

COURT OF APPEALS  
PERRY COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
CRISTEN L. MYERS, SR.	:	Case No. 10-CA-4
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,  
Case No. 00-CR-6996

JUDGMENT: Sentence Vacated; Remanded

DATE OF JUDGMENT ENTRY: December 3, 2010

APPEARANCES:

For Plaintiff-Appellee

JOSEPH A. FLAUTT  
111 North High Street  
P.O. Box 569  
New Lexington, OH 43764

For Defendant-Appellant

STEVEN P. SCHNITTKE  
114 South High Street  
P.O. Box 536  
New Lexington, OH 43764

*Farmer, P.J.*

{¶1} On September 1, 2000, the Perry County Grand Jury indicted appellant, Cristen Myers, Sr., on one count of attempted murder in violation of R.C. 2903.02 and R.C. 2923.02, one count of aggravated burglary in violation of R.C. 2911.11, one count of felonious assault in violation of R.C. 2903.11, and one count of violating a protection order in violation of R.C. 2919.27. Said charges arose from an incident involving appellant and his wife.

{¶2} A jury trial commenced on January 10, 2001. The jury found appellant guilty as charged. By judgment entry of sentence filed March 13, 2001, the trial court sentenced appellant to an aggregate term of twenty years in prison. By judgment entry of resentence filed July 13, 2001, appellant was resented in order to include the findings necessary to impose consecutive sentences. The entry stated that the trial court notified appellant that postrelease control up to three years was mandatory in his case. Appellant's convictions and sentences were affirmed on appeal. *State v. Myers*, Perry App. No. 01-CA-5, 2002-Ohio-253.

{¶3} On May 22, 2009, appellant filed a motion to void the unexpired term of incarceration and for resentencing to correct the error in the July 13, 2001 entry that he was subject to only three years of postrelease control instead of the mandatory five years. By entry filed June 24, 2009, the trial court denied appellant's request to void the unexpired term of incarceration. By nunc pro tunc judgment entry of resentence filed July 10, 2009, the trial court corrected the error.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶5} "THE TRIAL COURT ERRED AS IN ITS FAILURE TO RETURN DEFENDANT/APPELLANT TO COURT FOR HEARING ON THE NUNC PRO TUNC RE-SENTENCING HEARING."

II

{¶6} "THE TRIAL COURT ABUSED ITS DISCRETION BY SENTENCING DEFENDANT/APPELLANT TO CONSECUTIVE SENTENCES FOR THE CONVICTIONS OF ATTEMPTED MURDER [ORC 2903.02(A)] AND FELONIOUS ASSAULT [ORC 2903.11(A)] AS SAID CRIMES ARE ALLIED OFFENSE OF SIMILAR IMPORT."

I

{¶7} Appellant claims the trial court erred in denying him a resentencing hearing. Appellant claims the July 10, 2009 nunc pro tunc judgment entry of resentence should not have been filed without a hearing and without his presence. We agree.

{¶8} The genesis of the nunc pro tunc judgment entry was a May 22, 2009 motion filed by appellant seeking resentencing pursuant to R.C. 2929.19 to include the proper postrelease control language. In its entry filed June 24, 2009, the trial court ordered "the State to prepare and circulate a Nunc Pro Tunc Entry reflecting what actually occurred at the hearing, with the same to be submitted to this Court for filing within twenty (20) days from date of this Entry."

{¶9} On July 10, 2009, the trial court journalized a nunc pro tunc judgment entry of resentence with the inclusion of the following language:

{¶10} "The Court has further notified the defendant that post release control is mandatory in this case up to a maximum of five years, as well as the consequences of violating conditions of post release control imposed by the Parole Board under Section 2967.28 Revised Code. As part of this sentence, the defendant is ORDERED to serve any term of post release control imposed by the Parole Board, and any prison term imposed for violation of that post release control."

{¶11} Appellant had sought an order of conveyance so he could attend the hearing. The trial court denied a hearing and appellant's personal appearance.

{¶12} We note nowhere in the pleadings to the trial court or in this assignment of error does appellant argue that he was not orally informed of postrelease control or the five year mandatory time.

{¶13} The trial court ordered the state to prepare an entry reflecting what actually occurred at the hearing. The state prepared an entry stating that the trial court had notified appellant of the five year mandatory postrelease control time. We note a transcript to refute this finding has not been filed.

{¶14} The issues raised by the specific facts sub judice are apposite to the case law that has evolved after *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250. In *Bezak*, the Supreme Court of Ohio emphasized that a remand for resentencing pursuant to R.C. 2929.19 shall include a new sentencing hearing. The judgment entry in *Bezak* was correct and complied with the statute, but during the sentencing hearing, the trial court had failed to notify the defendant of postrelease control time. In this case, appellant was informed of five years of postrelease control time during his sentencing hearing, but the judgment entry listed three years instead. Therefore, the question is

whether the trial court was required to hold a resentencing hearing or was the nunc pro tunc procedure correct?

{¶15} In *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, syllabus, the Supreme Court of Ohio stated the following:

{¶16} "1. When 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.

{¶17} "2. When a trial court fails to notify an offender about postrelease control at the sentencing hearing but incorporates that notice into its journal entry imposing sentence, it fails to comply with the mandatory provisions of R.C. 2929.19(B)(3)(c) and (d), and, therefore, the sentence must be vacated and the matter remanded to the trial court for resentencing."

{¶18} *Bezak* adopted *Jordan* and found the failure to inform a defendant during sentencing of postrelease control deemed the judgment void and a new hearing was required:

{¶19} "The question presented is whether, when a court of appeals remands a case for resentencing because of the trial court's failure to inform the offender at the sentencing hearing that he may be subject to postrelease control, the court must conduct a new sentencing hearing or may instead merely give that information in open court and summarily reimpose the original sentence. We conclude that *Bezak* was entitled to a de novo sentencing hearing pursuant to *Jordan*." *Bezak* at ¶6.

{¶20} Upon review, we conclude that *Jordan* and *Bezak* require a resentencing hearing, and a nunc pro tunc entry was insufficient. The matter is remanded for a de novo hearing.

{¶21} Assignment of Error I is granted.

II

{¶22} Appellant claims the trial court erred in sentencing him to consecutive sentences on his convictions for attempted murder and felonious assault as they are allied offenses of similar import.

{¶23} Based upon our remand in Assignment of Error I, the issue raised by this assignment is not ripe for appeal.

{¶24} The sentence of the Court of Common Pleas of Perry County, Ohio is hereby vacated and the matter is remanded for a resentencing hearing.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ John W. Wise

s/ Patricia A. Delaney

JUDGES

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

STATE OF OHIO

Plaintiff-Appellee

-vs-

CRISTEN L. MYERS, SR.

Defendant-Appellant

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JUDGMENT ENTRY

CASE NO. 10-CA-4

For the reasons stated in our accompanying Memorandum-Opinion, the sentence of the Court of Common Pleas of Perry County, Ohio is vacated and the matter is remanded to said court for a resentencing hearing consistent with this opinion. Costs to appellee.

s/ Sheila G. Farmer

s/ John W. Wise

s/ Patricia A. Delaney

JUDGES