[Cite as *State v. Taylor*, 2016-Ohio-2781.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	Case No. 15CA12
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
DARRYL D. TAYLOR,	:	
Defendant-Appellant.	:	**RELEASED: 4/27/2016**

APPEARANCES:

Scott D. Evans, Ironton, Ohio, for appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, C. Michael Gleichauf, Lawrence County Assistant Prosecuting Attorney, Ironton, Ohio, for appellee.

Harsha, J.

{¶1} A jury convicted Darryl D. Taylor of trafficking in drugs and found that his property was subject to forfeiture. After the trial court sentenced him, Taylor filed this appeal and argues that there was insufficient evidence to support his conviction and that the conviction was against the manifest weight of the evidence. He appears to argue that he established an entrapment defense because the informant initiated the sale; or in the alternative, that there is no evidence that he formed the intent to sell or offer to sell oxycodone. In support he argues the only evidence presented concerning three controlled buys came from a confidential informant, whom Taylor argues was not credible. He also contends that there was insufficient evidence that the sale occurred in the presence of juveniles because the confidential informant could not provide the names of the juveniles or give a physical description with certainty, i.e. she was not credible. But, the credibility of witnesses is a task for the jury. The state introduced

testimony of investigators and the confidential informant, as well as the audio-video recordings of each of the three controlled buys. And the informant testified she was familiar with the children. Based on this evidence, the jury properly found the essential elements of the crimes proven beyond a reasonable doubt. Because the jury did not clearly lose its way or create a manifest miscarriage of justice, we reject Taylor's first assignment of error.

{¶2} Next, Taylor contends that the trial court erred in denying his motion to suppress because police obtained evidence through the informant in violation of his Fourth Amendment right to be free from unreasonable searches in his home. However, the record shows that Taylor willingly invited the confidential informant – a relative of his ex-wife—into his residence so that he could sell her oxycodone. Thus, there was no violation of Taylor's Fourth Amendment rights. We overrule Taylor's second assignment of error.

{¶3} Finally, Taylor argues that the trial court erred in its sentencing because R.C. 2929.19(B) requires the trial court to impose post-release control for his second degree felony conviction. Taylor claims he was not advised of post-release control so his sentence is void. The state agrees that, according to the sentencing transcript, Taylor was not advised of post-release control at the sentencing hearing and thus that portion of his sentence is void. We agree and sustain Taylor's third assignment of error.

{¶4} We affirm in part, reverse in part, and remand for limited resentencing.

I. FACTS

{¶5} Taylor was the subject of a Lawrence County Drug and Major Crimes Task Force investigation. The chief investigator testified that the task force worked with

a confidential informant to set up three separate purchases of oxycodone from Taylor. The confidential informant was equipped with an audio-visual recording device and marked purchase money. On the first buy the informant went to Taylor's residence and purchased 20 oxycodone 30 mg tablets; on the second buy she purchased 15 oxycodone 30 mg tablets; and on the third buy she purchased 15 oxycodone 30 mg tablets. Each purchase met or exceeded the bulk amount of 450 mg of oxycodone. Investigators set up each of the three buys, searching the confidential informant and her vehicle before and after the buys and following the informant to and from Taylor's residence. The jury viewed the audio-visual recordings from each of the three controlled buys.[1]

{¶6} The confidential informant testified that she knew Taylor because he was married to her cousin and she knew Taylor's two children, who were approximately eight and ten years old. When she arrived at Taylor's residence to make the first controlled buy, she saw both of Taylor's children playing in the front yard, approximately 20 feet from where she and Taylor transacted the controlled buy. The confidential informant testified that the day before the first controlled buy, Taylor met with her to discuss how they were going to conduct his sale of oxycodone to her. She testified that Taylor told her that they were never going to talk on the phone, he was never going to physically hand the pills to her, and he was never going to sell her fewer than 10 oxycodone 30 mg tablets.

[1] We had difficulty reviewing the three audio-video recordings of the controlled buys. Eventually, we were able to view the recordings for the second and third buys, but were never able to review the recording of the first buy. However, because there was sufficient testimony from witnesses concerning the first controlled buy, the inability to view that recording did not control our decision.

{¶7} After the third controlled buy police obtained and executed a search warrant for Taylor's residence and seized four firearms, an additional 19 oxycodone 30 mg tablets, two thousand and seventeen dollars in cash, of which four hundred and fifty dollars were marked money from the controlled buy earlier that day, a money counter, and a counterfeit bill detector. The state introduced photographs of evidence obtained from the search, including photographs of a plastic bag with 19 oxycodone 30 mg tablets, a box containing small, re-sealable plastic bags, a stack of money, and serial number comparisons that identified the marked money used in the controlled buys.

{¶8} Police arrested Taylor, who waived his *Miranda* rights and gave an audio-recorded statement in which he disclosed the location of firearms in his residence, but refused to answer questions related to the controlled buys. Based on the information Taylor provided, investigators located two firearms in the bedroom, one in a kitchen cabinet, and one in the trunk of Taylor's vehicle.

{¶9} A jury found Taylor guilty on count one of trafficking in drugs in the presence of juveniles in violation of R.C. 2925.03(A)(1)(C)(1)(c), a second degree felony, on counts two and three of trafficking in drugs in violation of R.C. 2925.03(A)(1)(C)(1)(c), and on count four of trafficking in drugs in violation of R.C. 2925.03(A)(2)(C)(1)(c), all of which are third degree felonies. The jury also found that Taylor's cell phone and $2,017.00 in cash were subject to forfeiture. However, the jury found Taylor not guilty of having a firearm on or about him while trafficking in drugs.

{¶10} At the sentencing hearing the trial court sentenced Taylor to a total of 13 years in prison and a total fine of $22,500. The trial court did not inform Taylor that he would be subject to a period of post-release control, nor did it inform him of the potential

prison term that may be imposed should he violate the terms of the post-release control. However, the judgment of conviction sets forth the post-release control period and sanctions for possible violations. Taylor appealed.

II. ASSIGNMENTS OF ERROR

{¶11} Taylor raises three assignments of error:

1. THE EVIDENCE PRESENTED AT TRIAL IS INSUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION, WHICH CONVICTION IS MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE AND MUST BE REVERSED.

2. THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION TO SUPPRESS TO THE PREJUDICE OF THE DEFENDANT'S SUBSTANTIAL RIGHTS. THE ADMISSION OF THIS EVIDENCE VIOLATED THE DEFENDANT-APPELLANT'S RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 14 OF THE OHIO CONSTITUTION.

3. THE TRIAL COURT FAILED TO COMPLY WITH THE REQUIREMENTS OF R.C. 2929.19 BY NOT IMPOSING POST-RELEASE CONTROL.

III. LAW AND ANALYSIS

A. Drug Convictions: Sufficiency and Manifest Weight of the Evidence

{¶12} Taylor contends that his convictions for trafficking in oxycodone and trafficking in oxycodone in the presence of juveniles are not supported by sufficient evidence and are against the manifest weight of the evidence. "When a court reviews a record for sufficiency, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. Maxwell*, 139 Ohio St.3d 12, 2014–Ohio–1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). That analysis does not

include a weighing of the evidence or witness credibility. *See State v. Tolbert,* 4th Dist. Washington No. 15CA5, 2015-Ohio-4733. It simply determines whether the evidence, if believed, would support a conviction. But the weight and credibility of evidence are to be determined by the trier of fact. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 132. "A jury, sitting as the trier of fact, is free to believe all, part or none of the testimony of any witness who appears before it." *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014–Ohio–1941, ¶ 23. We defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *Id*.

{¶13} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011–Ohio–6254, 960 N.E.2d 955, ¶ 119. "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins* at 387.

{¶14} We review Taylor's implicit challenge to the jury's rejection of his affirmative defense of entrapment under the manifest weight of the evidence standard. The sufficiency-of-the-evidence standard is inapplicable when a defendant raises an

affirmative defense as justification for the crime because such a defense admits the facts that amount to a violation but interposes a justification for the otherwise illegal conduct. *See State v. Bundy*, 2012-Ohio-3934, 974 N.E.2d 139, ¶30-31 (4th Dist.) We do, however, find entrapment cognizable under a manifest-weight-of-the evidence standard.

{¶15} The jury convicted Taylor of trafficking in oxycodone. R.C. 2925.03(A) sets forth the essential elements of drug trafficking: "No person shall knowingly do any of the following: (1) Sell or offer to sell a controlled substance or a controlled substance analog.* * *"

{¶16} Taylor claims that his drug convictions are against the manifest weight of the evidence because "[t]here is simply no evidence that [he] independently formed the intent to sell or offer to sell oxycodone as charged in the indictment." We construe this statement to imply he was entitled to an acquittal based upon entrapment. In other words, he claims the genesis of the crimes originated with the state and not him. The trial court gave the jury an instruction on entrapment, but the jury rejected Taylor's entrapment defense and found him guilty on all the trafficking offenses.

{¶17} By raising an entrapment defense, the defendant admits that he committed the offense but seeks to avoid criminal liability for his conduct. *State v. Doran*, 5 Ohio St.3d 187, 193, 449 N.E.2d 1295 (1983); *State v. Pack*, 4th Dist. Athens No. 09CA26, 2009-Ohio-6960, ¶ 9-12. The Supreme Court of Ohio defines entrapment under a subjective test that focuses on the defendant's predisposition to commit an offense. *Doran* at 191. "[E]ntrapment is established where the criminal design originates with the officials of the government, and they implant in the mind of an innocent person

the disposition to commit the alleged offense and induce its commission in order to prosecute." *Id*. at paragraph one of the syllabus. The defense is available "when the government acts, under a prearranged agreement, through an 'active government informer,' whether paid or not." *State v. Klapka*, 11th Dist. Lake No. 2003-L-044, 2004-Ohio-2921, ¶ 29, citing *Sherman v. United States*, 356 U.S. 369, 373-374, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). "However, entrapment is not established when government officials 'merely afford opportunities or facilities for the commission of the offense' and it is shown that the accused was predisposed to commit the offense." *Doran* at 192, 449 N.E.2d 1295, quoting *Sherman* at 372.

{¶18} To assist in determining predisposition, the *Doran* court advanced a nonexclusive list of relevant factors: "(1) the accused's previous involvement in criminal activity of the nature charged, (2) the accused's ready acquiescence to the inducements offered by the police, (3) the accused's expert knowledge in the area of the criminal activity charged, (4) the accused's ready access to contraband, and (5) the accused's willingness to involve himself in criminal activity." *Doran*, 5 Ohio St.3d at 192.

{¶19} Because entrapment is an affirmative defense, the defendant has the burden of going forward, as well as the burden of proving the defense by a preponderance of the evidence. *Id*. at paragraph two of the syllabus; R.C. 2901.05(A). Thus the defendant asserting an entrapment defense must adduce evidence supporting his lack of predisposition. *Doran* at 193. The Supreme Court of Ohio has found this requirement fair:

> The accused, as a participant in the commission of the crime, will be aware of the circumstances surrounding the crime, and is at no disadvantage in relaying to the fact-finder his version of the crime as well as the reasons he was not predisposed to commit the crime. Moreover,

> the accused will certainly be aware of his previous involvement in crimes of a similar nature which may tend to refute the accused's claim that he was not predisposed to commit the offense. In summary, none of the evidence which is likely to be produced on the issue of predisposition would be beyond the knowledge of the accused or his ability to produce such evidence.

Id.

{¶20} The record confirms that Taylor failed to carry his burden to establish the entrapment defense. First, Taylor failed to adduce any evidence that the criminal design in this case originated with a government agent. The Director of the Lawrence County Drug Task Force testified that they received information that Taylor was involved in trafficking in drugs from persons who said they were able to purchase drugs from Taylor. As a result, the Task Force began an investigation of Taylor.

{¶21} The confidential informant testified that prior to making any buys from Taylor, Taylor set up a meeting with her in which he told her "how we were going to do things." She testified that Taylor told her, "we were never going to talk on the phone. He's never going to hand me the pills and I couldn't get under ten [pills]." The Director also testified that the price that Taylor sold the oxycodone tablets to the informant, $30 per tablet, was indicative of his level of significance in the drug trafficking trade. Taylor's price was lower than that typically sold at the street level, indicating that Taylor is higher up on the drug trafficking chain. After officers searched Taylor's residence, they found an additional nineteen 30 mg oxycodone tablets, a number of small plastic baggies, nine hundred and thirty dollars in cash, a bill counter and a counterfeit bill detector. One of the officers testified that the evidence seized from the search showed that Taylor was involved in drug trafficking.

{¶22} Taylor presented no evidence that the criminal design for the trafficking offenses originated with the government or that a government agent implanted in his mind the disposition to commit these offenses. Thus, the jury's finding that he failed in his burden to prove entrapment was not against the manifest weight of the evidence.

{¶23} Trafficking under R.C. 2925.03(A)(1) requires an intent to sell and trafficking under R.C. 2925.03(A)(2) requires that the offender must know that the substance is intended for sale*,* but the sale can be made by a person other than the offender. *State v. Cabrales,* 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶ 29, 32. Here, the state proved that Taylor did more than just intend to sell, he actually knowingly sold oxycodone to the confidential informant. “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.” R.C. 2901.22(B).

{¶24} The state introduced evidence that Taylor met with the confidential informant the day before the first controlled buy and instructed her of the protocol she must follow to purchase oxycodone from him. Several investigators and the confidential informant testified about the three controlled buys and the jury saw the audio-visual recordings of the three sales. The state also presented photographs and testimony concerning the drugs and money recovered in the search of Taylor’s home, as well as the testimony and laboratory report of a forensic scientist with the Bureau of Criminal Investigation who testified that she analyzed the tablets Taylor sold and those found in the search and determined that they were 30 mg oxycodone tablets. The state

presented testimony that the bulk amount of oxycodone is 450 milligrams and that each of Taylor's three sales as well as the amount found in his house during the search met or exceeded the bulk amount. R.C. 2925.01(D)(1)(d).

{¶25} On the charge that the trafficking occurred in the presence of juveniles, Taylor claims that the informant "identified two of Mr. Taylor's children playing in the yard at the time of the September 9, 2014 transaction, yet she was unable to provide either their names or physical descriptions with any certainty and the video was inconclusive – casting significant doubt on the first count of the indictment."

{¶26} The state presented sufficient evidence that drug trafficking occurred in the presence of juveniles. Under R.C. 2915.03(A)(1)(C)(1)(c), "if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree." An offense is "committed in the vicinity of a juvenile" if an offender (1) commits the offense within one hundred feet of a juvenile, or (2) within the view of a juvenile. R.C. 2925.01(BB). A "juvenile" is a person under 18 years of age. R.C. 2925.01(N).

{¶27} The confidential informant gave sufficient testimony to establish that there were juveniles present within 100 feet of the controlled buys, even though on cross-examination she was unclear about some of the details. She testified that she personally knows Taylor's children who are both under the age of 18. She identified their gender, race, and ages, and was fairly certain of both of their names and she stated that they were about 20 feet away from her when she purchased the oxycodone. On cross examination she testified that she was certain of one of the child's name, but

less certain of the other's. She also stated that she was no longer certain if they had long or short hair because it had been ten months since she saw them during the first controlled buy and it was possible that they had cut or grown out their hair. The confidential informant's testimony provided sufficient evidence that juveniles were within 100 feet of the first controlled buy. The state need not prove details about the children's hair length ten months later or identify them by name to prove that juveniles were present.

{¶28} Based on this substantial, credible evidence, the jury properly found the essential elements of these crimes proven beyond a reasonable doubt and did not clearly lose its way or create a manifest miscarriage of justice so as to warrant a reversal. We overrule Taylor's first assignment of error.

B. Motion to Suppress

{¶29} Taylor contends that the trial court erred in denying his motion to suppress because the actions of the confidential informant amounted to an illegal search of his residence by an agent of the state. He argues that the confidential informant should be held to the same standards of a law enforcement officer and therefore probable cause was required. Because the confidential informant entered his residence and took audio-visual recordings without a valid search warrant, he argues that all evidence of the controlled buys was obtained in violation of the United States and Ohio Constitutions and could not be used against him in court.

1. Standard of Review and Law

{¶30} In general, "appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 7:

> "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539."

Id. quoting *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8.

{¶31} "The Fourth Amendment to the United States Constitution and the Ohio Constitution, Article I, Section 14, prohibit unreasonable searches and seizures." *State v. Emerson*, 134 Ohio St.3d 191, 2012-Ohio-5047, 981 N.E.2d 787, ¶ 15. The constitutional provisions contain nearly identical language and have been interpreted to afford the same protection. *State v. Hoffman*, 141Ohio St.3d 428, 2014-Ohio-4795, 25 N.E.3d 993, ¶ 11.

{¶32} The Fourth Amendment protects against two types of unreasonable intrusions: 1) searches, which occur when an expectation of privacy that society is prepared to consider reasonable is infringed upon and 2) seizures, which occur when there is some meaningful interference with an individual's liberty or possessory interest in property. *See State v. Jacobsen* 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L.Ed.2d 85 (1984).

{¶33} "[S]earches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). "Once the defendant demonstrates that he was subjected to a warrantless search or seizure, the burden shifts to the state to establish that the warrantless search or seizure was constitutionally permissible." *State v. Johnson*, 4th Dist. Scioto No. 14CA3618, 2014-Ohio-5400, ¶ 13, citing *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 98.

{¶34} Taylor's suppression motion challenged the state's use of the confidential informant to enter his house and make audio-video recordings of the controlled buys without a search warrant. He argued that the use of the audio-video recordings violated R.C. 2933.51, R.C. 2933.52, and R.C. 2933.521 as well as his Fourth Amendment rights.

{¶35} "The Fourth Amendment limits official government behavior; it does not regulate private conduct,"; "[c]ourts have regularly declined to exclude evidence when it is obtained by private persons." *See, generally,* Katz, Martin, Lipton, Giannelli, and Crocker, *Baldwins Ohio Practice Criminal Law*, Sections 3:1-3:4 (3d Ed.2014), Katz, *Ohio Arrest, Search & Seizure*, Section 28:14 (2014); *State v. Branch*, 2d Dist. Montgomery No. 22758, 2008-Ohio-6721, ¶ 28; *State v. Jedd*, 146 Ohio App.3d 167, 171, 765 N.E.2d 880 (4th Dist. 2001). However, the Fourth Amendment does apply to searches and seizures where a private party acted as an instrument or agent of the government. *See State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.*, 97 Ohio

St.3d 504, 2002-Ohio-6717, 780 N.E.2d 981, ¶ 13. In that instance, the burden is on the defendant to show that state involvement transformed a private search into state action. Katz, *Ohio Arrest, Search & Seizure*, at Section 28:14.

{¶36} There is no reasonable expectation of privacy when a person entrusts a supposed companion in criminal activities and that companion betrays that trust. Where the private party acts as an agent of the government, the Fourth Amendment does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. *See Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); *Lopez v. United States*, 373 U.S. 427, 83 S. Ct. 1381, 10 L.Ed.2d 462 (1963).

> No warrant to 'search and seize' is required * * * when the Government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics from the accused, *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966), or when the same agent, unbeknown to the defendant, carries electronic equipment to record the defendant's words and the evidence so gathered is later offered in evidence. *Lopez v. United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963).

United States v. White, 401 U.S. 745, 749, 91 S.Ct. 1122, 1125, 28 L.Ed.2d 453 (1971); *see also State v. Geraldo*, 68 Ohio St. 2d 120, 123, 429 N.E.2d 141, 144 (1981) ("If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case."); *State v. Lee*, 4th Dist. Gallia No. 83 CA 17, 1986 WL 2028, *13 (Jan. 23, 1986) ("the Ohio Supreme Court held in syllabus language in [*Geraldo*] that "Neither the federal constitution nor state law requires the suppression of evidence obtained by the warrantless recording of a telephone conversation between a consenting police

informant and a non-consenting defendant. "); *State v. Wallace*, 2012-Ohio 6270, 986 N.E.2d 498, ¶29 (7th Dist.) ("The fact that a confidential informant was used to record conversations is not a violation of the Fourth Amendment. Both federal and Ohio courts have long permitted the warrantless recording of conversations between a cooperating informant and a defendant."). In essence the wrongdoer has no reasonable expectation of privacy in what he openly reveals to a supposed accomplice. There is no Fourth Amendment protection for such misplaced confidence. *United States v. White,* at 749-752.

{¶37} Taylor's argument that the state's audio-video recordings of the controlled buys violates R.C. 2933.51, et seq. also fails. Under the statute, the state is permitted to intercept a wire, oral, or electronic communication, if one of the parties to the communication has given prior consent to the interception by the state. R.C. 2933.52(B)(3). Here the confidential informant gave consent and voluntarily cooperated with investigators.

{¶38} Taylor's argument that the confidential informant's presence in his residence constituted an illegal search by the state also fails. Taylor invited the confidential informant into his house – her presence was with his knowledge and consent. Thus, the state was not required to have a search warrant. Because the confidential informant's actions did not constitute a search and did not violate Taylor's Fourth Amendment rights, we overrule his second assignment of error.

C. Notification of Post-Release Control

{¶39} Taylor correctly argues that R.C. 2929.19(B)(2)(c) requires the trial court to impose a period of post-release control because his sentence included one second-

degree felony. Although the judgment of conviction states that Taylor is subject to a mandatory three-year period of post-release control for the second-degree felony and optional post-release control periods for the third-degree felonies, as well as potential sanctions for violations of post-release control, Taylor points out the trial court did not inform Taylor that he would be subject to post-release control at the sentencing hearing.

1. Standard of Review, Law, and Analysis

{¶40} When reviewing felony sentences we apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 2016-Ohio-1002, __ N.E.3d __, ¶ 1. R.C. 2953.08(G)(2) specifies that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either that "the record does not support the sentencing court's findings" under the specified statutory provisions or "the sentence is otherwise contrary to law." *Id.*

{¶41} When a court determines that a prison term is necessary at sentencing, R.C. 2929.19(B)(3)(c) requires it to notify the offender of a mandatory term of post-release control for certain felony convictions, including felonies of the second degree. To comply with this requirement, the Supreme Court of Ohio held that trial courts must actually notify offenders of post-release control sanctions both at the sentencing hearing and in the sentencing entry. *See State v. Jordan,* 104 Ohio St.3d 21, 2004–Ohio–6085, 817 N.E.2d 864, at paragraph one of the syllabus (superseded by statute on separate grounds as stated in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958.) When a court fails to properly impose post-release control for a particular offense, the offending portion of the sentence is void, must be set aside, and is subject to review and correction. *State v. Fischer,* 128 Ohio St.3d 92, 2010–Ohio–6238, 942

N.E.2d 332, at ¶ 27–29; *State v. Triplett*, 4th Dist. Lawrence No. 10CA35, 2011-Ohio-4628, ¶ 4.

{¶42} The trial court convicted Taylor of a second-degree felony and three third-degree felonies. The state concedes that the trial court failed to inform Taylor that he would be subject to post-release control upon his release. Our review of the record confirms this. The transcript from the sentencing hearing shows that trial court did not inform Taylor that he would be subject to post-release control, nor did it inform him of the sanctions for violation of post-release control. As a result, that portion of the sentence is vacated and the matter remanded for a resentencing hearing in accordance with R.C. 2929.191. We sustain Taylor's third assignment of error.

III. CONCLUSION

{¶43} Having overruled Taylor's first and second assignments of error, we affirm his convictions and, having sustained his third assignment of error, we reverse his sentence and remand for resentencing.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART,
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, J: Concurs in Judgment and Opinion.
McFarland, J.: Concurs in Judgment Only.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.