

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

TREY A. STEVENS

Defendant-Appellant

: JUDGES:

:

:

:

:

:

:

:

:

:

:

:

:

Hon. Sheila G. Farmer, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. CT2016-0055

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Muskingum County
Court of Common Pleas, Case No.
CR2012-0160

JUDGMENT:

REVERSED

DATE OF JUDGMENT ENTRY:

December 29, 2016

APPEARANCES:

For Plaintiff-Appellee:

D. MICHAEL HADDOX
MUSKINGUM COUNTY
PROSECUTOR

GERALD V. ANDERSON II
27 North Fifth St., P.O. Box 189
Zanesville, OH 43702-0189

For Defendant-Appellant:

TREY A. STEVENS, PRO SE
732 Dryden Road
Zanesville, OH 43701

Delaney, J.

{¶1} Defendant-Appellant Trey A. Stevens appeals the September 29, 2016 judgment entry of the Muskingum County Court of Common Pleas to deny his motion to vacate post-release control. Plaintiff-Appellee is the State of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} On October 31, 2012, Defendant-Appellant Trey A. Stevens pleaded guilty to three counts of robbery, second-degree felonies in violation of R.C. 2911.02(A)(2). The trial court sentenced Stevens on December 10, 2012. At the sentencing hearing, the State of Ohio contends the trial court properly advised Stevens of post-release control and the consequences of violating post-release control. Stevens did not provide this Court with a transcript of the sentencing hearing. Therefore, we must presume regularity of the sentencing hearing. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 400 N.E.2d 384 (1980).

{¶3} The trial court filed the sentencing entry on December 11, 2012. The sentencing entry stated as to post-release control:

The Court further notified the Defendant that “**Post Release Control**” is **mandatory** in this case for **three (3) years** as well as the consequences for violating conditions of post release control imposed by Parole Board under Revised Code §2967.28. The Defendant is ordered to serve as part of this sentence any term for violation of that post release control.

{¶4} Stevens did not appeal his sentence.

{¶5} On July 13, 2015, Stevens filed a pro se motion to vacate his post-release control. He argued the sentencing entry was void because the trial court failed to set forth

the penalties for violating post-release control. The trial court denied the motion on September 29, 2016.

{¶6} It is from this judgment entry Stevens now appeals.

ASSIGNMENT OF ERROR

{¶7} Stevens raises one Assignment of Error:

{¶8} “THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT’S MOTION TO VACATE POST RELEASE CONTROL.”

ANALYSIS

{¶9} This case comes to this Court on the accelerated calendar. App.R. 11.1, which governs accelerated calendar cases, provides in pertinent part:

(E) Determination and judgment on appeal.

The appeal will be determined as provided by App.R. 11.1. It shall be sufficient compliance with App.R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form.

{¶10} One of the important purposes of the accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts, and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Assn.*, 11 Ohio App.3d 158, 463 N.E.2d 655 (10th Dist.1983).

{¶11} This appeal shall be considered in accordance with the aforementioned rules.

{¶12} In his sole Assignment of Error, Stevens argues the trial court erred in denying his motion to vacate post-release control because the December 11, 2012

sentencing entry was void. Steven contends the trial court failed to notify him of the consequences of violating post-release control.

{¶13} In *State v. Richard-Bey*, 5th Dist. Muskingum Nos. CT2014–0012, CT2014–0013, 2014–Ohio–2923, this Court considered similar post-release control language as that used in the present sentencing entry. The trial court in *Richard-Bey* sentenced appellant to eight years in prison on July 16, 2004. The trial court notified the appellant of mandatory post-release control for up to five years. *Id.* at ¶ 1. The appellant was resentenced on August 30, 2010 to address the sole issue of post-release control pursuant to *State v. Bloomer*, 122 Ohio St.3d 200, 2009–Ohio–2462, 909 N.E.2d 1254. The trial court sentenced the appellant to an aggregate term of eight years in prison and notified him of mandatory post-release control for five years. The sentencing entry was silent, however, as to the consequences of violating post-release control. *Id.* at ¶ 17, 909 N.E.2d 1254. The trial court did not inform the appellant “that if he violated his supervision or a condition of post-release control, the parole board could impose a maximum prison term of up to one-half of the prison term originally imposed” pursuant to R.C. 2929.19(B)(3)(e) [now R.C. 2929.19(B)(2)(e)]. *Id.*

{¶14} The appellant appealed the 2010 sentencing entry and we affirmed the entry in *State v. Richard-Bey*, 5th Dist. Muskingum No. CT2010–Ohio–0051, 2011–Ohio–3676.

{¶15} On April 29, 2013, the appellant pleaded guilty to one count of having a weapon while under disability in violation of R.C. 2923.13. *Id.* at ¶ 3. By sentencing entry filed May 21, 2013, the trial court sentenced the appellant to 30 months. The trial court

also terminated the appellant's post-release control in the 2004 case and ordered the remaining time be imposed and served consecutively to the 30-month sentence. *Id.*

{¶16} The appellant filed a petition for post-conviction relief in both the 2004 and 2013 cases, seeking relief from sentencing. *Id.* at ¶ 4. The appellant also filed a motion for vacation of void post-release control violation in the 2013 case, claiming the balance of his post-release control imposed in that case was an error because it was a nullity in the 2004 case. The trial court denied the petition and motion and the appellant filed a pro se appeal. *Id.*

{¶17} On appeal, the appellant argued the trial court lacked jurisdiction to impose the remainder of his void post release control sanction. We agreed. We stated:

The 2004 sentencing entry in Case No.CR2004–119A was corrected on August 30, 2010 to address the sole issue of post-release control pursuant to *State v. Bloomer*, 122 Ohio St.3d 200, 909 N.E.2d 1254, 2009–Ohio–2462. The entry was filed on September 7, 2010. The entry notified appellant that post-release control was mandatory for five years. However, the entry was silent as to the consequences of violating post-release control. Appellant was not “informed that if he violated his supervision or a condition of post-release control, the parole board could impose a maximum prison term of up to one-half of the prison term originally imposed” pursuant to R.C. 2929.19(B)(3)(e) [now R.C. 2929.19(B)(2)(e)]. *State v. Ketterer*, 126 Ohio St.3d 448, 935 N.E.2d 9, 2010–Ohio–3831, ¶ 77 (reviewing a nunc pro tunc entry) (decided five days before appellant's resentencing). “A sentence that does not include the statutorily mandated term of post-

release control is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack.” *State v. Fischer*, 128 Ohio St.3d 92, 942 N.E.2d 332, 2010–Ohio–6238, paragraph one of the syllabus. See also, *State v. Billiter*, 134 Ohio St.3d 103, 980 N.E.2d 960, 2012–Ohio–5144.

State v. Richard–Bey, 2014–Ohio–2923, ¶ 17.

{¶18} The appellant had finished serving his sentence in the 2004 case. “Because the trial court did not properly impose post-release control in its September 7, 2010 entry, the trial court cannot terminate appellant's post-release control in Case No. CR2004–119A and order the remaining time be imposed and served consecutively to the thirty month sentence in Case No. CR2013–0037.” *State v. Richard–Bey*, 2014–Ohio–2923, ¶ 18. We found the trial court erred in denying the appellant's motion for vacation of void post-release control violation. *Id.* at ¶ 19.

{¶19} We find *Richard–Bey* to be directly on point to the facts of the present case. In the present case, the trial court did not inform Stevens in the December 11, 2012 sentencing entry that if he violated his supervision or a condition of post-release control, the parole board could impose a maximum prison term of up to one-half of the prison term originally imposed pursuant to R.C. 2929.19. The December 11, 2012 sentencing entry does not include a statutorily mandated term of post-release control and is void. Accord *State v. Kepler*, 5th Dist. Muskingum No. CT2015-0021, 2015-Ohio-3291; *State v. Grimes*, 5th Dist. Muskingum No. CT2015-0026, 2015-Ohio-3497; *State v. Murphy*, 5th Dist. Muskingum No. CT2015-0023, 2015-Ohio-3598; *State v. Moore*, 5th Dist.

Muskingum No. CT2015-0028, 2015-Ohio-5514. *Contra State v. Jaryd Moore*, 5th Dist.

Muskingum No. CT2015-0027, 2015-Ohio-3435.

{¶20} Based on this Court's decision in *Richard–Bey*, we find the trial court erred in denying Stevens's motion to vacate post-release control. The sole Assignment of Error is sustained.

CONCLUSION

{¶21} For the reasons stated in the foregoing opinion, the judgment of the Muskingum County Court of Common Pleas is hereby reversed.

By: Delaney, J. and

Wise, J., concur.

Farmer, P.J., dissents.

Farmer, P.J., dissenting.

{¶22} I respectfully dissent from the majority's view on the authority of this court's opinion in *State v. Jayrd Moore*, 5th Dist. Muskingum No. CT2015-0027, 2015-Ohio-3435.

HON. SHEILA G. FARMER