[Cite as *State v. Bunger*, 2010-Ohio-5862.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
TERRY BUNGER	:	Case No. CT10-0028
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. CR2005-0060
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 24, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ROBERT SMITH 27 North Fifth Street Zanesville, OH 43701	ERIC J. ALLEN 713 South Front Street Columbus, OH 43206

Farmer, J.

{¶1} On March 3, 2005, the Muskingum County Grand Jury indicted appellant, Terry Bunger, on one count of rape of a child under thirteen years of age in violation of R.C. 2907.02.

{¶2} On January 3, 2006, appellant pled guilty to attempted rape. By entry filed February 6, 2006, the trial court sentenced appellant to eight years in prison. By entry filed May 7, 2010, appellant was resentenced in order to include postrelease control language in the sentencing entry.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "APPELLANT IS ENTITLED TO A DE NOVO SENTENCING HEARING PURSUANT TO *STATE V. BEZAK*, 114 OHIO ST. 3D 94."

I

{¶5} Appellant claims the trial court erred in denying him a resentencing hearing pursuant to *State v. Bezak,* 114 Ohio St.3d 94, 2007-Ohio-3250. We disagree.

{¶6} In *Bezak,* the Supreme Court of Ohio held the following at syllabus: "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."

{¶7} During appellant's original sentencing hearing on January 3, 2006, the trial court informed appellant of his postrelease control obligation as follows:

{¶8} "THE COURT: You understand if you went to prison in this matter, since this is a sex offense, it's mandatory upon your release that you be placed upon five years of post-release control?

{¶9} "THE DEFENDANT: Yes, sir.

{¶10} "THE COURT: You understand that while on post-release control, you'd be subject to a variety of rules and regulations? Should you fail to follow those - - those rules and regulations, you can be sent back to prison for up to nine months for each rule violation you may commit, the - - the total amount of time you can be sent back to prison would be equal to one-half of your original prison sentence.

{¶11} "THE DEFENDANT: Yes, sir.

{¶12} "THE COURT: You also understand if you commit a new felony while on post-release control, in addition to any sentence you receive for that new felony, additional time can be added to that sentence in the form of the time you have left on post-release control or one year, whichever is greater?

{¶13} "THE DEFENDANT: Yes, sir." January 3, 2006 T. at 5-6.

{¶14} The trial court's February 10, 2006 entry of conviction and sentence failed to memorialize the postrelease control colloquy.

{¶15} On May 7, 2010, the trial court resentenced appellant to include his postrelease control obligation:

{¶16} "The Court finds that Defendant has been convicted of one (1) count of Attempted Rape (Victim less than 10 years of age), a felony of the second degree, in violation of ORC §2923.02(A) and §2907.02(A)(1)(b), and is subject to the sentencing

guidelines of Ohio Revised Code Section 2929.13(D) and 2929.13(F)(2). On February 8, 2006, Defendant was sentenced to eight (8) years in prison.

{¶17} "***The Court notified Defendant that 'Post Release Control' is mandatory in this case for five (05) years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code §2967.28. Defendant is ordered to serve as part of this sentence any term for violation of that post-release control.***"

{¶18} We find *Bezak* does not apply in this case because in *Bezak,* the sentencing entry provided the requisite postrelease control language, but the trial court had failed to so advise the defendant during the sentencing hearing.

{¶19} In *State ex rel. Carnail v. McCormick,* 126 Ohio St.3d 124, 2010-Ohio-2671, ¶35-38, the Supreme Court of Ohio recently sustained a mandamus action on facts similar to those sub judice:

{¶20} "Judge McCormick's 1999 sentencing entry for Carnail failed to include the statutorily required five-year term of postrelease control. R.C. 2967.28(B)(1). '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***. *State v. Simpkins,* 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, syllabus; *State v. Boswell,* 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, ¶8 ('Our recent line of cases dealing with postrelease control has consistently held that sentences that fail to impose a mandatory term of postrelease control are void'); see also *State v. Singleton,* 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶14, 18-19, and cases cited therein. ' "The effect of determining that a judgment is void is well

established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment." ' *State v. Bezak,* 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶12, quoting *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268, 39 O.O.2d 414, 227 N.E.2d 223.

{¶21} "Ohio appellate courts have uniformly recognized that void judgments do not constitute final, appealable orders.***The 1999 sentencing entry was not a final, appealable order, because it was void for failing to include the statutorily required mandatory term of postrelease control.

{¶22} "Consistent with our holding in *Culgan,* once Judge McCormick denied Carnail's motion to correct the 1999 sentence, Carnail was entitled to the requested extraordinary relief in mandamus to compel the judge to issue a new sentencing entry to comply with R.C. 2967.28(B)(1) to obtain a final, appealable order. Under this precedent, Carnail was not relegated to appealing the judge's order denying his motion to correct the sentence. See *Culgan,* 119 Ohio St.3d 535, 2008-Ohio-4609, 895 N.E.2d 805, ¶8, and cases cited therein. Similarly, in *State v. Clutter,* Crawford App. No. 3-08-27, 2008-Ohio-6576, 2008 WL 5205682, the Third District Court of Appeals dismissed an appeal from a trial court's denial of a defendant's motion for resentencing and held that under *Culgan,* the appropriate remedy was an action in mandamus or procedendo. Id. at ¶13-14.

{¶23} "Consequently, the court of appeals erred in dismissing Carnail's mandamus action." (Some citations omitted.)

{¶24} Upon review, we find the trial court's May 7, 2010 entry complies with the aforementioned mandates.

{¶25} The sole assignment of error is denied.

{¶26} The judgment of the Court of Common Pleas of Muskingum County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Wise, J. concur.

_s/ Sheila G. Farmer_____

_s/ William B. Hoffman_____

_s/ John W. Wise_____

JUDGES

SGF/sg 1112

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
TERRY BUNGER	:	
Defendant-Appellant	:	CASE NO. CT10-0028

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio is affirmed. Costs to appellant.

_s/ Sheila G. Farmer_____

_s/ William B. Hoffman_____

_s/ John W. Wise_____

JUDGES