

[Cite as *State v. Mason*, 2020-Ohio-3671.]

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : Nos. 108929 and 109026
 v. :
 :
 RODERICK MASON, :
 :
 Defendant-Appellant. :
 :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 9, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-16-602780-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Christopher D. Schroeder, Assistant Prosecuting Attorney, *for appellee*.

Paul Mancino, Jr., *for appellant*.

ANITA LASTER MAYS, P.J.:

{¶ 1} Defendant-appellant Roderick Mason (“Mason”) appeals the trial court’s denial of his motion to withdraw his plea without a hearing and his prison sentence. Pursuant to App.R. 3(B), sua sponte, we have consolidated the two

appeals Mason has filed, for the purpose of disposition, because they contain the same facts and issues. We affirm the trial court's decision.

I. Facts and Procedural History

{¶ 2} In 2016, Mason pleaded no contest and was found guilty of drug trafficking, drug possession, having weapons while under disability, and possessing criminal tools. Mason was sentenced to 16 years' imprisonment. Mason appealed and in *State v. Mason*, 8th Dist. Cuyahoga No. 104533, 2017-Ohio-7065 ("*Mason I*"), this court affirmed Mason's conviction and sentence. However, this court found that "[t]he trial court incorrectly stated that the postrelease control term was for 'three years' and not five years as dictated by R.C. 2967.28(B)(1) * * *." *Id.* at ¶ 41. This court modified and corrected Mason's postrelease control and remanded to the trial court to correct the sentencing entry. *Id.* at ¶ 51.

{¶ 3} Mason appealed to the Supreme Court of Ohio. The Ohio Supreme Court declined to accept Mason's case for review in *State v. Mason*, 152 Ohio St.3d 1425, 2018-Ohio-923, 93 N.E.3d 1005 ("*Mason II*"). On remand, the trial court did as they were instructed by this court and corrected the sentencing journal entry. Mason appealed again to this court arguing that "the trial court erred when it modified his sentence in his absence in violation of Crim.R. 43." *State v. Mason*, 8th Dist. Cuyahoga No. 107447, 2019-Ohio-1773, ¶ 13 ("*Mason III*").

{¶ 4} In *Mason III*, this court ruled that

[t]he trial court's April 19, 2018 judgment entry imposing the correct period of postrelease control is vacated. Case is remanded for the trial

court to hold a limited resentencing hearing to properly impose postrelease control and allow Mason to be physically present or appear via video-conferencing equipment for that hearing. The limited hearing must cover only the imposition of postrelease control.

Id. at ¶ 28.

{¶ 5} On July 26, 2019, Mason filed a presentence motion to withdraw his plea, although he had already been sentenced, and this court affirmed his sentence. The trial court denied Mason’s motion to withdraw his plea without a hearing. Four days before Mason’s scheduled hearing for the imposition of postrelease control by the trial court, Mason filed an appeal with this court appealing the trial court’s denial of his motion to withdraw his guilty plea. On August 27, 2019, the trial court, as instructed by this court in *Mason III*, held a limited resentencing hearing and executed this court’s mandate, advising Mason that he would be subject to five years of mandatory postrelease control supervision. Thereafter, Mason filed another appeal with this court. As a result, we have consolidated Mason’s appeals, and he assigns three errors for our review. Mason argues that:

- I. Defendant was denied due process of law when the court denied his motion to withdraw his plea prior to the sentencing without a hearing;
- II. Defendant was denied due process of law when the court proceeded with sentencing when an appeal had been filed to the court of appeals;¹ and

¹ In *State v. Mason*, 8th Dist. Cuyahoga No. 104533, appellant filed this duplicate assignment of error.

III. Defendant was denied due process of law when the court increased the sentence after the defendant started serving his original sentence.

II. Motion to Withdraw Guilty Plea

{¶ 6} The state argues that Mason's assignment of error is barred by res judicata because in Mason's first appeal he argued that the trial court misstated his postrelease control. We reject the state's argument. Mason's assignment of error is challenging the trial court's denial of his motion to withdraw his guilty plea, not the sentence itself.

{¶ 7} Mason argues that the trial court erred when it denied his motion to withdraw his plea prior to the limited resentencing hearing. In *Mason I*, Mason was sentenced to 16 years' imprisonment. The record reveals that after Mason's conviction and sentence were affirmed this court remanded the case to the trial court to correct the sentencing entry from three years of postrelease control to the mandatory five years of postrelease control. We find that upon this court's affirmance of Mason's sentence, Mason's subsequent motion to withdraw his guilty plea is considered a postsentence motion as determined by the Ohio Supreme Court in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958.

{¶ 8} In *Singleton*, the Ohio Supreme Court noted the difference between improperly imposing postrelease control versus the trial court completely omitting postrelease control. "[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 forth in R.C. 2929.191.” *Singleton* at ¶ 1. However, in the case where the trial court fails to include any postrelease control in the sentence, the sentence is void. *Id.* at ¶ 18. As a result, “[a] motion to withdraw a plea of guilty or no contest made by a defendant who has been given a void sentence must be considered as a presentence motion under Crim.R. 32.1.” *Id.* at ¶ 19, citing *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422. In accordance with the Ohio Supreme Court’s decision in *Singleton*, we find that Mason’s sentence was not void, and therefore his motion to withdraw his sentence is not a presentence motion under Crim.R. 32.1.

{¶ 9} Crim.R. 32.1 provides that “[a] motion to withdraw a plea of guilty * * * may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.” “We review a trial court’s decision to grant or deny a postsentence motion to withdraw a guilty plea pursuant to Crim.R. 32.1 for abuse of discretion.” *State v. Johnson*, 2019-Ohio-2332, 138 N.E.3d 560, ¶ 12 (8th Dist.), citing *State v. Wilkey*, 5th Dist. Muskingum No. CT2005-0050, 2006-Ohio-3276, ¶ 21. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 10} Mason, who seeks to withdraw a plea of guilty after the imposition of sentence, has the burden of establishing the existence of manifest injustice. *Richmond Hts. v. McEllen*, 8th Dist. Cuyahoga No. 99281, 2013-Ohio-3151, ¶ 7, citing *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. “[M]anifest injustice’ comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her.” *State v. Sneed*, 8th Dist. Cuyahoga No. 80902, 2002-Ohio-6502, ¶ 13.

{¶ 11} Mason argues that the manifest injustice occurred at his original trial when the trial court misadvised him regarding the length of his postrelease control. Mason contends that the Ohio Supreme Court’s decision in *State v. Bishop*, 156 Ohio St.3d 156, 2018-Ohio-5132, 124 N.E.3d 766, demonstrates that because of the trial court’s error, Mason is entitled to withdraw his guilty plea. However, the facts in *Bishop* are distinguishable from the facts in the instant case. In *Bishop*, the trial court failed to advise the defendant “that once he pleaded guilty to the possession offense, the court would have the authority under R.C. 2929.141 to terminate Bishop’s existing postrelease control and impose a prison term that he would serve consecutively to the term of imprisonment imposed for the possession offense.” *Id.* at ¶ 3. The Ohio Supreme Court ruled that

Crim.R. 11(C)(2)(a) requires a trial court to advise a criminal defendant on postrelease control for a prior felony, during his plea hearing in a new felony case, of the trial court’s authority under R.C. 2929.141 to terminate the defendant’s existing postrelease

control and to impose a consecutive prison sentence for the postrelease-control violation.

Id. at ¶ 21.

{¶ 12} In the instant case, the trial court informed Mason of postrelease control but erred in imposing a three-year postrelease control term instead of the mandatory five-year postrelease control term. The trial court, as it did in *Bishop*, did not fail to advise Mason of the court's authority to terminate postrelease control and impose consecutive sentences. Mason also cites our decision in *State v. Ricks*, 8th Dist. Cuyahoga No. 86634, 2006-Ohio-4268, which stated

[t]his court has long held that a plea is invalid if the defendant has a mistaken belief of the possible sentence because of a misunderstanding or misrepresentation by defense counsel. *State v. Longo*, 4 Ohio App.3d 136, 140, 446 N.E.2d 1145 (1982). If a misrepresentation by counsel is enough to vacate a plea, so would a mistaken representation by the trial judge.

Id. at ¶ 16.

{¶ 13} However, the facts in *Ricks* can be distinguished from the facts in the instant case. In *Ricks*,

[i]n exchange for his plea, defendant was promised something which the trial court could not provide. The record is clear that defendant would not have pled guilty if the court had not promised him it would terminate his parole and incorporate any postrelease control or parole into his sentence. The trial court erred, therefore, when it accepted defendant's plea.

Id. at ¶ 17.

{¶ 14} Mason has not demonstrated that his plea was a result of the trial court promising him anything related to parole or postrelease control. The facts in

Mason's case are more analogous to the facts in *State v. Schleiger*, 12th Dist. Preble No. CA2009-09-026, 2010-Ohio-4080, where the trial court improperly imposed postrelease control. The Twelfth District Court of Appeals followed the mandates set forth by the Ohio Supreme Court, stating,

[t]he Ohio Supreme Court has held that in cases where a defendant is sentenced after July 11, 2006, R.C. 2929.191 provides a mechanism for a trial court to correct the improper imposition of postrelease control. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958.

Id. at ¶ 5.

{¶ 15} If Mason's motion was a presentence motion, he would be entitled to a hearing.

A presentence motion to withdraw a guilty plea should be freely and liberally granted. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). Nevertheless, a defendant does not have an absolute right to withdraw a plea prior to sentencing, and accordingly, the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea. *Id.*

State v. Brown, 8th Dist. Cuyahoga No. 108063, 2019-Ohio-3773, ¶ 13.

{¶ 16} However, as previously stated, when an appellant files a postsentence motion to withdraw a plea, the appellant has the burden of establishing the existence of manifest injustice. *See State v. Stovall*, 8th Dist. Cuyahoga No. 104787, 2017-Ohio-2661, ¶ 16-17. Mason has not demonstrated that the trial court abused its discretion or that a manifest injustice occurred. Mason filed a postsentence motion, the trial court is not required to hold a hearing. "Postsentence motions to withdraw a plea are treated differently. Where the basis for denying the motion 'is clearly

warranted,' the trial court is not obligated to hold a hearing.” *State v. Congress*, 8th Dist. Cuyahoga No. 102867, 2015-Ohio-5264, ¶ 11, quoting *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, ¶ 51. Thus, a trial court need not hold an evidentiary hearing on a postsentence motion to withdraw a guilty plea if the record indicates the movant is not entitled to relief and the movant has failed to submit evidentiary documents sufficient to demonstrate a manifest injustice. *State v. Russ*, 8th Dist. Cuyahoga No. 81580, 2003-Ohio-1001, ¶ 12.

{¶ 17} Mason’s first assignment of error is overruled.

III. Trial Court’s Jurisdiction During Pending Appeal

{¶ 18} In the second assignment of error, Mason argues that the trial court did not have jurisdiction to resentence him while his appeal with this court was pending. Before the trial court resentenced Mason, in accordance with our directive, Mason filed an appeal asserting that the trial court erred by denying his motion to withdraw his guilty plea.

“Once a case has been appealed, the trial court loses jurisdiction except to take action in aid of the appeal. *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97, 378 N.E.2d 162 (1978). The trial court retains jurisdiction over issues not inconsistent with the appellate court’s jurisdiction to reverse, modify, or affirm the judgment appealed from. *Id.*; *Yee v. Erie Cty. Sheriff’s Dept.*, 51 Ohio St.3d 43, 44, 553 N.E.2d 1354 (1990).”

State ex rel. Lisboa v. Galvin, 8th Dist. Cuyahoga No. 92525, 2009-Ohio-969, ¶ 6, quoting *In Re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207, ¶ 9.

{¶ 19} In *Mason III*, the trial court was directed by this court pursuant to Crim.R. 43 to hold a resentencing hearing and sentence Mason to the correct mandatory postrelease control term. “A court has jurisdiction to take action to enforce a judgment which is pending on appeal if there is no stay. A court may consider collateral issues not related to the merits of the action.” (Internal citations omitted.) *Middleton v. Luna’s Restaurant & Deli, LLC*, 5th Dist. Stark No. 2011-CA-00181, 2012-Ohio-348, ¶ 11. The resentencing issue was not related to Mason’s appeal regarding his motion to withdraw his plea.

{¶ 20} Additionally, “[a] trial court must follow a mandate from a reviewing court. *State v. Gates*, 8th Dist. Cuyahoga No. 82385, 2004-Ohio-1453, ¶ 9; *State v. Bronston*, 8th Dist. Cuyahoga No. 97558, 2012-Ohio-2631, ¶ 4; *State v. Carlisle*, 8th Dist. Cuyahoga No. 93266, 2010-Ohio-3407, ¶ 16.” *State v. Vargas*, 8th Dist. Cuyahoga No. 105680, 2017-Ohio-9177, ¶ 8.

{¶ 21} In *Carlisle*, we explicitly stated how the appellate mandate works:

An appellate mandate works in two ways: it vests the lower court on remand with jurisdiction and it gives the lower court on remand the authority to render judgment consistent with the appellate court’s judgment. Under the “mandate rule,” a lower court must “carry the mandate of the upper court into execution and not consider the questions which the mandate laid at rest.”

Id.

{¶ 22} Therefore, Mason’s second assignment of error is overruled.

IV. Increase of Mandatory Postrelease Control

{¶ 23} In the third assignment of error, Mason contends that the trial court erred when it increased his sentence after he started serving his original sentence. The trial court corrected the postrelease control from three years to five years, and Mason argues that effectively increased his sentence. He also argues that because the trial court failed to properly inform him about his postrelease term, his entire sentence is void, which vacates his guilty plea. We find that Mason’s argument is misplaced. The failure to impose the correct postrelease term does not void the entire sentence, just the postrelease term, and the trial court retains jurisdiction to correct it.

{¶ 24} Mason’s argument that correcting his postrelease control from three years to five years effectively increases his entire sentence, as stated above, is misplaced. The correction of postrelease control will not change the length of a defendant’s time served for postrelease control. *State v. Moon*, 8th Dist. Cuyahoga No. 93673, 2010-Ohio-4483, ¶ 32.

{¶ 25} In *State v. Cowan*, 8th Dist. Cuyahoga No. 103855, 2016-Ohio-8045, the trial court, as in this case, erred in imposing an incorrect term of postrelease control. “A sentence that fails to comply with the statutory requirements of postrelease control is void only as to postrelease control and must be rectified only in that aspect, unless the defendant has completed his sentence.” (Internal citations omitted.) *Id.* at ¶ 12.

{¶ 26} Mason’s entire sentence is not void as a result of the trial court’s error, only the postrelease control portion of the sentence.

“When a judge fails to properly impose statutorily mandated postrelease control as part of a defendant’s sentence, the postrelease-control sanction is void.” *State v. Holdcroft*, 137 Ohio St. 3d 526, 2013-Ohio-5014, 1 N.E.3d 382, paragraph two of the syllabus, applying *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332. The trial court retains jurisdiction to correct the flawed imposition of postrelease control while the defendant is still in prison on that offense. *Holdcroft* at ¶ 14. The *Holdcroft* court noted that the legislature held that in enacting R.C. 2929.191, the legislature set forth a procedure whereby postrelease control may be properly authorized and given effect, even though initial notification was inadequate if the offender has not been released from prison “under the prison term the court imposed.” *Id.* at ¶ 31.

State v. Cowan, 8th Dist. Cuyahoga No. 103855, 2016-Ohio-8045, ¶ 15.

{¶ 27} Mason argues that the Ohio Supreme Court’s decision in *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, mandates that his plea be vacated. In *Sarkozy*, the trial court completely failed to advise the defendant that there was any term of mandatory postrelease control as a part of his sentence. As a result, the court in *Sarkozy*, ruled that, “Sarkozy’s plea could not have been knowingly and intelligently given because the trial court failed to advise him at the plea hearing that postrelease control would be part of his sentence.” *Id.* at ¶ 26. In this instant case, the trial court did inform Mason that he would be subject to a mandatory postrelease term. Therefore, the decision in *Sarkozy* does not apply.

{¶ 28} Instead, the facts in *State v. Cockrell*, 8th Dist. Cuyahoga No. 104207, 2017-Ohio-1358, are more analogous to Mason’s case. After pleading guilty to

aggravated robbery and burglary, the appellant in *Cockrell* was sentenced to four years' imprisonment, and was subject to a mandatory five-year postrelease control term, but the trial court erred and imposed a three-year postrelease control term. The appellant argued that his sentence was void and unenforceable. This court stated that because the appellant "completed his prison sentence from which postrelease control was ordered and his sentencing entry was not corrected prior to his release from prison, [he] can no longer be resentenced in any manner and he cannot be punished for a violation of the terms and conditions of the void postrelease control." *Id.* at ¶ 20. However, "R.C. 2929.191 states that a sentencing court can remedy its error in improperly imposing postrelease control, but any correction must occur prior to the offender being released from prison. *See also Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶ 23 (8th Dist.)." *Id.* at ¶ 18. The correction to Mason's sentence was made while he is still in prison. Thus, the sentence is not void. *See also State v. Samilton*, 8th Dist. Cuyahoga No. 92823, 2010-Ohio-439, ¶ 8 ("[T]he Ohio Supreme Court recently held that for sentences imposed after July 11, 2006, the trial court shall apply the procedures set forth in R.C. 2929.191 to correct the court's failure to properly impose postrelease control.").

{¶ 29} In a decision released May 14, 2020, the Ohio Supreme Court has clarified the standard on how to determine whether a trial court's mistake on

postrelease control sentencing is void or voidable. In *State v. Harper*, 2020-Ohio-2913, ¶ 42, the court determined that

[a] sentence is void when a sentencing court lacks jurisdiction over the subject-matter of the case or personal jurisdiction over the accused. When the sentencing court has jurisdiction to act, sentencing errors in the imposition of postrelease control render the sentence voidable, not void, and the sentence may be set aside if successfully challenged on direct appeal.

{¶ 30} In *Mason I*, Mason, on direct appeal, argued that he “was denied due process of law when the court misadvised defendant concerning postrelease control for a felony of the first degree.” *Mason I* at ¶ 11. Mason’s sentence was vacated, and in *Mason III*, the trial court held a limited resentencing hearing to properly impose postrelease control. *Mason III*, at ¶ 28. The trial court retained subject matter and personal jurisdiction and therefore Mason’s sentence was voidable. This court, in *Mason III*, correctly set aside or vacated Mason’s sentence, determining that he successfully challenged his sentence on direct appeal. The trial court, per our mandate in *Mason III*, correctly resentenced Mason to the mandatory five-year postrelease control term.

{¶ 31} In *Harper*, the court stated,

[t]oday, we realign our precedent in cases involving the imposition of postrelease control with the traditional understanding of what constitutes a void judgment. When a case is within a court’s subject-matter jurisdiction and the accused is properly before the court, any error in the exercise of that jurisdiction in imposing postrelease control renders the court’s judgment voidable, permitting the sentence to be set aside if the error has been successfully challenged on direct appeal.

Id. at ¶ 4.

{¶ 32} Mason's third assignment of error is overruled.

{¶ 33} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANITA LASTER MAYS, PRESIDING JUDGE

LARRY A. JONES, SR., J., and
EILEEN A. GALLAGHER, J., CONCUR