[Cite as *State v. Muff*, 2010-Ohio-6466.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MAXWELL MUFF

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 10 CA 16

O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. 00 CR 7016

JUDGMENT: Reversed

DATE OF JUDGMENT ENTRY: December 28, 2010

APPEARANCES:

For Plaintiff-Appellee

JOSEPH FLAUTT
PROSECUTING ATTORNEY
111 North High Street
New Lexington, Ohio 43764

For Defendant-Appellant

PATER GALYARDT
ASSISTANT PUBLIC DEFENDER
250 East Broad Street, Suite 1400
Columbus, Ohio 43215

Wise, J.

{¶1} Defendant-Appellant Maxwell Muff appeals from Perry County Court of Common Pleas February 4, 2010, Nunc Pro Tunc Judgment Entry of Sentence.

{¶2} Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} On October 25, 2000, the Perry County Grand Jury indicted appellant on one count of rape in violation of R.C. § 2907.02. The victim was Appellant's stepdaughter.

{¶4} Subsequently, a jury trial commenced on May 23, 2001. After the jury found Appellant guilty, the trial court, pursuant to a Judgment Entry filed July 16, 2001, sentenced Appellant to nine years in prison.

{¶5} The trial court's sentencing entry contained an incorrect notification, stating that "post-release control is mandatory in this case up to a maximum of three years…", instead of the statutorily mandated five-year term of post-release control.

{¶6} Appellant appealed his conviction and sentence, and this Court affirmed. *See State v. Muff,* Perry App. No. 01-CA-13, 2002-Ohio-2510.

{¶7} On February 4, 2010, approximately four months prior to Appellant's completion of his prison term, the trial court sua sponte filed a nunc pro tunc judgment entry of sentence. This judgment stated that "postrelease control is mandatory in this case up to a maximum of five years…"

{¶8} Appellant was released from prison on May 21, 2010, and was placed on post-release control for five years by the Ohio Adult Parole Authority.

{¶9} On May 21, 2010, Appellant filed a pro se motion challenging his judgment entry of sentence and the imposition of post-release control.

{¶10} On June 29, 2010, the trial court denied Appellant's motion.

{¶11} Appellant now raises the following assignment of error on appeal:

ASSIGNMENT OF ERROR

{¶12} "I. BECAUSE THE TRIAL COURT'S SENTENCING ENTRIES DID NOT PROPERLY IMPOSE POSTRELEASE CONTROL UPON MAXWELL MUFF, THEY ARE CONTRARY TO R.C. 2967.28, A VIOLATION OF MR. MUFF'S DUE PROCESS RIGHTS, AND THE OHIO PAROLE AUTHORITY'S IMPOSITION OF POSTRELEASE CONTROL UPON MR. MUFF CANNOT BE ENFORCED. (citations omitted)."

I.

{¶13} Appellant, in his sole assignment of error, argues that the trial court's imposition of post-release control was improper and that the sentencing entry was void. We agree.

{¶14} The February 4, 2010, Judgment Entry stated that "postrelease control is mandatory in this case *up to a* maximum of five years…"

{¶15} We find this to be in error as Appellant was subject to the statutorily mandated five-year term of post-release control.

{¶16} R.C. §2929.191, effective July 11, 2006, sets forth a procedure for the trial court to correct a judgment of conviction when the trial court, either at the sentencing hearing or in the final judgment, failed to properly notify a defendant about the requisite postrelease control or about the possibility of the parole board imposing a prison term for violating a condition of postrelease control. Under that statute, prior to the offender's

release from prison and after a hearing, the court may prepare and issue a nunc pro tunc correction to the judgment of conviction.

{¶17} R.C. §2929.191(C) details how such a hearing must be conducted. It provides:

{¶18} "On and after the effective date of this section, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division. Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing, the prosecuting attorney of the county, and the department of rehabilitation and correction. The offender has the right to be physically present at the hearing, except that, upon the court's own motion or the motion of the offender or the prosecuting attorney, the court may permit the offender to appear at the hearing by video conferencing equipment if available and compatible. An appearance by video conferencing equipment pursuant to this division has the same force and effect as if the offender were physically present at the hearing. At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction."

{¶19} In *State v. Singleton,* 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, the Supreme Court of Ohio held that R.C. §2929.191 applies prospectively and, thus, "the de novo sentencing procedure detailed in the decisions of the Ohio Supreme Court is the appropriate method to correct a criminal sentence imposed prior to July 11, 2006, that lacks proper notification and imposition of postrelease control." Id. at ¶ 35.

The Supreme Court further stated that "because R.C. 2929.191 applies prospectively to sentences entered on or after July 11, 2006, that lack proper imposition of postrelease control, a trial court may correct those sentences in accordance with the procedures set forth in that statute." Id.

{¶20} In the present case, this most recent incorrect Nunc Pro Tunc sentencing entry was entered approximately four months prior to the conclusion of Appellant's sentence. Since that time Appellant has completed his sentence and been released from prison.

{¶21} In *State v. Simpkins,* 117 Ohio St.3d 420, 2008-Ohio-1197, the Ohio Supreme Court held that, "[i]n 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." *Id.* at syllabus.

{¶22} In *State v. Singleton,* 124 Ohio St.3d 173, 2009-Ohio-6434, the Ohio Supreme Court recognized that a trial court lacks authority to resentence an offender if the sentencing error was discovered "after the offender ha[s] been released from prison." *Id.* at ¶ 15; see also *State v. Bloomer,* 122 Ohio St.3d 200, 2009-Ohio-2462, at ¶ 70 (noting that a defendant cannot be subjected to another sentencing hearing after he "has completed the prison term imposed in his original sentence"); *State v. Bezak,* 114 Ohio St.3d 94, 2007-Ohio-3250, at ¶ 18 (concluding that defendant could not be resentenced because he had "already served the prison term ordered by the trial court.").

{¶23} As Appellant in the case sub judice has been released from prison, based on the foregoing, the trial court cannot now re-sentence him to correct his void sentence.

{¶24} Appellant's sole assignment of error is sustained.

{¶25} For the foregoing reasons, the judgment of the Court of Common Pleas, Perry County, Ohio, is reversed.

By: Wise, J.

Hoffman, P. J., and

Farmer, J., concur.

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JUDGES

JWW/d 1215

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

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MAXWELL MUFF	:	
Defendant-Appellant	:	Case No. 10 CA 16

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Perry County, Ohio, is reversed.

Costs assessed to Appellee.

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JUDGES