

[Cite as *State v. Cunningham*, 2011-Ohio-2045.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 10AP-452  
 : (C.P.C. No. 99CR-06-3468)  
 Anthony Cunningham, :  
 : (REGULAR CALENDAR)  
 Defendant-Appellant. :

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D E C I S I O N

Rendered on April 28, 2011

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*Ron O'Brien*, Prosecuting Attorney, and *Laura R. Swisher*, for  
appellee.

*Anthony Cunningham*, pro se.

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Anthony Cunningham ("appellant"), appeals from a judgment entered by the Franklin County Court of Common Pleas denying his motion to impose valid sentence(s). For the following reasons, we affirm.

{¶2} In October 1999, appellant was found guilty, pursuant to a jury trial, of four counts of forcible rape involving a child under age thirteen, one count of kidnapping committed with sexual motivation, and two counts of gross sexual imposition involving a child under age thirteen. On December 10, 1999, a sentencing hearing was held. At the hearing, the trial court imposed a sentence of life imprisonment on the four rape counts,

ten years on the kidnapping count, and five years on the two counts of gross sexual imposition. The trial court ordered all of the counts to run concurrently to one another. The trial court orally advised appellant that if he was released from prison, he would be placed on post-release control for a maximum period of five years. The trial court further advised appellant at the hearing that if he committed any violations while on post-release control, he could receive additional prison time as a result of those violations.

{¶3} In addition, the record reflects that appellant signed a notice titled "Prison Imposed" on the date of the sentencing hearing. That form reads as follows:

NOTICE  
(Prison Imposed)

The Court hereby notifies the Defendant as follows:

\* \* \*

B. Post-Release Control.

After you are released from prison, you (will, may) have a period of post-release control for 5 years following your release from prison. If you violate [any] post-release control sanction imposed upon you, any one or more of the following may result:

- (1) The Parole Board may impose a more restrictive post-release control sanction upon you; and
- (2) The Parole Board may increase the duration of the post-release control subject to a specified maximum; and
- (3) The more restrictive sanction that the Parole Board may impose may consist of a prison term, provided that the prison term cannot exceed nine months and the maximum cumulative prison term so imposed for all violations during the period of post-release control cannot exceed one-half of the stated prison term originally imposed upon you; and
- (4) If the violation of the sanction is a felony, you may be prosecuted for the felony and, in addition to any sentence it

imposes on you for the new felony, the Court may impose a prison term subject to a specified maximum, for the violation.

I hereby certify that the Court read to me, and gave me in writing, the notice set forth herein.

(R. 67.)

{¶4} Appellant signed on the signature line following the language set forth above. Additionally, the attorney who represented appellant at the sentencing hearing also signed his name to a second signature line, which certified that the trial judge "read to the Defendant, and gave (him,her) in writing, the notice set forth within." (R. 67.)

{¶5} Finally, the trial court determined at the hearing that appellant was a sexual predator.

{¶6} A sentencing entry was filed on December 15, 1999. The sentencing entry did not accurately reflect what occurred at the sentencing hearing on December 10, 1999. Instead, the sentencing entry reflected a sentence of only ten years as to the four counts of rape and the kidnapping and a sentence of five years as to the two counts of gross sexual imposition, with all counts to run concurrently. In addition, the sentencing entry stated that appellant had been notified "orally and in writing, of the possibility of Bad Time pursuant to R.C. 2929.19(B)(3)(b) and the applicable periods of Post-Release Control pursuant to R.C. 2929.19(B)(3)(c), (d) and (e)." (R. 61 at 2.) However, the sentencing entry did not specifically state that the period of post-release control was to be five years.

{¶7} Appellant filed a timely direct appeal. In September 2000, this court affirmed appellant's convictions and found no error with the sexual predator designation. See *State v. Cunningham* (Sept. 21, 2000), 10th Dist. No. 00AP-67. The Supreme Court of Ohio denied appellant's motion for leave to appeal in February 2001. Over the course of several years, appellant subsequently filed numerous motions, including a

postconviction petition, a motion to reopen his appeal, and a motion to vacate or set aside sentence, as well as motions for new trial, among others.<sup>1</sup> All of these motions were denied.

{¶8} Also during this time period, in April 2001, the State of Ohio filed a motion to amend appellant's sentencing entry to reflect a term of life incarceration on each of the four rape offenses. On May 23, 2001, a corrected sentencing entry was filed. This entry reflected a life sentence for the four rape offenses, but also mistakenly imposed a life sentence for the kidnapping offense. However, the language regarding the imposition of post-release control was identical to that found in the original sentencing entry. A second corrected sentencing entry was filed on July 6, 2001. This second corrected entry properly reflected a ten year sentence for the kidnapping conviction. As to the imposition of post-release control, the language in this sentencing entry was again identical to that found in the two previous sentencing entries.

{¶9} On February 22, 2010, appellant filed a motion to impose valid sentence(s), arguing his sentencing entries were void, were not final appealable orders, and failed to comply with Crim.R. 32(C). Specifically, appellant argued the trial court erred in failing to properly include post-release control in the sentencing entry, and thus the sentences were void. On April 16, 2010, the trial court denied appellant's motion, finding further review was barred by law and by res judicata. Appellant now files this timely appeal and asserts a single assignment of error for our review:

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<sup>1</sup> In 2008, appellant also filed a petition contesting reclassification as a sexual offender under S.B. No. 10. However, that matter is not the subject of the instant appeal.

FIRST ASSIGNMENT OF ERROR:

JUDGMENT OF CONVICTION AND SENTENCE ARE VOID FOR FAILURE TO COMPLY WITH STATUTORY RE[Q]UIREMENTS AND THUS THE ACCUSED HAS BEEN DEPRIVED OF HIS RIGHTS TO DUE PROCESS IN VIOLATION OF THE 5TH, 6TH AND 14TH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

{¶10} Subsequent to the filing of his merit brief and his reply brief, appellant filed an application for reconsideration and/or to supplement his brief on December 15, 2010. Because the matter was fully briefed and already submitted to the court at that time, and because his filing does not contain any new authority, said motion is denied. Appellant's supplemental briefing shall not be considered by this court.

{¶11} In his sole assignment of error, appellant claims the trial court erred in denying his motion to impose a valid sentence, arguing the trial court erred by failing to include in the sentencing entry the proper notification regarding post-release control. Appellant submits his sentences are void because the sentencing entry failed to reflect the length of the mandatory post-release control period and also failed to provide notice of the consequences for violating post-release control.

{¶12} The State of Ohio, on the other hand, contends appellant's motion was properly denied, arguing: (1) the motion is barred by res judicata; and (2) appellant received notice of his post-release control and the trial court properly imposed said post-release control.

{¶13} "In 1996, the General Assembly imposed a duty on trial courts to notify an offender at the sentencing hearing of the imposition of postrelease control and of the authority of the parole board to impose a prison term for a violation; the General Assembly also required that a court include any postrelease-control sanctions in its

sentencing entry. See former R.C. 2929.14(F) and former R.C. 2929.19(B)(3)(b) through (d) and (B)(4), Am.Sub.S.B. No. 2, 146 Ohio Laws, Part IV, 7136, 7470, 7486-7487." *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, ¶22.

{¶14} Appellant asserts that in order to comply with the statutory mandates regarding imposition of post-release control, the sentencing entry must include the length of the period of post-release control imposed by the trial court, as well as notice of the consequences for violating post-release control. However, we have previously determined otherwise.

{¶15} In *State v. Mays*, 10th Dist. No. 10AP-113, 2010-Ohio-4609, the defendant appealed from a nunc pro tunc entry filed after he was resentenced via a videoconference conducted while he was still incarcerated at an institution operated by the Ohio Department of Rehabilitation and Corrections. The resentencing hearing clarified the application of post-release control and stated the length of the post-release control term. Mays challenged the use of the videoconference to resentence him and argued that he had a right to be present at the resentencing. While declining to address the propriety of the process used, we determined that the resentencing hearing had in fact been unnecessary, because post-release control had been properly imposed through the original proceeding and the original entry.

{¶16} In considering the entire record, we found post-release control had been properly imposed because: (1) the original sentencing entry, like the sentencing entry at issue here, stated that appellant had been notified of the applicable periods of post-release control; (2) the defendant had signed a "Prison Imposed" notice which stated that he was subject to a five-year period of post-release control, just like the appellant in the case sub judice; and (3) the defendant had also signed a plea form which stated he

understood that he would be subject to a mandatory, five-year period of post-release control if a prison term was imposed.

{¶17} We also reached a similar determination in *State v. Chandler*, 10th Dist. No. 10AP-369, 2010-Ohio-6534 (where the original sentencing entry stated that the defendant was informed of the applicable period of post-release control but did not specify that the applicable period was five years, but the defendant signed a plea form indicating he would be subject to five years of post-release control if prison was imposed, the record contained a "Prison Imposed" notice setting forth a five-year period of post-release control, and the guilty plea hearing transcript revealed the trial court orally advised the defendant he would be subject to a five-year period of post-release control, post-release control was properly imposed in the original sentencing entry).

{¶18} The applicable language set forth in the sentencing entries in *Mays* and *Chandler*, as well as the language used in the "Prison Imposed" notice in those two cases is virtually identical to that found here in the instant case. While the appellant in the case sub judice was convicted pursuant to a jury trial, and thus did not sign an entry of guilty plea form containing notification of post-release control sanctions, we find the rationale set forth in *Mays* and *Chandler* is equally applicable here. Therefore, we find appellant was properly notified of post-release control and the trial court properly complied with the statutory requirements governing the proper imposition of post-release control. As a result, we find appellant's convictions are not void.

{¶19} We note that the trial court denied appellant's motion to review his sentence and impose a valid sentence on the grounds that further review was barred by law and by res judicata. Had appellant's sentence in fact been void because it failed to include the statutorily mandated term of post-release control, review would not have been precluded

by principles of res judicata. See *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, paragraph one of the syllabus ("[a] sentence that does not include the statutorily mandated term of postrelease control is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack."). See also *State v. Holcomb*, 184 Ohio App.3d 577, 2009-Ohio-3187, ¶19, citing *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577 (where a sentence is void for failure to include post-release control, the reviewing court has an obligation to recognize the void sentence, vacate it, and order resentencing. Therefore, if a trial court receives an untimely or successive petition for postconviction relief that challenges a void sentence, it must ignore the procedural irregularities, vacate the void sentence, and resentence the offender.).

{¶20} Because we find appellant's sentences are not void and the appellant was properly notified of post-release control, we overrule appellant's single assignment of error. Appellant's motion to supplement his brief is denied. The judgment of the Franklin County Court of Common Pleas denying appellant's motion to impose valid sentence is affirmed.

*Motion to supplement denied;  
Judgment affirmed.*

BROWN and CUNNINGHAM, JJ., concur.

CUNNINGHAM, J., of the First Appellate District, sitting by  
assignment in the Tenth Appellate District.

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