

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2010-09-228
	:	CA2010-12-346
- vs -	:	<u>OPINION</u>
	:	10/11/2011
JOHNNY R. WATKINS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR05-08-1400

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Scott T. Blauvelt, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

POWELL, P.J.

{¶1} Defendant-appellant, Johnny Ray Watkins, appeals his sentence in the Butler County Court of Common Pleas for murder, tampering with evidence, and intimidation of a crime victim or witness.

{¶2} On July 28, 2005, appellant struck the victim, Steve Eakins, in the head with a blunt object and subsequently slit Eakin's throat, killing him. Following the attack, appellant attempted to conceal the murder weapon and threatened to kill the witnesses if they reported

the crime.

{¶3} Following a jury trial, appellant was convicted of one count of murder, an unclassified felony in violation of R.C. 2903.02(A); one count of intimidation of a crime victim or witness, a third-degree felony in violation of R.C. 2921.04(B); and three counts of tampering with evidence, third-degree felonies in violation of R.C. 2921.12(A)(1).

{¶4} During the sentencing hearing on December 20, 2006, the trial court imposed a prison term of 15 years to life for appellant's murder conviction. The trial court also imposed an aggregate six-year prison term for appellant's remaining convictions. The trial court then declined to impose postrelease control, stating, "I am specifically not going to order [postrelease control] in this matter since [appellant] is going to be on parole, if released, because there's a life tail on the murder charge." However, the judgment entry filed January 23, 2007 stated: "[t]he 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 [sic]."

{¶5} On January 30, 2007, appellant appealed his convictions to this court, but did not raise the issue of postrelease control. On March 10, 2008, we affirmed appellant's convictions in an accelerated judgment entry. *State v. Watkins* (Mar. 10, 2008), Butler App. No. CA2007-01-035. A second appeal regarding the imposition of court costs also resulted in an accelerated entry affirming the trial court's decision. *State v. Watkins* (Apr. 21, 2008), Butler App. No. CA2007-11-283.

{¶6} On August 13, 2010, appellant filed a motion for resentencing with the trial court, arguing the court failed to properly impose postrelease control for his lower-level convictions at the time of sentencing in 2006. On August 20, 2010, the trial court denied

appellant's motion upon finding appellant was not entitled to a new sentencing hearing. As a result, appellant filed a third appeal to this court on September 1, 2010. However, the same day, appellant also filed a postconviction motion for reconsideration with the trial court, claiming his sentence was void due to the trial court's failure to notify him of postrelease control. Upon review, the trial court acknowledged it was required to notify appellant of postrelease control pursuant to the Ohio Supreme Court's decision in *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831.

{¶7} The trial court found that under *Ketterer*, appellant was entitled to a new sentencing hearing limited to the proper imposition of postrelease control pursuant to R.C. 2929.191. The trial court explained, "the legislature passed a statute, * * * 2929.191, which says that if it's a sentencing that occurred after * * * July 11th, 2006, [the court] is not required to do a complete de novo resentencing. What is required is to have a hearing as set forth in that statute which is a hearing under subsection C * * * which is we [only] address the issue of the improper imposition of [postrelease control.]"

{¶8} On December 16, 2010, the trial court held a resentencing hearing limited to postrelease control issues. The trial court advised appellant he was subject to a mandatory three-year term of postrelease control for the witness intimidation charge under R.C. 2967.28(B)(3). The trial court also advised appellant he was subject to a term of postrelease control of up to three years for the tampering charges under R.C. 2967.28(C). On December 21, 2010, the trial court filed a nunc pro tunc entry reflecting the changes in appellant's sentence.

{¶9} Appellant timely appeals, raising three assignments of error. For ease of analysis, we will address appellant's assignments of error out of order.

{¶10} Assignment of Error No. 2:

{¶11} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT AND ACTED WITHOUT JURISDICTION WHEN IT CONDUCTED A HEARING PURSUANT TO R.C. 2929.191 AND ISSUED A NUNC PRO TUNC JUDGMENT ENTRY IMPOSING SENTENCE UPON APPELLANT AFTER PERFECTION OF AN APPEAL FROM THE ORIGINAL JUDGMENT IN THIS MATTER."

{¶12} In his second assignment of error, appellant argues the trial court lacked jurisdiction to issue its December 21, 2010 nunc pro tunc entry while his third appeal was pending before this court. The state concedes appellant's second assignment of error has merit.

{¶13} We find that while the issue of resentencing was before this court, the trial court lacked jurisdiction to issue the nunc pro tunc judgment entry correcting appellant's sentence. See *Mason v. Lawhorn*, Warren App. No. 2006-05-060, 2007-Ohio-2289, footnote one ("[i]t is settled that the filing of a notice of appeal divests the trial court of jurisdiction and that any subsequent ruling or order by the trial court is null and void"). Accordingly, the December 21, 2010 nunc pro tunc entry is void ab initio and has no effect on the instant appeal.

{¶14} Appellant's second assignment of error is sustained.

{¶15} Assignment of Error No. 1:

{¶16} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT OVERRULED HIS MOTION FOR RESENTENCING WITHOUT A HEARING."

{¶17} In his first assignment of error, appellant argues the trial court erred in overruling his resentencing motion in an entry filed August 20, 2010. Appellant argues the trial court should have held a de novo resentencing hearing to correct the postrelease control

errors in his sentence, and that it must do so on remand.¹ While the state concedes the error, it argues the resentencing hearing on remand must be limited to the issue of postrelease control pursuant to R.C. 2929.191.

{¶18} Appellant's assignment of error is sustained to the extent the parties agree that the case requires remand for a resentencing hearing. We will address the required scope of the resentencing hearing under appellant's third assignment of error.

{¶19} Assignment of Error No. 3:

{¶20} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT FAILED TO CONDUCT A FULL RESENTENCING HEARING."

{¶21} Under his third assignment of error, appellant raises two arguments regarding the December 16, 2010 resentencing hearing. We will address each argument in turn.

{¶22} Appellant initially challenges the trial court's decision, albeit null and void, to limit the December 16, 2010 resentencing hearing to postrelease control issues under R.C. 2929.191. Appellant argues the errors in his sentence were not capable of correction under the statute. Seeking to prevent this "error" from occurring twice, appellant asks this court to order a de novo resentencing hearing on remand. Conversely, the state argues the resentencing hearing must be limited to the imposition of postrelease control pursuant to R.C. 2929.191.

{¶23} In *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the Supreme Court of Ohio held, "[f]or criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set

1. In response to appellant's motion for reconsideration filed September 1, 2010, the trial court did, in fact, hold a limited resentencing hearing on December 16, 2010. However, because appellant's third appeal was pending at the time of the December 16, 2010 hearing, the order stemming from the hearing is void ab initio and was not dispositive of appellant's sentencing issues. See *Lawhorn*, 2007-Ohio-2289; *In re Miller*, Seneca App. Nos. 13-06-41, 13-06-42, 13-06-51, 13-06-52, 2007-Ohio-4238, ¶6.

forth in R.C. 2929.191." *Id.* at paragraph two of the syllabus.

{¶24} The *Singleton* court further stated:

{¶25} "R.C. 2929.191 * * * applies to offenders who have not yet been released from prison and who fall into at least one of three categories: those who did not receive notice at the sentencing hearing that they would be subject to postrelease control, those who did not receive notice that the parole board could impose a prison term for a violation of postrelease control, or those who did not have both of these statutorily mandated notices incorporated into their sentencing entries. R.C. 2929.191(A) and (B). For those offenders, R.C. 2929.191 provides that trial courts may, *after conducting a hearing with notice to the offender*, the prosecuting attorney, and the Department of Rehabilitation and Correction, *correct an original judgment of conviction by placing on the journal of the court a nunc pro tunc entry* that includes a statement that the offender will be supervised under R.C. 2967.28 after the offender leaves prison and that the parole board may impose a prison term of up to one-half of the stated prison term originally imposed if the offender violates postrelease control." *Id.* at ¶23. (Emphasis added.)

{¶26} The court also held that the R.C. 2929.191 hearing pertains only to the "flawed imposition of postrelease control," and the legislature intended to "leave undisturbed the sanctions imposed upon the offender that are unaffected by the court's failure to properly impose postrelease control at the original sentencing." *Id.* at ¶24.

{¶27} The Supreme Court of Ohio further clarified its position in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, finding that if a "judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, that *part* of the sentence is void and must be set aside," and "only the offending portion of the sentence is subject to review and correction." *Id.* at ¶26-28. (Emphasis sic.) The new sentencing hearing a defendant is

entitled to under R.C. 2929.191(C) "is limited to proper imposition of postrelease control." *Id.* at ¶29.

{¶28} In the case at bar, appellant initially argues the trial court did more than "fail" to impose statutorily mandated postrelease control when it stated: "I am specifically not going to order [postrelease control] in this matter[.]" According to appellant, "*declining*" to impose postrelease control is distinguishable from, and more egregious than, merely "failing" to impose the sanction. (Emphasis sic.)

{¶29} Appellant's attempt to distinguish articulated from unarticulated failures in postrelease control notification is arbitrary and unsupported in the law. Articulated or not, the fact remains the trial court did not properly impose postrelease control during appellant's sentencing hearing in 2006. See R.C. 2967.28. Under the specific facts of this case, we find the trial court simply "failed" to properly impose postrelease control during the sentencing hearing, which rendered that *part* of appellant's sentence void. *Fischer*, 2010-Ohio-6238 at paragraph one of the syllabus. Because appellant was sentenced after July 11, 2006 and was not yet released from prison, his sentence was subject to correction under R.C. 2929.191.

{¶30} Accordingly, we reject appellant's first argument that the trial court's diction somehow precluded application of R.C. 2929.191.

{¶31} Appellant next argues his due process rights were violated when the trial court included the "additional sanction" of postrelease control language in the original judgment entry outside of his presence.² Appellant argues his entire sentence is therefore void and asks this court to remand for a de novo resentencing hearing. We disagree.

2. Crim.R. 43(A) and Section 10, Article I of the Ohio Constitution embody the United States Supreme Court's holding that an accused is guaranteed the right to be present at all stages of a criminal proceeding that are critical to its outcome when his or her absence may frustrate the fairness of the proceedings. *Kentucky v. Stincer* (1987), 482 U.S. 730, 745, 107 S.Ct. 2658. See, also, *State v. Hill* (1995), 73 Ohio St.3d 433, 444.

{¶32} The Supreme Court of Ohio has stated that resentencing a qualifying offender under R.C. 2929.191 does not violate the Due Process Clause of the United States Constitution. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462. In *Bloomer*, the court held that where a sentence lacks statutorily mandated postrelease control, it fails to comply with the law, thus an offender has no legitimate expectation in its finality. *Id.* at ¶27-28. Absent an expectation of finality in the sentence, resentencing the offender pursuant to R.C. 2929.191 would not increase the offender's punishment or otherwise violate due process. *Id.* at ¶26, 28. See, also, *Singleton*, 2009-Ohio-6434 (applied properly, R.C. 2929.191 does not offend double jeopardy or separation-of-powers doctrine).

{¶33} In the case at bar, the fact that the trial court imposed postrelease control in the January 23, 2007 judgment entry is of no consequence. As previously discussed, as soon as the postrelease control error occurred during the December 2006 sentencing hearing, that *part* of appellant's sentence became void and therefore lacked finality. *Fischer*, 2010-Ohio-6238 at ¶26; *Bloomer*, 2009-Ohio-2462 at ¶28. Absent a legitimate expectation of finality in his sentence, appellant cannot now argue the trial court "imposed an additional sanction upon [him]," or otherwise offended due process, as the court corrected all postrelease control errors in compliance with R.C. 2929.191.

{¶34} Because appellant was originally sentenced after July 11, 2006 and was not yet released from prison, R.C. 2929.191 is, and always has been, the proper mechanism to correct the postrelease control errors in his sentence. Cf. *State v. Woodson*, Stark App. No. 2010 CA 00101, 2011-Ohio-1324 (R.C. 2929.191 proper mechanism to correct disparity between pronounced postrelease control of "two years and 144 days," versus entry imposing "up to a maximum of five [5] years"); *State v. Hardy*, Montgomery App. No. 22933, 2011-Ohio-2824 (R.C. 2929.191 proper mechanism to correct postrelease control errors in both

sentencing hearing and judgment entry, where original sentence was entered after July 11, 2006).

{¶35} Accordingly, we find the trial court is required to resentence appellant pursuant to R.C. 2929.191 on remand.

{¶36} Judgment affirmed in part, reversed in part, and remanded for resentencing pursuant to R.C. 2929.191.

RINGLAND and HUTZEL, JJ., concur.