

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee/ Cross-Appellant,	:	
	:	
v.	:	No. 10AP-867
	:	(C.P.C. No. 05CR01-529)
Willie J. Peeks,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant/ Cross-Appellee.	:	

D E C I S I O N

Rendered on May 12, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for
appellee/cross-appellant.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant and cross-appellee, Willie J. Peeks, appeals from a judgment of the Franklin County Court of Common Pleas resentencing him to 16 years in prison and five years of mandatory post-release control. Because the trial court erred in resentencing defendant to 16 years in prison, we vacate the trial court's judgment in part.

I. Facts and Procedural History

{¶2} On January 25, 2005, defendant was indicted on multiple counts of aggravated robbery and robbery, some with specifications, as well as one count each of tampering with evidence and having a weapon while under a disability. All charges stemmed from four robberies defendant committed between December 2004 and January 2005. Although defendant initially entered a plea of not guilty to all the charges, defendant prior to trial changed his plea to guilty on four counts of aggravated robbery.

{¶3} At a sentencing hearing held on December 19, 2005, the trial court sentenced defendant to eight-year prison terms for each count. The court ordered two of the sentences to be served concurrently and two to be served consecutively, for a total prison term of 16 years. The court further stated that "because I'm sending you to prison you have a maximum mandatory, I believe it's five years * * * Post release." The judgment entry journalizing the trial court's sentence stated that "[a]fter the 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)."

{¶4} Defendant appealed, arguing his sentence was void because the trial court, in imposing consecutive sentences, made factual findings under R.C. 2929.14(E)(4). Defendant argued the trial court erred in so doing because the Supreme Court of Ohio in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, found R.C. 2929.14(E)(4) unconstitutional and severed it from Ohio's sentencing statutes. *Id.* at paragraphs three and four of the syllabus. We affirmed the trial court's judgment, concluding the trial court's considering the R.C. 2929.19(E)(4) factors was harmless beyond a reasonable doubt and

only could have benefitted defendant. *State v. Peeks*, 10th Dist. No. 05AP-1370, 2006-Ohio-6256, ¶15. Defendant appealed our decision to the Supreme Court of Ohio, and the court affirmed on the authority of *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642. *In re Criminal Sentencing Cases*, 116 Ohio St.3d 31, 2007-Ohio-5551, ¶10.

{¶5} On April 20, 2010 defendant filed in the trial court, through counsel, a "Motion to Vacate Sentence," alleging the trial court failed to properly inform him concerning the details of post-release control at the sentencing hearing and in the court's judgment entry. At the same time, defendant asserted the United States Supreme Court decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711 required the trial court to make the findings under severed R.C. 2929.14(E) prior to imposing consecutive sentences. The trial court held a resentencing hearing, reimposed the same sentence, and notified appellant he not only would be subject to a mandatory term of five years post-release control upon his release from prison but could be returned to prison for up to one-half his original sentence should he violate the terms of his post-release control. The court incorporated the notice of post-release control into its amended judgment entry.

{¶6} Defendant timely filed a notice of appeal with this court, and the state filed a notice of cross-appeal.

II. Assignments of Error

{¶7} Defendant assigns a single error:

The trial court erred in imposing consecutive terms of incarceration for felony convictions without making findings required by R.C. 2929.14(E)(4) to overcome the statutory presumption favoring concurrent sentences.

{¶8} The state assigns two errors on cross-appeal:

STATE'S FIRST ASSIGNMENT OF ERROR

THE COMMON PLEAS COURT ERRED IN RESENTENCING DEFENDANT, AS THE ORIGINAL SENTENCE DID NOT CONSTITUTE A "VOID SENTENCE" THAT WOULD ALLOW SUCH A RESENTENCING.

STATE'S SECOND ASSIGNMENT OF ERROR

THE COMMON PLEAS COURT ERRED IN RESENTENCING DEFENDANT IN VIOLATION OF THE *SPECIAL PROSECUTORS* DOCTRINE AND LAW-OF-THE-CASE DOCTRINE.

III. Defendant's Assignment of Error – R.C. 2929.14(E)

{¶9} Defendant's single assignment of error contends the trial court erred in imposing consecutive sentences without making the findings contained in R.C. 2929.14(E)(4). Defendant argues the United States Supreme Court decision in *Ice* essentially overruled *Foster* insofar as *Foster* found R.C. 2929.14(E)(4) unconstitutional and severed it from Ohio's sentencing provisions. Defendant further asserts subsequent reenactments of R.C. 2929.14 post-*Ice* revived the judicially-severed consecutive sentencing considerations.

{¶10} The Supreme Court of Ohio recently addressed and rejected defendant's argument, concluding "[t]he United States Supreme Court's decision in *Oregon v. Ice* * * * does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*." *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, paragraph two of the syllabus. As a result, "[t]rial court judges are not obligated to engage in judicial fact-finding prior to imposing

consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made." *Id.* at paragraph three of the syllabus.

{¶11} Pursuant to *Hodge*, defendant's single assignment of error would be overruled but for our disposition of one of the arguments in the state's cross-appeal. In light of that disposition, defendant's single assignment of error is moot.

IV. State's Cross-Appeal – Defendant's Resentence

{¶12} The state's cross-appeal asserts the common pleas court erred in resentencing defendant, because the court properly instructed defendant regarding post-release control at his original sentencing hearing and in the judgment entry journalizing that sentence. With that premise, the state contends defendant's original sentence was not void, the trial court should not have resentenced him, and the sentence subject of defendant's current appeal should be vacated.

{¶13} Defendant prompted the trial court's decision to resentence him when he filed in the trial court his April 20, 2010 motion to vacate his sentence. Defendant claimed his original sentence violated *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462 because the trial court failed both to provide a specific period of post-release control in the judgment entry and to "give an explanation of post release control conditions that was sufficiently detailed to satisfy the subsequent holdings of the Ohio Supreme Court." (Motion, 5.) The trial court determined, based on a line of Supreme Court cases, that resentencing was appropriate and so scheduled defendant for a resentencing hearing.

{¶14} The line of cases the trial court referenced began when a trial court imposed a sentence less than the statutory minimum, causing the Supreme Court to hold

"[a]ny attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." *State v. Beasley* (1984), 14 Ohio St.3d 74, 75. Twenty years later, the court analyzed the consequences of a trial court's failure to notify a defendant of post-release. The court held that if a trial court failed to notify an offender about post-release control pursuant to R.C. 2929.19(B)(3), the proper remedy was to vacate the sentence and remand the matter to the trial court for resentencing. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph two of the syllabus.

{¶15} Following *Jordan*, the Supreme Court in *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250 held that where an offender was not properly informed about the imposition of post-release control at the sentencing hearing, the "sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense." *Id.* at syllabus. See also *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶6, cert. denied, 129 S.Ct. 463 (stating that "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, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence"); *Bloomer* at ¶2, 27 (explaining sentence is void if "the court fails to follow the statutory mandates to impose postrelease control").

{¶16} The Supreme Court of Ohio recently decided *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, where it reaffirmed that if a sentence "does not include the statutorily mandated term of postrelease control," it "is void." *Id.* at paragraph one of the syllabus. The court added that such a void sentence "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." Id. The court, however, clarified that although res judicata does not preclude review of a void sentence, "res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence." Id. at paragraph three of the syllabus. At the same time, the court modified *Bezak*, holding "[t]he new sentencing hearing to which an offender is entitled under *State v. Bezak* is limited to proper imposition of postrelease control." Id. at paragraph two of the syllabus. Thus, when a "judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, that *part* of the sentence is void and must be set aside" while the rest of the sentence remains in force. (Emphasis sic.) Id. at ¶26.

{¶17} Relying on *Fischer*, the state asserts that, even if post-release control were not properly imposed at defendant's original sentencing hearing, "[u]nder *Fischer*, the trial court could only 'resentence' defendant to the extent of adding post-release control." (State's reply brief, 1.) The state correctly applies *Fischer* to the facts of defendant's resentencing. See *State v. Gopp*, 9th Dist. No. 10CA0023, 2011-Ohio-1530. Pursuant to *Fischer*, the resentencing hearing was limited to properly imposing post-release control. *Fischer* at paragraph two of the syllabus.

{¶18} In the event we so applied *Fischer*, the state's brief states it withdraws the other contentions underlying its cross-appeal, including whether defendant's original sentence was void.

{¶19} Deeming the remaining contentions of the state's assignments of error on cross-appeal to be withdrawn, and defendant's single assignment of error being moot, we

sustain to the limited extent indicated the state's assignments of error on cross-appeal, we affirm the judgment of the trial court in re-imposing a mandatory five-year period of post-release control on defendant at the resentencing hearing, and we vacate the remainder of the trial court's resentence, leaving in tact defendant's original sentence in all respects except post-release control.

Judgment affirmed in part and vacated in part.

TYACK and CONNOR, JJ., concur.
