[Cite as *State v. Reed*, 2012-Ohio-5983.]

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

State of Ohio — Court of Appeals No. E-11-049

Appellee — Trial Court No. 2005-CR-244

v.

Marvin Reed — **DECISION AND JUDGMENT**

Appellant — Decided: December 14, 2012

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Mollie B. Hojnicki, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the June 14, 2011 judgment of the Erie County Court of Common Pleas, which denied the motion of appellant, Marvin Reed, to find his original sentence void. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellant asserts the following assignments of error on appeal:

FIRST ASSIGNMENT OF ERROR: The Trial Court Erred When it Denied Appellant's Motion for Sentencing.

SECOND ASSIGNMENT OF ERROR: The Trial Court Erred When it Denied Appellant's Motion for Determination of Status of Proceedings.

{¶ 2} In 2005, appellant was indicted in two multi-count indictments. On October 24, 2006, appellant pled guilty to and was convicted of several counts (felonies of the first, second, and third degree) and all other charges were dismissed. By a judgment journalized on January 18, 2007, the court sentenced appellant to a total of 12 years of incarceration. Appellant was notified at the plea hearing, at the sentencing hearing, and in the sentencing judgment entry that he was subject to being supervised after leaving prison for a mandatory period of five years and was also informed of the consequences of violating a postrelease control condition. This term of postrelease control was the longest period of postrelease control to which appellant was subject. We affirmed the trial court's judgment in 2008. *State v. Reed*, 6th Dist. No. No. E-07-005, 2008-Ohio-1573.

{¶ 3} Appellant filed a pro se motion for sentencing on April 14, 2011, and a motion for determination of status proceedings on April 26, 2011, in the trial court. Appellant argued that because he had not been properly informed of postrelease control for each offense, the trial court lacked jurisdiction to sentence him and, therefore, there

has been an unreasonable delay in sentencing. The trial court denied both motions on June 14, 2011. Appellant appeals from the judgment.

{¶ 4} In his first assignment of error, appellant argues the trial court erred when it denied his motion for resentencing on the grounds that he had not been given proper notice of the postrelease control sanction applicable for each offense.

{¶ 5} In 2006, the trial court was required to inform appellant at the sentencing hearing he would be subject to mandatory postrelease control supervision for a statutorily-imposed term after he left prison. R.C. 2929.19(B)(3)(c) and (d), effective, July 11, 2006. The term of postrelease control term is five years for the first degree felonies and three years for the second and third degree felonies. R.C. 2967.28(B)(1), (2) and (3), effective July 11, 2006. The court was also required to notify appellant of the consequences of violating postrelease control. R.C. 2929.19(B)(3)(e), effective July 11, 2006.

{¶ 6} These notifications are required to be included in the trial court's judgment of conviction and sentencing. R.C. 2929.14(F), effective July 11, 2006, and *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraph one of the syllabus, *superseded by statute on other grounds as stated in State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶ 22. The language the court used in the judgment was required to be sufficient enough that a reasonable person would understand that the court had authorized a postrelease control sanction as part of the sentence. *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d 78, ¶ 51.

{¶ 7} Appellant argues that because he was sentenced to multiple offenses of varying degrees, he should have been given notice of the applicable postrelease control sanction for each sentence he would receive. Appellant relies upon R.C. 2967.28(B)(1), (B)(2), and (C) to support his argument. While appellant cites to subsection (C), it is subsection (B)(3) that applies regarding his third-degree felony. R.C. 2967.28(B), effective July 11, 2006, provided that:

> (B) *Each sentence* to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to *a period of post-release control* * * *.
>
> (1) For a felony of the first degree or for a felony sex offense, five years;
>
> (2) For a felony of the second degree that is not a felony sex offense, three years;
>
> (3) For a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years. (Emphasis added.)

{¶ 8} Because appellant was convicted of more than one felony, he would have been subject to several postrelease control sanctions pursuant to this statue. However, the

General Assembly has provided that only one term of postrelease control can be imposed for multiple offense sentences pursuant to R.C. 2967.28(F)(4)(c). This statute, effective July 11, 2006, provided that:

> (c) If an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last, as determined by the parole board. Periods of post-release control shall be served concurrently and shall not be imposed consecutively to each other.

It was not until 2008 that this statute was amended to provide that either the "parole board *or the court*" could determine the period of postrelease control which would expire last. (Emphasis added.) R.C. 2967.28(F)(4)(c), effective April 7, 2009. Nonetheless, even before the amendment occurred, the trial court was required to impose postrelease control pursuant to R.C. 2967.28(B). *Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶ 13 citing *Woods v. Telb*, 89 Ohio St.3d 504, 512-513, 733 N.E.2d 1103 (2000), *overruled on other grounds by Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864. Therefore, the trial court would have also been required to impose the longest postrelease control sanction possible pursuant to R.C. 2967.28(F)(4)(c).

{¶ 9} Several courts have held that for cases involving multiple offenses with identical postrelease control sanction terms, the trial court does not have to notify the defendant of each applicable postrelease control term because it can only impose one term and notice of one term serves as notice of each term. *State v. Kidd*, 2d Dist. No.

2010 CA 109, 2011-Ohio-6323, ¶ 11; *State v. Scott*, 6th Dist. No. S-10-023, 2011-Ohio-5527, ¶ 41-54; *State v. Deskins*, 9th Dist. No. 10CA009875, 2011-Ohio-2605, ¶ 22. These cases rely upon the holding in *State v. Sulek*, 2d Dist. No. 09CA75, 2010-Ohio-3919, ¶ 24. In *Sulek, supra*, the second district voided Sulek's entire sentence for three offenses because the trial court erred by imposing a postrelease control sanction of "up to five years" instead of "three years." Although the *Sulek* court recognized the issue of separate notice of all applicable postrelease control terms was rendered moot, it specifically addressed the issue because of our holding in *State v. Reznickchek*, 6th Dist. Nos. L-07-1426 and L-07-1427, 2008-Ohio-2384, ¶ 29. The *Sulek* court held that:

> Only one term of post-release control is actually served, even though a defendant was sentenced to multiple prison terms. Therefore, when multiple terms of imprisonment are imposed a notification should specify the maximum term of post-release control to which the defendant will be subjected as a result. When identical post-release control requirements apply to multiple prison terms, the same notification may apply to each of the offenses concerned. When different post-release control terms apply to multiple prison terms, a single notification of the maximum stated term may also serve to satisfy the notification requirement applicable to any lesser terms * * *. *Sulek* at ¶ 24.

The *Sulek* court went on to distinguish the *Reznickchek* case on the ground that it involved a situation where the single notification was expressly limited to only two of the

three offenses, even though all of the offenses carried identical three-year terms of postrelease control. *Id.*

{¶ 10} However, we have also held that the trial court must notify appellant as to each postrelease control term applicable for each offense. *State v. Scott*, 6th Dist. No. E-09-048, 2010-Ohio-297, ¶ 13, 20. In *Scott*, we held that the "failure to provide notice of possible or required postrelease control will support a reversal for resentencing," *id*. at ¶ 13, and that the trial court erred when it specifically notified the defendant of the mandatory three-year term pursuant to his burglary conviction, but failed to state that he could be subjected to two additional discretionary terms of postrelease control of up to three years in length for his convictions of disruption of public services and theft, *id*. at ¶ 20.

{¶ 11} Therefore, we must readdress this issue. The Ohio Supreme Court has held that "[a] sentence is the sanction or combination of sanctions imposed for each separate, individual offense." *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, syllabus. This rule impacts the ability of the appellate court to modify, remand, or vacate the sentence for a single offense in a multiple-offense sentence. This rule is not, however, applicable to the notice of a postrelease control sanction because R.C. 2967.28(F)(4)(c) has been interpreted as providing that only one postrelease control sanction can be imposed in cases where multiple sentences are imposed. *State v. Morris*, 8th Dist. No. 97215, 2012-Ohio-2498, ¶ 16; and *State v. Orr*, 8th Dist. No. 96377, 2011-Ohio-6269, ¶ 47-50.

{¶ 12} Therefore, we now hold that even though R.C. 2967.28(B) requires notification of the postrelease control term to be imposed based upon the particular level of offense involved, that statute is limited in multiple offense cases by R.C. 2967.28(F)(4)(c), which mandates that only one postrelease control sanction (the longest term) can be imposed for all of the offenses. Therefore, the court only has the duty in multiple offense cases to notify the defendant of and impose the longest term of postrelease control applicable under R.C. 2967.28(B). Furthermore, the trial court need not announce at the sentencing hearing nor include in the sentencing judgment the applicable postrelease control sanction for each individual offense irrespective of whether the terms of control are identical or different. We hereby overrule *Scott*, 6th Dist. No. E-09-048, 2010-Ohio-297.

{¶ 13} Appellant's first assignment of error is not well-taken.

{¶ 14} In appellant's second assignment of error he argues that he should be released from prison. This argument is premised on the success of his first assignment of error. Having found the first assignment of error not well-taken, the second assignment of error is rendered moot.

{¶ 15} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the court 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. _____

Thomas J. Osowik, J. _____
JUDGE
CONCUR.

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JUDGE