

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23776
v.	:	T.C. NO. 03 CR 4645
CLARK A. HUDSON	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 5th day of November, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Clark Hudson, filed December 11, 2009. On December 30, 2003, Hudson was indicted on one count of attempted rape, in violation of R.C. 2907.02(A)(2)/2923.02, a felony of the second degree.

Following a jury trial, he was found guilty and sentenced to a term of six years in prison. The trial court designated Hudson a sexually oriented offender, a designation which required Hudson to register with the sheriff for a period of ten years. It is not disputed that at sentencing, the trial court did not inform Hudson that he was subject to a mandatory period of post-release control. The Termination Entry, dated June 4, 2004, provides that the court “advised the defendant that following the defendant’s release from prison, the defendant will/may serve a period of post-release control under the supervision of the parole board.”

{¶ 2} On December 2, 2009, the trial court issued an Amended Termination Entry, following a new sentencing hearing, at which Hudson was advised that he was subject to a mandatory five-year period of post-release control upon his release and to additional sanctions should he violate the terms of post-release control. At the hearing, Hudson indicated that he had received notice from the Attorney General’s office that he had been reclassified as a Tier II sex offender, pursuant to the reclassification scheme enacted by Senate Bill 10. The court re-sentenced Hudson to a term of six years and designated him a Tier II sex offender. On December 3, 2009, the trial court filed an Explanation of Duties to Register as a Sex Offender (“Explanation of Duties”), which provided that Hudson was a Tier II sex offender subject to registration requirements for 25 years.

{¶ 3} On December 4, 2009, the trial court issued another Amended Termination Entry, following another sentencing hearing, at which Hudson was again sentenced to a six year term and redesignated as a Tier III sex offender with attendant lifetime registration requirements. Hudson was also notified regarding post-release control, and the Amended Termination Entry provides, “as part of this sentence, the defendant will be supervised by

the Parole Board for a period of Five years Post-Release Control after the defendant's release from imprisonment." The Amended Termination Entry also sets forth the consequences for violating any post-release control sanctions. At the hearing, Hudson argued that the trial court lacked jurisdiction to reclassify him as a Tier III offender. On December 8, 2009, the trial court filed an Explanation of Duties consistent with the resentencing hearing.

{¶ 4} Hudson asserts two assignments of error. His first assignment of error is as follows:

{¶ 5} "APPELLANT'S RE-SENTENCING PROCEEDINGS ON DECEMBER 2, 2009 AND DECEMBER 3, 2009 ARE VOID, AS THE TRIAL COURT DID NOT UNDERGO A FULL DE NOVO HEARING WHEN IMPLEMENTING TERMS OF POSTRELEASE CONTROL."

{¶ 6} While Hudson refers to both resentencing hearings in his assigned error, his Notice of Appeal indicates that he appeals from the judgment of December 4, 2009, which accordingly is the focus of our analysis.

{¶ 7} Each sentence to a prison term for a felony sex offense "shall include a requirement that the offender be subject to a term of post-release control imposed by the parole board after the offender's release from imprisonment." R.C. 2967.28(B). A defendant who is sentenced to a term of imprisonment for a felony sex offense is subject upon his release to a mandatory period of post-release control of five years. R.C. 2967.28(B)(1).

{¶ 8} R.C. 2929.19(B)(3)(c) provides that when a defendant is sentenced to a term of imprisonment, the sentencing court must "[n]otify the offender that the offender will be

supervised under section 2967.28 of the Revised Code after the offender leaves prison * * * .” Any sentence of imprisonment imposed without the statutorily-required notification is void. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, applying *State v. Beasley* (1984), 14 Ohio St.3d 74. A defendant who demonstrates that his sentence is void is entitled to a de novo sentencing hearing for the trial court to correct a sentence that omitted notice of post-release control. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250.

{¶ 9} Crim.R. 32(A) governs the imposition of sentence and provides that the court shall: “(1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he * * * wishes to make a statement in his or her own behalf or present any information in mitigation of punishment; (2) Afford the prosecuting attorney an opportunity to speak; (3) Afford the victim the rights provided by law; (4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate.”

{¶ 10} Hudson directs our attention initially to *State v. Winston*, 182 Ohio App.3d 306, 2009-Ohio-2171, ¶ 12, in which the trial court at resentencing informed Winston that he was subject to a mandatory term of post-release control following his release from prison and then reimposed the identical sentence imposed by the original sentencing court, without affording Winston “a full de novo sentencing hearing as if the original sentence had never been imposed.”

{¶ 11} Our review of the proceedings that occurred on December 3, 2009, reveals that Hudson, unlike Winston, received the de novo hearing to which he was entitled to correct his sentence. Defense counsel spoke on Hudson’s behalf, the court addressed

Hudson directly and gave him an opportunity to speak, and the prosecutor addressed the court. The court considered the purposes and principles of sentencing and the seriousness and recidivism factors prior to imposing sentence. As the State asserts, pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, trial courts have full discretion to impose a prison sentence within the statutory range without making statutory findings. *Foster*, ¶ 100. Finally, Hudson was properly advised that he was subject to post-release control for five years and of the consequences of violating post-release control.

{¶ 12} We note that Hudson also asserts in the body of his first assigned error that the trial court failed to inform him of his appellate rights, as required by Civ.R.32(B)(2). While the trial court did neglect to so advise Hudson, he has shown no prejudice. Hudson was appointed appellate counsel, he was allowed to proceed in forma pauperis, the transcript of proceedings was prepared at the State's expense, and he timely filed his appeal.

{¶ 13} There being no merit to Hudson's first assigned error, it is overruled.

{¶ 14} Hudson's second assigned error is as follows:

{¶ 15} "OHIO REVISED CODE § 2950, AS AMENDED BY SENATE BILL 10, CANNOT UNDER THE OHIO CONSTITUTION BE APPLIED RETROACTIVELY TO THE APPELLANT."

{¶ 16} Hudson argues that retroactive application of S.B. 10 violates Article II, Section 28, of the Ohio Constitution. We have previously rejected this argument. *State v. Haines*, Montgomery App. No. 23222, 2010-Ohio-1123, ¶ 18.

{¶ 17} Regarding Hudson's designation as a Tier III sex offender, we note our decision in *State v. Gibson*, Champaign App. No. 2009 CA 47, 2010-Ohio-3447, in which

we affirmed the trial court's judgment denying Gibson's motion for a declaration that his sexual predator classification was void and asking the court to enjoin enforcement thereof. Gibson asserted that the trial court did not advise him about post-release control at sentencing and did not incorporate the notice into his sentencing entry, "voiding the whole sentence along with post-release control, sexual predator registration, and the sentence itself." *Id.*, at ¶ 15. We determined that we "need not address * * * whether the trial court properly included notice of post-release control under R.C. 2929.19(B)(3)(c) in Gibson's judgment entry because, regardless of the outcome of that issue, we agree[d] with the trial court that Gibson's sexual predator status would not be affected even if Gibson's sentence were void." *Id.*, at ¶ 21. We noted that a "defendant's sex offender classification is not a 'final judgment of conviction' and is not a part of the criminal sanctions imposed upon a convicted defendant under the sentencing statutes. * * * Although Gibson was informed of his sexual offender classification at sentencing and his status was included in the court's judgment entry, his classification was a separate and distinct proceeding, which is not affected by the validity of his sentencing." *Id.*, at ¶ 22. In so ruling, we relied upon *State v. Williams*, 177 Ohio App.3d 865, 2008-Ohio-3586, and *State v. Poissant*, Fairfield App. No. 08 CA 7, 2009-Ohio-4235.

{¶ 18} In *Poissant*, the Fifth District determined that the trial court erred in reclassifying appellant as a Tier III offender where his sex offender classification was "intact when he appeared before the court for resentencing" based upon the trial court's failure to advise him of post-release control. The court further noted that, "pursuant to R.C. 2950.032(A)(1)(a), the determination of appellant's new classification under the [Adam

Walsh Act] is the responsibility of the Attorney General * * * .”

{¶ 19} We note that since *Poissant* was decided, the Ohio Supreme Court determined that “R.C. 2950.031 and 2950.032, which require the attorney general to reclassify sex offenders who have already been classified by court order under former law, impermissibly instruct the executive branch to review past decisions of the judicial branch and thereby violate the separation-of-powers doctrine.” *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶1 of the syllabus. The Supreme Court further noted that “R.C. 2950.031 and 2950.032 violate the separation-of-powers doctrine by requiring the opening of final judgments.” *Id.*, at ¶ 67. The Supreme court severed R.C. 2950.031 and 2950.032 from the Adam Walsh Act and held that those sections “may not be applied to offenders previously adjudicated by judges * * * and the classifications and community-notification and registration orders imposed previously by judges are reinstated.” *Id.*, ¶ 66.

{¶ 20} The trial court lacked jurisdiction at resentencing to classify Hudson as a Tier III sex offender, and that designation is vacated. Hudson’s original designation as a sexually oriented offender is reinstated.

{¶ 21} The judgment of the trial court is affirmed in part and reversed in part consistent with this opinion.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

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