

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2011-P-0088
PAUL D. SANDERS,	:	
Defendant-Appellant.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2004 CR 0121.

Judgment: Affirmed in part; reversed in part and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Paul D. Sanders, pro se, PID: A473235, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, OH 44430-0901 (Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Paul D. Sanders, appeals from a judgment of the Portage County Court of Common Pleas, dismissing as untimely his pro se petition for postconviction relief.

{¶2} On April 15, 2004, appellant was indicted on three counts: counts one and two for aggravated robbery, felonies of the first degree in violation of R.C. 2911.01(A)(1) and (3); and count three, failure to comply with order or signal of a police officer, a felony of the third degree in violation of R.C. 2921.331(B) and (C)(3). Count one arose

from a separate incident than counts two and three. Appellant ultimately entered a guilty plea to an amended count one, robbery, a felony of the second degree in violation of R.C. 2911.01(A)(3). Counts two and three proceeded to a jury trial on September 24, 2004. The jury found appellant guilty on both counts. The court sentenced appellant to two years in prison on count one, robbery; nine years on count two, aggravated robbery; and four years on count three, failure to comply with order or signal of a police officer, consecutive, for an aggregate prison term of 15 years.

{¶3} Appellant previously filed an appeal with this court challenging his consecutive sentences and raising an ineffective assistance of counsel claim. On September 9, 2005, this court affirmed the judgment of the trial court. *State v. Sanders*, 11th Dist. No. 2004-P-0094, 2005-Ohio-4778. On March 29, 2006, the Ohio Supreme Court declined jurisdiction on appellant's delayed appeal. *State v. Sanders*, 108 Ohio St.3d 1508, 2006-Ohio-1329.

{¶4} Since the time of his direct appeal, appellant has filed several unsuccessful pro se post-sentence motions, including a motion to vacate void judgment, motion for relief from collection of court costs, motion for sentencing, motion for leave to withdraw guilty plea, and the underlying petition for postconviction relief in which he challenged the validity of his sentence and requested a hearing on the merits. The state responded with a motion to dismiss appellant's petition, and the trial court converted the state's motion to dismiss to a summary judgment motion. The trial court concluded that appellant filed his petition for postconviction relief outside of the 180-day requirement and that he failed to comply with the mandates in R.C. 2953.23 to file an untimely petition. Accordingly, the court dismissed appellant's petition. Appellant filed the present appeal, pro se, asserting the following assignments of error:

{¶5} “[1.] Whether the trial court abused its discretion thereby implicating due process when it failed to vacate defendant’s void sentence and accord defendant a new ‘de novo’ sentencing hearing regardless of the trial court’s characterization of the proceedings as a post-conviction relief proceeding.

{¶6} “[2.] Whether the trial court abused its discretion thereby violating procedural due process when it denied ‘without hearing’ defendant’s motion to withdraw guilty plea, Crim.R. 11(C)(2)(a).”

{¶7} In his first assignment of error, appellant alleges that the trial court committed reversible error when it granted summary judgment in favor of the state because his sentence did not conform to the statutory mandates requiring the imposition of a postrelease control term. Accordingly, he contends that his sentence must be vacated as void. Specifically, appellant requests this court to remand the matter to the trial court for a “new”, de novo sentencing hearing. We agree that appellant’s sentence is void because it failed to include the statutorily required postrelease control term. However, as explained further below, the sentencing hearing to which appellant is entitled is limited strictly to proper imposition of postrelease control.

{¶8} Pursuant to *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, “a trial court’s failure to notify an offender at the sentencing hearing about postrelease control is error. * * * [B]ecause a trial court has a statutory duty to provide notice of postrelease control at the sentencing hearing, any sentence imposed without such notification is contrary to law.” *Id.* at ¶10. Furthermore, any sentence that does not conform with the statutory postrelease control mandates is subject to collateral attack by any party. *Id.* at ¶35. Although appellant advanced his postrelease control argument

via a postconviction relief motion which is subject to time limitations, the substantive argument is a collateral attack not subject to time limits. *Id.* at ¶19-20, 25.

{¶9} Appellant pleaded guilty to robbery, a second degree felony. He was found guilty by a jury of aggravated robbery, a first degree felony, and failure to comply with order or signal of a police officer, a felony of the third degree, and was sentenced on all three counts during a single hearing. Under R.C. 2967.28 (B)(1)-(3), the statutory subsections that set forth periods of postrelease control, the trial court was required to notify appellant that he is subject to mandatory postrelease control terms of three years, five years, and three years, respectively, on the above counts. Yet, our review of the transcript of the sentencing hearing reveals that the trial court failed to notify of postrelease control when sentencing appellant.

{¶10} The trial court's judgment entry states that appellant was notified during the hearing that he "*may* be supervised under post release control." (Emphasis added.) However, as noted, in addition to the fact that the trial court failed to notify appellant of postrelease control at the sentencing hearing, appellant was also subject to *mandatory*, not discretionary, terms of postrelease control. Thus, the trial court's written judgment entry does not reflect what actually took place at sentencing and is also incorrect as a matter of law. See *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, ¶19 (while trial court must incorporate postrelease control notice into the sentencing entry, the main focus regarding postrelease control has always been on the notification itself and not the sentencing entry).

{¶11} Accordingly, we agree with appellant to the extent that his sentence did not include the statutorily mandated terms of postrelease control, is contrary to law, and

therefore, void. However, appellant's request for a de novo sentencing hearing is misplaced pursuant to *Fischer*, 2010-Ohio-6238.

{¶12} In *Fischer*, the Supreme Court of Ohio reaffirmed its prior holdings that a sentence that failed to include the statutorily required postrelease term is void. *Id.* at ¶1. Nonetheless, the *Fischer* Court constrained its holding solely to the illegal portion of the sentence, stating that “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.” *Id.* at ¶26. In that case, the proper remedy is to resentence the defendant. *Id.* at ¶10. However, “the new sentencing hearing to which an offender is entitled *** is limited to proper imposition of postrelease control.” *Id.* at ¶29. Thus, the only part of the sentence that is void and subject to resentencing is the portion that fails to comply with the requirements of the postrelease control statutes.

{¶13} Appellant bases his request for a de novo hearing on, inter alia, *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, and *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, two cases that preceded *Fischer* on the subject of postrelease control notification. In *Singleton*, the Court held that for sentencing imposed before July 11, 2006 the effective date of R.C. 2929.191(which would include Sanders’ sentence), in which the trial court failed to properly impose postrelease control, a full, de novo sentencing hearing is required. *Id.* at paragraph one of the syllabus. On the other hand, for sentences imposed on or after that date, the nunc pro tunc correcting procedure set forth in R.C. 2929.191 could be used. *Id.* at paragraph two of the syllabus. However, the holding in *Singleton* was predicated upon *Bezak*. *Id.* at ¶17, 22, 25.

{¶14} In *Bezak*, the Court concluded that when a court of appeals remands a case for resentencing because of the trial court’s failure to notify the offender of

postrelease control at sentencing, the court must conduct a new sentencing hearing *in its entirety* rather than a hearing limited to reimposing postrelease control. *Id.* at ¶16. But, the Court in *Fischer* expressly modified *Bezak* in that narrow context and, as previously noted, held that the only portion of the sentence that is void is the part that fails to comport with the postrelease control, and the new sentencing hearing to which an offender is entitled is limited to proper imposition of postrelease control. *Fischer* at ¶29.

{¶15} As recognized by this and other appellate courts in this state, the holding in *Singleton* has been effectively overruled by the holding in *Fischer* because *Fischer* abrogates the offender's entitlement to a de novo sentencing hearing. See *State v. Pesci*, 11th Dist. No. 2011-L-096, 2012-Ohio-3743, ¶9-11; *State v. Reid*, 2nd Dist. No. 24841, 2012-Ohio-2666, ¶21; *State v. Bunting*, 5th Dist. Nos. 2011CA00112, 00130, and 00131, 2012-Ohio-445, ¶19-20; and *State v. Deaver*, 4th Dist. No. 10CA7, 2011-Ohio-1393, ¶6-9. Under the scope of *Fischer*, appellant is not entitled to a de novo sentencing hearing.

{¶16} Based on the foregoing, appellant's first assignment has merit to the extent that he maintains his sentence is void. Accordingly, this court remands this matter to the trial court for a resentencing hearing limited solely to proper imposition of postrelease control.

{¶17} In his second assignment of error, appellant contends that his guilty plea on count one, robbery, was not entered knowingly, voluntarily, and intelligently as mandated by Crim. R. 11(C)(2)(a). Specifically, appellant points to the fact that during the plea colloquy, he was not notified that a postrelease control term was mandatory. Appellant also argues that the trial court failed to instruct him regarding the

consequences for a violation of postrelease control. Appellant maintains that he would have insisted on proceeding to trial on that count had he known that the imposition of postrelease control was mandatory and that any violation of the same would result in further sanctions. The record reflects that appellant was advised that he “could be” placed on postrelease control when released from prison, and contrary to appellant’s own assertion, that his sentence could be increased by up to one half if he violated the terms of postrelease control. Nonetheless, based on the doctrine of *res judicata* and in consideration of the limits of matters which can be considered in a petition for postconviction relief, we disagree with appellant’s assertions.

{¶18} This court has held, “[a] defendant is barred by the doctrine of *res judicata* from raising any defense or constitutional claim in a postconviction proceeding that was or could have been raised at trial or on direct appeal from his conviction.” *State v. Davie*, 11th Dist. No. 2007-T-0069, 2007-Ohio-6940, ¶23; see also *State v. Lintz*, 11th Dist. No. 2010-L-067, 2011-Ohio-6511, ¶37-38. “To avoid the application of *res judicata*, the evidence supporting appellant’s claim must assert competent, relevant and material evidence outside the trial court’s record, and it must not be evidence that existed or was available for use at the time of trial.’ * * * ” *State v. Poling*, 11th Dist. No. 2012-A-0002, 2012-Ohio-3039, ¶19.

{¶19} Furthermore, “Ohio courts, including the Supreme Court, ‘have applied *res judicata* to bar the assertion of claims in a motion to withdraw a guilty plea that were or could have been raised at trial or on appeal.” *State v. Hazel*, 10th Dist. Nos. 10AP-1013, 2014, 2011-Ohio-4427, ¶18, quoting *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, ¶59; *State v. Ables*, 4th Dist. No. 11CA22, 2012-Ohio-3377, ¶14.

{¶20} Appellant's contention that he would have elected to go to trial on the robbery count had he been properly notified of postrelease control at the time of his plea agreement, if true, would have been known to him at the time and could have been raised on direct appeal. However, appellant failed to do so. Consequently, because appellant did not raise this issue in his direct appeal, he is precluded from raising it at this time. While *Fischer* holds that *the part* of appellant's sentence that did not include proper postrelease control notification is void, *Fischer* also makes it clear that res judicata still applies to the other aspects of the merits of appellant's conviction, and does not permit reexamination of all perceived errors at trial or in other proceedings prior to sentencing. *Fischer* at ¶25. Furthermore, appellant does not rely on any matters outside the record to support his claim such that it would be the proper subject of a postconviction proceeding.

{¶21} Accordingly, appellant's second assignment of error is not well-taken.

{¶22} The judgment of the Portage County Court of Common Pleas is thereby affirmed in part; reversed in part and remanded.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.