

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff - Appellee

-vs-

JOSEPH CHURCHILL

Defendant - Appellant

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JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. William B. Hoffman, J.

Hon. Craig R. Baldwin, J.

Case No. 15 CAA 10 0084

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Delaware County  
Court of Common Pleas, Case No.  
14 CR I 08 0352

JUDGMENT:

Judgment Vacated in part and  
Remanded

DATE OF JUDGMENT:

February 2, 2017

APPEARANCES:

For Plaintiff-Appellee

CAROL HAMILTON O'BRIEN  
Delaware County Prosecuting Attorney

By: CORY J. GOE  
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For Defendant-Appellant

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*Baldwin, J.*

{¶1} Appellant Joseph Churchill appeals a judgment of the Delaware County Common Pleas Court convicting him of two counts of breaking and entering (R.C. 2911.13(A)) and one count of failure to comply (R.C. 2921.331(B)) upon a plea of guilty. Appellee is the State of Ohio.

#### STATEMENT OF THE FACTS AND CASE

{¶2} On August 7, 2015, the Delaware County Grand Jury indicted appellant with two counts of breaking and entering, two counts of possession of criminal tools, two counts of theft, and one count of failure to comply with the order or signal of a police officer. Pursuant to a negotiated plea, appellant pled guilty to two counts of breaking and entering, both fifth degree felonies, and to failure to comply, a fourth degree felony. The State dismissed the remaining counts.

{¶3} The written plea agreement signed by appellant recited that appellant understood his right to appeal a maximum sentence and his other appeal rights. However, at the change of plea hearing, the prosecutor represented to the court that pursuant to discussions that morning, appellant agreed to waive his right to appeal. Plea Tr. 3.

{¶4} Appellant was sentenced to twelve months incarceration on each count, to be served consecutively. At the sentencing hearing, the court informed appellant that he “may be subject to three years Post Release Control” upon release from prison. Sent. Tr. 15. Likewise, the written sentencing judgment recites that appellant “shall be subject to an optional period of Post Release Control of three years.” Judgment, September 29, 2015, 4.

{¶15} Appellant assigns two errors to this Court on appeal:

{¶16} “I. BECAUSE THE TRIAL COURT IMPROPERLY NOTIFIED CHURCHILL THAT HIS POST-RELEASE CONTROL WAS A DISCRETIONARY THREE-YEAR TERM, INSTEAD OF A DISCRETIONARY TERM OF ‘UP TO’ THREE YEARS, CHURCHILL’S POST-RELEASE CONTROL WAS IMPROPERLY IMPOSED.

{¶17} “II. CHURCHILL DID NOT WAIVE HIS RIGHT TO APPEAL: BECAUSE CHURCHILL DID NOT RECEIVE CONSIDERATION FOR HIS WAIVER, HIS WAIVER WAS NOT KNOWING AND VOLUNTARILY [SIC]. BUT EVEN IF HE DID WAIVE ASPECTS OF HIS RIGHT TO APPEAL, CHURCHILL DID NOT WAIVE HIS RIGHT TO PROPER NOTIFICATION OF POST-RELEASE CONTROL, BECAUSE IT CANNOT BE WAIVED.”

I.

{¶18} In his first assignment of error, appellant argues that the trial court improperly notified him he was subject to an optional term of post-release control of three years, when in fact he was subject to an optional term of post-release control of up to three years.

{¶19} The parties agree that pursuant to R.C. 2967.28(C), the proper term of post-release control is an optional period of up to three years:

Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that

a period of post-release control is necessary for that offender. This division applies with respect to all prison terms of a type described in this division, including a term of any such type that is a risk reduction sentence. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(2)(d) of section 2929.19 of the Revised Code regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (D)(2) of section 2929.14 of the Revised Code a statement regarding post-release control. Pursuant to an agreement entered into under section 2967.29 of the Revised Code, a court of common pleas or parole board may impose sanctions or conditions on an offender who is placed on post-release control under this division.

**{¶10}** The State argues that the trial court's error in stating the possible term of post-release control as "three years" rather than "up to three years" has no ill-effect on appellant, as after the sentence is imposed, it is up to the parole board and not the trial court to make the reduction. However, Ohio case law establishes that a trial court errs in failing to include the "up to" language set forth in R.C. 2967.28(C). See, *State v. Lewis*, 7th Dist. Mahoning 12 MA 107, 2013-Ohio-892, ¶20; *State v. Ramey*, 2nd Dist. Montgomery No. 24944, 2012-Ohio-3978.

**{¶11}** The trial court in the instant case correctly informed appellant that post-release control was discretionary; however, the court incorrectly stated the potential term of post-release control as three years, rather than up to three years. The Ohio Supreme

Court has held that if post-release control was not properly rendered, the offending portion of the sentence dealing with post-release control is subject to review and correction. *State v. Fischer*, 128 Ohio St.3d 92, 2010–Ohio–6238, 942 N.E.2d 332; *State v. Bezak*, 114 Ohio St.3d 94, 2007–Ohio–3250, 868 N.E.2d 961. The new sentencing hearing to which the offender is entitled is limited to the issue of post-release control. *Id. See, State v. Williams*, 5th Dist. Licking No. 14–CA–82, 2015–Ohio–1125 at ¶ 39; *State v. Pryor*, 5th Dist. Fairfield No. 11–CA–12, 2011–Ohio–4383 at ¶ 8. Accordingly, appellant is entitled to a new sentencing hearing limited solely to the issue of post-release control.

{¶12} The first assignment of error is sustained.

II.

{¶13} In his second assignment of error, appellant argues that he did not waive his right to appeal the issue of post-release control because (a) no consideration was given for his waiver, and (b) the right to proper notification of post-release control cannot be waived.

{¶14} In *State v. Fischer*, 128 Ohio St.3d 92, 2010–Ohio–6238, the Ohio Supreme Court held, in pertinent part, “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.” *Id.*, at paragraph one of the syllabus. The right to appeal a sentencing entry that is void and contrary to law cannot be waived. *State v. Middleton*, 8th Dist. Cuyahoga No. 99979, 2013-Ohio-5591, ¶ 15.

{¶15} The second assignment of error is sustained.

**{¶16}** The judgment of the Delaware County Common Pleas Court is vacated as to the portion of the sentence imposing post-release control and is affirmed in all other respects. This case is remanded to that court for proper imposition of post-release control. Costs are assessed to appellee.

By: Baldwin, J.

Gwin, P.J. and

Hoffman, J. concur.