[Cite as *State v. Smalls*, 2010-Ohio-535.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- TAWANN LAVAR SMALLS Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. Sheila G. Farmer, J. Hon. John W. Wise, J. Case No. 2009-CA-00151 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 1999-CR-1576
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	February 16, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO PROSECUTING ATTORNEY STARK COUNTY, OHIO By: RONALD MARK CALDWELL Assistant Prosecuting Attorney Appellate Section 110 Central Plaza, South – Suite 510 Canton, Ohio 44702-1413	BERNARD L. HUNT 2395 McGinty Road, N.W. North Canton, Ohio 44720

Hoffman, P.J.

{¶1} Defendant-appellant Tawann Lavar Smalls appeals his sentence entered by the Stark County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE

{¶2} On December 23, 1999, Appellant was indicted on multiple charges of felonious assault with a firearm specification and having weapons under disability. On April 20, 2000, a jury found Appellant guilty on all counts and specifications.

{¶3} On April 27, 2000, the Stark County Court of Common Pleas sentenced Appellant to eight years incarceration on all six of the felonious assault charges, ordering two be served consecutively to each other, and the remaining concurrently. The court imposed a one year sentence on the having weapons under disability charge. The court also imposed the mandatory three-year prison term on each of the six firearm specification counts, but imposed them concurrently with each other; this aggregate three-year term was then imposed consecutively to the aggregate sixteen-year term for the underlying offenses for a total of nineteen years.

{¶4} On May 8, 2000, Appellant filed an appeal with this Court. Via Judgment Entry of May 7, 2001, this Court affirmed the April 27, 2000 judgment of the trial court.

{¶5} On June 30, 2008, Appellant filed a motion for resentencing pursuant to R.C. 2929.191, asserting the original sentence did not include a provision for post-release control, as defined by R.C. 2967.28. The trial court denied the motion.

{¶6} On July 30, 2008, Appellant appealed the trial court's decision denying his motion for resentencing to this Court. Via Judgment Entry of February 23, 2009, this

Court reversed the decision of the trial court, and remanded the matter for further proceedings.

{¶7} On May 4, 2009, the trial court resentenced Appellant following a hearing, imposing the same prison sentence but adding a five year term of post-release control.

{¶8} Appellant now appeals, assigning as error:

{¶9} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR A NEW TRIAL, WITHOUT A HEARING.

{¶10} "II. THE TRIAL COURT ERRORED [SIC] WHEN IT FAILED TO PROPERLY ADVISE THE APPELLANT OF THE TERMS OF HIS POST-RELEASE CONTROL OBLIGATIONS AT THE RE-SENTENCING HEARING.

{¶11} "III. THE TRIAL COURT ERRORED [SIC] AND LOST JURISDICTION WHEN IT ATTEMPTED TO RE-SENTENCE THE APPELLANT AFTER A NEARLY NINE YEAR DELAY."

I, II, and III

{¶12} All three of the assigned errors set forth by Appellant raise common and interrelated issues; therefore, we will address the arguments together.

{¶13} In *State v. Bezak* 114 Ohio St3d 94, 2007-Ohio-3250, the Ohio Supreme Court held,

{¶14} "We hold that when a trial court fails to notify an offender that he may be subject to postrelease 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 postrelease 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."

{¶15} In *State v. Simpkins* 117 Ohio St.3d 420, 2008-Ohio-1197, the Court held:

{¶16} "We hold that in cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence.

{¶17} "***

{¶18} "Here, we consider whether a defendant who was not sentenced properly to a statutorily mandated period of postrelease control can be resentenced if he is still imprisoned and there was no direct appeal from the judge's sentencing error. That question is answered by a discrete line of decisions arising from cases that are more closely analogous to appellant's case.

{¶19} "Our analysis begins by making a key distinction that has been obscured in our law: the difference between sentences that are void and those that are voidable. We recognize that we have not always used these terms as properly and precisely as possible. See, e.g., *State v. Payne,* 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 34 (Lanzinger, J., concurring) (suggesting that the court had not properly used the term 'void' and instead should have used the term 'voidable' in referring to the sentences at issue in *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 103); *Kelley v. Wilson,* 103 Ohio St.3d 201, 2004-Ohio-4883, 814 N.E.2d 1222, ¶

14 ("despite our language in [*State v. Green* (1998), 81 Ohio St.3d 100, 689 N.E.2d 556] that the specified errors rendered the sentence 'void,' the judgment was voidable and properly challenged on direct appeal"); *State v. Parker,* 95 Ohio St.3d 524, 2002-Ohio-2833, 769 N.E.2d 846, ¶ 20-26 (Cook, J., dissenting) (arguing that the majority opinion confused void and voidable judgments).

{¶20} "In general, a void judgment is one that has been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act. *State v. Payne,* 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 27. Unlike a void judgment, a voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but the court's judgment is invalid, irregular, or erroneous. Id.

{¶21} "Although we commonly hold that sentencing errors are not jurisdictional and do not necessarily render a judgment void, see *State ex rel. Massie v. Rogers* (1997), 77 Ohio St.3d 449, 450, 674 N.E.2d 1383; *Johnson v. Sacks* (1962), 173 Ohio St. 452, 454, 20 O.O.2d 76, 184 N.E.2d 96 'The imposition of an erroneous sentence does not deprive the trial court of jurisdiction', there are exceptions to that general rule. The circumstances in this case-a court's failure to impose a sentence as required by law-present one such exception.

{¶22} "***

{¶23} "Therefore, in circumstances in which the judge disregards what the law clearly commands, such as when a judge fails to impose a nondiscretionary sanction required by a sentencing statute, the judge acts without authority. *Beasley,* 14 Ohio St.3d at 75, 14 OBR 511, 471 N.E.2d 774. Such actions are not mere errors that render a sentence voidable rather than void. If a judge imposes a sentence that is unauthorized

by law, the sentence is unlawful. 'If an act is *unlawful* it not erroneous or voidable, but it is wholly unauthorized and void.' (Emphasis sic.) *State ex rel. Kudrick v. Meredith* (1922), 24 Ohio N.P. (N.S.) 120, 124, 1922 WL 2015, *3.

{¶24} "Because a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void, it must be vacated. The effect of vacating the sentence places the parties in the same position they would have been in had there been no sentence. *Bezak,* 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 13, citing *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267, 39 O.O.2d 414, 227 N.E.2d 223.

{¶25} "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. *Cruzado,* 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, at ¶ 19; *Jordan,* 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, at ¶ 23. Indeed, it has an obligation to do so when its error is apparent.

{¶26} "***

{¶27} "Neither constitutional principles nor the doctrine of res judicata requires that sentencing become a game in which a wrong move by the judge or prosecutor means immunity for a defendant. See *Bozza v. United States* (1947), 330 U.S. 160, 166-167, 67 S.Ct. 645, 91 L.Ed. 818."

{¶28} The Ohio Supreme Court recently held post-release control resentencing does not offend the principles of double jeopardy, due process or separation of powers. *State v. Bloomer,* 122 Ohio St.3d 200, 2009-Ohio-2462.

{¶29} Appellant maintains the trial court abused its discretion in denying his motion for a new trial without a hearing. At the resentencing hearing in this matter, the following exchange occurred:

{¶30} "Mr. Quinn: To that end he is, he is requesting a new trial in the matter in, in as much as that he believes the, the case law supports the, the proposition that he's entitled to that due to the irregularity in the proceedings. The proceedings in this case were that the, the sentence was not a valid sentence. Due to those irregularities he believes the case law supports that he's entitled to a new trial.

{¶31} "In addition, he believes that he's entitled to an outright dismissal again for the, the same reason. I, I believe it's State versus Baker that indicates that a delay in sentencing - - in this case we're talking about sentencing and not resentencing; we're talking about sentencing in the - - from the outset. That there, there was a delay of approximately ten years in, in actually giving him an effective sentence.

{¶32} "The Court of Appeals has indicated in this case that this - - the sentence that was imposed was a nullity, did not comply, and it is his, his position that the Court because of that delay is deprived of jurisdiction to impose a sentence at this time.

{¶33} "He, uh - - we request that these be made a part of the record. I've indicated to him that I believe these are in the nature of post conviction motions. I've also indicated to him that we will be bringing those appropriately.

{¶34} "I've also indicated to him that we would be making a request for a, for a, uh, a, uh, attorney to be appointed for any post conviction and appeals purposes so that he may pursue those rights.

{¶35} "He is not prepared to, uh, to proceed with the sentencing portion, Your Honor.

{¶36} "The Defendant: No, I'm not.

{¶37} "The Court: Okay. Well, first of all, I get to run this courtroom, okay. All right.

{¶38} "First of all, counsel, as to the motion for the new trial, I've not received the motion nor read it, and I will rule appropriately, okay. That's the first thing we have to handle here today.

{¶39} "I've read the case from the Fifth District Court of Appeals, and my understanding today that what I am to do is issue a judgment in accordance with the opinion that has been provided which mostly focuses on post-release control."

{¶40} "* * *

{¶41} "The Defendant: And also, Your Honor, as for my, um, um, as for my, uh, my new trial motion, as, as my attorney said, I do want to file for a new trial on the grounds of error of law occurring in that trial for the simple fact that I had my substantial rights violated under Constitutional Amendment 14 since my sentence is a nullity and void and I wasn't able to find out that fact until after or as soon as the Court of Appeals deemed my sentence to be void, Your Honor.

{¶42} "* * *

{¶43} "The Court: Okay, well, sir, there's no motion for a new trial in front of me so let's get to the sentencing issue today. When I get that motion - -

{¶44} "The Defendant: Well, I'm just - - I was just trying to, uh - - excuse me, Your Honor, I was just trying to make an oral motion.

{¶45} "The Court: Okay. And your oral motion for a new trial today is denied.

{¶46} "The Defendant: Okay. Um - -

{¶47} "The Court: Okay. And I'll review your written motion when I receive it."

{¶48} Tr. at 4-11.

{¶49} Based upon the above cited case law and the record set forth above, the trial court did not abuse its discretion in denying Appellant's motion for a new trial. The original sentence imposed by the trial court was void for failing to include the required post-release control provisions, and the trial court had jurisdiction to conduct a new sentencing hearing pursuant to this Court's earlier remand order.

{¶50} Appellant further maintains the trial court erred in failing to advise him of the terms of his post-release control at the resentencing hearing.

{¶51} R.C. 2967.28(B) reads:

{¶52} "Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a sentencing court to notify the offender pursuant to division (B)(3)(c) of section 2929.19 of the Revised Code of this requirement or to include in the judgment of conviction entered on the journal a statement that the offender's sentence includes this requirement does not negate, limit, or otherwise affect the mandatory period of

supervision that is required for the offender under this division. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(c) of section 2929.19 of the Revised Code regarding post-release control or to include 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 a statement regarding post-release control. Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of post-release control required by this division for an offender shall be of one of the following periods:

{¶53} "(1) For a felony of the first degree or for a felony sex offense, five years;

{¶54} "(2) For a felony of the second degree that is not a felony sex offense, three years;

{¶55} "(3) For a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years."

{¶56} At the May 4, 2009 hearing, the trial court set forth the sentence imposed:

{¶57} "Now, I also want to explain one other thing to you, okay? I want to explain to you post-release control.

{¶58} "I believe, Kristen, there's a mandatory five years of post-release control?

{¶59} "Ms. Mlinar: Yes, Your Honor.

{¶60} "The Court: All right.

{¶61} "You will be subject to a term of post-release control of five years. If this period of post-release control is imposed upon your release from prison and if you violate the conditions of that supervision, the parole board may impose a prison term as part of the sentence not to exceed nine months, and the maximum cumulative prison term for all violations under this division shall not exceed one-half of the stated prison term originally imposed as part of the sentence."

{¶62} Tr. at 21-22.

{¶63} The trial court memorialized Appellant's sentence via Judgment Entry of May 18, 2009, stating:

{¶64} "The Court has further notified the defendant that post release control is mandatory in this case up to a maximum of five (5) 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."

{¶65} Based upon the above and in light of the requirements of R.C. 2967.28(B), the trial court properly sentenced Appellant including the required term of post release control.

{¶66} Finally, Appellant asserts the trial court lost jurisdiction in resentencing him after a nine year delay. Because Appellant was still incarcerated at the time of resentencing, we find this argument unpersuasive based upon the holding in *Bezak*.

{¶67} Accordingly, the sentence imposed by the Stark County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Wise, J. concur

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

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

s/ John W. Wise
HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
TAWANN LAVAR SMALLS	:	
	:	
Defendant-Appellant	:	Case No. 2009-CA-00151

For the reasons stated in our accompanying Opinion, the sentence imposed by the Stark County Court of Common Pleas is affirmed. Costs to Appellant.

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

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

s/ John W. Wise
HON. JOHN W. WISE