

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

DAVID A. NESSER

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P. J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 10 CA 61

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. 01 CR 357

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

January 12, 2011

APPEARANCES:

For Plaintiff-Appellee

KENNETH OSWALT
PROSECUTING ATTORNEY
TRACY F. VANWINKLE
ASSISTANT PROSECUTOR
20 South Second Street, 4th Floor
Newark, Ohio 43055

For Defendant-Appellant

WILLIAM T. CRAMER
470 Olde Worthington Road
Suite 200
Westerville, Ohio 43082

Wise, J.

{¶1} Appellant David A. Nesser appeals from his felony resentencing in the Court of Common Pleas, Licking County. The Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2} On September 4, 2002, appellant was convicted by a Licking County jury of three counts of gross sexual imposition, R.C. 2907.05(A)(4), all third degree felonies. At the time appellant committed these crimes, he was on non-reporting probation for a felony conviction in Florida. On October 3, 2002, the trial court sentenced appellant to three years in prison on each count, to be served consecutively, for a total term of nine years. Pursuant to R.C. 2967.28(B)(1), appellant was subject to a mandatory five-year period of post-release control (“PRC”). However, the trial court judge did not include PRC in appellant’s sentence at that time.

{¶3} Appellant thereafter appealed to this Court, challenging his consecutive sentences. This Court affirmed the trial court’s judgment on August 18, 2005. See *State v. Nesser*, Licking App.No. 02CA103, 2005-Ohio-4313. Appellant also unsuccessfully sought state and federal habeas relief.

{¶4} On April 2, 2010, approximately four months prior to appellant’s scheduled release from prison, the State of Ohio filed a motion with the trial court, seeking resentencing to add the PRC term. The trial court conducted a resentencing hearing on May 26, 2010, and the next day issued a judgment entry imposing the original prison term and adding a five-year term of PRC.

{¶5} On June 18, 2010, appellant filed a notice of appeal. He herein raises the following sole Assignment of Error:

{¶6} “I. THE TRIAL COURT VIOLATED APPELLANT’S STATE AND FEDERAL RIGHTS TO DUE PROCESS AND FUNDAMENTAL FAIRNESS BY IMPOSING POSTRELEASE CONTROL FOR THE FIRST TIME AT A RESENTENCING HEARING THAT WAS HELD OVER EIGHT YEARS AFTER HIS CONVICTION AND JUST PRIOR TO HIS COMPLETION OF THE UNDERLYING PRISON TERM.”

I.

{¶7} In his sole Assignment of Error, appellant contends the trial court’s resentencing hearing to impose PRC requirements was violative of his due process rights under the Ohio and United States Constitutions. We disagree.

{¶8} Recently, in *State v. Fischer*, ___ N.E.2d ___, 2010-Ohio-6238, the Ohio Supreme Court held as follows: “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.” *Id.*, at paragraph one of the syllabus.

{¶9} *Fischer* was partially premised on the Court’s decision in *State v. Simpkins*, 117 Ohio St.3d 420, 884 N.E.2d 568, 2008-Ohio-1197, which held that “in cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence.” *Id.* at ¶ 6. Although the Ohio Supreme Court in *Simpkins* ultimately held that the State of Ohio was entitled to a new sentencing hearing to have postrelease control imposed,

the Court nonetheless noted that “[i]n some circumstances, including the completion of a sentence, it may be reasonable to find that a defendant’s expectation of finality in his sentence has become legitimate and must be respected.” * * *. Id. at ¶38.

{¶10} Appellant herein urges that he has reached such an “expectation of finality” in his case, pointing out that he has been confined for more than eight years, and that the issue of PRC never arose during his direct appeal and habeas proceedings. He maintains that the passage of time has undermined a proper and informed resentencing determination. He also asserts that unlike the defendant in *Simpkins*, he was completely uninformed of any PRC requirements, rather than merely being partially informed. See *Simpkins* at f.n. 3.

{¶11} However, upon review, we find no basis to except this case from the rule of law set forth in *Fischer* and *Simpkins*.¹ We thus find no reversible error in appellant’s PRC resentencing under the circumstances presented.

¹ We recognize that for criminal sentences imposed on and after July 11, 2006, R.C. 2929.191 controls the procedures for trial courts to follow when correcting a failure to properly impose postrelease control. This case predates R.C. 2929.191.

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

{¶13} For the foregoing reasons, the judgment of the Court of Common Pleas,
Licking County, Ohio, is affirmed.

By: Wise, J.

Hoffman, P. J., and

Farmer, J., concur.

JUDGES

JWW/d 0104

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

STATE OF OHIO

Plaintiff-Appellee

-vs-

DAVID A. NESSER

Defendant-Appellant

:
:
:
:
:
:
:
:
:
:
:
:

JUDGMENT ENTRY

Case No. 10 CA 61

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

Costs assessed to appellant.

JUDGES