

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-190570
Plaintiff-Appellee,	:	TRIAL NO. B-0405710
vs.	:	<i>JUDGMENT ENTRY.</i>
MALLON ROBERTS,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Mallon Roberts was convicted of murder in 2005. He unsuccessfully challenged his conviction on direct appeal. *State v. Roberts*, 1st Dist. Hamilton No. C-050279, 2007-Ohio-856, *appeal not accepted*, 115 Ohio St.3d 1424, 2007-Ohio-5056, 874 N.E.2d 539. In 2015, he filed a “Motion to Correct Judgment Entry Pursuant to Criminal Rule 36,” which the trial court denied. This court affirmed the decision as modified, remanding the matter to allow the trial court to correct the sentence in which it had improperly imposed a period of postrelease control. *State v. Roberts*, 1st Dist. Hamilton No. C-150528, 2017-Ohio-1060. On remand, the trial court issued an entry vacating the term of post-release control in a letter format. Roberts appealed from this entry, arguing that the trial court erred when it changed the terms of his sentence without him being present. We dismissed his appeal because the trial court’s entry did not meet the requirement of a judgment of conviction. *State v. Roberts*, 1st Dist. Hamilton No. C-180202 (Nov. 16, 2018).

In September 2019, the trial court entered a proper judgment of conviction titled “Judgment Entry: Sentence: Incarceration *** Nunc Pro Tunc 3/10/2005***.” Roberts now appeals from this entry, raising five assignments of error with respect to his sentencing.

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Under R.C. 2953.08(G)(2), this court may only modify or vacate a defendant's sentence if we clearly and convincingly find that either (1) the record does not support the mandatory sentencing findings, or (2) that the sentence is contrary to law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 7; *State v. White*, 2013-Ohio-4225, 997 N.E.2d 629, ¶ 11 (1st Dist.).

In his first, second and fourth assignments of error, Roberts argues the trial court erred by vacating the erroneous reference to postrelease control outside of his presence in violation of Crim.R. 43(A)(1); the court lacked jurisdiction to vacate the erroneous reference; and, could not do so by using a nunc pro tunc entry. We overrule these assignments on the authority of *State ex rel. Roberts v. Marsh*, 156 Ohio St.3d 440, 2019-Ohio-1569, 128 N.E.3d 222, ¶ 11, where the Ohio Supreme Court held that a “trial court was not required to conduct a de novo in-person resentencing hearing in order to vacate an erroneous reference to post-release control in a sentencing entry, and could instead achieve such result through [a] nunc pro tunc order.”

We also overrule Roberts's third assignment of error, where he contends the trial court erred by enhancing his sentence to include DNA testing. His sentence was not enhanced; Roberts had always been required to submit to DNA testing. At the time he was convicted, the version of R.C. 2901.07(B)(1) in effect required that all defendants convicted of a felony and sentenced to prison must submit to DNA testing. In the original judgment entry issued in 2005, the trial court did not notify Roberts of this requirement, but this was harmless error. *See State v. Carter*, 2017-Ohio-1328, 88 N.E.3d 513 (1st Dist.) (holding that R.C. 2901.07(B) does not confer any substantive rights on a defendant).

In his final assignment of error, Roberts now challenges the imposition of his sentences for murder and the repeat-violent-offender specification. We overrule this assignment under the doctrine of res judicata. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 19 (a defendant who fails on direct appeal to

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challenge the sentence imposed on him for an offense is barred by res judicata from appealing that sentence following a remand for resentencing to correct unrelated errors).

Accordingly, the judgment of the trial court is affirmed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., ZAYAS and CROUSE, JJ.

To the clerk:

Enter upon the journal of the court on June 24, 2020

per order of the court _____.

Presiding Judge

