

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

HAROLD WAYNE JOHNSON, JR.,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY **Case No. 17 BE 0032**

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 16 CR 338

BEFORE:

Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:

Affirmed.

Atty. Daniel P. Fry, Belmont County Prosecutor, *Atty. J. Flanagan*, Chief Asst. Prosecutor, Courthouse Annex 1, 147-A West Main Street, St. Clairsville, Ohio 43950, No Brief Filed for Appellee and

Atty. Rhys B. Cartwright-Jones, 42 N. Phelps St., Youngstown, OH 44503 for Appellant.

Dated: November 5, 2018

Robb, P.J.

{¶1} Defendant-Appellant Harold Wayne Johnson, Jr. appeals from his conviction entered in Belmont County Common Pleas Court for aggravated murder with a gun specification in violation of R.C. 2903.01(A) and R.C. 2941.145. Although Appellant was advised of postrelease control at the sentencing hearing, the advisement was not set forth in the sentencing judgment entry. The issue in this appeal is whether the sentencing judgment entry must contain the postrelease control advisement.

{¶2} Appellant pled to aggravated murder, an unclassified felony, and therefore is not subject to postrelease control. The sentencing judgment entry not imposing postrelease control is correct. For the reasons expressed below, this appeal is meritless and the conviction is affirmed.

Statement of the Case

{¶3} Appellant was indicted for aggravated murder of Clint Stephens in violation of R.C. 2903.01(A) with an attendant firearm specification in violation of R.C. 2941.145. 1/5/17 Indictment. Appellant entered a plea of not guilty by reason of insanity. 2/15/17 J.E. Competency evaluations occurred and it was determined Appellant was legally sane. 5/17/17 J.E. A plea agreement was reached by the state and Appellant. 6/6/17 J.E. Appellant agreed to pled guilty to the indictment and the state agreed to recommend a 20 year to life sentence plus the mandatory consecutive three years for the firearm specification to be served first. 6/5/17 Plea Tr.; 6/19/17 Sentencing Tr. 4.

{¶4} The trial court followed the recommendation; it sentenced Appellant to life imprisonment with parole eligibility after serving 20 years and 3 years for the firearm specification, which was ordered to be served first and consecutive to the 20 years to life sentence. 6/20/17 J.E. At the sentencing hearing, the trial court advised Appellant that if he was ever released he would be subject to 5 years of postrelease control. 6/19/17 Sentencing Tr. 10. The sentencing judgment entry, however, does not contain an advisement on postrelease control. 6/20/17 J.E.

{¶5} Appellant filed a timely appeal from the conviction.

Assignment of Error

“The trial court erred in failing to incorporate a postrelease advisement into Johnson’s judgment entry of sentence.”

{¶6} Appellant admits the trial court advised him about postrelease control at the sentencing hearing and does not argue the advisement was incorrect. Instead, he contends the postrelease control advisement was not incorporated into the final judgment entry. He argues the failure to incorporate the advisement into the entry requires the matter be remanded to the trial court with instructions for it to issue a nunc pro tunc corrective entry that includes the postrelease control advisement. The state has not filed an Appellee’s brief in this matter.

{¶7} Appellant was indicted and pled to aggravated murder in violation of R.C. 2903.01(A). Aggravated murder is an unclassified felony and is subject to the death penalty or life imprisonment. R.C. 2903.01(F); R.C. 2929.02(A); R.C. 2929.03; R.C. 2929.04. Aggravated murder is not subject to postrelease control because it is an unclassified felony and postrelease control statutes do not apply to unclassified felonies. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 36 (“However, an individual sentenced for aggravated murder such as Clark is not subject to postrelease control, because that crime is an unclassified felony to which the postrelease-control statute does not apply. R.C. 2967.28. Instead, such a person is either ineligible for parole or becomes eligible for parole after serving a period of 20, 25, or 30 years in prison.”); *State v. Paige*, 7th Dist. No. 17 MA 0146, 2018-Ohio-2782, ¶ 31.

{¶8} Therefore, the sentence issued in the judgment entry that does not impose a postrelease control sentence is the correct sentence for the crime of aggravated murder.

{¶9} Admittedly, in reviewing the issue presented to us it becomes apparent the trial court did err when it stated at the sentencing hearing Appellant would be subject to a five year term of postrelease control. That error, however, does not require us to remand the matter for a new sentencing hearing and order the trial court to advise Appellant that he is not subject to postrelease control. We have held a new sentencing hearing is not required when a trial court sentences the offender to postrelease control

for murder and memorializes the sentence in a judgment entry, but then in a later judgment entry deletes the improper reference to postrelease control. *State v. Ortiz*, 7th Dist. No. 15 MA 0023, 2016-Ohio-4813, 68 N.E.3d 188, ¶ 10-12 (postrelease control advisement was not included as part of sentence in the judgment entry denying motion to withdraw a guilty plea). We explained the remedy for an improper reference to postrelease control is to delete the reference and since the trial court has already done that, the error had been remedied; thus, no new sentencing hearing was required. *Id.* at ¶ 12. In reaching this conclusion, we cited the *Brister* case from the Fifth Appellate District. *Id.* at 10, citing *State v. Brister*, 5th Dist. No. 13 CA 21, 2013-Ohio-5874.

{¶10} In *Brister*, the offender had been sentenced to postrelease control as a part of the sentence for his murder conviction. *Brister* at ¶ 3. The offender filed a motion to correct a void sentence arguing he was not subject to postrelease control because he was convicted of an unclassified felony. *Id.* He additionally requested a new sentencing hearing. *Id.* at ¶ 4. The trial court agreed with the offender that he was not subject to a term of postrelease control and issued a nunc pro tunc entry deleting the reference to postrelease control; however, the trial court denied the offender's request for a new sentencing hearing. *Id.* The offender appealed. On appeal, the Fifth Appellate District stated the issue before it was whether a new sentencing hearing was needed to remove the improperly imposed term of postrelease control. *Id.* at ¶ 13. It held that it was not and the trial court corrected the matter through the nunc pro tunc order. *Id.* at ¶ 14-19.

{¶11} In reaching that conclusion, the court made clear that an improper advisement on postrelease control only renders that portion of the sentence void, not the entire sentence. *Id.* at ¶ 15. See also *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, paragraphs 2 and 4 of the syllabus. The court explained that while R.C. 2929.191 provides an avenue to correct postrelease control when the sentencing entry conflicts with the oral pronouncement or where the term of postrelease control was omitted, the statute does not address a scenario where the term of postrelease control was improperly included. *Brister* at ¶ 16-17. It then reasoned that since a nunc pro tunc entry can be used to correct mistakes in judgments, orders, and

other parts of the record, the trial court's use of a nunc pro tunc entry was permissible. *Id.* at ¶ 17-19, quoting *State v. Rolling*, 8th Dist. No. 95473, 2011–Ohio–121, ¶ 10-11.

{¶12} Both *Brister* and *Oritz* stand for the proposition that a new sentencing hearing is not needed in this instance. Admittedly, the facts in the case before us are slightly different; the trial court in the case at hand did not issue a nunc pro tunc entry to remove the improper postrelease control advisement. Rather, the trial court advised about postrelease control at the sentencing hearing, but did not put that information in the final judgment entry. This distinction does not require us to order a new sentencing hearing. The advisement at the sentencing hearing, at most, constitutes harmless error. The final judgment entry is correct; there is no postrelease control sentence, and Appellant is not and cannot be subject to postrelease control for his conviction of aggravated murder, an unclassified felony.

{¶13} In conclusion, the assignment of error is meritless and the conviction affirmed.

Donofrio, J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.