

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Julie A. Edwards, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-VS-	:	
	:	Case No. 2009-CA-51
RYAN WAYNE NICHOLS	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Court of Common Pleas, Case No. 2005-CR-0290, 2005-CR-0348, 2006-CR-0026, & 2006-CR-0027
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JUDGMENT:	Vacated, In Part and Remanded
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DATE OF JUDGMENT ENTRY:	August 10, 2009
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APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Gwin, P.J.

{¶1} Defendant-appellant Ryan W. Nichols appeals the October 3, 2008 judgment entry of the trial court in which the court overruled his motion to correct an illegal sentence. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 4, 2005, the Richland County Grand Jury indicted appellant on one count of failing to appear on a personal recognizance bond in violation of R.C. 2937.99 (Case No.2005-CR-290).

{¶3} On June 8, 2005, appellant was indicted on one count of safecracking in violation of R.C. 2911.31, one count of receiving stolen property in violation of R.C. 2913.51, and one count of tampering with evidence in violation of R.C. 2921.12, all involving National Electric Supply (Case No.2005-CR-348).

{¶4} On January 12, 2006, appellant was indicted on one count of breaking and entering in violation of R.C. 2911.13, and one count of theft in violation of R.C. 2913.02, both involving a CITGO Gas Station (Case No.2006-CR-26). On same date, appellant was indicted on twenty-four counts, including breaking and entering, theft, safecracking, receiving stolen property, criminal damaging in violation of R.C. 2909.06, and possession of criminal tools in violation of R.C. 2923.24, involving numerous businesses (Case No.2006-CR-27). All the charges arose from numerous break-ins in the Mansfield, Ohio area.

{¶5} A jury trial commenced on July 10, 2006. The jury found appellant guilty of twenty counts, all the counts in Case Nos.2005-CR-290, 2005-CR-348, and 2006-CR-26, and fourteen counts in Case No.2006-CR-27. The fourteen counts involved the

Duke and Duchess Gas Station, Richland Lumber, Washington Floors, the Western Shop, Arby's Restaurant, Hamad Tire, receiving stolen property regarding a Harley motorcycle and possession of criminal tools.¹ By judgment entries filed August 15, 2006, the trial court sentenced appellant to an aggregate term of nine and one-half years in prison.² Appellant was informed at his sentencing hearing and in the journal entries that his sentence included five years of post-release control.

{¶6} Appellant appealed his convictions and sentences to this Court, raising five assignments of error. This Court overruled four assignments of error, and affirmed appellant's convictions; however, we sustained appellant's fifth assignment of error. We found that the trial court erred in sentencing appellant to one additional felony count and one additional misdemeanor count for which appellant had not been convicted. This Court vacated appellant's sentence and remanded the case for resentencing.

{¶7} In accordance with the Court's remand order, appellant was brought back before the trial court on July 31, 2007. At that time, the trial court re-imposed the nine and one half year sentence.

{¶8} Appellant filed a motion to correct illegal sentence on September 18, 2008. In that motion, he argued that the trial court did not advise him at the July 31, 2007 re-sentencing hearing that he was subject to a term of post-release control. The trial court denied appellant's motion on October 3, 2008, noting that appellant was properly advised of his post-release control obligations in his original sentencing hearing.

¹ The trial court had dismissed two of the counts in Case No.2006-CR-27 prior to the case going to the jury.

² For a complete statement of the underlying facts, see *State v. Nichols*, Richland App. No. 2006CA0077, 2007-Ohio-3257.

{¶9} On March 31, 2009, nearly two years after his resentencing, appellant filed a motion for leave to file a delayed appeal, challenging the term of post-release control that was imposed by the trial court. By Judgment Entry filed April 23, 2009, this Court found that there was no record that appellant had been served with a copy of the trial court's October 8, 2008 order as required by Civ. R. 58(B) and App.R. 4(A). Accordingly, this Court found that appellant's notice of appeal was timely filed on March 31, 2009.

{¶10} Appellant has raised the following assignment of error for our consideration:

{¶11} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED MR. NICHOLS' MOTION TO CORRECT ILLEGAL SENTENCE, THEREBY DENYING HIM DUE PROCESS OF AND EQUAL PROTECTION UNDER THE LAW IN VIOLATION OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."

I.

{¶12} In his sole assignment of error appellant contends that the trial court failed to orally advise him at his re-sentencing hearing that post-release control was included in his sentence in violation of *State v. Bezak* (2007), 114 Ohio St.3d 94, 868 N.E.2d 961. We agree.

{¶13} R.C. 2929.14(F) (1) provides that if a court imposes a prison term for a felony, the sentence shall include a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment. R.C. 2929.19(B) (3) requires that the sentencing court notify the offender that the offender will be

supervised under R.C. 2967.28 after the offender leaves prison. The Supreme Court of Ohio has interpreted these provisions as requiring a trial court to give notice of post-release control both at the sentencing hearing and by incorporating it into the sentencing entry. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraph one of the syllabus. The trial court must do so regardless of whether the term of post-release control is mandatory or discretionary. *Id.* at paragraph two of the syllabus; *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, ¶ 18.

{¶14} In *State v. Jordan* the Court further held that “[w]hen a trial court fails to notify an offender about post-release control at the sentencing hearing, but incorporates that notice into its journal entry imposing sentence, it fails to comply with the mandatory provisions of R.C. 2929.19(B) (3) (c) and (d), and, therefore, the sentence must be vacated and the matter remanded to the trial court for resentencing.” *Id.* at paragraph two of the syllabus.

{¶15} The effect of vacating the sentence places the parties in the same position as they were had there been no sentence” *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568; *Bezak*, *supra* at paragraph 13 citing *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267, 227 N.E.2d 223. 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; *State v. McDowell*, Licking App. No. 2008-CA-0100, 2009-Ohio-1193; *State v. Frymier*, Licking App. No. 2008-CA-96, 2009-Ohio-2475.

{¶16} A trial court retains jurisdiction to correct a void sentence and is authorized to do so when its error is apparent.” *State v. Simpkins*, supra, citing *State v. Cruzado*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263 at paragraph 19; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864 at paragraph 23. *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.”

{¶17} In the case at bar, this Court vacated appellant’s original sentence. 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. Accordingly, the state’s argument that the trial court had already provided the appropriate oral notification regarding post-release control at his original sentencing hearing on July 24, 2006 is unpersuasive. However, the state concedes that, in this case, the trial court imposed a term of five years of post-release control when in fact appellant is only subject to a three-year term. We note that the trial court can correct this discrepancy upon re-sentencing. *State v. Bezak*, supra.

{¶18} Therefore, appellant's assignment of error is sustained. The sentence is vacated and the matter is remanded to said court for a new sentencing hearing consistent with the mandates of *Bezak*.

By Gwin, P.J.,

Edwards, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY

WSG:clw 0710

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

RYAN WAYNE NICHOLS

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2009-CA-51

For the reasons stated in our accompanying Memorandum-Opinion, The sentence is vacated and the matter is remanded to said court for a new sentencing hearing consistent with the mandates of *State v. Bezak* (2007), 114 Ohio St.3d 94, 868 N.E.2d 961. Costs to appellant.

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY