

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

STATE OF OHIO)	CASE NO: CR 01 407434
)	
Plaintiff)	JUDGE JOHN P. O'DONNELL
)	
vs)	
)	
CURTIS BRIDGES)	<u>JOURNAL ENTRY</u>
)	
Defendant)	

John P. O'Donnell, J.:

On May 30, 2008, the defendant Curtis Bridges filed a motion to vacate his sentence. The plaintiff State of Ohio filed its written opposition on July 30, 2008. The defendant then filed a motion to merge for purposes of sentencing and, after a hearing on August 18, 2009, the State filed its supplemental motion in response to defendant's motion to vacate sentence. The court now finds as follows:

STATEMENT OF FACTS

On May 17, 2001, the defendant was charged by indictment with one count of possession of cocaine in an amount exceeding 1,000 grams, in violation of Ohio Revised Code § 2925.11, and one count of trafficking in cocaine in an amount exceeding 1,000 grams, in violation of O.R.C. § 2925.03. Each count is a felony of the first degree with a mandatory prison sentence of ten years. Each count also included a major drug offender specification as described in O.R.C. 2941.1410.

The defendant ultimately entered guilty pleas to both counts and, on July 31, 2001, was sentenced to a mandatory term of ten years on the trafficking count, a mandatory term of ten years on the possession count, and a term of five years on the major drug offender specifications. The sentences for the major drug offender specifications were merged for a single sentence of five years on both, but consecutive to consecutive ten-year sentences for each of the underlying felonies, for a total prison term of 25 years.

At the sentencing hearing the defendant was orally advised of postrelease control as follows:

[O]n your release from prison, you will be subject to postrelease control by the Parole Board, and if you violated any of the restrictions placed upon you, they can impose more extensive restrictions or impose additional prison up to nine months for one violation, but a maximum of one-half of the original prison term that you received here for all violations.

The sentencing journal entry notes that “postrelease control is a part of this prison sentence for the maximum period allowed for the above felony(s) under R.C. 2967.28.” Hence, the defendant was never advised orally or in writing of the length of the postrelease control period.

The defendant now asserts his sentence is void because the court failed to impose a specific period of postrelease control at sentencing. He further argues that, at a resentencing hearing, the sentences for possession and trafficking should merge into a single mandatory term of ten years, and that an additional prison term may not be imposed on the major drug offender specifications because the statute authorizing that enhancement is unconstitutional.

LAW AND ANALYSIS

I. Postrelease Control Advisement

When sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about postrelease control and is further required to incorporate that notice into its journal entry imposing sentence.¹ Postrelease control is not properly included in a sentence where, as in this case, the trial court does not notify the defendant at the sentencing hearing and through the journal entry of the specific term of postrelease control.² In cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void.³

Ohio Revised Code §2929.191 became effective on July 11, 2006. That statute provides, in pertinent part:

*If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of section 2929.14 of the Revised Code, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison.
(Emphasis added.)*

¹ *State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-6085, at syllabus 1.

² See, e.g., *State v. McGee*, 2007-Ohio-6655, Cuyahoga Co. App. No. 89133, ¶16.

³ *State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197, at syllabus.

The statute does not provide an option; a new sentencing hearing is required.⁴ Hence, defendant Bridges is entitled to a new sentencing hearing. What remains to be decided are the parameters of the possible sentence.

II. Consecutive Sentences

Since the defendant's void sentence was imposed, the Ohio Supreme Court, in *State v. Cabrales*, 118 Ohio St. 3d 54, 2008-Ohio-1625, has definitively addressed the question of whether trafficking in drugs and possession of drugs are allied offenses of similar import pursuant to O.R.C. § 2941.25(A). The Court, at syllabus 2, held as follows:

Trafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of that same controlled substance under R.C. 2925.11(A) are allied offenses of similar import under R.C. 2941.25(A), because commission of the first offense necessarily results in commission of the second.

Whether the drugs that are the subject of the trafficking charge in this case are the same as those used to support the possession charge is a question of fact. If the evidence at the resentencing hearing supports a finding that the drugs are the same, the defendant will be sentenced to one ten-year mandatory prison sentence on the underlying felonies⁵ and the state will be asked to elect which of the two counts will merge into the other.⁶

III. Major Drug Offender Specification

O.R.C. §2929.01(W) defines a “major drug offender” as meaning “an offender who is convicted of or pleads guilty to the possession of, sale of, or offer to sell any drug . . . that consists of or contains at least one thousand grams of . . . cocaine.” Where, as here, a specification that the defendant is a major drug offender is included in the indictment, the court

⁴ *State v. Siwik*, 2009-Ohio-3896, Cuyahoga Co. App. No. 92341.

⁵ *I.e.*, not including the major drug offender enhancement.

⁶ *State v. Brown*, 119 Ohio St. 3d 447, 2008-Ohio-4569, ¶43.

may determine that the defendant is a major drug offender.⁷ As to a major drug offender, O.R.C. 2929.14(D)(3) provides as follows:

(I) If the offender commits a violation of section 2925.03 or 2925.11 of the Revised Code and that section classifies the offender as a major drug offender and requires the imposition of a ten-year prison term on the offender. . . and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in section 2941.1410 of the Revised Code charging that the offender is a major drug offender. . . the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.

(b) The court imposing a prison term on an offender under division (D)(3)(a) of this section may impose an additional prison term of one, two, three, four, five, six, seven, eight, nine, or ten years, if the court, with respect to the term imposed under division (D)(3)(a) of this section and, if applicable, divisions (D)(1) and (2) of this section, makes both of the findings set forth in divisions (D)(2)(a)(iv) and (v) of this section.

In *State v. Foster*, 109 Ohio St. 3d 1, 2008-Ohio-856, the Ohio Supreme Court, at syllabus 5, found that O.R.C. §2929.14(D)(3)(b) is unconstitutional because it requires judicial fact-finding offensive to a defendant's Sixth Amendment right to a trial by jury. However, the court also held, at syllabus 6, that O.R.C. 2929.14(D)(3)(b) is capable of being severed, and that, after severance, "judicial fact-finding is not required before imposition of additional penalties for . . .major-drug-offender specifications." Therefore, if a defendant meets the statutory definition of a major drug offender as set forth in O.R.C. 2929.01(W) – as defendant Barnes surely does – a trial court still has discretion to impose on the defendant up to ten years more than the usual maximum sentence because judicial fact-finding is not needed; the defendant is, by definition, a major drug offender upon admission, by way of a guilty plea, that he trafficked or possessed at least one thousand grams of cocaine.

⁷ O.R.C. 2941.1410.

CONCLUSION

Consistent with the reasoning given above, the defendant’s motion to vacate sentence is granted and a resentencing hearing will be held forthwith.⁸ At the hearing the state will either provide evidence that the drugs supporting the trafficking count are different from the drugs supporting the possession count, or the state will elect which count to merge into the other for purposes of sentencing. If the possession and trafficking counts do not merge, the defendant’s sentence will be in the range of ten to 30 years;⁹ if the counts do merge, the sentence will be in the range of ten to 20 years.¹⁰ Postrelease control for five years will be a part of the prison sentence imposed at the hearing.

IT IS SO ORDERED:

Judge John P. O’Donnell

Date

⁸ The hearing will be scheduled via a separate journal entry.

⁹ The mandatory sentence of ten years each on each count, to run concurrent, and with no enhancement for the major drug offender specification, would result in a minimum sentence of ten years. The mandatory ten years on each count, with a maximum enhancement of ten years for the MDO specification, all to run consecutive, would result in a maximum sentence of 30 years.

¹⁰ A single ten-year sentence plus from zero to ten additional years for the MDO enhancement.

SERVICE

A copy of this Journal Entry was sent by regular U.S. mail, this _____ day of
November, 2009, to the following:

Katherine Mullin, Esq.
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113
Attorney for Plaintiff

Paul Mancino, Jr., Esq.
75 Public Square, Suite 1016
Cleveland, OH 44113-2098
Attorney for Defendant

Judge John P. O'Donnell