[Cite as *State v. Lee*, 2010-Ohio-1704.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-09-1279

Appellee — Trial Court No. CR0200301864

v.

Johnny Lee, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: April 16, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Andrew J. Lastra, Assistant Prosecuting Attorney, for appellee.

Johnny Lee, Jr., pro se.

* * * * *

COSME, J.

{¶ 1} This appeal arises from the filing by the Lucas County Court of Common Pleas of a nunc pro tunc entry attempting to correct its omission of the mandatory term of postrelease control in appellant's sentencing order. Because appellant was sentenced before the effective date of R.C. 2929.191, any defects in the mandatory notification of

postrelease control require a de novo sentencing hearing consistent with the decisions of the Supreme Court of Ohio. For the reasons that follow, this matter is remanded to the trial court for a new sentencing hearing.

I. BACKGROUND

{¶ 2} Appellant pled guilty to one count of felonious assault, a second degree felony, and was sentenced to seven years of incarceration on September 17, 2003. Appellant was informed of the postrelease control during sentencing pursuant to R.C. 2929.19(B)(3), but the trial court failed to incorporate this notice into the sentencing order filed September 18, 2003.

{¶ 3} On August 12, 2009, appellant moved for resentencing arguing that the trial court had failed to comply with the statutory sentencing requirements. Without hearing, the trial court filed a nunc pro tunc entry on September 22, 2009, which states only: "Entry should reflect: Post Release Control Notice under R.C. 2929.19(B)(3) and R.C. 2967.28 was given at time of sentencing."[1] This appeal followed.

II. PRE-JULY 11, 2006 SENTENCES

{¶ 4} Appellant's first assignment of error asks:

{¶ 5} "Whether a nunc pro tunc order can be used to supply the omitted action of 'mandatory' postrelease control, Norris v. Schotten, 146 F.3d 314, at: 333-336 (6th Cir.

[1]Our holding in this case should not be construed as questioning the sufficiency of the notice in the nunc pro tunc entry. In *State v. Milazo*, 6th Dist. No. L-07-1264, 2008-Ohio-5137, ¶ 24, 27, citing *State v. Blackwell*, 6th Dist. No. L-06-1296, 2008-Ohio-3268, ¶ 15, this court held that an identically worded original entry of sentencing was satisfactory. Here, no notice was given in the original sentencing entry.

1998), quoting State v. Gruelich, __ N.E.2d __ (citation omitted). see also: State v. Boswell, 121 Ohio St.3d 575."

{¶ 6} At the outset, the trial court is required to order postrelease control as part of the sentence for all offenders convicted of first and second-degree felonies, or violent third-degree felonies. R.C. 2929.19(B)(3). It is undisputed that the trial court notified appellant at his sentencing hearing that he would be subject to mandatory postrelease control. The trial court did not, however, include this notice in the sentencing entry.

{¶ 7} The state asserts that the nunc pro tunc entry was proper because R.C. 2929.191 provides a mechanism for a trial court to correct its own judgment entry. We disagree.

{¶ 8} In *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph two of the syllabus, superseded by statute, *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the Supreme Court of Ohio held that the notice of the postrelease control requirement at sentencing is mandatory, and the trial court must also include that notice in its journal entry imposing sentence. The failure to notify a defendant about post-release control requires reversal of the sentence and a remand for resentencing.

{¶ 9} In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶ 6, certiorari denied (2008), ___ U.S. ___, 129 S.Ct. 463, 172 L.Ed.2d 332, superseded by statute on other grounds as stated in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the Supreme Court of Ohio stated: "[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."

{¶ 10} Most recently, in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the Supreme Court of Ohio addressed the statutory remedy to correct a failure to properly impose postrelease control. Am.Sub.H.B. No. 137, effective July 11, 2006, amended R.C. 2929.14, 2929.19, and 2967.28 and enacted R.C. 2929.191. R.C. 2929.191 established a procedure to remedy such a sentence. The court in *Singleton* noted that prior to the enactment of R.C. 2929.191, the state did not have a statutory remedy for sentences that lacked proper postrelease control. Id. at ¶ 25. Therefore, for those sentences that were imposed prior to the effective date of R.C. 2929.191, the de novo sentencing procedure set forth in *Singleton* should be followed. Id. at ¶ 26.

{¶ 11} Consistent with *Singleton*, we find that the trial court's nunc pro tunc entry was not adequate to remedy its failure to include the mandatory postrelease control language in the original sentencing order. Accordingly, appellant's first assignment of error is well-taken.

III. SENTENCING TRANSCRIPT

{¶ 12} Appellant's second assignment of error sets forth the following question:

{¶ 13} "Where the transcript of the proceedings (plea and sentencing) has been destroyed, may a reviewing court accept a belated nunc pro tunc entry which insufficiently seeks to impose a term of * [sic] undefined postrelease control as

controlling as to law and fact, see: State v. Hofman, 2004 WL 2848938 (Ohio App. 6 Dist.), 2004-Ohio-__."

{¶ 14} In his second assignment of error, appellant implies that the sentencing transcript has been destroyed, and the unavailability of the transcript would bar the imposition of postrelease control. The record reflects, however, that a transcript of the sentencing proceedings on September 17, 2003, is part of the record through appellant's own "Motion for 'Sentencing" filed with the common pleas court on August 12, 2009. As such, we need not reach the question of whether the unavailability of a transcript would bar the imposition of postrelease control. Appellant's second assignment of error is moot.

IV. CONCLUSION

{¶ 15} We hold that for sentences imposed prior to the effective date of R.C. 2929.191, a defect in the postrelease control notification renders the sentence void and such actions are subject to de novo sentencing hearings.

{¶ 16} Here, the trial court failed to notify appellant—in the sentencing entry—of mandatory postrelease control. The nunc pro tunc entry is insufficient to cure the defect in notice. Because appellant was not advised of his mandatory postrelease control in the sentencing entry, the de novo sentencing procedure detailed in the decisions of the Supreme Court of Ohio is the appropriate method to correct appellant's criminal sentence which was imposed in 2003.

{¶ 17} Wherefore, based upon the foregoing, the judgment of the Lucas County Court of Common Pleas is reversed and remanded for resentencing in accordance with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE