

[Cite as *State v. Brown*, 2011-Ohio-345.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95086

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LEWIS BROWN

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-430692

BEFORE: Kilbane, A.J., Boyle, J., and Rocco, J.

RELEASED AND JOURNALIZED: January 27, 2011

APPELLANT

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MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, Lewis Brown, appeals pro se from the order of the trial court that denied his motion for resentencing. For the reasons set forth below, we affirm.

{¶ 2} On December 16, 2002, defendant and codefendant, David Hines, were indicted on four counts in connection with the shooting death of store owner Mahir Sammor. Defendant was charged with one count of aggravated murder, in violation of R.C. 2903.01(A) (prior calculation and design), one count of aggravated murder, in violation of R.C. 2903.01(B) (felony murder), one count of

aggravated robbery, in violation of R.C. 2911.01, all with three-year firearm specifications, and one count of carrying a concealed weapon, in violation of R.C. 2923.12.

{¶ 3} Defendant pled not guilty, and the matter proceeded to a jury trial on November 7, 2003. Defendant was convicted of all charges. The jury recommended that defendant be sentenced to life without parole on each of the aggravated murder counts. The jury additionally determined that defendant was the principal offender and acted with prior calculation and design. Thereafter, on December 10, 2003, the trial court imposed the following sentence:

“The court imposes a prison term at Lorain Correctional Institution of 3 years on the firearm specifications to run prior to and consecutive to time on the base charges on each of Counts 1 and 2 of life without parole; 3 years on the firearm specification to run prior to and consecutive to 3 years on base charge on Count 3; 6 months on Count 4. All days to run concurrent with each other; 3 year firearm specifications to merge for sentencing. * * * Postrelease control is part of this prison sentence for the maximum period allowed for the above felony(s) under R.C. 2967.28.”

{¶ 4} Defendant’s conviction was affirmed on direct appeal. See *State v. Brown*, Cuyahoga App. No. 84059, 2004-Ohio-6862.

{¶ 5} On September 23, 2004, while his direct appeal was pending, defendant filed a petition for postconviction relief in which he asserted that he had been denied effective assistance of counsel, and that the prosecuting attorney engaged in misconduct in connection with alleged exculpatory evidence that was not produced at trial. This petition was denied on February 15, 2005.

{¶ 6} Thereafter, on March 15, 2010, defendant filed a pro se motion to vacate his sentence. Defendant maintained that his sentence was void because the trial court failed to properly advise him of the maximum penalty he faced. Specifically, defendant asserted that the trial court erred by failing to notify him that he was subject to mandatory postrelease control during the sentencing hearing. He further asserted that the trial court erred by sentencing him to postrelease control for the “maximum period allowed,” and by failing to impose a definite, five-year term of postrelease control in connection with the aggravated robbery conviction and a definite, three-year term of postrelease control for carrying a concealed weapon. In opposition, the State asserted that defendant was not subject to postrelease control for the aggravated murder convictions since this offense is an unclassified felony. The State additionally argued that, although defendant was subject to postrelease control on the aggravated robbery charge, his prison term for this offense expired, thus rendering moot any error arising from failure to properly impose postrelease control in this matter.

{¶ 7} If a defendant is subject to postrelease control, the trial court must notify him of postrelease control at the sentencing hearing, and must include the postrelease control terms in the sentence, or the sentence is void. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, at the syllabus; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864.

{¶ 8} Aggravated murder is an unclassified felony to which the postrelease control statute does not apply. R.C. 2967.28; *State v. Clark*, 119 Ohio St.3d 239,

2008-Ohio-3748, 893 N.E.2d 462. Aggravated robbery, a first degree felony, is subject to a mandatory five-year term of postrelease control under R.C. 2929.14(F)(1) and R.C. 2967.28(B); and carrying a concealed weapon, a felony of the fourth degree, is subject to “a period of post-release control of up to three years * * * if the parole board * * * determines that a period of post-release control is necessary for that offender.” R.C. 2967.28(C). Where a defendant has been convicted of both an offense that carries mandatory postrelease control and an unclassified felony to which postrelease control is inapplicable, the trial court’s duty to notify of postrelease control is not negated. *State v. Taylor*, Montgomery App. No. 20944, 2006-Ohio-843; *State v. Seals*, Clark App. No. 2009 CA 4, 2010-Ohio-2843.

{¶ 9} With regard to defendant’s challenge to the trial court’s advisement of postrelease control during his sentencing hearing, we note that we have not been provided with a transcript of the sentencing hearing, so we must presume that the proceedings before the trial court were proper. *State v. Estrada* (1998), 126 Ohio App.3d 553, 556, 710 N.E.2d 1168.

{¶ 10} As to defendant’s additional claim that in the sentencing journal entry the trial court improperly sentenced him to postrelease control for the “maximum period allowed,” and failed to set forth the mandatory five-year term for aggravated robbery, and the discretionary three-year term for carrying a concealed weapon, we note that in *State v. Bailey*, Cuyahoga App. No. 93994, 2010-Ohio-1874, this court considered a journal entry of sentence that stated

“post release control is a part of this prison sentence for the maximum period allowed for the above felony(s) under R.C. 2967.28.” This court determined that this language was sufficient, where the oral notifications were proper; but, see, *State v. Hagens*, Mahoning App. Nos. 09-MA-2 and 09-MA-3, 2009-Ohio-6526 (trial court’s language in journal entry that “post release control may be imposed up to a maximum period of three (3) years” held insufficient to advise defendant of the mandatory nature or period of the postrelease control).

{¶ 11} In any event, it is well settled that once the sentence for the offense that carries postrelease control has been served, the court can no longer correct sentencing errors and impose postrelease control at resentencing. *Bezak*. The *Bezak* Court explained:

“However, in this case, Bezak has already served the prison term ordered by the trial court, and therefore he cannot be subject to resentencing in order to correct the trial court’s failure to impose postrelease control at Bezak’s original sentencing hearing. In order that its record may be complete, the trial court is instructed to note on the record of Bezak’s sentence that because he has completed his sentence, Bezak will not be subject to resentencing pursuant to our decision.”
***Bezak* at ¶18.**

{¶ 12} Similarly, in *State v. Cobb*, Cuyahoga App. No. 93404, 2010-Ohio-5118, this court noted that it is the expiration of the sentence for which postrelease control is applicable that determines whether a court may correct a sentencing error and impose postrelease control at resentencing. The *Cobb* court stated:

“[I]t was the expiration of the individual terms, not the overall sentence that precludes trial courts from correcting errors in postrelease control at resentencing, holding ‘it is the expiration of the prisoner’s journalized sentence, rather than the offender’s ultimate release from prison that is determinative of the trial court’s authority to resentence.’ * * * [quoting *State v. Dresser*, Cuyahoga App. No. 92105, 2009-Ohio-2888, reversed on other grounds in *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110],¹ citing *State v. Bristow*, Lucas App. No. L-06-1230, 2007-Ohio-1864; *State v. Turner*, Franklin App. No. 06AP-491, 2007-Ohio-2187; *State v. Ferrell*, Hamilton App. No. C-070799, 2008-Ohio-5280.”

{¶ 13} Accord *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301. (The defendant was not notified at his sentencing that he would be subject to postrelease control, and the court did not incorporate a period of postrelease control in its journal entry. The journalized prison term had already been served, and there would be no remand for resentencing). Cf. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263 (where trial court erroneously sentenced defendant to five years of mandatory

¹ *Carnail* is distinguishable from this matter as it involved first degree felony rape convictions, and not unclassified felonies such as murder or aggravated murder. In *Carnail*, defendant pled guilty to two counts of rape in violation of R.C. 2907.02, a felony of the first degree. The court then sentenced him to concurrent life terms in prison, with parole eligibility after ten years. Thus the offense was a first degree felony and subject to mandatory postrelease control, but carried an indefinite sentence with a life parole tail. The *Carnail* court held that postrelease control was mandatory because R.C. 2967.28(B)(1) requires a period of five years of postrelease control for a felony of the first degree or a felony sex offense, even if it carries an indefinite sentence. Accord *State v. Hernandez*, Williams App. No. WM-08-015, 2009-Ohio-3915, ¶42-43 (same).

postrelease control, rather than three years as required in R.C. 2967.28(B), but the defendant had not yet completed his sentence, the trial court could correct the invalid sentence to include the appropriate, mandatory postrelease control term).

{¶ 14} In this matter, defendant correctly notes that the sentencing entry does not specifically include a mandatory five-year term of postrelease control for the aggravated robbery conviction, and does not include a discretionary three-year term of postrelease control for carrying a concealed weapon, contrary to the requirements of R.C. 2867.28. Nonetheless, the trial court's December 10, 2003, sentencing entry indicates that defendant was to serve a three-year term for the firearm specifications and three years for the base term of aggravated robbery on Count 3, and that the prison term for the aggravated robbery conviction would run concurrently with the terms imposed for the aggravated murder convictions. Thus, as it is now seven years since the entry of this order, it is clear that the prison term for the convictions for aggravated robbery and carrying a concealed weapon have both expired, and defendant is presently serving the life term for the aggravated murder charges.²

² Further, we note that pursuant to R.C. 2967.28(F)(4): "Any period of post-release control shall commence upon an offender's actual release from prison. If an offender is serving an indefinite prison term or a life sentence in addition to a stated prison term, the offender shall serve the period of post-release control in the following manner: (a) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under a life sentence or an indefinite sentence, and if the period of post-release control ends prior to the period of parole, the offender shall be supervised on parole. The offender shall receive credit for post-release control supervision during the period of parole. The offender is not

{¶ 15} Accordingly, pursuant to *Bezak* and *Cobb*, defendant cannot be subject to resentencing in order to correct the trial court's failure to impose postrelease control at the original sentencing hearing. Nonetheless, in order that its record may be complete, the trial court is instructed to note on the record of defendant's sentence that because he has completed the prison term for the aggravated robbery charge, he will not be subject to resentencing pursuant to our decision. R.C. 2929.191(A)(1) allows an offender to be returned to court for resentencing to include proper postrelease control notification "at any time before the offender is released from imprisonment under that term * * *."

Judgment affirmed.

It is ordered that appellee recover from 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

eligible for final release under section 2967.16 of the Revised Code until the post-release control period otherwise would have ended."

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

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., and
KENNETH A. ROCCO, J., CONCUR