

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
PUTNAM COUNTY**

STATE OF OHIO

CASE NUMBER 12-06-10

PLAINTIFF-APPELLEE

v.

OPINION

JAMES FREED

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: October 30, 2006

ATTORNEYS:

**JAMES FREED
In Propria Persona
Inmate #507-976
P.O. Box 1812
Marion, OH 43301-1812
Appellant.**

**GARY L. LAMMERS
Prosecuting Attorney
Reg. #0042040
234 East Main Street
Ottawa, OH 45875
For Appellee.**

Shaw, J.

{¶1} Although originally placed on our accelerated calendar, we have elected, pursuant to Local Rule 12(5), to issue a full opinion in lieu of a judgment entry. Defendant-Appellant, James Freed (“Freed”) appeals from the May 9, 2006 judgment of the Putnam County Court of Common Pleas, Putnam County, Ohio overruling Freed’s Petition for Post Conviction Relief to Correct a Manifest Injustice in Sentencing.

{¶2} On June 15, 1998 the Putnam County Court of Common Pleas sentenced Freed to six years in prison for his conviction of Aggravated Robbery, a violation of R.C. 2911.01(A)(1), a felony of the first degree. After serving the full six year term, Freed was released from prison. Approximately one year later, Freed committed the offense of Burglary in Auglaize County.¹

{¶3} On May 9, 2006 Freed filed a Motion for Post Conviction Relief to Correct a Manifest Injustice in Sentencing with the Putnam County Court of Common Pleas. This motion was overruled by the court on the same date.

{¶4} Freed now appeals, asserting six assignments of error.

¹ Although not properly documented in the record, there is some indication that on October 31, 2005 the Auglaize County Court of Common Pleas convicted Freed of Burglary, a violation of R.C. 2911.12(a)(4), a felony of the fourth degree, and that in its November 4, 2005 Journal Entry on Sentence, the court sentenced Freed to a prison term of 17 months. Additionally, and pursuant to R.C. 2929.141(B)(1), it appears that the Auglaize court found that Freed was on post release control at the time the Burglary was committed and therefore ordered that Freed serve an additional 730 days, or two years, to be served consecutively to the 17 month sentence for Burglary, for a total prison sentence of three years, five months.

ASSIGNMENT OF ERROR NO. I

THE ORIGINAL SENTENCING COURT ERRED WHEN IT IMPOSED A SIX YEAR SENTENCE UPON THE DEFENDANT FOR A CONVICTION OF A FIRST DEGREE FELONY WHEN IT FAILED TO INCORPORATE A MANDATORY STATUTORY FIVE YEAR POST RELEASE CONTROL REQUIREMENT INTO IT'S [SIC] SENTENCE AND SENTENCE JOURNAL ENTRY.

ASSIGNMENT OF ERROR NO. II

THE ORIGINAL SENTENCING COURT FURTHER ERRED BY AT NO TIME WHILE THE OFFENDER SERVED HIS ENTIRE SIX YEAR SENTENCE AND PRIOR TO IT'S [SIC] CONCLUSION NOTIFYING HIM OF THIS POST RELEASE CONTROL REQUIREMENT. THEREFORE, AT THE CONCLUSION OF THE DEFENDANT'S SIX YEAR TERM, THE SENTENCING COURT LOST IT'S [SIC] JURISDICTION TO RENOTIFY [SIC] OFFENDER OF MANDATORY POST RELEASE CONTROL REQUIREMENT.

ASSIGNMENT OF ERROR NO. III

SUBSEQUENTLY, THE TRIAL COURT OUT OF AUGLAIZE COUNTY DID NOT HAVE PROPER AUTHORITY TO IMPOSE A POST RELEASE CONTROL SANCTION PRISON TERM OF TWO YEARS UPON THIS DEFENDANT FOR VIOLATING A POST RELEASE CONTROL SANCTION THAT WAS NEVER PROPERLY IMPOSED BY THE ORIGINAL TRIAL COURT.

ASSIGNMENT OF ERROR NO. IV

THE ADULT PAROLE AUTHORITY DOES NOT HAVE THE AUTHORITY TO IMPOSE AND ENFORCE POST RELEASE CONTROL UPON OFFENDERS WHEN POST RELEASE CONTROL WAS NOT PROPERLY IMPOSED BY THE SENTENCING COURT AS PART OF IT'S [SIC] JUDICIALLY IMPOSED SENTENCE, AND INCORPORATED INTO IT'S [SIC] SENTENCE JOURNAL ENTRY.

ASSIGNMENT OF ERROR NO. V

WHEN THE TRIAL COURT IN AUGLAIZE COUNTY SENTENCED THIS DEFENDANT PURSUANT TO R.C. 2929.14, IT VIOLATED ART. II, §28 OF THE OHIO CONSTITUTION PROHIBITING THE ENFORCEMENT OF LAWS RETROACTIVELY.

ASSIGNMENT OF ERROR NO. VI

WHEN THE TRIAL COURT IN AUGLAIZE COUNTY SENTENCED THIS DEFENDANT PURSUANT TO R.C. 2929.14, IT VIOLATED ART. I §10 OF THE US [SIC] CONSTITUTION PROHIBITING THE PASSING AND ENFORCEMENT OF EX POST FACTO LAWS.

{¶5} Prior to addressing Freed’s assignments of error, we must first address the nature of this appeal as Freed has appealed the denial of his Petition for Post Conviction Relief to Correct a Manifest Injustice in Sentencing pursuant to R.C. 2953.21. According to R.C. 2953.21(A)(2),

Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication *. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eight days after the expiration of the time for filing the appeal.**

{¶6} In this case, Freed was convicted of Aggravated Robbery and sentenced by the Putnam County Court of Common Pleas on June 15, 1998. The record reflects that Freed never filed a direct appeal of his conviction or sentence pursuant to App.R.4(A). Pursuant to R.C. 2953.21, Freed had to file a petition for

post conviction relief within 180 days after the expiration of the time for filing the appeal to be timely. It follows then that if a defendant does not file a direct appeal, he has two hundred and ten days to file a timely petition for post conviction relief. *State v. Brooks* 9th Dist. 03CA008292, 2004-Ohio-194. However, the record reflects that Freed did not file his Petition for Post Conviction Relief until May 1, 2006.

{¶7} We note that the trial court's May 9, 2006 Judgment Entry is silent as to whether Freed's petition was timely filed pursuant to R.C. 2953.21(A)(2). However, a trial court is entitled to a presumption of correctness and presumption that the court knew the law and acted accordingly. *Fletcher v. Fletcher* (1984), 68 Ohio St.3d 464, 468, 628 N.E.2d 1342. A reviewing court will presume the validity of a judgment as long as there is evidence in the record to support it. *Id.* In the present case there is evidence in the record to support that Freed's Petition for Post Conviction Relief was untimely filed and therefore the trial court lacked jurisdiction to consider Freed's petition. R.C.2953.21(A)(2); see *State v. Gilliam* 4th Dist. No. 04CA13, 2005-Ohio-2470. Therefore, we may presume that this fact was, at least in part, the basis for the trial court's decision to overrule Freed's petition.

{¶8} Although Freed's Petition for Post Conviction Relief was untimely, in the interests of justice we shall address his first, second, and fourth assignments

of error. In his first assignment of error, Freed alleges that the Putnam County court erred when it failed to notify him of the mandatory nature of the post release control requirement for the Robbery charge and failed to properly incorporate said notification in its June 15, 1998 Judgment Entry of Sentence. In his second assignment of error, Freed alleges that the Putnam County court also erred when it failed to notify him of the post release control requirement at any time during his six year sentence. In his fourth assignment of error, Freed alleges that the Adult Parole Authority lacks the authority to impose and enforce post release control requirements upon offenders when said requirements are not properly imposed by the sentencing court and incorporated into the journal entry on sentencing.

{¶9} In the present case, it does not appear that the June 15, 1998 Judgment Entry of Sentence precisely conforms to the provisions of R.C. 2929.14 and R.C. 2967.28.

{¶10} Specifically, R.C. 2929.14, as effective March 17, 1998, provided in relevant part:

(A) Except as provided in division (C), (D)(2), (D)(3), (D)(4), or (G) of this section and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter and is not prohibited by division (G)(1) of section 2929.13 of the Revised Code from imposing a prison term on the offender, the court shall impose a definite prison term that shall be one of the following:

(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years. ***

(F) If a court imposes a prison term of a type described in division (B) of section 2967.28 of the Revised Code, it *shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division.* If a court imposes a prison term of a type described in division (C) of that section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary. (Emphasis added).

{¶11} Additionally, R.C. 2967.28, as effective March 17, 1998, provided the definition of “post release control” and stated in relevant part:

(A) As used in this section:

(1) "Post-release control" means a period of supervision by the adult parole authority after release from imprisonment that includes one or more post-release control sanctions imposed under this section.

(2) "Post-release control sanction" means a sanction that is authorized under sections 2929.16 to 2929.18 of the Revised Code and that is imposed upon a prisoner upon the prisoner's release from a prison term...

* * *

(B) 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:

(1) **For a felony of the first degree or for a felony sex offense, five years;**

* * *

(D)(1) Before the prisoner is released from imprisonment, the parole board ***shall impose*** upon a prisoner described in division (B) of this section, may impose upon a prisoner described in division (C) of this section, and shall impose upon a prisoner described in division (B)(2)(b) of section 5120.031 or in division (B)(1) of section 5120.032 of the Revised Code, one or more post-release control sanctions to apply during the prisoner's period of post-release control. (Emphasis added).

{¶12} The findings required by the sentencing statutes may be made either orally at the sentencing hearing or in written form in the judgment entry. *State v. Seitz* (2001), 141 Ohio App.3d 347, 348, 750 N.E.2d 1228. However, in the present case, we have no transcript before us from the sentencing hearing. Therefore, we must confine our discussion of the trial court's compliance with the sentencing statutes to the language contained in the Judgment Entry.

{¶13} Subsequent to the language ordering Freed to a term of six years in prison, the June 15, 1998 Judgment Entry contains the following language regarding post release control:

“Defendant is notified that as part of this sentence, the parole board may extend prison time up to 50% of the stated term in 15, 20, 60 or 90 day increments for crimes committed while in prison. After prison release, *if post-release control is imposed*, for violating post release control conditions, the adult parole authority or parole board *may impose* a more restrictive or longer control sanction, return defendant to prison for up to

nine months for each violation, up to a maximum of 50% of the stated term. If the violation is a new felony defendant may receive a new prison term of the greater of one year or the time remaining on post release control.” (Emphasis added).

{¶14} We find that the foregoing did not expressly comply with the mandatory requirements of R.C. 2929.14 and R.C. 2967.28. Ordinarily this would lead to the conclusion that the trial court erred in failing to notify Freed that he would be subject to post release control upon his release from prison, and that the June 15, 1998 Judgment Entry is void as it relates to the imposition of post release control sanctions.

{¶15} However, in *Watkins v. Collins*, __ Ohio St.3d __, 2006-Ohio-5082, the Supreme Court of Ohio recently addressed this very issue. *Watkins* addressed an action for a writ of habeas corpus to compel the release of 12 petitioners who are currently in prison for violating the terms of their post release control.

The sentencing entries for the petitioners specified that post release control was, at a minimum, discretionary and was part of their sentences. Specifically, the trial courts involved in sentencing petitioners Watkins, Streeter, Moore, McGlone, Gaskins, and Kearns stated that these petitioners were “[o]rdered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control.” The sentencing entries for petitioners Ivy and Ramey stated that “[f]ollowing the defendant’s release from prison, the defendant will/may serve a period of post-release control under the supervision of the parole board.” For petitioner Maddox, the sentencing entry likewise provided that “defendant is subject to post-release control which is (mandatory/optional) for up to (three/five) years.” The sentencing entry for petitioner McGowan stated that he “may be

subject to a period of three (3) years of post-release control by the parole board.” Finally, for petitioners Bowling and Abbott, the trial court sentencing entries stated that “if post release control is imposed, for violation of post release control conditions, the Adult Parole Authority or Parole Board could * * * return defendant to prison * * *.”

Watkins at ¶ 50.

{¶16} The Ohio Supreme Court noted that “while these entries erroneously refer to discretionary instead of mandatory post release control, they contain significantly more information than any of the sentencing entries previously held by this court to be insufficient.” *See e.g. Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, *Adkins v. Wilson*, 110 Ohio St.3d 1454, 2006-Ohio-4275, 852 N.E.2d 749, and *Gensley v. Eberlin*, 110 Ohio St.3d 1474, 2006-Ohio-4474, 853 N.E.2d 313. *Watkins* at ¶ 51. Consequently, the court found as follows:

“The sentencing entries at issue are sufficient to afford notice to a reasonable person that the courts were authorizing post release control as part of each petitioner’s sentence. A reasonable person in the position of any of the petitioners would have had sufficient notice that post release control could be imposed following the expiration of the person’s sentence. Any challenged to the propriety of the sentencing court’s imposition of post release control in the entries could have been raised on appeal.”

Watkins at ¶ 51.

{¶17} Therefore, the Ohio Supreme Court found that the petitioners’ sentencing entries, although they mistakenly included wording that suggested that

imposition of post release control was discretionary, contained sufficient language to authorize the Adult Parole Authority to exercise post release control over the petitioners and denied the writ. *Watkins* at ¶ 53.

{¶18} Accordingly, pursuant to the ruling of the Ohio Supreme Court in *Watkins v. Collins, supra*, Freed's first, second, and fourth assignments of error must be overruled, notwithstanding the untimeliness of the petition in this case.

{¶19} Turning our attention to Freed's third, fifth, and sixth assignments of error, we note that these assignments of error directly relate to the Journal Entry on Sentence rendered by the Auglaize County Court of Common Pleas on November 4, 2005. However, we note that Freed has not filed an appeal from the Auglaize County Journal Entry. Therefore, the Auglaize County Journal Entry is not currently before us on appeal and is thus not subject to our review. For that reason, we find that Freed's third, fifth, and sixth assignments of error relate to matters outside the jurisdiction of this court pertaining to this appeal and must be overruled.

{¶20} Accordingly, the May 9, 2006 Judgment Entry is affirmed.

Judgment affirmed.

ROGERS and CUPP, JJ., concur.

r