

[Cite as *State v. Pace*, 2018-Ohio-275.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105491

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAMAR PACE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-96-345433-A

BEFORE: Laster Mays, J., McCormack, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: January 25, 2018

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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant Lamar Pace (“Pace”) pleaded guilty to six counts of rape (R.C. 2907.02) and three counts of gross sexual imposition (R.C. 2907.05) on March 5, 1997. Pace was sentenced to a 20-year agreed prison term and ordered to pay costs on April 3, 1997. Pace was declared a sexually oriented offender on April 4, 1997.

{¶2} Pace was scheduled to be released on March 28, 2017. On January 3, 2017, Pace appeared before the trial court and the prosecutor, and he was represented by appointed counsel at a video-conference hearing. Pace waived his right to physical presence pursuant to Crim.R. 43(A).

{¶3} Pace was informed that the hearing was required due to the trial court’s failure to impose postrelease control (“PRC”) at the time of sentencing. The trial court stated that it received a letter in November 2016 from the Ohio Department of Rehabilitation and Correction (“ODRC”) notifying the court of the PRC failure. The ODRC letter is dated February 11, 2008, and was directed to the original trial judge.

{¶4} Mandatory PRC applies to the crimes to which Pace pleaded guilty. R.C. 2967.28(B). The trial court advised Pace that the court was authorized under R.C. 2929.191 to correct the error where a hearing is provided and counsel assigned.

{¶5} Pace stated objections for the record, arguing that imposition of PRC is void, unlawful, and illegal, and that his due process and equal protection rights were

violated by: (1) the almost 20-year delay; (2) the unusual avenue of notice to the court by the ODRC; (3) the failure to provide the PRC advisement at the time of the plea; and (4) the agreed sentence journal entry did not mention the PRC. The trial court imposed a five-year period of PRC, and Pace now appeals.

I. Assignments of Error

{¶6} Pace asserts three assignments of error:

- I. Appellant did not enter his guilty plea knowingly, intelligently, or voluntarily because the trial court failed to properly inform him of the maximum and correct penalties as required by Crim.R. 11(C)(2)(a).
- II. The trial court violated Crim.R. 32 and appellant's constitutional rights when there was an unnecessary delay in sentencing appellant and in imposing postrelease control.
- III. The trial court erred by ordering appellant to pay costs when it did not properly comply with the statute.

II. Law and Analysis

A. Knowing, Intelligent, and Voluntary Plea

{¶7} Pace argues that his plea was not knowingly, intelligently, and voluntarily made because the trial court did not properly inform him of the maximum and correct penalties under Crim.R. 11(C)(2)(a) that provides:

(C) Pleas of guilty and no contest in felony cases.

* * *

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶8} The question of whether Pace’s plea was knowingly, intelligently, and voluntarily made was available through direct appeal after his conviction. A sentence that omits postrelease control is void; however, “only the offending portion of the sentence is subject to review and correction.” *State v. Padgett*, 8th Dist. Cuyahoga No. 95065, 2011-Ohio-1927, ¶ 7, citing *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332. Thus, the sole issue before this court is the propriety of imposing postrelease control.

{¶9} Due to Pace’s failure to provide transcripts of the 1997 plea and sentencing proceedings before this court, we must presume regularity in the trial court’s proceedings. *Smith v. Perry*, 8th Dist. Cuyahoga No. 78027, 2001 Ohio App. LEXIS 1691, at 5-6 (Apr. 12, 2001), citing *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 400 N.E.2d 384 (1980), and *Columbus v. Hodge*, 37 Ohio App.3d 68, 68, 523 N.E.2d 515 (10th Dist.1987).

{¶10} It is undisputed that the sentencing entry in this case did not contain the required notice of PRC. Pursuant to R.C. 2967.28 as in effect as of July 1, 1996:

(B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of postrelease control imposed by the parole board after the offender’s release from

imprisonment. Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of postrelease control required by this division for an offender shall be of one of the following periods:

(1) For a felony of the first degree or for a felony sex offense, five years[.]

{¶11} Prior to the July 11, 2006 effective date of R.C. 2929.191, a failure to impose postrelease control constituted a void sentence and required that the entire sentence be vacated and remanded to the trial court for a de novo sentencing hearing. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶ 17. *Singleton* determined that the de novo hearing process would apply to sentences entered prior to the July 11, 2006 enactment, and the statutory procedure would apply to post July 11, 2006 sentences.

{¶12} *Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, confirmed that a sentence lacking the requisite postrelease control advisement was void, but determined that the lawful part regarding the merits of a conviction was barred by res judicata. *Id.* at ¶ 40. The legislature subsequently amended R.C. 2929.191 in 2011 to apply to all proceedings alleging the failure to impose postrelease control.

{¶13} Pace's first assigned error is without merit. The trial court's order is affirmed.

B. Crim.R. 32 and R.C. 2929.191

{¶14} In his second assignment of error, Pace argues that the delay in imposing PRC constitutes a delay in sentencing under Crim.R. 32 and impinges Pace's due process and equal protection rights under the Fifth and Fourteenth Amendments of the United

States Constitution. As Pace acknowledges in his brief, the holding of *Fischer* at ¶ 29, negates his argument. A “trial court may hold a new sentencing hearing that is limited to proper imposition of postrelease control.” “[T]he postrelease control correction relates back to the original sentence as if it had been included, and, therefore, Crim.R. 32(A) was satisfied.” *State v. Lintz*, 11th Dist. Lake No. 2010-L-067, 2011-Ohio-6511, ¶ 28.

{¶15} Where a defendant has completed the sentence for which PRC is being challenged, the trial court no longer has jurisdiction to rectify the situation. *State v. Loper*, 8th Dist. Cuyahoga No. 104828, 2017-Ohio-542, ¶ 11, citing *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. Pace had not completed his sentence, so the trial court retained jurisdiction to correct the PRC deficiency.

{¶16} Through R.C. 2929.191, the General Assembly resolved the post-sentence PRC issue. The statute

“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: those who did not receive notice at the sentencing hearing that they would be subject to postrelease control, those who did not receive notice that the parole board could impose a prison term for a violation of postrelease control, or those who did not have both of these statutorily mandated notices incorporated into their sentencing entries. R.C. 2929.191(A) and (B).”

(Emphasis added.) *State v. Cockrell*, 8th Dist. Cuyahoga No. 104207, 2017-Ohio-1358, ¶ 14, quoting *Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶ 23.

{¶17} R.C. 2929.191 requires that the court hold a hearing with the offender, who shall be represented by counsel, and the prosecutor. The offender may be physically present or may consent to appear by video conference. The parties present arguments for and against the correction, and the court may elect to issue a correction to the judgment of conviction. *Id.*

{¶18} The trial court followed the R.C. 2929.191 protocol in this case and properly imposed and journalized the mandatory five-year term of PRC. The second assignment of error is overruled.

C. Imposition of Court Costs

{¶19} The third and final assigned error challenges the trial court's imposition of court costs. Court costs were imposed in the trial court's 1997 judgment entry, which was not appealed.

Although the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence.

Fischer, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, at paragraph three of the syllabus.

{¶20} The third assigned error is barred by the doctrine of res judicata.

III. Conclusion

{¶21} The trial court's order is affirmed.

It is ordered that the 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

ANITA LASTER MAYS, JUDGE

TIM McCORMACK, P.J., and
SEAN C. GALLAGHER, J., CONCUR