[Cite as *State v. Williams*, 2010-Ohio-225.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

GRAFTON E. WILLIAMS III

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 2009 AP 10 0056

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 2006 CR 01 0016
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 25, 2010

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Grafton E. Williams III appeals from the decision of the Court of Common Pleas, Tuscarawas County, which denied his motion for felony resentencing. The relevant facts leading to this appeal are as follows.

{¶2} In September 2005, appellant was indicted by the Tuscarawas Grand Jury on multiple counts of felony non-support of dependents. On April 11, 2006, appellant pled no contest to the charges in the indictment. In June 2006, appellant was placed on community control.

{¶3} The trial court subsequently revoked appellant's community control and ordered him to prison. In June 2008, appellant was granted judicial release; however, on June 11, 2009, the court revoked appellant's judicial release. At that time, the trial court resentenced appellant to the balance of six consecutive twelve-month prison terms.

{¶4} On September 22, 2009, appellant filed a pro se motion for resentencing, as analyzed infra. The trial court overruled said motion on October 8, 2009.

{¶5} Appellant thereafter timely appealed, and herein raises the sole Assignment of Error:

{¶6} "I. THE TRIAL COURT'S SENTENCE IS UNLAWFUL AND VOID."

I.

{¶7} In his sole Assignment of error, appellant contends the trial court erred in denying his motion for resentencing. We disagree.

{¶8} In appellant's motion for resentencing, he argued that his sentence of June 11, 2009 was void based on R.C. 2967.28(C), which states in part as follows:

{¶9} "Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender. ***."

{¶10} The trial court's judgment entry of June 11, 2009, revoking judicial release, includes the following language:

{¶11} "ORDERED that the Defendant was notified that as a part of his sentence in this case *he will be supervised* under R.C. 2967.28, by the Ohio Parole Board, subsequent to the conclusion of a prison term and, further, if the Defendant violates that supervision, the Ohio Parole Board may, as a part of this sentence, return the Defendant to prison for a period of up to one-half of the prison term served. ***."

{¶12} Id. at 5, emphasis added.

{¶13} Appellant accordingly contends that he is entitled to resentencing because the trial court, via the above language, failed to impose post-release control with the proper discretion left to the Ohio Parole Board as required by R.C. 2967.28, and instead unlawfully sentenced him to "mandatory" post-release control.

{¶14} As appellant notes, in *State v. Bezak*, 114 Ohio St.3d 94, 868 N.E.2d 961, 2007-Ohio-3250, the Ohio Supreme Court held: "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." Id., at the syllabus.

Appellant also directs us to *State v. Hunter*, Cuyahoga App.No. 92032, 2009-Ohio-4194, wherein the Eighth District Court of Appeals stated as follows: " *** [Defendant Hunter] argues the trial court usurped the authority of the Adult Parole Authority ('APA'), which should have been the entity to determine whether appellant would be subject to postrelease control for the instant case pursuant to R.C. 2967.28. We agree with appellant. The trial court should not have imposed a term of postrelease control and should have left that determination to the APA." Id. at ¶ 29.

{¶15} Nonetheless, upon review, we are unpersuaded that *Bezak* must be extended to apply to the circumstances of the case sub judice. The import of the above-cited judgment entry language in this matter is that the Parole Board still manages any effective follow-up regarding post-release control. We find the trial court's use of the phrasing "will be supervised" in the judgment entry was not intended to override the Parole Board's statutory discretion in this case.[1] Thus, we hold the trial court did not err in denying appellant's request for resentencing.

[1] We additionally note that the General Assembly, in R.C. 2929.191(A)(1), uses "will be supervised" language in reference to notification under R.C. 2967.28.

{¶16} Appellant's sole Assignment of Error is overruled.

{¶17} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Tuscarawas County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, P. J., concurs.

Hoffman, J., concurs separately.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

_____

JUDGES

JWW/d 112

Hoffman, P.J., concurring

{¶18} I concur in the majority's decision to affirm the trial court's judgment. However, I do so for a different reason.

{¶19} I agree with Appellant the trial court improperly sentenced him by ordering "he will be supervised" under R.C. 2967.28. The crimes Appellant was convicted of are felonies of the fifth degree and do not require mandatory supervision under R.C. 2967.28(B)(1)or(3).[2]

{¶20} Although I find the sentence was in error, such error did not render the sentence void as was found by the Ohio Supreme Court in *Bezak*. *Bezak* is distinguishable. I find the error alleged herein was cognizable on direct appeal. Appellant failed to appeal the trial court's June 11, 2009 re-sentencing entry. His present appeal represents a collateral attack on the June 11, 2009 entry and is barred by res judicata.

{¶21} Accordingly, I concur in the majority's decision to affirm the trial court's decision.

/s/ William B. Hoffman_____
HON. WILLIAM B. HOFFMAN

[2] R.C. 2929.191(A)(1) uses the language "will be supervised" and also "may be supervised" in reference to R.C. 2967.28. The language to be used in sentencing depends upon whether supervision is mandatory or discretionary under R.C. 2967.28.

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
GRAFTON E. WILLIAMS III	:	
Defendant-Appellant	:	Case No. 2009 AP 10 0056

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ WILLIAM B. HOFFMAN_____

JUDGES