

[Cite as *State v. Tyson*, 2014-Ohio-5822.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2014CA00040
FRANK E. TYSON	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Stark County Court of Common Pleas, Case No. 2000CR0849

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 31, 2014

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Gwin, J.

{¶1} Appellant Frank E. Tyson appeals the decision of the Court of Common Pleas, Stark County, following a review of his sentence pursuant to *State v. Holdcroft, infra*. Appellee is the State of Ohio. The pertinent procedural history leading to this appeal is as follows.

{¶2} On July 28, 2000, the Stark County Grand Jury indicted appellant on one count each of kidnapping (R.C. 2905.01), burglary (R.C. 2911.12), failure to comply with the order or signal of a police officer (R.C. 2921.331), receiving stolen property (R.C. 2913.51), and grand theft of a motor vehicle (R.C. 2913.02). At his arraignment, appellant entered a plea of not guilty to the charges.

{¶3} A jury trial commenced on October 26, 2000. After hearing the evidence, the jury found appellant guilty on all counts contained in the indictment.

{¶4} Via a judgment entry filed November 6, 2000, the trial court sentenced appellant to a total of twenty-four years in prison.

{¶5} Appellant then filed a direct appeal. This Court affirmed appellant's conviction and sentence on September 24, 2001. See *State v. Tyson*, 5th Dist. Stark No. 2000CA00361, 2001-Ohio-1382.

{¶6} On November 26, 2007, appellant filed a motion for new trial under Crim. R. 33(B). Via a judgment entry filed on March 11, 2008, the trial court denied said motion as untimely. Appellant appealed that decision to this Court. On January 12, 2009, we affirmed the trial court's denial of a new trial. See *State v. Tyson*, 5th Dist. Stark No. 2008-CA-00068, 2009-Ohio-104.

{¶7} In the meantime, on June 17, 2008, appellant filed a petition for post-conviction relief. Via a judgment entry filed on October 17, 2008, the trial court overruled the petition, finding appellant had failed to meet the jurisdictional requirements set forth in R.C. 2953.23(A). This court affirmed on January 26, 2009. See *State v. Tyson*, 5th Dist. Stark No. 2008CA00253, 2009-Ohio-374.

{¶8} On August 11, 2010, appellant filed a motion requesting resentencing with proper post-release control notification. On May 20, 2011, the trial court conducted a limited resentencing hearing on the issue of post-release control. On June 6, 2011, the trial court issued a resentencing judgment entry, and on July 11, 2011, the trial court denied appellant's follow-up motion requesting a de novo resentencing hearing. Appellant then filed an appeal, asserting the trial court had erred in not conducting a "full de novo resentencing hearing." On February 21, 2012, we affirmed the decision of the trial court. See *State v. Tyson*, 5th Dist. Stark No. 2011CA00177, 2012-Ohio-712.

{¶9} In July 2013, Tyson filed a motion for resentencing based on the fact that he had completed his sentence for kidnapping at the time the trial court re-advised him of his post-release control obligations in May 2011. In accordance with *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, the trial court conducted a review/resentencing hearing on February 13, 2014. The trial court at that time vacated the post-release control previously imposed for appellant's kidnapping conviction and re-advised him of the remaining valid portions of his post-release control requirements. A judgment entry to that effect was issued on February 14, 2014.

{¶10} On March 12, 2014, appellant filed a notice of appeal. He herein raises the following three Assignments of Error:

{¶11} "I. THE TRIAL COURT ERRED IN NOT ISSUING A FINAL APPEALABLE ORDER BECAUSE IT FAILED TO PROPERLY SENTENCE THE APPELLANT PER CRIM.R. 32 AND STATE OF OHIO CASE LAW.

{¶12} "II. THE APPELLANT HAS YET TO BE PROPERLY SENTENCED FOR HIS CONVICTION OF FAILURE TO COMPLY FOR THE REASONS STATED IN ASSIGNMENT OF ERROR ONE; WHEREFORE, SAID SENTENCE IS VOID AND MUST BE SENTENCED AS A MISDEMEANOR PER OHIO SUPREME COURT CASES *STATE V. PELFREY* AND *STATE V. MCDONALD*.

{¶13} "III. THE APPELLANT'S SENTENCE FOR KIDNAPPING WAS VACATED AFTER SAID APPELLANT SERVED SAID SENTENCE; HOWEVER, DUE TO THE IMPROPER NOTIFICATION OF POST RELEASE CONTROL THE CONVICTION REMAINS UNSENTENCED AND CAN NOT BE REINSTATED."

I., II.

{¶14} In his First and Second Assignments of Error, appellant contends the trial court erred in originally failing to properly sentence him on his 2000 conviction for failure to comply with the order of a police officer, and that he is thus entitled to further resentencing or to have said offense treated as a misdemeanor.

{¶15} The most recent round of post-conviction litigation in this matter stemmed from the Ohio Supreme Court's decision in *State v. Holdcroft*, 137 Ohio St.3d 526, 1 N.E.3d 382, 2013–Ohio–5014. In essence, where an appellant has already served his prison sentence on an offense, he may not be resentenced to postrelease control on that offense, regardless of whether the offender is still in prison for other offenses. *State*

v. Loyed, 8th Dist. Cuyahoga No. 101054, 2014-Ohio-5141, ¶ 11, citing *Holdcroft* at ¶ 19.

{¶16} *Holdcroft* has some of its roots in *State v. Fischer*, 128 Ohio St.3d 92, 942 N.E.2d 332, 2010–Ohio–6238, in which the Ohio Supreme Court held that if a defendant is under a sentence in which post-release control was not properly rendered, the offending portion of the sentence dealing with post-release control is subject to review and correction. *Id.* The new sentencing hearing to which the offender is entitled is limited to the issue of post-release control. *Id.*

{¶17} We have held that res judicata applies in a defendant's appeal from *Fischer*-based or R.C. 2929.191-based resentencing to impose post-release control where the issue being appealed did not arise from the resentencing hearing. See *State v. Oweis*, 5th Dist. No. 11 CAA060050, 2012–Ohio–443, ¶ 16 (additional citations omitted). By logical extension, we hold that res judicata also applies upon an appeal from a *Holdcroft*-based review or resentencing where the issue did not arise from said review hearing.

{¶18} In the case sub judice, appellant specifically asserts the original sentencing entry and/or verdict form in his 2000 trial failed to properly include a description of the offense, the full statutory nomenclature, and the level of offense. In light of our holding *Oweis*, we find appellant's present claims, which could have been raised on direct appeal, do not arise from the trial court's *Holdcroft* review hearing and are presently barred by the doctrine of res judicata.

{¶19} Appellant's First and Second Assignments of Error are overruled.

III.

{¶20} In his Third Assignment of Error, appellant appears to argue that his entire sentence for kidnapping is now void and that his kidnapping conviction "cannot be reinstated." He thus maintains the matter must be remanded again for full resentencing to reflect same. We disagree.

{¶21} Appellant's argument is premised on his theory that *Fischer* never applied to the kidnapping portion of his case, because he had completed his sentence on that count before the Ohio Supreme Court decided *Fischer*. However, in our 2012 decision in appellate case number 2011CA00177, we approved the application of *Fischer* to appellant's resentencing hearing of May 20, 2011, finding that appellant had been properly granted a hearing "limited to the correction of the imposition of post-release control." See *State v. Tyson*, 5th Dist. Stark No. 2011CA00177, 2012-Ohio-712, ¶ 16. Appellant then unsuccessfully sought reconsideration under App.R. 26(A). No appeal was taken to the Ohio Supreme Court from 2011CA00177.

{¶22} Accordingly, we hold the general applicability of *Fischer* to appellant became the law of the case, and the trial court's treatment of the kidnapping conviction in the subsequent *Holdcroft* review/resentencing hearing was not erroneous on that basis.

{¶23} Appellant's Third Assignment of Error is overruled.

{¶24} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

By Gwin, J.,

Hoffman, P.J., and

Delaney, J., concur