

[Cite as *State v. Tucker*, 2011-Ohio-1368.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95289

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SAMUEL TUCKER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-420683

BEFORE: Cooney, J., Sweeney, P.J., and Rocco, J.

RELEASED AND JOURNALIZED: March 24, 2011

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Samuel Tucker (“Tucker”), appeals the trial court’s denial of his motion for resentencing. We find no merit to the appeal and affirm.

{¶ 2} Tucker pled guilty to attempted murder and kidnapping in June 2002. On July 1, 2002, the court sentenced him to ten years in prison for attempted murder and five years for kidnapping, to be served consecutively.

Tucker subsequently filed a motion for leave to file a delayed appeal and an application to reopen his appeal, which were denied.

{¶ 3} In January 2005, Tucker filed a motion to vacate his sentence on the ground that it was “contrary to law” because it violated the principles pronounced in *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403; *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435; and *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. The trial court denied the motion, and Tucker appealed. This court affirmed the denial of what this court noted was, in essence, a motion for postconviction relief. *State v. Tucker*, Cuyahoga App. No. 88568, 2007-Ohio-2123.

{¶ 4} In May 2010, Tucker filed a motion to correct his void sentence to impose postrelease control, arguing his sentence is void because the court failed to notify him that he would be subject to a mandatory five-year term of postrelease control. The trial court found that the sentencing occurred on the record in open court and properly imposed a mandatory term of five years’ postrelease control. The trial court issued a nunc pro tunc order relating back to July 2, 2002 to reflect the sentence pronounced in open court. Tucker now appeals from this order, raising two assignments of error.

{¶ 5} Both of Tucker's assigned errors challenge the trial court's imposition of postrelease control at the initial sentencing hearing held on July 1, 2002. The Ohio Supreme Court has held that principles of res judicata, including the doctrine of the law of the case, do not preclude appellate review of the imposition of postrelease control and that the sentence may be reviewed at any time, on direct appeal or by collateral attack. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332. Hence, the issue of Tucker's postrelease control is properly before this court.

Mandatory Postrelease Control

{¶ 6} In his first assignment of error, Tucker argues his sentence is void because the trial court failed to notify him that he would be subject to five years mandatory postrelease control upon his release from prison. Tucker also argues the trial court erred when it entered a nunc pro tunc sentencing entry to provide the mandatory term of postrelease control because it journalized facts not contained in the record. We disagree.

{¶ 7} Tucker was convicted of one count of attempted murder in violation of R.C. 2923.02 and one count of kidnapping in violation of R.C. 2905.01, both of which are first degree felonies subject to mandatory five years' postrelease control under R.C. 2929.14(F)(1) and 2967.28(B). The version of R.C. 2967.28(B) that existed at the time of sentencing required a

sentencing court imposing a prison term on a first degree felony offender to notify him that the parole board would impose a period of mandatory postrelease control upon his release from prison. R.C. 2967.28(B) as amended by S.B. 107, eff. 3-23-00. R.C. 2929.19(B)(3) further mandated that the court notify the offender at the sentencing hearing that he would be supervised pursuant to R.C. 2967.28 and that if he violated the terms of postrelease control, the parole board could impose a prison term of up to one-half of the prison term originally imposed on the offender. R.C. 2929.19(B)(3)(c) and (e). *State v. Shepard*, Cuyahoga App. No. 82158, 2003-Ohio-4938, ¶16-24.

{¶ 8} At the sentencing hearing, the trial court advised Tucker:

“[A]fter you’re done serving fifteen years, you will be placed on a postrelease control period of at least five years. If you violate any of the terms of your postrelease control, the parole board can return you to prison to serve an additional prison sentence, up to seven-and-a-half more years.”

{¶ 9} Although the trial court did not use the word “mandatory” in describing the term of postrelease control, the trial court’s language was sufficient to apprise Tucker of its mandatory nature. R.C. 2967.28(B) did not use the word “mandatory,” but stated that the sentence “*shall include a requirement* that the offender be subject to a period of post-release control.” (Emphasis added.) The trial court indicated that postrelease control “*will*”

be imposed. It did not say that it “*might*” be imposed. The word “will” leaves no room for discretion or any other possibility.

{¶ 10} Although the court stated that the term of postrelease control would last “at least five years,” as opposed to simply “five years,” this language is also sufficient to put Tucker on notice that postrelease control will not be less than five years, which reinforces its mandatory nature.

{¶ 11} Finally, the court explained that if Tucker were to violate any of the terms of postrelease control, the parole board had the power to return him to prison to serve an additional sentence of “up to seven-and-a-half more years.” Seven-and-a-half years is exactly half of fifteen years, which represents Tucker’s aggregate prison sentence. Thus, the trial court complied with the R.C. 2929.19(B)(3)(e) mandate to notify the offender that violation of any term of postrelease control could result in an additional prison sentence up to one-half the original prison sentence.

{¶ 12} Tucker argues the trial court improperly entered a nunc pro tunc entry to journalize his sentence. However, because the trial court properly notified Tucker of the terms of postrelease control at his 2002 sentencing hearing, the error was merely clerical in nature and the trial court was authorized to correct the mistake by nunc pro tunc entry. *State ex rel.*

Womack v. Marsh, ___ Ohio St.3d ___, 2011-Ohio-229, ___ N.E.2d ___, ¶14-15; Crim.R. 36.

{¶ 13} Accordingly, the first assignment of error is overruled.

{¶ 14} In his second assignment of error, Tucker makes two separate unrelated arguments. First, he argues that the trial court failed to impose postrelease control for each offense. Second, he argues the original sentencing journal entry was not a final, appealable order. Because these are separate and distinct issues, we address them separately.

Single Term of Postrelease Control

{¶ 15} Tucker contends the trial court should have imposed separate terms of postrelease control for each of his convictions. At the time of Tucker's sentencing, R.C. 2967.28(F)(5)(c) provided as follows:

“[i]f an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last. * * * Periods of post-release control shall be served concurrently and shall not be imposed consecutively to each other.”¹

{¶ 16} Thus, when a trial court imposes sentences for multiple convictions, the trial court's imposition of one term of postrelease control is proper. *Durain v. Sheldon*, 122 Ohio St.3d 582, 2009-Ohio-4082, 913 N.E.2d 442, at ¶1.

¹ This provision is currently set forth in R.C. 2967.28(F)(4)(c).

Final, Appealable Order

{¶ 17} Tucker argues the original sentencing journal entry was not a final, appealable order because it did not impose the mandatory term of five years postrelease control. Therefore, he argues, his case should be remanded to the trial court.

{¶ 18} In *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d 78, the Ohio Supreme Court considered the language necessary to provide notice of postrelease control in sentencing entries for purposes of appeal. The *Watkins* court held that sentencing entries were sufficient if they “afford notice to a reasonable person that the courts were authorizing postrelease control as part of each * * * sentence.” Id. at ¶51.

{¶ 19} The original sentencing journal entry stated, in part, that “[P]ostrelease control is part of this prison sentence for the maximum period allowed for the above felony(s) under R.C. 2967.28.” Thus, the sentencing entry not only included language that postrelease control was part of his sentence, but it also indicated that Tucker was subject to the maximum period of postrelease control required by law. We find this entry afforded Tucker sufficient notice to raise any claimed errors with regard to postrelease control on direct appeal in 2002. Since Tucker has not raised any other

issues with regard to the sentencing entry, we find it is a final, appealable order.

{¶ 20} Accordingly, the second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant 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. Case remanded to the trial court for execution of sentence.

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

COLLEEN CONWAY COONEY, JUDGE

JAMES J. SWEENEY, P.J., and
KENNETH A. ROCCO, J., CONCUR