

[Cite as *State v. Brown*, 2014-Ohio-5224.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 14 MA 6
PLAINTIFF-APPELLEE,)	
)	
VS.)	OPINION
)	
O'KEEFE BROWN,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 11CR1282.

JUDGMENT: Reversed and Remanded.

APPEARANCES:

For Plaintiff-Appellee:

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Prosecuting Attorney
Attorney Ralph Rivera
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For Defendant-Appellant:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: November 7, 2014

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VUKOVICH, J.

{¶1} Defendant-appellant O’Keefe Brown appeals after pleading guilty and being sentenced in the Mahoning County Common Pleas Court. The trial court correctly imposed three years of post-release control at the sentencing hearing, but then erroneously imposed five years of post-release control in the sentencing entry. The trial court also failed to orally advise appellant at the sentencing hearing of the consequences of violating post-release control as required by R.C. 2929.19(B)(2)(e). The state has filed a confession of judgment in this appeal. Therefore, the judgment of the trial court regarding the imposition of post-release control is hereby reversed, and the case is remanded for a post-release control imposition hearing.

STATEMENT OF THE CASE

{¶2} Appellant was indicted for one count of robbery in violation of R.C. 2911.02(A)(3), a third-degree felony which entails using or threatening the immediate use of violence against another. This count carried a specification under R.C. 2941.142(A), alleging that appellant committed the robbery while participating in a criminal gang. He was also indicted for one count of participation in a criminal gang in violation of R.C. 2923.42(A), a second-degree felony, for actively participating in a criminal gang from 2010 through 2012.

{¶3} Appellant pled guilty as charged on October 24, 2013. At the plea hearing, the court informed appellant that he will be subject to a mandatory term of three years of post-release control and advised him of the consequences of violating post-release control. (Plea Tr. at 7-8). The written plea made these advisements as well. (Written Plea at 5).

{¶4} Sentencing proceeded at a January 7, 2014 hearing. The court sentenced appellant to four years on the count of participation in a criminal gang, thirty-six months on the robbery count, and two years on the specification, all to run concurrent. At the sentencing hearing, the court imposed three years of mandatory post-release control and did not make any statements about the consequences of violating post-release control. (Tr. 10).

{¶15} In the January 15, 2014 sentencing entry, however, the court imposed *five* years of mandatory post-release control. And, although there was no advisement on the record at sentencing, the entry stated, “Defendant was orally advised of and provided with written notification of the possible post-release control sanctions for violation of post-release control, which notice is attached hereto and made a part hereof.” A timely notice of appeal was filed.

ASSIGNMENTS OF ERROR & ANALYSIS

{¶16} Appellant sets forth the following two assignments of error:

{¶17} “THE TRIAL COURT’S SENTENCING ENTRY FILED JANUARY 15, 2014 FAILS TO COMPLY WITH THE REQUIREMENTS OF O.R.C. §§2929.19 AND 2967.28 THEREBY REQUIRING A RE-SENTENCING HEARING PURSUANT TO O.R.C. §2929.191.”

{¶18} “THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO NOTIFY THE APPELLANT AT SENTENCING OF THE POSTRELEASE CONDITIONS PURSUANT TO O.R.C. §2929.19(B)(2)(e).”

{¶19} Only a first-degree felony and a felony sex offense are subject to five years of post-release control. See R.C. 2967.28(B)(1). A second degree felony (that is not a felony sex offense) and a third degree felony of violence (that is not a felony sex offense) are subject to a mandatory term of three years of post-release control. R.C. 2967.28(B)(2),(3). *Compare* R.C. 2967.28(C) (for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3), the term can be “up to three years”).

{¶110} The trial court thus correctly imposed three years of mandatory post-release control at the sentencing hearing. As the sentencing entry improperly purports to impose five years of post-release control, remand is required. Appellant urges that remand for a nunc pro tunc entry with instructions to enter the actual sentence imposed at the hearing would not be warranted as the matter is substantial and more than clerical. This contention need not be addressed in this case as we are remanding for a post-release control hearing due to the other issue presented.

{¶11} As appellant points out, the trial court failed to comply with R.C. 2929.19(B)(2)(e). Pursuant to that statute, if the sentencing court determines *at the sentencing hearing* that a prison term is necessary or required, the court shall notify the offender that if the offender violates any post-release control imposed, the parole board may impose a prison term of up to one-half of the stated prison term originally imposed upon the offender. R.C. 2929.19(B)(2)(e).

{¶12} This notification must be done at the sentencing hearing (and also placed in the sentencing entry). *State v. Mikolaj*, 7th Dist. No. 13MA152, 2014-Ohio-4007, citing *State v. Williams*, 7th Dist. No. 11MA31, 2012-Ohio-6277, ¶ 65 and *State v. Whitted*, 7th Dist. No. 11MA25, 2012-Ohio-1695, ¶ 16. The Supreme Court has stated that the sentencing court must provide statutorily-compliant notification to the defendant regarding post-release control at the time of sentencing, i.e. at the hearing, including a notification of the consequences for a violation. *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 962 N.E.2d 718, ¶ 18-20.

{¶13} A written notice incorporated into and attached to a sentencing entry does not provide evidence that a defendant was orally advised at the sentencing hearing as required by R.C. 2929.19(B)(2)(e) where the sentencing transcript contains no reference to such an oral advisement. *Mikolaj*, 7th Dist. No. 13MA152 at ¶ 17-26. See also *State v. Peck*, 7th Dist. No. 12MA205, 2013-Ohio-5526, ¶ 9 (“To avoid future errors of this sort, the trial court should discontinue its use of its postrelease control notice form as it appears to be the sole basis used to show compliance with the statutory notice requirements.”). The state confesses judgment, citing *Mikolaj*.

{¶14} Where the sentencing court fails to properly notify the defendant at the sentencing hearing of the consequences of a violation, the remedy is different than where the court did in fact give proper notification at the hearing but then clerically failed to restate that notice in the entry. *Id.* at ¶ 21 (nunc pro tunc entry can be used to reflect what actually took place where notification was properly given at sentencing hearing). To correct the lack of statutorily-required notice of post-release control items at the sentencing hearing, the court is to conduct a limited post-release control

hearing under R.C. 2919.191(C) and properly impose post-release control at that hearing. *Mikolaj*, 7th Dist. No. 13MA152 at ¶ 13, citing *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶ 1, 27-35 & syllabus (conduct limited post-release control hearing under R.C. 2919.191 to correct post-July 11, 2006 omissions).

{¶15} Appellant’s brief acknowledges this at one point, but at another seems to ask for a new sentencing hearing, citing *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864 and *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, which stand for that proposition. We point out here that those holdings requiring a new sentencing hearing were overruled in 2010, and only a limited post-release control hearing is required to correct post-release control failures. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 26-29.

{¶16} In conclusion, where the trial court does not advise the defendant at the sentencing hearing that the parole board can impose a prison term of up to one-half of his original sentence for a violation of post-release control, the imposition of post-release control must be reversed and the matter must be remanded for a post-release control imposition hearing. *Mikolaj*, 7th Dist. No. 13MA152 at ¶ 16. Accordingly, the imposition of post-release control in this case is reversed and remanded for a post-release control imposition hearing.

Waite, J., concurs.

DeGenaro, P.J., concurs.