[Cite as *State v. Kelley*, 2011-Ohio-88.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 94487 and 94488

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDRES KELLEY

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED
FOR RESENTENCING

Criminal Appeals from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-526189 and CR-524611

BEFORE: Stewart, P.J., Boyle, J., and Gallagher, J.

RELEASED AND JOURNALIZED: January 13, 2011

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MELODY J. STEWART, P.J.:

{¶ 1} In this consolidated appeal, defendant-appellant, Andres Kelley, appeals the sentences in his two criminal cases claiming that the sentences are void due to the trial court's failure to properly impose postrelease control. For the reasons set forth below, we remand the cases to the trial court for the limited purpose of properly imposing postrelease control according to the provisions of R.C. 2929.191.

{¶ 2} In Case No. CR-524611, appellant was indicted for drug trafficking and possession of criminal tools with forfeiture specifications, both felonies of the fifth degree. In Case No. CR-526189, appellant was indicted for attempted felonious assault, attempted abduction, and kidnapping. The indictment contained notice of prior conviction and repeat violent offender specifications.

{¶ 3} After trial had begun in Case No. CR-526189, appellant entered into a voluntary plea agreement with the state of Ohio covering both cases. In Case No. CR-526189, appellant agreed to plead guilty to attempted felonious assault with a notice of prior conviction, a felony of the third degree, and attempted abduction, a felony of the fourth degree. The state agreed to dismiss the kidnapping count and the repeat violent offender specification. In Case No. CR-524611, appellant agreed to plead guilty to the indictment as charged.

{¶ 4} On November 4, 2009, the trial court conducted a plea hearing on both cases and accepted appellant's guilty pleas. During the plea colloquy, the trial court correctly advised appellant that he would be subject to a three-year term of postrelease control and that if he violated the conditions of postrelease control he could be returned to prison for up to one-half of the original sentence.

{¶ 5} At the sentencing hearing on December 7, 2009, the trial court sentenced appellant to prison terms of one year for attempted abduction, two years for attempted felonious assault, and six months for each of the fifth degree felonies, with all sentences to be served concurrently. The court also imposed postrelease control on each of the counts and explained that if appellant violated the conditions of postrelease control he could be returned to prison for up to one-half of the original sentence. However, the court imposed the wrong period of postrelease control. The court stated: "You will have five years of postrelease control on each count on each case upon your release from prison." In the judgment entry of conviction for each case, journalized on December 9, 2009, the court changed the term of postrelease control, and stated, "postrelease control is part of this sentence for 3 years mandatory for the above felony(s) under R.C. 2967.28."

{¶ 6} Appellant timely appeals and raises a single error for review, claiming that the trial court improperly imposed postrelease control resulting in a void sentence. Appellant does not challenge the validity of his guilty pleas or of the prison terms imposed. He acknowledges that the sentencing entry in Case No. CR-526189 correctly states the applicable term of postrelease control and concedes that his rights are not affected by the trial court's error in stating postrelease control is mandatory in Case No. CR-524611 when it should say discretionary. However, he argues that under

Ohio law, where the trial court fails to properly impose postrelease control at sentencing, the remedy is to remand the case to the trial court for a sentencing hearing pursuant to R.C. 2929.191. We agree.

{¶ 7} At sentencing, the trial court erroneously imposed five years of postrelease control on each count in each case instead of the three years mandated by statute. Therefore, the terms of postrelease control imposed are contrary to law and must be corrected. See *State v. Grady*, 8th Dist. No. 93548, 2010-Ohio-4667.

{¶ 8} The General Assembly enacted R.C. 2929.191 in order to establish a procedure to remedy a sentence that fails to properly impose a term of postrelease control. The Supreme Court of Ohio recently held: "For criminal sentences imposed on or 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." *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph two of the syllabus. The *Singleton* court stated:

{¶ 9} "Effective July 11, 2006, R.C. 2929.191 establishes a procedure to remedy a sentence that fails to properly impose a term of postrelease control. It applies to offenders who have not yet been released from prison and who fall into at least one of three categories: [1] those who did not receive notice at the sentencing hearing that they would be subject to postrelease control,

[2] those who did not receive notice that the parole board could impose a prison term for a violation of postrelease control, or [3] those who did not have both of these statutorily mandated notices incorporated into their sentencing entries. R.C. 2929.191(A) and (B). For those offenders, R.C. 2929.191 provides that trial courts may, after conducting a hearing with notice to the offender, the prosecuting attorney, and the Department of Rehabilitation and Correction, correct an original judgment of conviction by placing on the journal of the court a nunc pro tunc entry that includes a statement that the offender will be supervised under R.C. 2967.28 after the offender leaves prison and that the parole board may impose a prison term of up to one-half of the stated prison term originally imposed if the offender violates postrelease control." Id. at ¶23.

{¶ 10} In this case, the trial court imposed an incorrect period of postrelease control for both cases at the sentencing hearing. Both the state and defense counsel failed to call the error to the court's attention at a time when it could have been corrected. The court also failed to include the proper language explaining the consequences of a violation of postrelease control in the written sentencing entry. When the trial court attempted to correct its error through the journal entries, it did not do so in accordance with the proper statutory provisions, and continued to incorrectly impose a mandatory term of postrelease control in Case. No. CR-524611.

{¶ 11} The state contends that this is harmless error, arguing that appellant is not prejudiced by the court's error at sentencing because the trial court corrected its error in the sentencing entry. We disagree. Appellant is entitled to a hearing where postrelease control can be properly imposed and to a correction of the trial court's sentencing entries notifying him of the correct term of postrelease control and that the parole board may impose a prison term of up to one-half of the stated prison term originally imposed if he violates postrelease control. See *Singleton*, 124 Ohio St.3d 173, paragraph two of the syllabus.

{¶ 12} Accordingly, we reverse the sentences in both cases and remand to the trial court for the limited purpose of the proper imposition of postrelease control pursuant to R.C. 2929.191.

{¶ 13} This cause is reversed and remanded for resentencing 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

MARY J. BOYLE, J., and
SEAN C. GALLAGHER, J., CONCUR