

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Julie A. Edwards, P.J.
	:	John W. Wise, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. CT2010-0015
	:	
	:	
KEITH M. O'NEAL, SR.	:	<u>OPINION</u>
	:	
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Muskingum County Court of Common Pleas Case No. CR2008-0090
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 15, 2010
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
RON WELCH 27 North Fifth Street Zanesville, Ohio 43701	KEITH M. O'NEAL, SR. Inmate #585475 Ross Correctional Institution P.O. Box 7010 Chillicothe, Ohio 45601-7010

Edwards, P.J.

{¶1} Defendant-appellant, Keith M. O'Neal, Sr., appeals from the March 17, 2010, Journal Entry of the Muskingum County Court of Common Pleas denying his Motion for De Novo Sentencing Hearing. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On April 3, 2008, the Muskingum County Grand Jury indicted appellant on one count of aggravated robbery in violation of R.C. 2911.01(A)(3), a felony of the first degree, one count of theft in violation of R.C. 2913.02(A)(1), a felony of the fifth degree, and one count of theft of a credit card in violation of R.C. 2913.02(A)(1), a felony of the fifth degree. At his arraignment on April 9, 2008, appellant entered a plea of not guilty to the charges.

{¶3} Subsequently, a jury trial commenced on June 3, 2008. After hearing all of the evidence, the jury, on June 3, 2008, convicted appellant of all counts. As memorialized in an Entry filed on July 14, 2008, appellant was sentenced to an aggregate prison term of twelve years. The trial court, in its Entry, stated that appellant had been noticed that Post-Release Control was mandatory for a period of five years “as well as the consequences for violating conditions for post-release control imposed by the Parole Board under Revised Code [Section] 2967.28.”

{¶4} Pursuant to an Opinion filed on September 29, 2009 in *State v. O'Neal*, Muskingum App. No. 08-CA-42, 2009 -Ohio- 5290, this Court affirmed the judgment of the trial court.

{¶5} Thereafter, on March 12, 2010, appellant filed a Motion for De Novo Sentencing Hearing. Appellant, in his motion, argued that his sentence was void

because the trial court had failed to advise him of the consequences for violating post-release control. Pursuant to a Journal Entry filed on March 17, 2010, the trial court denied appellant's motion.

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

{¶7} "THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL UNDER ARTICLE 1, SECTION 10, OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THE FORM OF THE TRIAL COURTS FAILURE TO SUBMITT (SIC) A VALID APPEALABLE ORDER."

I

{¶8} Appellant, in his sole assignment of error, argues that the trial court erred in denying his Motion for De Novo Sentencing Hearing. Appellant specifically contends that his sentence was void because the trial court failed to advise him at sentencing of the amount of additional prison time that he could be subjected to for violating post-release control. We note that appellant does not dispute that the trial court, in its March 17, 2010 Entry, stated that it had notified appellant that post-release control was mandatory for a period of five years.

{¶9} R.C. 2967.28 provides that every prison sentence for a felony of the first degree or a felony sex offense shall include a mandatory five-year period of post-release control. A trial court is required to notify a defendant at the time of the sentencing hearing of the potential of post-release control, and must incorporate that notice into its journal entry. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817

N.E.2d 864 . Where a sentence fails to contain a statutorily mandated term, such as post-release control, the sentence is void. *Id.*

{¶10} Appellant has failed to file a transcript of the sentencing hearing in this matter.¹ An appellant is required to provide a transcript for appellate review. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384, 385. Such is necessary because an appellant shoulders the burden of demonstrating error by reference to matters within the record. “When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to the assigned errors, the court has no choice but to presume the validity of the lower court’s proceedings, and affirm.” *Id.*

{¶11} We further note that appellant cites, among other cases, to *State v. Bedford*, 184 Ohio App.3d 588, 2009-Ohio-3972, 921 N.E.2d 1085 in support of his argument that his sentence is void. In such case, the court found that the trial court had made a mistake regarding post-release control in its journal entry. The trial court improperly had told the appellant that he was subject to mandatory post-release control and improperly had indicated that post-release control was mandatory in its journal entry when, in fact, post-release control was not mandatory. After the appellant appealed, the Ninth District Court of Appeals held as follows: “Because the trial court made a mistake regarding post-release control in its journal entry, Bedford’s sentence is void. This court notes that ‘[a] court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum.’ *Schenley v. Kauth* (1953), 160 Ohio St. 109, 51 O.O. 30, 113 N.E.2d 625, paragraph one of the syllabus.

¹ Appellant did not request that the transcript be transmitted to this Court.

Accordingly, not only is Bedford's sentence void, it follows that the journal entry in which the court attempted to impose that sentence is also void.” Id a paragraph 8.

{¶12} In contrast, in the case sub judice, the trial court’s July 14, 2008 Entry correctly notified appellant that post-release control in his case was mandatory for a period of five years and also indicated that it had advised appellant of the consequences for violating post-release control.

{¶13} Finally, to the extent that appellant argues that his sentencing entry is void because it does not state what the consequences for violating post-release control are, we note that this Court has upheld similar language contained in a sentencing Judgment Entry. See, for example, *State v. Smalls*, Stark App. No. 2009-CA-00151, 2010-Ohio-535.

{¶14} Appellant's sole assignment of error is, therefore, overruled.

{¶15} Accordingly, the judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Wise, J. and

Delaney, J. concur

s/Julie A. Edwards

s/John W. Wise

s/Patricia A. Delaney

JUDGES

JAE/d0819

