**[Cite as *State v. Lake*, 2012-Ohio-1236.]**

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

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| State of Ohio | Court of Appeals No. WD-10-058 |
| Appellee | Trial Court No. 04 CR 171 |
| v. | |
| Charles Slim Lake | **DECISION AND JUDGMENT** |
| Appellant | Decided: March 23, 2012 |

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Paul A. Dobson, Wood County Prosecuting Attorney, Gwen Howe-Gebers and Jacqueline M. Kirian, Assistant Prosecuting Attorneys, for appellee.

Jeffrey P. Nunnari, for appellant.

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**YARBROUGH, J.**

## I. Introduction

**{¶ 1}** This is an appeal from the judgment of the Wood County Court of Common Pleas following a resentencing hearing to correct the imposition of postrelease control. For the reasons that follow, we affirm.

## A. Facts and Procedural Background

**{¶ 2}** On July 23, 2004, following a jury trial, appellant Charles Slim Lake was found guilty of two counts of money laundering, felonies of the third degree, one count of forgery, a fifth-degree felony, and one count of engaging in a pattern of corrupt activity, a first-degree felony.[1] On September 27, 2004, the trial court sentenced appellant to four years in prison for each count of money laundering, 11 months for the count of forgery, and six years for the count of engaging in a pattern of corrupt activity. All of the prison terms were ordered to be served concurrently, for an aggregate term of six years. At the sentencing hearing, the court informed appellant that he would be subject to five years of postrelease control for the count of engaging in a pattern of corrupt activity. However, the original judgment of conviction simply ordered that appellant would be subject to postrelease control; it did not specify the length of the term.

**{¶ 3}** On August 23, 2010, approximately one month before appellant completed his six-year prison sentence, the trial court conducted a resentencing hearing to correct its imposition of postrelease control. At the hearing, the trial court orally informed appellant that he would be subject to up to three years of postrelease control on each of the counts of money laundering and forgery. On the count of engaging in a pattern of corrupt activity, the court stated, "[y]ou will be subject to five years of post-release control." The court then informed appellant of the consequences of violating postrelease control. In the

[1] This court affirmed the convictions in *State v. Lake*, 6th Dist. No. WD-04-072, 2006-Ohio-3059.

September 3, 2010 nunc pro tunc judgment of conviction, the court ordered, "The offender will be subject to Post Release Control *of five (5) years* * * *." (Emphasis sic.)

### B. Assignment of Error

**{¶ 4}** Appellant has timely appealed from this judgment, asserting as his sole assignment of error,

> THE TRIAL COURT'S PROCEEDINGS AND RESULTING *NUNC PRO TUNC* SENTENCING ENTRY IN WHICH IT ATTEMPTED TO IMPOSE POSTRELEASE CONTROL FAILS TO COMPLY WITH OHIO LAW, IS VOID, AND IS NOT SUBJECT TO FURTHER CORRECTION.

## II. Analysis

### A. The Trial Court Properly Imposed Postrelease Control

**{¶ 5}** Appellant presents four arguments in support of his assignment of error.

**{¶ 6}** Regarding appellant's first argument, former R.C. 2929.19(B)(3)(c)-(e),[2] requires the trial court to notify the offender at the sentencing hearing that he or she may

[2] In 2011, R.C. 2929.19(B)(3)(c)-(e) was renumbered to R.C. 2929.19(B)(2)(c)-(e). The statute in place at the time of the original sentencing required the court, at the sentencing hearing, to:

> (c) Notify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree, for a felony sex offense, or for a felony of the third degree in the commission of which the offender caused or threatened to cause physical harm to a person;

or will be subject to a term of postrelease control. In this case, because appellant was convicted of a first-degree felony, he was subject to a mandatory postrelease control term of five years. R.C. 2967.28(B)(1). Appellant argues that the trial court's oral admonition that he was "subject to five years of post-release control" was not sufficient to notify him that this term was mandatory. Upon examining the transcript from the hearing, we find this argument to be wholly without merit. Rather than the abbreviated version quoted by appellant, the full statement of the court was: "For engaging in a pattern of corrupt activity, a felony of the first degree, *you will be* subject to five years of post-release control." (Emphasis added.) This statement of the court leaves no doubt that postrelease control was mandatory. *See State v. Tucker*, 8th Dist. No. 95289, 2011-Ohio-1368, ¶ 9 ("The word 'will' leaves no room for discretion or any other possibility.") Therefore, we hold that the trial court, at the sentencing hearing, properly notified appellant of his postrelease control term in accordance with former R.C. 2929.19(B)(3)(c)-(e).

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> (d) Notify the offender that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the third, fourth, or fifth degree that is not subject to division (B)(3)(c) of this section;
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> (e) Notify the offender that, if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of this section, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of section 2967.131 of the Revised Code, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender.

**{¶ 7}** Appellant's second, third, and fourth arguments are interrelated and will be addressed together. Appellant contends that the trial court is without jurisdiction to impose postrelease control for his conviction of the third and fifth-degree felonies—money laundering and forgery, respectively—because he had already completed those sentences at the time of the resentencing hearing. Alternatively, appellant argues that the judgment entry is deficient because it does not inform him of any postrelease control sanctions relative to the third and fifth-degree felony offenses. Instead, the judgment entry only orders a period of five years, which is reserved for first-degree felonies and felony sex offenders. Finally, appellant argues the judgment entry is deficient because it does not state to which count the five-year term of postrelease control attaches, and also because it fails to state the mandatory nature of the postrelease control.

**{¶ 8}** As an initial matter, the state concedes the trial court lacks jurisdiction to impose postrelease control on the third and fifth-degree felonies. It is well-settled that resentencing is no longer an option once a defendant's journalized sentence has expired. *See, e.g., Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, ¶ 32; *State v. Bristow*, 6th Dist. No. L-06-1230, 2007-Ohio-1864, ¶ 14. Here, appellant was sentenced in 2004 to two four-year terms and one 11-month term on the money laundering and forgery counts. Those terms were to run concurrently to each other and to the six-year term imposed for engaging in a pattern of corrupt activity. Thus, appellant had completed the terms on the money laundering and forgery counts by September

2008, well before the resentencing hearing in August 2010. Therefore, he could not be resentenced on those counts.

**{¶ 9}** Moreover, the postrelease control terms associated with the money laundering and forgery counts were not made a part of the corrected sentence. "It is axiomatic that '[a] court of record speaks only through its journal entries.'" *Hernandez* at ¶ 30, quoting *State ex rel. Geauga Cty. Bd. of Commrs. v. Milligan*, 100 Ohio St.3d 366, 2003-Ohio-6608, 800 N.E.2d 361, ¶ 20. Here, the trial court did not include any mention of the imposition of postrelease control for the money laundering and forgery counts in the September 3, 2010 sentencing entry. R.C. 2967.28(C) provides for a discretionary postrelease control term of up to three years for third, fourth, or fifth-degree felonies where a prison term is imposed. In the sentencing entry, however, the court imposed a mandatory postrelease control term of five years. Under R.C. 2967.28(B), a mandatory postrelease control term of five years is imposed only for "a felony of the first degree or for a felony sex offense." R.C. 2967.28(B)(1). Therefore, we hold the corrected sentence contains only one mandatory five-year term of postrelease control, and that term necessarily attached to the first-degree felony of engaging in a pattern of corrupt activity.

**{¶ 10}** Turning to appellant's remaining argument that the September 3, 2010 judgment entry fails to state the mandatory nature of the postrelease control, we note that the judgment entry states "The offender *will be subject* to Post Release Control *of five (5) years* * * *." (Emphasis added.) As we articulated above in the context of the

sufficiency of the oral notice given at the resentencing hearing, the phrase "will be subject" leaves no doubt that the postrelease control term is mandatory.

**{¶ 11}** Accordingly, appellant's assignment of error is not well-taken.

**B. The Resentencing Hearing**

**{¶ 12}** As a final matter, we point out that the trial court stated it held the resentencing hearing "pursuant to Revised Code 2929.191." In addition, both parties cited to and relied upon R.C. 2929.191 in their appellate briefs. However, *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶ 26, held that R.C. 2929.191 does not apply retrospectively, and "for criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease control, the de novo sentencing procedure detailed in decisions of the Supreme Court of Ohio should be followed to properly sentence an offender." Thus, because appellant was sentenced prior to July 11, 2006, R.C. 2929.191 does not provide the proper method for correcting postrelease control. Nevertheless, the resentencing hearing in this case complied with the "de novo sentencing procedure detailed in decisions of the Supreme Court of Ohio." At the time *Singleton* was announced, *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 16, had determined that failure to impose mandatory postrelease control rendered the entire sentence void, and "[t]he trial court must resentence the offender as if there had been no original sentence." However, one year after announcing *Singleton*, the Ohio Supreme Court in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 27, limited *Bezak*, stating,

> [W]e reaffirm the portion of the syllabus in *Bezak* that states "[w]hen a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void," but with the added proviso that only the offending portion of the sentence is subject to review and correction.
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> Therefore, we hold that the new sentencing hearing to which an offender is entitled under *Bezak* is limited to proper imposition of postrelease control.

**{¶ 13}** Consequently, although appellant was entitled to a new sentencing hearing under *Bezak*, pursuant to *Fischer* that hearing was limited to the issue of postrelease control, which is precisely what occurred in this case.

## III. Conclusion

**{¶ 14}** For the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Arlene Singer, P.J. _____

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE

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JUDGE