[Cite as *State v. Sulek*, 2010-Ohio-3919.]

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

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| STATE OF OHIO | : | |
| Plaintiff-Appellee | : | C.A. CASE NO. 09CA75 |
| vs. | : | T.C. CASE NO. 02-CR-794 |
| KEITH SULEK | : | (Criminal Appeal from Common Pleas Court) |
| Defendant-Appellant | : | |

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O P I N I O N

Rendered on the 20th day of August, 2010.

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GRADY, J.:

{¶ 1} Defendant, Keith Sulek, appeals from a final order of the court of common pleas that denied Sulek's motion to vacate his sentences.

{¶ 2} In 2003, Sulek was convicted on his pleas of no contest

of seven felony offenses. The court imposed six-year sentences on each of two second-degree felony offenses of Aggravated Vehicular Assault, R.C. 2903.08(A)(1), and a one-year sentence on a fourth-degree felony offense of Endangering Children, R.C. 2919.22(A), for an aggregate term of thirteen years. The four other offenses were merged with the Aggravated Vehicular Assault offenses as allied offenses of similar import. R.C. 2941.25.

{¶ 3} When it imposed Defendant's sentences the court stated: "The Court notifies you that post-release control is mandatory in this case up to a maximum of five years . . . ." (December 9, 2003 Transcript, p. 33). The court also advised Defendant of the potential consequences of a post-release control violation. We affirmed Defendant's convictions and sentence on direct appeal. *State v. Sulek*, Greene App. No. 2004-CA-2, 2005-Ohio-4514.

{¶ 4} On August 24, 2009, Defendant filed a motion, pro se, asking the court to vacate his sentences. (Dkt. 100). Defendant argued that his sentences are void, per *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, and related authorities, due to several defects in the trial court's pronouncement regarding the post-release control to which Defendant would be subject. The trial court, relying on our holding in *State v. Harrington*, Greene App. No. 06-CA-29, 2007-Ohio-1335, denied the relief Defendant requested. (Dkt. 103, 104). Defendant filed a notice of appeal.

**FIRST ASSIGNMENT OF ERROR**

**{¶ 5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT OVERRULED AND DENIED APPELLANT'S MOTION. AS IN A MULTI-COUNT CONVICTIONS AND SENTENCING, THE SENTENCE MUST CONTAIN A PROVISION FOR POST-RELEASE CONTROL FOR EACH CONVICTION AND SENTENCE WHEN POST-RELEASE CONTROL IS A MANDATORY REQUIREMENT, AND THE APPELLANT MUST BE NOTIFIED OF POST-RELEASE CONTROL FOR EACH SENTENCE AT SENTENCING. WHEN POST-RELEASE CONTROL IS NOT PROVIDED AND APPELLANT IS NOT NOTIFIED, THE SENTENCE IS VOID PURSUANT TO O.R.C. §2967.28(B)(2) AND (B)(3), O.R.C. §2929.19(B), (B)(3), (c) AND (d). THIS VIOLATING APPELLANTS DUE PROCESS AND EQUAL PROTECTION RIGHTS PURSUANT TO THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND OHIO STATE'S CONSTITUTION CORRESPONDING PROVISIONS."**

**SECOND ASSIGNMENT OF ERROR**

**{¶ 6} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT OVERRULED AND DENIED APPELLANT'S MOTION. WHEN IT FAILED TO PROPERLY IMPOSE POST-RELEASE CONTROL ON THE APPELLANT. AS IT FAILED TO INFORM THE APPELLANT OF THE 'EXACT' PERIOD OF TIME THAT HE WOULD BE ON POST-RELEASE CONTROL FOR HIS MANDATORY POST-RELEASE CONTROL AT SENTENCING PURSUANT TO O.R.C. § 2967.28(B), (B)(2), (B)(3), AND (C), O.R.C. §2929.14(F), O.R.C. § 2929.19(B) AND (B)(3)(C), O.R.C.§ 2929.191. THIS VIOLATING APPELLANTS DUE PROCESS**

**AND EQUAL PROTECTION RIGHTS PURSUANT TO THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND OHIO STATE'S CONSTITUTION CORRESPONDING PROVISIONS."**

**THIRD ASSIGNMENT OF ERROR**

**{¶ 7} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT OVERRULED AND DENIED APPELLANT'S MOTION. WHEN THE TRIAL COURT FAILED TO COMPLY WITH OHIO CRIMINAL 32(C), AS THE JUDGMENT ENTRY OF SENTENCING IS VOID. AS THE TRIAL COURT FAILED TO NOTIFY THE APPELLANT OF A SPECIFICATE(SIC) SENTENCE THAT POST-RELEASE CONTROL WAS IMPOSED ON. THIS VIOLATING APPELLANTS (SIC) DUE PROCESS AND EQUAL PROTECTION RIGHTS PURSUANT TO THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND OHIO STATE'S CONSTITUTION CORRESPONDING PROVISIONS."**

**{¶ 8} Each sentence to a prison term for a felony offense of the first or second degree "shall include a requirement that the offender be subject to a term of post-release control imposed by the parole board after the offender's release from imprisonment." R.C. 2967.28(B). Unless reduced by the parole board prior to his release, a defendant who was sentenced to a term of imprisonment for a second degree felony is subject upon his release to a period of post-release control of three years. R.C. 2967.28(B)(2).**

**{¶ 9} Any prison sentence for a felony of the third, fourth, or fifth degree that is not a sex offense and in which physical**

harm was neither threatened nor caused "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 . . . determines that a period of post-release control is necessary for that offender." R.C. 2967.28(C).

{¶ 10} The post-release control requirements with respect to imprisonment for first and second degree felony offenses are mandatory. Those requirements are discretionary with respect to third, fourth, and fifth degree felony offenses. *State v. Vu*, Medina App. Nos. 07CA0094-M, 95-M, 96-M, 107-M, 108-M, 2009-Ohio-2945. However, the same notification requirement applies to any felony offense for which a term of imprisonment is imposed.

{¶ 11} R.C. 2929.19(B)(3)(c) provides that when a defendant is sentenced to a term of imprisonment the sentencing court must "[n]otify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison . . . ." Any sentence of imprisonment imposed without the statutorily-required notification is void. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085. A defendant who demonstrates that his sentence is void is entitled to a de novo sentencing hearing for the trial court to correct a sentence that omitted notice of post-release control. *State v. Bezak*, 114 Ohio St.3d. 94,

2007-Ohio-3250.

{¶ 12} A motion to withdraw a plea of guilty or no contest made by a defendant whose sentence is void must be considered as a presentence motion under Crim.R. 32.1. *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577. For criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose post-release control, trial courts shall conduct a de novo sentencing hearing. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434.

{¶ 13} In *State v. Harrington*, on which the trial court relied when it denied Defendant's motion to vacate his sentence, the defendant was convicted of a first-degree felony offense. R.C. 2967.28(B)(1) mandates a period of post-release control of five years in that instance, unless reduced by the parole board. The defendant in *Harrington* was notified that he would be subject to a term of post-release control "up to a maximum of 5 years." Id. at ¶32.

{¶ 14} The defendant in *Harrington* argued on appeal that his sentence was void because a full five-year period is mandated by R.C. 2967.28(B)(1). It is not, when the term is reduced by the parole board. Nevertheless, we found that any error in that respect could only be harmless because "[i]f the error has any legal effect at all, it would be to shorten Harrington's period

of post-release control, which would be to his advantage, not to his detriment." *Harrington*, at ¶34.

{¶ 15} The two Aggravated Vehicular Assault offenses for which Defendant Sulek was sentenced to terms of imprisonment are second-degree felonies, to which a mandatory period of post-release control of three years applies. R.C. 2967.28(B)(2). A discretionary term of up to three years is available for the third-degree felony offense of Endangering Children. R.C. 2967.28(C). The court instead notified Defendant at sentencing "that post-release control is mandatory in this case up to a maximum of five years . . . ." Unlike in *Harrington*, the court's erroneous pronouncement of a greater term could not work to Defendant Sulek's advantage.

{¶ 16} In *State v. Thaler*, Montgomery App. No. 21129, 2006-Ohio-4017, ¶11, we held that the trial court erred when it notified the defendant that he would be subject to a post-release control period of five years, when the proper period for the offense concerned was but three years. The court committed the same error in the present case, and the error is likewise prejudicial. The error renders Defendant's three sentences void, *Jordan*, and entitles him to a de novo sentencing hearing. *Singleton*.

{¶ 17} Defendant's second and third assignments of error are sustained, for the foregoing reasons.

**{¶ 18} In his first assignment of error, Defendant argues that the trial court erred when it failed to notify him of each three-year mandatory term of post-release control applicable to each sentence the court imposed for his two second-degree felony offenses of Aggravated Vehicular Assault, and of the discretionary term of post-release control of up to three years available for his fourth-degree felony offense of Endangering Children. Though the error assigned is rendered moot by our determination of the prior assignments of error, we will nevertheless decide it, in view of the holding in *State v. Reznickchek*, Lucas App. Nos. L-07-1426 and 1427, 2008-Ohio-2384, on which Defendant relies.**

**{¶ 19} In *Reznickcheck*, the trial court imposed prison sentences for each of three offenses: two second-degree felonies, for which a three-year term of post-release control is mandatory, and one third-degree felony, abduction, for which a discretionary term of up to three years is available. R.C. 2967.28(B)(2), (C). The court notified the defendant that "there will be mandatory three years of post-release control" imposed for the two second-degree felonies, but "failed to inform (the defendant) of postrelease control with respect to the abduction offense at the plea hearing or sentencing." Id.at ¶ 23, 29. Relying on *State v. Bezak*, the Sixth District held that the three sentences were void for failure to give the required notice concerning the sentence**

**imposed for the abduction offense.**

**{¶ 20} In *Bezak*, the defendant was sentenced to one term of imprisonment for a single offense, obstructing justice, R.C. 2921.32. The trial court imposed a six-month sentence, and for that reason declined to notify the defendant of post-release control requirements. The court of appeals reversed and remanded for resentencing. On review, the Supreme Court held that the defendant could not be resentenced because he had completed serving the sentence the court imposed. The syllabus of the Court in *Bezak* states:**

**{¶ 21} "When a defendant is convicted of or pleads guilty to one or more offense and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense."**

**{¶ 22} We do not construe *Bezak* to require a separate and specific notification of the post-release control requirement applicable to each one of multiple felony offenses for which a term of imprisonment is imposed. Rather, when the post-release control requirement pronounced by the court fails to give the defendant the notice required by R.C. 2929.19(B)(3)(c) for any one of multiple offenses, *Bezak* holds that the offender is entitled to a new sentencing hearing for that particular offense.**

**Resentencing is not required for those companion offenses for which notification was properly given.**

**{¶ 23} Only one term of post-release control is actually served, even though a defendant was sentenced to multiple prison terms. Therefore, when multiple terms of imprisonment are imposed a notification should specify the maximum term of post-release control to which the defendant will be subjected as a result. When identical post-release control requirements apply to multiple prison terms, the same notification may apply to each of the offenses concerned. When different post-release control terms apply to multiple prison terms, a single notification of the maximum stated term may also serve to satisfy the notification requirement applicable to any lesser terms, so long as the notification given does not exclude any lesser terms of post-release control the other offenses involve. If it does, the notification is improper and inadequate with respect to the lesser terms. *Reznickchek*.**

**{¶ 24} The problem in *Reznickcheck* was not that the three-year terms of mandatory post-release control the court imposed for the two second-degree felonies did not encompass the discretionary term of up to three years available for the single third-degree felony. The problem was that the notification was, by its terms, expressly limited to the two second-degree felonies; expressio unius, expression of one thing suggests the exclusion of others.**

**Therefore, per *Bezak*, the sentence that was imposed on the third-degree felony was void, and resentencing "for that particular offense" was required. We do not agree with the decision in *Reznickcheck* that the holding in *Bezak* required reversal of all three sentences the court had imposed.**

**{¶ 25} The trial court was not required to separately and expressly notify Defendant of the terms of post-release control applicable to each of the three offenses for which prison terms were imposed. The first assignment of error is overruled.**

**{¶ 26} Having sustained the second and third assignments of error for the court's erroneous notification of a greater-than-available term of post-release control, we will reverse and vacate the sentences the court imposed and remand the case for resentencing.**

**BROGAN, J., concurs.**

**FROELICH, J., dissenting in part, concurring in judgment.**

**{¶ 27} While concurring that the sentences should be vacated and the Appellant should be re-sentenced, I disagree with the majority's statement that "when different post-release control terms apply to multiple prison terms, a single notification of the maximum stated term may also serve to satisfy the notification**

**requirement applicable to any lesser terms, so long as the notification given does not exclude any lesser terms of post-release control the other offenses involve."**

**{¶ 28} I believe I understand the common sense of the statement - how is a defendant prejudiced if he is told he will be on PRC for three years for all his charges, but not told that he may be on PRC for up to three years simultaneously for some of the other charges? Even if the sentence for which the law requires three years PRC were vacated or the APA reduced the length of that period of PRC, he should still have been aware that he was required to serve any lesser terms.**

**{¶ 29} However practical such a resolution is, this does not appear to be the requirements of the Code as interpreted by the Supreme Court.**

**{¶ 30} The law surrounding PRC notification and what is a "void" or "voidable" sentence cries out for clarification. In the meantime, *Bezak* instructs us that a judgment is void if PRC is not properly included in the sentence for a particular offense. On remand, both as a matter of law and thoroughness in ensuring the Appellant is sentenced completely for each offense for which he has been convicted, the court should inform the Appellant of the separate PRC requirements for each particular offense to which they apply.**

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**Copies mailed to:**

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