[Cite as *State v. Scales*, 2004-Ohio-5590.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83330

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	and
vs.	:	OPINION
	:	
ROBERT SCALES,	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION	:	OCTOBER 21, 2004
CHARACTER OF PROCEEDING	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-417347
JUDGMENT	:	REVERSED AND REMANDED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

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MICHAEL J. CORRIGAN, A.J.:

{¶ 1} When sentencing defendant Robert Scales, the court concededly failed to advise him that post-release control would be a part of the sentence. The sole issue concerns the disposition of post-release control as a result of that error.

{¶ 2} In *State v. Fisher*, Cuyahoga App. No. 83098, 2004-Ohio-3123, we considered the precise issue raised here and stated at ¶37-38:

{¶ 3} "We are aware that there is a difference of opinion, even within this district, on whether an erroneous imposition of post-release should be remanded for correction or whether post-release controls are forever foreclosed. See *State v. Finger*, Cuyahoga App. No. 80691, 2003-Ohio-402, discretionary appeal allowed 99 Ohio St.3d 1470, 2003-Ohio-3801, 791 N.E.2d 985. The weight of authority within this district, *Finger* notwithstanding, is that errors in the imposition of post-release controls be remanded for resentencing. See *State v. Jordan*, Cuyahoga App. No. 80675, 2002-Ohio-4587, ¶15, appeal granted *State v. Jordan*, 98 Ohio St.3d 1460, 2003-Ohio-644. For what it's worth, we believe that because post-release control is governed by statute under R.C. 2967.28(B) and (C), the imposition of that part of a sentence that did not comply with the statutory requirements would be void." In *Woods* [v. *Telb*, 89 Ohio St.3d 504, 2000-Ohio-171] the supreme court stated that "post-release control is part of the original judicially imposed sentence." *Woods*, 89 Ohio St.3d 504, 512. In *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, the Ohio Supreme Court stated, "Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." If the court neglected to impose post-release controls, the sentence would be void and must be remanded for resentencing. An appellate court cannot simply delete that part of the sentence which was not imposed according to statutory requirements.

{¶ 4} "And it must be noted that post-release control is not itself a punishment, but a condition of parole, the violation of which is subject to punishment." See *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, certiorari denied (2003), *Martello v. Ohio*, 123 S.Ct. 2087. Therefore we see no constitutional impediment to a remand for resentencing in the event a court fails to advise the offender orally that post-release controls will be imposed." *Fisher*, supra, at ¶38.

{¶ 5} Consistent with our position in *Fisher*, we find that this case must be reversed and remanded for a new sentencing hearing, this time including the statutorily-mandated post-release controls.

Reversed and remanded.[1]

This cause is reversed and remanded for proceedings consistent with this opinion.

It is, therefore, ordered that said appellant recover of said appellee his costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

i. MICHAEL J. CORRIGAN
ii. ADMINISTRATIVE JUDGE

JAMES J. SWEENEY, J., CONCURS.

ANNE L. KILBANE, J., DISSENTS
WITH SEPARATE OPINION.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the

[1] We acknowledge the dissenting opinion only to point out that, in the interests of professionalism, we will not respond to its ad hominem attacks.

court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

ANNE L. KILBANE, J., DISSENTING:

{¶ 6} From this opinion reversing the two-year prison sentence and three years of community control sanctions imposed upon Robert Scales by Judge Lillian Greene, and remanding the case for resentencing, I dissent[1] because the majority, instead of ruling on the assignment of error, has taken on the role of County Prosecutor. Without authority, they punish Scales, although he prevailed on his assignment of error, by ordering another proceeding. Scales claims the failure to advise him of mandatory post-release control voids imposition of such controls. I agree and would remand only for a journal entry that accurately reflects what took place at the sentencing hearing.

{¶ 7} From the record we glean the following: In March of 2001, Scales pleaded guilty to an amended count of Felonious Assault,[2] a second degree felony, and one count of failure to comply with police order or signal, a third degree felony.[3] He was sentenced to two years on count one and three years of community control on the second.

{¶ 8} Although no mention of post-release control was made at either the plea or the sentencing hearing, the corresponding journal entry stated, "[p]ost release control is a part of this prison sentence for the maximum period allowed for the above felony(s) under R.C. 2967.28."

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[1]"[Dissents are] appeals to the brooding spirit of the law, to the intelligence of another day." Charles Evans Hughes, Chief Justice of the United States 1930-1941.

[2]R.C. 2903.11

[3]R.C. 2921.331

{¶ 9} After serving his prison term and, apparently entering into community control, Scales was informed that he would be placed on three years of post-release control. He then moved for leave to file a delayed appeal, which was granted, and now raises a single assignment of error set forth in the appendix to this opinion. The State did not file a cross-appeal.

{¶ 10} Scales claims that because the judge failed to advise him that mandatory post-release control was part of his sentence, this provision of his sentence is void. I agree.

{¶ 11} R.C. 2943.032 and R.C. 2929.19(B)(3) specifically require statements by a judge at the sentencing hearing that impose a definite sentence on a defendant at that time.[4] Reference in a sentencing journal entry to any parts of the sentence not so articulated or extensions provided by law is insufficient to qualify as notification to an offender of post-release control.[5]

{¶ 12} Further, and as was discussed at length in *State v. Jones*[6] under R.C. 2953.08, both the State and the defendant have the right to appeal a sentence. The State did not appeal the non-imposition of mandatory post-release control despite its clear right to do so, but instead responded by conceding the judge's failure to advise of mandatory post-release control.[7]

{¶ 13} I quite agree that the failure to advise Scales that mandatory post-release control and of the sanctions imposed should he violate such controls, makes Scales' sentence contrary to law. However, all Scales requested from this court was to find merit in, or overrule, his assignment of

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[4]See *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171, 733 N.E.2d 1103, paragraph two of the syllabus.

[5]See *State v. Stell* (May 16, 2002), Cuyahoga App. No. 79850; *State v. Dunaway* (Sept. 13, 2001), Cuyahoga App. No. 78007; *State v. Finger* (January 29, 2003), Cuyahoga App.No. 80691, 2003-Ohio-402.

[6]*State v. Jones* (May 24, 2001), Cuyahoga App. No. 77657.

[7]R.C. 2953.08(B).

error. We therefore agree that post-release controls should not have been imposed upon his release from prison, but we disagree over our remedy.

{¶ 14} It is clear that the sentencing entry must be corrected, but by what authority does the majority reverse the sentence and remand for a new sentencing hearing? If the State noted the judge's failure to impose mandatory post-release control, it should have, and could have, appealed. The failure to do so, and Scales' subsequent appeal only after learning of this additional sentence, renders it void, and not worthy of remand.

{¶ 15} As we held in *State v. Smiley*[8], an appellate court cannot use a defendant's appeal as a means to remand his case for the imposition of a greater sentence. The majority forgets in its lemming-like approach to "consistency," that Scales only asked that we find that placing him under post-release control was without legal authority, and he is correct. The sentencing journal entry should be corrected and the control(s) ended.

APPENDIX A :
ASSIGNMENT OF ERROR

I. THE TRIAL COURT ERRED WHEN IT FAILED TO INFORM THE APPELLANT AT EITHER THE PLEA OR SENTENCING HEARING THAT HE WAS SUBJECT TO MANDATORY POST RELEASE CONTROL.

[8](July 11, 2002), Cuyahoga App.No. 79514, 2002-Ohio-3544.