

[Cite as *State v. Cooper*, 2015-Ohio-4505.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103066

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARIO COOPER

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED; REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-07-504102-A

BEFORE: Kilbane, P.J., Boyle, J., and Blackmon, J.

RELEASED AND JOURNALIZED: October 29, 2015

APPELLANT

Mario Cooper, pro se
4142 East 138th Street
Cleveland, Ohio 44105

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
Brett Hammond
Assistant County Prosecutor
The Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, P.J.:

{¶1} In this pro se appeal, defendant-appellant, Mario Cooper (“Cooper”), appeals from the trial court’s denial of his motion to terminate postrelease control sanctions imposed for his drug possession conviction in Cuyahoga C.P. No. CR-07-504102-A. Cooper argues that the trial court’s sentencing entry failed to set forth the consequences of violating the terms of postrelease control. Since Cooper has subsequently completed the underlying terms of imprisonment and has been released from prison, the entry may not be corrected and postrelease control sanctions must be terminated. Having reviewed the record and the controlling case law, we reverse the trial court’s denial of Cooper’s motion to terminate postrelease control sanctions and remand the matter with instructions to vacate the imposition of postrelease control for the sentence that Cooper has already served.

{¶2} Cooper was charged on November 2, 2007, with first-degree felony drug trafficking, in violation of R.C. 2925.03(A)(1) (less than one hundred grams of crack cocaine); drug possession, in violation R.C. 2925.11(A); and possession of criminal tools, in violation of R.C. 2923.24(A), all with forfeiture specifications.

{¶3} This matter proceeded to a jury trial on April 29, 2008. The trafficking offense was subsequently dismissed, and Cooper was acquitted of the charge of possession of criminal tools. He was convicted of the charge of drug possession and specifications. He was sentenced to six years of imprisonment, to run concurrently with the sentence imposed in Cuyahoga C.P. No. CR-08-500179.¹ The journal entry of the sentence further provided:

¹In Case No. CR-500179-A, Cooper was charged with fourth-degree felony drug trafficking, in violation of R.C. 2925.03(A)(2) (less than five grams of crack cocaine), and one count of drug possession, in violation R.C. 2925.11(A). On May 7, 2008, Cooper pled guilty drug possession as charged, the drug trafficking charge was dismissed, and he was sentenced to 12 months of imprisonment, to run concurrent to the sentence in Case No. CR-504102-A. The

Post release control is part of this prison sentence for 5 years for the above felony(s) under R.C. 2967.28.

Post release control is mandatory for 5 years.

{¶4} Cooper appealed his conviction in CR-504102-A, and it was affirmed. *State v. Cooper*, 8th Dist. Cuyahoga No. 91566, 2009-Ohio-2583.

{¶5} Cooper was released from prison on October 1, 2013. On February 4, 2015, Cooper filed a Motion to Correct Void Sentence/Terminate Postrelease Control. In relevant part, he asserted that the journal entry failed to properly set forth the consequences for violating the requirements of postrelease control sanctions, that he had completed his prison term, and had been released from prison. Therefore, he argued that the postrelease control provision in the sentence was no longer subject to correction, and that all postrelease control sanctions must be terminated. The trial court denied his motion.

{¶6} Cooper now appeals, assigning the following error for our review:

Assignment of Error

Appellant's rights were violated when the trial judge refused to terminate the void sentence and post release control supervision in violation of the Ohio Supreme Court mandates, due process and equal protection clauses of the Fourteenth Amendments of the U. S. Constitution and [case law].

{¶7} Within this assignment of error, Cooper argues that the trial court erred in refusing to terminate postrelease control sanctions because the sentencing journal entry erroneously failed

sentencing entry further provided: "Post release control is part of this prison sentence for 3 years for the above felony(s) under R.C. 2967.28." Cooper also filed a motion to terminate postrelease control sanctions in this matter, but there has been no final ruling in that case, and Cooper has not listed this case in his notice of appeal. Therefore, although both the appellant and appellee discuss this case in their briefs, we lack jurisdiction over Case No. CR-500179-A.

to set forth the consequences of violating postrelease control, rendering this aspect of the sentence void and beyond correction because he has been released from prison. The state acknowledges that Cooper was released from prison on October 1, 2013, but asks this court to presume regularity in the sentencing proceedings because Cooper has not provided a sentencing transcript in this appeal.

{¶8} As an initial matter, we note that “[a] sentence that does not include the statutorily mandated term of postrelease control is void, is not precluded from appellate review by principles of res judicata, and 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, paragraph one of the syllabus. Therefore, the prior appeal in this matter does not bar the instant claim.

{¶9} Turning to the requirements for postrelease control notifications, we note that imposition of postrelease control consists of (1) notification of postrelease control at the time of sentencing, and (2) incorporation of postrelease control in the sentencing entry. *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 18-19. Pursuant to R.C. 2929.19(B)(2)(c) and (e), the trial court is required to notify a defendant at the sentencing hearing that he or she is subject to postrelease control following release from prison and is also required to notify the defendant of the consequences for violations of postrelease control. In addition, these postrelease control notifications must be included in the judgment entry journalized by the court. *State v. Elliott*, 8th Dist. Cuyahoga No. 100404, 2014-Ohio-2062, ¶ 8-10; *State v. Scott*, 8th Dist. Cuyahoga No. 102301, 2015-Ohio-2161, ¶ 8 (to be sufficient, the notification of postrelease control in the sentencing entry must notify the defendant of the details of the postrelease control and the consequences of violating postrelease control). As the *Elliott* court explained:

[H]ad the Supreme Court intended to abandon the requirement that the court, in its sentencing entry, notify the defendant of the consequences of violating postrelease control, a nunc pro tunc entry would be pointless.

{¶10} The *Qualls* court additionally held that if proper notification is given during the sentencing hearing, but omitted from the sentencing journal entry, a nunc pro tunc order may be issued to correct the entry. *Id.* at syllabus. However, once the defendant has been released from prison, a nunc pro tunc order cannot be issued to correct the entry and postrelease control cannot be imposed. *Id.* at ¶ 24; *State v. Dines*, 8th Cuyahoga No. 100647, 2014-Ohio-3143, ¶ 12; *State v. Chung*, 8th Dist. Cuyahoga No. 102092, 2015-Ohio-1959, ¶ 6-7.

{¶11} In opposition, the state notes that the absence of a sentencing transcript requires us to presume the regularity of the *sentencing hearing*, relying on *State v. Hill*, 8th Dist. Cuyahoga No. 96923, 2012-Ohio-2306; and *State v. Peterson*, 8th Dist. Cuyahoga No. 96958, 2012-Ohio-87. Nonetheless, in this matter, it is clear from the record that the sentencing *journal entry* does not properly set forth the consequences for failing to comply with the postrelease control sanctions. *Accord State v. Brito*, 8th Dist. Cuyahoga No. 101793, 2015-Ohio-1457 (court presumed that the trial court advised defendant of the consequences for violating postrelease control at the hearing, but the matter had to be remanded for a nunc pro tunc correction of the sentencing journal entry). Further, since Cooper has been released from prison, the sentencing journal entry is no longer subject to correction. *See State v. Mace*, 8th Dist. Cuyahoga No. 100779, 2014-Ohio-3040 (panel decision), and 2014-Ohio-5036 (affirmed en banc) (noting that although there was no transcript on appeal, the erroneous postrelease control provision in the sentencing journal entry could not be corrected where the defendant had completed his prison term).

{¶12} Therefore, in the instant matter, the absence of a transcript only affords the presumption of regularity with respect to the notifications given at the sentencing hearing. The sentencing journal entry, however, fails to contain notification of the consequences of violating postrelease control. Moreover, since Cooper has completed his prison term, the matter is no longer subject to correction by nunc pro tunc order; therefore, the postrelease control sanctions are now void and must be vacated. *Accord Mace; Dines; State v. Negron*, 8th Dist. Cuyahoga No. 100966, 2014-Ohio-5427. Accordingly, we conclude that the trial court erred in failing to grant Cooper's motion to terminate postrelease control sanctions.

{¶13} The state also argues that the Second, Sixth, and Tenth District Courts of Appeals have held that the consequences for violating postrelease control need not be set forth in the sentencing journal entry, citing to *State v. Clark*, 2d Dist. Clark No. 2012 CA 16, 2013-Ohio-299; *State v. Murray*, 6th Dist. Lucas No. L-10-1059, 2012-Ohio-4996, 979 N.E.2d 83; and *State v. Darks*, 10th Dist. Franklin No. 12AP-578, 2013-Ohio-176. This court has previously declined to follow this line of precedent, however. *See State v. Bryant*, 8th Dist. Cuyahoga No. 102650, 2015-Ohio-3678; *State v. Martin*, 8th Dist. Cuyahoga No. 102336, 2015-Ohio-2865; *Scott*, 8th Dist. Cuyahoga No. 102301, 2015-Ohio-2161.

{¶14} The sole assignment of error is sustained.

{¶15} Judgment is reversed, and the matter is remanded to the trial court with instructions to vacate the imposition of postrelease control sanctions in Case No. CR-504102-A.

{¶16} It is ordered that appellant recover of 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

MARY J. BOYLE, J., and
PATRICIA ANN BLACKMON, J., CONCUR