[Cite as *State v. Silguero*, 2011-Ohio-6293.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-274 (C.P.C. No. 01CR08-4399)
Armando Silguero,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 8, 2011

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*, for appellee.

Shaw & Miller, and *Mark J. Miller*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Armando Silguero, appeals from a judgment of the Franklin County Court of Common Pleas denying his motion for resentencing. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} In relation to the death of his wife, Ericka Silguero, appellant was indicted by a Franklin County Grand Jury on August 3, 2001, for aggravated murder and

kidnapping. Appellant elected to waive his right to a jury trial, and, after a bench trial, the trial court found appellant guilty of murder, a lesser degree of aggravated murder, and kidnapping. The two counts were merged for purposes of sentencing and the state elected to have appellant sentenced on the murder conviction. At a sentencing hearing held on January 16, 2002, the trial court imposed the mandatory sentence of 15 years to life in prison. A judgment entry reflecting the same was filed the following day.

{¶3} Appellant appealed to this court arguing that his convictions were not supported by sufficient evidence. On November 12, 2002, rejecting appellant's arguments, this court affirmed appellant's convictions in *State v. Silguero*, 10th Dist. No. 02AP-234, 2002-Ohio-6103. The trial court's January 17, 2002 judgment entry, however, stated that appellant was convicted of murder in violation of R.C. 2903.01. While R.C. 2903.01 pertains to aggravated murder, the offense for which appellant was indicted, the trial court found appellant guilty of murder, which is defined in R.C. 2903.02. Therefore, this court remanded the matter to the trial court with instructions to correct the clerical error.

{¶4} On September 1, 2010, appellant filed a pro se motion for a de novo sentencing hearing. In that motion, appellant argued that his sentence was void because it referenced post-release control in non-specific terms rather than stating appellant was subject to a mandatory five-year term of post-release control. The state filed a memorandum contra noting that because appellant was convicted of an unclassified felony, there should be no post-release control included in his sentence. Though this motion was not ruled on, the record reflects that on November 1, 2010, the trial court filed a "Corrected Judgment Entry." This entry, however, is identical in all respects to that filed

on January 17, 2002, as it does not correct the statute number or alter any other aspect of the entry.

{¶5} On February 4, 2011, appellant filed through counsel a motion for resentencing arguing that his sentence was void and that he was entitled to a de novo sentencing hearing. Specifically, appellant challenged the following language from the judgment entry, "[a]fter the imposition of the sentence, the Court notified the Defendant, orally and in writing, of the possibility of the applicable periods of post-release control pursuant to R.C. 2929.19(B)(3)(c), (d) and (e)." According to appellant, his entire sentence was void because the trial court added post-release control to his sentence for an offense that is an unclassified felony to which post-release control does not apply. Rejecting appellant's position that the entire sentence was void and that he was entitled to a de novo sentencing hearing, the trial court overruled appellant's motion for resentencing on March 17, 2011. That same day, the trial court filed a "2nd Corrected Judgment Entry" that was identical in all respects to the previous judgment entry except that the post-release control language was removed.

{¶6} This appeal followed and appellant brings the following assignment of error for our review:

> THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A DE NOVO RESENTENCING HEARING.

{¶7} In his sole assignment of error, appellant contends the trial court's imposition of post-release control for a murder conviction was not authorized by law; therefore, appellant claims his entire sentence is void and that he has a right to a new sentencing hearing.

{¶8} It is not disputed that appellant was convicted of murder, which is an unclassified felony to which the post-release control statute does not apply. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶36; *State v. Gripper*, 10th Dist. No. 10AP-1186, 2011-Ohio-3656, ¶10. Accordingly, the inclusion of post-release control language in appellant's sentencing entry was in error. It is appellant's position that this renders his entire sentence void and that a de novo sentencing hearing is required to correct this error. We disagree.

{¶9} In *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, the Supreme Court of Ohio 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. Id. at paragraph two of the syllabus. Thereafter, the Supreme Court 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 and the offender is entitled to a new sentencing hearing. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, syllabus.

{¶10} Recently, the Supreme Court decided *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, and reaffirmed that if a sentence does not include the statutorily-mandated term of post-release 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. The *Fischer* court also 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." *Fischer* at paragraph two of the syllabus. Accordingly,

when statutorily-mandated post-release control is not properly imposed, only that part of the sentence is void and must be set aside while the rest of the sentence remains in force. Id. at ¶26.

{¶11} In support of his position that he is entitled to a de novo sentencing hearing, appellant relies on cases that have held that a trial court's erroneous inclusion of post-release control for unclassified felony convictions renders an entire sentence void and requires a de novo sentencing hearing. See *State v. Crockett*, 7th Dist. No. 07-MA-233, 2009-Ohio-2894; *State v. Long*, 1st Dist. No. C-100285, 2010-Ohio-6115; *State v. Austin*, 8th Dist. No. 93028, 2009-Ohio-6108; *State v. Wright*, 9th Dist. No. 24610, 2009-Ohio-6081. These cases, however, predate the *Fischer* decision, and, therefore, we conclude they no longer constitute persuasive authority. *State v. Evans*, 8th Dist. No. 95692, 2011-Ohio-2153, ¶10 (after the *Fischer* decision, *Crockett* and *Long* "are no longer good law").

{¶12} In *Evans*, the Eighth District Court of Appeals reviewed the trial court's denial of the defendant's "motion to vacate void sentence." Id. at ¶5. The basis for the defendant's challenge was that the sentence imposed for his murder conviction erroneously included post-release control. Relying on *Fischer*, the *Evans*' court concluded that not only were *Crockett* and *Long* no longer good law, but, also, that the proper remedy for the erroneous inclusion of post-release control was to remand the matter for the trial court to correct the sentencing entry by eliminating the post-release control language.

{¶13} Similarly, in *State v. Lawrence*, 2d Dist. No. 24513, 2011-Ohio-5813, the defendant was convicted of murder and the judgment entry provided that the defendant was subject to a period of post-release control if he were released from prison. The

defendant in *Lawrence* argued that the imposition of post-release control rendered his sentence void, but the trial court rejected his argument and denied the motion to vacate his sentence. The trial court, however, did bring the defendant back for resentencing "to simply correct that the defendant will be on parole, not PRC, upon his release from prison." Id. at ¶3. The following day, the trial court filed a nunc pro tunc entry reflecting that, upon release from prison, the defendant would be subject to parole, not post-release control.

{¶14} The defendant's counsel filed an appellate brief, pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, and the appellate court stated that the issue before it was whether the trial court was correct in changing the judgment entry to reflect parole, rather than post-release control and whether there was any "arguable error" that occurred at the resentencing hearing. *Lawrence* at ¶5. The *Lawrence* court concluded that, pursuant to *Fischer*, only "the portion of Lawrence's judgment entry improperly imposing post-release control was void, and the remainder of his sentence was valid." Id. at ¶7, citing *Fischer* at ¶29 and *Evans*.

{¶15} Importantly, the court went on to note that while a trial court is required to notify a defendant that he or she will be subject to post-release control, there is no similar requirement that a trial court notify a defendant about parole supervision. Because the court found no other authority requiring that the trial court inform the defendant that he would be subject to parole supervision if released from prison, the court stated, "it is questionable whether the trial court was required to hold a re-sentencing hearing to notify Lawrence that he was subject to parole, rather than post-release control, upon his release." Id. at ¶8. Notwithstanding, the court held that "[e]ven assuming that a re-

sentencing hearing was required," there was no issue with arguable merit arising from the same as the defendant was given the same sentence as that imposed in 2001 with the exception of the omission of post-release control language. Id. at ¶9. See also *State v. Russell*, 10th Dist. No. 11AP-108, 2011-Ohio-4519 (no reversible error in the erroneous inclusion of post-release control to a sentence for an unclassified felony).

{¶16} In the case sub judice, the trial court included post-release control language in appellant's sentence even though appellant was convicted of murder, an unclassified felony. Pursuant to *Fischer*, and also *Evans* and *Lawrence*, it is clear that this does not render appellant's entire sentence void, nor does it require a de novo sentencing hearing. Moreover, the record reflects that the superfluous post-release control language has been removed from the sentencing entry pursuant to the judgment entry filed on March 17, 2011.[1]

{¶17} For these reasons, appellant's assignment of error is overruled and the judgment of the Franklin County Court of Common Pleas denying appellant's motion for a de novo sentencing hearing is hereby affirmed. However, other than deletion of the post-release control language, the March 17, 2011 judgment entry is in all respects the same as the original 2002 and the November 2010 judgment entries. That being said, we note that the judgment entry still contains the clerical error this court noted in its decision that affirmed appellant's convictions, i.e., the judgment entry states appellant was convicted under R.C. 2903.01 rather than R.C. 2903.02.

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[1] The matter before us does not allege error in the March 17, 2011 judgment entry as this appeal challenged the trial court's March 17, 2011 decision denying his motion for resentencing.

{¶18} Accordingly, this case is remanded to the trial court to correct the clerical error in the judgment entry to reflect the offense for which appellant was convicted. *Silguero* at ¶14, citing *State v. Lattimore*, 1st Dist. No. C-010488, 2002-Ohio-723.

Cause remanded with instructions; judgment affirmed.

BRYANT, P.J., and KLATT, J., concur.

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