

[Cite as *State v. Phillips*, 2010-Ohio-5130.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94017

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

ANTWANE PHILLIPS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-513798 and CR-524619

BEFORE: Kilbane, P.J., Dyke, J., and Cooney, J.

RELEASED AND JOURNALIZED: October 21, 2010

ATTORNEY FOR APPELLANT

Paul Mancino, Jr.
75 Public Square
Suite 1016
Cleveland, Ohio 44113-2098

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Margaret A. Troia
Assistant County Prosecutor
Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Antwane Phillips (“Phillips”), appeals his convictions for felonious assault and failure to comply. Phillips raises 14 assignments of error, including that he was denied due process, the right to a fair trial, and the effective assistance of counsel. After a review of the record and applicable law, we affirm Phillips’s convictions, but remand to the trial court to advise him of postrelease control by applying the procedures set forth in R.C. 2929.191.

{¶ 2} On May 28, 2009, Phillips was indicted on three counts. Counts 1 and 2 charged Phillips with felonious assault in violation of R.C.

2903.11(A)(2), with peace officer specifications. Count 3 charged Phillips with failure to comply in violation of R.C. 2921.331(B).

{¶ 3} On August 19, 2009, the case proceeded to a jury trial where the following testimony was adduced.

{¶ 4} Sergeant James Purcell (“Sergeant Purcell”), from the Cleveland Police Department, testified that on April 29, 2009, his unit received information from a confidential informant that a group of black males had just sold drugs out of their vehicles in the vicinity of 1439 Lakeview Avenue, in Cleveland. The informant described the vehicles involved as a white conversion van, a dark colored Monte Carlo, and a bronze Chevrolet Impala (“Chevrolet”). Sergeant Purcell testified that when he arrived at the location, a white conversion van and a dark-colored Monte Carlo were present. As he was inspecting these vehicles and talking with their occupants, Sergeant Purcell observed a bronze Chevrolet traveling northbound on Lakeview Avenue toward him. The vehicle then stopped and began traveling in reverse at a high rate of speed down Lakeview Avenue.

{¶ 5} Cleveland Police Detective Gerald Crayton (“Detective Crayton”) testified that he was with Purcell at the Lakeview Avenue location that evening and also saw the Chevrolet approach, stop, and then drive in reverse.

Detective Crayton stated that he then got into his unmarked car and instructed Sergeant Purcell to get into the passenger seat. Detective

Crayton stated that the Chevrolet then traveled in reverse to Ashbury Avenue. By the time Detective Crayton reached Ashbury Avenue, he no longer saw the vehicle, but did see car lights in the distance near East 111th Street. Assuming that the car lights ahead were that of the Chevrolet, Detective Crayton pursued the vehicle.

{¶ 6} As Detective Crayton approached the intersection of Ashbury Avenue and East 111th Street, he saw the Chevrolet coming down East 111th Street, a one-way street, directly towards him. Detective Crayton activated his lights and police siren and turned down the street, heading the wrong way toward the vehicle. Detective Crayton testified that the vehicle traveled in reverse down East 111th Street until it reached Wade Park Avenue, where it hit the curb and came to a stop.

{¶ 7} Detective Crayton testified that he believed the suspect had given up. As he and Sergeant Purcell were about to get out of the car, the driver of the Chevrolet revved its engine and struck the unmarked vehicle's front bumper. The driver of the Chevrolet then backed up, revved the engine again, and struck Detective Crayton's vehicle a second time. The driver's door to the Chevrolet opened, the driver exited, and then fled on foot behind the houses on Wade Park Avenue.

{¶ 8} Sergeant Purcell testified that he pursued the driver on foot but was unable to apprehend him. Sergeant Purcell then stated he and

Detective Crayton looked through the vehicle and found an attendance sheet for an Alcoholics-Anonymous meeting with Phillips's name on it. They secured a driver's license photograph of Phillips, and both testified that it was Phillips they saw driving the vehicle.

{¶ 9} Phillips took the stand in his own defense and gave a different version of events. Phillips testified that, at approximately 10:00 p.m., he left Lancer's restaurant located at East 79th Street and Carnegie Avenue and began driving to visit his grandfather who lived at 1528 East 120th Street near Ashbury Avenue. Phillips stated that he was heading down East 111th Street when he saw a car pass by, then back up and turn down the street driving toward him. Phillips stated that he did not know who was in the car, so he attempted to drive backwards to get out of their way. Phillips testified that his car was then struck twice. Phillips stated he became scared, got out of the car, and ran to his grandfather's house on East 120th Street.

{¶ 10} On August 26, 2009, the jury found Phillips guilty of all three counts.

{¶ 11} On August 27, 2009, the trial court sentenced Phillips to six years of imprisonment each on Counts 1 and 2, with the sentences to be served concurrently. On Count 3, Phillips was sentenced to four years of imprisonment, to be served consecutively to the sentence imposed on Counts 1 and 2, for an aggregate sentence of ten years of imprisonment.

{¶ 12} That same day, Phillips was also found to be in violation of the community control sanctions that were imposed in a previous case, Case No. CR-513798, in which Phillips had pled guilty to drug possession. The trial court terminated Phillips's community control sanctions and sentenced Phillips to one year of imprisonment, to be served consecutively to his ten-year prison sentence.

{¶ 13} Phillips filed the instant appeal, asserting 14 assignments of error for our review. As the first two assignments of error both discuss the jury view, we will address them together.

ASSIGNMENT OF ERROR NUMBER ONE

“DEFENDANT WAS DENIED DUE PROCESS OF LAW AND HIS CONSTITUTIONAL RIGHT TO BE PRESENT WHEN THE COURT ALLOWED THE JURY TO VIEW THE VEHICLE AND EXPERIMENTS WERE CONDUCTED DURING THAT VIEW WITHOUT [THE] PRESENCE OF DEFENDANT.”

ASSIGNMENT OF ERROR NUMBER TWO

“DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE EXPERIMENTS WERE CONDUCTED DURING A JURY VIEW IN DEFENDANT'S ABSENCE.”

{¶ 14} Immediately after the jury was impaneled, the jurors were taken on a jury view to the garage of the Justice Center to view Detective Crayton's

vehicle. The police siren and lights were also turned on for the jurors to observe. Phillips was not present during the jury view. Phillips argues that the prosecutor made improper comments during the jury view and that the State should not have been permitted to activate the siren and lights during the jury view.

{¶ 15} Trial courts are afforded broad discretion with respect to jury views, and we will not reverse their decision absent an abuse of discretion. *State v. Hanna*, 95 Ohio St.3d 285, 291, 2002-Ohio-2221, 767 N.E.2d 678, citing *State v. Zuern* (1987), 32 Ohio St.3d 56, 512 N.E.2d 585. An abuse of discretion connotes “more than an error of law or judgment; it implies that the court’s attitude was unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 16} We cannot find that the trial court abused its discretion in allowing the jury to view the car with the siren and lights activated. Phillips’s defense to the charges against him was that he was unaware the car pursuing him was a police car, therefore, the appearance of the car with the lights and siren activated was clearly relevant. Further, this court has previously determined that jury views are not a critical portion of the trial, and what is viewed on the jury view is not considered evidence. *State v. Arnold* (Dec. 13, 2001), Cuyahoga App. No. 78087, citing *State v. Tyler* (1990),

50 Ohio St.3d 24, 553 N.E.2d 576. Further, the record indicates that Phillips never objected during trial to any aspect of the jury view.

{¶ 17} Phillips maintains that the State made improper comments during the jury view. Pursuant to R.C. 2945.16, when jurors are on a jury view, no person other than a sheriff or an officer appointed by the court shall speak to the jurors regarding any matter related to the trial. Phillips points to numerous comments made by the State during trial that emphasize the volume of the siren and the brightness of the lights. These statements were not made during the jury view; however, they were made in closing arguments. Phillips cites to no authority that would prohibit the State from referring to the jury view during trial.

{¶ 18} Phillips also argues that it was improper for the trial court to allow the siren and lights on the car to be activated and that neither he nor his counsel were present during the jury view to object. However, a review of the record demonstrates that while Phillips waived his right to be present during the jury view, defense counsel never stated that he was not going to attend. There is no indication in the record that Phillips's counsel failed to attend the actual jury view. Phillips was brought down by deputies during a lunch break to view the vehicle at a later time. Phillips's counsel was not present for this view. Phillips could have requested that the trial court provide specific jury instructions regarding the jury view, but failed to do so.

{¶ 19} Phillips's first two assignments of error are overruled.

ASSIGNMENT OF ERROR NUMBER THREE

“DEFENDANT WAS DENIED DUE PROCESS OF LAW AND HIS RIGHT TO PRESENT A DEFENSE WHEN THE COURT WOULD NOT ENFORCE SUBPOENAS AND RULED THAT THE POLICE REPORT CONTAINED NO FAVORABLE MATERIAL.”

{¶ 20} On August 20, 2009, the third day of trial, Phillips subpoenaed two members of the Cleveland Police Department, Officer Robert Martin (“Officer Martin”) and Detective Benjamin McCully (“Detective McCully”), both of whom were present at 1439 Lakeview on the night of the incident. Phillips wanted to question Officer Martin and Detective McCully regarding the events surrounding the drug transaction on Lakeview that night. Phillips argues that the trial court erred in not enforcing the subpoenas. We disagree.

{¶ 21} We review the trial court's decision on the admission of evidence for an abuse of discretion. *State v. Ray*, Cuyahoga App. No. 93435, 2010-Ohio-2348, at ¶28, citing *State v. Duncan* (1978), 53 Ohio St.2d 215, 373 N.E.2d 1234. In order for evidence to be admissible, it must be relevant. Evid.R. 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evid.R. 401.

{¶ 22} In this case, the drug transaction that occurred on Lakeview was irrelevant to the charges against Phillips. There is no evidence that Phillips was involved in the drug activity at that location. The charges stem from Phillips deliberately driving his car into Detective Crayton's vehicle on Wade Park Avenue. Officer Martin and Detective McCully were not present at Wade Park Avenue where the incident occurred. In addition, Phillips did not attempt to subpoena these witnesses until the third day of trial.

{¶ 23} Phillips also moved to admit Officer Martin's police report into evidence. However, the police report outlines the arrest of a suspect involved in a drug transaction at 1439 Lakeview Avenue, in which Phillips was not involved. Phillips also requested that the police report prepared by Detective Crayton be admitted into evidence because it demonstrated that Phillips had no intent to injure Detective Crayton and Sergeant Purcell, but that Phillips was simply trying to push their car out of the way.

{¶ 24} However, Detective Crayton's report never stated that he believed Phillips was not attempting to injure him. Detective Crayton surmised that Phillips was attempting to push the car out of the way in order to flee, but this does not mean that Phillips did not also intend to injure the officers in the process. A jury may infer intent from circumstantial evidence, in this case repeatedly striking Detective Crayton's car with his own. *State v.*

Mackey (Dec. 9, 1999), Cuyahoga App. No. 75300, citing *State v. Robinson* (1954), 161 Ohio St. 213, 118 N.E.2d 517.

{¶ 25} Therefore, we cannot conclude that the trial court abused its discretion in denying Phillips's request to admit this evidence. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FOUR

“DEFENDANT WAS DENIED A FAIR TRIAL WHEN THE PROSECUTION WITNESSES WERE ALLOWED TO TESTIFY CONCERNING POSSIBILITIES.”

{¶ 26} Phillips argues that the testimony provided by both Detective Crayton and Sergeant Purcell was speculation and should not have been admissible. We disagree.

{¶ 27} Both Detective Crayton and Sergeant Purcell testified regarding their immediate reactions when Phillips struck their vehicle. Sergeant Purcell testified that he was worried he would suffer injuries if Phillips's car struck their car somewhere other than the bumper. Phillips argues that this testimony was speculative and should not have been admitted.

{¶ 28} In support of his argument, Phillips relies on *Brandt v. Mansfield Rapid Transit, Inc.* (1950), 153 Ohio St. 429, 92 N.E.2d 1. In *Brandt*, the Ohio Supreme Court concluded it was improper for the trial court to allow the plaintiff's medical doctor to speculate on possible causes of a medical condition. The instant case is significantly different because the actual

victim testified to his personal knowledge and observations of the incident, rather than speculations as were the issue in *Brandt*. Pursuant to Evid.R. 602 a witness may testify to matters within his or her personal knowledge.

{¶ 29} Therefore, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FIVE

“DEFENDANT WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR CROSS-EXAMINED DEFENDANT CONCERNING HIS FAILURE TO INFORM THE POLICE.”

{¶ 30} Phillips maintains that the trial court erred when it allowed the State to question him on why he did not contact police on the night of the incident. After a review of the record, we find no merit to this argument.

{¶ 31} At trial, Phillips testified regarding his version of events. Phillips testified that he was unaware that the car driving towards him on East 111th Street was a police car. Fearing for his safety, he fled on foot. On cross-examination, the State asked Phillips why he did not contact police if he felt so threatened that he was forced to abandon his vehicle.

{¶ 32} Phillips argues this line of questioning was a violation of his constitutional rights because he had no obligation to contact the police. However, when a defendant takes the stand in his own defense, he is subject to cross-examination on all relevant issues including his credibility. *State v. Fannin*, Cuyahoga App. No. 80014, 2002-Ohio-4180, at ¶77, citing *State v.*

Landrum (1990), 53 Ohio St.3d 107, 559 N.E.2d 710. This line of questioning by the State was clearly to test Phillips's credibility.

{¶ 33} This assignment of error is overruled.

{¶ 34} As Phillips's six and seventh assignments of error both involve the jury instructions provided by the trial court, we will address them together.

ASSIGNMENT OF ERROR NUMBER SIX

“DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT FAILED TO FULLY INSTRUCT THE JURY AND DEFINE TERMS FOR THEIR CONSIDERATION.”

ASSIGNMENT OF ERROR NUMBER SEVEN

“DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT DID NOT FULLY INFORM THE JURY THAT THE FAILURE TO COMPLY MUST BE PURSUANT TO A LAWFUL ORDER.”

{¶ 35} Phillips argues that the jury instructions were improper because the trial court failed to adequately define cause, failed to define the term “peace officer,” and did not properly instruct the jury on the elements of the charged offense. After a review of the record, we disagree.

{¶ 36} Phillips did not object to the jury instructions below; therefore, pursuant to Crim.R. 52(B), we review the instructions only for plain error. In order to find that there was plain error, we must determine that the defendant's substantial rights were so adversely affected that it undermined

the fairness of the trial. *State v. Allen*, Cuyahoga App. No. 93372, 2010-Ohio-3999, at ¶40, citing *State v. Swanson* (1984), 16 Ohio App.3d 375, 476 N.E.2d 672.

{¶ 37} Phillips argues that in the jury instruction regarding cause, the trial court stated that the jury was required to find that Phillips's actions resulted in physical harm to Detective Crayton and Sergeant Purcell. Phillips argues that this was inaccurate because Phillips's actions did not have to actually result in harm, as long as he attempted to cause serious physical harm. We fail to see how Phillips was prejudiced by the trial court providing a heightened standard in the jury instructions.

{¶ 38} Phillips argues that the trial court also erred when it provided jury instructions on "natural consequences" and "intervening causes." These jury instructions were taken nearly verbatim from Ohio Jury Instructions 409.55, which this court has previously determined to be proper. See *State v. Shropshire*, Cuyahoga App. No. 85063, 2005-Ohio-3588.

{¶ 39} Phillips also argues that the trial court failed to define "peace officer" for the jury. A review of the jury instruction demonstrates that the trial court instructed the jury on the definition of a police officer pursuant to R.C. 4511.01, rather than the definition of a peace officer pursuant to R.C. 2935.01. The definition of a peace officer specifically encompasses police officers employed with an organized police department. Phillips never

alleged that Detective Crayton and Sergeant Purcell are not peace officers, and therefore, we fail to see how Phillips was prejudiced by this omission.

{¶ 40} Finally, Phillips argues that pursuant to R.C. 2921.331(A), the jury should have been instructed that the failure to comply must have been in regards to a “lawful order of a police officer.” However, Phillips was charged pursuant to R.C. 2921.331(B), which states, “[n]o person shall operate a motor vehicle so as to willfully elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person’s motor vehicle to a stop.” This portion of the statute was specifically read to jurors as part of the jury instructions.

{¶ 41} Consequently, Phillips’s sixth and seventh assignments of error are overruled.

ASSIGNMENT OF ERROR NUMBER EIGHT

**“DEFENDANT WAS DENIED DUE PROCESS OF LAW
WHEN THE COURT DID NOT REQUIRE ANY CULPABLE
MENTAL STATE FOR THE PEACE OFFICER
SPECIFICATION.”**

{¶ 42} Each of the two counts of felonious assault contained a peace officer specification. Phillips argues that the trial court erred in not requiring any culpable mental state for the specifications. After a review of the applicable case law, we disagree.

{¶ 43} An offender does not have to have knowledge that the victim is a peace officer in order to enhance a conviction for felonious assault. *State v. Carter*, 9th Dist. No. 21474, 2003-Ohio-5042, at ¶10, citing *State v. Koreny* (Apr. 12, 2001), Cuyahoga App. No. 78074. The court reasoned that the General Assembly intended to enhance the degree of the felony when the victim is a peace officer pursuant to R.C. 2903.13, even where the defendant was unaware that the victim was a peace officer.

{¶ 44} Therefore, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER NINE

“DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED HIS MOTIONS FOR JUDGMENT OF ACQUITTAL.”

ASSIGNMENT OF ERROR NUMBER TEN

“DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED HIS MOTION FOR JUDGMENT OF ACQUITTAL FOR FAILURE TO COMPLY.”

{¶ 45} Phillips argues that the trial court erred when it denied his motion for acquittal pursuant to Crim.R. 29 with respect to both of the felonious assault charges and the failure to comply charge. We disagree.

{¶ 46} A motion for an acquittal pursuant to Crim.R. 29 challenges the sufficiency of the evidence. In reviewing a challenge based on sufficiency of the evidence, this court must determine whether the State met its burden at

trial. *State v. Smith*, Cuyahoga App. No. 93593, 2010-Ohio-4006, at ¶9, citing *State v. Bowden*, Cuyahoga App. No. 92266, 2009-Ohio-3598. “The relevant inquiry on appeal remains whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.” *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 47} Phillips was charged with two counts of felonious assault pursuant to R.C. 2903.11(A)(2), which states that no person shall cause or *attempt* to cause serious physical harm to another. Therefore, it was not necessary that the State demonstrate Detective Crayton and Sergeant Purcell actually suffered physical injuries. While Phillips argues that this was simply a minor car accident, both Detective Crayton and Sergeant Purcell testified that Phillips’s car was completely stopped when he revved his engine and hit their vehicle. Phillips then backed up, revved his engine again, and struck their vehicle for a second time. This clearly demonstrates his intent to cause serious physical injury.

{¶ 48} Phillips also argues that the trial court erred in failing to grant his Crim.R. 29 motion with respect to the failure to comply charge because Detective Crayton testified that it was not until he turned down East 111th Street that he activated his lights and siren. However, after Detective Crayton turned on his lights and siren, Phillips proceeded to drive in reverse

down East 111th Street, until he reached Wade Park Avenue, at which time Phillips deliberately drove into the police vehicle twice before fleeing on foot.

{¶ 49} Finding no merit to Phillips's ninth and tenth assignments of error, they are both overruled.

ASSIGNMENT OF ERROR NUMBER ELEVEN

**“DEFENDANT WAS DENIED DUE PROCESS OF LAW
WHEN THE COURT FAILED TO CONSIDER THE
STATUTORY CRITERIA FOR SENTENCING FOR
FAILURE TO COMPLY.”**

{¶ 50} Phillips argues that the trial court erred in sentencing him to four years imprisonment for his failure to comply charge because there was no evidence in the record to suggest that the trial court considered the proper sentencing factors. The State argues that the trial court was not required to state the reasons for its sentence. We agree.

{¶ 51} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Ohio Supreme Court excised portions of the Ohio Revised Code that previously required trial courts to make specific findings when sentencing a defendant. Shortly after *Foster* was decided, the Ohio Supreme Court issued

a plurality opinion in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.¹

{¶ 52} Pursuant to *Kalish*, this court must first determine whether the sentence complies with all applicable statutes and rules. If the sentence meets this first prong, this court will review the sentence only for an abuse of discretion.

{¶ 53} In the instant case, Phillips does not dispute that his sentence is statutorily permissible, therefore, we review it for an abuse of discretion. Phillips fled police by driving his vehicle in reverse, deliberately striking Detective Crayton's car twice, and then ultimately fleeing on foot. Consequently, we cannot find that the trial court abused its discretion when it sentenced him to four years of imprisonment on this count.

{¶ 54} This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWELVE

“DEFENDANT WAS DENIED DUE PROCESS OF LAW AND SUBJECTED TO MULTIPLE PUNISHMENTS WHEN THE COURT IN MERGING THE CONVICTIONS IMPOSED TWO SEPARATE SENTENCES.”

{¶ 55} Phillips was convicted of two counts of felonious assault and sentenced to six years of imprisonment on each count. Phillips maintains

¹We note that *Kalish* is merely persuasive, however, this court has routinely applied the two-pronged analysis in reviewing sentences. See *State v. Logan*, Cuyahoga App. No. 91323, 2009-Ohio-1685, at ¶4.

that the two counts of felonious assault should have been merged for sentencing as they stem from the same incident. We disagree.

{¶ 56} Pursuant to R.C. 2929.14, a trial court may not impose multiple sentences

{¶ 57} for charges that were part of the same act or transaction. A transaction has been defined as a “series of continuous acts bound together by time, space, and purpose, and directed toward a single objective.” *State v. Willis*, 69 Ohio St.3d 690, 691, 1994-Ohio-417, 635 N.E.2d 370, quoting *State v. Caldwell* (Dec. 4, 1991), Summit App. No. 14720.

{¶ 58} In *State v. Bari*, Cuyahoga App. No. 90370, 2008-Ohio-3663, the defendant was convicted of two counts of aggravated robbery for robbing two individuals at knife point at a Westlake office. The defendant argued that even though the robberies involved two victims, the robbery was one transaction, and therefore, he could only be sentenced on one count of aggravated robbery. This court disagreed and held that even though the robberies occurred during the same course of events, the defendant could be sentenced on both counts because a separate animus existed for each victim.

{¶ 59} In the instant case, even though the two counts of felonious assault occurred very close in time, each count listed a different victim. Phillips revved his engine striking Detective Crayton’s car, then backed up, revved the engine again, and struck the car for the second time. As separate

victims were listed in each count, we conclude that the trial court did not err when it failed to merge the two counts for sentencing.

{¶ 60} This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER THIRTEEN

“DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN HE WAS SENTENCED AS A PROBATION VIOLATOR WHEN THE COURT FAILED TO PROPERLY INFORM DEFENDANT CONCERNING POST-RELEASE CONTROL.”

{¶ 61} Phillips argues that the trial court erred in concluding that he violated his community control sanctions because he was not properly advised of postrelease control at his sentencing hearing. After a review of the record and the applicable case law, we agree.

{¶ 62} In Case No. CR-513798, Phillips pled guilty to one count of drug possession and was sentenced to one year of community control sanctions. The trial court imposed several restrictions on Phillips and ordered that if he violated the provisions of his community control sanctions, he would be ordered to serve one year in prison. Ultimately, when he was convicted on the charges in the instant case, he was found to have violated his community control sanctions stemming from the previous case and the one-year prison term was imposed.

{¶ 63} In Case No. CR-513798, the trial court informed Phillips of the possibility of postrelease control at his change of plea hearing, but failed to do

so at his sentencing hearing. The State argues that res judicata bars Phillips from raising this argument now when he could have raised the issue on a direct appeal. However, this court has previously rejected that theory, concluding that res judicata does not apply to cases in which a defendant was not properly advised of postrelease control because the sentence is void. *State v. White*, Cuyahoga App. No. 93732, 2010-Ohio-3607, at ¶5.

{¶ 64} Pursuant to R.C. 2929.191, when a defendant was sentenced, but not properly advised of postrelease control, the trial court may hold a hearing merely to advise the defendant that he is subject to postrelease control and issue the appropriate conforming journal entry. This court has previously concluded that this statute applies only prospectively to defendants who were sentenced after its enactment on July 11, 2006. *State v. Harris*, Cuyahoga App. No. 92892, 2010-Ohio-362, at ¶13, citing *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958.

{¶ 65} Consequently, we sustain this assignment of error and remand Case No. CR-513798 to the trial court to hold a hearing advising Phillips of postrelease control and to issue a conforming journal entry.

ASSIGNMENT OF ERROR NUMBER FOURTEEN

**“DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE
OF COUNSEL.”**

{¶ 66} Phillips alleges that he was denied effective assistance of counsel because his counsel failed to attend the jury view, failed to file a motion to suppress, failed to object to the imposition of improper evidence, and failed to object to the jury instructions. After a review of the record and applicable law, we disagree.

{¶ 67} In order for a defendant to demonstrate that his counsel was ineffective, he must demonstrate that “(1) the performance of defense counsel was seriously flawed and deficient; and (2) the result of appellant’s trial or legal proceeding would have been different had defense counsel provided proper representation.” *State v. Smiley*, Cuyahoga App. No. 93565, 2010-Ohio-4002, at ¶21, *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674.

{¶ 68} Phillips argues that his trial counsel was ineffective in failing to attend the jury view of Officer Crayton’s vehicle. A review of the record indicates that defense counsel never stated he was not going to attend the jury view. Phillips waived his presence at the jury view, and defense counsel requested that Phillips be taken to view the vehicle later in day. Defense counsel indicated that he would not need to accompany his client on his own individual viewing. Therefore, there is no evidence in the record to indicate that defense counsel was not present for the actual jury view.

{¶ 69} Phillips contends that his counsel was ineffective because he failed to file a motion to suppress. Phillips fails to state what evidence should have been suppressed. An appellant is required to state with specificity the alleged error presented for review with citations to the applicable portions of the record. App.R. 16(A)(7). As Phillips has failed to do this, we are unable to address this argument.

{¶ 70} Phillips also argues that his counsel was ineffective in failing to object to the State's line of questioning during Phillips's cross-examination. However, as discussed in Phillips's fifth assignment of error, when Phillips took the stand in his own defense, the State was permitted to cross-examine him regarding his credibility.

{¶ 71} Finally, Phillips argues that his counsel was ineffective in failing to object to the jury instructions. As we have already concluded in Phillips's sixth and seventh assignments of error that the jury instructions were proper, we find no merit to this argument.

{¶ 72} This assignment of error is overruled.

Convictions affirmed. Case remanded for further proceedings under R.C. 2929.191 in Case No. CR-513798.

It is ordered that appellee and appellant share the 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 common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

ANN DYKE, J., and
COLLEEN CONWAY COONEY, J., CONCUR