

[Cite as *State v. Jones*, 2004-Ohio-1698.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellant : C.A. Case No. 19978
v. : T.C. Case No. 03-CR-213
00-CR-219
FARRIS JONES : (Criminal Appeal from Common
Pleas Court)
Defendant-Appellee :

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OPINION

Rendered on the 2nd day of April, 2004.

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FAIN, P.J.

{¶1} Plaintiff-appellant the State of Ohio appeals from an order of the Montgomery County Court of Common Pleas terminating the post-release control supervision of defendant-appellee Farris Jones. The State contends that the trial court erred in terminating Jones's post-release control supervision, because

pursuant to R.C. 2967.28, the parole board, not the trial court, has authority over the post-release control of an offender convicted of a fourth- or fifth-degree felony that is not a sex crime.

{¶2} Although the State argues that R.C. 2967.28(C) is the applicable section, we find that Jones's third-degree felony conviction for Engaging in Soliciting After a Positive HIV Test, in case No. 2000-CR-219, is subject to R.C. 2967.28(B)(1). Because R.C. 2967.28(B)(1) mandates post-release control, the trial court lacked authority to terminate Jones's post-release control supervision.

{¶3} Accordingly, the judgment of the trial court terminating the post-release control supervision of Jones is reversed and vacated.

I

{¶4} In February, 2000, Farris Jones was convicted of Engaging in Soliciting After a Positive HIV Test, in violation of R.C. 2907.24, a felony of the third degree, in case No. 2000-CR-219 in the Montgomery County Court of Common Pleas. Jones was sentenced to two years imprisonment.

{¶5} After being released from prison, Jones was indicted for one count of the same offense, Engaging in Soliciting After a Positive HIV Test, one count of Loitering to Engage in Solicitation after a Positive HIV Test, and one count of Assault on a Peace Officer in case No. 2003-CR-213. At his arraignment, Jones plead not guilty. The case was tried by a jury. Jones was acquitted of the offenses of Engaging in Soliciting After a Positive HIV Test, Loitering to Engage in Solicitation after a Positive HIV Test, and Assault on a Peace Officer, but was

convicted of the lesser-included offense of Disorderly Conduct, a misdemeanor. Jones was held at the Montgomery County Jail on a detainer placed by the Adult Parole Authority pursuant to his post-release control supervision in case No. 2000-CR-219. Jones filed a motion to terminate his post-release control. The trial court terminated Jones's post-release control supervision and ordered Jones released from custody. From the order of the trial court, the State appeals.

II

{¶6} The State's sole assignment of error is as follows:

{¶7} "THE PAROLE BOARD, NOT THE TRIAL COURT, HAS ABSOLUTE AUTHORITY CONCERNING POST-RELEASE CONTROL OVER AN OFFENDER CONVICTED OF A FOURTH OR FIFTH DEGREE FELONY THAT IS NOT A SEX CRIME. THEREFORE, THE TRIAL COURT ERRED IN TERMINATING JONES' POST-RELEASE CONTROL."

{¶8} The State contends that the trial court erred in terminating Jones's post-release control, because pursuant to R.C. 2967.28 the parole board, not the trial court, has authority over the post-release control of an offender convicted of a fourth- or fifth-degree felony that is not a sex crime. The State relies on R.C. 2967.28(C), which provides that "[a]ny sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a

period of post-release control is necessary for that offender.”

{¶9} Although the State cites R.C. 2967.28(C) as the applicable section, R.C. 2967.28(C) applies to third-degree felonies that are not subject to R.C. 2967.28(B)(1). We conclude that Jones’s third-degree felony conviction for Engaging in Soliciting After a Positive HIV Test, in case No. 2000-CR-219, is subject to R.C. 2967.28(B)(1). R.C. 2967.28(B) states as follows:

{¶10} “Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a *felony sex offense*, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person 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. Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of post-release control required by this division for an offender shall be of one of the following periods:

{¶11} “(1) For a felony of the first degree or for a *felony sex offense*, five years[.]” (Emphasis added.)

{¶12} “Felony sex offense” is defined in R.C. 2967.28(A)(3) as “a violation of a section contained in Chapter 2907 of the Revised Code that is a felony.” Because Jones was convicted of violating R.C. 2907.24, Engaging in Soliciting After a Positive HIV Test, a third degree felony, Jones’s conviction was a felony sex offense and R.C. 2967.28(B)(1) applies.

{¶13} Pursuant to R.C. 2967.28(B)(1), Jones shall be subject to a period of five years of post-release control, imposed by the parole board, unless that period is reduced by the parole board pursuant to division (D) of the section. “[W]here post-release control is mandated by statute, a trial court lacks authority to alter or to eliminate this legislatively imposed sanction.” *State v. Johnson*, Cuyahoga App. No. 80459, 2002-Ohio-4581, at ¶24. “Pursuant to R.C. 2967.28(B), post-release control is mandatory for * * * felony sex offenses[.]” *Id.* at ¶8. Thus, the trial court in this case lacked authority to terminate Jones’s post-release control supervision, because that supervision is mandated by R.C. 2967.28(B)(1).

{¶14} Jones argues that the trial court has authority to terminate his post-release control supervision under R.C. 2929.141. R.C. 2929.141 states, in pertinent part, as follows:

{¶15} “(B) A person on release who by committing a felony violates any condition of parole, any post-release control sanction, or any conditions described in division (A) of section 2967.131 of the Revised Code that are imposed upon the person may be prosecuted for the new felony. *Upon the person's conviction of or plea of guilty to the new felony*, the court shall impose sentence for the new felony, [and] the court may terminate the term of post-release control if the person is a releasee[.]” (Emphasis added).

{¶16} Although Jones was charged with a felony, Jones was not convicted of and did not plead guilty to a felony in case No. 2003-CR-213. Jones was convicted of Disorderly Conduct, a misdemeanor, in case No. 2003-CR-213. Therefore, R.C. 2929.141 is inapplicable to this case, because it authorizes the

court to terminate post-release control “[u]pon the person’s conviction of or plea of guilty to the new felony,” but Jones was convicted of a misdemeanor. See R.C. 2929.141.

{¶17} The State’s sole assignment of error is sustained.

III

{¶18} The State’s sole assignment of error having been sustained, the judgment of the trial court terminating the post-release control supervision of Jones is reversed and vacated.

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GRADY and YOUNG, JJ., concur.

Copies mailed to:

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- Hon. Mary Donovan