

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-1183 (C.P.C. No. 04CR-6230)
Vernon Spence,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 26, 2011

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*, for
appellee.

Vernon Spence, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Vernon Spence, appeals from a judgment of the Franklin County Court of Common Pleas denying his motion for a de novo sentencing hearing and his motion to dismiss. Because the trial court (1) erred in failing to properly impose post-release control on defendant's convictions for first-degree felonies, but (2) did not err in denying defendant's motion to dismiss, we affirm in part and reverse in part.

I. Facts and Procedural History

{¶2} On September 27, 2004, the Franklin County Grand Jury indicted defendant on six counts of aggravated murder in violation of R.C. 2903.01(A) with death penalty specifications, one count of aggravated burglary in violation of R.C. 2911.11(A), one count of aggravated robbery in violation of R.C. 2911.01(A), and three counts of kidnapping in violation of R.C. 2905.01(A)(2), all with firearm specifications. The charges stemmed from the 2003 shooting deaths of Kayla Hurst, Aaron Grexa, and Eric Hlass in an apartment near the Ohio State University campus. Following a jury's verdict finding defendant guilty of all charges, the trial court conducted a separate penalty phase that culminated in the jury's recommending a sentence of life in prison without the possibility of parole.

{¶3} At a July 26, 2005 sentencing hearing, the trial court merged Counts One and Two, Counts Three and Four, and Counts Five and Six, all charging defendant with aggravated murder. The trial court accepted the jury's recommendation and sentenced defendant to three consecutive sentences of life in prison without parole for each of the three aggravated murder charges. The trial court further sentenced defendant to ten years each for his aggravated burglary, aggravated robbery, and kidnapping convictions, plus three years for the specifications, all to be served consecutively. The trial court did not mention post-release control at the sentencing hearing; nor did the trial court include post-release control in its July 28, 2005 judgment entry journalizing defendant's convictions and sentence. Defendant appealed, and this court affirmed his convictions. *State v. Spence*, 10th Dist. No. 05AP-891, 2006-Ohio-6257.

{¶4} On October 8, 2010, defendant filed in the trial court a motion for de novo sentencing, arguing his sentence was void because the trial court failed to impose post-release control on his non-capital convictions. One week later, on October 15, 2010, defendant filed a motion to dismiss for failure to prosecute, premised on what defendant characterized as the state's unreasonable delay in imposing a valid sentence and final appealable order. The trial court denied both of defendant's motions in an entry filed December 7, 2010, concluding that because defendant received three consecutive sentences of life without parole for the three aggravated murder convictions, he was not eligible for post-release control and his sentence is not void.

II. Assignments of Error

{¶5} Defendant timely appeals, assigning the following errors:

FIRST ASSIGNMENT OF ERROR

WHERE A SENTENCE IS VOID AS A MATTER OF LAW BECAUSE IT DOES NOT CONTAIN A STATUTORILY MANDATED PROPERLY IMPOSED TERM OF POST RELEASE CONTROL, A TRIAL COURT ABUSES IT'S DISCRETION WHEN DENYING A DEFENDANT'S GOOD FAITH MOTION FOR RESENTENCING PURSUANT TO THE PROVISIONS OF STATE V BEZAK, 114 Ohio St 3d 96, and STATE V SINGLETON, 920 N.E. 2d 958.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED IT'S DISCRETION WHEN IT DENIED THE APPELLANT'S MOTION TO DISMISS FOR FAILURE TO PROSECUTE DUE TO AN UNREASONABLE DELAY IN IMPOSING A VALID SENTENCE AND FINAL APPEALABLE ORDER.

(Sic passim.)

III. First Assignment of Error – Motion for De Novo Sentencing

{¶6} Defendant's first assignment of error asserts the trial court erred in denying his motion for de novo sentencing. Defendant argues the trial court's failure to include a period of post-release control in his sentence renders the sentence void.

{¶7} The line of cases upon which defendant relies began when a trial court imposed a sentence less than the statutory minimum, causing the Supreme Court to hold "[a]ny attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." *State v. Beasley* (1984), 14 Ohio St.3d 74, 75. Twenty years later, the Supreme Court shifted its focus to the consequences of a trial court's failure to notify a defendant of post-release control. The court held that if a trial court failed to notify an offender about post-release control pursuant to R.C. 2929.19(B)(3), the appellate court should vacate the sentence and remand the matter to the trial court for resentencing. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph two of the syllabus.

{¶8} Following *Jordan*, the Supreme Court in *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, held that where an offender was not properly informed about the imposition of post-release control at the sentencing hearing, the "sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense." *Id.* at syllabus. See also *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶6, cert. denied, 129 S.Ct. 463 (stating that "in cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the

defendant has completed his sentence"); *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶2, 27 (explaining sentence is void if "the court fails to follow the statutory mandates to impose postrelease control").

{¶9} Recently, the Supreme Court decided *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, where it reaffirmed that if a sentence "does not include the statutorily mandated term of postrelease control," it "is void." *Id.* at paragraph one of the syllabus. The court added that such a void sentence "is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack." *Id.* The court clarified that although res judicata does not preclude review of a void sentence, "res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence." *Id.* at paragraph three of the syllabus. At the same time, the court modified *Bezak*, holding "[t]he new sentencing hearing to which an offender is entitled under *State v. Bezak* is limited to proper imposition of postrelease control." *Id.* at paragraph two of the syllabus. Thus, when a "judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, that *part* of the sentence is void and must be set aside" while the rest of the sentence remains in force. *Id.* at ¶26. (Emphasis sic.)

{¶10} Defendant does not dispute that "an individual sentenced for aggravated murder * * * is not subject to postrelease control, because that crime is an unclassified felony to which the postrelease-control statute does not apply." *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶36, citing R.C. 2967.28. Defendant nonetheless argues that because he also was convicted of aggravated burglary, aggravated robbery, and three counts of kidnapping, the trial court had a duty to impose a period of post-release control

for those offenses. See, e.g., *State v. McKinney*, 11th Dist. No. 2010-T-0011, 2010-Ohio-6445 (concluding that because defendant, convicted of two counts of aggravated murder, also was convicted of the first-degree felonies of aggravated burglary, aggravated robbery, and kidnapping, the trial court was required to impose the statutorily mandated five-year period of post-release control for those offenses); R.C. 2967.28(B)(1). Accordingly, defendant asserts he is entitled to a de novo sentencing hearing for the imposition of post-release control for his non-capital convictions.

{¶11} From a practical standpoint, defendant will never be released from prison in light of the sentence imposed for his capital convictions. Nonetheless, nothing in the plain language of R.C. 2967.28 relieves a trial court from its duty to impose post-release control as part of the defendant's sentence for the first-degree felonies of which he was found guilty at the same time. To the contrary, the Supreme Court of Ohio concluded that where an offender is serving an indefinite prison term or a life sentence in addition to a stated prison term, "the presence of an indefinite and a definite sentence does not eliminate the postrelease-control requirement." *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, ¶20. Instead, R.C. 2967.28(F) "merely provides a procedural mechanism in which either supervision on parole or postrelease control is required to satisfy both sentences." *Id.*

{¶12} The inmate in *Carnail* was convicted of rape and sentenced to an indefinite sentence of life in prison with parole eligibility after ten years. The present case is arguably distinguishable because defendant will never be eligible for release on parole. *Carnail*, however, determined that "[b]ecause R.C. 2967.28(B)(1) is phrased in broad, sweeping language," the courts "must accord it broad, sweeping application." *Id.* at ¶20.

Thus, "[a]lthough it could be implied from [R.C. 2967.28(F)] that postrelease control is unnecessary for indefinite or life sentences, there is no specific language in either this or other provisions that modifies the express language in R.C. 2967.28(B)(1) requiring postrelease control." *Id.* "That is, R.C. 2967.28(B)(1) is not expressly limited to definite sentences; instead, it applies broadly to '[e]ach sentence to a prison term for a felony of the first degree.'" *Id.*

{¶13} *Carnail* determined the legislature is the body to determine whether sound public policy supports alleviating the trial court of the duty to notify an offender of post-release control where the offender is serving an indefinite sentence in addition to a definite sentence. *Id.* at ¶30 (noting that "insofar as general policy considerations might support subjecting a defendant only to the parole provisions of R.C. Chapter 2971 without the additional application of the postrelease-control provisions of R.C. 2967.28, the General Assembly is the final arbiter of public policy"), citing *State ex rel. VanCleave v. School Emps. Retirement Sys.*, 120 Ohio St.3d 261, 2008-Ohio-5377, ¶27.

{¶14} Although defendant never will be released from prison, we cannot ignore the broad language of R.C. 2967.28 and the policy set forth in *Carnail* requiring strict statutory compliance with the post-release control statute until the legislature directs otherwise. Accordingly, consistent with the other courts of appeals in the state, we are constrained to conclude the trial court erred in failing to impose post-release control as part of defendant's sentence for his first-degree felony convictions of aggravated burglary, aggravated robbery, and kidnapping. See, e.g., *State v. Brown*, 8th Dist. No. 95086, 2011-Ohio-345, ¶8 (stating "[w]here a defendant has been convicted of both an offense that carries mandatory postrelease control and an unclassified felony to which

postrelease control is inapplicable, the trial court's duty to notify of postrelease control is not negated"), citing *State v. Taylor*, 2d Dist. No. 20944, 2006-Ohio-843; *State v. Seals*, 2d Dist. No. 2009 CA 4, 2010-Ohio-2843; *McKinney*. Thus, under *Fischer*, defendant's sentences remain, but he is entitled to a new sentencing hearing for the limited purpose of imposing post-release control for his non-capital convictions. *Fischer* at ¶29.

{¶15} Defendant's first assignment of error is sustained to the extent indicated.

IV. Second Assignment of Error – Motion to Dismiss

{¶16} Defendant's second assignment of error asserts the trial court erred in denying his motion to dismiss for failure to prosecute. Defendant argues the trial court's failure to include post-release control in his sentencing entry rendered his sentence void and resulted in an unreasonable delay in imposing a valid sentence and issuing a final appealable order.

{¶17} Defendant's argument erroneously presumes that the entire judgment against him was void as a result of the trial court's failure to impose post-release control. As the Supreme Court explained in *Fischer*, a trial court's failure to properly apply post-release control sanctions does not render a judgment "nonfinal and unappealable." *Fischer* at ¶38-39. Defendant's remedy is a new sentencing hearing for the limited purpose of imposing post-release control, not dismissal of the case.

{¶18} Defendant's second assignment of error is overruled.

V. Disposition

{¶19} The trial court erred in failing to impose post-release control related to the jury's finding him guilty of aggravated burglary, aggravated robbery, and kidnapping. The trial court's error in not applying post-release control does not render defendant's

judgment any less final, and defendant is not entitled to dismissal for failure to prosecute. Having sustained defendant's first assignment of error to the extent indicated and overruled defendant's second assignment of error, we affirm in part and reverse in part the judgment of the trial court and remand the matter for the limited purpose of conducting a hearing to impose post-release control as part of the sentence for defendant's non-capital convictions.

*Judgment affirmed in part and reversed
in part; cause remanded with instructions.*

KLATT and CONNOR, JJ., concur.
