

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-L-096
JAMES E. PESCI,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 98 CR 000578.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Matthew W. Weeks, Carl P. Kasunic Co., L.P.A., 4230 State Route 306, Building I, Suite 300, Willoughby, OH 44094 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, James E. Pesci, filed a notice of appeal from the trial court's resentencing entry of September 13, 2010.¹ In that entry, the trial court issued a correction to the judgment entry filed on January 22, 2001, to include a statement that Pesci will be supervised under R.C. 2967.28 after his release from prison. For the following reasons, we affirm the judgment of the trial court.

1. For a complete factual history, please see *State v. Pesci*, 11th Dist. No. 2001-L-026, 2002-Ohio-7131 (Dec. 20, 2002).

{¶2} On appeal, Pesci raises the following three assignments of error for our review:

{¶3} [1.] The trial court erred when it held the resentencing hearing without Appellant physically present, pursuant to O.R.C. §2929.191(C), and the trial court abused its discretion in denying Appellant's request to appear in-person.

{¶4} [2.] The trial court abused its discretion when it denied Appellant's requests to stay/continue the resentencing hearing.

{¶5} [3.] Appellant was denied due process under the Ohio Constitution Art. I, §10 and Sixth Amendment of the U.S. Constitution, when the trial court failed to follow the requirements of Ohio Criminal Rule 43(A) and O.R.C. §2929.191(C).

{¶6} As appellant's errors all relate to his resentencing hearing, we review them in a consolidated fashion. Appellant was first sentenced in 2001; however, pursuant to the state's motion for resentencing, appellant was resentenced on September 8, 2010. At the hearing, appellant appeared by videoconferencing. At the resentencing hearing, the court notified appellant of the mandatory nature of post-release control and reflected such in its sentencing entry.

{¶7} On appeal, appellant argues R.C. 2929.121(C) permits him to be present at the resentencing hearing. Further, appellant maintains that circumstances existed which warranted a continuance of the resentencing hearing.

{¶8} In *State v. Singleton*, the Ohio Supreme Court addressed R.C. 2929.191, the statutory remedy to correct the trial court's failure to properly impose post-release control. The *Singleton* Court held:

{¶9} [F]or sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease control, trial court shall conduct a de novo sentencing hearing in accordance with decision of the Supreme Court of Ohio. However, for criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, ¶1.

{¶10} Thereafter, in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶26-29, the Ohio Supreme Court held that sentences imposed prior to the effective date of R.C. 2929.191 are only partially void and may be corrected to properly impose post-release control.

{¶11} Here, appellant was sentenced in 2001, prior to the effective date of R.C. 2929.191. Thus, R.C. 2929.191 is not applicable. Furthermore, a review of the record reveals that at his original sentencing, appellant was properly advised of the mandatory nature of post-release control. During his sentencing hearing, the trial court stated: "Upon your release from prison, Mr. Pesci, you will receive a period of post-release control for three years." The judgment entry of the original sentencing hearing, however, stated that "post release control is mandatory in this case *up to* a maximum of 3 years." (Emphasis added.)

{¶12} This court has addressed the issue where a trial court, although properly advising a defendant of the mandatory nature of post-release control at the sentencing hearing, failed to properly include such in its judgment entry of sentencing. “[W]hen the trial court correctly advises the offender at a sentencing hearing of the mandatory nature of post-release control but fails to indicate as much in its sentencing entry, the result is a clerical error which may be corrected through a nunc pro tunc entry.” *State v. McKenna*, 11th Dist. No. 2010-T-0001, 2011-Ohio-770, ¶21.

{¶13} Recently, the Ohio Supreme Court released *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, where the appellant was sentenced prior to the effective date of R.C. 2929.191 and the sentencing entry failed to include post-release control, but he was properly notified of post-release control at his sentencing hearing. On appeal, the appellant argued the sentencing entry could not be corrected through a nunc pro tunc entry, but instead the trial court was required to hold a de novo resentencing hearing to correct the void sentence and to properly impose post-release control. The Ohio Supreme Court held that “[w]hen a defendant is notified about post-release control at the sentencing hearing, but notification is inadvertently omitted from the sentencing entry, the omission can be corrected with a nunc pro tunc entry and the defendant is not entitled to a new sentencing hearing.” *Id.* at syllabus.

{¶14} Consequently, in this case, the trial court exceeded its obligation, because under the present factual scenario, it was not required to hold a resentencing hearing.

{¶15} As an aside, this court has addressed whether a defendant has a right to be physically present at his resentencing hearing in the absence of a waiver. We noted that:

{¶16} Ohio Appellate Districts have held that, pursuant to Crim.R. 43(A), it is error to hold a re-sentencing via video conference without a waiver. See, e.g., *State v. Morton*, 10th Dist. No. 10AP-562, 2011-Ohio-1488, ¶¶13-14, 18; *State v. Steimle*, 8th Dist. No. 95076, 2011-Ohio-1071, ¶¶16-17. However, these courts have also held that such error is harmless without a showing of prejudice. *Morton, supra*; *Steimle, supra*. *State v. Dudas*, 11th Dist. No. 2011-L-093, 2012-Ohio-2121, ¶25.

{¶17} Here, appellant has not alleged that he was prejudiced by the trial court holding the resentencing via video conference.

{¶18} Consequently, appellant's first and third assignments of error are without merit.

{¶19} We also do not find merit in appellant's second assignment of error. The Ohio Supreme Court has held that "[t]he grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion." *State v. Unger*, 67 Ohio St.2d 65, 67 (1981). An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting *Black's Law Dictionary* 11 (8th Ed.2004). In determining whether a trial court abused its discretion when ruling on a motion for continuance, a reviewing court must weigh any potential prejudice to the defendant against the trial court's "right to control its own docket and the public's interest in the prompt and efficient dispatch of justice." *State v. Unger*, 67 Ohio St.2d at

67. The record reveals that appellant has suffered no prejudice. Accordingly, appellant's second assignment of error is without merit.

{¶20} Based on the foregoing, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.