

[Cite as *State v. Mickens*, 2009-Ohio-2554.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	No. 08AP-743
	:	(C.P.C. No. 04CR01-528)
Plaintiff-Appellee,	:	
v.	:	No. 08AP-744
	:	(C.P.C. No. 04CR05-2952)
Montez E. Mickens,	:	No. 08AP-745
	:	(C.P.C. No. 05CR01-447)
Defendant-Appellant.	:	(REGULAR CALENDAR)
	:	

D E C I S I O N

Rendered on June 2, 2009

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant

APPEALS from the Franklin County Court of Common Pleas.

CONNOR, J.

{¶1} In these consolidated appeals, defendant-appellant, Montez E. Mickens appeals from judgments of the Franklin County Court of Common Pleas, in which the trial court, upon remand and pursuant to a conditional writ of habeas corpus issued by the federal court based upon the authority of *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, resentenced appellant to a term of incarceration. For the reasons that follow, we vacate the judgments and remand for resentencing.

{¶2} Between January 30, 2004 and January 20, 2005, appellant was indicted in three separate cases on 28 offenses. On July 14, 2005, appellant entered several pleas of guilty. In case No. 04CR-528, appellant pleaded guilty to one count of burglary, a violation of R.C. 2911.12 and a felony of the second degree. In case No. 04CR-2952, appellant pleaded guilty to ten counts of burglary, all violations of R.C. 2911.12 and all felonies of the third degree. In case No. 05CR-447, appellant pleaded guilty to one count of aggravated robbery, a violation of R.C. 2911.01 and a felony of the first degree, with a one-year firearm specification.

{¶3} On September 13, 2005, the court imposed an aggregate sentence of 18 years. Specifically, appellant was sentenced to serve one year for each of the ten burglaries in case No. 04CR-2952, with the counts running consecutively to each other, three years for the burglary in case No. 04CR-528, and five years for the aggravated robbery and gun specification in case No. 05CR-447. The sentences in all three cases were imposed consecutively. The three-year sentence for the burglary in case No. 04CR-528, as well as the five-year sentence for the aggravated robbery and the gun specification in case No. 05CR-447 were non-minimum sentences. At the sentencing hearing, appellant signed written notices of post-release control sanctions in each of the three cases. The three sentencing entries also contained notices of post-release control.

{¶4} Appellant did not timely appeal this sentence. However, on August 14, 2006, he filed a motion for leave to file a delayed appeal, which this court denied. *State v. Mickens* (Oct. 17, 2006), 10th Dist. No. 06AP-822 (memorandum decision). Appellant then appealed to the Ohio Supreme Court, which denied leave to appeal. *State v.*

Mickens, 112 Ohio St.3d 1493, 2007-Ohio-724. Next, appellant sought relief in federal court by filing a habeas corpus petition.

{¶5} The habeas petition set forth four grounds for relief. Appellant claimed this court's denial of his motion for leave to file a delayed appeal was a denial of due process; that his non-minimum and consecutive prison terms were void under *Blakely* and *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348; that he received ineffective assistance of counsel when his trial counsel failed to raise a *Blakely* challenge to his non-minimum and consecutive prison terms; and that application of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, to his case would violate double jeopardy and ex post facto principles.

{¶6} The federal district court granted relief as to the claim that the trial court's imposition of non-minimum, consecutive prison terms violated *Blakely*. The federal district court vacated appellant's sentence and remanded the cases for resentencing.

{¶7} On July 30, 2008, appellant was resentenced by the trial court. The court reimposed nearly the same sentence, except that it reimposed an aggregate sentence of 17 years, rather than the original 18-year sentence. Specifically, the trial court reimposed the same prison terms for all 11 burglary convictions. However, the court reduced appellant's prison term for the aggravated robbery with gun specification by one year, thereby imposing a four-year (rather than a five-year) sentence and making that sentence a minimum sentence. Again, the trial court required all of the prison terms to run consecutively.

{¶8} The trial court filed its amended judgment entries on August 1, 2008. The entries reflect that appellant was notified of post-release control sanctions both orally and

in writing. However, the record of the hearing does not reflect that appellant was orally notified of post-release control sanctions during the sentencing hearing.

{¶9} On appeal, appellant asserts the following five assignments of error for this court's review:

FIRST ASSIGNMENT OF ERROR: AT THE RESENTENCING HEARING, AS TO CASE NO. 04CR-01-528, IMPOSITION OF GREATER THAN THE TWO-YEAR MINIMUM TERM FOR AN INDIVIDUAL WHO HAD NOT PREVIOUSLY SERVED TIME IN PRISON VIOLATED THE SIXTH AMENDMENT AND DUE PROCESS GUARANTEES OF THE FEDERAL CONSTITUTION AND THE EQUIVALENT GUARANTEES UNDER THE OHIO CONSTITUTION.

SECOND ASSIGNMENT OF ERROR: AS TO ALL THREE INDICTMENTS, THE IMPOSITION OF CONSECUTIVE SENTENCES VIOLATED THE SIXTH AMENDMENT AND DUE PROCESS GUARANTEES OF THE FEDERAL CONSTITUTION AND THE EQUIVALENT GUARANTEES UNDER THE OHIO CONSTITUTION.

THIRD ASSIGNMENT OF ERROR: AT THE RESENTENCING HEARING THE TRIAL COURT ERRED BY IMPOSING VERSIONS OF THE SENTENCING STATUTES AS EXCISED PURSUANT TO THE SYLLABUS OF STATE V. FOSTER (2006), 109 OHIO ST.3D 1, 2006-OHIO-856 AS FOSTER IMPROPERLY APPLIED OHIO PRECEDENT WITH REGARD TO EXCISION.

FOURTH ASSIGNMENT OF ERROR: APPELLANT[']S SENTENCE IS VOID BECAUSE THE COURT MADE NO MENTION OF POSTRELEASE CONTROL DURING THE SENTENCING HEARING.

FIFTH ASSIGNMENT OF ERROR: APPLYING STATE V. COLON, 118 OHIO ST.3D 26, 2008-OHIO-1624, THE INDICTMENTS WERE DEFECTIVE AS THEY FAILED TO ALLEGE THE MENS REA ELEMENT FOR EACH OF THE OFFENSES FOR WHICH APPELLANT WAS CONVICTED.

{¶10} As appellant's first and second assignments of error are interrelated, the court shall address them jointly. Together they challenge the imposition of non-minimum, consecutive sentences upon an individual who had not previously served a prison term, arguing that the sentences violate the Sixth Amendment, as well as the due process guarantees under the Ohio and Federal constitutions. Appellant further asserts that the retroactive application of *Foster*, which excised portions of Ohio's sentencing statutes, violates ex post facto principles because it imposes upon him a greater punishment than would the sentencing statutes that were in effect at the time he committed his offenses. Appellant argues that, prior to *Foster*, he and other criminal defendants had a vested expectation of presumptive minimum and concurrent sentences unless the statutory findings were made. Appellant contends the application of *Foster* to offenses committed prior to *Foster* divests those defendants of that presumption, in violation of due process. Therefore, appellant submits he is entitled to minimum, concurrent sentences for his convictions.

{¶11} Appellee, argues that this court has repeatedly found that the retroactive application of *Foster* to cases not yet final does not violate either due process or the principles against ex post facto laws.

{¶12} In *Foster*, the Ohio Supreme Court determined that portions of Ohio's sentencing statutes had been "eviscerated" by recent decisions rendered by the United States Supreme Court. *Id.* at ¶49. The *Foster* court based this conclusion upon the decisions in *Apprendi* and *Blakely*.

{¶13} *Apprendi* involved a New Jersey hate crime statute that permitted a 20-year sentence, rather than the usual ten-year maximum, if the judge determined the crime was

committed " 'with a purpose to intimidate * * * because of race, color, gender, handicap, religion, sexual orientation or ethnicity.' " *Id.* at 468-69, 120 S.Ct. at 2351. The United States Supreme Court found that *Apprendi's* sentence violated his Sixth Amendment jury rights because it exceeded the statutory maximum sentence and was based upon judicial fact-finding. The *Apprendi* court ruled that the jury, rather than the judge, must find all of the facts essential to punishment. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. at 2362-63.

{¶14} In *Blakely*, the defendant was sentenced to approximately three years more than the statutory maximum of the standard sentencing range because the judge determined Blakely had acted with "deliberate cruelty." *Blakely* at 298, 124 S.Ct. at 2534. The facts supporting that finding were neither admitted by the defendant nor found by a jury. Thus, the judge could not have imposed the "exceptional" sentence based solely upon the facts admitted in the guilty plea. *Id.* at 304, 124 S.Ct. at 2537. The United States Supreme Court extended the rule in *Apprendi* and defined the "statutory maximum" set forth under *Apprendi* to be "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303, 124 S.Ct. at 2537. "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Id.* at 303, 124 S.Ct. at 2537. The court determined Blakely's sentence violated his Sixth Amendment jury trial rights because a jury did not find the facts that authorized the "exceptional" sentence.

{¶15} In *Foster*, the Ohio Supreme Court held, inter alia, that R.C. 2929.14(E)(4) and 2929.41(A), which required the court, rather than a jury, to make certain findings prior to imposing consecutive sentences, was unconstitutional. *Foster* at ¶83. The court in *Foster* also held that, those sections which created presumptive minimum or concurrent terms or required judicial fact-finding in order to overcome that presumption, which included R.C. 2929.14(B), 2919.19(B)(2), and 2929.41, were also unconstitutional. *Foster* at ¶97. In order to remedy this, the Ohio Supreme Court severed the offending sections from Ohio's statutory sentencing scheme by applying a severance remedy similar to that adopted in *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738.

{¶16} After severance, the Ohio Supreme Court held in *Foster* that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster*, paragraph seven of the syllabus.

{¶17} This court has addressed the issues raised in these first two assignments of error on several occasions. In *State v. Alexander*, 10th Dist. No. 06AP-501, 2006-Ohio-1298, citing *Sant v. Hines Interests Ltd. Partnership*, 10th Dist. No. 05AP-586, 2005-Ohio-6640, we determined "[w]e are bound to apply *Foster* as it was written." *Alexander* at ¶7. Based upon *Foster*, once the mandatory judicial fact-finding was properly eliminated from the sentencing statutes, "there is nothing to suggest a 'presumptive term.'" *Foster* at ¶96. Therefore, in *Alexander*, we determined that, "at the time that appellant committed his crimes the law did not afford him an irrebuttable presumption of minimum and concurrent sentences." *Id.* at ¶8.

{¶18} In *State v. Gibson*, 10th Dist. No. 06AP-509, 2006-Ohio-6899, this court found that, because the defendant knew of the statutory range of punishment at the time he committed his offenses, and because that statutory range had not changed, the retroactive application of *Foster* did not violate ex post facto principles or a defendant's right to due process. *Gibson* at ¶18. In addition, we determined that *Foster* neither judicially increased the sentencing range, nor retroactively applied a new statutory maximum sentence to an earlier committed crime and that the holding of *Foster* was not unexpected. *Gibson* at ¶18.

{¶19} In *State v. Houston*, 10th Dist. No. 06AP-662, 2007-Ohio-423, we reiterated the findings in *Gibson* and also explained it was unlikely the Ohio Supreme Court would direct trial and appellate courts to violate the constitution. *Houston* at ¶4, citing *Gibson* at ¶15.

{¶20} Finally, in *State v. Satterwhite*, 10th Dist. No. 06AP-666, 2007-Ohio-798, citing to *Houston*, we concluded that the remedy set forth under *Foster* did not violate a defendant's right to a jury trial when he was resentenced without the court making " 'any additional factual findings not found by a jury' " and without exceeding " 'the statutory maximum based upon factual findings the jury did make.' " *Satterwhite* at ¶18, quoting *Houston* at ¶5.

{¶21} Furthermore, "[a] court of appeals is bound by and must follow decisions of the Ohio Supreme Court, which are regarded as law unless and until reversed or overruled." *Sherman v. Millhon* (June 16, 1992), 10th Dist. No. 92AP-89, citing *Battig v. Forshey* (1982), 7 Ohio App.3d 72.

{¶22} Based upon this reasoning, we overrule appellant's first and second assignments of error. However, we note that a recent opinion issued by the United States Supreme Court in *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, appears to possibly call into question the necessity of the Ohio Supreme Court's actions in severing certain sections of Ohio's sentencing statutes as unconstitutional pursuant to *Apprendi* and *Blakely*.

{¶23} In *Ice*, the court recognized that many state courts were divided over whether or not the rule in *Apprendi* governed consecutive sentencing decisions. The court acknowledged that some states, like Ohio, believed that *Apprendi* was applicable, while other states, like Illinois and Maine, had found that *Apprendi* did not apply. *Ice* at 716. In resolving that question, the court looked at the historical role of juries, the historical role of judges in imposing consecutive sentences, as well as the states' interests in developing their penal systems, and determined that allowing state legislatures to determine the system for administering multiple sentences did not "implicate the core concerns that prompted [the court's] decision in *Apprendi*," with that "core concern" being an attempt by the legislature to " 'remove from the [province of the] jury' " the determination of facts warranting punishment for a specific statutory offense. *Ice* at 718, quoting *Apprendi* at 490, 120 S.Ct. 2348.

{¶24} The court went on to find that the Oregon statute at issue, which provided judges with discretion in determining whether a defendant's sentences for distinct offenses should run concurrently or consecutively, but also required judges to make certain predicate fact-findings before imposing consecutive sentences, was not unfaithful

to the goals of the Sixth Amendment and the right to a jury trial. Thus, the Oregon statute was upheld by the court. *Ice* at 719; Or. Rev. Stat. 137.123.

{¶25} In light of this clarification of the applicability of the rule of *Apprendi*, it may now be necessary to take another look at some of Ohio's current sentencing statutes, as well as some of those which immediately preceded the decision in *Foster*. However, such a look could only be taken by the Ohio Supreme Court, as we are bound to follow the law and decisions of the Ohio Supreme Court, unless or until they are reversed or overruled. Therefore, appellant's first and second assignments of error are overruled.

{¶26} In his third assignment of error, appellant argues the trial court erred by applying the revised sentencing statutes as established under *Foster* because the Ohio Supreme Court misapplied Ohio precedent on severance when it excised the offending subsections of the statutes and drastically rewrote S.B. No. 2, thereby eliminating accountability in sentencing.

{¶27} Appellant argues the power to establish crimes and penalties rests with the Ohio General Assembly. As a result, appellant asserts reviewing courts must give effect to the intent of the legislature in construing its legislation. Here, by severing portions of the sentencing statutes, appellant argues the Ohio Supreme Court violated the three-part severance test set forth in *Geiger v. Geiger* (1927), 117 Ohio St. 451. Because the severance doctrine requires a reviewing court to leave intact any portion of a statute that is not in conflict with the constitution and to retain legislative intent whenever possible, appellant argues the striking of the sentencing factors allows courts to sentence as if the legislature had never imposed a system of accountability in sentencing, which is inconsistent with legislative intent.

{¶28} The state of Ohio does not directly address this assignment of error, other than to argue that the rule of lenity is not applicable here because there is no ambiguity in the sentencing statutes. The state of Ohio submits that, pursuant to *State v. Henderson*, 10th Dist. No. 06AP-645, 2007-Ohio-382, ¶10, "*Foster* clearly and unambiguously severed the unconstitutional portions of the pertinent sentencing statutes."

{¶29} In considering a remedy to the *Blakely* problem in *Foster*, the Ohio Supreme Court looked at three options: requiring sentencing juries; reducing sentences to minimum terms until the legislature could act; and severing the offending statutory sections. The court chose the severance option.

{¶30} The *Foster* court determined that the overriding goals of Ohio's sentencing statutes, pursuant to R.C. 2929.11, are to protect the public and to punish the offenders. *Foster* at ¶87. The court then looked to *Booker* for guidance. The court also examined R.C. 1.50 and the severance test announced under *Geiger*.

{¶31} The three questions to be examined in order to determine if severance is appropriate under *Geiger* are: " '(1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?' "*Geiger* at 466, quoting *State v. Bickford* (1993), 28 N.D. 36, syllabus.

{¶32} The Ohio Supreme Court found that excising the unconstitutional provisions of the sentencing statutes did not diminish the overriding objectives of the legislature,

which included the goals of protecting the public and punishing the offender. Severance also preserved the "truth in sentencing" element. In addition, the court determined that without adding any language, "the vast majority of S.B.2, which is capable of being read and of standing alone, is left in place." *Foster* at ¶98. While the court observed that, by giving sentencing judges full discretion, it could arguably impair the goals of S.B. No. 2, it was, nevertheless, constrained by the principles of the separation of powers and could not rewrite the statutes. *Foster* at ¶100.

{¶33} We too are constrained. We are bound to follow the law in *Foster* as it was written and must also follow the law and decisions of the Ohio Supreme Court, unless or until they are overturned or reversed. Because this court cannot overrule or modify *Foster*, we decline to consider appellant's challenge. Accordingly, appellant's third assignment of error is overruled.

{¶34} In his fourth assignment of error, appellant argues his sentence is void because the trial court failed to advise him of post-release control sanctions during the resentencing hearing. Appellant argues that, pursuant to *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, and *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, notification of post-release control requires both notification at the hearing as well as incorporation of the post-release control sanctions in the sentencing journal entry. Although the resentencing entry reflects that appellant was notified of post-release control both orally and in writing, the transcript of the resentencing hearing does not reflect notification at the hearing. Therefore, appellant argues his sentence is void and he is entitled to a new resentencing hearing.

{¶35} The state of Ohio makes the following arguments against this: (1) *Jordan* and *Bezak* do not apply here because appellant's case involves a resentencing proceeding to correct a *Blakely/Foster* error, while *Jordan* and *Bezak* involved direct appeals from original sentences involving postrelease control errors; (2) appellant waived any objection to post-release control by failing to challenge the error at the original sentencing or at any of the prior proceedings or during the resentencing proceedings; (3) the trial court's authority at the resentencing was limited to correcting its prior imposition of non-minimum and consecutive prison terms based upon erroneous fact-finding. Therefore, the trial court was without authority to extend or vary the federal district's remand order and thus acted properly by not orally revisiting other aspects of appellant's sentence; (4) this act does not constitute plain error; (5) the trial court complied with the purpose of the statute, which is to provide appellant with notice of the imposition of post-release control; and (6) *res judicata* and the law of the case support affirmation of the trial court's resentencing.

{¶36} In *Jordan*, paragraph one of the syllabus, the Ohio Supreme Court determined that "[w]hen sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about post-release control and is further required to incorporate that notice into its journal entry imposing sentence."

{¶37} In paragraph two of the syllabus, the *Jordan* court went on to state that "[w]hen a trial court fails to notify an offender about post-release control at the sentencing hearing but incorporates that notice into its journal entry imposing sentence, it fails to comply with the mandatory provisions of R.C. 2929.19(B)(3)(c) and (d), and, therefore,

the sentence must be vacated and the matter remanded to the trial court for resentencing."

{¶38} In *Jordan*, the court further found that R.C. 2929.19(B)(3) "expressly prescribes what a trial court must do 'at the sentencing hearing' after it has decided to impose a prison term." *Jordan* at ¶17.

{¶39} R.C. 2929.19(B)(3)(c) and (d) provide as follows:

(3) Subject to division (B)(4) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

(c) Notify 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 first degree or second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person. If a court imposes a sentence including a prison term of a type described in division (B)(3)(c) of this section on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(3)(c) of this section that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under division (B) of section 2967.28 of the Revised Code.

(d) Notify the offender that the offender may 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 third, fourth, or fifth degree that is not subject to division (B)(3)(c) of this section.

{¶40} Additionally, R.C. 2929.19(A) requires the trial court to hold a sentencing hearing before imposing sentence on an offender who was convicted of or pleaded guilty

to a felony and also before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded pursuant to R.C. 2953.07 or 2953.08.

{¶41} R.C. 2929.19(B)(3)(c) and (d) set forth a statutory requirement handed down by the legislature, which mandates that offenders are notified of post-release control sanctions by the trial court both at the hearing and in writing via the journal entry imposing sentence. Here, based upon the crimes for which appellant was convicted, he is subject to a maximum period of five years of mandatory post-release control following his release from prison. This court has previously found " '[a]ny attempt by a trial court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void.' " *State v. Ramey*, 10th Dist. No. 06AP-245, 2006-Ohio-6429, ¶8, quoting *State v. Beasley* (1984), 14 Ohio St.3d 74, 75.

{¶42} In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶15, quoting *Jordan* at ¶26, the Ohio Supreme Court reiterated that the trial " 'court's duty to include a notice to the offender about postrelease control at the sentencing hearing is the same as any other statutorily mandated term of a sentence.' "

{¶43} Therefore, the sentence is void if all of the mandated, statutory requirements are not met.

{¶44} The state of Ohio argues appellant cannot challenge the alleged error regarding notification of post-release control because appellant failed to raise any objection at the original sentencing hearing or at any of the prior proceedings or during the resentencing proceedings. We disagree.

{¶45} First, there is no evidence in the record before this court which would demonstrate that appellant was not orally advised of post-release control sanctions at the

original sentencing hearings. The first journal entries imposing sentence reflect that appellant was advised both orally and in writing of the applicable periods of post-release control. The record also reflects that appellant signed the "Prison Imposed" form for all three cases, which indicated that he had been advised of the imposition of post-release control. However, with respect to the original sentencing hearing, we have not been provided with a transcript of the actual hearing in order to know whether or not that oral notification did in fact take place. Because there is nothing to refute that it did not take place, and because the journal entries indicate that oral advisement occurred, we presume it did. Presuming it did, appellant would not be required to object, but even if it did not, without that oral notification by the trial court during the hearing, the trial court would have failed to comply with the mandated statutory requirements, the sentence would be void, and appellant would be entitled to a new sentencing hearing. See *Bezak* syllabus. See also *State v. Downing*, 10th Dist. No. 08AP-48, 2008-Ohio-4463. Furthermore, a void judgment has no legal effect and any party whose rights are affected can challenge the judgment at any time, at any place. *State v. Holloman*, 10th Dist. No. 07AP-875, 2008-Ohio-2650, ¶9, citing *State v. Hairston*, 10th Dist. No. 07AP-160, 2007-Ohio-5928.

{¶46} Second, with respect to providing notification at the resentencing hearing, we find that the trial court was required to advise (or re-advise) appellant of the imposition of post-release control sanctions. In *State v. Smith*, 9th Dist. No. C.A. 06CA0070-M, 2007-Ohio-2841, the Ninth Appellate District rejected the state of Ohio's argument that the defendant had waived his right to appeal the issue of notification of post-release control sanctions because he did not object at the sentencing hearing. The Ninth District

found the state's argument to be without merit because "the very issue Defendant is appealing is that the term of post-release control was not discussed from the bench at the resentencing hearing. Defendant could not have objected to something that was never imposed." *Smith* at ¶16.

{¶47} The circumstances in *Smith* are similar to many of the circumstances in the instant case. In *Smith*, the defendant was convicted and sentenced in April 2004. At that time, he was notified of the five-year mandatory term of post-release control. He appealed his convictions, which were affirmed by the appellate court in March 2005, but reversed by the Ohio Supreme Court in May 2006. The Ohio Supreme Court reversed and remanded for resentencing consistent with its decision in *Foster*. In July 2006, Smith was resentenced to the same terms as the original sentence, but he was not notified of mandatory post-release control during the hearing. However, the sentencing entry indicated that Smith had been notified of post-release control. Smith appealed the lack of oral notification.

{¶48} The Ninth District found that, when applying *Foster*, Smith's previous sentence "must be treated as if it never existed." *Smith* at ¶19. Therefore, the *Smith* court determined, as a result, the only viable sentence imposed upon the defendant was the July 2006 sentence. Because the trial court was required to comply with R.C. 2929.19, it was required to give the statutorily mandated notification regarding post-release control at that resentencing hearing. Thus, the court vacated the sentence and remanded for re-sentencing a second time.

{¶49} In the case before us, appellant was resentenced by the trial court as a result of the federal district court granting relief as to the claim that the imposition of non-

minimum, consecutive prison terms violated *Blakely*. We note that *Foster*, which was at issue in *Smith* is, in large part, based upon the decision issued in *Blakely*. Here, the federal district court vacated appellant's sentence and remanded the cases for resentencing pursuant to *Blakely*. We find that the federal district court's act of vacating the sentence means the original sentence must be "treated as if it never existed." *Smith* at ¶19. See also Black's Law Dictionary (7th ed.1999) (vacate means "[t]o nullify or cancel; make void; invalidate").

{¶50} Finally, we point out that R.C. 2929.19(A) requires the trial court to hold a sentencing hearing before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded pursuant to R.C. 2953.07 or 2953.08. While the case before us involves a remand from a federal district court, rather than an intermediary appellate court or the Ohio Supreme Court, we find that the same reasoning behind the notification is applicable here.

{¶51} Thus, based upon the analysis set forth above, we find the trial court was required to notify appellant of post-release control sanctions at the resentencing hearing.

{¶52} Therefore, appellant's fourth assignment of error is sustained. Accordingly, this court vacates appellant's sentence and remands for resentencing, due to the trial court's failure to give the requisite post-release control notification. Appellant must be resentenced and the trial court must include notification of post-release control sanctions in handing down its sentence, both orally and in writing.

{¶53} In his fifth assignment of error, appellant argues his indictments were defective pursuant to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"), because they failed to allege the mental element in each of the offenses for which he was

convicted. Appellant asserts that the omission of the recklessness element from his aggravated robbery conviction, as well as the omission of recklessness from the trespass element of the burglary indictments, renders the indictments defective.

{¶54} The state of Ohio argues all of the indictments allege the requisite mental elements and that appellant waived his right to raise this issue by pleading guilty to the charges. In addition, the state of Ohio submits appellant is barred from bringing this claim because, although this action is a timely appeal from his resentencing, it is not a timely first appeal as of right from his conviction. Therefore, the state of Ohio argues this claim is barred by *res judicata*, the law of the case, and the principles of waiver and forfeiture.

{¶55} The mental state of the offender is part of every criminal offense except those that plainly impose strict liability. *Colon I* at ¶11, citing *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, ¶18. Under R.C. 2901.21(B):

When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

{¶56} Thus, recklessness is the "catchall" mens rea for offenses that do not provide the required mental state in the statute. There is an exception for strict liability statutes where the mental state of the offender is irrelevant, but the statute must plainly indicate a purpose to impose strict liability. *Colon I* at ¶13, citing *Lozier* at ¶21.

{¶57} In *Colon I* at ¶15, the Ohio Supreme Court held that a defendant's indictment on a robbery charge pursuant to R.C. 2911.02(A)(2) was defective because it

failed to include the mental element of recklessness, meaning it failed to charge that the physical harm was "recklessly" inflicted. As a result, the Ohio Supreme Court found that the defect in the indictment constituted a structural error. *Id.* at ¶19.

{¶58} Subsequently, the Ohio Supreme Court clarified its decision in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*"), finding that the rule announced in *Colon I* is prospective in nature and applies only to those cases pending on the date *Colon I* was announced. *Colon II* at ¶5. The court went on to find that the facts in *Colon I* were "unique" and that the application of a structural-error analysis to a defective indictment is appropriate only in rare cases, such as *Colon I*, where multiple errors at the trial followed the defective indictment. Therefore, the court determined that in most defective indictment cases, the court may analyze the error pursuant to a Crim.R. 52(B) plain-error analysis. *Colon II* at ¶6-8.

{¶59} We note that several appellate courts in Ohio have determined *Colon I* is not applicable to cases where the defendant has entered a plea of guilty rather than proceeding to trial. In *State v. Straughter*, 10th Dist. No. 08AP-777, 2009-Ohio-641, and in *State v. Mills*, 10th Dist. No. 08AP-687, 2008-Ohio-6609, we cited to *State v. Smith*, 6th Dist. No. L-07-1346, 2009-Ohio-48, where the court determined that the defendant's entry of a guilty plea instead of proceeding to trial distinguished it from *Colon I* because *Colon I* was based largely upon the multiple errors that occurred during trial. *Id.* at ¶10. See also *State v. McGinnis*, 3d Dist. No. 15-08-07, 2008-Ohio-5825, ¶26 ("we find that McGinnis has waived any alleged errors in the indictment by pleading guilty to the offenses. * * * the defendant in *Colon* did not plead guilty like McGinnis, herein. 'The plea of guilty is a complete admission of the defendant's guilt.' "); *State v. Gant*, 3d Dist. No. 1-08-22,

2008-Ohio-5406, ¶13 ("Gant has waived any alleged errors in the indictment by pleading guilty to the offenses").

{¶60} However, assuming *arguendo* that the holding in *Colon I* is applicable to circumstances where a defendant has entered a guilty plea and that appellant is not barred from bringing this claim because his case had not yet concluded when *Colon I* was issued, due to the federal habeas action, we find appellant's convictions are not affected by *Colon I*.

{¶61} With respect to the aggravated robbery indictment, appellant pleaded guilty to one count of aggravated robbery with a firearm specification as indicted pursuant to R.C. 2911.01(A)(1). The relevant portion of the statute reads as follows:

No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following: (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it[.]

{¶62} In *State v. Wharf*, 86 Ohio St.3d 375, 1999-Ohio-112, the Ohio Supreme Court determined that the deadly weapon element of R.C. 2911.02(A)(1) ("[h]ave a deadly weapon on or about the offender's person or under the offender's control") did not require a mens rea of recklessness. Thus, the *Wharf* court found it was not necessary to prove a specific mental state with respect to the deadly weapon element of robbery.

{¶63} Furthermore, this court has previously held that *Colon I* is not applicable to a conviction for aggravated robbery under R.C. 2911.01(A)(1). In *State v. Ferguson*, 10th Dist. No. 07AP-640, 2008-Ohio-3827, we held that the holding in *Colon I* is inapplicable to appellant's conviction for aggravated robbery under R.C. 2911.01(A)(1). See also *Mills* at

¶13 (a violation of R.C. 2911.01(A)(1) requires no intent beyond that required for the theft element of the offense); *State v. Robertson*, 10th Dist. No. 08AP-15, 2008-Ohio-6909, ¶14 (aggravated robbery under R.C. 2911.01(A)(1) is a strict liability offense, and thus *Colon I* does not apply because the indictment is not required to set forth a culpable mental state for the offense); *State v. Chester*, 10th Dist. No. 08AP-1, 2008-Ohio-6679, ¶42 (defendant's aggravated robbery conviction under R.C. 2911.01(A)(1) and/or (A)(3) is unaffected by the holding in *Colon I*); *Straughter* at ¶9 ("*Colon I* is not applicable to a conviction for aggravated robbery under R.C. 2911.01(A)(1).") Therefore, we find appellant's indictment is not defective as to the aggravated robbery count.

{¶64} With respect to the burglary indictments, we find that *Colon I* is inapplicable here as well.

{¶65} Appellant pleaded guilty to one count of burglary as a felony of the second degree and as indicted pursuant to R.C. 2911.12(A)(2). The relevant portion of the statute reads as follows:

No person, by force, stealth, or deception, shall * * * [t]respas in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense[.]

{¶66} Appellant also pleaded guilty to ten counts of burglary as felonies of the third degree. The applicable portion of the statute reads as follows:

No person, by force, stealth, or deception, shall * * * [t]respas in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or

separately occupied portion of the structure any criminal offense[.]

R.C. 2911.12 (A)(3).

{¶67} In *Mills*, supra, at ¶14, citing to *State v. Davis*, 8th Dist. No. 90050, 2008-Ohio-3453, ¶21, we found *Colon I* was inapplicable to an indictment charging the defendant with aggravated burglary ("burglary statutes are not controlled by R.C. 2901.21 because they contain a mental state - namely purposefully. Furthermore, the mental state required by trespassing - namely, knowingly - is incorporated by reference into the burglary statutes."). See also *State v. Day*, 2d Dist. No. 07-CA-139, 2009-Ohio-56, ¶23 (because the burglary statute includes two mental states, "knowingly" as incorporated in the predicate offense of trespass, and "purposefully" as written in the statute, the *Colon* holding does not apply to burglary and aggravated burglary).

{¶68} In addition, the Ohio Supreme Court has determined that trespass is an element of aggravated burglary. See *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, ¶14. Therefore, trespass is also an element of the lesser included offense of burglary. *State v. Moore*, 10th Dist. No. 07AP-914, 2008-Ohio-4546, ¶54.

{¶69} The Ohio Supreme Court has recognized that the elements of a predicate offense do not need to be stated in the indictment for a compound offense. See *State v. Buehner*, 110 Ohio St.3d 4003, 2006-Ohio-4707, ¶11 ("an indictment that tracks the language of the charged offense and identifies a predicate offense by reference to the statute number need not also include each element of the predicate offense in the indictment"). See also *Moore* at ¶55, citing *Buehner* ("an indictment that tracks the language of the statute setting forth the charged offense does not have to separately set

forth the elements of a predicate offense"). Trespass is a predicate offense of burglary, so therefore it is unnecessary to separately set forth all of the elements of trespass within the burglary indictments.

{¶70} Furthermore, in *Moore* at ¶56, we held that because the indictment for burglary properly tracked the statutory language of R.C. 2911.12 in setting forth the charged offense, including the identification of trespassing as a predicate offense, and because there is nothing in the *Colon* decisions indicating any attempt to overrule *Buehner*, *Moore's* indictment was not defective and it was not necessary to consider whether the *Colon* structural error analysis was applicable. That same reasoning is applicable here as well. Therefore, appellant's fifth assignment of error is overruled.

{¶71} Accordingly, appellant's first, second, third, and fifth assignments of error are overruled, appellant's fourth assignment of error is sustained, the judgments of the Franklin County Court of Common Pleas are vacated, and these matters are remanded to that court for resentencing, consistent with this decision.

Judgments vacated; causes remanded.

BRYANT and BROWN, JJ., concur.
