[Cite as *Surella v. Ohio Adult Parole Auth.*, 2011-Ohio-6833.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Aleksandr Surella,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-499 (C.P.C. No. 10CVH-6-8811)
Ohio Adult Parole Authority et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 30, 2011

Yeura R. Venters, Public Defender, and *Sheryl Trzaska*, for appellant.

Michael DeWine, Attorney General, and *M. Scott Criss*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, Aleksandr Surella, appeals from a judgment entered in the Franklin County Court of Common Pleas dismissing his complaint against defendants-appellees, Ohio Adult Parole Authority ("APA") and Deputy Director of the Ohio Department of Rehabilitation and Correction ("DRC"), pursuant to Civ.R. 12(B)(6). For the following reasons, we affirm.

{¶2} In November 2003, appellant, a minor, admitted to one count of rape, a first-degree felony if committed by an adult, and two counts of gross sexual imposition ("GSI"), each a third-degree felony if committed by an adult, in the Juvenile Division of the Morrow County Court of Common Pleas. The juvenile court held a dispositional hearing in January 2004 and found appellant to be a Serious Youthful Offender ("SYO"), pursuant to R.C. 2153.13, and a sexual predator.

{¶3} In an entry filed January 16, 2004, the juvenile court committed appellant to the Department of Youth Services ("DYS") for a minimum term of two years and a maximum term until his 21st birthday. Pursuant to its SYO finding, the juvenile court also imposed a three-year term of incarceration with the DRC, but stayed the adult portion of his sentence pending the successful completion of the DYS commitment. The January 2004 entry did not reference post-release control.

{¶4} Appellant was eventually placed on DYS-supervised release, but after he violated the terms of his release, the juvenile court held a hearing in July 2007 to determine whether to invoke the adult portion of his SYO sentence. The parties agreed to recommend an adult sentence of four years (consecutive two-year terms for the GSI counts) with the opportunity for judicial release. The state agreed to stay the imposition of the rape sentence unless appellant violated the terms of his judicial release.

{¶5} In an entry filed September 7, 2007, the juvenile court, following the parties' recommendation, found appellant in violation of the terms of his DYS-supervised release and imposed a four-year term of incarceration with the DRC. The juvenile court's judgment entry stated the following pertaining to post-release control:

> Should the Defendant serve this whole term he is subject to five (5) years of post release control. For any violation of post release control conditions, the Adult Parole Authority of Parole Board could impose a more restrictive or longer control sanction, or return the Defendant to prison for up to nine (9) months for each violation, up to a maximum of 1/2 of the stated prison term. If the violation is a new felony, the Defendant may receive a prison term of the greater of one (1) year of the time remaining on post release control, in addition to any other prison term imposed for the new offense.

(Complaint, Exhibit B.)

{¶6} The juvenile court granted judicial release in November 2007 and released appellant on various community-control sanctions. Appellant eventually violated the terms of his release, and the state moved to impose the remaining adult portion of his sentence, including the previously suspended rape sentence. At a hearing held on April 15, 2008, appellant admitted to violating the terms of his release, and the juvenile court imposed three years for the previously suspended rape sentence to be served concurrently with the remaining GSI sentences, for an aggregate term of four years with DRC. The juvenile court's entry stated the following with respect to post-release control:

> The Court has further notified the Defendant/Adjudicated Delinquent Child 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. The Defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control.

(Complaint, Exhibit D.)

{¶7} In June 2010, appellant, who had been released on post-release control, sought declaratory and injunctive relief against appellees in the Franklin County Court of

Common Pleas. Attaching the sentencing entries from January 2004, September 2007, January 2008, and April 2008, appellant sought a declaration that appellees lacked authority to supervise him on post-release control because the juvenile court failed to properly journalize post-release control prior to his release from prison. He claimed that, although the September 2007 and April 2008 entries referenced post-release control, the 2007 entry did not use the word "mandatory" and the April 2008 entry stated that his term was mandatory for "up to" five years.

{¶8} Appellees moved to dismiss the complaint for failure to state a claim upon which relief may be granted pursuant to Civ.R. 12(B)(6). Based on the Supreme Court of Ohio's holding in *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, appellees argued that the language employed in the juvenile court's sentencing entries was sufficient to authorize appellant's supervision on post-release control. According to appellees, any imperfection in the post-release control language was, at most, voidable error that could have been raised on a direct appeal.

{¶9} In his memorandum contra, appellant claimed that the absence of post-release control language in the original January 2004 entry precluded the juvenile court from including post-release control in its September 2007 and April 2008 sentencing entries. Alternatively, appellant claimed that the language used in the 2007 and 2008 entries was insufficient to authorize post-release control given the lack of the word "mandatory" in the 2007 entry and the "up to" language in the 2008 entry.

{¶10} The trial court, in a decision and entry filed May 3, 2011, granted appellees' motion to dismiss. Relying on *Watkins*, the trial court found that the language contained in the September 2007 and April 2008 sentencing entries sufficiently

authorized appellees to exercise post-release control and that any error in the entries should have been claimed on direct appeal.

{¶11} In a timely appeal, appellant now advances the following assignment of error for our consideration:

> The trial court erred when it dismissed [Appellant's] complaint for failing to state a claim upon which relief could be granted. Fifth and Fourteenth Amendments to the United States Constitution; Section 1, Article IV and Section 16, Article I of the Ohio Constitution.

{¶12} We review de novo a trial court's decision to dismiss a complaint for failure to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6). *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶5. In deciding a motion filed pursuant to Civ.R. 12(B)(6), the trial court must presume all factual allegations in the complaint are true and construe the complaint in the light most favorable to the plaintiff, drawing all reasonable inferences in favor of plaintiff. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. The trial court may dismiss the case only if it appears beyond a doubt that the plaintiff can prove no set of facts entitling the plaintiff to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus.

{¶13} This court has held that a plaintiff released from prison cannot use a declaratory judgment action to collaterally attack the imposition of post-release control unless that portion of the underlying sentence is void. *Strong v. Ohio State Adult Parole Auth.*, 10th Dist. No. 11AP-52, 2011-Ohio-5615, ¶14. This comports with the principle that collateral attacks, though generally disfavored, may be appropriate where the judgment was procured by fraud or issued without jurisdiction. Id. at ¶13, citing *Ohio*

Pyro, Inc. v. Ohio Dept. of Comm., Div. of State Fire Marshal, 115 Ohio St.3d 375, 2007-Ohio-5024, ¶25. As the Supreme Court has recognized, a sentence that is void for failure to include the statutorily mandated term of post-release control "may be reviewed at any time, on direct appeal *or by collateral attack*." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, paragraph one of the syllabus (emphasis added). "If, however, the sentence is voidable, a collateral attack is improper." *Strong* at ¶14, citing *Fischer*.

{¶14} In his complaint, appellant alleged that appellees lacked authority to supervise him on post-release control because his post-release control was not properly journalized as part of his sentence in Morrow County, thereby rendering his sentence "void." Appellant's challenge was based on whether post-release control was properly incorporated into the juvenile court's sentencing entries; he did not allege a lack of notification at the sentencing hearing under R.C. 2929.19(B) or that he was unaware of post-release control prior to entering his admissions to the offenses in 2003. Therefore, our analysis turns on whether the juvenile court properly incorporated post-release control into its sentencing entry.

{¶15} Pursuant to R.C. 2929.14(D)(1), a court imposing a prison term for an offense subject to mandatory post-release control "shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division." Where, as here, the offense is a first-degree felony or a felony sex offense, post-release control is mandatory for five years. R.C. 2967.28(B)(1).

{¶16} Post-release control is not referenced in the juvenile court's January 2004 entry, which ordered DYS commitment and stayed the adult portion of the SYO sentence. The juvenile court did, however, include such language in the sentencing entries filed in September 2007 and April 2008. The September 2007 entry, which partially invoked the adult portion of the SYO sentence, stated that appellant "is subject to five (5) years of post release control." The April 2008 entry, which revoked judicial release and imposed the remaining adult sentence, included the following: "The Court has further notified [appellant] that post release control is mandatory in this case up to a maximum of 5 years."

{¶17} Though he contends that none of the Morrow County entries sufficiently incorporated post-release control, appellant first argues that we may only look to the 2004 entry to make this determination. Specifically, appellant claims that the absence of post-release control language in the 2004 entry rendered the entire sentence void and prohibited the juvenile court from including post-release control in the 2007 and 2008 entries. We disagree. In *Fischer*, the Supreme Court of Ohio explained that when a court fails to impose statutorily mandated post-release control as part of a defendant's sentence, only "that *part* of the sentence * * * is void." Id. at ¶26 (emphasis sic). Consequently, the void portion of an offender's sentence remains subject to review and correction at any point prior to the expiration of the offender's term of incarceration. See id. at paragraph two of the syllabus (modifying *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, syllabus). Thus, assuming arguendo that post-release control was not properly journalized in the 2004 entry (or even the 2007 entry) the juvenile court was permitted to correct that portion of the sentence in the 2008 entry when it revoked

judicial release and imposed appellant's prison term. As such, our inquiry will be confined to the 2008 entry.

{¶18} Appellant claims that, even if the juvenile court was permitted to include post-release control in the April 2008 entry, the entry's use of the words "up to" failed to authorize the enforcement of post-release control. We disagree.

{¶19} In *Strong*, this court found that the use of "up to" language in a sentencing entry did not, by itself, render the post-release control portion of the sentence void. Id. at ¶27. The plaintiff in *Strong* sought a declaratory judgment that the APA lacked authority to supervise him on post-release control because "the words 'up to' in the Stark County judgment entry were legally insufficient to impose a mandatory period of postrelease control and rendered the postrelease control portion of his sentence void." Id. at ¶4. We affirmed the trial court's decision granting summary judgment in favor of the APA, relying on our prior decisions that upheld entries with less precise post-release control language. Id. at ¶22, citing *State v. Mays*, 10th Dist. No. 10AP-113, 2010-Ohio-4609; see also *State v. Addison*, 10th Dist. No. 10AP-554, 2011-Ohio-2113; *State v. Chandler*, 10th Dist. No. 10AP-369, 2010-Ohio-6534. Because the only basis for the plaintiff's void-sentence challenge was the "up to" language in the sentencing entry attached to his complaint, we found that he failed to present sufficient evidence that the post-release control portion of his sentence was void. Id. at ¶29.

{¶20} The result in *Strong* is consistent with the Supreme Court of Ohio's holdings in *Watkins* and *Patterson v. Ohio Adult Parole Auth.*, 120 Ohio St.3d 311, 2008-Ohio-6147. In *Watkins*, inmates incarcerated for violating the terms of their mandatory post-release control sought habeas relief to compel their release from

prison. The inmates claimed that their sentencing entries misstated that post-release control was discretionary or ambiguous as to whether it was discretionary or mandatory. Two of the sentencing entries at issue stated that "post release control is (mandatory/optional) in this case up to a maximum of (3/5) years." *Watkins* at ¶9; see also ¶11 (similar language). Other entries stated, "the defendant will/may serve a period of post-release control under the supervision of the parole board." Id. at ¶5; see also ¶7 (similar language). The inmates claimed, "by misrepresenting the mandatory nature of their postrelease control, the trial courts never properly imposed such control and that they therefore could not be imprisoned * * * for violating that control." Id. at ¶43.

{¶21} The court denied the habeas petitions and found that the sentencing entries, despite their erroneous references to discretionary post-release control, "contained sufficient language to authorize the Adult Parole Authority to exercise postrelease control over the petitioners." Id. at ¶53. The court reasoned that the entries "specified that postrelease control was, at a minimum, discretionary and was part of [the inmates'] sentences." Id. at ¶50. Unlike sentencing entries lacking any reference to post-release control, the court found the inmates' sentencing entries to be "sufficient to afford notice to a reasonable person that the courts were authorizing postrelease control as part of each petitioner's sentence." Id. at ¶51. Consequently, the court held, "[a]ny challenge to the propriety of the sentencing court's imposition of postrelease control in the entries could have been raised on appeal." Id. at ¶51.

{¶22} In *Patterson*, the court denied habeas relief where, as here, the sentencing entry used "up to" language to describe the mandatory term of post-release

control. The court, citing *Watkins*, found the entry to be sufficient to allow enforcement of post-release control: "We have never held that these claims can be raised by extraordinary writ when the sentencing entry includes postrelease control, however inartfully it might be phrased." Id. at ¶8. The court distinguished the case from *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, where the "sentencing entry did not include postrelease control," id., and *Bezak*, where the post-release control challenge was raised in a "direct appeal from sentence imposing postrelease control." Id.

{¶23} These decisions confirm that, where a sentencing entry incorporates post-release control as part of the sentence, claims that such language was "inartfully phrased" are non-jurisdictional and concern, at most, voidable error that should be raised on direct appeal. These cases cannot be distinguished merely because they involved extraordinary writs. Other appellate districts, including this court, have applied decisions such as *Watkins* outside the "writ" context. See, e.g., *Addison* at ¶18; *State v. Gonzalez*, 193 Ohio App.3d 385, 2011-Ohio-1542, ¶30-31; *State v. Tucker*, 8th Dist. No. 95289, 2011-Ohio-1368, ¶18-19; *State v. McKenna*, 11th Dist. No. 2009-T-0034, 2009-Ohio-6154, ¶82-83; *State v. Garrett*, 9th Dist. No. 24377, 2009-Ohio-2559, ¶15-16; *State v. Jones*, 7th Dist. No. 06 MA 17, 2009-Ohio-794, ¶12.

{¶24} Appellant argues that *Watkins* was "abrogated" by the Supreme Court of Ohio's holding in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434. (Appellant's Brief, 9.) However, the narrow issue before the court in *Singleton* was whether the correction of post-release control should be corrected at a de novo hearing or through the remedial procedure set forth in R.C. 2929.191. Id. at ¶1. The prosecution did not

dispute that the trial court's holding that post-release control was not properly imposed. Id. at ¶36. Thus, the *Singleton* court did not "abrogate" (much less mention) its holding in *Watkins*. In fact, the court has sunsequently reaffirmed the logic employed in *Watkins* and *Patterson*. See, e.g., *State ex rel. Peterson v. Durkin*, 129 Ohio St.3d 213, 2011-Ohio-2639, ¶1 ("The entry also included sufficient language that postrelease control was part of his sentence so as to give appellant sufficient notice to raise any claimed errors on appeal rather than by extraordinary writ."); *State ex rel. Paige v. Corrigan*, 129 Ohio St.3d 448, 2011-Ohio-4057, ¶1 ("Paige also had an adequate remedy by appeal to raise his claims that his March 2004 sentencing entry contained incorrect terms of postrelease control."); *State ex rel. Pruitt v. Cuyahoga Cty. Court of Common Pleas*, 125 Ohio St.3d 402, 2010-Ohio-1808, ¶4.

{¶25} Appellant also relies on our memorandum decision in *State v. Hazel* (Mar. 31, 2010), 10th Dist. No. 09AP-1132, for the proposition that the "up to" language in the 2008 entry rendered the sentence void. However, we found such reliance to be misplaced in *Strong*, reasoning that "*Hazel*, a memorandum decision, is not binding, especially to the extent it lacks support in the more recent cases this court decided on the issue." *Strong* at ¶21, citing Rep.R. 3(A), Rules for the Reporting of Opinions. Moreover, *Hazel* is distinguishable from the present case, given that the defendant in *Hazel* was also asserting that the trial court failed to properly notify him of post-release control at the sentencing hearing in violation of R.C. 2929.19(B)—a separate challenge to the imposition of post-release control. See *Watkins* at ¶46 (distinguishing the two claims). However, even in the context of R.C. 2929.19(B), this court has held 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." *State v. Williams*, 10th Dist. No. 10AP-922, 2011-Ohio-4923, ¶19.

{¶26} Likewise, we disagree with appellant's argument that this case is controlled by *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462. As we noted in *Strong*, the sentencing entry in *Bloomer* "completely omitted postrelease control" whereas the Stark County entry at issue in *Strong* did not. Id. at ¶26. The same distinction exists here. Appellant does not claim that post-release control was completely omitted from the juvenile court's 2008 sentencing entry, but, rather, he merely alleges imperfections in the language incorporating post-release control. As explained above, such claims do not rise to the level of jurisdictional error, and they should be raised, if at all, on direct appeal.

{¶27} Based on the above, we find that the existence of the words "up to" in the April 2008 sentencing entry did not render appellant's post-release control sentence void. The 2008 entry (as well as the 2007 entry) specified that post-release control was, at a minimum, part of appellant's sentence, and, therefore, appellees were authorized to exercise post-release control supervision. "[T]here are no 'magic words' that a trial court must use to properly impose post-release control." *State v. Holloman*, 10th Dist. No. 11AP-454, 2011-Ohio-6138, ¶9, citing *Williams* at ¶19. The language challenged in appellant's complaint represented, at most, voidable error that should have been raised on direct appeal. Because the sentence was not void, appellant's declaratory judgment action was an improper collateral attack, and the trial court properly dismissed his complaint pursuant to Civ.R. 12(B)(6).

{¶28} Accordingly, appellant's sole assignment of error is overruled. Having overruled the assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.

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