

[Cite as *State v. Gulley*, 2010-Ohio-3590.]

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	
-vs-	:	
	:	Case No. 2010-CA-00003
JESSE J. GULLEY	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Stark County Court of Common Pleas, Case No. 2005-CR-0745

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: August 2, 2010

APPEARANCES:

For Plaintiff-Appellee

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*Gwin, P.J.*

{¶1} Appellant Jesse J. Gulley appeals the December 9, 2009 Judgment of the Stark County Common Pleas Court denying his Motion for Resentencing.

#### STATEMENT OF THE FACTS AND CASE

{¶2} A jury found appellant guilty of possession of cocaine pursuant to R.C. 2925.11, a felony of the first degree. Subsequently, the trial court sentenced appellant to nine years in prison and a \$20,000 fine. For a complete statement of the facts underlying appellant's conviction, see *State v. Gulley*, Stark App. No. 2006CA00114, 2008-Ohio-887.

{¶3} Appellant's motion for leave to file a delayed appeal was granted, and this Court affirmed his conviction. *State v. Gulley*, Stark App. No. 2006 CA 00114, 2008-Ohio-887, 2008 WL 570442, motion for delayed appeal denied, 120 Ohio St.3d 1451, 2008-Ohio-6813, 898 N.E.2d 967.

{¶4} On December 3, 2009, appellant filed a motion with the trial court asking for a new sentencing hearing under the line of cases emanating from the Ohio Supreme Court relating to post release control. See e.g., *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, syllabus.

{¶5} By Judgment Entry filed December 9, 2009 the trial court overruled appellant's motion.

{¶6} Appellant has timely appealed raising as his sole assignment of error:

{¶7} "I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO BE RE-SENTENCED PURSUANT TO [SIC.] 2967.28."

## I.

{¶8} In his sole assignment of error, appellant argues that the trial court erred in denying his motion for re-sentencing. We agree.

{¶9} Upon review of the record in the case sub judice, we find that the sentencing judgment entry did not include the imposition of post-release control and further the trial court failed to notify appellant as to post-release control at the sentencing hearing.

{¶10} R.C. 2929.14(F) (1) provides that if a court imposes a prison term for a felony, the sentence shall include a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment. R.C. 2929.19(B) (3) requires that the sentencing court notify the offender that the offender will be supervised under R.C. 2967.28 after the offender leaves prison. The Supreme Court of Ohio has interpreted these provisions as requiring a trial court to give notice of post-release control both at the sentencing hearing and by incorporating it into the sentencing entry. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraph one of the syllabus. The trial court must do so regardless of whether the term of post-release control is mandatory or discretionary. *Id.* at paragraph two of the syllabus; *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, ¶ 18.

{¶11} A sentence that fails to notify the offender that he or she is subject to post-release control is wholly unauthorized and void. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961. "Because a sentence that does not conform to statutory mandates requiring the imposition of post-release control is a nullity and void,

it must be vacated. The effect of vacating the sentence places the parties in the same position as they were had there been no sentence" *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568 (decided March 20, 2008), Bezak, supra at paragraph 13 citing, *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267, 227 N.E.2d 223.

{¶12} In the case at bar, the trial court originally sentenced appellant on March 9, 2006 before the effective date of R.C. 2929.191.

{¶13} “[W]ith R.C. 2929.191, the General Assembly has now provided a statutory remedy to correct a failure to properly impose post release control. Effective July 11, 2006, R.C. 2929.191 establishes a procedure to remedy a sentence that fails to properly impose a term of post-release control. It applies to offenders who have not yet been released from prison and who fall into at least one of three categories: those who did not receive notice at the sentencing hearing that they would be subject to post-release control, those who did not receive notice that the parole board could impose a prison term for a violation of post-release control, or those who did not have both of these statutorily mandated notices incorporated into their sentencing entries. R.C. 2929.191(A) and (B). For those offenders, R.C. 2929.191 provides that trial courts may, after conducting a hearing with notice to the offender, the prosecuting attorney, and the Department of Rehabilitation and Correction, correct an original judgment of conviction by placing on the journal of the court a nunc pro tunc entry that includes a statement that the offender will be supervised under R.C. 2967.28 after the offender leaves prison and that the parole board may impose a prison term of up to one-half of the stated

prison term originally imposed if the offender violates post release control.” *State v. Singleton*, 124 Ohio St.3d 173, 179, 920 N.E.2d 958, 963, 2009-Ohio-6434 at ¶ 23.

{¶14} For criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose post-release control, trial courts shall conduct a *de novo* sentencing hearing in accordance with decisions of the Supreme Court of Ohio. *State v. Singleton*, *supra* at paragraph 1 of the syllabus.

{¶15} Res Judicata does not act to bar a trial court from correcting the error. *State v. Simpkins*, *supra*, citing *State v. Ramey*, Franklin App. No. 06AP-245, 2006-Ohio-6429, at paragraph 12; See also, *State v. Barnes*, Portage App. No.2006-P-0089, 2007-Ohio-3362 at paragraphs 49-51; *State v. Rodriguez* (1989), 65 Ohio App.3d 151, 154, 583 N.E.2d 347. Furthermore, re-sentencing a defendant to add a mandatory period of post release control that was not originally included in the sentence does not violate due process. *State v. Simpkins*, *supra* at paragraph 20 of syllabus.

{¶16} Here, the record establishes that the trial court failed to properly impose post-release control at appellant's original sentencing hearing, which occurred prior to July 11, 2006. For the reasons stated above, R.C. 2929.191 does not apply to appellant's sentence. Therefore, the Ohio Supreme Court's case law describes the procedure to be followed to correct this sentence.

{¶17} Accordingly, appellant's sole assignment of error is sustained.

{¶18} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby reversed and this case is remanded to the trial court for a *de novo* sentencing hearing consistent with the law and this opinion.

By Gwin, J.,

Edwards, P.J., and

Hoffman, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. WILLIAM B. HOFFMAN

