

trial court violated his constitutional rights by amending his sexual offender designation. He further contends that the amended sentence imposing post-release control is void.

{¶ 2} We conclude that the trial court lacked jurisdiction at the re-sentencing to classify Stephens as a Tier III sex offender. We further conclude that the trial court's imposition of post-release control is valid.

{¶ 3} The order of the trial court from which this appeal is taken is Affirmed in part, and Reversed in part. The Tier III sexual offender designation is vacated and Stephens's original designation as a sexually oriented offender is reinstated. The imposition of post-release control is affirmed.

I

{¶ 4} In 1999, Stephens was convicted of Rape, Kidnapping and Intimidation of Crime Victim/Witness. He was sentenced to a prison term of eleven years. Stephens was classified as a sexually oriented offender, but was not subjected to community notification provisions. It is undisputed that at sentencing, the trial court did not inform Stephens that he was subject to a mandatory period of post-release control. The Termination Entry stated 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."

{¶ 5} In 2010, with approximately four months left to serve on his sentence, Stephens was brought before the trial court for a new sentencing hearing. Of relevance hereto, Stephens was classified as a Tier III sex offender, with a lifetime requirement of verifying his residency every ninety days. Stephens was also notified that he must serve a period of five years post-release control.

{¶ 6} Stephens appeals from the order re-sentencing him, and re-classifying him as a Tier III offender.

II

{¶ 7} Stephen’s First and Second Assignments of Error state as follows:

{¶ 8} “THE RETROACTIVE APPLICATION OF SENATE BILL 10 VIOLATES THE EX POST FACTO, DUE PROCESS, AND DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES CONSTITUTION AND RETROACTIVE CLAUSE OF SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION, FIFTH, EIGHT, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; AND SECTIONS 10 AND 28, ARTICLES I AND II, RESPECTIVELY, OF THE OHIO CONSTITUTION.

{¶ 9} “THE APPLICATION OF SENATE BILL 10 VIOLATES THE CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS BY ALLOWING THE OHIO LEGISLATURE TO OVERRULE A COURT’S FINAL JUDGMENT.”

{¶ 10} Stephens contends that the trial court violated his constitutional rights by changing his classification from a sexually-oriented offender to a Tier III offender. Specifically he claims that the reclassification and reporting requirements of the Ohio sex offender classification system are unconstitutional.

{¶ 11} All of the constitutional claims raised by Stephens in his First Assignment of Error have been previously rejected. See, *State v. Desbiens*, Montgomery App. No. 22489, 2008-Ohio-3375; *State v. Barker*, Montgomery App. No. 22963, 2009- Ohio-2774. Subsequently, in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶ 1 of the syllabus, 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.” 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.

{¶ 12} In *State v. Fischer*, ___ Ohio St.3d ___, 2010-Ohio-6238, the Supreme Court of Ohio has held that a sentence that omits a provision for post-release control, or that misstates a provision for post-release control, is partially void; that is, the part of the sentence that omits or misstates post-release control is void, but the remaining parts of the sentence are not void, and retain their res judicata effect. “Therefore, we hold that the new sentencing hearing to which an offender is entitled under [*State v.*] *Bezak*[, 114 Ohio St.3d 94, 2007-Ohio-3250,] is limited to proper imposition of postrelease control.” *State v. Fischer*, *supra*, ¶ 29.

{¶ 13} Under *State v. Fischer*, *supra*, the trial court was free to correct its previously incorrect handling of post-release control, but was not free to re-visit other aspects of its sentencing order. Perforce, then, it was not free to re-visit its previous sexual offender classification, which was not even part of the sentencing order, proper.

{¶ 14} Stephens’s First Assignment of Error is overruled, and his Second Assignment

of Error is sustained. Since the trial court lacked jurisdiction at re-sentencing to re-classify Stephens as a Tier III sex offender, that designation is vacated and Stephens's original designation as a sexually oriented offender is reinstated.

III

{¶ 15} Stephen's Third Assignment of Error is as follows:

{¶ 16} "THE RETROACTIVE RE-SENTENCING OF APPELLANT TO ADD A PERIOD OF FIVE YEARS POST RELEASE CONTROL VIOLATES THE EX POST FACTO, DUE PROCESS, AND DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES CONSTITUTION AND RETROACTIVE CLAUSE OF SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION, FIFTH EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; SECTION 10, ARTICLE I OF THE UNITED STATES CONSTITUTION; AND SECTIONS 10 AND 28, ARTICLES I AND II, RESPECTIVELY, OF THE OHIO CONSTITUTION."

{¶ 17} Stephens contends that the trial court lacked jurisdiction to amend his sentence because he had "virtually completed" his sentence. Thus, he contends that the post-release control provision in the amended termination entry has "no force and effect."

{¶ 18} We considered this issue in *State v. Hudson*, Montgomery App. No. 23776, 2010-Ohio-5386, wherein we stated:

{¶ 19} "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).

{¶ 20} “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, 817 N.E.2d 864, 2004-Ohio-6085, applying *State v. Beasley* (1984), 14 Ohio St.3d 74, 471 N.E.2d 774. 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, 868 N.E.2d 961, 2007-Ohio-3250.

{¶ 21} “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.’ ” *Hudson* at ¶ 7 - 9.

{¶ 22} Since *State v. Hudson*, supra, was decided, the Supreme Court of Ohio issued its opinion in *State v. Fischer*, supra, amending its holding in *State v. Bezak*, supra. Under *State v. Fischer*, the trial court does not have the authority to re-visit the underlying sentence, but may, and should, correct the defective provision for post-release control.

{¶ 23} In the case before us, the trial court erroneously re-visited the entirety of the

sentence (which is understandable, since *State v. Bezak*, supra, so required). But that error is harmless, since the trial court re-imposed the identical sentence (other than the post-release control provision) that it had originally imposed.

{¶ 24} The Third Assignment of Error is overruled.

IV

{¶ 25} That part of the order from which this appeal is taken that re-classified Stephens as a Tier III sex offender is Reversed, and his original sexual offender classification is reinstated. That part of the order from which this appeal is taken that provides for a term of post-release control is Affirmed.

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GRADY, P.J., and FROELICH, J., concur.

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