

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals Nos. L-10-1250
L-10-1251

Appellee

Trial Court Nos. CR0200702589
CR0200402553

v.

Andre Tribue

DECISION AND JUDGMENT

Appellant

Decided: August 26, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

John P. Millon, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is a consolidated appeal from a judgment of the Lucas County Court of Common Pleas, entered in two cases, that denied the motion of defendant-appellant, Andre Tribue, to vacate a void judicial sanction.

{¶ 2} On November 29, 2004, in Lucas County Common Pleas case No. CR0200402553, appellant entered a plea of no contest to an amended count of burglary, in violation of R.C. 2911.12(A)(2), a felony of the second degree. Appellant was then found guilty and sentenced to serve two years in the Ohio Department of Rehabilitation and Corrections. The sentencing entry of November 30, 2004, states: "Defendant given notice of appellate rights under R.C. 2953.08 and notice under R.C. 2929.19(B)(3)." On June 26, 2006, the judge signed a nunc pro tunc entry which amended the original entry to state, "Defendant given notice of appellate rights under R.C. 2953.08 and post release control notice under R.C. 2929.19(B)(3) and R.C. 2967.28."

{¶ 3} Following his release from prison and while he was on postrelease control in case CR0200402553, appellant was indicted in Lucas County Common Pleas case No. CR0200702589 on three counts of burglary in violation of R.C. 2911.12(A)(4) and (C), all fourth degree felonies. On September 6, 2007, appellant withdrew his previous not guilty pleas and entered a guilty plea to one count of attempted burglary in violation of R.C. 2923.02 and 2911.12(A)(4) and (C), a felony of the fifth degree. Pursuant to a request by the state, the court entered a nolle prosequi on the remaining counts. On September 28, 2007, appellant was sentenced to 11 months in prison in case No. CR0200702589. The court also found that the attempted burglary conviction constituted a violation of the terms of postrelease control in case No. CR0200402553. The court therefore sentenced appellant to 979 days in prison for violating the terms of his

postrelease control and ordered that term to be served consecutively to the term imposed for the new felony.

{¶ 4} Subsequently, appellant filed a motion to vacate a void judicial sanction in which he asserted that because the original sentencing entry in case No. CR0200402553 failed to state the mandatory nature of the postrelease control to which appellant would be subjected, it did not properly impose a term of postrelease control and it could not be corrected through a nunc pro tunc entry. Appellant therefore argued that he had been improperly placed on postrelease control and the trial court could not sanction him for violating the terms of postrelease control. Finding that the original sentencing entry in case No. CR0200402553 complied with the notification requirements and that the nunc pro tunc entry was unnecessary, the lower court denied appellant's motion to vacate a void judicial sanction. Appellant now challenges that judgment through the following assignments of error:

{¶ 5} "1. Trial court committed error, to the detriment of appellant, by failing to properly notify the appellant of mandatory 3 year period of post release control and the accompanying penalties for violating post release control at the plea and sentencing hearing on November 29, 2004.

{¶ 6} "2. Trial court committed error by issuing a nunc pro tunc judgment entry on June 22, 2006, which was an improper remedy to provide notice to appellant of post release control.

{¶ 7} "3. Because appellant was not properly notified of post release control prior to his release, the post release control portion of his sentence was void.

{¶ 8} "4. The trial court committed error when its sentence on September 28, 2007 relied on a violation of a void imposition of post release control, and the trial court improperly denied appellants [sic] motion to void that sentence."

{¶ 9} In his first assignment of error, appellant contends that because the sentencing entry of November 30, 2004, in case No. CR0200402553, failed to mention any period of postrelease control as part of the sentence, the sentencing entry was defective. Although appellant also asserts that he was not notified of postrelease control at the combined plea and sentencing hearing of November 29, 2004, in his motion before the trial court he limited his argument to the alleged flawed sentencing entry and made no mention of the sentencing hearing. Moreover, appellant has not provided this court with a transcript of the November 29, 2004 sentencing hearing. We will therefore presume the validity of that proceeding, see *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, and will limit our discussion to the sentencing entry itself.

{¶ 10} The sentencing hearing in case No. CR0200402553 proceeded on November 29, 2004. At that time, R.C. 2929.19(B)(3)(c) required a sentencing court to "[n]otify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the * * * second degree * * *." The court is required to notify the defendant of postrelease control both during the sentencing hearing and in the sentencing judgment.

State v. Jordan, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph one of the syllabus (superseded by statute on other grounds); *State v. Ayers*, 6th Dist. No. E-07-072, 2009-Ohio-393, ¶ 17. Failure of the sentencing court to properly include postrelease control in a sentence when it is statutorily required renders the sentence void. See *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶ 6 (superseded by statute on other grounds.)

{¶ 11} Appellee argues, and this court agrees, that the original sentencing entry in case No. CR0200402553 was sufficient to impose postrelease control. In previous cases, this court has found that the original judgment entry was valid under the version of R.C. 2929.19(B)(3)(c) in effect at the time of appellant's sentencing. The judgment entry at issue in *State v. Milazo*, 6th Dist. No. L-07-1264, 2008-Ohio-5137, ¶ 3, contained wording nearly identical to the judgment in the case at hand: "[D]efendant has been given notice under R.C. 2929.19(B)(3) and of appellate rights under R.C. 2953.08." See, also, *State v. Maddox*, 6th Dist. No. L-09-1237, 2010-Ohio-1476. In *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, the Ohio Supreme Court considered the language necessary to provide notice of postrelease control in sentencing entries. The court concluded that sentencing entries were sufficient if they "afford[ed] notice to a reasonable person that the courts were authorizing postrelease control as part of each * * * sentence." *Id.* at ¶ 51. Because the trial court's judgment entry of sentence referenced R.C. 2929.19(B)(3)(c) and because that statute at that time referenced the

postrelease control statute, R.C. 2967.28, the judgment entry was sufficient to impose postrelease control. The first assignment of error is not well-taken.

{¶ 12} In his second assignment of error, appellant asserts that the lower court erred in entering a nunc pro tunc order on June 22, 2006, in an attempt to correct its improper sentencing entry of November 30, 2004. Having found that the original sentencing order was valid, any issues regarding the nunc pro tunc order are moot. The second assignment of error is therefore not well-taken.

{¶ 13} We will address appellant's third and fourth assignments of error together. Appellant asserts that because he was not properly notified of postrelease control prior to his release from prison, that portion of his sentence is void. He further asserts that the trial court, therefore, erred in sentencing him to an additional 979 days for violating the terms of his postrelease control and in denying his motion to vacate a void sentence. Again, given that the original sentencing entry of November 30, 2004, properly imposed postrelease control on appellant, appellant's third and fourth assignments of error are not well-taken.

{¶ 14} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair proceeding and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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