

STATE OF OHIO                     )  
  )ss:  
COUNTY OF SUMMIT            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No.       24680

Appellee

v.

GARLAND V. PHELPS

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     CR 99 01 0195

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 10, 2010

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BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant Garland Phelps appeals several rulings of the Summit County Court of Common Pleas, including the entry which denied his motion to withdraw his guilty plea. For reasons set forth below, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I.

{¶2} In 1999, Phelps pled guilty to multiple felony charges. In 2000, the trial court sentenced Phelps to a total term of fifteen years in prison. Phelps' sentencing entry inadequately notified him of post-release control, rendering his sentence void. The trial court recognized this and in April 2008 ordered that Phelps be resentenced. At the same time the trial court denied Phelps' motion to vacate his guilty plea. Subsequently, Phelps' filed additional motions to withdraw his guilty plea. Those motions were denied on February 13, 2009, and Phelps was resentenced on February 24, 2009.

{¶3} Phelps has appealed, raising three assignments of error for our review.

## II.

### ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED IN NOT PERMITTING THE APPELLANT TO WITHDRAW HIS GUILTY PLEA BECAUSE IT FAILED TO ABIDE BY ITS PROMISE TO SENTENCE THE APPELLANT TO TEN YEARS IN PRISON.”

### ASSIGNMENT OF ERROR II

“THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANT’S MOTION TO WITHDRAW HIS GUILTY PLEA [BECAUSE] \* \* \* APPELLANT WAS NOT PROPERLY INFORMED ABOUT POST RELEASE CONTROL \* \* \* [AND] APPELLANT WAS NOT INFORMED THAT [SOME OF HIS CONVICTIONS] REQUIRE MANDATORY TERMS OF INCARCERATION [OR THAT A PLEA TO CERTAIN CHARGES WOULD REQUIRE THE IMPOSITION OF CONSECUTIVE SENTENCES] \* \* \*.”

{¶4} Phelps argues in his first and second assignments of error that the trial court erred in denying his motion to withdraw his guilty plea. We agree that the trial court erred, albeit for reasons other than those articulated by Phelps.

{¶5} There is no dispute that Phelps’ initial 2000 sentence was void. When the trial court denied Phelps’ motion to withdraw his plea, Phelps had not yet been resentenced. The Supreme Court of Ohio has held that “[a] motion to withdraw a plea of guilty or no contest 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. Thus, the trial court was required to consider Phelps’ motion to withdraw his guilty plea as a presentence motion. Because it did not do so, we sustain Phelps’ assignments of error and remand the matter so that the trial court can consider his motion under the proper standard.

## III.

## ASSIGNMENT OF ERROR III

“THE TRIAL COURT ERRED IN RE-SENTENCING THE APPELLANT TO POST RELEASE CONTROL SANCTIONS BECAUSE MR. PHELPS WAS NOT NOTIFIED THAT HE WOULD BE SUBJECT TO SAID SANCTIONS PRIOR TO HIS PLEA. \* \* \* .”

{¶6} In Phelps’ third assignment of error he argues that when the trial court re-sentenced him in February 2009, it improperly ordered him subject to R.C. 2929.141(B). Phelps argues that because that section was not part of the Ohio Revised Code when Phelps pled guilty and was originally sentenced, applying that section to him now violates his due process rights and the Ex Post Facto Clauses of the Ohio and United States Constitutions. We disagree.

{¶7} In the trial court’s re-sentencing entry it states that “[i]f [Phelps] commits a new felony while subject to post-release control, [Phelps] [m]ay be sent to prison for the remaining post-release control period or Twelve (12) months, whichever is greater.” The trial court informed Phelps of the same at his re-sentencing hearing. The language at issue corresponds to portions of R.C. 2929.141(B)(1). The version of R.C. 2929.141(B)(1) in effect at the time of Phelps’ resentencing provided that:

“A person on release who by committing a felony violates \* \* \* any post-release control sanction \* \* \* may be prosecuted for the new felony. Upon the person’s conviction of or plea of guilty to the new felony, the court shall impose sentence for the new felony, the court may terminate the term of post-release control if the person is a releasee, and the court may do either or both of the following for a person who is either a releasee or parolee regardless of whether the sentencing court or another court of this state imposed the original prison term for which the person is on parole or is serving a term of post-release control:

“(1) In addition to any prison term for the new felony, impose a prison term for the violation. *If the person is a releasee, the maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the releasee has spent under post-release control for the earlier felony.*” (Emphasis added.)

R.C. 2929.141(B)(1) became effective July 8, 2002. However, R.C. 2929.141(B)(1) is analogous to former R.C. 2967.28(F)(4) which was repealed on July 8, 2002. *State v. Hill*, 5th Dist. No. CT2007-0042, 2008-Ohio-2867, at ¶10, fn. 1; *State v. Armpriester*, 2nd Dist. No. 21930, 2008-Ohio-401, at ¶13. Former R.C. 2967.28(F)(4), which was in effect at the time Phelps pled guilty and at the time he was originally sentenced, stated that

“[a] releasee who has violated any post-release control sanction \* \* \* by committing a felony may be prosecuted for the new felony, and upon conviction, the court shall impose sentence for the new felony. In addition to the sentence imposed for the new felony, the court may impose a prison term for the violation, and the term imposed for the violation shall be reduced by the prison term that is administratively imposed by the parole board or adult parole authority as a post-release control sanction. *The maximum prison term for the violation shall be either the maximum period of post-release control for the earlier felony under division (B) or (C) of this section minus any time the releasee has spent under post-release control for the earlier felony or twelve months, whichever is greater.*” (Emphasis added.)

As the language of former R.C. 2967.28(F)(4) mirrors the language of the version of R.C. 2929.141(B)(1) in effect at the time of Phelps’ re-sentencing, we cannot conclude that the trial court’s statements were improper or in violation of Phelps’ constitutional rights. See *Hill* at ¶21.

#### IV.

{¶8} In light of the foregoing, we sustain Phelps’ first and second assignments of error, overrule his third assignment of error, and remand this case for proceedings consistent with this opinion.

Judgment affirmed in part,  
reversed in part,  
and cause remanded.

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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 both parties equally.

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EVE V. BELFANCE  
FOR THE COURT

CARR, J.  
WHITMORE, J.  
CONCUR

APPEARANCES:

JANA DELOACH, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.