

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

State of Ohio

Court of Appeals No. F-09-014

Appellee

Trial Court No. 98CR000062

v.

Daniel Nicely

DECISION AND JUDGMENT

Appellant

Decided: June 18, 2010

* * * * *

Chris Dreyer, for appellant; Daniel Nicely, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Daniel Nicely, appeals a judgment, filed on July 29, 2009, in the Fulton County Court of Common Pleas, resentencing him for convictions in 1999 of four counts of gross sexual imposition, violations of R.C. 2907.05(A)(4) and third degree felonies. The four offenses constituted four counts of an eight count indictment filed on October 22, 1998, against him in the Fulton County Court of Common Pleas. Nicely

entered an *Alford* plea (pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25) to the four counts on May 25, 1999, and the state dismissed the remaining counts.

{¶ 2} A sentencing hearing proceeded on August 5, 1999. In a judgment entered on August 6, 1999, the trial court sentenced Nicely to serve three years imprisonment on two counts and two years, on the remaining two counts. The trial court also ordered that the sentences run consecutively, for a total period of incarceration of ten years in length. The trial court made no reference to postrelease control at the sentencing hearing or in the judgment imposing sentence.

{¶ 3} On July 16, 2009, the state filed a motion with the trial court for the court to conduct a de novo resentencing hearing. The state indicated in the motion that Nicely's term of imprisonment would expire on July 31, 2009, and sought resentencing in order to add a mandatory five year period of postrelease control on Nicely's sentence before his sentence expired. The trial court conducted a resentencing hearing on July 24, 2009. Nicely was present at the hearing and was represented by counsel.

{¶ 4} On July 29, 2009, the trial court filed a judgment resentencing Nicely to the original ten year period of imprisonment, but with the addition of five years postrelease control. Nicely has appealed that judgment to this court.

Anders v. California

{¶ 5} Counsel for Nicely has filed an appellant's brief but has also requested leave of court to withdraw as counsel under the procedure set forth in *Anders v. California* (1967), 386 U.S. 738. In *Anders*, the Supreme Court of the United States

established the procedure to be followed where appointed counsel concludes that there is no merit to an appeal and seeks to withdraw. Under *Anders*, counsel must undertake a "conscientious examination" of the case and, if he determines an appeal would be "wholly frivolous," advise the court and seek permission to withdraw. *Id.* at 744.

{¶ 6} The request to withdraw must be accompanied with a brief "referring to anything in the record that might arguably support the appeal." *Id.* A copy of the brief is to be furnished to the appellant. *Id.* The appellant is permitted additional time to raise any points he chooses in his own brief. *Id.*

{¶ 7} Counsel for Nicely provided him with a copy of the *Anders* brief he filed. He also notified Nicely that he had determined that no issue of merit existed for appeal and of Nicely's right to file his own additional appellate brief. Nicely has filed his own appellant's brief.

{¶ 8} Counsel did not identify anything in the record that might possibly support an appeal. In his pro se brief, Nicely asserts six assignments of error:

{¶ 9} "First Assignment of Error: The imposition of postrelease control at resentencing violates appellant's right to finality after the execution of his sentence.

{¶ 10} "Second Assignment of Error: The state is barred from resentencing appellant because of the res judicata doctrine, and failure to follow the appeal time limits in law and appellate rules.

{¶ 11} "Third Assignment of Error: The use of the nunc pro tunc procedure to impose postrelease control when it was not originally sentenced is not the proper corrective mechanism and renders the statute ineffective as a matter of law.

{¶ 12} "Fourth Assignment of Error: R.C. §2929.191 violates the ex post facto clauses of the U.S. and Ohio Constitutions.

{¶ 13} "Fifth Assignment of Error: The consecutive sentence imposed on appellant exceeded the maximum prison term allowed by division (A) of R.C. §2929.14 for the most serious offense of which the appellant was convicted. Appellant's sentence is contrary to law.

{¶ 14} "Sixth Assignment of Error: The appellant was sentence without citation of the proper statute and subjected to vague and unknown sanctions for violating an uncited statute. This sentencing is contrary to law and violates the sixth amendment of the Constitution."

Validity of Original Sentencing

{¶ 15} The original sentencing hearing in this case proceeded on August 5, 1999, and the sentencing judgment was filed on August 6, 1999. At that time, R.C. 2929.19(B)(3)(c) required a sentencing court to provide notice of postrelease control to offenders being sentenced for felony sex offenses and also for offenders sentenced for third degree felonies. The statute required the trial court to notify the defendant of postrelease control both during the sentencing hearing and in the sentencing judgment. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph one of the syllabus; *State*

v. *Ayers*, 6th Dist. No. E-07-072, 2009-Ohio-393, ¶ 17. No notice of postrelease control was provided either at appellant's original sentencing hearing or in the original sentencing judgment.

{¶ 16} In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, the Ohio Supreme Court considered the validity of sentencing judgments where the trial court failed to provide statutorily mandated notices of postrelease control. The court held that where "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." *State v. Simpkins*, at paragraph one of the syllabus.

{¶ 17} Subsequently, in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the Ohio Supreme Court readdressed the issue to consider the effect of the enactment of R.C. 2929.191. The statute provides for a remedial procedure to correct a sentence that failed to properly impose postrelease control. *Singleton* at ¶ 23. The Ohio Supreme Court determined, however, that the statute does not apply to sentencings that occurred prior to the statute's effective date; that is, prior to July 11, 2006:

{¶ 18} "We recognize the General Assembly's authority to alter our caselaw's characterization of a sentence lacking postrelease control as a nullity and to provide a mechanism to correct the procedural defect by adding postrelease control at any time before the defendant is released from prison. However, for sentences imposed prior to the effective date of the statute, there is no existing judgment for a sentencing court to

correct. H.B. 137 cannot retrospectively alter the character of sentencing entries issued prior to its effective date that were nullities at their inception, in order to render them valid judgments subject to correction. Therefore, for criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease control, the de novo sentencing procedure detailed in decisions of the Supreme Court of Ohio should be followed to properly sentence an offender." *Singleton* at ¶ 26.

{¶ 19} Prior decisions of the Ohio Supreme Court outlining resentencing procedures due to failure to comply with statutory notice of postrelease control require a de novo procedure that proceeds with resentencing as if the appellant had not been previously sentenced for the offense. *State v. Bezak*, 112 Ohio St.3d 94, 2007-Ohio-3250, ¶ 16; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 37; *State v. Riley*, 184 Ohio App.3d 211, 2009-Ohio-3227, ¶ 11-17.

July 24, 2009 Resentencing

{¶ 20} At the resentencing hearing conducted by the trial court on July 24, 2009, Nicely was present and represented by counsel. The trial court permitted Nicely an opportunity to make a statement before imposition of sentence. Counsel was permitted to speak on Nicely's behalf. The trial court stated before imposition of sentence that "[t]he court has considered the record and oral statements, the victim impact, the PSI, as well as the principles and purposes of sentencing as the court is required to do under Revised Code Section 2929.11. And the court has balanced the seriousness and recidivism factors as the court is required to do under Revised Code Section 2929.12."

{¶ 21} The trial court imposed the same prison term for the four felonies as originally imposed. It also provided notice of a five year period of postrelease control and of the sanctions that could be imposed for violation of postrelease control. The trial court provided the notice both at the sentencing hearing and in the sentencing judgment of July 29, 2009. The trial court also ordered restitution and notified Nicely of his right to appeal.

{¶ 22} Appellant argues under his first assignment of error that the trial court lacked authority to modify the 1999 sentencing judgment. He argues that the sentence became final in 1999 and the time for any appeal of the sentence had expired. Under his second assignment of error, Nicely also argues that any change to the sentence is barred under the doctrine of res judicata.

{¶ 23} Under *Simpkins* and *Singleton*, sentencing judgments issued prior to July 11, 2006, that failed to properly impose postrelease control are void judgments that are subject to de novo resentencing to impose postrelease control unless the defendant has completed his sentence. *Simpkins* at paragraph one of the syllabus; *Singleton* at paragraph one of the syllabus and ¶ 25-26. Accordingly, appellant's argument that he was not subject to resentencing due to the finality of his original sentence is without merit.

{¶ 24} Appellant's first assignment of error is not well-taken.

{¶ 25} The Ohio Supreme Court ruled in *Simpkins* that the doctrine of res judicata does not apply to a sentencing judgment where the sentencing failed to meet statutory requirements for notice of postrelease control. *Simpkins* at ¶ 30.

{¶ 26} Appellant's second assignment of error is not well-taken.

{¶ 27} Nicely's third and fourth assignments of error challenge the validity of R.C. 2929.191 and are based upon the assumption that the trial court employed the procedure under R.C. 2929.191 in resentencing him. We have reviewed the transcript of the resentencing hearing conducted on July 24, 2009. The record demonstrates that the trial court conducted a de novo hearing, proceeding as if the original sentencing never occurred. It did not follow any abbreviated procedure under R.C. 2929.191. Accordingly, we conclude that appellant's third and fourth assignments of error are not well-taken.

{¶ 28} Under the fifth assignment of error, Nicely argues that the trial court erred by sentencing him to consecutive sentences on convictions of four counts of gross sexual imposition because the sentences taken together exceeded the maximum prison term for the most serious offense of which he stands convicted. Each count constituted a third degree felony. The trial court's imposition of consecutive sentences on the four convictions resulted in a total term of imprisonment of ten years. The maximum term of imprisonment for any of the third degree felonies was five years. Nicely asserts a challenge to the sentences under R.C. 2953.08(C).

{¶ 29} This argument is also without merit. Even prior to the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, it had been recognized that " * * * the right to appeal a sentence under R.C. 2953.08(C) does not mean that consecutive sentences for multiple convictions may not exceed the maximum sentence allowed for the most serious conviction." *State v. Beverly*, 5th Dist. No. 03 CAA 02011, 2003-Ohio-6777, ¶ 17, quoting *State v. Haines* (Oct. 29, 1998), 10th Dist. No. 98AP-195.

{¶ 30} Furthermore, after the Ohio Supreme Court's decision in *Foster*, "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for maximum, consecutive or more than the minimum sentences." *Foster* at ¶ 100; *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶ 41.

{¶ 31} The Ohio Supreme Court's decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26, sets forth the standard of review on appeal of felony sentencing. Appellate courts "must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *Id.*

{¶ 32} Here, the sentences under the four counts are within the range authorized for third degree felonies under R.C. 2929.14(A)(3). In imposing sentence, the trial court

stated that it had considered the principles and purposes of felony sentencing under R.C. 2929.11 and seriousness and recidivism sentencing factors under R.C. 2929.12. We conclude that the sentences are not contrary to law.

{¶ 33} The next step under *Kalish* is to "determine whether the trial court actually abused its discretion. An abuse of discretion is "'more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'"" *Kalish* at ¶ 19, quoting *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157. The trial court did not impose maximum sentences on any count. The sentence on each count was within the statutory range. We find no abuse of discretion demonstrated in the record as to the sentences imposed.

{¶ 34} Appellant's fifth assignment of error is not well-taken.

{¶ 35} Under the sixth assignment of error, appellant argues that the trial court erred in failing to set forth statutory authority for resentencing in its judgment. He claims that he was "sentenced without citation of the proper statute and subjected to vague and unknown sanctions for violating an uncited statute."

{¶ 36} In fact, appellant was sentenced upon conviction to four counts of an indictment charging him with gross sexual imposition, violations of R.C. 2907.05(A)(4) and third degree felonies. Resentencing was requested by the state by motion filed on July 16, 2009. In its brief in support of the motion, the state stated that at the original, August 5, 1999 sentencing hearing, the trial court "did not notify Defendant that he would be subject to post-release control" and that "the Adult Parole Authority may not

impose post-release control unless the trial court notified the defendant at the sentencing hearing that he would be subject to a particular period of post-release control and incorporated that notification into its sentencing entry."

{¶ 37} Citing *State v. Simpkins* and other Ohio Supreme Court precedent, the state argued that the state was entitled to a new sentencing hearing using a de novo resentencing procedure. On July 17, 2009, the trial court issued an order to convey appellant to the Fulton County Court of Common Pleas for resentencing on July 24, 2009.

{¶ 38} At the resentencing hearing on that date, appellant was present and represented by counsel. The record demonstrates that the trial court and appellant's counsel discussed the reasons for resentencing before the court proceeded with resentencing. Appellant raised no objection claiming surprise either with respect to the nature of the proceedings or reasons for resentencing.

{¶ 39} We conclude that appellant's sixth assignment of error is not well-taken.

{¶ 40} We have conducted our own independent review of the record and proceedings in the trial court and conclude that appellant's appeal is entirely without merit. We grant the motion of appellant's counsel to withdraw. In consideration thereof, we affirm the judgment of the Fulton County Court of Common Pleas. Appellant is ordered to pay the costs pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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