[Cite as *State v. O'Neal*, 2010-Ohio-1252.]

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

STATE OF OHIO	C.A. No. 09CA0045-M
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
WILLIAM B. O'NEAL	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellant	CASE No. 04-CR-0547

DECISION AND JOURNAL ENTRY

Dated: March 29, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} William O'Neal pleaded guilty to three counts of kidnapping with firearm specifications, two counts of felonious assault, one count of carrying a concealed weapon, and one count of illegal possession of a firearm in a liquor premises. The trial court sentenced him to 13 years in prison. This Court reversed his sentence under *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856. After the court resentenced him in June 2006, Mr. O'Neal appealed. This Court dismissed the appeal because it concluded that the court's judgment entry was not a final, appealable order because it did not comply with Rule 32(C) of the Ohio Rules of Criminal Procedure. Meanwhile, in April 2007, the trial court entered a "Nunc Pro Tunc Judgment Entry." Mr. O'Neal appealed from the nunc pro tunc entry, and this Court determined that his appeal was "now properly before this Court." *State v. O'Neal*, 9th Dist. No. 07CA0050-M, 2008-Ohio-1325, at ¶4. It affirmed Mr. O'Neal's sentence. In 2009, Mr. O'Neal moved to

invalidate his sentence, arguing that the court had not properly imposed post-release control. The trial court denied his motion. This Court reverses because the court made a mistake regarding post-release control at Mr. O'Neal's resentencing hearing and in its judgment entry.

POST-RELEASE CONTROL

{¶2} Mr. O'Neal's assignment of error is that the trial court incorrectly denied his motion to invalidate his sentence. According to Mr. O'Neal, he is entitled to a new sentencing hearing because the court incorrectly wrote in its judgment entry that post-release control was for a discretionary period of "up to a maximum of five years."

{¶3} The trial court sentenced Mr. O'Neal for kidnapping, a felony of the first degree, felonious assault, a felony of the second degree, carrying a concealed weapon, a felony of the fourth degree, and illegal possession of a firearm in a liquor premises, a felony of the fifth degree. Under Section 2967.28(B) of the Ohio Revised Code, "[e]ach sentence to a prison term for a felony of the first degree [or] . . . felony of the second degree . . . shall include a requirement that the offender be subject to a period of post-release control . . . after the offender's release from imprisonment." For a felony of the first degree, the period is five years. R.C. 2967.28(B)(1). "For a felony of the second degree that is not a felony sex offense," the period is three years. R.C. 2967.28(B)(2). Under Section 2967.28(C), "[a]ny sentence to a prison term for a felony of the third, fourth, or fifth degree . . . shall include a requirement that the offender be subject to a period of post-release control of up to three years . . . , if the parole board . . . determines that a period of post-release control is necessary for that offender."

{¶4} "If an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last, as determined by the parole board or court." R.C. 2967.28(F)(4)(c). For Mr.

O'Neal, the period of post-release control that will expire last is the one for kidnapping, which is five years because it is for a felony of the first degree. R.C. 2967.28(B)(1).

{¶5} Under Section 2929.14(F)(1), "[i]f a court imposes a prison term for a felony of the first degree, . . . it shall include in the sentence a requirement that the offender be subject to a period of post-release control after [his] release from imprisonment . . . ." In addition, under Section 2929.19(B)(3)(c), "if the sentencing court determines . . . that a prison term is necessary or required, [it] shall . . . [n]otify the offender that [he] will be supervised under section 2967.28 of the Revised Code after [he] leaves prison if [he] is being sentenced for a felony of the first degree . . . ."

{¶6} At Mr. O'Neal's May 2006 sentencing hearing, the trial court told him that "the prison authority could put you on post-release control for up to five years." In its June 2006 "Judgment Entry" and its April 2007 "Nunc Pro Tunc Judgment Entry," the court wrote "that post-release control is mandatory in this case up to a maximum of 5 years . . . ." Each time, the court mistakenly indicated that Mr. O'Neal could be subject to less than five years of post-release control instead of indicating that he will be subject to the full term of five years. See *State v. Pirovolos*, 9th Dist. No. 08CA0087-M, 2009-Ohio-4422, at ¶3. His sentence, therefore, does not conform to the statutory requirements for post-release control under Sections 2919.14(F)(1), 2919.19(B)(3)(c), and 2967.28(B)(1).

{¶7} In *State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197, the Ohio Supreme Court held 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 . . . ." *Id.* at syllabus. The Supreme Court reasoned that "no court has the authority to substitute a different sentence for that which is required by law." *Id.* at ¶20. It concluded that "a

sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void [and] must be vacated." *Id*. at ¶22.

{¶8} In *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434, the Ohio Supreme Court reconsidered *Simpkins* and its other post-release control opinions to address the effect that Section 2929.19.1 had on those decisions. The effective date of Section 2929.19.1 was July 11, 2006. The Supreme Court held that, "[f]or criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall conduct a de novo sentencing hearing in accordance with [*Simpkins* and its other post-release control decisions]." *Id*. at paragraph one of the syllabus. "For criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191." *Id*. at paragraph two of the syllabus. It concluded that, because the trial court incorrectly imposed post-release control and Mr. Singleton was sentenced before July 11, 2006, he was entitled to a de novo sentencing hearing. *Id*. at ¶36.

{¶9} The trial court did not properly impose post-release control when it resentenced Mr. O'Neal. Under *Singleton*, the remedy is dependent on whether the sentence was imposed before or after July 11, 2006. *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434, at ¶1. The trial court entered its "Judgment Entry" on June 14, 2006. It entered its "Nunc Pro Tunc Judgment Entry," however, on April 4, 2007.

{¶10} "A *nunc pro tunc* order may be issued by a trial court, as an exercise of its inherent power, to make its record speak the truth." *State v. Greulich*, 61 Ohio App. 3d 22, 24 (1988). "It is used to record that which the trial court did, but which has not been recorded." *Id*. "[It is] limited in proper use to reflecting what the court actually decided, not what the court might or should have decided." *State ex rel. Cruzado v. Zaleski*, 111 Ohio St. 3d 353, 2006-

Ohio-5795, at ¶19 (quoting *State ex rel. Mayer v. Henson*, 97 Ohio St. 3d 276, 2002-Ohio-6323, at ¶14). "It can be used to supply information which existed but was not recorded, to correct mathematical calculations, and to correct typographical or clerical errors." *Greulich*, 61 Ohio App. 3d at 24.

{¶11} It is not necessary to determine whether the trial court's "Nunc Pro Tunc Judgment Entry" was correctly labeled as a nunc pro tunc entry. After the trial court issued its "Nunc Pro Tunc Judgment Entry," this Court considered the notice of appeal that Mr. O'Neal filed from it and determined that his appeal was "now properly before this Court." *State v. O'Neal*, 9th Dist. No. 07CA0050-M, 2008-Ohio-1325, at ¶4. The doctrine of law of the case "provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan*, 11 Ohio St. 3d 1, 3 (1984). It "precludes a litigant from attempting to rely on arguments at a retrial [that] were fully pursued, or available to be pursued, in a first appeal. New arguments are subject to issue preclusion, and are barred." *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St. 3d 402, 404-05 (1996).

{¶12} After this Court issued its decision affirming the trial court's "Nunc Pro Tunc Judgment Entry," the parties could have moved this Court to reconsider it on the basis that the trial court's judgment entry was not a proper nunc pro tunc order. They also could have appealed that issue to the Ohio Supreme Court. Because they did not, this Court must assume, under the doctrine of law of the case, that the "Nunc Pro Tunc Judgment Entry" was a proper nunc pro tunc entry.

{¶13} In general, "[a] nunc pro tunc entry relates back to the date of the journal entry it corrects." *State v. Battle*, 9th Dist. No. 23404, 2007-Ohio-2475, at ¶6; see *In re Petition for*

Inquiry into Certain Practices, 150 Ohio St. 393, paragraph two of the syllabus (1948) (noting that a nunc pro tunc entry is generally "given a retrospective application as between the parties thereto."). "It is an order issued now, which has the same legal force and effect as if it had been issued at an earlier time, when it ought to have been issued." *State v. Greulich*, 61 Ohio App. 3d 22, 24 (1988). Accordingly, even though the trial court issued its "Nunc Pro Tunc Judgment Entry" in April 2007, it must be treated as if it had been issued at the time the court entered its June 2006 judgment entry.

{¶14} Because the "Nunc Pro Tunc Judgment Entry" is treated as if it was entered on June 14, 2006, it was issued before the effective date of Section 2929.19.1. Because it "does not conform to [the] statutory mandates requiring the imposition of postrelease control," it is void and must be vacated. *State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197, ¶22. Under *Singleton*, Mr. O'Neal is entitled to a de novo sentencing hearing. *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434, at paragraph one of the syllabus. Mr. O'Neal's assignment of error is sustained.

CONCLUSION

{¶15} The trial court incorrectly denied Mr. O'Neal's motion to invalidate his sentence. The judgment of the Medina County Common Pleas Court is reversed, and this cause is remanded for further proceedings consistent with this opinion.

Judgment reversed,
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 Medina, 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

BELFANCE, J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶16} Regardless of whether the nunc pro tunc entry relates back to June 2006, I respectfully dissent as I am unwilling to extend this Court's reasoning and hold that O'Neal's sentence is void pursuant R.C. 2967.28(B)(1) which requires that an offender convicted of a first degree felony is subject to a mandatory five-year term of post-release control.

APPEARANCES:

JOSEPH F. SALZGEBER, attorney at law, for appellant.

DEAN HOLMAN, prosecuting attorney, and RUSSELL HOPKINS, assistant prosecuting attorney, for appellee.