[Cite as *State v. Conway*, 2011-Ohio-24.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 2010-CA-50
Plaintiff-Appellee	:	
	:	Trial Court Case No. 06-CR-1401
v.	:	
	:	
DAVID B. CONWAY	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 7th day of January, 2011.

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Defendant-Appellant, *pro se*

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FAIN, J.

{¶ 1} Defendant-appellant David Conway appeals *pro se* from a judgment overruling his motion to correct a void sentence. Conway contends that the trial court erred by overruling his motion to correct a void sentence, because the original sentence mistakenly incorporated a period of mandatory post-release control *up to* a

maximum of three years, when it should have provided for a mandatory period of post-release control of three years. R.C. 2967.28(B)(2).

{¶ 2} We conclude that the trial court should have held a hearing, pursuant to R.C. 2929.191, to correct a sentencing entry that failed to impose a mandatory term of post- release control. Accordingly, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

I

{¶ 3} David Conway was found guilty of Burglary in Clark County Common Pleas Court Case No. 06-CR-1401, in April 2007, following a jury trial. The trial court sentenced Conway to an eight-year term of imprisonment, and stated that the sentence was to be served consecutive to an eight-year prison term that had been imposed in Clark County Case No. 06-CR-1400. This resulted in a total prison term of sixteen years.

{¶ 4} The two cases involved burglaries at different residences in the same general area, and the cases were consolidated for trial. *State v. Conway*, Clark App. No. 07CA0034, 2008-Ohio-3001, ¶ 2-3. We affirmed both convictions and sentences on appeal. Id. at ¶ 23. We concluded that the convictions were supported by sufficient evidence, and that the trial judge did not err in refusing to sever the two cases. Id. at ¶ 6-22.

{¶ 5} The appeal currently before us involves Case No. 06-CR-1401. The judgment entry of conviction and sentence in that case notes that Conway had been informed that post release control would be mandatory, “up to” a maximum of three

years.

{¶ 6} On direct appeal, Conway did not raise any issue about post-release control. Instead, he has raised this issue in a *pro se* post-judgment motion, filed in April 2010. Conway contended in the motion that the trial court should have imposed a three-year mandatory term of post-release control, rather than a discretionary term of up to three years. Conway argued that the judgment is, therefore, void under *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, and that we lacked jurisdiction to determine the merits of his direct appeal.

{¶ 7} The trial court overruled Conway's motion in April 2010, noting that the original judgment entry stated that post-release control is mandatory. Conway appeals from the entry overruling his motion to correct the sentence.

II

{¶ 8} Conway's sole assignment of error is as follows:

{¶ 9} "THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S MOTION TO CORRECT A VOID SENTENCE."

{¶ 10} Under this assignment of error, Conway contends that the trial court erred by failing to follow statutory mandates on sentencing. Conway also argues that the trial court failed to notify him that the parole board could impose a prison term of up to one-half of the prison term originally imposed if he violates the terms of his supervision or a condition of his post-release control.

{¶ 11} The judgment entry of conviction and sentence filed in Case No. 06-CR-1401 states that:

{¶ 12} "The Court has informed defendant that post release control is mandatory in this case up to a maximum of three years, as well as the consequences for violating conditions of post release control imposed by the Parole Board. Defendant is ordered to serve, as part of this sentence, any such terms of post release control imposed and any prison term for violation of that post release control."

{¶ 13} In responding to Conway's brief, the State notes that there is a disagreement about whether a sentence is rendered void if a court uses terms like "up to" when discussing a mandatory term. Compare *State v. Whitehouse*, Lorain App. No. 09CA009581, 2009-Ohio-6504 (holding that the sentence is rendered void), and *State v. Bailey*, Cuyahoga App. No. 93994, 2010-Ohio-1874 (holding that the sentence is not void). The State has neither discussed nor acknowledged our decision in *State v. Marriott*, Clark App. No. 2008 CA 48, 2010-Ohio-3115, which was issued before the State's brief was filed.

{¶ 14} In *Marriott*, we allowed the defendant to reopen his appeal to assert claims of ineffective assistance of counsel. These claims were based on counsel's alleged ineffectiveness "in failing to argue that he [Marriott] had been sentenced on multiple allied offenses of similar import and that his sentence was void due to the trial court's improper notification of postrelease control." Id. at ¶ 2. In *Marriott*, the Clark County Prosecuting Attorney conceded that:

{¶ 15} "the trial court's judgment entry improperly stated that Marriott would face postrelease control *up to* a maximum of five years, that Marriott's judgment entry of conviction needs to be corrected, and that this correction must occur following a

hearing in accordance with R.C. 2929.191." Id. at ¶ 51 (italics added).

{¶ 16} We noted in *Marriott* that:

{¶ 17} "R.C. 2929.191, effective July 11, 2006, sets forth a procedure for the trial court to correct a judgment of conviction when the trial court, either at the sentencing hearing or in the final judgment, failed to properly notify a defendant about the requisite postrelease control or about the possibility of the parole board imposing a prison term for violating a condition of postrelease control. Under that statute, prior to the offender's release from prison and after a hearing, the court may prepare and issue a nunc pro tunc correction to the judgment of conviction.

{¶ 18} "R.C. 2929.191(C) details how such a hearing must be conducted. It provides:

{¶ 19} " 'On and after the effective date of this section, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division. Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing, the prosecuting attorney of the county, and the department of rehabilitation and correction. The offender has the right to be physically present at the hearing, except that, upon the court's own motion or the motion of the offender or the prosecuting attorney, the court may permit the offender to appear at the hearing by video conferencing equipment if available and compatible. An appearance by video conferencing equipment pursuant to this division has the same force and effect as if

the offender were physically present at the hearing. At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction.'

{¶ 20} "In *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, the Supreme Court of Ohio held that R.C. 2929.191 applies prospectively and, thus, 'the de novo sentencing procedure detailed in the decisions of the Ohio Supreme Court is the appropriate method to correct a criminal sentence imposed prior to July 11, 2006, that lacks proper notification and imposition of postrelease control.' Id. at ¶ 35. The Supreme Court further stated that 'because R.C. 2929.191 applies prospectively to sentences entered on or after July 11, 2006, that lack proper imposition of postrelease control, a trial court may correct those sentences in accordance with the procedures set forth in that statute.' Id.

{¶ 21} "Although *Singleton's* comment that the procedures in R.C. 2929.191 apply to correct sentences imposed after the effective date of the statute could be considered dictum, the Supreme Court has since applied that comment to cases where the defendant was sentenced after July 11, 2006, and the court failed to properly notify the defendant of postrelease control. See *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶ 214 (stating that *Fry* must be resentenced according to R.C. 2929.191 to correct improper term of postrelease control); *State v. Fuller*, 124 Ohio St.3d 543, 2010-Ohio-726, 925 N.E.2d 123 (reversing the appellate court 'to the extent that the court of appeals held that a hearing pursuant to R.C. 2929.191 was not required to correct appellant's sentence').

{¶ 22} "Accordingly, we agree with the parties that Marriott's judgment entry

must be corrected in accordance with R.C. 2929.191, including having a hearing using the procedures set forth in R.C. 2929.191(C)." *Marriott*, 2010-Ohio-3115, ¶ 52-58.

{¶ 23} We sustained Marriott's assignments of error, and remanded the matter to the trial court for resentencing under R.C. 2929.191. Id. at ¶ 58-59.

{¶ 24} The Supreme Court of Ohio recently held that the proper remedy is an action in mandamus or procedendo, not a direct appeal from the denial of a motion for resentencing. *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671. The Supreme Court of Ohio's decision in *Carnail* was based on the concept that void judgments do not result in final appealable orders.

{¶ 25} More recently, however, the Supreme Court of Ohio has decided *State v. Fischer*, _____ Ohio St.3d _____, 2010-Ohio-6238, decided December 23, 2010. In that case, the Supreme Court held that a sentence that does not comply with the post-release control requirements is only partially void, and it may be reviewed at any time, on direct appeal or by collateral attack. Id., ¶ 30. "[W]hen an appellate court concludes that a sentence imposed by a trial court is in part void, only the portion that is void may be vacated or otherwise amended."[1] Id., ¶ 28.

{¶ 26} *State v. Fischer*, supra, suggests that an appellate court could simply correct the sentencing deficiency without remanding the cause. Id., ¶¶ 29-30. But

[1]In the case before us, there is a discrete part of the sentencing entry that is "void" – the part that provides for post-release control for "up to" three years. In a case in which a trial court completely omits to provide for post-release control, the decision in *State v. Fischer*, supra, as we understand it, would hold that the part of the sentencing entry that does not exist (the non-existent provision for post-release control) is void, but the rest of the sentencing entry, which does exist, is not void.

R.C. 2929.191(C) expressly requires that a trial court must conduct a hearing before correcting a judgment of conviction with a defective provision relating to post-release control. *State v. Fischer*, supra, refers to R.C. 2929.191 at ¶ 31, and nowhere in the opinion does the court indicate that any of the provisions in R.C. 2929.191 are unenforceable or inapplicable. The holding in *State v. Fischer*, supra, is recapitulated at ¶ 40, and provides only that the part of a sentence that is void may be reviewed on appeal, or may be collaterally attacked, but that the non-void parts of the sentence may be subject to res judicata or law of the case. It does not deal with the question of whether the process of correcting a post-release control defective sentence requires a hearing in the trial court, as would seem to be mandated by R.C. 2929.191(C).

{¶ 27} Since it is clear that we may reverse the post-release control aspects of the sentence and remand this cause to the trial court for a hearing under R.C. 2929.191(C), and it is not clear that we may take the alternative step of ignoring R.C. 2929.191(C) and making the correction to the sentence that the trial court should have made, we elect the former course.

{¶ 28} Conway's sole assignment of error is sustained.

III

{¶ 29} Conway's sole assignment of error having been sustained, the order from which this appeal is taken is Reversed, and this cause is Remanded for further proceedings in accordance with this opinion.

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GRADY, P.J., and DONOVAN, J., concur.

Copies mailed to:

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