

[Cite as *State v. Pesci*, 2011-Ohio-1058.]

[Please see original opinion at 2011-Ohio-476.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 94904

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JAMES PESCI**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
AFFIRMED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case Nos. CR-370751, CR-364532, and CR-370752

**BEFORE:** Blackmon, J., S. Gallagher, P.J., and Cooney, J.

**RELEASED AND JOURNALIZED:** March 10, 2011

**APPELLANT**

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**ON RECONSIDERATION<sup>1</sup>**

**PATRICIA ANN BLACKMON, J.:**

{¶ 1} Appellant James Pesci appeals, pro se, the trial court's denial of his motions to vacate his sentences and to withdraw his pleas and assigns the following error for our review:

“The trial court abused its discretion and committed reversible and/or plain error in violation of the Ohio and United States Constitutions, Crim.R. 52(B) by denying the appellant's motion to vacate the void judgments.”

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<sup>1</sup>The original announcement of decision, *State v. Pesci*, Cuyahoga App. No. 94904, 2011-Ohio-476, released February 3, 2011, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See App.R. 22(C); see, also, S.Ct.Prac.R. 2.2(A)(1).

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court’s decision. The apposite facts follow.

### **Facts**

{¶ 3} In three different cases, Pesci pled guilty to the following: CR-364532, receiving stolen property; CR-370751, burglary, six counts of receiving stolen property, and one count of possession of a dangerous ordnance; and CR-370752, four counts of receiving stolen property. On January 14, 2000, the trial court sentenced Pesci in all three cases to a total of six-and-one-half years in prison. Thus, by June 2006, Pesci had completed his sentences in all three cases.

{¶ 4} On November 13, 2009, Pesci, although having served his sentences, filed in each case a motion to vacate the void judgment arguing the trial court failed to impose postrelease control. The trial court denied the motions after indicating that the sentences had expired and no postrelease control would be imposed.

### **Postrelease Control**

{¶ 5} In his sole assigned error, Pesci argues that the trial court erred by refusing to vacate the void judgments.

{¶ 6} While Pesci argues the trial court erred by not advising him of postrelease control at the joint sentencing hearing, the transcript indicates the trial court advised Pesci that he would be subject to postrelease control. The trial court, however, failed to indicate whether the postrelease control would be mandatory or discretionary, or the length of time. In *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d

78, the defendants were fully advised that they could be subject to postrelease control. The problem was that the notice failed to advise them that the postrelease control was mandatory. *Id.* at ¶46. The *Watkins* court noted that the preeminent purpose of R.C. 2967.28 was to ensure that defendants know at their sentencing that, “their liberty could continue to be restrained after serving their initial sentences.” *Id.* at ¶52. Thus, the fact that the defendants were erroneously advised that their postrelease control was discretionary and not mandatory, did not require the sentence to be vacated because the court’s notice at least informed the defendants that they were subject to some kind of postrelease control. *Id.* at ¶46. Likewise, in the instant case, the trial court advised Pesci he would be subject to postrelease control; thus, Pesci was on notice that his liberty could continue to be restrained after serving his sentences.

{¶ 7} The trial court, however, was also obligated to include the advisement in the sentencing entries and failed to do so. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864. Because Pesci’s sentences had expired by the time he filed his motions to vacate, the trial court was without authority to resentence him. Once an offender has served the prison term ordered by the trial court, he or she cannot be subject to resentencing in order to correct the trial court’s failure to properly impose postrelease control. *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, 912 N.E.2d 1106; *State*

*v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶18; *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, ¶32; *Simpkins* at ¶6.

{¶ 8} Pesci argues the appropriate remedy is to vacate his sentences. However, the Ohio Supreme Court in *State v. Fischer*, Slip Opinion No. 2010-Ohio-6238, held that “when a judge fails to impose statutorily mandated postrelease control as part of the defendant’s sentence, that part of the sentence is void and must be set aside.” *Id.* at ¶26. Thus, only the void part of the sentence is vacated, not the entire sentence. This is exactly how the trial court handled the matter. The court stated in the journal entry that Pesci was not subject to postrelease control.

{¶ 9} Pesci also argues that because the trial court failed to inform him regarding postrelease control at his guilty pleas, the pleas must be vacated. We note that Pesci failed to provide us with a transcript of his guilty plea; therefore, we are unable to determine if the trial court failed to so advise him. Nonetheless, this court in *State v. Cottrell*, Cuyahoga App. No. 95053, 2010-Ohio-5254, addressed a similar argument where the defendant, who had served his sentence, requested a plea to be vacated based on the trial court’s failure to advise him of postrelease control at the plea hearing. We held:

“Generally, trial courts are required to treat a Crim.R. 32.1 motion as a ‘pre-sentence motion’ in cases where a void sentence is at issue. See, *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422. But because [the defendant] has already served his void sentence in this case, his motion is treated as a ‘post-sentence motion’ subject to the more stringent standard of ‘manifest injustice.’ *State v. Simone*, 9th Dist. No. 24966, 2010-Ohio-1824.” *Id.* at ¶14.

{¶ 10} A manifest injustice is “a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her.” *State v. Sneed*, Cuyahoga App. No. 80902, 2002-Ohio-6502, ¶13. The Ohio Supreme Court has also defined manifest injustice as a “clear or openly unjust act.” *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 1998-Ohio-271, 699 N.E.2d 83. This standard permits a defendant to withdraw his guilty plea only in extraordinary cases. *State v. Smith* (1977), 49 Ohio St.2d 261, 264, 361 N.E.2d 1324.

{¶ 11} We conclude that even if the trial court failed to advise Pesci at his plea hearings regarding postrelease control, the failure did not constitute a manifest injustice. Pesci would not have been prejudiced by the omission as he has completed his sentences and is not subject to postrelease control. Accordingly, Pesci’s assigned error is overruled.<sup>2</sup>

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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<sup>2</sup>We note the state argues the court properly denied the motions to vacate because they were untimely petitions for postconviction relief. However, the Ohio Supreme Court in *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, held that a reviewing court has an obligation to recognize void sentences, vacate them, and order resentencing. Thus, “presumably, this means that a trial court, confronted with an untimely or successive petition for postconviction relief that challenges a void sentence, must ignore the procedural irregularities of the petition [and vacate if so required].” *State v. Holcomb*, 184 Ohio App.3d 577, 2009-Ohio-3187, 921 N.E.2d 1077, ¶19.

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.

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PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., and  
COLLEEN CONWAY COONEY, J., CONCUR