[Cite as *State v. Breeden*, 2012-Ohio-1100.]

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

State of Ohio — Court of Appeals No. L-11-1122

Appellee — Trial Court No. CR0200603030

v.

Eric Breeden — **DECISION AND JUDGMENT**

Appellant — Decided: March 16, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Timothy Young, Ohio Public Defender, and Jeremy J. Masters, Assistant State Public Defender, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} This is an accelerated appeal from the judgment of the Lucas County Court of Common Pleas, which denied appellant's motion to vacate his conviction and sentence for violating the terms and conditions of his postrelease control.

{¶ 2} On September 14, 2006, the Lucas County Grand Jury handed down a single count indictment, charging appellant, Eric Breeden, with unlawful sexual contact with a minor, a third degree felony. Appellant was arrested and held in lieu of bond. Counsel was appointed. Appellant pled not guilty

{¶ 3} On November 15, 2006, appellant appeared before the court to withdraw his not guilty plea and enter a plea of no contest to the reduced charge of attempted unlawful sexual conduct with a minor, a fourth degree felony. As part of his change of plea, in open court appellant executed a written plea agreement advising him of the potential sentence for the amended offense and acknowledging that he understood that "[i]f I am sentenced to prison, for a * * * felony sex offense, after my release I will have 5 years of post-release control under conditions determined by the parole board." Prior to accepting the plea, the court advised appellant that "you could be placed in as much as three years of post-release control."

{¶ 4} At the conclusion of the plea hearing, the court accepted appellant's plea, found him guilty of the amended charge and ordered a presentence investigation. At the sentencing hearing, the court found that appellant was a sexually oriented offender and sentenced him to a six-month term of incarceration. The court made no mention of postrelease control. In its judgment of conviction, the court stated, "[d]efendant given notice of appellate rights under R.C. 2953.08 and post-release control notice under R.C. 2929.19(B)(3) and R.C. 2967.28." Appellant did not appeal, but served his sentence in full and was released.

{¶ 5} On March 3, 2008, appellant was placed on community control after pleading no contest to a sex offender notification violation. In September 2008, appellant pled guilty to yet another notification violation. The court accepted the plea, found appellant guilty and sentenced him to 14 months in prison for this offense. The court also found appellant in violation of the provisions of the terms of his community control in the March 2008 case and imposed an additional consecutive 11 months incarceration for that offense. Additionally, the court found appellant had violated the terms of his post-release control from the 2006 offense and imposed a consecutive 1,421 days judicial sanction for that violation.

{¶ 6} In 2011, appellant moved the trial court to vacate his judicial sanction for the postrelease control violation, arguing that pursuant to law postrelease control had never been properly imposed and that, since he had been released from prison before any attempt to remedy this error, that sanction should be deemed void. When the trial court denied appellant's motion, he appealed.

{¶ 7} In two assignments of error appellant asserts that the trial court erred in denying his motion to vacate a judicial sanction for violation of postrelease control that was improperly imposed and that his trial counsel was ineffective for failing to discover that postrelease control had been improperly imposed.

{¶ 8} Both of appellant's assignments of error are predicated on the proposition that he was not properly informed of the statutorily mandated five-year period of

postrelease control at his sentencing hearing, rendering the imposition of the control void. These assignments of error will be discussed together.

{¶ 9} In 1996, the Ohio General Assembly enacted a sweeping reform of the state's criminal sentencing structure. With Am.Sub.S.B. 2, the legislature abandoned a system of indefinite sentences issued at the discretion of the sentencing court and nearly automatically subject to as much as a 30 percent reduction for good behavior. Instead, the legislature enacted a system designed to introduce "truth in sentencing" into criminal sentences. *Woods v. Telb*, 89 Ohio St.3d 504, 508, 733 N.E.2d 1103 (2000). In the new scheme, the Ohio Parole Board no longer had authority to determine how long an offender would stay in prison. Parole was replaced by postrelease control. *Id.* First and second degree felons, felony sex offenders or third degree violent offenders became subject to mandatory postrelease control for specified periods. *Id.* at 509, R.C. 2967.28(B). Other offenders became subject to postrelease control at the discretion of the Adult Parole Authority. *Id.*, R.C.2967.28(D).

{¶ 10} In 1999, this court ordered habeas corpus petitioner Milton Woods released from custody. Woods had been jailed for violating Adult Parole Authority imposed postrelease control. We concluded that R.C. 2967.28, which authorized parole board discretion to impose postrelease control, violated the separation of powers doctrine by permitting an executive branch agency, the parole board, to usurp the power of the judiciary to impose criminal sentences. *Woods v. Telb*, 6th Dist. No. L-99-1083, 1999 WL 436564 (June 23, 1999). In a state's appeal, the Supreme Court of Ohio reversed our

decision, holding that there was no parole board infringement on judicial authority, because postrelease control is part of the original judicially imposed sentence. *Woods v. Telb*, *supra*, at 512. Additionally, the court instructed, "* * * pursuant to R.C. 2967.28(B) and (C), a trial court must inform the offender at sentencing or at the time of a plea hearing that postrelease control is part of the offender's sentence." *Id.* at 513.

{¶ 11} The obligation of a sentencing court to notify an offender of mandatory or discretionary postrelease control was reiterated and clarified in *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 22, in which the court stated,

> [I]f a trial court has decided to impose a prison term upon a felony offender, it is duty-bound to notify that offender at the sentencing hearing about postrelease control and to incorporate postrelease control into its sentencing entry, which thereby empowers the executive branch of government to exercise its discretion.

{¶ 12} The court in *Jordan* also held that, if a sentencing court fails to *both* make postrelease control notification at the sentencing hearing *and* incorporate notice into its judgment of conviction, the court does not comply with R.C. 2929.19(B)(3)(c) and any sentence imposed is contrary to law. *Id.* at ¶ 23. "[T]herefore, the sentence must be vacated and the matter remanded to the trial court for resentencing." *Id.* at paragraph two of the syllabus. *Accord Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, ¶ 16. Subsequently, in *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 16, the court explained that if a sentencing court fails to provide the

statutorily mandated notice of postrelease control, the sentence is void and on remand the court must "resentence the offender as if there had been no original sentence." This holding was later clarified, limiting resentencing only to the proper imposition of postrelease control. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, paragraph two of the syllabus; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, syllabus.

{¶ 13} As this jurisprudence was developing, the legislature enacted Am.Sub.H.B. 137, "to make changes to the post-release control law * * *." Preamble, Am.Sub.H.B. 137 (eff. 07/11/2006), Baldwin's Ohio Legislative Service Annotated, L-1911 (Vol. 4, 2006). The act amended R.C. 2929.14, 2929.19 and 2967.28 and created R.C. 2929.191. In each of these provisions, the legislature included similar language:

> If a court imposes a sentence including a prison term of a type described in this division on or after [July 11, 2006,] the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under [R.C. 2967.28(B)]. [R.C. 2929.191] 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 include in the sentence pursuant to this division a statement regarding post-release control. Former R.C. 2929.14(F)(1), now (D)(1).

{¶ 14} Former R.C. 2929.19(B)(3), now (B)(2), was amended to provide, in material part:

> (2) Subject to division (B)(4) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:
>
> (a) Impose a stated prison term * * *
>
> (c) Notify the offender that the offender will be supervised under [R.C. 2967.28] after the offender leaves prison if the offender is being sentenced * * * for a felony sex offense * * *. If a court imposes a sentence including a prison term of a type described in division (B)(2)(c) of this section on or after [July 11, 2006,] the failure of a court to notify the offender pursuant to division (B)(2)(c) of this section that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under division (B) of section 2967.28 of the Revised Code.
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> * * *
>
> (e) * * * If a court imposes a sentence including a prison term on or after [July 11, 2006,] the failure of a court to notify the offender * * * that the parole board may impose a prison term * * * for a violation of that

> [post-release] supervision or a condition of post-release control * * * or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the authority of the parole board to so impose a prison term for a violation of that nature if * * * the parole board notifies the offender prior to the offender's release of the board's authority to so impose a prison term. [R.C. 2929.191] applies if, prior to [July 11, 2006,] a court imposed a sentence including a prison term and failed to notify the offender pursuant to division (B)(2)(e) of this section regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control.

{¶ 15} R.C. 2967.28 deals with pardon, parole and probation. R.C. 2967.28(B) mandates that each prison term imposed for a first or second degree felony, felony sex offense or violent felony "shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment." Am.Sub.H.B. 137 amended the statute to include the following:

> If a court imposes a sentence including a prison term of a type described in this division on or after [July 11, 2006,] the failure of a sentencing court to notify the offender pursuant to [R.C. 2929.19 (B)(3)(c)] of this requirement or to include in the judgment of conviction entered on the journal a statement that the offender's sentence includes this requirement does not negate, limit, or otherwise affect the mandatory

period of supervision that is required for the offender under this division. [R.C. 2929.191] applies if, prior to [July 11, 2006,] a court imposed a sentence including a prison term * * * and failed to notify the offender pursuant to division (B)(2)(c) of [R.C. 2929.19] regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (D)(1) of [R.C. 2929.14] a statement regarding post-release control.

{¶ 16} Am.Sub.H.B. 137 also enacted for the first time R.C. 2929.191, a provision for correcting postrelease control judgments. Sections (A) and (B) of R.C. 2929.191 deal expressly with erroneous sentencing entries prior to H.B. 137's effective date, July 11, 2006, and describe procedures to rectify omission of notice of postrelease control which include a hearing as described in R.C. 2929.191(C).

{¶ 17} R.C. 2929.191(C) provides:

> On and after [July 11, 2006,] a court that wishes to prepare and issue a correction to a judgment of conviction * * * 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 * * *. 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.

{¶ 18} The legislature declared in Am.Sub.H.B. 137, that its purpose in amending R.C. 2929.14, 2929.19, and 2967.28 and in enacting R.C. 2929.191 was to,

> * * * reaffirm that, under the amended sections as they existed prior to [July 11, 2006]: (1) by operation of law and without need for any prior notification or warning, every convicted offender sentenced to a prison term * * * for a felony sex offense * * * always is subject to a period of post-release control after the offender's release from imprisonment pursuant to and for the period of time described in [R.C. 2967.28(B)]; * * * and (3) by operation of law and without need for any prior notification or warning, every convicted offender sentenced to a prison term and subjected to supervision under a period of post-release control after the offender's release from imprisonment always is subject to having the Parole Board impose * * * a prison term of up to one-half of the stated prison term originally imposed upon the offender if the offender violates that supervision or a condition of post-release control imposed under [R.C.

2967.131(B)]. Section 5(A), Am.Sub.H.B. 137, Baldwin's Ohio Legislative Service Annotated, *supra,* at L-1971.

{¶ 19} Am.Sub.H.B. 137 was passed as an emergency measure,

> [T]o protect the residents of this state from the consequences that might result if the state is forced to release without supervision offenders who have been convicted of serious offenses and imprisoned solely because the offenders were not provided notice of the fact that the law always requires their supervision upon release from prison. *Id.*, Section 7, at L-1972.

{¶ 20} Constitutional challenges to Am.Sub.H.B. 137 for due process, double jeopardy, separation of powers and the one subject rule for offenders who had been sentenced prior to the act's effective date were rejected. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254.

{¶ 21} Retrospective application of R.C. 2929.191was held ineffective in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958. The court held that since a sentence imposing postrelease control without the statutorily mandated notices at the sentencing hearing and in the sentencing entry is a nullity, *id.* at ¶ *25,* prior to the enactment of R.C. 2929.191 there was "no existing judgment for a sentencing court to correct." *Id.* at ¶ 26. Consequently, the court concluded, for sentences imposed prior to July 11, 2006, courts must correct postrelease control infirmities through the de novo

sentencing procedure articulated in prior case law. *Id.* Thus, Singleton, who had been sentenced prior to July 11, 2006, was entitled to a de novo sentencing.

{¶ 22} Even though no party in *Singleton* had been sentenced after July 11, 2006, the court nonetheless examined the application of R.C. 2929.191 for offenders sentenced after that date and concluded:

{¶ 23} "For criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191" *Id.* at paragraph two of the syllabus.

{¶ 24} The adoption of the *Singleton's* second syllabus paragraph was not without controversy. One justice, joined by two others, complained that reaching the prospective application of R.C. 2929.191 when the issue was not before the court amounted to an advisory opinion. ("The majority answers a question that is of no relevance to the instant case and places that answer in the syllabus." *Id.* at ¶ 38. (Pfeifer, J., concurring in part and dissenting in part.)) The minority also differed substantively, maintaining that the intent of Am.Sub.H.B. 137 was to provide a vehicle, through R.C. 2929.191, to correct past mistakes and to make prospective postrelease control sentencing errors "basically irrelevant." *Id.* at ¶ 49. ("All of these amendments attempt to make prospective mistakes nonproblematic and employ R.C. 2929.191 to address past errors. For the General Assembly, the prospective application of R.C. 2929.191 was never a consideration." *Id.* at ¶ 53. (Pfeifer, J., concurring in part and dissenting in part.))

{¶ 25} This dispute evidences a real difference in the outcome of the present matter, because it has long been held that, after an offender has completed the prison term imposed in his or her original sentence, the offender cannot be subjected to another sentencing to correct a sentencing court's flawed imposition of postrelease control. *Hernandez v. Kelly*, *supra*, ¶ 29, following *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio- 4746, 814 N.E.2d 837, ¶ 33. A*ccord State v. Bezak*, *supra* at ¶ 18; *State v. Simpkins*, *supra*, at syllabus; *State v. Bloomer*, *supra*, ¶ 70; *State v. Singleton*, *supra*, ¶ 20. Appellant was sentenced after July 11, 2006 and he has completed the prison term imposed at sentencing. It is also clear that he was not properly informed during the sentencing hearing that he would be subject to a mandatory five-year period of postrelease control when he completed his term of imprisonment.

{¶ 26} Under the *Singleton* minority view, after July 11, 2006, a trial court's failure to properly inform an offender of mandatory or discretionary postrelease control, both at the sentencing hearing and in the judgment of conviction, is of no consequence. In appellant's case a five-year term of postrelease control was mandatory. Constructive notice was supplied by R.C. 2967.28(B)(1) and the failure of a court to notify the offender of postrelease control or to enter postrelease control in the judgment of conviction, "* * * does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender * * *." R.C. 2929.19(B)(2); R.C. 2967.28(B). In such a circumstance, the imposition of judicial sanction for violation of the terms and conditions of appellant's postrelease control would be affirmed.

{¶ 27} Under the syllabus rule articulated by the majority in *Singleton*, a different result obtains. The trial court's failure to give proper notice of postrelease control results in that portion of the sentence being void. Even though the imposition of postrelease control is statutorily mandatory, the flawed execution of the sentencing hearing renders it a nullity. Since appellant has already completed the period of imprisonment to which he was sentenced, he can no longer be resentenced in any manner and he cannot be punished for a violation of the terms and conditions of a postrelease control which does not exist in the law.

{¶ 28} We are bound by the decisions rendered by the Supreme Court of Ohio. Accordingly, appellant's first assignment of error is found well-taken. His second assignment of error is moot.

{¶ 29} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed and the order sentencing him to postrelease control is vacated. This matter is remanded to said court for entry of appropriate orders in conformity with this decision. It is ordered that appellee 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.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
CONCUR.
JUDGE