[Cite as *State v. Frymier*, 2009-Ohio-2475.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Julie A. Edwards, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2008-CA-96
JASON FRYMIER	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Licking County Court of Common Pleas, Case No. 97CR00327
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 22, 2009
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
KENNETH OSWALT Assistant Prosecuting Attorney 20 South Second Street Newark, OH 443055	ANDREW T. SANDERSON 21 West Church Street Suite 201 Newark, OH 43055

Gwin, P.J.

{¶1} This matter is on appeal from defendant-appellant, Jason Frymier's re-sentencing to impose a term of post-release control.

STATEMENTS OF FACTS AND CASE

{¶2} On October 3, 1997, the Licking County Grand Jury indicted appellant, on one count of attempted aggravated murder in violation of R.C. 2903.01(A) and one count of aggravated burglary in violation of R.C. 2911.11(A)(1). Both counts carried a gun specification pursuant to R.C. 2941.145. Said charges arose from a shooting incident involving appellant's father-in-law, Terry Booher, on September 25, 1997[1]. A jury trial commenced on January 12, 1998. The jury found appellant guilty as charged. By judgment entry filed January 14, 1998, the trial court sentenced appellant to ten years on the attempted aggravated murder charge and nine years on the aggravated burglary charge, to be served consecutively. The trial court also sentenced appellant to three years on the gun specification to be served consecutively to the other sentences.

{¶3} Appellant appealed his convictions and sentences to this Court, raising two assignments of error: ineffective assistance of trial counsel because his counsel failed to challenge the state's physical evidence; and the trial court erred in sentencing him to consecutive sentences and the maximum sentence as to the attempted aggravated murder charge. This Court overruled both assignments of error, and affirmed appellant's convictions and sentences.

{¶4} On June 5, 2003, Mr. Frymier moved the trial court to reconsider the original sentence imposed. This motion was opposed by the government through its filing on

[1] For a complete statement of the underlying facts see *State v. Frymier* (August 18, 1998), Licking App. No. 98CA0020.

June 9, 2003, and overruled by the trial court through its entry dated June 23, 2003. On May 14, 2008, the prosecution filed a motion requesting a "resentencing hearing." Said hearing was held on July 7, 2008. Over the objection of appellant, the trial court sentenced appellant to twenty-two years in prison and an additional term of post-release control supervision.

{¶5} Appellant has filed a timely notice of appeal, raising the following assignment of error for our consideration:

{¶6} "I. THE 'RESENTENCING' OF THE APPELLANT WAS IN ERROR."

I.

{¶7} In his sole assignment of error, appellant claims that his resentencing in order to "correct" the omission of his earlier sentence in its failure to include a period of post-release control is prohibited. Appellant's argument advances three different legal theories: (1) a claimed double jeopardy violation; (2) a claim that R.C. 2929.191 is an unconstitutionally retroactive law; and (3) a claim that R.C. 2929.191 is unconstitutional in that it purports to allow for the "correction" of a previously imposed sentence that was void, rather than a true "resentencing." We disagree with each proposition.

{¶8} In *State v. Bezak,* 114 Ohio St.3d 94, 868 N.E.2d 961, 2007-Ohio-3250, the Ohio Supreme Court held, "[w]hen a defendant is convicted of or pleads guilty to one or more offenses and post-release control is not properly included in a sentence for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense."

{¶9} More recently, in *State v. Simpkins,* 117 Ohio St. 3d 420, 2008-Ohio-1197, the State moved to resentence the defendant prior to his release from incarceration for

convictions of rape and gross sexual imposition. Following a hearing, the Court of Common Pleas, Cuyahoga County, resentenced defendant to the same period of imprisonment, but adding five years of post-release control. The defendant appealed arguing that the decision in *Hernandez v. Kelley,* 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, did not support the after-the-fact resentencing of a defendant who has nearly completed his sentence. The Ohio Supreme Court affirmed the Eighth District Court of Appeals and held, "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which post-release control is required, but not properly included in the sentence, the sentence is void and the state is entitled to a new sentencing hearing in order to have post-release control imposed on the defendant unless the defendant has completed his sentence." Id. at paragraph one of the syllabus; *State v. McDowell,* Licking App. No. 2008-CA-0110, 2009-Ohio-1193 at ¶ 10.

{¶10} In such a re-sentencing hearing, the trial court may not merely inform the offender of the imposition of post-release control and automatically re-impose the original sentence. Rather, the effect of vacating the trial court's original sentence is to place the parties in the same place as if there had been no sentence." *State v. Bezak,* 114 Ohio St.3d at 95, 2007-Ohio-3250, 868 N.E.2d 961. Thus, the offender is entitled to a de novo sentencing hearing. Id.*;* See also, *State v. Bruner,* Ashtabula App. No.2007-A0012, 2007-Ohio-4767; *State v. Smalls,* Stark App. No. 2008 CA 00164, 2009-Ohio-832.

{¶11} *Res Judicata* does not act to bar a trial court from correcting the error. *State v. Simpkins,* supra, citing *State v. Ramey,* Franklin App. No. 06AP-245, 2006-Ohio-6429, at paragraph 12; See also, *State v. Barnes,* Portage App. No.2006-P-0089,

2007-Ohio-3362 at paragraphs 49-51; *State v. Rodriguez* (1989), 65 Ohio App.3d 151, 154, 583 N.E.2d 347. Furthermore, re-sentencing a defendant to add a mandatory period of post-release control that was not originally included in the sentence does not violate due process. *State v. Simpkins,* supra at paragraph 20 of syllabus.

{¶12} Moreover, such a resentencing does not violate finality or double jeopardy restraints, because jeopardy does not attach to a void sentence. *Jordan,* 104 Ohio St.3d 21, 2006-Ohio-6085, 817 N.E.2d 864 at ¶ 25, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, 14 OBR 511, 471 N.E.2d 774 ("trial court's correction of a statutorily incorrect sentence did not violate appellant's right to be free from double jeopardy"). Thus, "'an invalid sentence for which there is no statutory authority is * * * a circumstance under which there can be no expectation of finality' to trigger the protections of the Double Jeopardy Clause." *State v. Ramey,* 10th Dist. No. 06AP-245, 2006-Ohio-6429, 2006 WL 3518010, at ¶ 16, quoting *State v. McColloch* (1991), 78 Ohio App.3d 42, 46, 603 N.E.2d 1106. Accordingly, appellant's reliance on the Double Jeopardy Clause is misplaced.

{¶13} In response to the Supreme Court of Ohio's holdings above, the General Assembly enacted R.C. 2929.191, which applies in cases where the original sentencing occurred prior to the statute's effective date, July 11, 2006, and where the trial court failed to notify the offender of post release control at the time of the original sentencing. R.C. 2929.191 provides:

{¶14} "(A)(1) If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division

that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of section 2929.14 of the Revised Code, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison.

{¶15} "If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type described in division (B)(3)(d) of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(2) of section 2929.14 of the Revised Code, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison.

{¶16} "(2) If a court prepares and issues a correction to a judgment of conviction as described in division (A)(1) of this section before the offender is released from imprisonment under the prison term the court imposed prior to the effective date of this

section, the court shall place upon the journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. If the court sends a copy of the entry to the department, the department promptly shall deliver a copy of the entry to the offender. The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the sentence and the judgment of conviction entered on the journal and had notified the offender that the offender will be so supervised regarding a sentence including a prison term of a type described in division (B)(3)(c) of section 2929.19 of the Revised Code or that the offender may be so supervised regarding a sentence including a prison term of a type described in division (B)(3)(d) of that section.

{¶17} "(B)(1) If, prior to the effective date of this section, a court imposed a sentence including a prison term and failed to notify the offender pursuant to division (B)(3)(e) of section 2929.19 of the Revised Code regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control or to include in the judgment of conviction entered on the journal a statement to that effect, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that if a period of supervision is imposed

following the offender's release from prison, as described in division (B)(3)(c) or (d) of section 2929.19 of the Revised Code, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of section 2967.131 of the Revised Code the parole board may impose as part of the sentence a prison term of up to one-half of the stated prison term originally imposed upon the offender.

{¶18} "(2) If the court prepares and issues a correction to a judgment of conviction as described in division (B)(1) of this section before the offender is released from imprisonment under the term, the court shall place upon the journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. If the court sends a copy of the entry to the department, the department promptly shall deliver a copy of the entry to the offender. The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the judgment of conviction entered on the journal and had notified the offender pursuant to division (B)(3)(e) of section 2929.19 of the Revised Code regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control.

{¶19} "(C) 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 the case at bar, appellant concedes that the trial court originally sentenced him prior to July 11, 2006 and failed to notify him about post release control during the sentencing hearing or in its subsequent judgment entry. Appellant further agrees that the trial court conducted the resentencing hearing before his prison term expired.

{¶21} Appellant's argument that the trial court employed a statutory mechanism to "correct" the sentence originally imposed is unpersuasive. As previously noted, the trial court conducted a new sentencing hearing because the failure to advise appellant of the mandatory period of post-release control rendered the original sentence void. *State v. Simpkins,* supra*; State v. Bezak,* supra. "Whether the trial court fails to notify a defendant at the sentencing hearing, in the subsequent judgment entry, or both, the effect is the same-the sentence is void for failing to comply with statutory requirements

governing post release control. Thus, based on R.C. 2929.191 and the Supreme Court of Ohio precedent, we find that the trial court had the authority to conduct the [re-sentencing] hearing to notify [appellant] of post release control and to issue its subsequent corrective entry. We also find that doing so did not violate finality-of-sentencing or double-jeopardy principles." *State v. Schmitt*, 175 Ohio App.3d 600, 888 N.E.2d 479, 2008-Ohio-1010 at ¶ 18.

{¶22} Appellant's argument that R.C. 2929.191 is an unconstitutionally retroactive law is equally without merit. Whether the trial court relied upon R.C. 2929.191 is not relevant. We note a reviewing court is not authorized to reverse a correct judgment merely because it was reached for the wrong reason. *State v. Lozier* (2004), 101 Ohio St.3d 161, 166, 2004-Ohio-732 at ¶46, 803 N.E.2d 770, 775. [Citing State *ex rel. McGinty v. Cleveland City School Dist. Bd. of Edn.* (1998), 81 Ohio St.3d 283, 290, 690 N.E.2d 1273]; *Helvering v. Gowranus* (1937), 302 U.S. 238, 245, 58 S.Ct. 154, 158. In the absence of R.C. 2929.191, the trial court would still have been authorized to conduct a new sentencing hearing in order to advise appellant concerning post-release control.

{¶23} Accordingly, appellant's sole assignment of error is denied.

{¶24} For the foregoing reasons, the judgment of the Licking County Court of Common Pleas is affirmed.

By: Gwin, P.J.,

Edwards, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY

WSG:clw 0401

[Cite as *State v. Frymier*, 2009-Ohio-2475.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JASON FRYMIER	:	
Defendant-Appellant	:	CASE NO. 2008-CA-96

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY