

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-554 (C.P.C. No. 02CR-1154)
Maurice H. Addison,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 3, 2011

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Shaw & Miller, and *Mark J. Miller*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Maurice H. Addison, appeals from a judgment of the Franklin County Court of Common Pleas sentencing him to eight years in prison and five years of mandatory post-release control. Because (1) defendant lacks standing to challenge the constitutionality of R.C. 2929.191, and (2) the trial court included the

mandatory period of post-release control in defendant's original sentence, we remand for the sole purpose of vacating the resentencing entry.

I. Facts and Procedural History

{¶2} On June 24, 2003, the trial court, following a bench trial, found defendant guilty of one count of aggravated robbery, two counts of robbery, two counts of kidnapping, two counts of abduction, all with firearm specifications, as well as one count of carrying a concealed weapon, and one count of receiving stolen property. At a September 23, 2003 sentencing hearing, the trial court merged the two counts of robbery, one count of kidnapping, and one count of abduction with the conviction for receiving stolen property. The trial court further merged the remaining count of abduction with the conviction for the remaining count of kidnapping and made the findings that allowed the trial court to sentence defendant on the kidnapping offense as a second-degree felony.

{¶3} During the sentencing hearing, the trial court explained to defendant the nature of post-release control, detailed the consequences of violating the terms of post-release control, and told defendant he was "going to be on post-release control" for five years. (Sept. 23, 2003 Tr. 17.) The trial court then sentenced defendant to a total of eight years in prison, imposing three years for the first-degree felony aggravated robbery, two years for the second-degree felony kidnapping, and three years for the firearm specifications, all to run consecutively to each other but concurrently with the concurrent one-year sentences the court imposed for each of the fourth-degree felonies of receiving stolen property and carrying a concealed weapon.

{¶4} The October 7, 2003 judgment entry journalizing defendant's sentence indicated "the court notified the defendant of the applicable periods of post-release control pursuant to R.C. 2929.19(B)(3)(c), (d) and (e)," but it did not specifically state whether defendant was subject to a mandatory period of post-release control. (Oct. 7, 2003 Judgment Entry.) The record contains a document, filed the same day, entitled "NOTICE (Prison Imposed)." The document advises that "[a]fter you are released from prison, you (will, may) have a period of post-release control for 5 years following your release from prison." (Notice Prison Imposed, R. 133.) It does not select either "will" or "may" but notes first-degree felonies carry a mandatory period of five years of post-release control. (Notice Prison Imposed, R. 133.) The document bears the signatures of both defendant and his counsel.

{¶5} Defendant appealed his conviction, claiming ineffective assistance of counsel. This court affirmed. *State v. Addison*, 10th Dist. No. 03AP-1102, 2004-Ohio-5154.

{¶6} On June 1, 2010, the trial court held a resentencing hearing in which defendant appeared via videoconference. The trial court imposed the same eight-year sentence it originally imposed and specified defendant was subject to five years of mandatory post-release control. A judgment entry journalizing the resentencing was filed June 1, 2010, and in it the trial court specified defendant is subject to a mandatory five-year period of post-release control.

II. Assignments of Error

{¶7} Defendant appeals from the June 1, 2010 judgment, assigning the following errors:

1. The Legislature usurped the Supreme Court's authority with the passage of R.C. 2929.191 because Section 5(B), Article IV of the Ohio Constitution grants the Supreme Court and not the Legislature the authority to prescribe rules governing practice and procedure in all state courts in Ohio.
2. Resentencing an offender pursuant to 2929.191 violates the Due Process Clause of the United States Constitution because it interferes with the legitimate expectation of finality in a nearly completed prison term.
3. Resentencing an offender after his sentence has commenced, pursuant to R.C. 2929.191, violates the Fifth Amendment protections against Double Jeopardy.

III. First Assignment of Error – Constitutionality of R.C. 2929.191

{¶8} Defendant's first assignment of error asserts R.C. 2929.191 is unconstitutional as a de facto rule of court that violates Section 5(B), Article IV of the Ohio Constitution, because it was not properly adopted as a rule of practice and procedure of the courts of Ohio. See Section 5(B), Article IV of the Ohio Constitution (vesting the Supreme Court of Ohio with the power to "prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right," and further providing "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect"). The state responds that not only did defendant not raise in the trial court the constitutionality argument he assigns as error on appeal, but he also lacks standing to challenge the constitutionality of R.C. 2929.191.

{¶9} The General Assembly enacted R.C. 2929.191 as part of H.B. 137 to create a mechanism allowing a trial court to correct a sentence that failed to include the necessary term of post-release control. The Supreme Court, however, pointed out in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, that trial courts have two distinct procedures they may employ to correct a sentence lacking proper notice and imposition of post-release control. The Supreme Court explained that, based on the effective date of H.B. 137, the corrective procedures in R.C. 2929.191 apply only to cases in which the original sentence was imposed on or after July 11, 2006. *Singleton* at ¶35. The court clarified that to correct a pre-July 11, 2006 sentence that lacks proper notification and imposition of post-release control, the appropriate method is a de novo sentencing hearing in accordance with Ohio Supreme Court case law. *Id.*

{¶10} Here, the trial court originally sentenced defendant at a hearing conducted September 23, 2003, journalized its sentence in an October 7, 2003 judgment entry, and so imposed defendant's original sentence prior to July 11, 2006. Pursuant to *Singleton*, the resentencing hearing on June 1, 2010 necessarily was a de novo sentencing hearing rather than an application of R.C. 2929.191. Accordingly, defendant lacks standing to challenge the constitutionality of R.C. 2929.191, as the statute does not apply to defendant. See *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶31 (concluding that because Bloomer's sentencing and resentencing occurred before July 11, 2006, Bloomer was not resentenced pursuant to R.C. 2929.191 and "Bloomer has no standing to challenge the constitutionality of that act"); *State v. McKay*, 124 Ohio St.3d 442, 2010-

Ohio-718, ¶1 (concluding "R.C. 2929.191 may not be applied to a sentence entered prior to July 11, 2006").

{¶11} Because defendant lacks standing to challenge the facial constitutionality of R.C. 2929.191, we overrule his first assignment of error.

IV. Second and Third Assignments of Error – Resentencing

{¶12} Defendant's second and third assignments of error are interrelated, so we address them together. In his second and third assignments of error, defendant asserts the trial court erred in applying R.C. 2929.191 to his resentencing. Although defendant phrases his assigned errors in the context of the trial court's application of R.C. 2929.191, the statute is not properly applied to defendant's resentencing. We thus construe defendant's assigned errors to challenge generally the trial court's procedures in resentencing him.

{¶13} Defendant's second assignment of error asserts the trial court violated his due process rights in resentencing him when he had completed all but 15 days of his eight-year prison term and had a legitimate expectation of finality in his sentence. His third assignment of error contends the trial court violated his protection against double jeopardy when it resentenced him, added post-release control to his sentence and in effect imposed multiple punishments for the same offense in direct conflict with the Fifth Amendment's protection against double jeopardy.

{¶14} This court addressed a similar argument in *State v. Mays*, 10th Dist. No. 10AP-113, 2010-Ohio-4609, where the defendant, who appeared by videoconference for resentencing regarding the applicable period of post-release control, challenged the

process used to communicate and clarify post-release control. Not reaching the merits of Mays' assignment of error, this court concluded Mays' original sentence was not void, did not require resentencing, and was correctable through a properly perfected appeal following the original sentence.

{¶15} Explaining, this court observed Mays' original sentencing entry included the statement that "[a]fter imposition of sentence the Court notified the defendant, orally and in writing, of the applicable periods of post-release control pursuant to R.C. 2929.19(B)(3)(c), (d) and (e)." *Id.* at ¶3. The record also included (1) a criminal disposition sheet noting "S.B. 186 satisfied," (2) Mays' signature to his guilty plea form indicating five years of mandatory post-release control for a first-degree felony, and (3) Mays' signature to a document entitled "NOTICE (Prison Imposed)" indicating both that Mays would be subject to five years of post-release control and the possible sanctions if Mays violated post-release control. On such a record, this court determined "post-release control was appropriately included in the [original] sentence" so that "[t]he subsequent [resentencing] hearing was unnecessary and had no legal effect." *Id.* at ¶8. As a result, "even if an error occurred, it was not prejudicial." *Id.* We remanded the case for the sole purpose of vacating the nunc pro tunc entry filed to clarify the period of post-release control.

{¶16} Here, as in *Mays*, defendant's original sentencing entry included the statement that "the court notified the defendant of the applicable periods of post-release control pursuant to R.C. 2929.19(B)(3)(c), (d) and (e)." Like *Mays*, it did not explicitly note that defendant, having been convicted of a first-degree felony, was subject to a mandatory five-year period of post-release control. (Oct. 7, 2003 Judgment Entry.) The

record here also reflects defendant's signature to a "NOTICE (Prison Imposed)," nearly identical to that in *Mays*, indicating defendant was subject to five years of post-release control as a result of being convicted of a first-degree felony.

{¶17} Although, unlike *Mays*, the record here does not contain either a guilty plea form or a disposition sheet indicating compliance with S.B. 186, the transcript from the original sentencing reveals the trial court adequately explained post-release control and informed defendant he would be subject to a mandatory five-year period of post-release control due to his conviction of a first-degree felony. The trial court also explained the possible penalties defendant could face if he violated the terms of his post-release control.

{¶18} Because of its overwhelming similarities to defendant's case, *Mays* controls, meaning "[t]he subsequent hearing was unnecessary and had no legal effect." *Mays* at ¶8. As a result, to the extent defendant contends the trial court erred in originally sentencing him, defendant's appropriate remedy was to challenge his sentence on direct appeal. See *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, ¶51 (holding sentencing entry's error in referring to post-release control as discretionary rather than mandatory did not operate to deprive the petitioner of notice of the imposition of post-release control, so "[a]ny challenge to the propriety of the sentencing court's imposition of postrelease control in the entries could have been raised on appeal").

{¶19} Although defendant appealed his conviction, he did not raise any issues of sentencing and thus is precluded from so doing at this time. See *State v. Stekelenburg*, 9th Dist. No. 24825, 2010-Ohio-219, ¶8 (holding that where appellant could have raised

an issue in her first appeal, she is "prohibited by the doctrine of law of the case from raising that issue" in a subsequent appeal); *Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St.3d 402, 404-05 (explaining that the law of the case doctrine "precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal").

{¶20} In applying *Mays*, we nonetheless are mindful of the Supreme Court of Ohio's recent decision in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, which held that "[a] sentence that does not include the statutorily mandated term of postrelease control is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack." *Fischer* at paragraph one of the syllabus. Our holdings in *Mays* and here are consistent with *Fischer*.

{¶21} The trial court in both *Mays* and the present case properly included the statutorily mandated term of post-release control in the defendant's original sentencing hearing. Indeed, the court in *Fischer* repeatedly referred to the duty to include post-release control in the sentence as the trial court's obligation to notify the defendant *at the sentencing hearing* of any post-release control obligations. See *Fischer* at ¶10, 12. As the record here is clear the trial court properly informed defendant of his post-release control obligations during the September 23, 2003 sentencing hearing, his sentence is not void, and *Fischer* does not resurrect the post-release control argument defendant failed to raise during his first appeal.

{¶22} Even if *Mays* does not apply, defendant's arguments are unpersuasive. Defendant first contends the trial court interfered with his expectation of finality in resentencing him when he completed all but 15 days of his eight-year prison term. Had the trial court actually failed to properly include post-release control in defendant's sentence, that sentence would be void. *Fischer* at paragraph one of the syllabus. Defendant can have no legitimate expectation of finality in a void sentence. *State v. Barber*, 2d Dist. No. 22929, 2010-Ohio-831, ¶15; *Bloomer* at ¶28. So long as defendant had not completed his sentence, the trial court retained authority to correct a void sentence. *Bloomer* at ¶28. That defendant nearly completed the eight-year prison term does not deprive the trial court of the authority to correct his sentence. *Id.*; *State v. Ramey*, 10th Dist. No. 06AP-245, 2006-Ohio-6429 (affirming the imposition of post-release control at a resentencing hearing one day before defendant's scheduled release from prison and rejecting defendant's double jeopardy and due process arguments).

{¶23} Defendant next suggests the trial court violated principles of double jeopardy because the resentencing amounted to multiple punishments for the same conduct. In *Bloomer*, the Supreme Court of Ohio held that "[b]ecause jeopardy does not attach to a void sentence, the subsequent imposition of the statutorily required sentence cannot constitute double jeopardy." *Bloomer* at ¶27. As a result, even if defendant's original sentence were void, the trial court did not violate double jeopardy in correcting that sentence to include the requisite period of post-release control. Were we to reach defendant's due process and double jeopardy arguments, they would fail.

{¶24} In the final analysis, we apply this court's decision in *Mays* and conclude the trial court included the five-year term of post-release control in defendant's original sentence, at least to the point the sentence was not void. Any errors were correctable in a timely filed appeal of the original sentence. Defendant's second and third assignments of error are overruled.

V. Disposition

{¶25} Accordingly, we overrule defendant's first assignment of error because defendant lacks standing to challenge the facial constitutionality of R.C. 2929.191, as that statute does not apply to defendant's case. Further, we overrule defendant's second and third assignments of error because the trial court's original sentence was not void. Having overruled defendant's three assignments of error, we remand with instructions to vacate defendant's June 1, 2010 resentencing entry, which leaves effective defendant's original judgment, including the sentence.

*Judgment affirmed; case remanded with instructions
to vacate June 1, 2010 resentencing entry.*

FRENCH and DORRIAN, JJ., concur.
