[Cite as *State v. Harris*, 2011-Ohio-1072.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95097

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT E. HARRIS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-443407

BEFORE: Stewart, P.J., Celebrezze, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 10, 2011

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MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Robert E. Harris, appeals from a sua sponte nunc pro tunc sentencing order that imposed a five-year mandatory term of postrelease control. Harris argues that the court had no jurisdiction to enter the nunc pro tunc sentencing order because he had been released from prison before the court entered the order.

{¶ 2} In October 2004, a jury found Harris guilty of first degree aggravated robbery with one and three-year firearm specifications. The court imposed a three-year sentence for aggravated robbery and ordered that sentence to be served consecutively to a

merged three-year sentence for the gun specifications, for a combined six-year sentence. Although Harris was subject to a five-year mandatory term of postrelease control for having committed a felony of the first degree, see R.C. 2967.28(B)(1), the court's sentencing entry stated that "postrelease control is part of this prison sentence for the maximum period allowed for the above felony(s) under R.C. 2967.28." We upheld Harris's conviction on appeal and in that appeal, Harris did not challenge any aspect of his sentence. See *State v. Harris*, 8th Dist. No. 85544, 2005-Ohio-5195. On April 8, 2010, the court issued an order directing the sheriff to transport Harris to the court for a "PRC hearing set for 4-21-10 at 9:00 a.m." That hearing did not go forward, however, because it appears that Harris had been released from prison March 24, 2010. The court then issued the nunc pro tunc entry at issue in this appeal in order to "correct the record as it reflects in the transcript," stating that "postrelease control for 5 years mandatory is part of this sentence for maximum period allowed for the above felony under R.C. 2967.28."

{¶ 3} The parties do not dispute the proposition that "in cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence." *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, at ¶6; see, also, *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958 (trial court lacks authority to resentence an

offender if the sentencing error was discovered "after the offender ha[s] been released from prison.")

{¶ 4} The state concedes that Harris was not in prison at the time the court issued the nunc pro tunc ruling, but argues that Harris was still imprisoned or not released from prison because he was on "transitional control" — a transfer occurring up to 180 days prior to the expiration of a prison term or release on parole, under closely monitored supervision and confinement in the community, such as a stay in a licensed halfway house or restriction to an approved residence on electronic monitoring. See R.C. 2967.26(A). In *State v. Bodiford*, 9th Dist. No. 10CA009770, 2010-Ohio-5923, the Ninth District Court of Appeals considered an identical argument concerning the validity of postrelease control imposed on a defendant released on transitional control. Concluding that placement in transitional control is not equivalent to being released from prison because transitional control entails continued confinement in a halfway house or by way of electronic monitoring in an approved residence, the court of appeals held that Bodiford had not been released from prison and that the court did not err by imposing postrelease control. Id. at ¶7-8.

{¶ 5} We agree with *Bodiford's* conclusion that an offender transitioned into supervised, transitional control has not been "released" from prison in a manner that would preclude the imposition of postrelease control. While on transitional control, Harris was presumably under some form of restraint or control by the prison authority, so he must be considered to have been under a form of continued confinement during that

period. He may not have been physically held in a prison facility at the time the court issued the nunc pro tunc sentencing entry, but his freedom of movement was sufficiently curtailed for punitive reasons that he could not have been deemed to have completed his sentence. We thus conclude that the court could impose a term of postrelease control on Harris in April 2010.

{¶ 6} The next issue is whether the court could validly impose postrelease control by way of a nunc pro tunc entry. In *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraph one of the syllabus states: "When sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about postrelease control and is further required to incorporate that notice into its journal entry imposing sentence." The supreme court later found that *Jordan* had been superseded in part by R.C. 2929.191, which established a statutory remedy for the correction of a sentence imposed after July 11, 2006 that improperly imposed postrelease control. However, the supreme court later limited the application of R.C. 2929.191 by holding: "For criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall conduct a de novo sentencing hearing in accordance with decisions of the Supreme Court of Ohio." *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph one of the syllabus.

{¶ 7} The courts have, however, distinguished cases in which the court either failed to mention postrelease control or somehow misstated the term during the

sentencing hearing, yet properly stated the term in the sentencing entry from those cases in which the court properly advised the defendant about postrelease control in the sentencing hearing but issued an incorrect sentencing entry. In the former circumstance, a remand for a de novo hearing is required because R.C. 2929.19(B)(3)(c) requires the court to "notify" the offender about postrelease control and the supreme court has held that this notification must come during the sentencing hearing. *Jordan*, 104 Ohio St.3d at paragraph two of the syllabus. In the latter circumstance, the issue is not whether the court properly notified the defendant about postrelease control during the sentencing hearing, but whether the court's sentencing entry accurately reflects what transpired during the sentencing hearing. Courts have always been allowed to correct void judgments or clerical mistakes in judgments that arose from oversight or omission. See Crim.R. 36; *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶19 (the term "clerical mistake" refers to a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment). Correction of a sentencing entry to reflect that the court did impose the correct term of postrelease control during the sentencing hearing is permissible. See *State v. Gause*, 182 Ohio App.3d 143, 2009-Ohio-2140, 911 N.E.2d 977 (holding that a trial court could issue a nunc pro tunc entry to add omitted postrelease control language to a sentencing entry when the record showed that the court had ordered postrelease control during sentencing); *State v. Sneed*, 8th Dist. No. 91414, 2008-Ohio-5247, ¶11-13.

{¶ 8} The parties make convincing arguments both for and against the use of a nunc pro tunc order as a means of correcting the sentencing entry that, as in this case, omits to state that which the court admittedly advised during the sentencing hearing. However, we need not determine whether the court validly used a nunc pro tunc order — the nunc pro tunc order was, in any event, insufficient to fulfill the court's obligations under R.C. 2929.19(B)(3)(e) because it did not inform Harris that a violation of postrelease control could result in a maximum prison term of up to one-half of the prison term originally imposed.

{¶ 9} The sentencing entry stated only that "postrelease control for 5 years mandatory is part of this prison sentence for the maximum period allowed for the above felony under R.C. 2967.28." While this entry was intended to correct the original sentencing entry to reflect that the court imposed a five-year mandatory term of postrelease control, it failed to state the consequences should Harris violate the terms of postrelease control. See *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶77; *State v. James*, Cuyahoga App. No. 94400, 2010-Ohio-5361, ¶25. It follows that even if the court was permitted to amend the original entry nunc pro tunc, the nunc pro tunc entry is nonetheless flawed, so the original sentencing entry is itself void.

{¶ 10} Unlike the court's error in failing to incorporate the correct term of postrelease control, we do not find that the court's failure to advise Harris of the consequences of violating postrelease control is an error that can be corrected nunc pro tunc. When amending the sentencing entry nunc pro tunc, the court specifically stated

that it had correctly advised Harris of the length of postrelease control. With no transcript of the sentencing in the record on appeal, there is nothing in the record to contradict the court's statement, so, if we determined that use of a nunc pro tunc entry would be valid in this instance, we would apply a presumption of regularity to hold that the court could amend the sentencing entry nunc pro tunc to reflect that which transpired at the sentencing hearing. The court's nunc pro tunc entry did not, however, make any claim to have advised Harris during the sentencing hearing of the consequences of violating postrelease control. The court had an affirmative obligation to inform Harris about the consequence of violating postrelease control, so we cannot presume that it did so from the silent record. Indeed, the court's failure to note the consequences of violating postrelease control in the nunc pro tunc entry strongly suggests that it did not so advise Harris during the sentencing hearing. We thus find that this is not a case in which we could order a remand for the sole purpose of having the court correct a clerical omission of that which had been stated at the sentencing hearing.

{¶ 11} The court imposed sentence on October 18, 2004, so the remedy for the failure to advise of the consequences of violating postrelease control would be a remand to the court for a de novo sentencing hearing. See *Singleton*, paragraph two of the syllabus.

{¶ 12} We are aware that in *State v. Fischer*, ___ Ohio St.3d ___, 2010-Ohio-6238, ___ N.E.2d ___, the supreme court suggested that the courts of appeals could, under authority of R.C. 2953.08(G)(2)(b), modify a sentencing defect without remanding for

resentencing. Id. at ¶29. The syllabus of a supreme court opinion states the controlling point of law, see S.Ct.R.Rep.Op. 1(B), and there is nothing in *Fischer* that purports to overrule *Singleton* (a case released just one year before *Fischer*), either explicitly or implicitly. Perhaps the R.C. 2953.08(G)(2) modification suggested by *Fischer* was meant to be limited to cases in which the court failed to impose a statutorily-mandated term of postrelease control. See, e.g., *State v. Christinger*, 8th Dist. No. 94632, 2011-Ohio-458 (applying R.C. 2953.08(G)(2) to modify a term of postrelease control from five years of mandatory postrelease control to three years of mandatory postrelease control on each of the second degree felonies); *State v. Williams*, 8th Dist. Nos. 94321, 94322, and 94323, 2011-Ohio-316 (applying R.C. 2953.08(G)(2) to correct discretionary term of postrelease control that had been incorrectly stated as mandatory and to correct improperly stated length of mandatory postrelease control). The use of R.C. 2953.08(G)(2) to correct obvious errors of law in the application of statutorily-based terms of postrelease control may well prove to be an effective means of dealing with certain postrelease control issues. In this case, however, the court did not misstate the nature or the length of postrelease control, but failed to advise Harris of the consequences of violating postrelease control. This is an obligation that falls on the court at sentencing and not something that can be incorporated by modification under R.C. 2953.08(G)(2). We thus find that a de novo remand under *Singleton* is the proper course in this case.

{¶ 13} Finally, appellate counsel for Harris advised us during oral argument that Harris has now been released from transitional control, is no longer under custody, and

that postrelease control cannot be imposed. Counsel did not offer any proof of those assertions. We are limited to the record on appeal, see App.R. 9(A), and the record presently before us does not show that Harris has been released from custody. Although it may seem obvious to some that Harris's sentence has expired and he has been released from custody, at this stage, that conclusion can only be reached by conjecture, not proof in the record. We therefore have no recourse but to remand this case to the trial court, trusting that if Harris is no longer in custody, he will take the necessary steps to prove that fact prior to resentencing.

{¶ 14} This cause is reversed and remanded for proceedings consistent with this opinion.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS

SEAN C. GALLAGHER, J., DISSENTS WITH
SEPARATE OPINION

SEAN C. GALLAGHER, J., DISSENTING:

{¶ 15} I respectfully dissent from the majority opinion.

{¶ 16} This case is the "poster child" for all that is wrong with the tattered remnants of Senate Bill 2 and its costly history. The time and resources spent on endless appeals and rehearings, the need to adopt the legislative "fix" of R.C. 2929.191, the need for video resentencing, the costs of never-ending legal representation, as well as the incalculable expense of prisoner transport and housing, speak to an inglorious legacy.

{¶ 17} Here the majority is forced to go through a tortured analysis going back over seven years covering legal territory including, but not limited to, a review of the original sentencing hearing and journal, an order to resentence in 2010, the viability of a nunc pro tunc entry to correct a prior "postrelease control" issue, the question of whether an inmate's status in "transitional control" amounts to imprisonment, the application of R.C. 2929.191, the distinction between what is said at a hearing versus what is written in a journal entry, the effect of an entry that is "void," and an examination of the effect of a missing transcript on the presumption of regularity — all to see this appeal end with an order to remand.

{¶ 18} I believe it is finally time for the litigation to come to an end in this matter. While I recognize the majority's concern regarding the uncertain release date, in my view, it is apparent from the record that Harris, who received a six-year sentence in October 2004, is no longer in prison or on transitional control. Further, as the majority notes, the

same was represented by counsel at oral argument. Therefore, I would find Harris is no longer subject to any postrelease control.