked what appellant was doing in her bedroom, L.O. stated that he had "touched" her. When asked what she meant by "touched," Hutson testified that L.O. "pulled her panties down and put her finger down by her privates." Hutson clarified that L.O. pointed by her vagina.

{¶ 7} Hutson testified that she immediately called Children's Hospital and set up an appointment for L.O. at the Mayerson Center, an extension of the hospital that examines children who may have been subject to abuse. At the Mayerson Center, L.O. was interviewed by Cecelia Freihofer, a social worker and forensic interviewer. Freihofer admitted in her testimony that some of L.O.'s statements were inconsistent, that L.O. was below the normal level of a four-year-old, and that the physical exam of L.O. was normal. However, she testified that L.O.'s statements were consistent with experiencing inappropriate sexual contact.

{¶ 8} Without objection, Freihofer's recorded interview with L.O. was played for the jury.[2] In the interview, L.O. stated that she was being interviewed because appellant touched her private. Freihofer testified that L.O. demonstrated what she meant by private by spreading her legs and pointing to her vagina. During the interview, L.O. consistently maintained that appellant touched her private with his hand or finger, but provided other inconsistent statements. L.O. initially stated that she had clothes on her body when appellant touched her. However, L.O. later stated that her private had "no clothes on it" and that her pajamas were on her "belly" when appellant touched her. Also, she said that appellant touched her "always in the night," but later stated that it happened in the mornings and "all

2. Defense counsel stipulated to the authenticity and admissibility of the video of Freihofer's recorded interview of L.O.

the time." Additionally, while she expressed that her private did not hurt, she stated that appellant touched her on the "inside" of her private.

{¶ 9} Based on L.O.'s allegation and Freihofer's report, appellant was interviewed by Bernard Boerger, a Clermont County Deputy Sheriff. At trial, Boerger testified that appellant initially denied ever touching L.O. or going into her bedroom. However, appellant later stated that he "probably did do it" but could not remember, and if he did remember he would go to jail. Ultimately, Boerger testified that appellant stated that he rubbed L.O.'s vagina and admitted to digitally penetrating her. Boerger also testified that appellant admitted that he thinks about touching children "all the time," which appellant clarified as meaning "every other day."

{¶ 10} Boerger's interview with appellant was recorded, and a portion of the interview was played for the jury where the following exchange took place:

> DETECTIVE BOERGER: And you did pull her underwear down?
>
> THE DEFENDANT: Yes.
>
> DETECTIVE BOERGER: And did you rub her vagina?
>
> THE DEFENDANT: Yes.

{¶ 11} When asked whether he ever put his finger inside L.O.'s vagina, appellant at first stated that he did not remember, but later specified that he "woke up and [his] finger was inside her" and that this occurred on "[a]ll three days." During the interview, appellant maintained that Hutson never lies and that L.O. had no reason to lie. At trial, however, appellant testified that he did not touch L.O. and Hutson was lying regarding the alleged abuse. He also asserted that Hutson had manipulated L.O. to accuse him of these acts. Nevertheless, appellant again admitted that he thinks about touching children "all the time."

{¶ 12} Following deliberation, the jury found appellant guilty of all three counts of rape with the specification that the victim was under 10 years of age. Appellant was sentenced to 15 years to life in prison on each count to run consecutively for an aggregate sentence of 45 years to life in prison. Appellant was also classified as a Tier III sex offender.

{¶ 13} Appellant now appeals, raising five assignments of error. For ease of analysis, we will address appellant's first and second assignments of error together.

{¶ 14} Assignment of Error No. 1:

{¶ 15} THE JURY ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY FINDING HIM GUILTY OF RAPE, AS THOSE FINDINGS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE.

{¶ 16} Assignment of Error No. 2:

{¶ 17} THE JURY ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY FINDING HIM GUILTY OF RAPE, AS THOSE FINDINGS WERE CONTRARY TO LAW.

{¶ 18} Appellant argues that the jury erred to his prejudice by finding him guilty of three counts of rape because the findings were not supported by sufficient evidence. Appellant further argues that his convictions were against the manifest weight of the evidence. We disagree.

{¶ 19} As we have previously stated, "a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Harbarger*, 12th Dist. No. CA2011-05-045, 2011-Ohio-5749, ¶ 5; *State v. Wilson,* 12th Dist. No. CA2006-01-007, 2007-Ohio-2298, ¶ 35. In turn, while a review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct concepts, this court's determination that appellant's conviction was supported by the manifest weight of the evidence necessarily supports a finding of sufficiency. *State v. Thompkins,* 78 Ohio St.3d 380, 386 (1997); *State v. Rigdon,* 12th Dist. No. CA2006-05-064, 2007-Ohio-2843, ¶ 34; *see,*

e.g., *Harbarger* at ¶ 5.

{¶ 20} A manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *State v. Clements,* 12th Dist. No. CA2009-11-277, 2010-Ohio-4801, ¶ 19. A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 39; *State v. James,* 12th Dist. No. CA2003-05-009, 2004-Ohio-1861, ¶ 9. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide because it is in the best position to judge the credibility of the witnesses and the weight to be given to the evidence. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus; *State v. Gesell,* 12th Dist. No. CA2005-08-367, 2006-Ohio-3621, ¶ 34. Therefore, the question upon review is whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Good,* 12th Dist. No. CA2007-03-082, 2008-Ohio-4502, ¶ 25.

{¶ 21} Appellant was convicted of three counts of rape in violation of R.C. 2907.02(A)(1)(b) with the specification that the victim was under ten years of age. This statute prohibits a person from engaging "in sexual conduct with another who is not the spouse of the offender " when "[t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person." R.C. 2907.02(A)(1)(b). According to R.C. 2907.01(A), "sexual conduct" includes "without privilege to do so, the insertion, however slight, of any part of the body * * * into the vaginal or anal opening of another." "Penetration, however slight, is sufficient to complete vaginal or anal intercourse." *Id*.

{¶ 22} Appellant contends that no reasonable trier of fact could have found him guilty

of three counts of rape beyond a reasonable doubt and that the trial court clearly lost its way in convicting him because L.O. is a developmentally delayed four-year-old who provided contradictory statements. While we agree that some of L.O.'s statements were contradictory, nevertheless after a thorough review of the record, we find appellant's convictions were supported by the manifest weight of the evidence. In the recorded interview conducted by Freihofer, L.O. consistently stated that appellant touched her private with his hand or finger and demonstrated what she meant by private by spreading her legs and pointing to her vagina. L.O. also stated in the recorded interview that when appellant touched her private, it had "no clothes on it," that her pajamas were on her "belly," and that appellant touched her on the "inside" of her private. Freihofer testified that these statements were consistent with experiencing inappropriate sexual contact. Furthermore, though appellant denied at trial that he had touched L.O., he admitted such to Boerger by stating that he "woke up and [his] finger was inside of her" and that this occurred on "[a]ll three days." The conduct occurring on three days is also supported by Hutson's testimony, which revealed that appellant showered three days in a row, including the day she heard appellant leaving L.O.'s bedroom. Showering was uncommon for appellant as he had previously exhibited poor hygiene.

{¶ 23} In light of the foregoing, we cannot say the trial court clearly lost its way or that a manifest miscarriage of justice occurred when the jury believed appellant's admission to Boerger and other corroborating evidence supporting his convictions rather than appellant's trial testimony. Because we find appellant's convictions for all three counts of rape are not against the manifest weight of the evidence, we also necessarily find appellant's convictions were supported by sufficient evidence. *State v. Davis*, 12th Dist. No. CA2010-06-143, 2011-Ohio-2207, ¶ 44. Accordingly, appellant's first and second assignments of error are overruled.

{¶ 24} Assignment of Error No. 3:

{¶ 25} DEFENDANT-APPELLANT WAS DENIED HIS RIGHTS OF DUE PROCESS AND OF ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION BECAUSE HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

{¶ 26} Appellant argues that his trial counsel was ineffective for failing to move for acquittal under Crim.R. 29. We disagree.

{¶ 27} To demonstrate ineffective assistance of counsel, a two-prong test is employed. First, a defendant must establish that his counsel's representation fell below an objective standard of reasonableness, and second, that the defendant was prejudiced as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 141-143 (1989); *State v. Bradford*, 12th Dist. No. CA2010-04-032, 2010-Ohio-6429, ¶ 97. Under the first prong, reversal "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland* at 687; *State v. Hand,* 107 Ohio St.3d 378, 2006-Ohio-18, ¶ 199. Under the second prong, the defendant has the burden to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694.

{¶ 28} Regarding appellant's claim, the failure to assert a motion for acquittal under Crim.R. 29 is not, per se, ineffective assistance of counsel. *See Bradford* at ¶ 102; *State v. Annor*, 12th Dist. No. CA2009-10-248, 2010-Ohio-5423, ¶ 21. Crim.R. 29(A) requires a judgment of acquittal if there is insufficient evidence to sustain a conviction. *See Annor* at ¶ 20. As noted above in the discussion of appellant's first assignment of error, there was sufficient evidence presented at trial to support appellant's convictions. Consequently, any

Crim.R. 29 motion made by trial counsel would have been futile. *See Bradford* at ¶ 102. Therefore, appellant was not deprived of effective assistance of counsel. Appellant's third assignment of error is overruled.

{¶ 29} Assignment of Error No. 4:

{¶ 30} THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY IMPOSING A SENTENCE THAT IS AN ABUSE OF DISCRETION.

{¶ 31} In his fourth assignment of error, appellant argues that his aggregate sentence of 45 years to life was an abuse of discretion because it was excessive. We disagree.

{¶ 32} "Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 100.[3] In applying *Foster*, an appellate court must first "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." *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4. If the sentence meets the first prong, then "the trial court's decision shall be reviewed under an abuse-of-discretion standard." *Id*.

{¶ 33} Appellant concedes that the trial court complied with the first prong under *Kalish* and that the length of his sentence is not clearly and convincingly contrary to law. Appellant's

3. The Ohio Supreme Court held in *State v. Hodge,* 128 Ohio St.3d 1, 2010-Ohio-6320, that Ohio's former statutory provisions regarding consecutive sentencing that were found unconstitutional in *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, were not automatically revived by the United States Supreme Court decision in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711 (2009). *Hodge* at ¶ 39. The court reiterated that "trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made." *Id*. Recently, the General Assembly revived statutory language requiring fact-finding for consecutive sentences. *See* 2011 Am.Sub.H.B. No. 86. However, this legislation had an effective date of September 30, 2011 and is not applicable to appellant as he was sentenced in March 2011. *See State v. Du*, 2nd Dist. No. 2010-CA-27, 2011-Ohio-6306, ¶ 23; *State v. Ford*, 2nd Dist. No. 11-CA-26, 2011-Ohio-5203.

sentence fell within the proper range for a person convicted of rape when the victim was under ten years of age. R.C. 2971.03(B)(1)(b). In addition, the trial court made clear in its judgment entry that it considered the purposes and principles of R.C. 2929.11 and the factors listed in R.C. 2929.12 when it determined appellant's sentence. *See State v. Clay*, 12th Dist. No. CA2011-02-004, 2011-Ohio-5086, ¶ 11.

{¶ 34} Regarding the second prong under *Kalish*, an abuse of discretion "implies that the trial court's decision was unreasonable, arbitrary, or unconscionable." *State v. Kirchoff*, 12th Dist. Nos. CA2010-12-104 and CA2010-12-105, 2011-Ohio-4718, ¶ 11. As to sentencing, a trial court has not abused its discretion as long as it "gave careful and substantial deliberation to the relevant statutory considerations." *Id*.

{¶ 35} In the present case, the trial court considered the seriousness of appellant's actions and found that the offenses were "more serious" because of L.O.'s age and disabilities. The trial court also found appellant had previously committed sex offenses and had been placed in mental health facilities for "sex offender treatment." Despite such opportunities for rehabilitation, appellant still experienced urges to molest children and acted upon these urges. Furthermore, the trial court acknowledged that appellant refused to accept responsibility for his actions. Finally, the trial court specified that it had "thought very long and hard on this case and also what the appropriate sentence would be." In light of the foregoing considerations, we cannot say that three consecutive sentences of 15 years to life in prison were unreasonable, arbitrary, or unconscionable. Accordingly, we find the trial court did not abuse its discretion in sentencing appellant to an aggregate of 45 years to life in prison and overrule appellant's argument. However, because appellant brought sentencing within the purview of this court, this conclusion does not end our sentencing inquiry. *State v. Wiggins*, 12th Dist. No. CA2009-09-119, 2010-Ohio-5959, ¶ 16.

{¶ 36} Our review of the record reveals the trial court erred in its sentencing of

appellant when it failed to impose a mandatory five-year term of postrelease control for each of appellant's three rape convictions because rape is both a felony of the first degree and a felony sex offense. R.C. 2907.02(B), 2967.28(A)(3), and 2967.28(B)(1); *State ex rel. Carnail v. McCormick,* 126 Ohio St.3d 124, 2010-Ohio-2671, ¶ 14, 24. To correct a failure to impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191 for offenders sentenced on or after July 11, 2006, who have not yet been released from prison, and who did not receive notice at their sentencing hearing that they would be subject to postrelease control. *State v. Singleton,* 124 Ohio St.3d 173, 2009-Ohio-6434, ¶ 23; R.C. 2929.191. With a failure to impose statutorily mandated postrelease control, only that part of the sentence is void. *State v. Fischer,* 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 26. Therefore, the hearing appellant is entitled to under R.C. 2929.191 only pertains to the failed imposition of mandatory postrelease control and does not disturb the remainder of his sentence. *See State v. Watkins*, 12th Dist. Nos. CA2010-09-228 and CA2010-12-346, 2011-Ohio-5227, ¶ 27-29. Consequently, while appellant's sentence of 45 years to life in prison was not an abuse of discretion and should not be disturbed, we remand for further proceedings in accordance with R.C. 2929.191 for the imposition of a mandatory five-year term of postrelease control for each of appellant's three rape convictions.

{¶ 37} Assignment of Error No. 5:

{¶ 38} THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY APPLYING AND CLASSIFYING HIM UNDER OHIO'S ADAM WALSH ACT [S.B. 10].

{¶ 39} In his fifth assignment of error, appellant challenges the constitutionality of Ohio's sex offender registration statutes under the current version of R.C. Chapter 2950, 2007 Am.Sub.S.B. No. 10 ("S.B. 10"). Appellant argues that because the Ohio Supreme Court recently held that S.B. 10 is punitive in nature, he was denied due process when he

was classified as a Tier III sex offender without a hearing. We disagree.

{¶ 40} We first note that such a hearing is not required by S.B. 10, and appellant failed to raise the issue of whether he was denied a constitutionally protected right to a hearing before being classified as a Tier III sex offender at the trial court level. "Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue[.]" *State v. Awan*, 22 Ohio St.3d 120 (1986), paragraph one of the syllabus. However, such waiver is discretionary, and an appellate court may review claims of defects affecting substantial rights even if they were not brought to the attention of the trial court under a plain error standard of review. *In re M.D.*, 38 Ohio St.3d 149, 151 (1988); Crim.R. 52(B). *See In re Adrian R.*, 5th Dist. No. 08-CA-17, 2008-Ohio-6581, ¶ 27 (applying waiver doctrine to S.B. 10).

{¶ 41} The right to procedural due process is found in the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution. For protections to attach under these clauses, a sexual offender must show that he was deprived of a protected liberty or property interest. *Doe v. Dann*, N.D.Ohio No. 1:08 CV 220, 2008 WL 2390778, at *6 (June 9, 2008); *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, ¶ 6. "A constitutionally protected liberty interest has been defined as freedom from bodily restraint and punishment." *Hayden* at ¶ 14, *quoting Ingraham v. Wright*, 430 U.S. 651, 673-674, 97 S.Ct. 1401 (1977). As to the processes afforded a sexual offender, due process is "flexible and calls for such procedural protections as the particular situation demands." *Hayden* at ¶ 6, *quoting Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893 (1976). At a minimum, however, the basic procedural requirements of the due process clause are notice and an opportunity to be heard. *State v. Hochhausler,* 76 Ohio St.3d 455, 459 (1996).

{¶ 42} Prior to S.B. 10, Ohio's sex offender registration statutes were considered civil or remedial in nature, and no punishment was imposed on a sexual offender by the statutes.

See State v. Cook, 83 Ohio St.3d 404, 411 (1998). Without imposing a punishment, a sexual offender was not deprived of a constitutionally protected liberty interest, and in turn, not deprived of due process. *See Hayden* at ¶ 14. However, the implementation of S.B. 10 transformed the nature of the sex offender registration statutes from remedial to punitive. *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, ¶ 21. Because S.B. 10 is punitive, and thus imposes a punishment, the possibility exists that a sexual offender may be deprived of a protected liberty interest by virtue of his classification.

{¶ 43} Despite such a possibility, the United States Supreme Court has held that, even if an offender is deprived of a liberty interest, procedural due process is not violated when a law turns on the offender's conviction alone. *Connecticut Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 1-2, 123 S.Ct. 1160 (2003). *See State v. Wood*, 5th Dist. No. 09-CA-205, 2010-Ohio-2759 (holding due process not implicated by S.B. 10). A conviction is "a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." *Connecticut* at 1. Moreover, when a registration requirement is mandated by law, the trial court "merely engages in the ministerial act of rubber-stamping the registration requirement on the offender." *Hayden* at ¶ 16. As the Ohio Supreme Court noted in *Hayden* ¶ 15:

> In fact, affording appellee a hearing under these facts would be nothing more than an empty exercise. The point of such a hearing would be to determine whether appellee committed a sexually oriented offense. What evidence could appellee possibly present that would justify a finding that he is not? The fact of his conviction of attempted rape is established.

{¶ 44} Similarly, appellant's classification as a Tier III sex offender is statutorily mandated and solely based on his convictions for rape. R.C. 2950.01(G)(1)(a). Appellant's convictions for rape were already established through a jury trial where he was afforded procedural safeguards. Providing appellant a hearing prior to classifying him as a Tier III sex offender under S.B. 10, as appellant argues is required by due process, would be "nothing

more than an empty exercise." *See Hayden* at ¶ 15. Therefore, we find that procedural due process is not implicated by S.B. 10. *See Wood* at ¶ 30. Appellant's fifth assignment of error is overruled.

{¶ 45} Judgment affirmed in part, reversed in part as to sentencing only, and remanded for further proceedings regarding the postrelease control provisions of appellant's sentence.

PIPER and DINKELACKER, JJ., concur

Dinkelacker, J., of the First Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5 (A)(3), Article IV of the Ohio Constitution.