

**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. 2014-L-044
JAMES D. ERVIN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 08 CR 000556.

Judgment: Affirmed.

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

Charles R. Grieshammer, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

DIANE V. GRENDALL, J.

{¶1} Defendant-appellant, James D. Ervin, appeals various judgments of the Lake County Court of Common Pleas, denying a motion to vacate his guilty plea and/or vacate his convictions and sentence, denying a motion for reconsideration, and correcting the imposition of post-release control. For the following reasons, the judgments of the lower court are affirmed.

{¶2} On October 30, 2008, the Grand Jury of Lake County returned a twelve-count Indictment, charging Ervin with the following: Attempted Grand Theft of a Motor Vehicle (Count 1), a felony of the fifth degree in violation of R.C. 2913.02; Receiving Stolen Property (Count 2), a felony of the fifth degree in violation of R.C. 2913.51(A); Possessing Criminal Tools (Count 3), a felony of the fifth degree in violation of R.C. 2923.24; Theft (Count 4), a felony of the fifth degree in violation of R.C. 2913.02(A)(1); Breaking and Entering (Count 5), a felony of the fifth degree in violation of R.C. 2911.13(B); Burglary (Count 6), a felony of the second degree in violation of R.C. 2911.12(A)(1); Burglary (Count 7), a felony of the fourth degree in violation of R.C. 2911.12(A)(4); Breaking and Entering (Count 8), a felony of the fifth degree in violation of R.C. 2911.13(B); Receiving Stolen Property (Count 9), a felony of the fifth degree in violation of R.C. 2913.51(A); Breaking and Entering (Count 10), a felony of the fifth degree in violation of R.C. 2911.13(B); Breaking and Entering (Count 11), a felony of the fifth degree in violation of R.C. 2911.13(B); and Resisting Arrest (Count 12), a misdemeanor of the second degree in violation of R.C. 2921.33(A).

{¶3} On December 18, 2008, the trial court entered Judgment on Ervin's Written Plea of Guilty to Attempted Grand Theft of a Motor Vehicle (Count 1), Receiving Stolen Property (Count 2), a reduced charge of Burglary (Count 6) being a felony of the third degree in violation of R.C. 2911.12(A)(3), Breaking and Entering (Count 8), and Receiving Stolen Property (Count 9).

{¶4} On January 18, 2009, the trial court sentenced Ervin to twelve months in prison for each count of Attempted Grand Theft, Receiving Stolen Property (two counts), and Breaking and Entering, and five years in prison for Burglary. Additionally,

the court sentenced Ervin to three years in prison for violating post-release control imposed as part of the sentence in another case (Lake C.P. No. 03-CR-000038). All prison sentences were ordered to be served consecutively for an aggregate prison sentence of twelve years. The court ordered Ervin to pay restitution in the amount of \$387.48. Finally, the court advised Ervin that “post-release control is mandatory in this case for a period of three (3) years.”

{¶5} On January 22, 2009, the trial court issued its Judgment Entry of Sentence.

{¶6} Ervin’s sentence was affirmed on appeal. *State v. Ervin*, 11th Dist. Lake Nos. 2009-L-025 and 2009-L-026, 2009-Ohio-6382.

{¶7} On June 4, 2010, the trial court entered an Order vacating the three-year prison term for violating post-release control on the grounds that Ervin “was not advised during the [sentencing] hearing that he would be subject to post-release control upon completion of his five year prison term in Case No. 03CR000038,” and “the court’s judgment entry of sentence erroneously stated that post-release control was optional, when, in fact, it was mandatory.” Accordingly, Ervin’s aggregate prison sentence was reduced from twelve to nine years.

{¶8} On August 18, 2010, Ervin filed a Motion to Withdraw Guilty Pleas pursuant to Criminal Rule 32.1 on the grounds that the trial court did not comply with Criminal Rule 11(C)(2) when it accepted his pleas.

{¶9} On September 14, 2010, the trial court entered an Order denying Ervin’s Motion to Withdraw. The court’s Order was affirmed on appeal. *State v. Ervin*, 11th Dist. Lake No. 2010-L-113, 2011-Ohio-3121.

{¶10} On September 24, 2013, Ervin filed a Motion to Withdraw Guilty Plea/or Vacate a Void Judgment and Sentence for Good Cause, based on the void imposition of post-release control in Lake C.P. No. 03-CR-000038.

{¶11} On March 21, 2014, the trial court entered an Order denying Ervin's Motion to Withdraw Guilty Plea/or Vacate a Void Judgment and Sentence. The Order was stamped: "FINAL APPEALABLE ORDER Clerk to serve pursuant to Civ.R. 58(B)."

{¶12} On March 25, 2014, the Lake County Clerk of Courts sent the parties a Notice of Final Appealable Order.

{¶13} On April 3, 2014, Ervin filed a Motion for Reconsideration of the Trial Court's Denial of Motion to Withdraw Guilty Plea/or Vacate Void Judgment and Sentence.

{¶14} On April 10, 2014, the State filed a Response, in which the State "respectfully declines to respond * * * for the reasons that the Court issued a Notice of Final Appealable Order."

{¶15} On April 22, 2014, the trial court issued an Order denying Ervin's Motion for Reconsideration.

{¶16} On April 23, 2014, the trial court held a Video Conference Hearing to correct Ervin's sentence with respect to post-release control sanctions in the present case. The court advised Ervin that "post-release control is optional in this case for up to three (3) years," whereas the court described post-release control as mandatory in the original January 22, 2009 Judgment Entry of Sentence.

{¶17} On May 6, 2014, Ervin filed a Notice of Appeal, identifying the following Judgment Entries: “Resentencing Judgment entered on April 23, 2014 / April 22, 2014 / Reconsideration / March 21, 2014.”¹

{¶18} On appeal, Ervin raises the following assignments of error:

{¶19} “[1.] The trial court erred when it failed to vacate a judgment entry of sentence which was based in part upon a void post release control finding in violation of the defendant-appellant’s constitutional rights to due process.”

{¶20} “[2.] The trial court erred to the prejudice of the defendant-appellant by denying his pre-sentence motion to withdraw his plea in violation of the defendant-appellant’s constitutional rights to due process.”

{¶21} Ervin has not raised any issues which this court may properly review. Both assignments of error challenge the denial of his Motion to Withdraw Guilty Plea/or Vacate a Void Judgment and Sentence for Good Cause. The trial court entered a final judgment with respect to this Motion on March 21, 2014, appropriately designated a final appealable order. Ervin’s Notice of Appeal was not filed within thirty days of the entry as required by Appellate Rule 4(A)(1).

{¶22} The April 22, 2014 judgment denying Ervin’s Motion for Reconsideration of the Trial Court’s Denial of Motion to Withdraw Guilty Plea/or Vacate Void Judgment and Sentence is a “nullity” from which an appeal does not lie. *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 381, 423 N.E.2d 1105 (1981).

{¶23} With respect to the April 23, 2014 sentencing hearing to correct the imposition of post-release control (docketed on April 29, 2014), Ervin raises no error.

1. This Court’s jurisdiction was properly invoked by the appeal of the resentencing judgment entry.

{¶24} As Ervin has failed to raise any issues which this court is capable of reviewing, the assignments of error are without merit.

{¶25} For the foregoing reasons, the judgments of the Lake County Court of Common Pleas, denying Ervin's motion to vacate his guilty plea and/or vacate his convictions and sentence, denying his motion for reconsideration, and correcting the imposition of post-release control, are affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O'TOOLE, J.,

concur.