

[Cite as *State v. Loper*, 2017-Ohio-542.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 104828

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**MARVIN LOPER**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED; REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-01-413675-D

**BEFORE:** E.A. Gallagher, P.J., Boyle, J., and Jones, J.

**RELEASED AND JOURNALIZED:** February 16, 2017

**FOR APPELLANT**

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**ATTORNEYS FOR APPELLEE**

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EILEEN A. GALLAGHER, P.J.:

{¶1} Defendant-appellant Marvin Loper, pro se, appeals from the trial court's order denying his motion to terminate postrelease control. Loper contends that the portion of his sentence imposing postrelease control is void and should be terminated because he completed his sentence before the trial court properly imposed postrelease control. For the reasons that follow, we affirm the trial court's decision. However, we remand the case for the trial court to enter a nunc pro tunc order correcting the July 20, 2012 sentencing journal entry to include the fact of conviction and Loper's complete sentence and that otherwise complies with Crim.R. 32(C).

### **Factual and Procedural Background**

{¶2} On April 19, 2002, Loper was sentenced to a total of ten years in prison after a jury found him guilty of two counts of possession of drugs and one count of possession of criminal tools. When he committed these offenses, Loper was on parole in another case. The trial court sentenced him to seven years and ten years, respectively, on the two drug possession charges and 11 months on the possession of criminal tools charge. The sentences were to be served concurrently to each other, for an aggregate prison term of ten years, but were to be served consecutively to "any term that may be imposed by the Ohio parole board."

{¶3} At sentencing, the trial court did not properly impose postrelease control. The trial court advised Loper that postrelease control was part of his sentence but did not

inform him that postrelease control was mandatory for five years and did not advise him of the consequences of violating postrelease control.

{¶4} On May 15, 2012, Loper filed, pro se, a “motion to correct term of postrelease control pursuant to *State v. Jordan*, 104 Ohio St.3d 21,” requesting that the trial court vacate the postrelease control and conduct a new sentencing hearing where postrelease control “can be properly imposed.” The state agreed that Loper had not been properly advised of postrelease control during sentencing and filed its own “motion for limited resentencing to properly impose post release control,” requesting that the trial court conduct a limited hearing, pursuant to R.C. 2929.191, to properly impose postrelease control.

{¶5} In July 2012, the trial court resentedenced Loper to postrelease control. The transcript from the sentencing hearing is not part of the record on appeal. The trial court’s July 20, 2012 journal entry states, in relevant part:

Re-sentencing for post release control. \* \* \* Defendant shall be subject to a mandatory period of post release control of 5 years on Count 2; mandatory 3 years post release control on Count 1; and up to 3 years post release control on Count 5. Post release control is part of this prison sentence for 5 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. \* \* \*

{¶6} On July 5, 2016, Loper filed, pro se, a motion to terminate postrelease control, arguing that the portion of his sentence imposing postrelease control was void (and that his postrelease control should, therefore, be terminated) because he had

“completed his term of imprisonment in this case” when the trial court resentenced him on postrelease control in July 2012. The state opposed the motion, maintaining that Loper was “still incarcerated” and “was still serving his prison term imposed on the underlying felonies” when the trial court resentenced him on postrelease control in July 2012. On July 14, 2016, the trial court denied Loper’s motion.

{¶7} Loper appealed, raising the following two assignments of error for review:

Assignment of Error No. 1: The trial [court] erred when it denied Loper’s motion to terminate his post release control when the post release control was not rightfully and lawfully imposed as Loper’s sentence had expired when the court imposed the P.R.C., leaving that part of his sentence totally void in nature.

Assignment of Error No. 2: The trial court abused its discretion and committed plain error by denying Loper’s motion to terminate post release control.

### **Law and Analysis**

{¶8} Loper argues that the portion of his sentence imposing postrelease control is void because he had completed his ten-year sentence by the time the trial court resentenced him to postrelease control in July 2012 and that the trial court, therefore, erred in denying his motion to terminate postrelease control. The state maintains that Loper “was still incarcerated on the underlying case” in July 2012 and that the trial court had the authority to resentence him on postrelease control at that time.

{¶9} 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 postrelease control and the consequences of violating postrelease

control.” *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 18. The trial court must also incorporate the postrelease control notification into the sentencing entry “to reflect the notification that was given at the sentencing hearing.” *Id.* at ¶ 19; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraph one of the syllabus.

{¶10} When a trial court errs in imposing a term of postrelease control at sentencing, “that part of the sentence is void and must be set aside.” (Emphasis omitted.) *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 26. “[O]nly the offending portion of the sentence is subject to review and correction.” *Id.* at ¶ 27. Thus, if a trial court fails to properly notify a defendant of postrelease control at the sentencing hearing, a new sentencing hearing may be held to correct the error that is limited to the proper imposition of postrelease control. *Id.* at ¶ 29; *see also* R.C. 2929.191.

{¶11} However, once the sentence for the offense that carries postrelease control has been served, the court can no longer correct a sentencing error and impose postrelease control at resentencing. *See, e.g., State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 5; *State v. Brown*, 8th Dist. Cuyahoga No. 95086, 2011-Ohio-345, ¶ 11. As the Ohio Supreme Court explained in *Holdcroft*:

A trial court loses jurisdiction to resentence a defendant for the purpose of imposing postrelease control once the defendant has served his entire sentence of incarceration. \* \* \* A trial court does not have the authority to

resentence a defendant for the purpose of adding a term of postrelease control as a sanction for a particular offense after the defendant has already served the prison term for that offense. \* \* \* [A] sentence served is a sentence completed.

*Id.* at ¶ 5, 18. Where the trial court fails to properly impose postrelease control and the defendant has completed his sentence, “the term of postrelease control is void and should be terminated.” *State v. Smith*, 8th Dist. Cuyahoga No. 104632, 2016-Ohio-7898, ¶ 7; *see also State v. Bryant*, 8th Dist. Cuyahoga No. 102650, 2015-Ohio-3678, ¶ 8-11 (where defendant had completed his sentence, the trial court could not resentence him to rectify error in imposition of postrelease control).

{¶12} Loper was originally sentenced in April 2002. Loper admits that he was still incarcerated at the time of his resentencing on postrelease control in July 2012 but contends that, at that time, he had completed his ten-year term of imprisonment in this case and “was still incarcerated due to a parole violation.” Loper’s argument assumes that he served his prison sentence in this case before he served the prison term imposed by the parole board for his parole violation. However, he points to nothing in the record that supports this claim.

{¶13} The trial court ordered that the ten-year sentence imposed in this case be served “consecutively to any term that may be imposed by the Ohio parole board.” Although it is not clear from the record what prison term was imposed by the Ohio parole board, there is nothing in the record that indicates that Loper was not still serving his

ten-year sentence in this case as of July 2012 when he was resentenced on postrelease control.

{¶14} Accordingly, the trial court did not err in denying Loper's motion to terminate postrelease control. Loper's assignments of error are overruled.

{¶15} However, we note, sua sponte, that the trial court's July 20, 2012 sentencing journal entry merely imposes postrelease control. It does not set forth the fact of conviction or Loper's complete sentence. Although, given the procedural posture of this case, there is no issue regarding our jurisdiction to address the assignments of error raised in this appeal, to avoid any potential concerns regarding compliance with Crim.R. 32(C) or R.C. 2929.191 (authorizing the issuance of a "correction to the judgment of conviction") to the extent they may be applicable to the resentencing here, we remand the matter for the trial court to enter a nunc pro tunc order correcting the July 20, 2012 sentencing journal entry to include the fact of conviction and Loper's complete sentence and that otherwise complies with Crim.R. 32(C).

{¶16} Judgment affirmed; matter remanded for the trial court to enter a nunc pro tunc order correcting the July 20, 2012 sentencing journal entry to include the fact of conviction and Loper's complete sentence and that otherwise complies with Crim.R. 32(C).

It is ordered that appellee recover from appellant the 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 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.

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EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and  
LARRY A. JONES, SR., J., CONCUR