[Cite as *State v. Williams*, 2011-Ohio-4923.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 10AP-922
v.	:	(C.P.C. No. 03CR-6358)
Vincent D. Williams,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 27, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Eric J. Allen, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Plaintiff-appellant, State of Ohio ("the state"), appeals from a judgment of the Franklin County Court of Common Pleas granting defendant-appellee, Vincent D. Williams' ("defendant"), motion to vacate void sentence and consequent order to immediately release defendant from prison. For the reasons that follow, we reverse.

{¶2} On May 31, 2001, defendant pled guilty to one count of burglary, a second-degree felony, in case No. 00CR-4322, and to one count of attempted burglary, a

fourth-degree felony, in case No. 00CR-5842.[1] Upon the parties' joint recommendation, the trial court imposed a three-year prison term in case No. 00CR-4322 to be served concurrently with a 12-month prison term in case No. 00CR-5842. The court also imposed a period of post-release control of three years.

{¶3} Prior to entering the plea of guilty in case No. 00CR-4322, defendant signed a written "Entry of Guilty Plea" form acknowledging that he would be sentenced to a "Three year[s]-Mandatory" period of post-release control. (Exhibit to state's Memorandum Contra Defendant's Motion to Vacate Void Sentence.) Defendant also signed a written "Notice (Prison Imposed)" form informing him that he "will * * * have a period of post-release control for 3 years following [his] release from prison." (Exhibit to state's Memorandum Contra.) At the plea and sentencing hearing, the trial court asked defendant if his attorney had gone over the forms with him and if it was his signature on the forms. The defendant replied "yes" to both questions. (Tr. 6.) Also at the hearing, the trial court orally informed defendant that he "may" have a period of post-release control. However, upon being reminded by the defense attorney, the trial court corrected itself and told defendant that "It is mandatory. You will have a period of post-release control of *up to* three years." (Emphasis added.) (Defendant's Motion to Vacate Void Sentence, Exhibit C, at 14.) The sentencing entry, filed June 1, 2001, stated "[a]fter imposition of sentence, the Court notified the Defendant, orally and in writing, of the applicable periods of post-release control pursuant to R.C. 2929.10(B)(3)(c), (d) and (e)," but it did not specifically

[1] The original judgment entry for case No. 00CR-5842, attached as Exhibit A to Motion of Defendant Vincent D. Williams to Vacate Void Sentence, reflects in the caption case No. 00CR-5342. However, the transcript from case No. 00CR-5842, attached as Exhibit C to Motion of Defendant Vincent D. Williams to Vacate Void Sentence, reflects in the caption case No. 00CR-5842. Because the final order in case No. 03CR-6358, under review here, refers to case No. 00CR-5842, we will do the same.

state whether defendant was subject to a mandatory period of post-release control. (Defendant's Motion to Vacate Void Sentence, Exhibit A.)

{¶4} Approximately three and one-half years later, after having completed his three-year prison term in case Nos. 00CR-4322 and 00CR-5842, yet while still subject to his post-release control, defendant was convicted of attempted burglary, a third-degree felony, and possession of criminal tools, a fifth-degree felony, in case No. 03CR-6358. On February 28, 2004, he was sentenced to a five-year prison term in case No. 03CR-6358 for the attempted burglary and a 12-month prison term for the possession of criminal tools, to run concurrently. The trial court also imposed an additional judicial sanction of 873 days for the violation of post-release control. The 873 days were to run consecutive to the five-year prison term. The sentencing entry, filed March 1, 2004, states "[t]he Court hereby imposes an additional 873 days consecutive for the post-release control violation." (Mar. 1, 2004 Judgment Entry.)

{¶5} Thereafter, defendant filed a direct appeal to this court in *State v. Williams*, 10th Dist. No. 04AP-279, 2004-Ohio-6254 ("*Williams I*"). In his fourth assignment of error, defendant argued that the trial court erred when it imposed the balance of post-release control because, when he was convicted in the prior case, he was not informed that post-release control was part of the sentence. We noted that the record of case No. 00CR-4322 was not part of the record in the appeal of case No. 03CR-6358 and, therefore, overruled the assignment of error. On October 12, 2007, defendant filed a motion to vacate void sentence, arguing that the 873 additional days in prison were a nullity because the trial court in the previous case did not properly notify him of his post-release control sanction. The trial court denied the motion, and defendant appealed the decision.

In *State v. Williams*, 10th Dist. No. 08AP-1090, 2009-Ohio-3233 ("*Williams II*"), we overruled the assignment of error and noted that defendant had not provided the trial court with the sentencing entry or transcript from case No. 00CR-4322 and, therefore, there was no evidence of error. Defendant then challenged his sentence with two original actions in the Supreme Court of Ohio. The Supreme Court dismissed both actions in *Williams v. Unknown Warden*, 114 Ohio St.3d 1474, 2007-Ohio-3699, and *Williams v. Smith*, 118 Ohio St.3d 1502, 2008-Ohio-3369.

{¶6} Finally, on March 5, 2010, defendant filed a motion to vacate void sentence in case No. 03CR-6358. At this time, defendant had already completed his sentence for his convictions in case No. 03CR-6358 but was still in prison serving the additional 873 days imposed for his violation of post-release control in case No. 00CR-4322. He attached the sentencing entry and transcript from case Nos. 00CR-4322 and 00CR-5842. The trial court granted the motion on September 1, 2010, and ordered defendant's immediate release from his post-release control sanction.

{¶7} The state now appeals the trial court's September 1, 2010 decision and order of immediate release and assigns the following errors:

> **FIRST ASSIGNMENT OF ERROR**
>
> THE TRIAL COURT ERRED BY RULING THAT THE IMPOSITION OF PRC IN 00CR-4322 AND 00CR-5842, RENDERED THE SENTENCES IN THOSE CASES "VOID."
>
> **SECOND ASSIGNMENT OF ERROR**
>
> EVEN IF THE SENTENCES IN 00CR-4322 AND 00CR-5842 WERE "VOID," THE TRIAL COURT ERRED BY VACATING THE SENTENCE IMPOSED IN 03CR-6358.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT LACKED AUTHORITY TO GRANT DEFENDANT'S "MOTION TO VACATE" AS THE "MOTION" WAS AN UNTIMELY AND SUCCESSIVE PETITION FOR POSTCONVICTION RELIEF.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY GRANTING THE PETITION OR "MOTION" AS DEFENDANT'S ARGUMENT WAS BARRED BY THE DOCTRINE OF RES JUDICATA.

FIFTH ASSIGNMENT OF ERROR

THE TRIAL COURT MISAPPLIED THE "LAW OF THE CASE" SET FORTH BY THIS COURT IN *WILLIAMS I* AND *WILLIAMS II.*

SIXTH ASSIGNMENT OF ERROR

THE TRIAL COURT LACKED AUTHORITY TO "VACATE" DEFENDANT'S SENTENCE WITHOUT REGAINING JURISDICTION FROM THIS COURT AFTER *WILLIAMS I* OR *WILLIAMS II.*

{¶8} In its first assignment of error, the state argues that the sentence in case No. 00CR-4322 was not void and, therefore, it was error to vacate the additional 873 additional prison days in case No. 03CR-6358 and error to order defendant's immediate release. Consistent with our analysis in *State v. Mays*, 10th Dist. No. 10AP-113, 2010-Ohio-4609, *State v. Chandler*, 10th Dist. No. 10AP-369, 2010-Ohio-6534, and *State v. Addison*, 10th Dist. No. 10AP-554, 2011-Ohio-2113, we agree.

{¶9} In *Mays*, *Chandler* and *Addison*, this court analyzed the facts and circumstances of each case and found that post-release control pursuant to R.C. 2967.28 was properly imposed at the original sentencing and, therefore, the original sentences were not void and/or resentencing was not necessary. Our analysis in those cases, as

here, was of course prompted by R.C. 2929.19(B)(3)(c), (d) and (e), which require the trial court "at the sentencing hearing" to:

> (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 * * * [.]
>
> (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. * * *
>
> (e) Notify the offender that, if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of this section, and if the offender violates that supervision * * *, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender. * * *

(Emphasis added.) R.C. 2929.19.

{¶10} The Supreme Court of Ohio in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, stated that "R.C. 2929.19[(B)(3)(c), (d) and (e)] mandates that a court, *when imposing sentence*, notify the offender *at the hearing* that [1] he will be supervised pursuant to R.C. 2967.28 and [2] that the parole board may impose a prison term of up to one-half of the prison term originally imposed on the offender if he violates supervision or a condition of post-release control. And the imposed post-release control sanctions are to be included in the judgment entry journalized by the court." (Emphasis added.) Id. at ¶11.

{¶11} As relevant to this case, R.C. 2967.28(B)(2) states in part: "Each sentence to a prison term for a felony of * * * the second degree * * * shall include a requirement

that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment[.] * * * [A] period of post-release control required by this division for an offender shall be of one of the following periods: * * * [f]or a felony of the second degree * * * three years[.]"

{¶12} The trial court here relied on *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, in determining that defendant's original sentence in case No. 00CR-4322 was void. The court noted that defendant Barnes, whose sentence was reversed in the *Bloomer* case, was never notified of the term of post-release control. The court concluded that, at the sentencing hearing in case No. 00CR-4322, defendant was not properly notified of his term of post-release control, even though he was notified that post-release control was mandatory. Therefore, pursuant to its view of *Bloomer*, the trial court ruled in the instant case that the sentence was void and that defendant was entitled to immediate release from his post-release control sanction.

{¶13} The court noted that, at the original sentencing hearing in case No. 00CR-4322, the trial court informed defendant regarding post-release control:

> It is mandatory. You will have a period of post-release control *up to* three years. While you are on post-release control, if you violate any conditions that the parole board imposed, several things could happen. The board could increase the length of the conditions, could increase the severity, and the most severe thing they can do is impose prison time up to one-half of the original sentence, one-half being a year-and-a-half. Of course, if the violation was a felony, you could be separately prosecuted for that.

(Emphasis added.) (Sept. 1, 2010 Decision and Entry.) The court went on to note that in the original sentencing entry of June 1, 2001, the court stated " 'After the imposition of sentence, the Court notified the Defendant, orally and in writing, of the applicable periods

of post-release control pursuant to R.C. 2929.10(B)(3)(c), (d), and (e).' " (Sept. 1, 2010 Decision and Entry.)

{¶14} We agree with the trial court that *Bloomer* requires trial courts to inform a defendant at hearing of the term or length of post-release control. In *Bloomer*, the Supreme Court of Ohio stated: "Thus, the court failed to satisfy the most basic requirement of R.C. 2929.191 and our existing precedent—that it notify the offender of the mandatory nature of the term of post-release control and the length of that mandatory term and incorporate that notification into its entry." Id. at ¶69. We disagree with the trial court, however, in its determination that defendant was not properly notified of the mandatory term. In making its determination, the trial court apparently focused on the "up to" language emphasized above. Therefore, we will carefully consider this language.

{¶15} Numerous court decisions have addressed the use of "up to" language in sentencing when a defendant was actually subject to a mandatory term of post-release control. In *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, the Supreme Court of Ohio considered the case of a prisoner who sought a writ of habeas corpus to compel his release from prison and post-release control imposed by the Adult Parole Authority ("APA"). The issue presented to the court was whether the APA had authority to impose post-release control when the trial court did not impose it in its sentence. In its discussion of the facts and procedural history, the Supreme Court noted that, prior to filing the habeas corpus petition, the prisoner was convicted and sentenced ("first sentence"), successfully appealed the judgment of conviction and specifications and, on remand, entered a plea agreement and was resentenced ("second sentence"). The prisoner's habeas corpus petition challenged the second sentence. With regard to the first

sentence, the Supreme Court commented that the trial court's oral advice to Hernandez that he was "being sent to prison and placed on post-release control by the Parole Board for a period of *up to* five years * * * was erroneous because under R.C. 2967.28(B)(1), his offense warranted a mandatory post-release control period of five years, not 'up to' five years." (Emphasis added.) Id. at ¶2. However, the Supreme Court's analysis did not turn on this issue. The Supreme Court granted the writ based on its finding that, in imposing the second sentence, the trial court did not notify Hernandez at the sentencing hearing that he would be subject to mandatory post-release control and did not incorporate post-release control into its sentencing entry. Id. at ¶16.

{¶16} Shortly thereafter, in *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, the Supreme Court of Ohio considered a similar challenge to the APA's authority to impose post-release control. In *Watkins*, several prisoners sought a writ of habeas corpus to compel their release from prison for violating the terms of post-release control. Two of the prisoners, Streeter and Maddox, complained that, when they were sentenced on felonies of the third degree, the sentencing entry read "that post-release control is (mandatory/optional) in this case *up to* a maximum of (3/5) years," and "that defendant is subject to post-release control which is (mandatory/optional) for *up to* (three/five) years," (emphasis added) id. ¶9, 11. Petitioners claimed that they were entitled to the writ because they failed to receive adequate notice of post-release control, and their sentencing entries failed to incorporate adequate notice of post-release control into their sentences. Id. at ¶27. The Supreme Court declined to grant the writ, noting that, while these entries erroneously refer to discretionary instead of mandatory post-release control, they "are sufficient to afford notice to a reasonable person that the courts were

authorizing post-release control as part of each petitioner's sentence" and that the entries contained "significantly more" information than the entries in *Hernandez* and other similar cases. Id. at ¶51. The Supreme Court held that this result was consistent with the preeminent purpose of the post-release control statute—i.e., "that offenders subject to postrelease control know at sentencing that their liberty could be constrained after serving their initial sentences." Id. at ¶52.

{¶17} More recently, the Supreme Court of Ohio considered a challenge to post-release control based on a defendant's contention that the trial court failed to properly notify him of post-release control at the hearing and failed to properly incorporate post-release control into its resentencing entry. In *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, the defendant challenged notification of post-release control (1) at the re-sentencing hearing, (2) in the resentencing entry, and (3) in the nunc pro tunc entry filed almost six months after the resentencing entry. The nunc pro tunc entry stated " '[a]s to Count(s) Two, Three, Four and Five: The Court has notified the defendant that *post-release control* is *Mandatory* in this case *up to* a maximum of *5 years*, as well as the consequences for violating conditions of post-release control imposed by the Parole Board, under Revised Code Section 2967.28.' " (Emphasis added.) Id. at ¶68. Count Two was for aggravated robbery, and Count Three was for aggravated burglary, both felonies of the first degree. Count Four was for grand theft of a motor vehicle, a fourth-degree felony, and Count Five was for burglary, a third-degree felony. Id. at ¶2. The Supreme Court found numerous errors with the imposition of post-release control at the hearing, in the resentencing entry, and in the nunc pro tunc entry, including an error which defendant did not raise. Id. at ¶77-78. However, the Supreme Court did not comment on

the "up to" language, even though Counts Two and Three subjected defendant to mandatory post-release control. The Supreme Court concluded that, "viewed cumulatively," the errors were not harmless, and the trial court failed to properly impose post-release control. Id. at ¶78-79.

{¶18} This court has also considered "up to" language in the context of imposing post-release control. In *State v. Franks*, 10th Dist. No. 04AP-362, 2005-Ohio-462, the defendant alleged that the trial court abused its discretion in not allowing defendant to withdraw her guilty pleas to two counts of felonious assault, both second-degree felonies. Defendant argued that her pleas were not knowing, as required by Crim.R. 11, because the trial court orally informed her at the hearing that she could be subject to up to three years of post-release control. In determining that the trial court had substantially complied with Crim.R. 11(C), this court considered the "totality of the circumstances" and found that the trial court did not err. Id. at ¶8, 15. The transcript of the plea hearing revealed that the defendant was informed at the hearing that she "will" be supervised by the parole board for " 'at least up to three years' after her release from prison." Id. at ¶15. We noted that, even if the "at least up to" language could in some way be construed as a misstatement of the law, the plea form correctly notified defendant she would be subject to post-release control for a mandatory three years. Id. The plea form read "[i]f the Court imposes a prison term, I understand that the following period(s) of post-release control is/are applicable: * * * F-2 Three Years Mandatory." Id. at ¶12. We also noted that, during the oral colloquy, the defendant, in response to questions by the court, informed the judge that her attorney had explained the guilty plea form to her before she signed it and that she understood its contents. Id. at ¶14.

{¶19} The *Watkins* and *Franks* cases demonstrate that, when a term of post-release control is mandatory, the use of "up to" language does not necessarily invalidate the imposition of post-release control. Although a sentencing court must comply with statutory requirements, the Supreme Court has not prescribed a "magic words" test for imposing post-release control, and we decline to do so here. This is consistent with other areas of criminal sentencing where appellate courts have held that trial courts need not recite specific magic words in imposing a sentence. See, e.g., *State v. Bingham*, 7th Dist. No. 08 MA 182, 2010-Ohio-608, ¶23 ("[T]he language of a sentencing statute is not 'talismanic,' and, therefore, a trial court need not recite the exact language of R.C. 2929.13(B)(2), as if it amounted to the 'magic words' necessary to impose a prison term on an offender."); *State v. Clark*, 10th Dist. No. 02AP-1312, 2003-Ohio-4136, ¶36 ("With respect to the maximum sentence, while not uttering the 'magic words,' it is clear from the transcript the trial court made the required finding that, in her experience, this was the worst form of the offense."). Therefore, we must consider the facts and circumstances of each case to determine whether the sentencing court properly imposed post-release control.

{¶20} In addition to evaluating the unique facts and circumstances of each case involving an alleged error in the imposition of post-release control, we look to similar cases that have previously come before the court. Here, we find that *Mays*, *Chandler*, and *Addison* are particularly relevant to our review.

{¶21} In *Mays*, a defendant appealed a trial court's entry of a nunc pro tunc entry clarifying the imposition of post-release control. We noted that the original sentencing entry included a statement that the court had notified the defendant "orally and in writing,

of the applicable periods of post-release control." Id. at ¶3. We also observed that the defendant signed a guilty plea form providing that he was subject to a mandatory five-year term of post-release control. Id. at ¶5. Further, the defendant signed a document captioned "NOTICE (Prison Imposed)" that indicated that he was subject to a mandatory five-year term of post-release control. Id. at ¶6. We found that "[u]nder the circumstances, post-release control was appropriately included in the [original] sentence," and we remanded for the limited purpose of vacating the nunc pro tunc entry because the hearing upon which it was based had no legal effect. Id. at ¶8-10.

{¶22} Similarly, in *Chandler*, this court considered an appeal seeking reversal of the imposition of a five-year period of post-release control and finding that the defendant was a Tier III sex offender. The defendant in *Chandler* had been resentenced after his initial sentencing hearing in order to clarify the post-release control portion of his sentence. After reviewing the record, we found that the defendant signed a guilty plea form indicating that he was subject to a mandatory five-year term of post-release control and that, at the plea hearing, the trial court verbally indicated that the defendant was subject to a mandatory five-year term of post-release control. *Chandler* at ¶3, 6. Further, the defendant signed a form captioned "NOTICE (Prison Imposed)" that indicated that he was subject to a mandatory five-year term of post-release control. Id. at ¶4-5. At the sentencing hearing, the trial court once again verbally indicated that the defendant was subject to a mandatory five-year term of post-release control. Id. at ¶7. However, the trial court's sentencing entry did not expressly recite the term or mandatory nature of the post-release control, simply stating that the trial court "notified the Defendant, orally and in writing, of the applicable periods of post-release control." Id. at ¶8. Relying on *Mays*, we

ruled that post-release control was properly imposed as part of the original sentencing entry. We noted that, in both cases, the sentencing entry did not expressly state the term of post-release control but that the defendants had signed guilty plea forms and notices indicating that they were subject to mandatory five-year post-release control periods. Id. at ¶14. Moreover, in *Chandler*, the record reflected two verbal notifications of the mandatory term of post-release control. Id.

{¶23} Recently, in *Addison*, we once again considered issues arising from the imposition of post-release control following an initial sentencing hearing and a resentencing to clarify the post-release control period. In that case, the record indicated that, at the initial sentencing hearing, the trial court verbally advised the defendant that he would be on post-release control for five years; the court's sentencing entry indicated that the defendant had been notified of the applicable period of post-release control but did not recite that period. Id. at ¶3-4. The record also indicated that the defendant signed a form captioned "NOTICE (Prison Imposed)" referring to a five-year post-release control period; the form contained language indicating that the defendant "will" or "may" be subject to such a period, but neither "will" nor "may" was selected. Id. at ¶4. Although there was no plea agreement in *Addison*, we concluded that the case had "overwhelming similarities" to *Mays*. Id. at ¶18. We found that the trial court properly informed the defendant of his post-release control obligations at the original sentencing hearing and that his sentence was not void. Id. at 21.

{¶24} In the case before us, the transcript reveals that, immediately prior to orally informing defendant that he would have a period of post-release control "up to" three years, the trial court refers to the "NOTICE (Prison Imposed)" form which defendant and

his attorney signed and submitted to the court at that hearing. That form states "After you are released from prison, you (will/may) have a period of post-release control for three years following your release from prison." (Exhibit to state's Memorandum Contra Defendant's Motion to Vacate Void Sentence.) "Will" is circled. The form also informs defendant of the possible consequences for violating post-release control. As in *Mays* and *Chandler*, this form notified the defendant that he was subject to a mandatory term of post-release control and notified him as to the length of that term.

{¶25} Also, as in *Mays* and *Chandler*, at the hearing at which defendant entered his plea and was sentenced, defendant tendered to the court an Entry of Guilty Plea form, which he signed, his attorney signed and the judge signed. The form reads: "I understand that the following period(s) of post-release control is/are applicable. An "X" was marked in the box next to the words "Three Year-Mandatory." This form also informs defendant of the possible consequences of a violation of post-release control.

{¶26} Finally, we note that, as in *Mays*, *Chandler* and *Addison*, the original sentence entry reads: "After the imposition of sentence, the Court notified the Defendant, orally and in writing, of the applicable periods of post-release control pursuant to R.C. 2929.19(B)(3)(c), (d) and (e)." (Defendant's Motion to Vacate Void Sentence, Exhibit A.)

{¶27} With all these factors in mind, we conclude, considering the facts and circumstances presented here, that post-release control was properly imposed at the original sentencing hearing and in the original sentencing entry. Therefore, imposition of the 873 days remaining on post-release control as an additional judicial sentence in case No. 03CR-6358 was appropriate. The trial court erred in granting defendant's motion to

vacate void sentence and in ordering defendant's immediate release. Accordingly, the state's first assignment of error is sustained.

{¶28} Our resolution of the first assignment of error renders the remaining assignments of error moot.

{¶29} For the foregoing reasons, the state's first assignment of error is sustained, and the state's remaining five assignments of error are moot. The judgment of the Franklin County Court of Common Pleas is reversed, and this matter is remanded to that court for further proceedings in accordance with law and consistent with this decision.

Judgment reversed; cause remanded.

BRYANT, P.J., concurs.
CONNOR, J., dissents.

CONNOR, J. dissenting.

{¶30} Although my reasoning is different from that of the trial court, I agree with the trial court's ultimate decision to vacate the defendant's sentence and to order his immediate release from his post-release control sanction. Because the majority does not, I respectfully dissent.

{¶31} The majority's decision focuses upon the imposition of post-release control in the context of whether or not the defendant was properly notified of the specific length of the term of his post-release control and of whether that term was mandatory or discretionary. The majority cites to numerous cases in which we have recently upheld the imposition of post-release control in these contexts based upon the use of a guilty plea form and a "prison imposed" notice in conjunction with "partial" notification provided orally at a sentencing hearing and/or in a written sentencing entry. However, I believe the

majority's focus is misplaced here. I believe the focus should be on the notification the defendant received (or did not receive) with respect to the consequences for violating post-release control, specifically, notification that if he committed a felony while on post-release control, the court could impose an additional prison term, subject to a specified maximum, for the violation, in addition to any prison term imposed for the new felony.

{¶32} It is not disputed that at the time of his plea hearing, on May 31, 2001, the defendant and his attorney signed an "Entry of Guilty Plea" form which jointly recommended a three-year prison term for the second-degree burglary count and notified the defendant that he would receive three years of mandatory post-release control. At the sentencing hearing, the defendant and his attorney also signed a "Notice (Prison Imposed)" form on May 31, 2001, which stated as follows:

> After you are released from prison, you will have a period of post-release control for 3 years following your release from prison. If you violate post-release control sanctions imposed upon you, any one or more of the following may result:
>
> (1) The Parole Board may impose a more restrictive post-release control sanction upon you; and
> (2) The Parole Board may increase the duration of the post-release control subject to a specified maximum; and
> (3) The more restrictive sanction that the Parole Board may impose may consist of a prison term, provided that the prison term cannot exceed nine months and the maximum cumulative prison term as imposed for all violations during the period of post-release control cannot exceed one-half of the stated prison term originally imposed upon you; and
> (4) *If the violation of the sanction is a felony, you may be prosecuted for the felony and, in addition to any sentence it imposes on you for the new felony, the Court may impose a prison term, subject to a specified maximum, for the violation*.

(Emphasis added.)

{¶33} The court also verbally informed the defendant at the sentencing hearing that his three years post-release control was mandatory. The court went on to specifically detail the consequences for violation of the conditions of post-release control as follows: "While you are on post-release control, if you violate any conditions that the parole board imposed, several things could happen. The board could increase the length of the conditions, could increase the severity, *and the most severe thing they can do is impose prison time of up to one half of the original sentence, one half being a year and a half*. *Of course, if the violation was a felony, you could be simply prosecuted for that.*" (Emphasis added.) (May 31, 2001 Tr. 14-15.)

{¶34} The notification given in the original sentencing entry in case Nos. 00CR-4322 and 00CR-5842 stated "[a]fter imposition of sentence, the Court notified the Defendant, orally and in writing, of the applicable periods of post-release control pursuant to R.C. 2929.10(B)(3)(c), (d) and (e)."

{¶35} I believe it is significant to note that the defendant was not advised by the court, either in its sentencing entry or verbally at his sentencing hearing, that "the court may impose a prison term subject to a specified maximum."

{¶36} The defendant and his attorney did, however, sign an entry of guilty plea which stated in very small print: "I understand that I may be prosecuted, convicted, and sentenced to an additional prison term for a violation that is a felony. I also understand that such a felony violation may result in a consecutive prison term of twelve months or the maximum period of unserved post-release control, which is ever greater."

{¶37} This notification, however, is not at all consistent with the language contained in the court's sentencing entry or with the court's verbal notification of possible

consequences at sentencing. Additionally, I believe its placement and small print size make it such an insignificant part of the "Entry of Guilty Plea" that it would be difficult to notice. Finally, this notification does not state whether such an additional sentence would be imposed administratively, by the parole board, or by the court.

{¶38} I believe proper notification regarding the court's ability to impose an additional prison term, subject to a specified maximum, for a felony violation committed while on post-release control is critical here. In this case, the defendant served his original three-year sentence and was placed on post-release control. While on post-release control, the defendant committed a felony violation, attempted burglary, and as a result he was sentenced in this case, case No. 03CR-6358. The sentencing judge in 03CR-6358 imposed the balance of the time the defendant had left on post-release control on the old case, case No. 00CR-4322. The trial court stated: "As you're well aware, the statute gives me authority to impose an additional 873 days on his post-release control." (Tr. 181.) Counsel for the defendant, however, objected as follows:

> One is, I do not know whether the sentencing judge formally apprised on the record Mr. Williams of the ramifications of getting a new felony while on post-release control. I did attempt to retain the transcript of that sentencing hearing. I was unsuccessful in doing that because apparently the individual who took that down, the stenographer, is no longer employed with the county.
>
> Secondly, Your Honor, I have a copy of the sentencing entry signed by Judge Johnson. It does not reference that this matter was addressed in any kind of colloquy or any sort of discussion with Mr. Williams.

(Tr. 182.)

{¶39} It is interesting to note that the trial judge in case No. 03CR-6358, after he imposed the additional 873 days for violating post-release control in case No. 00CR-4322, gave the following admonition to the defendant: "I do have to advise you again with respect to post-release control. After you are released from the institution, you will have a period of post-release control up to a maximum of five years. If you violate any conditions of post-release control your sentence could be extended and that will be done administratively as part of the sentence. The extension would be for a period of nine months for each violation and/or you can serve the entire amount, the balance of your post-release control." (Tr. 183.)

{¶40} Thus, even the trial judge who added 873 days, or the balance of the defendant's three years post-release control on the first case, case No. 00CR-4322, incorrectly advised the defendant about the consequences of violating post-release control, including the consequences that could be imposed if that violation involved the commission of a new felony.

{¶41} While I agree with the majority that the defendant was sufficiently notified at the sentencing hearing and during his exchange with the trial court that he would serve three years mandatory post-release control upon his release from the institution, I do not believe that the court adequately notified the defendant of certain significant consequences of post-release control, specifically that a sentencing court in a separate, subsequent case could impose the balance of time remaining on his post-release control term as an additional sentence, consecutive to any sentence imposed for a new violation.

{¶42} In *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, the Supreme Court of Ohio stated that "[w]hen an offender violates community control conditions and

that offender was not properly notified of the specific term that would be imposed, an after-the-fact reimposition of community control would totally frustrate the purpose behind R.C. 2929.19(B)(5) notification, which is to make the offender aware *before a violation* of the specific prison term that he or she will face for a violation." Id. at ¶33. Although *Brooks* involved community control, in my opinion, that general principal also applies here for failure to notify defendants of the consequences of violations of post-release control.

{¶43} Further, in *Hernandez v. Kelley*, 108 Ohio St.3d 395, 2006-Ohio-126, the Supreme Court of Ohio held that defendants are to be informed of the exact consequences of a conviction, and the objective of Ohio's sentencing laws is to ensure all interested parties "know precisely the nature and duration of the restrictions that have been imposed by the trial court on the defendant's personal liberty." Id. at ¶31. " 'Post-release control constitutes a portion of the maximum penalty involved in an offense for which a prison term will be imposed.' " *State v. Kerrin*, 8th Dist. No. 85153, 2005-Ohio-4117, ¶12, quoting *State v. Griffin*, 8th Dist. No. 83724, 2004-Ohio-4344, ¶13. Proper notification to defendants of penalties that they will face if they violate post-release control is essential.

{¶44} Because defendant was not provided proper notification of the consequences he could face if he violated post-release control, and because defendant has already served his sentence in case No. 00CR-4322, as well as his five-year sentence in case No. 03CR-6358, and thus he cannot be subjected to another sentencing to correct the trial court's flawed imposition of the 873 days for violations of post-release control sanctions (see *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250,

¶18), I would vacate his sentence and order his immediate release from his post-release control sanction.

{¶45} Therefore, for the hereinbefore stated reasons, I would affirm the decision of the trial court.

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