

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ROBERT M. BARCUS	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Petitioner	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 10-CA-69
JUDGE W. DAVID BRANSTOOL	:	
	:	
	:	
Respondent	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Writ

JUDGMENT: Denied

DATE OF JUDGMENT ENTRY: August 27, 2010

APPEARANCES:

For Petitioner

TRACY F. VANWINKLE
Assistant Prosecutor
20 South Second St., 4th Fl.
Newark, OH 43055

For Respondent

ROBERT M. BARCUS PRO SE
LONDON CORRECTIONAL INSTITUTION
1580 State Route 56
Box 69
London, OH 43140

Hoffman, J.

{¶1} Petitioner, Robert M. Barcus, has filed a Petition for Writ of Prohibition requesting the trial court be prevented from resentencing him. The Petition suggests Respondent failed to properly impose post-release control when Petitioner was sentenced in Licking County Case Number 04 CR 089. Petitioner suggests the sentence is therefore voidable which would prevent resentencing. Petitioner further avers because the State failed to appeal the sentence, the trial court lacks jurisdiction to resentence Petitioner. Respondent has filed a Motion to File Outside of Time and Motion to Dismiss. Because we sua sponte find the Petition fails to state a claim upon which relief may be granted, Respondent's motions are denied as moot.

{¶2} The Supreme Court has held, "Sua sponte dismissal of a complaint for failure to state a claim upon which relief can be granted is appropriate if the complaint is frivolous or the claimant obviously cannot prevail on the facts alleged in the complaint. Rules Civ.Proc., Rule 12(B)(6)." *State ex rel. Kreps v. Christiansen* 88 Ohio St.3d 313, 725 N.E.2d 663 (Ohio, 2000). Relator has not provided the Court with a copy of the sentencing entry. Even assuming all of the facts alleged in the Petition are true, Relator has not stated a claim upon which relief may be granted. The Supreme Court has specifically held prohibition does not lie where the sentencing entry fails to include post-release control. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263.

{¶3} Further, the Supreme Court has held a sentence which does not contain post- release control notification is void not voidable as suggested by Petitioner, "We hold that when a trial court fails to notify an offender that he may be subject to post-

release control at a sentencing hearing, as required by former R.C. 2929.19(B)(3), the sentence is void; the sentence must be vacated and the matter remanded to the trial court for resentencing. The trial court must resentence the offender as if there had been no original sentence. When 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.” *State v. Bezak* (2007), 114 Ohio St.3d 94, 97, 868 N.E.2d 961, 964.

{¶4} Finally, the Supreme Court has held, “A trial court's jurisdiction over a criminal case is limited after it renders judgment, but it retains jurisdiction to correct a void sentence and is authorized to do so. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 23. Indeed, the trial court has an obligation to do so when its error is apparent. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 23.” *Bowen v. Sheldon* (2010), 124 Ohio St.3d 551, 925 N.E.2d 129, 131.

{¶5} Because Respondent does have jurisdiction to resentence Petitioner, the Petition for writ of prohibition is denied.

{¶6} WRIT DENIED.

{¶7} COSTS TO PETITIONER.

{¶8} IT IS SO ORDERED.

By: Hoffman, J.,

Gwin, P.J., and

Farmer, J., concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

WBH:ag

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ROBERT M. BARCUS

Petitioner

-VS-

JUDGE W. DAVID BRANSTOOL

Respondent

JUDGMENT ENTRY

CASE NO. 10-CA-69

For the reasons stated in our accompanying Memorandum-Opinion, the writ is denied.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER