[Cite as *State v. Anderson*, 2009-Ohio-5461.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24623
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
KENTONIO L. ANDERSON	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CR 99 03 0589(A)

DECISION AND JOURNAL ENTRY

Dated: October 14, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} In 1999, Kentonio Anderson pleaded guilty to five counts of aggravated robbery, and the trial court sentenced him to seventeen years in prison. In 2006, he attempted to appeal, but this Court concluded that the trial court's sentencing entry was not a final order. Mr. Anderson moved for resentencing, and the trial court resentenced him in 2007. In September 2008, he moved to be resentenced again, arguing that his sentence was void under *State v. Bezak*, 114 Ohio St. 3d 94, 2007-Ohio-3250, and *State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197. He argued that, under Section 2929.19(B)(3)(e) of the Ohio Revised Code, the trial court had to tell him at the sentencing hearing that, if he violated the terms of post-release control, he could be sent back to prison for up to half of his original sentence. He argued that the court did not comply with the requirement because, even though it told him that he could be sent back to prison for violating post-release control, it said it could only be for up to five years. He also

moved to withdraw his plea. On February 2, 2009, the trial court held a hearing on his motions. On February 5, 2009, it granted his motion to withdraw his plea. The State has appealed, assigning as error that the court incorrectly allowed Mr. Anderson to withdraw his plea. Because the court did not address whether Mr. Anderson established the existence of manifest injustice, this Court remands for a new hearing on the motion.

CRIMINAL RULE 32.1

{¶2} Rule 32.1 of the Ohio Rules of Criminal Procedure provides that "[a] motion to withdraw a plea of guilty . . . may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." "A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court." *State v. Smith*, 49 Ohio St. 2d 261, paragraph two of the syllabus (1977). "At the same time, the extent of the trial court's exercise of discretion . . . is determined by the particular provisions that govern the motion under which the defendant is proceeding . . . ." *State v. Francis*, 104 Ohio St. 3d 490, 2004-Ohio-6894, at ¶33. "[A] presentence motion to withdraw a guilty plea should be freely and liberally granted." *State v. Boswell*, 121 Ohio St. 3d 575, 2009-Ohio-1577, at ¶1 (quoting *State v. Xie*, 62 Ohio St. 3d 521, 527 (1992)). A defendant who moves to withdraw his plea after the imposition of sentence "has the burden of establishing the existence of manifest injustice." *Smith*, 49 Ohio St. 2d 261, at paragraph one of the syllabus.

{¶3} Although Mr. Anderson moved to withdraw his plea after he was resentenced in 2007, the Ohio Supreme Court has held that "[a] motion to withdraw a plea . . . made by a defendant who has been given a void sentence must be considered as a presentence motion under

Crim.R. 32.1." *State v. Boswell*, 121 Ohio St. 3d 575, 2009-Ohio-1577, at syllabus. Accordingly, this Court must begin by determining whether Mr. Anderson's 2007 resentencing was void.

POST-RELEASE CONTROL

{¶4} In 1996, the General Assembly "created major changes in the premise of felony sentencing in Ohio." *Hernandez v. Kelly*, 108 Ohio St. 3d 395, 2006-Ohio-126, at ¶31. "As part of [its] goal of achieving 'truth in sentencing,' the new felony-sentencing law was intended to ensure that all persons with an interest in a sentencing decision would know precisely the sentence a defendant is to receive upon conviction for committing a felony. The goal is that when the prosecutor, the defendant, and victims leave the courtroom following a sentencing hearing, they know precisely the nature and duration of the restrictions that have been imposed by the trial court on the defendant's personal liberty." *Id*.

{¶5} At the time of Mr. Anderson's offenses, Section 2929.19(B)(3) of the Ohio Revised Code provided that, "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: (a) Impose a stated prison term; . . . (c) . . . if the offender is being sentenced for a felony of the first degree, for a felony of the second degree, . . . or for a felony of the third degree that . . . in the commission of which the offender caused or threatened to cause physical harm to a person, notify the offender that a period of post-release control . . . will be imposed following the offender's release from prison; (d) . . . if the offender is being sentenced for a felony of the third, fourth, or fifth degree that is not subject to division (B)(3)(c) of this section, notify the offender that a period of post-release control . . . may be imposed following the offender's release from prison; (e) Notify the offender that, if a period of post-release control is imposed following the offender's release from

prison . . . and . . . the offender violates a post-release control sanction[,] . . . the parole board may impose a more restrictive post-release control sanction . . . [which] may consist of a prison term, provided that the prison term [per violation] cannot exceed nine months and the maximum cumulative prison term so imposed for all violations during the period of post-release control cannot exceed one-half of the stated prison term originally imposed upon the offender."

{¶6} In *State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-6085, the Supreme Court considered the consequence of a trial court's failure to notify a defendant about post-release control under Section 2929.19(B)(3)(c) and (d). *Id*. at ¶4. In the cases under review in *Jordan*, the trial courts had not told the defendants about post-release control at the sentencing hearing, but had properly included it in their sentencing entries. *Id*. The Supreme Court noted that Section 2929.19(B)(3) "expressly prescribes what a trial court must do 'at the sentencing hearing' after it has decided to impose a prison term." *Id*. at ¶17 (quoting R.C. 2929.19(B)(3)). Construing Section 2929.19(B)(3)(c) and (d), it concluded that, "if a trial court has decided to impose a prison term upon a felony offender, it is duty-bound to notify that offender at the sentencing hearing about postrelease control and to incorporate postrelease control into its sentencing entry . . . ." *Id*. at ¶22. "Because a trial court has a statutory duty to provide notice of postrelease control at the sentencing hearing, any sentence imposed without such notification is contrary to law." *Id*. at ¶23. "Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." *Id*. at ¶25 (quoting *State v. Beasley*, 14 Ohio St. 3d 74, 75 (1984)).

{¶7} Summarizing, the Supreme Court wrote that "[t]he court's duty to include a notice to the offender about postrelease control at the sentencing hearing is the same as any other statutorily mandated term of a sentence. And based on the reasoning in *Beasley*, a trial court's

failure to notify an offender at the sentencing hearing about postrelease control is error." *State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-6085, at ¶26. "Accordingly, when a trial court fails to notify an offender about postrelease control at the sentencing hearing but incorporates that notice into its journal entry imposing sentence, it fails to comply with the mandatory provisions of R.C. 2929.19(B)(3)(c) and (d), and, therefore, the sentence must be vacated and the matter remanded to the trial court for resentencing." *Id*. at ¶27.

{¶8} In *State v. Bezak*, 114 Ohio St. 3d 94, 2007-Ohio-3250, the Supreme Court again considered a trial court's failure to advise a defendant about post-release control at the sentencing hearing. *Id*. at ¶16. It concluded that "[its] decision in *State v. Jordan* controls." *Id*. at ¶12. Noting that Mr. Bezak "was not informed about the imposition of postrelease control at his sentencing hearing," it determined "the sentence imposed by the trial court is void." *Id*. It held that, "[if] a trial court fails to notify an offender that he may be subject to postrelease control at a sentencing hearing, as required by [Section] 2929.19(B)(3), the sentence is void; the sentence must be vacated and the matter remanded to the trial court for resentencing." *Id*. at ¶16.

{¶9} Recently, the Supreme Court "again confront[ed] the consequences of the trial court's failure to . . . notify an offender about postrelease control at the time of sentencing . . . ." *State v. Bloomer*, 122 Ohio St. 3d 200, 2009-Ohio-2462, at ¶1. It noted that Section 2929.19 "mandates that a court, when imposing sentence, must notify the offender at the hearing that he will be supervised . . . and that upon violating supervision or 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." *Id*. at ¶2 (citing R.C. 2929.19(B)(3)(c) and (e)). It also noted that it "ha[d] previously addressed the consequences of a sentencing court's failure to follow the requirements of these and other sentencing statutes in a series of cases beginning with *State v.*

Beasley (1984), 14 Ohio St.3d 74. . . . There, we . . . recognized that '[a]ny attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void.'" *Id.* at ¶3 (quoting *Beasley*, 14 Ohio St. 3d at 75). The Court held that, "[i]n accordance with our decision in *Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, . . . a sentence is void if the court fails to follow the statutory mandates to impose postrelease control." *Id*. at ¶27.

{¶10} In this case, the trial court did not disregard the notification requirement under Section 2929.19(B)(3)(e). It told Mr. Anderson at the sentencing hearing that "I'm also going to advise you that when you finish your time, . . . you will be placed on five years of Post-Release Control . . . . [a]nd if you violate the terms of Post-Release Control, they can send you back to prison for up to half the amount – actually, half of the amount that you went to prison for, 17 years, but up to five years. I think the maximum possible is five years. You could be sentenced to an additional five years if you violate the terms of Post-Release Control."

{¶11} The trial court correctly told Mr. Anderson that, if he violated post-release control, he could be sent back to prison for up to half the duration of his original sentence. Because his sentence was seventeen years, the maximum was eight-and-a-half years. The court then mistakenly told Mr. Anderson that the maximum was five years. Although the court was incorrect about the maximum, the mistake does not make Mr. Anderson's sentence void. Unlike the trial courts in *Jordan*, *Bezak*, and *Bloomer*, the trial court in this case did not ignore the notification requirements under Section 2929.19(B)(3). While the Ohio Supreme Court has written that a trial court may not disregard the notification requirement under Section 2929.19(B)(3)(e), it has not held that a mistake in notification under that subsection makes a sentence void. *State v. Bloomer*, 122 Ohio St. 3d 200, 2009-Ohio-2462, at ¶2-3. This Court declines to read *Bloomer* as requiring such a conclusion without specific guidance from the

Supreme Court. Mr. Anderson's sentence, therefore, is not void and his motion to withdraw his plea must be evaluated as a post-sentence motion.

MANIFEST INJUSTICE

{¶12} As noted previously, a presentence motion to withdraw a guilty plea should be freely and liberally granted, but a post-sentence motion should only be granted if the defendant has met his burden of establishing the existence of manifest injustice. *State v. Xie*, 62 Ohio St. 3d 521, 527 (1992); *State v. Smith*, 49 Ohio St. 2d 261, paragraph one of the syllabus (1977). At the hearing on Mr. Anderson's motion, the trial court found that he "wasn't told that he would be placed on Post-Release Control at the time of the plea." Noting that the Ohio Supreme Court has held "that you have to read him his rights or those rights both at the plea and at sentencing," the court said that it was "going to grant the motion to withdraw his plea." In its journal entry, it granted the motion without explanation.

{¶13} It is not clear from the hearing transcript or the journal entry whether the court applied the presentence standard or the correct post-sentence standard when it reviewed Mr. Anderson's motion to withdraw his plea. The court's journal entry, therefore, is vacated and this matter is remanded so that the trial court can determine whether he has met his burden of establishing the existence of manifest injustice. See *State v. Boswell*, 121 Ohio St. 3d 575, 2009-Ohio-1577, at ¶13 ("Because the trial court granted Boswell's motion [to withdraw his guilty plea] without opinion . . . we remand to the trial court to consider the motion under the [proper] standard . . . ."). The State's assignment of error is sustained.

CONCLUSION

{¶14} Because it is not clear whether the trial court reviewed Mr. Anderson's motion to withdraw plea as a post-sentence motion, this Court is unable to determine whether the court

correctly exercised its discretion. The judgment of the Summit County Common Pleas Court is vacated, and this matter is remanded for the trial court to determine whether Mr. Anderson met his burden of establishing manifest injustice.

Judgment vacated,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, J.
CONCURS, SAYING:

{¶15} I concur. While I believe it would be reasonable and logical to assume that the Supreme Court of Ohio would determine based on its precedent and prior reasoning, that

inaccuracies in the post release control notifications required pursuant to R.C. 2929.19(B)(3)(e) would render a sentence void, the Supreme Court of Ohio has not addressed this precise issue. Given the ramifications inherent in concluding that a sentence is void, I believe that extending the doctrine outside of the boundaries directly addressed by the Supreme Court would be unwise at this point.

{¶16} In 1984, in *State v. Beasley* (1984), 14 Ohio St.3d 74, the Supreme Court made the pronouncement that sentences that disregard statutory requirements are void. Id. at 75. In doing so it declared that a trial court's failure to impose a prison term when a mandatory prison term applied rendered the sentence void. Id. In 2004, the Supreme Court began its examination of void sentences in the context of post-release control sanctions. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085. The Court held that "[w]hen a trial court fails to notify an offender about postrelease control at the sentencing hearing but incorporates that notice into its journal entry imposing sentence, it fails to comply with the mandatory provisions of R.C. 2929.19(B)(3)(c) and (d), and, therefore, the sentence must be vacated and the matter remanded to the trial court for resentencing." Id. at paragraph two of the syllabus. While, the Court did not specifically state that the sentence involved in *Jordan* was void, id., the term is used in the opinion, id. at ¶¶23, 25, and later case law indicates that such was the Court's intention. See *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, at ¶5, quoting *Jordan*, at ¶23 (stating that *Jordan* held that "'[b]ecause a trial court has a statutory duty to provide notice of postrelease control at the sentencing hearing, any sentence imposed without such notification is contrary to law' and void."). In *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at syllabus, the Court held that "[w]hen a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for

that offense is void. The offender is entitled to a new sentencing hearing for that particular offense."

{¶17} The Supreme Court reaffirmed its stance that failures in notifications concerning post-release control rendered a sentence void in *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at syllabus. It stated that "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence." Id.

{¶18} Since *Simpkins*, the Supreme Court has addressed the void/voidable issue on several occasions and has continued to hold that sentences that do not include proper post-release control notifications are void. See *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at ¶10 ("It is undisputed that Boswell's sentence is void. It failed to include mandatory postrelease control, violating R.C. 2967.28. As a result, we place him in the same position that he would be in if he had never been sentenced and treat his motion to withdraw his guilty plea as a presentence motion."); *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462; *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, at ¶35. In fact, the Supreme Court went so far in *Boswell* as to provide that courts should independently, without any motion from the parties, vacate void sentences when they encounter them. *Boswell* at ¶12 ("Despite the lack of a motion for resentencing, we still must vacate the sentence and remand for a resentencing hearing in the trial court. Because the original sentence is actually considered a nullity, a court cannot ignore the sentence and instead must vacate it and order resentencing.").

{¶19} In this case, the trial court correctly advised Anderson of the actual term of post-release control. However, the trial court erroneously told him that if he violated post-release control, he would receive up to five years in prison, when in fact, he faced eight-and-one-half years. While the Supreme Court has discussed the post-release control notification requirements provided by R.C. 2929.19(B)(3)(e), which addresses the consequences for violating post-release control, see *Jordan* at ¶15, fn. 1 and *Bloomer* at ¶2, it has not specifically declared that a failure to properly notify an offender about the term of incarceration upon violating post-release control renders the sentence void. Nevertheless, given the Supreme Court's proclivity for determining that errors in post-release control notifications render a sentence void, it would be logical and reasonable to conclude that the Court would likewise conclude errors in R.C. 2929.19(B)(3)(e) notifications would also cause the sentence to be void. However, I concur in the judgment of this Court determining Anderson's sentence to not be void, as I am well aware of the enormous and often unexpected consequences of determining that a sentence is void. While the trial court clearly erred in its R.C. 2929.19(B)(3)(e) notification to Anderson, I agree that this Court should proceed with caution and to await guidance from the Ohio Supreme Court on this issue.

APPEARANCES:

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellant.

CHARLES R. QUINN, attorney at law, for appellee.