

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26228
	:	
v.	:	T.C. NO. 99CR4257
	:	
BRIAN T. JONES	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

.....

OPINION

Rendered on the 8th day of May, 2015.

.....

MICHELE D. PHIPPS, Atty, Reg. No. 0069829, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

MICHAEL HALLOCK JR., Atty. Reg. No. 0084630, P. O. Box 292017, Dayton, Ohio 45429
Attorney for Defendant-Appellant

.....

PER CURIAM:

{¶ 1} Defendant-appellant, Brian Jones, appeals the trial court's October 30, 2013 denial of his "Motion to Vacate Void Post Release Control Sentence." Jones filed his notice of appeal on May 15, 2014. We granted Jones' motion for a delayed appeal on June 17, 2014.

{¶ 2} On October 6, 2000, Jones pled guilty to three counts of aggravated robbery and three firearm specifications attached to each count of aggravated robbery. Jones was sentenced to: three years for each aggravated robbery to run concurrently, and three years for each firearm specification which ran consecutive to one another as well as to the aggravated robbery sentence. At sentencing, the trial court indicated that Jones would be on post release control for “up to” five years when the statutorily¹ mandated post-release control is “for five years.” The discretionary language used by the trial court prompted Jones’ request to vacate the void post release control sentence on September 16, 2013, which the court, citing the Supreme Court’s earlier decision in *Watkins v. Collins*,² 111 Ohio St. 3d 425, 2006-Ohio-5082, 857 N.E.2d 78, overruled.

{¶ 3} It is from this order that Jones now appeals.

{¶ 4} Jones’ sole assignment of error is as follows:

THE TRIAL COURT FAILED TO PROPERLY NOTIFY DEFENDANT-APPELLANT BRIAN JONES OF THE TERMS OF HIS POST-RELEASE CONTROL, EVEN WHEN GIVEN AN OPPORTUNITY TO CORRECT ITS INITIAL ERROR.

{¶ 5} Pursuant to Local R. 2.24 the State of Ohio gave notice that it does not contest the error assigned by Jones. The law relating to this issue is well settled. In *State v. Fischer*, the Ohio Supreme Court held that mistakes in imposition of statutorily mandated post release control render the post release portion of a sentence void and that that portion must be set aside. 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶

¹ R.C. 2967.28 governs post-release control.

² *Watkins* upheld the post-release control sentences despite the use of discretionary language.

26. It has been repeatedly held that “up to” language is insufficient when post- release control is mandatory and such error causes the post-release control portion of the sentence to be void. See, e.g., *State v. Fleming*, 2013-Ohio-503, 990 N.E.2d 145, ¶ 21-24 (2d Dist.), citing *State v. Billiter*, 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960, ¶ 12, and *State v. Adkins*, 2d Dist. Greene No. 2010-CA-69, 2011-Ohio-2819, ¶ 6 and 14.

{¶ 6} Thus, the trial court clearly erred when it imposed post-release control upon Jones for “up to five years” since the five-year term is mandatory. Under R.C. 2929.191, a trial court may correct an error in imposing post-release control prior to the time the defendant is released from imprisonment under that term. However, Jones has completed the 12-year term, thus it is too late to correct the error. Thus, we agree with the State of Ohio which gave notice of conceded error.

{¶ 7} Accordingly, the trial court’s order of October 30, 2013 is reversed and the entry of post release control for “up to 5 years” is vacated.

.....

FAIN, J., DONOVAN, J. and HALL, J., concur.

Copies mailed to:

Michele D. Phipps
Michael Hallock Jr.
Brian T. Jones
Ohio Department of Rehabilitation and Correction
Record Keeper, Southeastern Correctional Institution
Hon. Michael W. Krumholtz