[Cite as *State v. Chittenden*, 2010-Ohio-6071.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 2010-CA-55
RONALD CHITTENDEN	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Court of Common Pleas, Case No. 1997CR0543-H
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 8, 2010
APPEARANCES:	
For Plaintiff-Appellant	For Defendant-Appellee
KIRSTEN L. PSCHOLKA-GARTNER Assist. Richland Co. Prosecutor 38 South Park Street Mansfield, OH 44902	JOHN A. BOYD 3 North Main Street, Ste 505 Mansfield, OH 44902

Gwin, P.J.

{¶1} Defendant-appellant Ronald Chittenden appeals the March 25, 2010 judgment entry of the trial court in which the court re-sentenced appellant in order to advise him of his post-release control obligations. Plaintiff-appellee is the State of Ohio.

STATEMENT OF FACTS AND LAW

{¶2} On May 29, 1998, appellant was convicted of one count of Involuntary Manslaughter, R.C. 2903.04(A), one count of Aggravated Burglary, R.C. 2911.01(A)(3), and one count of Aggravated Robbery, R.C. 2911.11(A) (1). The trial court sentenced appellant to a total term of fifteen (15) years imprisonment. Appellant's statutorily mandated post-release control obligations were omitted at the sentencing hearing, and were omitted from the judgment entry in which the sentencing hearing was memorialized.

{¶3} On March 25, 2010, the trial court brought appellant back from prison for resentencing. The trial court advised appellant that he was subject to mandatory post-release control for a period of five (5) years, and journalized it in the March 25, 2010 judgment entry from which appellant appeals.

{¶4} Appellant sets forth one assignment of error:

{¶5} "I. BECAUSE APPELLANT HAD ALREADY SERVED TWELVE YEARS OF HIS FIFTEEN YEAR SENTENCE, APPELLANT HAD A REASONABLE AND LEGITIMATE EXPECTATION THAT HIS ORIGINAL SENTENCE WAS FINAL; THE TRIAL COURT THEREFORE ERRED, VIOLATING THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES AND OHIO CONSTITUTIONS, WHEN IT RESENTENCED APPELLANT TO AN ADDITIONAL, CONSECUTIVE, MANDATORY,

FIVE YEAR TERM OF POST RELEASE CONTROL PURSUANT TO R.C. 2967.28(B)(1)."

I.

{¶6} Appellant argues that the trial court erred in conducting an "after-the-fact" re-sentencing hearing, violating his double jeopardy rights. We disagree.

{¶7} 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.

{¶8} 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.

{¶9} Under Section 2967.28(B) of the Ohio Revised Code, "[e]ach sentence to a prison term for a felony of the first degree [or] ... felony of the second degree ... shall include a requirement that the offender be subject to a period of post-release control ... after the offender's release from imprisonment." For a felony of the first degree, the period is five years. R.C. 2967.28(B)(1). "For a felony of the second degree that is not a felony sex offense," the period is three years. R.C. 2967.28(B)(2). Under Section

2967.28(C), "[a]ny sentence to a prison term for a felony of the third, fourth, or fifth degree ... shall include a requirement that the offender be subject to a period of post-release control of up to three years ..., if the parole board ... determines that a period of post-release control is necessary for that offender."

{¶10} Effective July 11, 2006, R.C. 2929.191 establishes a procedure to remedy a sentence that fails to properly impose a term of post-release control. It applies to offenders who have not yet been released from prison and who fall into at least one of three categories: those who did not receive notice at the sentencing hearing that they would be subject to post-release control, those who did not receive notice that the parole board could impose a prison term for a violation of post-release control, or those who did not have both of these statutorily mandated notices incorporated into their sentencing entries. R.C. 2929.191(A) and (B). *State v. Nichols*, Richland App. No. 2009-CA-0111, 2010-Ohio-3104 at ¶ 16.

{¶11} R.C. 2929.191 provides, in pertinent part, as follows:

{¶12} "(A)(1) If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include a statement to that effect 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, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of

conviction that includes in the judgment of conviction the statement that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison.

{¶13} "If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type described in division (B)(3)(d) of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(2) of section 2929.14 of the Revised Code, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison".

{¶14} R.C. 2929.191(B)(2) provides that a correcting judgment entry shall be labeled a "nunc pro tunc" judgment entry and that such entry shall have the following effect:

{¶15} "The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the sentence and the judgment of conviction entered on the journal and had notified the offender pursuant to division (B)(3)(e) of section 2929.19 of the Revised

Code regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control."

{¶16} Division (C) of R.C. 2929.191 requires the trial court to conduct a hearing relative to the correction of the original sentencing order and to give notice of the "date, time, place, and purpose" of the hearing. The offender may be present "in person or by means of video conferencing." See, *State v. Dixon*, Perry App. Nos. 2006-CA-19, 2006-CA-20, 2007-Ohio-3496 at ¶ 20-25.

{¶17} In the case at bar, the trial court conducted such a hearing on March 24, 2010[1]. Appellant was present and represented by appointed counsel. The re-sentencing entry contains the appropriate notification. The re-sentencing took place before the expiration of appellant's fifteen-year prison term imposed in this case.

{¶18} Trial courts are now statutorily authorized to correct sentencing entries to include omitted post-release control notifications. "Thus, the above statutory enactments supersede the decision in *Hernandez v. Kelly*. After July 11, 2006, a trial court may now re-sentence an offender prior to the expiration of his original stated prison term in order to notify him regarding post release control." *State v. Leonard*, 11th Dist. No.2006-A-0064, 2007-Ohio-1545 at ¶ 18. (Footnotes omitted). *State v. Dixon*, supra at ¶26.

{¶19} This Court recently reviewed the same issues as set forth herein in the case *State v. Rich*, Stark App. No. 2006 CA 00171, 2007-Ohio-362: "'[h]ere, the trial court was statutorily required to impose a period of post-release control. The original

[1] In the case at bar, appellant has not provided this court with a transcript of the March 23, 2010 proceedings. Without a transcript of the proceedings, appellant cannot demonstrate any error or irregularity in connection with the trial court's decision. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St. 2d 197, 199, 400 N.E.2d 384.

sentencing entry did not include the imposition of post-release control and therefore was void. Because jeopardy did not attach to the void sentence, the trial court did not violate defendant's constitutional guarantee against double jeopardy in later correcting the sentence.' "(Citation omitted.) Id. at ¶ 11. See, also, *State v. Mayle*, 5th Dist. No.2006CA128, 2007-Ohio-2816; *State v. Vogt*, Stark App. No.2006 CA 00183, 2007-Ohio-488, *State v. Broyles*, Stark App. No. 2006 CA 00170, 2007-Ohio-487, and *State v. Roberson*, Stark App. No. 2006 CA 00155, 2007-Ohio-643.

{¶20} We therefore find no merit in appellant's double jeopardy claim under the facts and circumstances of this case.

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

{¶22} For the foregoing reasons, the judgment of the Court of Common Pleas, of Richland County, Ohio, is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. SHEILA G. FARMER

WSG:clw 1129

[Cite as *State v. Chittenden*, 2010-Ohio-6071.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RONALD CHITTENDEN	:	
Defendant-Appellant	:	CASE NO. 2010-CA-55

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

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. SHEILA G. FARMER