

[Cite as *State v. Gurley*, 2018-Ohio-381.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 104981

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**RAYSHAWN GURLEY**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
AFFIRMED IN PART, VACATED IN PART,  
AND REMANDED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR- 16-604373-A

**BEFORE:** E.T. Gallagher, J., Kilbane, P.J., and McCormack, J.

**RELEASED AND JOURNALIZED:** February 1, 2018

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Rayshawn Gurley (“Gurley”), appeals his sentence and claims the following error:

The trial court erred by imposing a mandatory term of postrelease control for Appellant’s conviction pursuant to R.C. 2923.162(A)(3) because it is not an offense of violence as defined by R.C. 2901.01(A)(9)(c).

{¶2} We find some merit to the appeal and remand the case to the trial court to issue a nunc pro tunc journal entry imposing a mandatory term of postrelease control.

### **I. Facts and Procedural History**

{¶3} In February 2016, Gurley was celebrating a birthday with friends at an East Cleveland bar when one of his friends started arguing with another individual. Gurley subsequently heard gunshots outside the bar. After waiting a few minutes, Gurley exited the bar, and found his friend had been shot. Shocked by the shooting, Gurley took his friend’s gun and fired it into a field. He did not see anyone in the field, but he believed the suspects had fled in that direction.

{¶4} After shooting the weapon, Gurley attended to his friend, who died at the scene. Gurley confessed to police that he discharged the firearm in the field and gave credible information to detectives during the homicide investigation. Gurley was subsequently charged with one count of discharging a firearm on or near a prohibited premises in violation of R.C. 2923.162(A)(3), with one- and three-year firearm specifications (Count 1), one count of felonious assault with one- and three-year firearm specifications (Count 2), one count of tampering with evidence (Count 3), one count of

obstructing official business (Count 4), and one count of having a weapon while under disability (Count 5). He pleaded guilty to the indictment, which was amended to delete the firearm specifications attendant to Count 2.

{¶5} At sentencing, Gurley's trial counsel explained that despite the fact that Gurley was homeless when he aged out of foster care, he was an intelligent young man, who had earned a high school diploma. Counsel also reminded the court that Gurley cooperated with the police during the homicide investigation. When the court asked if there was a victim for the felonious assault charge, the prosecutor replied, "None to be noted, your Honor." (Tr. 30.)

{¶6} The trial court considered Gurley a good candidate for rehabilitation and sentenced him accordingly. After merging Counts 1 and 2 and Counts 3 and 4, the court sentenced Gurley to the mandatory three-year prison term on the firearm specification on Count 1 and a nine-month prison term on the underlying conviction. The court also sentenced Gurley to a two-year concurrent prison term on Count 5, and a two-year concurrent term of probation on Count 3. With respect to postrelease control, the court stated:

Upon your release, you'll be placed on post-release control for a minimum period of time of three years and I believe that's going to be mandatory because it's that type of crime. It's an offense of violence. You'll be on post-release control.

(Tr. 52.) Despite the court's finding that Gurley committed an offense of violence that is subject to mandatory postrelease control, the sentencing entry states that Gurley is subject

to postrelease control for a period of “up to 3 years.” Gurley now appeals the imposition of postrelease release control as part of his sentence.

## II. Law and Analysis

{¶7} In his sole assignment of error, Gurley argues the trial court erred by imposing a mandatory term of postrelease control on his discharging of a firearm on or near a prohibited premises conviction. He contends the court erroneously concluded that discharging a firearm in violation of R.C. 2923.162(A)(3) is an offense of violence.

{¶8} Gurley’s discharging a firearm conviction is a third-degree felony. R.C. 2967.28 governs postrelease control and provides that a prison term imposed on a third-degree felony that is an offense of violence “shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender’s release from imprisonment.” Therefore, a third-degree felony that involves an offense of violence is subject to a mandatory period of postrelease control.

{¶9} R.C. 2901.01(A)(9) defines “offense of violence” as including any of the following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.15, 2903.21, 2903.211, 2903.22, 2905.01, 2905.02, 2905.11, 2905.32, 2907.02, 2907.03, 2907.05, 2909.02, 2909.03, 2909.24, 2911.01, 2911.02, 2911.11, 2917.01, 2917.02, 2917.03, 2917.31, 2919.25, 2921.03, 2921.04, 2921.34, or 2923.161, of division (A)(1) of section 2903.34, of division (A)(1), (2), or (3) of section 2911.12, or of division (B)(1), (2), (3), or (4) of section 2919.22 of the Revised Code or felonious sexual penetration in violation of former section 2907.12 of the Revised Code;

(b) A violation of an existing or former municipal ordinance or law of this or any other state or the United States, substantially equivalent to any section, division, or offense listed in division (A) (9)(a) of this section;

(c) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons;

(d) A conspiracy or attempt to commit, or complicity in committing, any offense under division (A)(9)(a), (b), or (c) of this section.

{¶10} Discharging a firearm on or near a prohibited premises in violation of R.C. 2923.162(A)(3) is not included in the list of violent offenses enumerated in R.C. 2901.01(A)(9)(a). Thus, it not an offense that the legislature has categorically deemed an offense of violence. Gurley’s conviction may nevertheless qualify as an offense of violence under R.C. 2901.01(A)(9)(c).

{¶11} R.C. 2901.01(A)(9)(c), quoted above, provides that even where an offense is not expressly identified as an offense of violence under R.C. 2901.01(A)(9)(a), (b), and (d), it may nevertheless qualify as an “offense of violence” if the defendant knowingly commits an offense “involving physical harm to persons or a risk of serious physical harm to persons.” Applying R.C. 2901.01(A)(9)(c), this court has held that a particular crime qualifies as an “offense of violence” if the defendant “pleads guilty to an offense that contains an element of physical harm or *a risk of serious physical harm,*” or “if the defendant admits or stipulates to the relevant facts in an attached furthermore clause.” (Emphasis added.) *State v. Cargill*, 8th Dist. Cuyahoga No. 98705, 2013-Ohio-2689, ¶ 20. See also *State v. Freeman*, 8th Dist. Cuyahoga No. 103677, 2016-Ohio-3178.

{¶12} Gurley pleaded guilty to discharging a firearm on or near a prohibited premises in violation of R.C. 2923.162(A)(3). The indictment identified the offense as a third-degree felony as opposed to a misdemeanor because it alleged that “the violation created a substantial risk of physical harm to any person.” R.C. 2923.162(C)(2) provides that a violation of R.C. 2923.162(A)(3) that creates a substantial risk of physical harm to persons is a third-degree felony. Therefore, because Gurley pleaded guilty to an offense that alleged a substantial risk of physical harm, the offense qualifies as an “offense of violence” under R.C. 2901.01(A)(9)(c) and the test outlined in *Cargill*.

{¶13} Despite Gurley’s guilty plea to an offense of violence and the court’s finding to that effect in open court and on the record, the trial court’s judgment entry provides that Gurley is subject to a discretionary term of “up to 3 years” of postrelease control. Therefore, the sole assignment of error is sustained to the extent that the trial court made an error regarding the imposition of postrelease control.

{¶14} The trial court’s judgment is affirmed in part and vacated in part. Gurley’s convictions are affirmed. However, we remand the case to the trial court to issue a nunc pro tunc journal entry that is consistent with the court’s finding on the record that Gurley pleaded guilty to an offense of violence that is subject to mandatory postrelease control.

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. The defendant’s conviction having

been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

EILEEN T. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., and  
TIM McCORMACK, J., CONCUR