[Cite as *State v. Cousin*, 2003-Ohio-6346.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 82147

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
DAVID COUSIN	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	NOVEMBER 26, 2003
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from Common Pleas Court Case No. CR-423053
	:	
JUDGMENT	:	REVERSED AND REMANDED FOR RESENTENCING.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee:

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FRANK D. CELEBREZZE, JR., J.:

{¶1} The appellant, David Cousin, appeals his conviction and sentence issued in the Court of Common Pleas, Criminal Division. Upon our review of the arguments of the parties and the record presented, we reverse the judgment of the trial court for the reasons set forth below and remand for resentencing.

{¶2} The record reflects that Cousin was indicted in five separate cases on charges of receiving stolen property, aggravated robbery, kidnaping and drug trafficking, all with firearm specifications, in the following case numbers: 427640, 427434, 423053, 429103, 423702. All of the offenses in question took place on April 22, 2002. As part of a plea arrangement, Cousin pleaded guilty to the following: attempted robbery in case numbers 427434, 423702 and 423053, receiving stolen property in case number 427640, and drug possession in case number 429103. All remaining counts, as well as all firearm specifications, were dismissed.

{¶3} Appellant presents eight assignments of error for our consideration.[1] Because Assignments of Error VI and VIII are dispositive of this matter, we will address them first.

{¶4} Abuse of discretion is not the standard of review with respect to sentencing; instead, an appellate court must find error by clear and convincing evidence. R.C. 2953.08(G)(2) provides that

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[1] Appellant's eight assignments of error are included in appendix A of this Opinion.

an appellate court may not increase, reduce, or otherwise modify a sentence imposed under Senate Bill 2 unless it finds by clear and convincing evidence that the sentence is not supported by the record or is contrary to law. Clear and convincing evidence is more than a mere preponderance of the evidence; it is that evidence "which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *State v. Garcia* (1998), 126 Ohio App. 3d 485, citing *Cincinnati Bar Assoc. v. Massengale* (1991), 58 Ohio St. 3d 121, 122. When reviewing the propriety of the sentence imposed, an appellate court shall examine the record, including the oral or written statements at the sentencing hearing and the presentence investigation report. R.C. 2953.08(F)(1)-(4).

{¶5} R.C. 2929.19(B)(3) sets forth in pertinent part:

{¶6} "(3) 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:

{¶7} "(a) Impose a stated prison term;

{¶8} "(b) Notify the offender that, as part of the sentence, the parole board may extend the stated prison term for certain violations of prison rules for up to one-half of the stated prison term;

{¶9} "(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;

{¶10} "(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;

{¶11} "(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 [2967.13.1] 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."

{¶12} A review of the sentencing hearing transcript reflects that the lower court did not notify the appellant of the possibility of post-release control, as reflected in the lower court's sentencing journal entry. In fact, the court's findings on

the record during sentencing are woefully inadequate and provide us with very little evidence that the court considered any of the requisite factors found in the applicable statutes. The Ohio Supreme Court recently held, "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 post-release control is part of the offender's sentence." *Woods v. Telb* (2000), 89 Ohio St.3d 504, 513. The trial court is obligated to notify defendants of post-release control and the possibility of sanctions, including prison, available for violation of such controls. See *State v. Newman* (Jan. 31, 2002), Cuyahoga App. No. 80034. The reference to any extensions provided by law in the sentencing journal is insufficient to qualify as notification to an offender of post-release control as required by *Woods*. See *Ohio v. Dunaway* (Sept. 13, 2001), Cuyahoga App. No. 78007.

{¶13} This court addressed the issue in several recent cases. In *State v. Bryant* (May 2, 2002), Cuyahoga App. No. 79841, this court "considered this argument both before and since the *Woods* decision, and [has] consistently held that the absence of verbal notice at the sentencing hearing runs afoul of the post-release control notice requirements, and results in prejudicial error." *Bryant* at 17. More recently, the court has been divided on whether failure to address post-release control at the sentencing hearing abrogates that portion of the sentence or merely requires the case

to be remanded for a new sentencing hearing. In *State v. Smith* (June 19, 2003), Cuyahoga App. 81344, the court held:

{¶14} "This writer follows decisions of the Eighth District that hold the trial court's notification duty with regard to post-release control is simply a ministerial one which is mandated by law. *State v. Rashad* (Nov. 8, 2001), Cuyahoga App. No. 79051; *State v. Shine* (Apr. 29, 1999), Cuyahoga App. No. 74053. This does not render that portion of the sentence to be a nullity; rather, lacking discretion in the matter, the trial court simply is required to hold a new sentencing hearing in order for it to correct its failure to notify a defendant who is subject to post-release control provisions. *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171; *State v. Bryant*, Cuyahoga App. No. 79841, 2002-Ohio-2136." *Smith* at ¶ 7.

{¶15} This issue is currently being considered by the Supreme Court in *State v. Jordan* (Sep. 5, 2002), Cuyahoga App. No. 80675 and *State v. Johnson* (Sep. 5, 2002), Cuyahoga App. No. 80459, 98 Ohio St.3d 1460. *State v. Finger* (Jan. 29, 2003), Cuyahoga App. No. 80691, was also appealed to the Supreme Court and is being held for the decision in the *Jordan* and *Johnson* cases. 98 Ohio St.3d 1535.

{¶16} We are inclined to follow the holding in *State v. Smith*; therefore, we find that Assignment of Error VI has merit. Not only did the trial court fail to mention post-release control during the

plea hearing or sentencing phase, but it failed to comply with R.C. 2929.19(B) with respect to maximum sentences. When the trial court imposes the maximum prison term, it shall state on the record the reasons for imposing the maximum sentence. R.C. 2929.19(B). To impose the maximum sentence, there must be a finding on the record that the offender committed one of the worst forms of the offense or posed the greatest likelihood of recidivism. See *State v. Banks* (Nov. 20, 1997), Cuyahoga App. No. 72121; *State v. Beasley* (June 11, 1998), Cuyahoga App. No. 72853. While the court need not use the exact language of the statute, it must be clear from the record that the trial court made the required findings. See Id., *State v. Assad* (June 11, 1998), Cuyahoga App. Nos. 72648, 72649; *State v. Boss* (Sep. 15, 1997), Clermont App. No. CA96-12-107; *State v. Fincher* (Oct. 14,1997), Franklin App. No. 97 APA03-352.

{¶17} While, R.C. 2929.12 grants trial courts the discretion to "determine the most effective way to comply with the purposes and principles of sentencing set forth in section R.C. 2929.11 of the Revised Code," it does not absolve the court from complying with the terms of R.C. 2929.19 altogether.

{¶18} We therefore find that the trial court abused its discretion in failing to comply with the applicable sentencing guidelines, and appellant's assignments of error VI and VIII are well taken. Pursuant to App.R. 12(A)(1)(c), appellant's remaining assignments of error are moot. Because the appellant's plea was

taken in compliance with Crim.R. 11 and remains in effect, the case is hereby reversed and remanded for resentencing.

Judgment reversed and remanded.

FRANK D. CELEBREZZE, JR.
JUDGE

ANN DYKE, J., CONCURS.

PATRICIA A. BLACKMON, P.J., CONCURS IN JUDGMENT ONLY (WITH SEPARATE CONCURRING OPINION).

PATRICIA ANN BLACKMON, P.J.:

{¶19} I respectfully concur in judgment only with the majority opinion to reverse and remand for resentencing. I write separately to explain. In this case, Cousin was sentenced for attempted robbery, receiving stolen property, and drug possession. At his sentencing hearing, he was not sentenced to post-release control or notified that he was subject to post-release control. However, the trial court's journal entry showed post-release control as a part of Cousin's sentence. This journal entry is reminiscent of the one in *State v. Bryant*.[2] In *Bryant*, we concluded from the record that Bryant had not appeared before the trial court at the time of the trial court's journalization of the post-release control. Bryant also had not been advised of the imposition of post-release control at his sentencing hearing. Consequently, we concluded the trial

[2]Cuyahoga App. No. 79841, 2002-Ohio-2136.

court had violated Crim.R. 43(A) by modifying a sentence in the defendant's absence. *Bryant,* therefore, should control this case and is different from *State v. Smith*.[3] In *Smith*, defendant had served his sentence, was never informed of post-release control, and was appealing a charge of escape for violation of post-release control. Consequently, I believe *Smith* is distinguishable from the fact in the instant case and therefore does not apply.

Appendix A

{¶20} Appellant's assignments of error:

{¶21} "I. THE APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE OHIO AND FEDERAL CONSTITUTIONS WHEN DEFENSE COUNSEL FAILED TO FILE A MOTION TO CONSOLIDATE THE ROBBERY OFFENSES PURSUANT TO CRIMINAL RULE 8(A) AND CRIMINAL RULE 13."

{¶22} "II. THE TRIAL COURT ERRED WHEN IT FAILED TO ORDER THE PROSECUTOR TO CONSOLIDATE THE INDICTMENTS PURSUANT TO CRIMINAL RULE 8(A) AND CRIMINAL RULE 13."

{¶23} "III. THE TRIAL COURT ERRED IN SENTENCING APPELLANT WITHOUT COMPLYING WITH THE REQUIREMENTS OF O.R.C. 2929.19(3)(b)-(f) WHICH REQUIRED THE COURT TO NOTIFY HIM THAT AS PART OF THE SENTENCE THE PAROLE BOARD MAY EXTEND THE STATED PRISON TERM FOR CERTAIN VIOLATIONS OF PRISON RULES FOR UP TO ONE-HALF THE STATED PRISON TERM."

{¶24} "IV. THE TRIAL COURT ERRED IN SENTENCING APPELLANT WITHOUT COMPLYING WITH THE REQUIREMENTS OF O.R.C. 2929.19(3)(C) THAT HE 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 FO THE THIRD DEGREE IN THE

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[3]Cuyahoga App. No. 81344, 2003-Ohio-3215.

COMMISSION OF WHICH THE OFFENDER CAUSED OR THREATENED TO CAUSE PHYSICAL HARM TO A PERSON."

{¶25} "V. THE TRIAL COURT ERRED IN SENTENCING APPELLANT WITHOUT COMPLYING WITH THE REQUIREMENTS OF ORC 2929.19(3)(D) THAT HE 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 THIRD, FOURTH OR FIFTH DEGREE THAT IS NOT SUBJECT TO DIVISION (B)(3)(C) OF THIS SECTION."

{¶26} "VI. THE TRIAL COURT ERRED IN SENTENCING APPELLANT WITHOUT COMPLYING WITH THE REQUIREMENTS OF ORC 2929.19(3)(E) NOTIFYING 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."

{¶27} "VII. THE TRIAL COURT ERRED IN IMPOSING A PRISON TERM FOR FELONIES OF THE FOURTH AND FIFTH DEGREE OR FOR A FELONY DRUG OFFENSE BY NOT CLEARLY STATING ITS REASONS FOR IMPOSING THE PRISON TERM, BASED UPON THE OVERRIDING PURPOSES AND PRINCIPLES OF FELONY SENTENCING SET FORTH IN SECTION 2929.11 OF THE REVISED CODE AND ANY FACTORS LISTED IN DIVISIONS (B)(1)(A) TO (I) OF SECTION 2929.13 OF THE REVISED CODE THAT IT FOUND TO APPLY RELATIVE TO THE OFFENDER."

{¶28} "VIII. THE TRIAL COURT ERRED IN IMPOSING MAXIMUM PRISON TERMS FOR A FELONY OF THE FOURTH DEGREE AND A FELONY OF THE FIFTH DEGREE DRUG OFFENSE BY NOT CLEARLY STATING ITS REASONS FOR IMPOSING THE MAXIMUM PRISON TERM BASED UPON THE OVERRIDING PURPOSES AND PRINCIPLES OF FELONY SENTENCING SET FORTH IN SECTION 2929.11 OF THE REVISED CODE."

KEY WORDS:
#82147; *S/O v. David Cousin*

R.C. 2953.08(G)(2); R.C. 2953.08(F)(1)-(4); R.C. 2929.19; R.C. 2929.12; APP.R. 12; CRIM.R. 11; SENTENCING; POST RELEASE CONTROL; SENATE BILL 2; CLEAR AND CONVINCING.