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COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

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BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2001 CR 00029**
vs.	:	**Judge McBride**
JEFFREY N. SAAG,	:	**DECISION/ENTRY**
Defendant	:	

Nick Horton, assistant prosecuting attorney for the state of Ohio, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103

Jeffrey N. Saag, *pro se* defendant, #A425718, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601

This cause is before the court for consideration of a motion styled "Motion to Set Aside Judgment" filed by the defendant Jeffrey N. Saag on May 12, 2017. This matter has been fully briefed by the parties, and the court now renders this decision.

Upon consideration of the defendant's motion, the record of this case, the written arguments submitted by the parties as to the motion and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The defendant Jeffrey N. Saag was indicted on twelve counts on January 17, 2001. Counts 1 through 6 charged the defendant with rape in violation of R.C. 2907.02(A)(1)(b), felonies of the first degree. Counts 7 through 12 charged the defendant with gross sexual imposition in violation of R.C. 2907.05(A)(4), felonies of the third degree. The state alleged that the defendant engaged in sexual conduct and sexual contact with his daughter on multiple occasions "on or about 1992" while she was 12-years old.

On January 24, 2002, the defendant entered a plea of guilty to the charges of rape in Counts 1 and 2 at his plea hearing. The state agreed to dismiss the remaining ten counts. The state read the following facts, which the defendant agreed were accurate:

> "As to count number 1 and count number 2, the defendant on or about two separate occasions in 1992, at 118 Shady Lane in Amelia, Clermont County, Ohio, did engage in sexual conduct with another who was not his spouse, and the other person was less than 13 years of age, whether or not the age of that person was known by the defendant. Specifically, the defendant on those two occasions in 1992 engaged in sexual conduct when the defendant's date of birth was 2-4-61 and the victim's date of birth was 12-16-80."

On February 1, 2002, the court issued a judgment entry finding the defendant guilty of Counts 1 and 2 and ordering a presentence investigation.

On March 11, 2002, the court held a sentencing hearing at which it sentenced the defendant to a prison term of 5 to 25 years on Count 1 and a prison term of 5 to 25 years on Count 2, with the two prison terms to be served consecutively. The defendant

was sentenced under the sentencing laws as they existed before S.B. 2 was enacted. The court issued its judgment entry sentencing the defendant to prison on March 13, 2002.

The defendant did not file a direct appeal. He did, however, file a petition to vacate or set aside judgment on September 11, 2003. The court overruled the motion on October 20, 2003. The defendant appealed the trial court's decision, and the Twelfth District Court of Appeals affirmed the trial court's decision on June 14, 2004.

The defendant next filed a motion to correct sentence on July 14, 2014. The court issued an entry overruling that motion on July 31, 2014. The defendant appealed the trial court's decision, and on May 4, 2015 the Twelfth District Court of Appeals overruled the defendant's assigned errors.

Most recently, on May 12, 2017, the defendant filed a "Motion to Set Aside Judgment." The defendant's motion alleges that the trial court failed to provide the defendant with notification of postrelease control at his sentencing hearing on March 11, 2002.

The state responded in opposition to the defendant's motion on May 15, 2017. The defendant filed a reply memorandum on May 23rd. Thereafter, the court took the motion under advisement.

LEGAL ANALYSIS

The court finds that the defendant's motion should be construed as a petition for postconviction relief under R.C. 2953.21. A petition for postconviction relief is a motion

by the defendant, "subsequent to his or her direct appeal," that seeks "vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated."[1] A motion is a petition for postconviction relief under R.C. 2953.21(A)(1) if it was "(1) filed subsequent to [the defendant's] direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment sentence."[2]

The Ohio Supreme Court has advised that a court "may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged."[3] It is the motion's "language, not its label" that "determines whether it satisfies the requirements of R.C. 2953.21."[4]

The instant motion is a postconviction petition for relief because the defendant filed it subsequent to the time limit for his direct appeal, claims his sentence contains violations of the "separation of powers,"[5] seeks to render his sentence void, and asks for this court to set aside his sentence.[6]

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[1] *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), at the syllabus. *See State v. Keith*,12th Dist. Butler No. CA2015-12-213, 2016-Ohio-7359, ¶ 15, quoting *Reynolds*, 79 Ohio St.3d 158 (holding same).
[2] *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, ¶ 12, quoting *Reynolds*, 79 Ohio St.3d at 160.
[3] *Schlee*, 2008-Ohio-545 at ¶ 12, citing *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522. *See State v. Wilkins*, 12th Dist. Clinton No. CA2013-05-012, 2013-Ohio-5372, ¶ 10 (finding that where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21).
[4] *State v. Lawson*, 103 Ohio App.3d 307, 312, 659 N.E.2d 362 (12th Dist. 1995), citing *State ex rel. Carrion v. Harris*, 40 Ohio St.3d 19, 20, 530 N.E.2d 1330 (1988).
[5] Defs. Mot., pg. 3.
[6] *Wilkins*, 2013-Ohio-5372 at ¶ 10.

The procedure a defendant must use to seek postconviction relief is set forth in R.C. 2953.21 through R.C. 2953.23,[7] which are "the means by which a convicted defendant may seek to have the trial court's judgment or sentence vacated or set aside pursuant to a PCR petition."[8] Unlike an appeal of a criminal conviction, a petition for postconviction relief "is a collateral civil attack on a criminal judgment."[9]

R.C. 2953.21 sets forth the general guidelines for postconviction relief:[10]

> "(A)(1)(a) Any person who has been convicted of a criminal offense * * * and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief."

A defendant is not automatically entitled to an evidentiary hearing upon filing a motion for postconviction relief.[11] Rather, a trial court "properly denies a postconviction relief petition without a hearing if the supporting affidavits, the documentary evidence, the files, and the records of the case do not demonstrate that the petitioner set forth

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[7] Id. at ¶ 12.
[8] *State v. Boles*, 12th Dist. Brown No. CA2016-07-014, 2017-Ohio-786, ¶ 14, citing *State v. Hibbard*, 12th Dist. Butler No. CA2013-03-051, 2014-Ohio-442, ¶ 12. *See State v. Rose*, 12th Dist. Butler No. CA2012-03-050, 2012-Ohio-5957, ¶ 15, citing *Bush*, 96 Ohio St.3d 235 ("R.C. 2953.21 is the exclusive remedy by which a person can bring a collateral challenge to the validity of a conviction or sentence in a criminal case.").
[9] *State v. McKelton*, 55 N.E.3d 26, 2016-Ohio-3116, ¶ 6 (12th Dist.), citing *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). *See State v. Wolf*, 12th Dist. Clermont No. CA2016-05-027, 2016-Ohio-8103, ¶ 7, citing *State v. Peters*, 12th Dist. Clermont No. CA2015-07-066, 2016-Ohio-5288, ¶ 9 ("A postconviction proceeding is not an appeal of a criminal conviction, but rather, a collateral attack on a criminal judgment.").
[10] *Boles*, 2017-Ohio-786 at ¶ 15.
[11] *State v. Murray*, 12th Dist. Brown No. CA2015-12-029, 2016-Ohio-4994, ¶ 34, quoting *State v. Vore*, 12th Dist. Warren Nos. CA2012-06-049 and CA2012-10-106, 2013-Ohio-1490, ¶ 11.

sufficient operative facts to establish substantive grounds for relief."[12] "Substantive grounds for relief exist where there was a denial or infringement of the petitioner's constitutional rights of a magnitude sufficient to render the judgment void or voidable."[13] It is within the sound discretion of the trial court to determine whether an evidentiary hearing should be held.[14]

Generally, a postconviction petition for relief is subject to timeliness requirements, as well as the doctrine of *res judicata*.[15] However, *res judicata* does not apply to bar a challenge arguing that a sentence is void because it failed to include postrelease control notifications.[16] In addition, a challenge to postrelease control may be brought at any time through direct appeal or collateral attack, such as the present motion.[17]

Statutes imposing requirements for postrelease control sentencing require a trial court to provide a "statutorily compliant notification to a defendant regarding postrelease control at the time of sentencing, including notifying the defendant of the details of postrelease control and the consequences of violating postrelease control."[18] When a sentence does not include the statutorily mandated term of postrelease control as part

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[12] *Murray*, 2016-Ohio-4994 at ¶ 34, quoting *State v. Blackenburg*, 12th Dist. Butler No. CA2012-04-088, 2012-Ohio-6175, ¶ 9.
[13] *McKelton*, 2016-Ohio-3216 at ¶ 9, citing R.C. 2953.21(A).
[14] *Murray*, 2016-Ohio-4994 at ¶ 35, citing *McKelton*, 2016-Ohio-3216 at ¶ 11. *See Keith*, 2016-Ohio-7359 at ¶27, citing *State v. Wilson*, 12th Dist. Madison No. CA2013-10-034, 2014-Ohio-2342, ¶ 16.
[15] *See* R.C. 2953.21(A)(2) and *State v. Sheldon*, 12th Dist. Brown No. CA2016–04–010, 2016-Ohio-6984, ¶ 30.
[16] *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 1 (2010).
[17] *Fischer*, 2010-Ohio-6238 at ¶ 1.
[18] *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 13, citing R.C. 2929.19(B), R.C. 2967.28, and *Woods v. Telb*, 89 Ohio St.3d 504, 733 N.E.2d 1103 (2000), at paragraphs one and two of the syllabus.

of the defendant's sentence, "the postrelease-control sanction is void."[19] In such a case, only "that *part* of the sentence is void and must be set aside."[20] When "a sentence is void because it does not contain a statutorily mandated term, the proper remedy is, likewise, to resentence the defendant."[21] When resentencing the defendant to correct the void portion of the sentence, "only the offending portion of the sentence is subject to review and correction."[22]

Postrelease control did not exist before the Ohio legislature enacted S.B. 2, which became effective on July 1, 1996.[23] Before its enactment, certain convicted defendants were subject to parole.[24] The legislature's passage of S.B. 2 changed Ohio's criminal code by modifying the classification of criminal offenses and corresponding sentences.[25] One of those modifications replaced parole with postrelease control.[26] By enacting S.B. 2, postrelease notice requirements, discussed above, were "incorporated into Ohio law."[27]

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[19] *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, at paragraph one of the syllabus. *See Fischer*, 2010-Ohio-6238 at ¶ 1 (holding same); *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, ¶ 8, citing *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, at the syllabus (holding same).

[20] (Emphasis original.) *Fischer*, 2010-Ohio-6238 at ¶ 26.

[21] *Fischer*, 2010-Ohio-6238 at ¶ 10, citing *State v. Beasley*, 14 Ohio St.3d 74, 471 N.E.2d 774 (1984).

[22] *Holdcroft*, 2013-Ohio-5014 at ¶ 7, quoting *Fischer*, 2010-Ohio-6238 at ¶ 27. *See State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶ 25 (finding that, when the trial court fails to properly impose postrelease control, the defendant is entitled to a *de novo* sentencing hearing).

[23] *State v. Ferrell*, 5th Dist. Stark No. 2013CA00121, 2013-Ohio-5521, ¶ 9, citing *State v. Gimbrone*, 2d Dist. Montgomery No. 23062, 2009-Ohio-6264.

[24] *Ferrell*, 2013-Ohio-5521 at ¶ 9, quoting *Gimbrone*, 2009-Ohio-6264.

[25] *State v. Rush*, 83 Ohio St.3d 53, 55 697 N.E.2d 634 (1998).

[26] *Ferrell*, 2013-Ohio-5521 at ¶ 9.

[27] Id., citing *State v. Bailey*, 10th Dist. Franklin No. 97APA06-754, 1999 WL 333231 (May 18, 1999).

At the time the defendant was sentenced in 2001, S.B. 2 only applied to crimes committed on or after its effective date of July 1, 1996.[28] Furthermore, R.C. 2967.021 provides likewise:

> "(A) Chapter 2967. of the Revised Code [dealing with parole], as it existed prior to July 1, 1996, applies to a person upon whom a court imposed a term of imprisonment prior to July 1, 1996, and a person upon whom a court, on or after July 1, 1996, and in accordance with law existing prior to July 1, 1996, imposed a term of imprisonment for an offense that was committed prior to July 1, 1996.
>
> (B) Chapter 2967. of the Revised Code, as it exists on and after July 1, 1996, applies to a person upon whom a court imposed a stated prison term for an offense committed on or after July 1, 1996."[29]

In the present case, the defendant's offenses were based upon conduct from 1992, prior to the effective date of S.B. 2. The defendant was sentenced on March 11, 2002. Accordingly, the provisions of S.B. 2 do not apply to the defendant's offenses and the court properly sentenced the defendant under the law in existence before S.B. 2. As such, the defendant is not subject to the postrelease control provisions of S.B. 2

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[28] *Rush*, 83 Ohio St.3d at 57. *See Ferrell*, 2013-Ohio-5521 at ¶ 10 (explaining that S.B. 2 only applies to crimes committed on or after July 1, 1996); *State v. Ross*, 7th Dist. Mahoning No. 11-MA-32, 2012-Ohio-2433, quoting *State v. Gavin*, 8th Dist. Cuyahoga No. 90017, 2008-Ohio-2042, ¶ 11 ("[P]ost-release control does not apply to pre-Am.Sub.S.B. No. 2 sentences for crimes committed on or before July 1, 1996 as post-release control did not exist prior to July 1, 1996."); *Gavin*, 2008-Ohio-2042 at ¶ 11 (explaining that postrelease control is inapplicable to sentences for crimes committed on or before July 1, 1996). Of note, in cases in which a defendant committed a crime prior to July 1, 1996, but was not sentenced until on or after September 30, 2011 (when H.B. 86 was enacted), the defendant is entitled to be sentenced under H.B. No. 86. *See State v. Thomas*, 148 Ohio App.3d 248, 2016-Ohio-5567, 70 N.E.3d 496, ¶ 18; *State v. White*, __ N.E.3d __, 2017-Ohio-810, ¶ 85 (10th Dist.) (finding, based on *Thomas*, that a defendant who committed his offense before the enactment of S.B. No. 2, but was convicted and sentenced subsequent to the 2011 enactment of H.B. No. 86 was entitled to be sentenced under H.B. 86). However, in the case at bar, the Ohio Supreme Court's ruling in *Thomas* is inapplicable because the defendant committed his offense before the enactment of S.B. 2 and was convicted and sentenced before the enactment of H.B. 86 on September 30, 2011.

[29] (Emphasis added.) R.C. 2967.021.

and therefore is not entitled to any notification of postrelease control.[30] Accordingly, the court did not err in failing to notify him of a mandatory term of postrelease control on his sentences for each count of rape.

The defendant notes in his memorandum contra that his written plea of guilty states the periods of postrelease control required for different degrees of felonies and felony sex offenses. It states, in pertinent part, "Additionally, that a period of post release control under the supervision of the adult parole authority of: 5 years for a felony 1 or felony sex offense is required * * *."

Although the defendant's written plea lists the postrelease control requirements for differing felony degrees, that does not transform the defendant's sentence to include a term of postrelease control. At the sentencing hearing, the court did not impose postrelease control on the defendant, and the court's judgment entry sentencing the defendant to prison likewise does not impose postrelease control on the defendant. The notice of postrelease control in the written plea form does not confer on the defendant the right to receive postrelease control nor to receive notifications for postrelease control. The court concludes the defendant has not set forth sufficient operative facts in his postconviction petition for relief to establish substantive grounds for relief.[31]

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[30] *See Ferrell*, 2013-Ohio-5521 at ¶ 12 (finding that the trial court correctly denied the defendant's "motion to correct void sentence" in which the defendant claimed that R.C. 2967.28 required him to be sentenced to postrelease control for his four convictions, the crimes for which occurred from 1986-1988; because the crimes occurred before July 1, 1996, the defendant was not entitled to any notification of postrelease control); *Ross*, 2012-Ohio-2433 at ¶ 23 (affirming the trial court's decision denying the defendant's resentencing hearing request where the defendant committed his crimes prior to the effective date of S.B. 2, which was July 1, 1996, and as such was not entitled to notification of postrelease control).

[31] *Murray*, 2016-Ohio-4994 at ¶ 34, quoting *Blackenburg*, 2012-Ohio-6175 at ¶ 9.

CONCLUSION

For the foregoing reasons, the defendant's petition for postconviction relief is not well-taken and is denied.

IT IS SO ORDERED.

DATED: 9-29-17

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of this Decision/Entry were sent on this 2nd day of October 2017 by e-mail to Nick Horton, at nhorton@clermontcountyohio.gov, and by regular U.S. Mail to Jeffrey N. Saag, *pro se* defendant, #A425718, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601

Judicial Assistant to Judge McBride