

[Cite as *State v. Collins*, 2006-Ohio-814.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86266

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	
-VS-	:	AND
	:	
CHARLES COLLINS	:	OPINION
	:	
Defendant-Appellant	:	

Date of Announcement of Decision:	FEBRUARY 23, 2006
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Character of Proceeding:	Criminal appeal from Court of Common Pleas Case No. CR-368019
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Judgment:	Affirmed
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Date of Journalization:

Appearances:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor MATTHEW E. MEYER, Assistant Prosecuting Attorney 1200 Ontario Street Cleveland, Ohio 44113
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For Defendant-Appellant:	JONATHAN N. GARVER, ESQ. 4403 St. Clair Avenue Cleveland, Ohio 44103
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JAMES J. SWEENEY, P.J.:

{¶ 1} Defendant-appellant, Charles Collins ("defendant"), appeals from his sentence that exceeds the minimum prison term and imposes consecutive prison terms. For the reasons that follow, we affirm.

{¶ 2} This matter returns following the resentencing hearing held pursuant to this Court's decision in *State v. Collins*, Cuyahoga App. No. 78596, 2004-Ohio-5855. At resentencing, the trial court reduced defendant's prison term from 24 years to a total sentence of 13 years. Defendant assigns one error for our review:

{¶ 3} "I. The imposition of greater-than-minimum and/or consecutive sentences based upon findings neither found by a jury and proven beyond a reasonable doubt, nor admitted by appellant, constitutes a denial of appellant's right to a jury trial and a denial of due process of law, in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 10 and 16 of the Constitution of the State of Ohio."

{¶ 4} Defendant contends that his sentence violates his constitutional rights to jury trial and due process under the authority of the United States Supreme Court's decisions in *Blakely v. Washington*, (2004), 542 U.S. 296 and *Booker v. United States* (2005), 543 U.S. 220. Defendant maintains it was unconstitutional for the trial court to impose more than the minimum prison sentence

and to impose consecutive sentences due to the judicial fact finding mandated by Ohio's sentencing laws.

{¶ 5} Defendant's argument has been addressed and rejected by en banc decisions of this Court. *State v. Atkins-Boozer*, Cuyahoga App. No. 84151, 2005-Ohio-2666, ¶30 (imposition of more than minimum sentence "does not implicate the Sixth Amendment as construed in *Blakely*."); *State v. Lett*, 161 Ohio App.3d 274, 2005-Ohio-2665, ¶¶25 and 47 (trial court's imposition of maximum and consecutive sentences do not implicate the Sixth Amendment as construed in *Blakely*.)¹

{¶ 6} Defendant's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

¹We decline to follow the rationale of the dissent for the reason that the issue of post-release control was not raised or argued by either party in this appeal. Further, *Hernandez v. Kelly*, __ Ohio St.3d __, 2006-Ohio-126 is not analogous since it concerned a petition for a writ of habeas corpus rather than an error that was the proper subject of a direct appeal.

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

MICHAEL J. CORRIGAN, J., CONCURS.
COLLEEN CONWAY COONEY, J., DISSENTS.
(See dissenting opinion attached).

JAMES J. SWEENEY
PRESIDING JUDGE

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 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. 112, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86266

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	D I S S E N T I N G
	:	
vs.	:	O P I N I O N
	:	
CHARLES COLLINS	:	
	:	
Defendant-Appellant	:	

DATE: FEBRUARY 23, 2006

COLLEEN CONWAY COONEY, J., DISSENTING:

{¶ 7} I respectfully dissent from the majority's decision. I would remand for resentencing because the court failed to notify appellant of post-release control. An appeal is an adequate remedy at law which I propose should be explored fully now so that appellant will not face the possibility of having to seek the extraordinary remedy of habeas corpus as done recently in *Hernandez v. Kelly*, ____ Ohio St.3d ____, 2006-Ohio-126. As the Ohio Supreme Court stated in *Hernandez*, "[S]entencing errors by a court that had proper jurisdiction cannot be remedied by extraordinary writ because the petitioner has or had adequate remedies in the ordinary course of law, e.g., appeal and postconviction relief, for review of any alleged sentencing error." Id. at _ 11.

{¶ 8} The court noted in a related context that "'When a trial court makes an error in sentencing a defendant, the usual procedure is for an appellate court to remand to the trial court for resentencing.'" Id. at _ 30, citing *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, _ 33.

{¶ 9} In the instant case, appellant has argued that the trial court made an error in sentencing, albeit an error not specifically related to post-release control. Clearly, the trial court

committed an error in sentencing by failing to notify appellant that he would be subject to post-release control under R.C. 2967.28. Therefore, I would find plain error and remand for resentencing consistent with *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085. See *State v. Lynch*, Cuyahoga App. No. 86437, 2005-Ohio-3392.