[Cite as *State v. Wesley*, 2024-Ohio-4798.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 113668
v.	:	
NELSON WESLEY,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART AND REMANDED
RELEASED AND JOURNALIZED: October 3, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-19-639908-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Timothy R. Troup and Chauncey Keller, Assistant Prosecuting Attorneys, *for appellee*.

Cullen Sweeney, Cuyahoga County Public Defender, and Robert B. McCaleb, Assistant Public Defender, *for appellant*.

SEAN C. GALLAGHER, J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.App.R. 11.1. Nelson Wesley appeals the imposition of

postrelease control attendant to his conviction for a third-degree, attempted felonious assault offense. For the following reasons, we affirm in part, reverse in part, and remand.

{¶ 2} Neither party elaborated on the underlying facts. This is of little consequence in light of the limited nature of this appeal, which focuses on the imposition of postrelease control under R.C. 2967.28(B). Of note, and for unexplained reasons, Wesley spent three years and 108 days in pretrial confinement attributed to this case. Upon pleading guilty to the third-degree offense, the trial court imposed a 36-month term of imprisonment and a one-to-three-year mandatory term of postrelease control. The final entry of conviction contains all required notifications regarding the imposition of the postrelease control and the consequences of any potential violation. As a result of the credit for time already served, the trial court deemed Wesley's term of imprisonment "complete," and he was ordered to present himself to the county jail for imposition of the mandatory postrelease control. This appeal timely followed.

{¶ 3} In the first assignment of error, Wesley claims that "the trial court erred as a matter of law in imposing post release control when [he] was never 'release[d]' from prison because he was never in fact imprisoned." According to Wesley, because his credit for time served subsumed the three-year prison term imposed on the third-degree felony offense, the trial court lacked authority to impose the one-to-three-year term of postrelease control included in the final sentence. Wesley's argument is without merit.

{¶ 4} Wesley contends that although the trial court imposed a sentence of three years in prison on the third-degree attempted felonious assault offense, he "was never released from prison because he never was sent to prison," having served all his time in jail. According to Wesley, this means the term of postrelease control imposed by the trial court was invalid because the parole board cannot impose postrelease control since Wesley served his term of imprisonment in jail and not prison. His argument, however, is entirely based on the notion that an offender must be "released from prison" in order to trigger the postrelease control requirement. The statutory language, however, is not limited to the parole board imposing postrelease control upon an offender's *release from prison* as Wesley argues. R.C. 2967.28(B), the statute controlling the imposition of postrelease control, provides in pertinent part that "[e]ach sentence to a prison term . . . for a felony of the third degree that is an offense of violence and is not a felony sex offense shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board *after the offender's release from imprisonment*." (Emphasis added.) *Id.*

{¶ 5} First and foremost, the trial court's imposition of postrelease control preceded the trial court's declaration that the 36-month sentence had been served due to the credit for time served in pretrial confinement. As a result, and even if that procedural quirk is one of consequence, the trial court was authorized and required to impose the one-to-three-year term of postrelease control as part of the 36-month prison sentence imposed for the offense. Wesley is confusing the trial court's

authority to impose the term of postrelease control as part of the sentence, with the parole board's authority to impose the actual term of postrelease control upon the offender's release from imprisonment. Before the parole board can impose the postrelease control, the trial court must first impose postrelease control in the final sentence.

{¶ 6} Nevertheless, Wesley's argument as it pertains to the parole board's authority to impose postrelease control upon the offender's release from imprisonment is an implicit attempt to rewrite the statutory language at issue — substituting the word "prison" in place of "imprisonment." R.C. 2967.28(B) is unambiguous and requires that an offender under certain circumstances be subject to a period of postrelease control after the offender's "release from imprisonment," not just his release from "prison."

{¶ 7} Imprisonment and prison are two distinct terms, the former being broader in context than specific references to "prison." R.C. 1.05(A) defines "imprisonment" as

> being imprisoned under a sentence imposed for an offense or serving a . . . jail term, term of local incarceration, or other term under a sentence imposed for an offense in an institution under the control of the department of rehabilitation and correction, a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse, a minimum security jail, a community-based correctional facility, or another facility described or referred to in section 2929.34 of the Revised Code for the type of criminal offense and under the circumstances specified or referred to in that section.

Thus, according to the statutory language, Wesley is subject to a term of postrelease control upon being "released" from "imprisonment," which includes various types

of confinement such as a term in jail or other local incarceration imposed as a sentence on the offense. It then follows that the trial court's conclusion that Wesley's credit for time served subsumed the three-year term of imprisonment imposed is of no consequence. The end result is that Wesley was released from his term of imprisonment upon the court's statement that Wesley had already served the term in pretrial confinement. Following that "release from imprisonment," the term of postrelease control was required to be imposed by the parole board.

{¶ 8} We note, however, that the trial court's decision to deem Wesley's sentence as complete does not appear to be based on the controlling statutory sections, and that decision is the source of the current controversy. R.C. 2967.28(B) should be read in conjunction with R.C. 2929.19(B)(2)(g)(i). Under the latter provision, a trial court is statutorily required to *calculate* the total number of days the offender has been confined because of the offense for which the sentence is imposed, excluding conveyance time, and that number is to be provided to the Ohio Department of Rehabilitation and Correction ("ODRC"), which is statutorily required to *reduce* the offender's stated prison term based on the trial court's calculation under R.C. 2967.191. The statutory framework is silent as to the trial court's authority to terminate a sentence of its own accord based on its calculation.

{¶ 9} The trial court's action in this case is similar to a "time-served" sentence, a form of sentence not generally authorized by the General Assembly. *State v. Thompson*, 2022-Ohio-1073, ¶ 20-22 (S. Gallagher, J., concurring); *State v. Allen*, 2020-Ohio-5155, ¶ 49 (10th Dist.) (noting that by the trial court applying the

time-served calculation to "terminate" the case, the court is essentially imposing "time-served" as the final sentence). It is that procedural history that forms the basis of Wesley's current argument.

{¶ 10} Had the trial court calculated the days of confinement and conveyed Wesley to begin serving his 36-month term of imprisonment, remembering that conveyance time is statutorily excluded from any time-served calculations under R.C. 2929.19(B)(2)(g)(i), ODRC would have implemented the credit and released Wesley subject to his mandatory term of postrelease control. Thus, Wesley is seeking to benefit from the trial court's decision immediately releasing him from his sentence without conveyance to prison, by attempting to delete a mandatory term of his sentence based on the benevolent act of the trial court.

{¶ 11} Wesley is essentially asking this court to recognize a requirement that offenders in his position be conveyed to prison despite having served the entirety of the imposed prison term while awaiting trial. Perhaps that is what the legislature requires, but that is not a question in need of an answer in this appeal. R.C. 2967.28(B) required the trial court to impose the mandatory term of postrelease control and, upon Wesley's release from imprisonment, the parole board was required to implement that sentence. Nothing within the statutory scheme requires the offender to be first released from "prison" before R.C. 2967.28(B) can be implemented.

{¶ 12} Notwithstanding the unambiguous language used in the statute, Wesley places a great deal of weight to dicta from *State v. Jirousek*, 2016-Ohio-7743

(11th Dist.), in support of his argument that he must serve time in prison before R.C. 2967.28(B) is implicated. In that case, the defendant was sentenced to a term of community-control sanctions following an earlier, successful appeal challenging his original prison sentence. *Id.* at ¶ 9. The appeal resulted in the offender's release from prison, and in light of the community-control sanctions being imposed upon remand, he did not reenter prison following the resentencing. That offender was nonetheless required to serve postrelease control on another count for which the imposed prison term had already been served. The defendant claimed that because he was not serving and being released from a prison sentence at the time the postrelease control was established by the parole board, the parole board lacked authority to enforce the judicially imposed sentence. *Id.*

{¶ 13} Ultimately, the Eleventh District concluded that the defendant should have challenged the imposition of postrelease control in his earlier appeal, but in the alternative, the panel concluded that the defendant in fact served a prison term before the sentence was amended to community-control sanctions following the direct appeal. *Id.* at ¶ 15. According to the Eleventh District, the defendant was released from that prison term following the original appeal and although time elapsed between his release and the parole board's implementation of postrelease control, that time was not statutorily relevant. *Id.* at ¶ 15. The statute did not require

the postrelease control to begin within any given time frame following the release from imprisonment.[1] *Id.*

{¶ 14} Arguably, *Jirousek* supports the trial court's action in this case. Wesley served his three-year prison term in county jail for the offense upon which the sentence was imposed, which also constitutes "imprisonment" for the purposes of R.C. 2967.28(B). Upon being sentenced to the three-year prison term for the third-degree felony, the trial court credited Wesley for that time served. That credit subsumed the imposed prison sentence. At some point before the final sentencing, Wesley was released from imprisonment. Under the dicta in *Jirousek*, the parole board was required to implement the imposed one-to-three-year term of postrelease control regardless of the additional time between that release and the final sentencing.

{¶ 15} Under either form of the analysis, the first assignment of error is overruled.

{¶ 16} In the second assignment of error, Wesley claims "[t]he trial court erred as a matter of law in imposing post release control when Appellant was never advised of the consequences of violating post release control." As a result, according to Wesley, the imposition of postrelease control must be reversed, and the matter

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[1] This is not to say that *Jirousek* would permit the imposition of postrelease control following an offender's release from imprisonment, but instead the panel recognized the distinction between that concept and the case before the *Jirousek* panel that dealt with a term of postrelease control that was timely imposed but a break occurred between the release from imprisonment and the implementation of the postrelease control monitoring.

remanded to the trial court to "vacate the imposition of post-release control." There is no dispute that despite providing that admonishment during the change-of-plea colloquy and again in the final entry of conviction, the trial court omitted an advisement as to the consequences of violating the mandatory term of postrelease control during the sentencing hearing.

{¶ 17} Wesley does not offer any discussion, argument, or citation to authority justifying the scope of the remand requested, in which he seeks an order for the trial court to vacate the imposition of postrelease control altogether. *See* App.R. 16(A)(7). R.C. 2929.19(B)(2)(d) and (B)(2)(f) provide that "the failure of a court to notify the offender" of the consequences of violating postrelease control "does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender." *Id.* R.C. 2929.19(B)(2)(f), however, requires the parole board to provide any advisement as to the consequences of violating postrelease control before the offender's release from imprisonment. In light of the unique procedural posture of this case, that advisement is impossible.

{¶ 18} Notwithstanding, Wesley ignores the fact that the advisement detailing the consequences of the failure to abide by the terms of the postrelease control imposed by the parole board is contained within the final sentencing entry and was provided during Wesley's change-of-plea hearing, and he directly appealed the validity of that sentence based on the trial court record. He has not discussed the implications of that procedural history within this appeal. It is not the role of an appellate court to flush out or create legal analysis on behalf of one of the parties.

See State v. Quarterman, 2014-Ohio-4034, ¶ 19, citing *State v. Bodyke*, 2010-Ohio-2424, ¶ 78 (O'Donnell, J., concurring in part and dissenting in part); *see also Russo v. Gissinger*, 2023-Ohio-200, ¶ 28 (9th Dist.), quoting *State v. Taylor*, 1999 Ohio App. LEXIS 397 (9th Dist. Feb. 9, 1999) ("'It is the duty of the appellant, not [an appellate court], to demonstrate his assigned error through an argument that is supported by citations to legal authority and facts in the record.'"). This limited discussion severely hampers our review in light of the fact that to accept Wesley's argument, this panel would be required to independently provide authority and a discussion supporting the requested relief. We decline that invitation.

{¶ 19} This appeal is the direct appeal from the final sentence entered, which included the mandatory term of postrelease control. In this case, the postrelease control sanction was imposed in the final entry of conviction and included all required notices under R.C. 2929.19(B)(2)(d). In general, when a party directly appeals a sentence that includes an improperly imposed term of postrelease control under R.C. 2967.28, the remedy is a remand for a new sentencing hearing to correct the error. *See State v. Bates*, 2022-Ohio-475, ¶ 22 (errors in the imposition of postrelease control must be timely appealed by the "aggrieved party" or are barred by res judicata). A remand for a new hearing is especially pertinent to cases in which the postrelease control was imposed, but the oral notifications at the sentencing hearing were deficient and led to improper sentences. *State v. Smith*, 2022-Ohio-832, ¶ 7 (8th Dist.) (trial court erred imperfectly providing the required advisements

before imposing the required term of postrelease control and the matter remanded for a new sentencing hearing to correct the deficiency).

{¶ 20} Wesley relies primarily on *State v. Holdcroft*, 2013-Ohio-5014, paragraph three of the syllabus, in which the Ohio Supreme Court concluded that "[a] trial court does not have the authority to resentence a defendant *for the purpose of adding a term of post-release control* as a sanction for a particular offense after the defendant has already served the prison term for that offense." (Emphasis added.) *Id.* Notwithstanding, the Court distinguished direct appeals from collateral attacks "so long as a timely appeal is filed from the sentence imposed, the defendant and the state may challenge any aspect of the sentence and sentencing hearing, and the appellate court is authorized to modify the sentence or remand for resentencing to fix whatever has been successfully challenged." *Id.* at ¶ 9. And importantly, the mere fact that the sentence is served before the appellate process is complete does not limit the available remedies upon remand. *State v. Christian*, 2020-Ohio-828, ¶ 16 (trial court had authority to resentence the offender upon remand even though the sentence on the affected count had been completely served because the remand occurred during the direct appeal of the sentence).

{¶ 21} In this case, the postrelease control was imposed before Wesley was deemed to have served his sentence and Wesley filed a direct appeal challenging that aspect of the final sentence. In light of the fact that the imposition of postrelease control was timely appealed by Wesley, and because we agree that the trial court inadvertently failed to include the advisement detailing the consequences of a

potential violation during the sentencing hearing, rendering his final sentence voidable through the direct appeal as discussed in *Smith*, we reverse and vacate the final entry of conviction. This matter is remanded for the sole purpose of orally providing Wesley the proper notifications and the reissuance of the final entry of conviction. *See Smith* at ¶ 8-13 (S. Gallagher, A.J., concurring). The second assignment of error is sustained in part.

{¶ 22} Even though Wesley was deemed to have served his prison term upon sentencing, in light of the credit for time served being applied by the trial court, the term of postrelease control was nonetheless properly imposed as part of that sentence. No new sentence or sanction is being added upon remand. The sole issue advanced in this appeal is the lack of the oral notification regarding the consequences of violating the mandatory postrelease control at the sentencing hearing, an advisement that Wesley received on two other occasions — once during the plea colloquy and once again in the final entry of conviction that concluded the sentencing portion of the case — but one not provided at the time of sentencing.

{¶ 23} We affirm in part, reverse in part, and remand. The matter is reversed and remanded for the sole purpose of the trial court complying with the advisement requirements under R.C. 2967.28 before imposing the mandatory term of postrelease control applicable in this case. In all other respects, the conviction is affirmed.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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SEAN C. GALLAGHER, JUDGE

MICHAEL JOHN RYAN, P.J., and
FRANK DANIEL CELEBREZZE, III, J., CONCUR