

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	Nos. 06AP-333
	:	(C.P.C. No. 01CR-03-1790)
	:	and 06AP-334
Gary J. Perry,	:	(C.P.C. No. 01CR-05--2966)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on December 19, 2006

Ron O'Brien, Prosecuting Attorney, *Sheryl L. Prichard* and *Seth L. Gilbert*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DESHLER, J.

{¶1} Defendant-appellant, Gary J. Perry, appeals from two judgment entries nunc pro tunc entered by the Franklin County Court of Common Pleas in two criminal cases in which appellant was a defendant and the court's prior sentencing entries failed to impose intended post-release control in addition to terms of incarceration.

{¶2} In his first case, appellant pled guilty to a single count of receiving stolen property and was sentenced to a prison term of six months. Post-release control is

discretionary for this category of offense. The court stated at sentencing that appellant would be subject to a post-release control for a period of three years, but did not include the post-release control in the sentencing entry. In the second case, appellant pled guilty to a count of robbery and was sentenced to a prison term of four years to run consecutively to the sentence in the first case. Post-release control is mandated by statute for this offense. Again, the trial court stated at sentencing that appellant would be subject to post-release control after completion of his prison term (without mentioning duration of post-release control), but the judgment entry did not reflect this.

{¶3} Appellant was apparently released from prison in May 2005. Because his sentencing entries made no mention of post-release control, he was released without such constraints. On February 24, 2006, the state filed motions in both cases to correct the prior sentencing entries nunc pro tunc to reflect the imposition of post-release control. The trial court granted the motions without a hearing and entered nunc pro tunc entries on March 8, 2006 imposing post-release control terms in both cases.

{¶4} Appellant has timely appealed and brings the following assignment of error:

THE TRIAL COURT ERRED WHEN IT ATTEMPTED TO MODIFY A FINAL JUDGMENT OF CONVICTION AND SENTENCE WITH A NUNC PRO TUNC ORDER, WITHOUT NOTICE TO THE DEFENDANT AND WITHOUT THE DEFENDANT BEING PRESENT, THAT CHANGED THE DEFENDANT'S SENTENCE AFTER THE DEFENDANT HAD ALREADY BEEN RELEASED FROM THE PRISON TERM WHICH HAD PREVIOUSLY BEEN IMPOSED.

{¶5} We focus on appellant's robbery case because it presents the stronger argument for imposition of post-release control in this matter, since sentencing statutes made such terms mandatory for that offense. The question before us is whether a

defendant who has been convicted of a crime or crimes for which sentencing statutes require the imposition of post-release control, but whose sentencing entry did not reflect the required post-release control, may be resentenced by the trial court and post-release control imposed even after the defendant has served his originally-imposed term of incarceration and has been released from the Department of Rehabilitation and Correction.

{¶6} Appellant raises various statutory and constitutional arguments opposing resentencing, including alleged violation of the double jeopardy and due process guarantees under the United States Constitution. Because we find that the case can be decided solely on statutory grounds, we do not reach the constitutional arguments. *In re Boggs* (1990), 50 Ohio St.3d 217, 221.

{¶7} The state emphasizes on appeal that the original sentencing entry in the robbery case did not comply with statutory requirements imposing post-release control as mandatory for the offenses for which appellant was convicted. In the receiving stolen property case, the state asserts that the trial court expressed the intent to impose post-release control, but omitted the intended term from the sentencing entry through a clerical error or oversight which can be properly remedied by a nunc pro tunc entry reflecting the true intent of the trial court.

{¶8} Because the original sentencing entry in the robbery case did not comply with the law, the state argues, it was void ab initio. The logical corollary suggested by the state is that, since a trial court retains authority to correct void sentences, *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, the trial court was properly complying with the statutory

sentencing requirements when it resentenced appellant to reflect the mandatory three-year post-release control requirement in the robbery case.

{¶9} Appellant responds, inter alia, by pointing out that the balance between, on the one hand, preserving and respecting the finality of judgments, and on the other hand, allowing correction of unlawful judgments, has been decided in favor of finality when criminal defendants seek to collaterally attack an unlawful sentence. *State v. Wilson*, Franklin App. No. 05AP-939, 2006-Ohio-2750, at ¶17 (applying res judicata to bar collateral attack based upon issues fully within the record, such as a sentencing entry, and thus reviewable but not challenged on direct appeal). Because the prosecution can successfully invoke res judicata to preserve a concededly unlawful sentence that inures to the state's benefit, appellant argues that the same principle should apply to preserve an illegal judgment that inures to a defendant's benefit.

{¶10} This court has recently addressed a case precisely on all fours, as to facts and law with the one before us, and decided it on the narrowest available grounds. In keeping with that precedent, we do not enter the wider policy debate engaged in by the parties in this case. In *State v. Lanier* (Sept. 28, 2006), Franklin App. No. 06AP-589 (Memorandum Decision), the defendant was sentenced without imposition of a statutorily required term of post-release control. After the defendant served his prison sentence and was released, the state filed a motion with the trial court seeking correction of the sentencing entry. The trial court denied the motion and the state filed a motion for leave to appeal, which we denied. Confining our decision to the narrow ground of whether post-release control may be imposed after a defendant has served and been released from his prison sentence, we held as follows:

We are unpersuaded that resentencing is an appropriate remedy in the instant case, in which appellee has served his term of imprisonment and has been released from confinement. Section 2967.28(B)(2) of the Ohio Revised Code requires that each prison sentence imposed for a felony of the second degree include a three-year period of PRC. Subsection (D)(1) of that section sets forth the duties of the parole board with respect to each term of PRC imposed as part of an offender's sentence. Specifically, it provides, "[b]efore the prisoner is released from imprisonment, the parole board shall impose upon a prisoner described in division (B) of this section * * * one or more post-release control sanctions to apply during the prisoner's period of post-release control." (Emphasis added.)

We find no precedent for post-release correction of a sentence to include a mandatory term of PRC, nor do we find a provision anywhere in the Ohio Revised Code or the Ohio Administrative Code that allows the parole board to impose PRC upon an individual who has already been released from prison. Because nothing in Ohio law permits the relief that appellant seeks, and because the language of R.C. 2967.28(D)(1) effectively prohibits it, the trial court could not have granted the relief. Therefore, appellant cannot demonstrate, as required by App.R. 5(C), the probability that the trial court erred in denying appellant's motion. For this reason, the motion for leave to appeal is denied.

Id. at ¶24-25.

{¶11} In another case on comparable facts, *State v. Johnson* (Nov. 14, 2006), Franklin App. No. 06AP-588 (Memorandum Decision), we followed the reasoning in *Lanier* and further held that recently enacted Am.Sub.H.B. No. 137, effective July 11, 2006, "created no post-release remedy for the trial court's failure to include [post-release control] in an offender's sentence." Id. at ¶14. While, as in *Johnson*, the present case is not subject to H.B. No. 137, which did not become effective until after the trial court resentenced appellant, the extension of *Lanier* expressed in *Johnson* confirms our holding as consistent with the legislative intent expressed in H.B. 137.

{¶12} In accordance with the foregoing, appellant's sole assignment of error has merit and is sustained. The judgment of the Franklin County Court of Common Pleas entering nunc pro tunc sentencing entries and imposing post-release control in addition to appellant's prison terms is reversed. The matter is remanded to the court of common pleas to vacate the nunc pro tunc sentencing entries and reinstate appellant's original sentences.

Judgment reversed and cause remanded.

KLATT, P.J., and TRAVIS, J., concur.
