[Cite as *State v. Burley*, 2010-Ohio-4840.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-136
ALONZO BURLEY	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas Case No. 2004CR0020
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	September 23, 2010

APPEARANCES:

For Plaintiff-Appellee:

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Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-Appellant, Alonzo Burley, appeals from his resentencing, wherein a period of post-release control was imposed on Appellant in addition to his original prison sentence of six years after pleading guilty to three counts of robbery, felonies of the second degree, in violation of R.C. 2911.02(A)(2).

{¶2} Appellant was originally indicted on January 12, 2004. He pled guilty to three counts of robbery and was sentenced to six years in prison on September 2, 2004. At the sentencing hearing, Appellant was advised that he would be subject to a mandatory period of post-release control and that if he violated that post-release control, he would be subject to being returned to prison for said violations. The trial court omitted to include this post-release control language in its initial judgment entry, however.

{¶3} On November 3, 2009, the State filed a motion requesting the court to resentence Appellant and to enter a corrected judgment entry pursuant to R.C. 2929.191(C). Appellant filed a memorandum in opposition to the resentencing of Appellant on November 17, 2009.

{¶4} A hearing was held on November 18, 2009, wherein Appellant objected to the proceedings and requested that they be dismissed. The trial court overruled the objection and resentenced Appellant to his original sentence of six years and added the language in the judgment entry that he is also subject to three years of mandatory post-release control.

{¶5} Appellant raises one Assignment of Error:

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

I.

{¶7} In his sole assignment of error, Appellant argues that the trial court erred in resentencing him and imposing a mandatory term of post-release control in the judgment entry. We disagree.

{¶8} Appellant first argues that the doctrine of res judicata bars the trial court from resentencing him. A sentence which fails to notify the offender that he or she is subject to post-release control is wholly unauthorized and void. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961. "Because a sentence that does not conform to statutory mandates requiring the imposition of post-release control is a nullity and void, it must be vacated. 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 ¶13 citing *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267, 227 N.E.2d 223.

{¶9} 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 ¶19; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864 at ¶23. Res Judicata does not act to bar a trial court from correcting the error. *State v. Simpkins*, supra, citing *State v. Ramey*, 10th Dist. No. 06AP-245, 2006-Ohio-6429, at ¶12; *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 ¶20 of syllabus. “In 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.” *State v. Simpkins*, supra at ¶1 of the syllabus; See also, *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263. “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. Smalls*, 5th Dist. No.2008 CA 00164, 2009-Ohio-832.

{¶10} This court has repeatedly stated that when a sentence is void, such as a sentence that improperly advises a defendant of post-release control terms, the trial court is authorized to correct the sentence. *State v. McDowell*, 5th Dist. No. 2008-CA-0110, 2009-Ohio-1193. See also, *State v. Reid*, 5th Dist. No. 09-CA-5, 2009-Ohio3835 (rejecting res judicata argument on similar grounds).

{¶11} Thus, Appellant’s res judicata claim is without merit.

{¶12} Appellant also argues that the trial court's resentencing hearing is prohibited by the Eight Amendment's ban on “cruel and unusual punishment.”

{¶13} The Eighth Amendment to the United States Constitution prohibits "[e]xcessive" sanctions. It provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

{¶14} Moreover, Section 9, Article I of the Ohio Constitution sets forth the same restriction: "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted."

{¶15} "It is well established that sentences do not violate these constitutional provisions against cruel and unusual punishment unless the sentences are so grossly disproportionate to the offenses as to shock the sense of justice in the community. *State v. Chaffin* (1972), 30 Ohio St.2d 13, 59 O.O.2d 51, 282 N.E.2d 46; *State v. Jarrells* (1991), 72 Ohio App.3d 730, 596 N.E.2d 477." *State v. Hamann* (1993), 90 Ohio App.3d 654, 672, 630 N.E.2d 384, 395.

{¶16} In *State v. Hairston,* the Court reiterated, " '[a]s a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment.' " 118 Ohio St.3d 289, 293, 888 N.E.2d 1073, 1077, 2008-Ohio-2338 at ¶ 21, quoting *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 69, 203 N.E.2d 334.

{¶17} In the case at bar, Appellant's sentences are all within statutorily authorized ranges. The Eighth Amendment's ban on cruel and unusual punishment does not prohibit a court from correcting a void sentence.

{¶18} Appellant's assignment of error is overruled.

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

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

[Cite as *State v. Burley*, 2010-Ohio-4840.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
ALONZO K. BURLEY	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-136
	:	

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

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HON. PATRICIA A. DELANEY

_____
HON. SHEILA G. FARMER

_____
HON. JOHN W. WISE