

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

State of Ohio

Court of Appeals No. L-09-1255

Appellee

Trial Court No. CR0200802710

v.

Rodney Oneal Searcy

DECISION AND JUDGMENT

Appellant

Decided: April 8, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Jack J. Brady, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals his sentence for drug possession issued by the Lucas
County Court of Common Pleas.

{¶ 2} In 2008, appellant, Rodney Oneal Searcy, pled no contest and was found guilty of cocaine possession and marijuana trafficking, both fourth degree felonies. He was sentenced to a concurrent fourteen month sentence on each count.

{¶ 3} In 2009, appellant filed a pro se motion for resentencing, asserting that he had not been properly informed of postrelease control sanctions to which he might become subject. Appellant argued that, pursuant to *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, he was entitled to a new sentencing hearing and sentencing de novo. When the trial court denied appellant's motion, he filed a notice of appeal.

{¶ 4} On appeal, appellant's counsel filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, maintaining that appellate counsel had found no appealable issue and requesting leave to withdraw. This court noted that counsel had failed to address the *Bezak* issue and appointed new counsel to do so.

{¶ 5} Newly appointed counsel has filed a second *Anders* brief in which he suggests that the trial court substantially complied with the postrelease control notification requirement, the portion of *Bezak* that mandated de novo sentencing has been overruled, appellant has completed his sentence and was not placed on postrelease control so endured no prejudice and, in any event, since appellant's sentence is complete, this appeal is moot.

{¶ 6} The state has filed a brief in which it invites us to revisit and clarify our decision in *State v. Helms*, 6th Dist. No. L-10-1079, 2010-Ohio-6520, which appellee suggests confuses the requirements of postrelease control notification.

{¶ 7} The procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue is set forth in *Anders*, supra and *State v. Duncan* (1978), 57 Ohio App.2d 93. In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the case, determines it to be wholly frivolous he should so advise the court and request permission to withdraw. *Anders*, supra, at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* Counsel must also furnish his client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that he chooses. *Id.* Once these requirements have been satisfied, the appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 8} In this case, appointed counsel for appellant has satisfied the requirements set forth in *Anders*. We note further that appellant has not filed a pro se brief or otherwise responded to counsel's request to withdraw. Accordingly, we shall proceed with an examination of the potential assignments of error set forth by counsel for appellant and the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 9} We decline appellee's invitation to clarify another case. There are sufficient grounds to find this appeal without merit that do not approach that substantive issue.

{¶ 10} As appellant's counsel points out, *Bezak*, the case upon which appellant might principally rely, has been substantially modified by *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238. *Fischer*, at paragraph two of the syllabus, restricts the issue at the resentencing hearing after an improper notice of postrelease control to the issue of postrelease control only. Consequently, even had appellant not been properly advised of the potential for postrelease control, he would not be entitled to a complete de novo sentencing hearing, but one on the issue of postrelease control alone. The rationale for this is that *Fischer*, at ¶ 26, holds that the illegal sentence resulting from an improper postrelease control notification voids only that part of the sentence and it is only that part of the sentence that must be set aside. It is " * * * only the portion that is void [that] may be vacated or otherwise amended." *Id.* at ¶ 28.

{¶ 11} Applying all this means that, assuming that appellant was not properly given notice of postrelease control, without a resentencing hearing such sanctions may not be imposed. In this matter, appellant has completed his sentence and no postrelease control was imposed. As a result, there is no remedy that we could apply that appellant does not already have. Accordingly, as appellant's counsel suggests, this matter is moot. See, also, *In Re S.J.K.*, 114 Ohio St.3d 23, 2007-Ohio-2621, ¶ 9. As a result, this appeal lacks merit and is wholly frivolous and appellant's counsel's motion to withdraw is granted.

{¶ 12} The judgment of the Lucas County Court of Common Pleas is affirmed.

Appellant is ordered to pay the costs of this appeal 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.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

<p>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: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
