

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Freddy Lamar Strong,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-52 (C.P.C. No. 10CVH-9011)
Ohio State Adult Parole Authority et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on November 1, 2011

Timothy Young, Ohio Public Defender, and *E. Kelly Mihocik*,
for appellant.

Michael DeWine, Attorney General, and *Ryan G. Dolan*, for
appellees.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Plaintiff-appellant, Freddy Lamar Strong, appeals from a judgment of the Franklin County Court of Common Pleas granting the summary judgment motion of defendant-appellee, the Ohio State Adult Parole Authority ("APA"). Because the evidence submitted in connection with the motions for summary judgment does not demonstrate a genuine issue of material fact for trial, we affirm.

I. Facts and Procedural History

{¶2} On June 16, 2010, plaintiff filed a complaint in the Franklin County Court of Common Pleas seeking declaratory and injunctive relief against the APA. According to the complaint, plaintiff pled guilty in November 2004 to one count of sexual battery in violation of R.C. 2907.03(A)(3), a felony of the third degree, in case No. 2004CR1448 in the Stark County Court of Common Pleas. (Complaint, ¶7.) The complaint alleges the trial court sentenced plaintiff to three years of incarceration and stated, in its judgment entry, that postrelease control was "mandatory in this case up to a maximum of 5 years." (Complaint, ¶7, Exhibit B.) Plaintiff did not appeal from that sentence, completed his period of incarceration, and was released from custody on August 17, 2007. (Complaint, ¶10, Exhibit C.) Upon plaintiff's release, the APA placed plaintiff on postrelease control for a period of five years. (Complaint, ¶11, Exhibit C.)

{¶3} Plaintiff's complaint sought a declaratory judgment that the APA lacked the authority to subject him to postrelease control because postrelease control was not properly imposed as part of plaintiff's sentence, it violated the separation of powers doctrine, and it contravened principles of double jeopardy. Plaintiff sought preliminary and permanent injunctions to restrain the APA from subjecting him to postrelease control and requested an order directing the APA to immediately release him from postrelease control supervision.

{¶4} Following the APA's answer to the complaint, plaintiff moved for summary judgment on September 2, 2010 pursuant to Civ.R. 56 and requested the trial court to order his immediate release from postrelease control supervision. Plaintiff argued the words "up to" in the Stark County judgment entry were legally insufficient to impose a

mandatory period of postrelease control and rendered the postrelease control portion of his sentence void.

{¶5} On September 27, 2010, the APA filed a memorandum opposing plaintiff's summary judgment motion as well as its own cross-motion for summary judgment. The APA noted that for it to apply postrelease control to an offender, the trial court must include the applicable postrelease control term in the offender's sentencing entry. Acknowledging the "up to" language in the sentencing entry, the APA contended the language did not render the sentence void on its face or nullify the APA's authority to apply postrelease control. Instead, the APA argued, the sentencing entry placed plaintiff on notice that postrelease control was mandatory, and plaintiff's remedy was to challenge his sentence on direct appeal, not in a collateral attack. Plaintiff filed a reply memorandum on October 21, 2010 supporting his summary judgment motion and opposing the APA's cross-motion for summary judgment.

{¶6} The trial court issued a decision and entry on December 16, 2010, granting the APA's and denying plaintiff's respective summary judgment motions. The court pointed out that neither party submitted a transcript from plaintiff's November 2004 sentencing hearing, so the court did not know whether the Stark County court advised plaintiff regarding postrelease control. The trial court further noted that, even if it had jurisdiction to hear a lawsuit filed against the APA, "at the heart of this action is a collateral attack on a sentence issued by the Stark County Court of Common Pleas." (Dec. 16, 2010 Judgment Entry.) Relying on *Ohio Pyro, Inc v. Ohio Dept. of Comm., Div. of State Fire Marshall*, 115 Ohio St.3d 375, 2007-Ohio-5024, cert. denied (2008), 552 U.S. 1275, 128 S.Ct. 1652, the court concluded plaintiff's action was an improper

collateral attack on another court's judgment, because not only did the Stark County court have jurisdiction to issue the sentence against plaintiff, but the sentence was not the product of fraud.

II. Assignments of Error

{¶7} Plaintiff appeals, assigning the following errors:

FIRST ASSIGNMENT OF ERROR

The Stark County Court of Common Pleas' Judgment Entry improperly imposed postrelease control and is contrary to law. Mr. Strong's complaint asked the Franklin County Court of Common Pleas to determine whether or not the APA has authority to supervise Mr. Strong. It did not challenge the Stark County Court of Common Pleas' judgment.

SECOND ASSIGNMENT OF ERROR

When a judgment improperly imposes postrelease control, that portion of the judgment is void. The complaint alleges a permissible collateral attack on a void judgment.

III. Standard of Review

{¶8} An appellate court's review of summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. Summary judgment is proper only when the parties moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving parties are entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 1997-Ohio-221.

{¶9} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. The moving party, however, cannot discharge its initial burden under this rule with a conclusory assertion that the non-moving party has no evidence to prove its case; the moving party must specifically point to evidence of a type listed in Civ.R. 56(C), affirmatively demonstrating that the non-moving party has no evidence to support the non-moving party's claims. *Id.*; *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259. Once the moving party discharges its initial burden, summary judgment is appropriate if the non-moving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. *Dresher* at 293; *Vahila* at 430; Civ.R. 56(E).

IV. First Assignment of Error - Collateral Attack

{¶10} Plaintiff's first assignment of error contends the present case is not a collateral attack on another court's judgment. He asserts his complaint instead merely asked the trial court to declare the parties' legal rights and relations and, in particular, to decide the APA lacks the authority to supervise him because his sentencing entry from Stark County did not properly impose postrelease control.

{¶11} "The objective of a collateral attack is to modify a previous judgment because it is allegedly ineffective or flawed for some fundamental reason." *Ohio Pyro* at ¶19. Collateral attacks can be mounted in either the court that issued the judgment or in a different court, as they involve any new "proceeding" not encompassed within the proceeding in which the original judgment was entered. *Id.* at ¶20. Because plaintiff is

attempting to defeat, by means of a proceeding other than a direct appeal, the operation of the Stark County judgment entry imposing postrelease control, the present action is a collateral attack. *Id.* at ¶16, 20. Plaintiff's first assignment of error is overruled.

V. Second Assignment of Error – Postrelease Control: Void or Voidable

A. The Collateral Attack Doctrine

{¶12} The "collateral attack doctrine," although an option available to litigants, is narrowed in its application because it "disfavors the authority of one court to revisit a judgment of another court, in another proceeding, in other than very limited circumstances." *Id.* at ¶1. Although a collateral attack is not inherently improper, direct appeals are the primary way to challenge a judgment. *Id.* at ¶19, 22.

{¶13} The "reasons for disfavoring collateral attacks do not apply in two principal circumstances – when the issuing court lacked jurisdiction or when the order was the product of fraud." *Id.* at ¶23; *Lewis v. Reed* (1927), 117 Ohio St. 152, 159. The trial court thus properly relied on the language from *Ohio Pyro* to conclude collateral attacks are proper when the court issuing the order lacked jurisdiction or the order was the product of fraud. Collateral attacks are also proper when the judgment at issue is void. *Ohio Pyro* at ¶25. "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." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, paragraph one of the syllabus.

{¶14} As a result, even though nothing in the record suggests the Stark County court lacked jurisdiction or plaintiff's sentence was the product of fraud, plaintiff's action is not an improper collateral attack if plaintiff's underlying sentence is void. *Cf. State v.*

Laney, 6th Dist. No. L-10-1151, 2011-Ohio-135, ¶5, 9 (determining collateral attack by a "motion for declaratory judgment that sentence is void" was proper where the record showed "that the trial court failed to properly impose postrelease control on" the defendant). If, however, the sentence is voidable, a collateral attack is improper. *Fischer*.

B. *Postrelease Control*

{¶15} If an "offender is being sentenced for a * * * felony sex offense," the court must "[n]otify the offender that the offender will be supervised" under R.C. 2967.28 "after the offender leaves prison." R.C. 2929.19(B)(2)(c). R.C. 2967.28(B)(1), in turn, requires the sentence for a felony sex offense, such as plaintiff's offense of sexual battery in violation of R.C. 2907.03(A)(3), to include a period of five years of postrelease control after the offender's release from imprisonment. The trial court must both notify the offender of the postrelease control requirement and state in the judgment of conviction that the offender's sentence includes postrelease control. R.C. 2929.19(B)(2)(c).

{¶16} "Any 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. Applying that principle, the Supreme Court analyzed the consequences of a trial court's failure to notify a defendant of postrelease control and held that "[w]hen 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." *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph one of the syllabus. If a trial court were to fail to notify an offender of postrelease control pursuant to R.C. 2929.19(B),

the proper remedy is to vacate the sentence and remand the matter to the trial court for resentencing. *Id.* at paragraph two of the syllabus.

{¶17} 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 postrelease 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. If, however, the offender served the prison term imposed in his original sentence, he cannot be subject to another sentencing to correct the trial court's flawed imposition of postrelease control. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶70, citing *Bezak* at ¶18; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, syllabus, cert. denied, 129 S.Ct. 463.

{¶18} The Supreme Court of Ohio recently decided *Fischer* and reaffirmed that "in cases in which a trial judge does not impose postrelease control in accordance with statutorily mandated terms * * * the sentence is void" and "may be reviewed at any time, on direct appeal or by collateral attack." *Id.* at ¶30. *Fischer* contrasted a voidable judgment which, "[u]nlike a void judgment, * * * is one rendered by a court that has both jurisdiction and authority to act, but the court's judgment is invalid, irregular, or erroneous." *Id.* at ¶6, quoting *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶27. *Fischer* nonetheless clarified that a sentence void for failure to comply with the statutory requirements of postrelease control is void only as to postrelease control and must be rectified only in that aspect. *Id.* at ¶8, 17. Stating it would continue to adhere to its prior postrelease control cases, *Fischer* overruled only the portion of *Bezak* which "require[d] a

complete resentencing hearing rather than a hearing restricted to the void portion of the sentence." *Id.* at ¶31, 36.

{¶19} "[I]n the absence of a proper sentencing entry imposing postrelease control, the parole board's imposition of postrelease control cannot be enforced." *Bloomer* at ¶71. See also *Woods v. Telb*, 89 Ohio St.3d 504, 511-12, 2000-Ohio-171 (explaining that because postrelease control is part of the original judicially imposed sentence, the APA's discretionary ability to impose postrelease control sanctions does not violate the separation of powers doctrine); *Jordan* at ¶19 (stating that "unless a trial court includes postrelease control in its sentence, the Adult Parole Authority is without authority to impose it"); *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, ¶16 (concluding that "without the trial court's proper imposition of postrelease control, the Adult Parole Authority remains powerless to implement it").

C. *The Stark County Judgment - "Up To" v. Mandatory*

{¶20} Plaintiff contends that, even if his complaint collaterally attacked the Stark County judgment, the complaint was proper because it challenged the void portion of the judgment. Relying on *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, and *State v. Hazel* (Mar. 31, 2010), 10th Dist. No. 09AP-1132 (memorandum decision), plaintiff, in his summary judgment motion and on appeal, maintains that because the "up to" language in the judgment entry imposed a discretionary period of postrelease control rather than the mandatory period of postrelease control R.C. 2967.28(B)(1) demands, the imposition of postrelease control was void. See *Bloomer* at ¶69 (concluding a trial court sentencing a defendant to postrelease control must "notify the offender of the mandatory nature of the term of postrelease control and the length of that mandatory term and incorporate that

notification into its entry"). The APA responds that the Stark County judgment entry included the necessary reference to postrelease control, and although it used somewhat erroneous language, plaintiff's sentence was voidable and subject to a challenge only on direct appeal, not void and subject to collateral attack.

{¶21} *Brooks* does not address the issue here, but instead concluded R.C. 2929.19(B)(5) requires a trial court that imposes a community control sanction to notify the offender at the sentencing hearing of "the specific prison term that may be imposed" if the conditions of community control are violated. *Brooks* at ¶6, 19. *Hazel*, a memorandum decision, is not binding, especially to the extent it lacks support in the more recent cases this court decided on the issue. See Rep.R. 3(A), Rules for the Reporting of Opinions. Since *Hazel*, this court determined, through a line of cases, that a technical deficiency in a sentencing entry imposing postrelease control does not render the entry void where the record as a whole reveals the trial court satisfied all of the statutorily mandated terms for imposing postrelease control.

{¶22} Among those cases, *State v. Mays*, 10th Dist. No. 10AP-113, 2010-Ohio-4609, appeal not allowed, 127 Ohio St.3d 1535, 2011-Ohio-376, addressed an original sentencing entry that stated the court informed Mays orally and in writing of the "applicable periods" of postrelease control pursuant to R.C. 2929.19; the entry did not state the length of postrelease control or whether it was mandatory or discretionary. *Id.* at ¶3. The record, however, also contained (1) a criminal disposition sheet noting "S.B. 186 satisfied," (2) Mays' signature to his guilty plea form indicating five years of mandatory postrelease control for a first-degree felony, and (3) Mays' signature to a document entitled "NOTICE (Prison Imposed)" indicating not only a five-year period of postrelease

control would follow Mays' release but also the possible sanctions if Mays violated postrelease control. *Id.* at ¶4-7. On such a record, *Mays* concluded the original sentence was not void, did not require resentencing, and was correctable through a properly perfected direct appeal following the original sentence. See also *State v. Chandler*, 10th Dist. No. 10AP-369, 2010-Ohio-6534 (applying *Mays* to find postrelease control properly imposed where the record was substantially similar to the facts in *Mays*).

{¶23} Similarly, in *State v. Addison*, 10th Dist. No. 10AP-554, 2011-Ohio-2113, the judgment entry indicated that the court notified Addison about the "applicable periods" of postrelease control pursuant to R.C. 2929.19(B)(3) but did not specifically state whether the period of postrelease control was mandatory. *Id.* at ¶4, 16. As in *Mays*, the record contained a document Addison signed entitled "NOTICE (Prison Imposed)" that stated first degree felonies, of which Addison was convicted, carried a mandatory period of five years postrelease control. *Id.* While the record did not contain either a guilty plea form or a disposition sheet indicating compliance with S.B. 186, it included the transcript from the original sentencing in which the trial court adequately explained postrelease control and informed defendant he would be subject to a mandatory five-year period of postrelease control. *Id.* at ¶17.

{¶24} Recognizing *Fischer* as the Supreme Court's most recent pronouncement on the topic, the *Addison* court concluded its result was consistent with *Fischer* because the trial court properly included the statutorily mandated term of postrelease control in the defendant's sentence, though not in the entry. *Id.* at ¶20-21. As *Addison* noted, *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." (Emphasis sic.) *Id.* at ¶21. Because the record in *Addison* was clear that the trial court properly informed Addison about his postrelease control obligations during the sentencing hearing, the court decided *Fischer* did not resurrect the postrelease control argument defendant failed to raise during his initial appeal. *Id.*

{¶25} Given the overwhelming similarities to *Mays*, *Addison* applied *Mays* and concluded the original sentencing entry was not void. *Id.* at ¶18. *Addison* added that, "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." *Id.* at ¶18, citing *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, ¶51. Although plaintiff asserts *Addison* erroneously interpreted *Watkins* and is wrong to the extent it suggests substantial compliance will suffice, *Watkins* specifically decided the somewhat erroneous language in the petitioners' sentencing entries there did not deprive the APA of the authority to implement postrelease control for the petitioners in that case.

{¶26} Relying on *Bloomer*, plaintiff nonetheless claims the court falls short of its statutory obligation if it only properly advises a defendant of postrelease control during sentencing, as the entry itself also must include an accurate statement of postrelease control as part of a defendant's sentence. In *Bloomer*, the Supreme Court noted that "[a]lthough Bloomer signed a guilty-plea form and an acknowledgment of sentencing components that advised him of the mandatory three-year period of postrelease control, the court failed to include postrelease control in its sentencing entry." *Id.* at ¶22. *Bloomer*, however, involved an original sentencing entry that completely omitted postrelease control; the Stark County judgment entry does not.

D. Summary Judgment and Postrelease Control

{¶27} Unlike *Mays*, *Chandler*, and *Addison*, the entire record from the underlying case is not before us. Instead it includes only what plaintiff attached to his complaint for declaratory judgment, the November 2004 Stark County judgment entry. (R. 2-3, Exhibit B.) Although the judgment entries in *Mays*, *Chandler*, and *Addison* alone may have been insufficient to properly impose postrelease control, other documents in the record, as well as the sentencing hearing transcript, provided this court with the basis on which to determine the trial court properly included the mandatory term of postrelease control in the defendant's original sentence. Here, we are unable to know exactly what the court said to plaintiff at the sentencing hearing because neither party filed the sentencing hearing transcript or provided any explanation as to why the transcript, or the rest of the Stark County record, was not filed in this case.

{¶28} In moving for summary judgment, the APA argued that the "up to" language in plaintiff's sentence did not render the postrelease control portion of his sentence void, but merely voidable, and not subject to collateral attack. Plaintiff's summary judgment motion contended the language in the entry was insufficient. Even if the language in the entry were insufficient, that fact did not resolve the case, given the rationale of *Mays* and *Addison*. To demonstrate the entry was void, plaintiff needed also to submit the record from the sentencing hearing. In the absence of that evidence, the trial court could not determine the Stark County sentence imposing postrelease control on plaintiff was void. Cf. *Hartt v. Munobe*, 67 Ohio St.3d 3, 7, 1993-Ohio-177; *State v. Smith* (June 13, 2000), 10th Dist. No. 99AP-1151 (noting that "[w]here the record is unclear, we presume regularity in the proceedings below").

{¶29} Accordingly, because plaintiff failed to present the court with documents demonstrating the postrelease control portion of his sentence was void, the trial court properly granted the APA's motion for summary judgment. Plaintiff's second assignment of error is overruled.

VI. Disposition

{¶30} Having overruled plaintiff's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and KLATT, JJ., concur.
