

[Cite as *State v. Pollard*, 2011-Ohio-725.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 94969

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**ANTHONY B. POLLARD**

DEFENDANT-APPELLANT

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**JUDGMENT:  
VACATED AND REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-494739

**BEFORE:** Kilbane, A.J., Sweeney, J., and Keough, J.

**RELEASED AND JOURNALIZED:** February 17, 2011

## **ATTORNEY FOR APPELLANT**

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## **ATTORNEYS FOR APPELLEE**

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MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, Anthony Pollard (“Pollard”), pro se, appeals the trial court’s denial of his motion for resentencing, arguing that the trial court’s imposition of postrelease control was improper. The State concedes this error, and for the reasons set forth below, we vacate his sentence and remand to the trial court for the limited purpose of the imposition of postrelease control under R.C. 2929.191.

{¶ 2} In April 2007, Pollard was charged with two counts of carrying a concealed weapon and one count of having a weapon while under disability. In March 2008, Pollard pled guilty to the charges and was sentenced to an aggregate of three years in

prison. With regard to postrelease control, the trial court stated in its journal entry that “[postrelease] control is part of this prison sentence for 3 years for [carrying a concealed weapon and having a weapon while under disability] under R.C. 2967.28. 3 years [postrelease] control on each count.”<sup>1</sup>

{¶ 3} On March 8, 2010, Pollard filed a motion for resentencing, arguing that the trial court did not have authority to impose three years of postrelease control on each count. He claims that the parole board has the authority to determine if he is placed on postrelease control. The trial court denied the motion, and this appeal follows.

{¶ 4} Pollard raises the following three assignment of errors for review.

#### ASSIGNMENT OF ERROR ONE

**“The trial court erred when its final order usurped the authority of the adult Parole Authority, and sentenced [Pollard] to an additional three years of post release control when the Adult Parole Authority should have been the entity to determine whether [Pollard] would serve on post release control.”**

#### ASSIGNMENT OF ERROR TWO

**“The trial court erred when it failed to uphold its obligation to order a re-sentence hearing in compliance with R.C. 2929.191(C) to correct the sentence as prescribed by the Ohio Supreme Court.”**

#### ASSIGNMENT OF ERROR THREE

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<sup>1</sup>R.C. 2967.28(C) provides that “[a]ny sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender’s release from imprisonment, if the parole board \* \* \* determines that a period of post-release control is necessary for that offender.”

**“The trial court erred when it failed to incorporate post release control correctly through its journal entry and docket information.”**

{¶ 5} We note that the Ohio Supreme Court has set forth the applicable standard of appellate review of a felony sentence in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶4:

**“In applying [*State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470,] to the existing statutes, appellate courts must apply a two-step approach. First, they must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. *If this first prong is satisfied, the trial court’s decision shall be reviewed under an abuse-of-discretion standard.*”<sup>2</sup> (Emphasis added.)**

{¶ 6} Pollard relies on *State v. Hunter*, Cuyahoga App. No. 92032, 2009-Ohio-4194, and argues that the trial court usurped the authority of the Adult Parole Authority (“APA”) when it sentenced him to three years of postrelease control on each count. As a result, he contends that “at the very least” he should be resentenced in accordance with the procedures outlined in R.C. 2929.191(C).

{¶ 7} The State concedes, and requests that the order of postrelease control be vacated. Also relying on *Hunter*, the State requests that the determination of postrelease control be left to the APA’s discretion and requests that if a resentencing hearing is necessary, Pollard would only be eligible for a hearing under R.C. 2929.191.

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<sup>2</sup>We recognize *Kalish* is merely persuasive and not necessarily controlling because it has no majority. The Supreme Court split over whether we review sentences under an abuse-of-discretion standard in some instances.

{¶ 8} In *Hunter*, the defendant pled no contest to receiving stolen property and forgery “and was sentenced to twelve months concurrent on each charge with an additional three-year period of postrelease control. The court [also] found that [defendant] was in violation of postrelease control in an earlier case. The court terminated that postrelease control and ordered [defendant] to serve the remaining time, which was to run consecutive to the current sentence of twelve months.” Id. at ¶6.

{¶ 9} On appeal, the defendant challenged his sentence, arguing that it was unlawful because “the trial court usurped the authority of the [APA], which should have been the entity to determine whether [defendant] would be subject to postrelease control for the instant case pursuant to R.C. 2967.28.” Id. at ¶29. This court agreed with the defendant, finding that “[t]he trial court should not have imposed a term of postrelease control and should have left that determination to the APA.” We vacated the court’s order imposing three years of postrelease control, and left that determination to the discretion of the APA. Id.

{¶ 10} Similarly, in the instant case, the trial court imposed three years of postrelease on each count, rather than leaving that determination to the APA. Under R.C. 2967.28(C), the APA has discretion to impose up to three years of postrelease control for felonies of the third, fourth, or fifth degree that are not felony sex offenses.

{¶ 11} Because the trial court erred when it advised Pollard about postrelease control, we vacate the court’s order imposing three years of postrelease control for each count and remand the case for the trial court to employ the “sentence-correction

mechanism” of R.C. 2929.191. See *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph two of the syllabus (where the Ohio Supreme Court held that “[f]or criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191.”)

{¶ 12} Accordingly, Pollard’s sentence is vacated and the case is remanded for the trial court to conduct a limited hearing under R.C. 2929.191.

It is ordered that appellant recover from appellee 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.

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

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MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

JAMES J. SWEENEY, J., and  
KATHLEEN ANN KEOUGH, J., CONCUR