

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	W. Scott Gwin, P.J.
Plaintiff-Appellee	:	John W. Wise, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. 2008 CA 00198
DONALD JACK BILLETER, pro se	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal Appeal From Stark County Court
Of Common Pleas Case No. 2004 CR 0452

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 8, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Edwards, J.

{¶1} Defendant-appellant, Donald Jack Billeter, appeals from the August 22, 2008, Judgment Entry of the Stark County Court of Common Pleas denying his Motion to Suspend Further Execution of Sentence. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On April 9, 2004, the Stark County Grand Jury indicted appellant on one count of escape in violation of R.C. 2921.34(A)(1)(C)(2)(a), a felony of the second degree. At his arraignment on April 16, 2004, appellant entered a plea of not guilty to the charge. The Bill of Particulars, which was filed on April 19, 2004, alleged that appellant, on March 8, 2004, had fled from his parole officer.

{¶3} Thereafter, on April 26, 2004, appellant withdrew his former not guilty plea and entered a plea of guilty to the charge of escape. As memorialized in a Judgment Entry filed on June 3, 2004, appellant was placed on community control for a period of three (3) years under specified terms and conditions.

{¶4} On July 30, 2004, a Motion to Revoke Community Control was filed. Following a hearing held on August 20, 2004, appellant's community control was revoked and appellant was sentenced to six (6) years in prison.

{¶5} On June 14, 2007, appellant filed a Motion for Judicial Release. Pursuant to a Judgment Entry filed on June 15, 2007, the trial court denied the same without a hearing.

{¶6} Subsequently, on July 21, 2008, appellant filed a Motion to Suspend Further Execution of Sentence. Appellant, in his motion, argued that his sentence was void ab initio pursuant to *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844

N.E.2d 301. Appellant, in his motion, argued that in an earlier 1998 case (Case No. 1998CR0651), he had pleaded guilty to one count of aggravated burglary in violation of R.C. 2911.11, a felony of the first degree, and one count of domestic violence in violation of R.C. 2919.25(A), a felony of the fifth degree, and that he was sentenced in such case to an aggregate prison sentence of three (3) years. The trial court, in such case, in a Judgment Entry that was attached to appellant's motion in the case sub judice, stated, in relevant part, as follows:

{¶7} “The Court has further notified the defendant that post-release control is mandatory in this case up to a maximum of three (3) years, as well as the consequences for violating conditions of post-release control imposed by the Parole Board under Revised Code Section 2967.28. The defendant is ordered 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.”

{¶8} Appellant, in his Motion to Suspend Further Execution of Sentence, argued that, the proper term of post-release control in his 1998 case was five years rather than three years and that, because he was not resentenced in such case before he served his entire sentence, “his placement on post-release control [in Case No. 1998CR0651] was unlawful, void, and a nullity.” Appellant further argued that his subsequent conviction for escape in the case sub judice, based upon his post-release control, was invalid because he should not have been on post-release control in his earlier case.¹

¹ We note that at the time appellant was charged with escape in the case sub judice, he had been on post-release control in his earlier case for less than three years. Appellant had been released from prison in his previous case on May 20, 2001. He was indicted in this case in April of 2004.

{¶9} As memorialized in a Judgment Entry filed on August 22, 2008, the trial court denied appellant's Motion.

{¶10} Appellant now raises the following assignment of error on appeal:

{¶11} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN DENYING APPELLANT'S 'MOTION TO SUSPEND FURTHER EXECUTION OF JURISDICTIONALLY DEFECTIVE CONVICTION AND SENTENCE AS SAME IS VOID AB INITIO, PURSUANT TO *HERNANDEZ V. KELLY*, 108 OHIO ST.3D. 395; *STATE V. SIMPKINS*, 117 OHIO ST.3D 420; AND CRIM.R. 47', WHERE POST RELEASE CONTROL FOR EARLIER [1998] SENTENCE IS NOT PROPER AND THE INSTANT CONVICTION FOR ESCAPE THEREFROM IS VOID."

I

{¶12} Appellant, in his sole assignment of error, argues that the trial court erred in denying his Motion to Suspend Further Execution of Sentence. We disagree.

{¶13} As is stated above, appellant argued that his sentence in the case should have been suspended based on *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301. In such case, an action for a writ of habeas corpus, the Ohio Supreme Court held that the Adult Parole Authority lacked authority to impose post-release control on an offender, whose prison sentence was completed, who had not been advised by the trial court of statutorily required post-release control. *Id.* at ¶ 28, 844 N.E.2d 301. However, in contrast to *Hernandez*, in the case sub judice, appellant, in his 1998 case, was advised of mandatory post-release control in the trial court's Judgment Entry. While, as appellant alleges, the trial court may have erred in advising appellant that the proper period of post-release control was three years rather than five

years, the Ohio Supreme Court, in *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, held that the trial court did notify the appellant of post-release control even though the trial court misstated the post-release control term as five years when the actual term was three years. See *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, at ¶ 50 (finding notice of post-release control during sentencing sufficient where post-release control was mandatory and entry contained some discretionary language).²

{¶14} Because, for the foregoing reasons, appellant's sentencing entry in Case No. 1998 CR 0651 was not void, his conviction for escape in the case sub judice was not invalid. We find, therefore, that the trial court did not err in denying appellant's Motion to Suspend Further Execution of Sentence.

² In *State v. Holloway*, Cuyahoga App. No. 86426, 86427, 2007-Ohio-2221, the appellant argued that he was denied due process of law when the trial court incorrectly stated that the length of the mandatory post-release control was three years rather than five years. The court held that the trial court's misstatement was harmless in light of *Watkins*, supra.

{¶15} Appellant's sole assignment of error is, therefore, overruled.

{¶16} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, J.

Gwin, P.J. and

Wise, J. concur

JUDGES

JAE/1118

