[Cite as *State v. Bregen*, 2011-Ohio-1872.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-06-039
	:	O P I N I O N
- vs -		4/18/2011
	:	
ALLEN G. BREGEN aka ALAN G. BREGEN,	:	
	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2005CR00601

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellee

Allen G. Bregen aka Alan G. Bregen, #A506729, Lebanon Correctional Institution, P.O. Box 56, Lebanon, Ohio 45036-0056, defendant-appellant, pro se

BRESSLER, J.

{¶1} Defendant-appellant, Allen G. Bregen aka Alan G. Bregen, appeals from a decision of the Clermont County Court of Common Pleas denying his motion to withdraw his guilty pleas. We affirm the trial court's decision denying Bregen's motion to withdraw his guilty pleas, but vacate the portion of the trial court's 2006 judgment entry advising Bregen that "post-release control is mandatory in this case up to a maximum of five (5) years[,]" since

this portion of the judgment entry is void, and remand this case with instructions that the trial court correct its 2006 judgment entry under R.C. 2929.191.

{¶2} In 2005, Bregen was found guilty of four counts of rape of a person under the age of 13 in violation of R.C. 2907.02(A)(1)(b) after he pled guilty to those counts in exchange for the dismissal of four other such counts. The trial court sentenced Bregen to an aggregate 40-year prison term and classified him as a sexual predator. In *State v. Bregen*, Clermont App. No. CA2005-11-101, 2006-Ohio-4691, this court affirmed the trial court's decision to classify Bregen as a sexual predator, but remanded the case for resentencing under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. On December 29, 2006, the trial court issued a judgment entry resentencing Bregen to an identical, aggregate 40-year prison term. This court affirmed the trial court's judgment resentencing Bregen in *State v. Bregen* (Sept. 25, 2007), Clermont App. No. CA2007-01-018 (accelerated calendar judgment entry), and the Ohio Supreme Court denied Bregen leave to appeal in *State v. Bregen*, 117 Ohio St.3d 1407, 2008-Ohio-565.

{¶3} In 2010, Bregen, acting pro se, filed in the trial court a motion to withdraw his guilty pleas under Crim.R. 32.1. The trial court denied Bregen's motion on the authority of *State ex rel. Special Prosecutors v. Court of Common Pleas* (1978), 55 Ohio St.2d 94.

{¶4} Bregen now appeals, assigning the following as error:

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRORED [sic] WHEN IT FAILED TO SEPERATE [sic] THE OFFENSES AS THEY WERE IMPROPERLY MERGED."

{¶7} Assignment of Error No. 2:

{¶8} "THE TRIAL COURT ERRORED [sic] WHEN IT FAILED TO INFORM THE DEFENDANT OF A MANDATORY PERIOD OF POST-RELEASE CONTROL."

{¶9} Assignment of Error No. 3:

{¶10} "THE TRIAL COURT ERRORED [sic] WHEN IT MANDATED THAT THE DEFENDANT REGISTER AS A SEXUAL PREDATOR AS IT WAS NOT LISTED IN THE INDICTMENT."

{¶11} Bregen essentially argues (1) his convictions and sentences on the four counts of rape of a person under the age of 13 should have been merged under R.C. 2941.25(A) and the Double Jeopardy Clauses of the United States and Ohio Constitutions (first assignment of error); (2) the trial court's failure to inform him of a mandatory period of postrelease control rendered his sentence "contrary to law" and thus void (second assignment of error); and (3) the trial court erred by classifying him as a sexual predator, as this was not listed as a specification in his indictment, as required by R.C. 2950.09 (third assignment of error). The state counters these arguments by pointing out that Bregen is appealing from the trial court's denial of his motion to withdraw his guilty pleas and that under *State ex rel. Special Prosecutors,* 55 Ohio St.2d 94, the trial court lacked jurisdiction to grant Bregen's motion, and therefore the trial court's denial of Bregen's motion must be affirmed.

{¶12} We agree with the state that the trial court lacked jurisdiction to grant Bregen's motion to withdraw his guilty pleas under Crim.R. 32.1. In *State ex rel. Special Prosecutors* at 97, the Ohio Supreme Court explained that "[t]he general rule of law is that the trial court loses jurisdiction to take action in a cause after an appeal has been taken and decided *** 'except to take action in aid of the appeal, until the case is remanded to it by the appellate court.'" (Citations omitted.) The court found that while trial courts "retain jurisdiction over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment," the trial court in that case did not have jurisdiction to grant the defendant's motion to withdraw his guilty plea to the charge of murder or his motion for a new trial, since those actions "were inconsistent with the judgment of the Court of Appeals affirming the trial court's conviction premised upon the guilty plea." Id. The court noted that

"[t]he judgment of the reviewing court is controlling upon the lower court as to all matters within the compass of the judgment[,]" and found that "the trial court lost its jurisdiction when the appeal was taken, and, absent a remand, it did not regain jurisdiction subsequent to the Court of Appeals' decision." Id.

{¶13} Applying *State ex rel. Special Prosecutors* to this case, we find that when the trial court convicted and sentenced Bregen on four counts of rape of a person under the age of 13 in 2005, the trial court lost jurisdiction over the matter when Bregen filed his direct appeal with this court. The trial court obtained jurisdiction once more in 2006 when this court remanded the case to the trial court for resentencing in light of *Foster.* However, when the trial court issued its December 28, 2006 judgment entry resentencing Bregen and Bregen appealed the trial court's judgment to this court, the trial court again lost jurisdiction over this case, and the trial court did not regain jurisdiction after this court affirmed the trial court's judgment resentencing Bregen.

{¶14} Bregen implicitly concedes that the trial court lacked jurisdiction to grant his motion to withdraw his guilty pleas under Crim.R. 32.1, as none of his assignments of error challenge the trial court's denial of his motion to withdraw his guilty pleas. Instead, Bregen's assignments of error raise arguments similar to the ones he raised in the trial court *in support of* his motion to withdraw his guilty pleas. However, Bregen is no longer using those arguments to support a motion to withdraw his guilty pleas, but instead, *to challenge the validity of his sentence.* By doing so, Bregen is changing his theory of the case in hopes of obtaining a reversal of the trial court's judgment. However, it is well settled that, generally, a party is not permitted to raise issues or arguments on appeal that the party failed to raise in the trial court at a time when the trial court could have corrected the alleged error or avoided it altogether. See, e.g., *State v. Guzman-Martinez*, Warren App. No. CA2010-06-059, 2011-Ohio-1310, ¶9, citing *State v. Abney*, Warren App. No. CA2004-02-018, 2005-Ohio-146, ¶

17, citing *State v. Awan* (1986), 22 Ohio St.3d 120, 122, and *State v. Childs* (1968), 14 Ohio St.2d 56, paragraph three of the syllabus.

{¶15} Furthermore, Bregen could have raised the issues and arguments he is now raising on appeal in the trial court during the original proceedings in this case *or* in his direct appeal to this court from his convictions and sentences, and since he did not, those matters are generally deemed to be res judicata. See, e.g., *In re J.B.*, Butler App. Nos. CA2005-06-176, CA2005-07-193, CA2005-08-377, 2006-Ohio-2715, ¶15, quoting *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus ("Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at trial, which resulted in that judgment of conviction, or on an appeal from that judgment.")

{¶16} Nevertheless, the state concedes that the trial court erred when it failed to properly inform Bregen about the mandatory five-year period of postrelease control imposed on him as a result of his convictions—an issue that Bregen raises in his second assignment of error. Specifically, the state points out that the trial court, in its December 29, 2006 judgment entry resentencing Bregen, used the "up to" language in notifying him of his postrelease control obligations. The state contends that the use of such language constitutes plain error, and therefore "[t]here must be a reversal and remand for the correction of the error pursuant to R.C. 2929.191." We agree.

{¶17} In *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6058, paragraph one of the syllabus, the court 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 post-release control and is further required to incorporate that notice into its journal entry imposing sentence." In *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, syllabus, the court stated:

{¶18} "When a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense."

{¶19} In *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, paragraphs one through four of the syllabus, the court affirmed the first sentence of the *Bezak* syllabus but modified the second sentence of the *Bezak* syllabus as follows:

{¶20} "1. 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.

{¶21} "2. The new sentencing hearing to which an offender is entitled under *State v. Bezak* is limited to proper imposition of postrelease control. (*State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, syllabus, modified.)

{¶22} "3. Although the doctrine of 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.

{¶23} "4. The scope of an appeal from a resentencing hearing in which a mandatory term of postrelease control is imposed is limited to issues arising at the resentencing hearing."

{¶24} Bregen was convicted of four, first-degree felonies and was re-sentenced after July 11, 2006. Therefore under R.C. 2967.28(B)(1), he was subject to a mandatory five-year period of postrelease control upon his release from prison. At Bregen's November 3, 2006 resentencing hearing, the trial court informed him that "[a] period of supervision by the Adult Parole Authority after release from prison is mandatory for five years." However, the trial court's December 29, 2006 judgment entry resentencing Bregen states, "notice is hereby

given to the defendant, that as part of his sentence post-release control is mandatory in this case *up to* a maximum of five (5) years." (Underlined emphasis, sic; italicized emphasis, added.)

{¶25} This court has held that a trial court's use of the words "up to" in informing a defendant about the number of years that the defendant will be subject to postrelease control following his sentence fails to adequately inform the defendant about both the *mandatory* nature of postrelease control and the *number of years* of postrelease control that a defendant must serve following his sentence, since "it improperly implies that he could be subject to something less than the statutorily required term." *State v. Gann*, Butler App No. CA2010-07-153, 2011-Ohio-895, ¶19. See, also, *State v. Addis*, Brown App. No. CA2009-05-019, 2010-Ohio-1008, ¶22. As a result, the portion of the trial court's December 29, 2006 judgment entry resentencing Bregen that fails to properly advise him about the statutorily mandated term of postrelease control is void. See *Fischer*, 2010-Ohio-6238 at paragraph one of the syllabus. Moreover, this court is not precluded from reviewing this error by principles of res judicata, and the error may be reviewed at any time on direct appeal or by collateral attack. Id. at ¶30. Therefore, we must remand this case to the trial court so that the trial court "can employ the 'sentence-correction mechanism of R.C. 2929.191.'" *Addis*, 2010-Ohio-1008 at ¶24.

{¶26} Consequently, Bregen's second assignment of error is sustained to the extent indicated.

{¶27} By contrast, the issues raised in Bregen's first and third assignments of error are still subject to the bar of res judicata, as Bregen could have raised these issues in the trial court at his original sentencing *or* in this court in his direct appeal of his convictions and sentences but did not, see *In re J.B.*, 2006-Ohio-2715 at ¶15, quoting *Perry*, 10 Ohio St.2d 175, paragraph nine of the syllabus, and Bregen has failed to demonstrate that the remaining

elements of his sentence are unlawful. *Fischer*, 2010-Ohio-6238 at paragraph three of the syllabus.

{¶28} For example, in his first assignment of error, Bregen essentially argues that his convictions and sentences on the four counts of rape of a person under the age of 13 should have been merged under R.C. 2941.25(A) and the Double Jeopardy Clauses of the United States and Ohio Constitutions because the four rape counts involved "offenses of the *same* kind, committed at the same *time*," and therefore the state was required to prove that he "committed each offense with a seperate [sic] and distinct animus[,]" which, Bregen contends, the state failed to do. Bregen is essentially arguing that he should have received one ten-year prison term for his offenses rather than four consecutive ten-year prison terms. We find this argument unpersuasive.

{¶29} While Bregen asserts that the offenses of which he was convicted were committed at the same time and with the same animus, the record shows that the offenses against the children took place "over no less than a two-month period of time[,]" during which Bregen "performed oral sex on each of his children, instructed them to perform oral sex on each other, masturbated in front of them, and ejaculated on his daughter." *Bregen*, 2006-Ohio-4691 at ¶11. The record shows that the incidents forming the basis of the counts to which Bregen pled guilty and for which he was convicted and sentenced took place "on several separate occasions over a period of time[,]" and "[t]he crimes were committed separately and there was a separate animus for each crime." *State v. Thomas*, Brown App. No. CA2002-01-001, 2003-Ohio-74, ¶16. Thus, the record does not support Bregen's claim that the offenses for which he was convicted and sentenced were committed with the same animus for purposes of R.C. 2941.25(B).

{¶30} In light of the foregoing, Bregen's first assignment of error is overruled.

{¶31} In his third assignment of error, Bregen contends that the trial court erred by

classifying him as a sexual predator since this was not listed as a specification in his indictment as required by R.C. 2950.09, and therefore "without this jurisdictional requirement," the trial court cannot order him "to register upon his release." However, R.C. 2950.09, which was repealed, effective January 1, 2008, did not require a sexual predator specification to be listed in a defendant's indictment before the defendant could be classified as one. Moreover, Bregen could have raised this issue in his direct appeal, and since he did not, he is precluded from raising it now by the principle of res judicata. See *Fischer*, 2010-Ohio-6238, paragraph three of the syllabus.

{¶32} Accordingly, Bregen's third assignment of error is overruled.

{¶33} The judgment of the trial court is reversed, and this cause is remanded for further proceedings consistent with this opinion.

HENDRICKSON, P.J., and RINGLAND, J., concur.

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