

[Cite as *State v. Bybee*, 2015-Ohio-878.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101696

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DWAYNE BYBEE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-583254-A

BEFORE: E.A. Gallagher, J., Jones, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: March 12, 2015

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EILEEN A. GALLAGHER, J.:

{¶1} Defendant-appellant Dwayne Bybee appeals the trial court’s imposition of an additional term of incarceration equal to the greater of the amount of time he had left on postrelease control in Case Nos. CR-10-539923-A, CR-10-543974, and CR-11-547880 (the “2010-2011 cases”) or one year based on his commission of a new felony while on postrelease control in the 2010-2011 cases. Bybee argues that the trial court failed to properly notify him of postrelease control and the consequences of violating its terms in the sentencing entries in the 2010-2011 cases — i.e., specifically that if he were to commit a new felony while on postrelease control, postrelease control could be terminated and a prison sentence imposed of the greater of the remaining period of postrelease control or one year — and that the postrelease control sanctions imposed as part of his sentences in the 2010-2011 cases and the sentence he subsequently received for violation of that postrelease control were, therefore, void. For the reasons that follow, we affirm Bybee’s sentence.

Procedural and Factual Background

The 2010-2011 Cases

{¶2} In 2011, Bybee was convicted of felonies in three separate cases. In Case No. CR-10-543974, Bybee pled guilty to trafficking, a third-degree felony with forfeiture and juvenile specifications. He was sentenced to two years in prison, and postrelease control for up to three years. In Case No. CR-10-539923, Bybee pled guilty to attempted felonious assault, a third-degree felony, and was sentenced to one year in prison, to run concurrently to the sentence in CR-10-543974. Mandatory postrelease control of three years was also imposed. In Case No. CR-11-547880, Bybee pled guilty to a charge of attempted failure to comply with an order or signal of a police officer, a fourth-degree felony, and resisting arrest, a second-degree misdemeanor. He was sentenced to a year in prison on the first count, and 90 days on the

second count, to run concurrently to each other and consecutively to the sentences in Case Nos. CR-10-539923 and CR-10-543974. Postrelease control of up to three years was also imposed as part of the sentence.

{¶3} In its sentencing entries in Case Nos. CR-10-543974 and CR-11-547880, the trial court provided the following notification with respect to postrelease control:

Post release control is part of this prison sentence for up to three years for the above felony(s) under R.C. 2967.28. Defendant advised that if post release control supervision is imposed following his/her release from prison and if he/she violates that supervision or condition of post release control under R.C. 2967.131(B), parole board may impose a prison term as part of the sentence of up to one-half of the stated prison term originally imposed upon the offender.

In its sentencing entry in Case No. CR-10-539923, the trial court provided the following notification with respect to postrelease control:

Post release control is part of this prison sentence for three years mandatory for the above felony(s) under R.C. 2967.28. Defendant advised that if post release control supervision is imposed following his/her release from prison and if he/she violates that supervision or condition of post release control under R.C. 2967.131(B), parole board may impose a prison term as part of the sentence of up to one-half of the stated prison term originally imposed upon the offender.

The 2014 Felony Conviction

{¶4} On March 17, 2014, the Cuyahoga County Grand Jury indicted Bybee on one count of drug possession, two counts of drug trafficking and one count of possessing criminal tools with various forfeiture specifications in Case No. CR-14-583254 (the “2014 case”) arising out of an incident that allegedly occurred on March 3, 2014. On May 28, 2014, Bybee pled guilty to one count of drug trafficking in violation of R.C. 2925.03(A)(2), a fifth-degree felony, with

forfeiture specifications and, in exchange for his plea, the remaining counts were dismissed. At the time he committed the offense giving rise to his conviction in the 2014 case, Bybee was on postrelease control in the 2010-2011 cases.

{¶5} Prior to accepting Bybee's plea in the 2014 case, the trial court explained the ramifications of Bybee's new felony conviction on his postrelease control in the 2010-2011 cases as follows:

THE COURT: Do you understand pleading guilty in this case has the following effect on your post-release control: The parole board can sanction you with up to one half your originally entered into sentence. As a violation of your post-release control I can terminate your post-release control and impose the greater of one year or the remaining time period left on your post-release control period as a prison sanction; do you understand that?

DEFENDANT BYBEE: Yes.

THE COURT: That prison time would be in addition to the penalties that I'm going to explain that you face in this case[,] which is again going to be [a] six to 12 months sentence. Do you understand that?

DEFENDANT BYBEE: I understand.

{¶6} On June 27, 2014, the trial court sentenced Bybee to one year in prison on the drug trafficking count in the 2014 case and postrelease control for up to three years. In addition, the trial court terminated postrelease control in the 2010-2011 cases and sentenced Bybee to a prison term equal to the greater of the remaining period of postrelease control or one year. At the time of the sentencing, approximately two years of postrelease control remained in the 2010-2011 cases. The one-year prison sentence in the 2014 case was imposed consecutively to the sentence for the violation of postrelease control in the 2010-2011 cases. Bybee timely appealed, raising the following assignment of error for review:

The trial court's imposition of a term of incarceration for the remaining period of defendant-appellant's post-release control is contrary to law and the sentence was void.

Law and Analysis

{¶7} In his sole assignment of error, Bybee argues that his consecutive sentence equal to the greater of the remaining period of postrelease control or one year for committing a felony while on postrelease control is void because the trial court failed to notify him in the sentencing entries in the 2010-2011 cases that, should he commit a felony while on post release control, his postrelease control could be terminated and he could be sentenced to an additional term of imprisonment equal to the greater of the remaining period of postrelease control or one year for committing a felony while on postrelease control. Based on the trial court's alleged improper postrelease control notification in the 2010-2011 cases, Bybee contends his sentences in those cases were void. Bybee further contends that because he had already served his full prison terms in the 2010-2011 cases at the time he committed the new felony in 2014, the sentencing errors in the 2010-2011 cases could not be fixed and that, therefore, he was not subject to postrelease control upon the expiration of his prison terms in the 2010-2011 cases. Bybee goes on to argue that because he was not properly subject to postrelease control at the time of he committed the 2014 felony, the trial court lacked authority to sentence him to an additional term of imprisonment based on his commission of that felony and that his consecutive sentence equal to the greater of the remaining period of postrelease control or one year for committing a new felony while on postrelease control should, therefore, be vacated and the case remanded for resentencing.

{¶8} The state contends that Bybee’s argument is based on “confusing the authority of two different statutes — R.C. 2929.19 and 2929.141” — and that “[n]othing prohibits the imposition of [the] sentence” imposed by the trial court. The state maintains that the additional sentence Bybee received for his commission of a new felony while on postrelease control in the 2010-2011 cases was authorized under R.C. 2929.141 and that R.C. 2929.141, unlike R.C. 2929.19, does not include a notification requirement. The state asserts that neither R.C. 2929.141 nor any other authority requires that a defendant be notified (as part of the postrelease notification during sentencing of offenses giving rise to postrelease control) that commission of a further felony while on postrelease control could lead to the termination of postrelease control and an additional prison term of the greater of 12 months or the period remaining on postrelease control.

{¶9} R.C. 2929.19 gives the parole board discretion to impose a prison term if a defendant violates the terms of his or her postrelease control. Former R.C. 2929.19(B)(3)¹ expressly requires that the trial court provide notice of this to each offender as follows:

if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the *court shall* do all of the following: * * *

(e) *Notify the offender* that, if a period of supervision is imposed following the offender’s release from prison, as described in division (B)(3)(c) or (d) of this section, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of section 2967.131 of the Revised Code, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender. * * *

¹Effective September 30, 2011, R.C. 2929.19 was amended to delete former section (B)(2) and redesignated. Accordingly, what was R.C. 2929.19(B)(3) at the time of sentencing in the 2010-2011 cases is now R.C. 2929.19(B)(2).

(Emphasis added.) The Ohio Supreme Court has held that this notice must be given to a defendant both during the sentencing hearing and in the sentencing judgment entry. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraph one of the syllabus.

{¶10} In addition to the authority provided the parole board to impose sanctions for violations of postrelease control under R.C. 2929.19, R.C. 2929.141 gives the trial court discretion to further punish defendants who commit additional felonies while on postrelease control. R.C. 2919.141 provides:

(A) Upon the conviction of or plea of guilty to a felony by a person on post-release control at the time of the commission of the felony, the court may terminate the term of post-release control, and the court may do either of the following regardless of whether the sentencing court or another court of this state imposed the original prison term for which the person is on post-release control:

(1) In addition to any prison term for the new felony, impose a prison term for the post-release control violation. The maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony. In all cases, any prison term imposed for the violation shall be reduced by any prison term that is administratively imposed by the parole board as a post-release control sanction. A prison term imposed for the violation shall be served consecutively to any prison term imposed for the new felony. The imposition of a prison term for the post-release control violation shall terminate the period of post-release control for the earlier felony.

(2) Impose a sanction under sections 2929.15 to 2929.18 of the Revised Code for the violation that shall be served concurrently or consecutively, as specified by the court, with any community control sanctions for the new felony.

{¶11} Bybee does not dispute that the trial court complied with the notification requirements of former R.C. 2929.19(B)(3)(e) and properly notified him, in its sentencing entries in the 2010-2011 cases,² that if he were to violate a condition of post release control under R.C.

²Bybee also does not contend that the trial court failed to make any required postrelease control notifications *during the sentencing hearing* in the 2010-2011 cases. The transcript from that sentencing hearing is

2967.131(B), the parole board could impose a prison term as part of the sentence of up to one-half of the stated prison term originally imposed. Nevertheless, Bybee contends that his sentences in the 2010-2011 cases are void because the trial court did not specifically advise him, in the journal entries at the time of his original sentencing in those cases, that the trial court could impose a prison sentence for the greater of the remaining period of postrelease control or one year if he were to commit another felony while on postrelease control. In other words, Bybee seeks to “extend the postrelease control notification requirement set forth by the Ohio Supreme Court in *State v. Jordan* and codified in R.C. 2929.19(B)(3) to R.C. 2929.141.” *State v. Witherspoon*, 8th Dist. Cuyahoga No. 90498, 2008-Ohio-4092, ¶ 17. However, he fails to point to “any statutory requirement that a trial court notify a defendant of the implications of R.C. 2929.141” during sentencing. *Id.*

{¶12} This court, and several others, have previously rejected similar arguments. In *Witherspoon*, this court held that postrelease control was properly imposed where the trial court advised the defendant at his sentencing hearing (and thereafter incorporated the notification in its sentencing entry) that he could receive up to three years of postrelease control and that if he violated the conditions of postrelease control, the parole authority could impose a further term of incarceration up to one half of his original sentence. *Id.* at ¶ 3, 19. In so ruling, the court rejected the defendant’s argument that the trial court was also required to notify him, as part of the postrelease control notification regarding the “consequences” of violating postrelease control, that violation of postrelease control could result in an “additional charge,” i.e., that he could be convicted of escape for failing to report as required under the terms of his postrelease control.

not part of the record in this appeal. Without a record of the proceedings, we presume the regularity of the proceedings. *State v. Gilmore*, 8th Dist. Cuyahoga No. 97844, 2012-Ohio-2216, ¶ 9.

Id. at ¶ 17-19 and fn. 11. The court noted that although the defendant “[was] not apprised of all the ramifications of [his] postrelease control, as long as [he was] advised that [his] liberty could continue to be restrained after sentencing, this provided adequate notice.” *Id.* at ¶ 18, citing *State v. Mullins*, 12th Dist. Butler No. CA2007-01-028, 2008-Ohio-1995, and *State v. Susany*, 7th Dist. Mahoning No. 07 MA 7, 2008-Ohio-1543.

{¶13} The Twelfth District reached a similar conclusion in *Mullins*, *supra*, distinguishing R.C. 2929.141 from the statutory notice requirements under former R.C. 2929.19(B)(3)(c)-(e).

As the court explained:

[A]ppellant argues that the 12-month consecutive sentence imposed by the trial court is void because he was never informed of such a possibility when he was sentenced on his original felony conviction for receiving stolen property. Appellant asks this court to amend the sentence from the trial court to vacate the 12 consecutive months imposed pursuant to R.C. 2929.141.

Ohio case law is clear that when sentencing a felony offender to [a] term of imprisonment, the trial court is required to notify the offender at the sentencing hearing about postrelease control and is further required to incorporate that notice into its journal entry imposing sentence. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraph two of the syllabus. A court is required to notify an offender both that he may be subject to postrelease control, and where applicable, that failure to comply with the conditions of postrelease control could result in imposition of a prison term of up to one-half of the stated prison term originally imposed. 2004-Ohio-6085 at ¶ 15. These requirements have been incorporated into Ohio’s sentencing statute at R.C. 2929.19(B)(3)(c)-(e). “Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void.” *Id.* It is not disputed that the trial court complied with both of these requirements in this case.

Appellant argues, however, that the trial court was also required to inform him of the potential consequences of committing a new felony while on postrelease control, as articulated in R.C. 2929.141. * * * Appellant argues that because the trial court failed to notify him of the potential implications of R.C. 2929.141 at his sentencing hearing on the original felony conviction, the court was barred from imposing the consecutive sentence upon conviction of the new felony. * * * While appellant attempts to extend the postrelease control notification requirements identified in *Jordan* and codified in R.C. 2929.19, he

fails to point to any statutory requirement that the trial court notify an offender of the implications of R.C. 2929.141. This issue was very recently examined in *State v. Susany*, 7th Dist. Mahoning No. 07 MA 7, 2008-Ohio-1543. In that case, the Seventh District Court of Appeals noted that “the preeminent purpose of R.C. 2967.28 was to ensure that defendants know at their sentencing that, ‘their liberty could continue to be restrained after serving their initial sentences.’” *Id.*, quoting *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d 78. The court went on to find that there is no requirement that a defendant be advised that upon the commission of a new offense, a defendant is subject to additional prison time for any felony committed while on postrelease control. 2008-Ohio-1543 at ¶ 95.

We find *Susany* to be persuasive and similarly find no error in the trial court’s failure, at appellant’s sentencing on his original offense, to inform him of the potential sentence for committing a new felony while on postrelease control. We therefore find the court properly exercised its jurisdiction and discretion pursuant to R.C. 2929.141 to impose the 12-month consecutive sentence when sentencing appellant on his conviction for attempted escape in this case.

Id. at ¶ 6-13; *see also Susany*, 2008-Ohio-1543 at ¶ 91, 95 (finding no error in the trial court’s failure, at the defendant’s original sentencing hearing, to inform him of the potential sentence for committing a new felony while on postrelease control, stating “[a]ppellant fails to direct our attention to any holding which states that a defendant must be advised that upon the commission of a new offense, a defendant is subject to additional prison time for any felony committed while on postrelease control. There is no such requirement * * *”); *State v. Burgett*, 3d Dist. Marion No. 9-10-37, 2010-Ohio-5945, ¶ 27-31 (reasoning that because “possible consequences of the commission of a felony under R.C. 2929.141 are discretionary options of the trial court,” “no notice to a defendant of those options is required”).

{¶14} We are aware of two recent cases that have reached contrary conclusions. In *State v. Pippen*, 4th Dist. Scioto No. 14CA3595, 2014-Ohio-4454, the Fourth District held that the portion of the defendant’s sentence that addressed postrelease control was void where the trial court failed to notify the defendant at the sentencing hearing of “all the consequences of violating

post-release control,” specifically, that “a prison term may be imposed for violation of post-release control in the form of the commission of a new felony, which prison term shall be served *consecutively* to any sentence imposed on a new felony.” (Emphasis added.) *Id.* at ¶ 22, 24-25. In reaching this conclusion, the Fourth District relied upon the Ohio Supreme Court’s decision in *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, and a decision of the Twelfth District, *State v. Chasteen*, 12th Dist. Butler No. CA2012-12-247, 2013-Ohio-3573, both of which addressed the *statutory* postrelease control *notification requirement under R.C. 2929.19(B)* and did not specifically address notice under R.C. 2929.141.

As the *Pippen* court explained:

The Supreme Court of Ohio addressed the “importance of notification” in *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶18, as follows:

“* * * in order to comply with separation-of-powers concerns and to fulfill the requirements of the post release-control-sentencing statutes, especially R.C. 2929.19(B) and 2967.28, a trial court must provide *statutorily compliant notification* to a defendant regarding postrelease control at the time of sentencing, *including notifying the defendant of the details of the postrelease control and the consequences of violating postrelease control*. [*Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171, 733 N.E.2d 1103 (2000), at paragraphs one and two of the syllabus; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, at paragraph one of the syllabus; *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, at ¶2.]” (Emphasis added).

As recently noted in *State v. Chasteen*, 12th Dist. Butler No. CA2012-12-247, 2013-Ohio-3573, ¶19: “When a court imposes a sentence that includes postrelease control, it must notify the offender at the sentencing hearing that he will be supervised pursuant to R.C. 2967.28 and that upon violating a condition of postrelease control, the parole board may impose a prison term of up to one-half of the prison term originally imposed upon the offender. R.C. 2929.19(B)(3)(c) and (e); *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶ 2, 909 N.E.2d 1254.”

(First emphasis added; second emphasis sic.)

{¶15} The court did not explain why it determined that these authorities, addressing “statutorily compliant notification,” specifically, the application of the statutory notification requirement under former R.C. 2929.19(B)(3)(c) and (e), applied equally to R.C. 2929.141, in which there is no statutory notice requirement. Nor did it address any of the cases discussed above that have reached a contrary conclusion. *See also State v. McDowell*, 9th Dist. Summit No. 26697, 2014-Ohio-3900, ¶ 12-15 (observing that “[a]s a procedural protection,” a trial court must inform an offender at the time of sentencing on the original charge that trial court may impose a consecutive sentence equal to the greater of the remaining period of postrelease control or one year if the offender commits a felony while on postrelease control), citing R.C. 2929.19(B)(2)(e) and *State v. Jordan*, *supra*.

{¶16} *Qualls* and *Jordan* address the requirements for “statutorily compliant notification.” *Qualls* at ¶ 18, 23. While we recognize that the trial court had a duty, pursuant to former R.C. 2929.19(B)(3), to notify the defendant both at the sentencing hearing and in its sentencing journal entry that (1) he would be subject to a period of postrelease control upon the conclusion of his prison term and (2) should the defendant violate the terms of postrelease control, an additional prison term could be imposed as set forth in former R.C. 2929.19(B)(3)(e), we find that there is “no such requirement contained in [R.C. 2929.141 or former R.C. 2929.19(B)(3)(e)] mandating the trial court to notify a defendant of *all* the possible consequences of his commission of a felony while on post release control.” (Emphasis added.) *Burgett*, 2010-Ohio-5945 at ¶ 27-31, citing *State v. Lane*, 3d Dist. Allen No. 1-10-10, 2010-Ohio-4819, ¶ 15.

{¶17} Accordingly, we find no error in the trial court’s failure, in the journal entries sentencing Bybee on his offenses in the 2010-2011 cases, to advise Bybee of the potential

sentence the trial court could impose if he were to commit a new felony while on postrelease control.³ Bybee’s assignment of error is overruled.

{¶18} The trial court’s judgment is 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.

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

EILEEN A. GALLAGHER, JUDGE

LARRY A. JONES, SR., P.J., and
MELODY J. STEWART, J., CONCUR

³While we find no error on the part of the trial court in this case, we agree with the Twelfth District in *Mullins* that the “better practice would be to include notification of the potential implications of R.C. 2929.141 when notifying defendants of the other potential implications of postrelease control.” *Mullins*, 2008-Ohio-1995 at ¶ 14.