

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	Case No. 14CA3657
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
VAN L. SMITH,	:	
Defendant-Appellant.	:	RELEASED: 03/03/2015

APPEARANCES:

Van L. Smith, Chillicothe, Ohio, pro se appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

Harsha, J.

{¶1} The Scioto County Court of Common Pleas convicted Van L. Smith upon his guilty plea to trafficking in cocaine and sentenced him to a mandatory prison term of six years and a postrelease control term of five years. Smith subsequently filed a motion for resentencing in which he claimed that his judgment was void because the trial court failed to impose a mandatory fine and a mandatory driver's license suspension. The state filed a memorandum in opposition in which it agreed that the trial court should modify Smith's sentence to include the mandatory sanctions that were missing from his original sentence. The trial court acknowledged its error, but denied Smith's motion.

{¶2} On appeal, Smith asserts that the trial court erred in failing to resentence him. The state concedes that the trial court erred. We agree. The trial court's failure to include the mandatory fine and driver's license suspension as part of Smith's sentence

rendered that part of his sentence void, and a remand is required for resentencing limited to the imposition of these mandatory sanctions. We sustain Smith's assignment of error, reverse the judgment of the trial court, and remand the cause for further proceedings.

I. FACTS

{¶3} In March 2013, the Scioto County Grand Jury returned an indictment charging Smith with trafficking in cocaine, possession of drugs, tampering with evidence, and possession of criminal tools. The trial court appointed counsel for Smith, and he entered a plea of not guilty to the charges.

{¶4} Smith later withdrew his original plea and pleaded guilty to the charge of trafficking in cocaine in return for the dismissal of the remaining charges. In November 2013, the trial court convicted Smith of trafficking in cocaine and sentenced him to a mandatory prison term of six years and five years of postrelease control. The sentence did not include a fine or driver's license suspension.

{¶5} Over eight months later, in July 2014, Smith filed a motion for resentencing. Smith claimed that his original sentence was void because it did not include the mandatory fine and driver's license suspension. In its memorandum in opposition, the state conceded that the trial court's sentencing entry failed to include the specified mandatory sanctions and argued that the court should modify the original sentence to include these terms. The state claimed that no hearing was necessary to correct the sentence. In August 2014, the trial court agreed that "it did not suspend the defendant's driver's license nor did it impose a mandatory fine," but it denied Smith's motion because it did not find "that it would be in the best interest of the defendant, Van

L. Smith, to be brought back to Scioto County to have a mandatory fine imposed and have his driver's license suspended." This appeal followed.

II. ASSIGNMENT OF ERROR

{¶6} Smith assigns the following error for our review:

The Trial Court abused its discretion when it failed to Re-Sentence Defendant-Appellant as Statutory [sic] required for the mandatory fines, and suspending of the driver's licenses as statutory [sic] required.

III. LAW AND ANALYSIS

{¶7} In his sole assignment of error, Smith asserts that the trial court abused its discretion when it failed to resentence him as statutorily required to correct his void sentence. Because Smith's claim raises a question of law, we reject his claimed standard of review and review this legal question de novo. See *State v. Carpenter*, 4th Dist. Lawrence No. 14CA13, 2014-Ohio-5698, ¶ 10 (court applies de novo standard of review to determine question of law).

{¶8} Smith's original sentence failed to include the mandatory fine required under R.C. 2925.03(D)(1) and 2929.18(B)(1) and the mandatory driver's license suspension required by R.C. 2925.01(D)(2) and (G). When a trial court fails to include a mandatory fine or driver's license suspension as part of a defendant's sentence, that part of the sentence is void. See *State v. Moore*, 135 Ohio St.3d 151, 2012-Ohio-5479, 985 N.E.2d 432, ¶ 14 ("Because the fine is a statutory punishment, the trial court's failure to impose the fine * * * renders that part of the sentence void"); *State v. Harris*, 132 Ohio St.3d 318, 2012-Ohio-1908, 972 N.E.2d 509, paragraph one of the syllabus ("When a trial court fails to include a mandatory driver's license suspension as part of an offender's sentence, that part of the sentence is void").

{¶9} Although the trial court acknowledged its error, it denied Smith's motion for resentencing. The trial court erred in doing so because this error requires resentencing to impose the mandatory fine and driver's license suspension. *Moore* at the syllabus ("[r]esentencing is limited to the imposition of the mandatory fine"); *Harris* at paragraph one of the syllabus ("[r]esentencing of the offender is limited to the imposition of the mandatory driver's license suspension"). Res judicata applies to the other parts of Smith's conviction and sentence. See *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 7, quoting *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 27, 40 ("the void sanction 'may be reviewed at any time, on direct appeal or by collateral attack * * *' but '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' ").

{¶10} Therefore, we sustain Smith's sole assignment of error and remand the cause for resentencing limited to the imposition of the mandatory fine and driver's license suspension.

{¶11} The state does not disagree with this result, but instead argues that "[n]o hearing is necessary and the trial court may simply remedy the portions of the judgment," or, in the alternative, a resentencing hearing should be limited to addressing the two sanctions. Smith replies that in accordance with Crim.R. 43, a hearing must be held at which he is physically present.

{¶12} In *State v. Schleiger*, 141 Ohio St.3d 67, 2014-Ohio-3970, 21 N.E.3d 1033, at ¶ 22, the Supreme Court of Ohio recently held that "a resentencing hearing is a 'critical stage' of the proceedings to which the right to counsel attaches." In that case,

the resentencing was limited to the imposition of statutorily mandated postrelease control. Similarly, the resentencing here is limited to the imposition of a statutorily mandated fine and driver's license suspension. Therefore, we disagree with the state's unsupported claim that the trial court need not conduct a hearing and may simply issue an amended judgment entry. "Crim.R. 43 provides a criminal defendant the right to be present at every stage of the criminal proceedings and any modification of a sentence." See *State v. Patrick*, 4th Dist. Lawrence No. 12CA16, 2013-Ohio-3821, ¶ 10, citing Crim.R. 43(A)(1); compare *State v. Glasser*, 4th Dist. Athens No. 11CA11, 2012-Ohio-3265, ¶ 49, citing *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 90 (accused has a fundamental right to be present at all critical stages of the criminal trial, but his absence does not necessarily result in prejudicial or constitutional error).

{¶13} Therefore, in accordance with *Moore* and *Harris*, we reverse the judgment denying Smith's motion for resentencing and remand the cause for resentencing limited to the imposition of the mandatory fine and driver's license suspension. The resentencing hearing constitutes a critical stage of the proceedings at which Smith must be present and represented by counsel. Thus, we sustain Smith's assignment of error.

IV. CONCLUSION

{¶14} Having sustained Smith's assignment of error, we reverse the judgment of the trial court and remand the cause for resentencing limited to the imposition of the mandatory fine and driver's license suspension.

JUDGMENT REVERSED
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.