

[Cite as *State v. Terry*, 2010-Ohio-5391.]

IN THE COURT OF APPEALS OF DARKE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 09CA0005
vs.	:	T.C. CASE NO. 07CR14004
LARRY TERRY	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 5th day of November, 2010.

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GRADY, J.:

{¶ 1} Defendant, Larry Terry, appeals from a judgment denying his motion for resentencing.

{¶ 2} Defendant was found guilty following a jury trial of one count of trafficking in cocaine, a felony of the third degree.

{¶3} Defendant's conviction subjected him to a term of post-release control of up to three years, imposed at the discretion of the parole board. R.C. 2967.28(C). The trial court was required, when Defendant's sentence was imposed, to notify Defendant of that fact, R.C. 2929.19(B)(3)(d), and further that if Defendant violates a condition of that post-release control the parole board may impose an additional prison term of up to one-half of the stated prison term for his trafficking offense. R.C. 2929.19(B)(3)(e).

{¶4} On September 24, 2007, the trial court sentenced Defendant to a four year prison term. On the issue of post-release control, the trial court stated:

{¶5} "I'm going to impose a four year prison sentence. Post-release control is a possibility.

{¶6} * * *

{¶7} "Post-release control. If you violate parole supervision, you know how it works. Could be an additional fifty percent more time added." (Sentence T. 9).

{¶8} On September 24, 2007, the trial court filed its judgment of conviction, which on the issue of post-release control states:

{¶9} "Upon completion of the prison term, the Defendant shall be subject to such further period of supervision under post-release control as the parole board may determine pursuant to law. As

authorized by law, the Adult Parole Authority may increase or reduce restrictions imposed by the parole board. If the Defendant violates the terms of post-release control, the parole board may return the Defendant to prison for a maximum period of nine months for each violation, but the total period of additional prison time imposed by the parole board for violations while under post-release control shall not exceed one-half of the Defendant's stated prison term. If the Defendant is convicted of a felony committed while under post-release control, the Court having jurisdiction over the new felony may return the Defendant to prison under these cases for an additional period of time as authorized by law and any prison term for the new felony may be served consecutively with the extension of prison time in this case. If the Court imposes additional prison time in this case, the Defendant shall be credited with any additional prison time imposed by the parole board for the same violation."

{¶ 10} On December 19, 2008, we affirmed Defendant's conviction and sentence on direct appeal. *State v. Terry*, Darke App. No. 1730, 2008-Ohio-6738.

{¶ 11} On May 5, 2009, Defendant filed a "Motion To Resentence." Defendant argued that the trial court failed to properly notify him during the sentencing hearing and in the judgment entry of sentence about post-release control. Specifically, the court

failed to notify Defendant that the length of the term of discretionary post-release control that could be imposed upon his release from prison was up to three years. As a result, Defendant argued that his sentence is void. Defendant requested the trial court to resentence him. On May 12, 2009, the trial court denied Defendant's motion for resentencing.

{¶ 12} Defendant appealed to this court from the trial court's judgment denying his motion for resentencing.

FIRST ASSIGNMENT OF ERROR

{¶ 13} "WHERE A SENTENCE IS VOID AS A MATTER OF LAW BECAUSE IT DOES NOT CONTAIN A STATUTORILY MANDATED TERM OF 'PROPERLY IMPOSED' POST-RELEASE CONTROL, A TRIAL COURT ABUSES ITS DISCRETION WHEN DENYING APPELLANT'S GOOD FAITH MOTION FOR RESENTENCING PURSUANT TO THE PROVISIONS OF *STATE V. BEZAK* (2007), 114 OHIO ST 3D 94, 868 N.E. 2D 961; AND *STATE V. JORDAN* (2004), 104 OHIO ST. 3D 21, 817 N.E.2D 864."

{¶ 14} Defendant argues that the trial court abused its discretion by denying his motion for resentencing when the sentence the court imposed during the sentencing hearing and in its judgment of conviction failed to state the length of the term of discretionary post-release control that applies in this case. A trial court is required to notify the offender at the sentencing hearing about post-release control, and is further required to

incorporate the specifics of that notice into its judgment of conviction setting forth the sentence the court imposed. Crim.R. 32(C). *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085; *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126.

{¶ 15} In denying Defendant's motion for resentencing, the trial court acknowledged that it had failed to state the length of the term of discretionary post-release control that applied in this case, but the court stated: "talismanic incantations are not necessary." However, among the most basic requirements of post-release control notification per R.C. 2967.28 and the Ohio Supreme Court's existing precedent is that the court must both notify the offender of the length of the term of post-release control that applies to his conviction(s) and incorporate that notification into its journalized judgment of conviction pursuant to Crim.R. 32(C). *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, at ¶69. Both are necessary in order to authorize the parole board to exercise the authority that R.C. 2967.28 confers on that agency.

{¶ 16} The Supreme Court has held that sentences that fail to include the required notifications are void because they are contrary to law, *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197. More recently, in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the court limited the holding in

Simpkins to sentences that were imposed prior to July 11, 2006, the effective date of R.C. 2929.191. That section creates a special procedure to correct defects in notification at the sentencing hearing and/or in the judgment of conviction.

{¶ 17} Defendant was sentenced on September 24, 2007, after R.C. 2929.191 became effective. The trial court's failure to identify the term of post-release control to which Defendant Terry would be subject, both at sentencing and in its judgment of conviction, entitled Terry to the relief that R.C. 2929.191 authorizes. The court abused its discretion when it denied Terry that relief on the motion he filed. The court's order is final and appealable, per R.C. 2505.02(B)(2), because it was entered in a "special proceeding" for which R.C. 2929.191 provides and deprived Defendant of the "substantial right" to resentencing which that section confers.

{¶ 18} The assignment of error is sustained. The order from which the appeal was taken will be reversed with respect to the post-release control it imposed, and the case will be remanded to the trial court for further proceedings consistent with this opinion.

BROGAN, J., And CANNON, J., concur.

(Hon. Timothy P. Cannon, Eleventh District Court of Appeals,

sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

Copies mailed to:

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Larry Terry

Hon. Jonathan P. Hein