[Cite as *State v. Hruby*, 2011-Ohio-3848.]

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

State of Ohio — Court of Appeals No. OT-10-036

Appellee — Trial Court No. 03-CR-092

v.

Craig Hruby — **DECISION AND JUDGMENT**

Appellant — Decided: August 5, 2011

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Joseph H. Gerber, Assistant Prosecuting Attorney, for appellee.

Michael W. Sandwisch, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals the sentencing judgment of the Ottawa County Court of Common Pleas following remand. For the reasons that follow, we affirm.

{¶ 2} In 2004, appellant, Craig S. Hruby, was convicted of two counts of gross sexual imposition for conduct involving his stepdaughter. He was sentenced to a four

year term of incarceration for each count, to be served consecutively. His conviction was affirmed on appeal. *State v. Hruby*, 6th Dist. No. OT-04-026, 2005-Ohio-3863, discretionary appeal not allowed, *State v. Hruby*, 107 Ohio St.3d 1698, 2005-Ohio-6763.

{¶ 3} In 2009, appellant moved for vacation of sentencing, noting that during his original sentencing hearing the court failed to notify him that, if he violated the conditions of his postrelease control, he could be subject to the imposition of an additional sentence of up to one-half of the original sentence. Such a notice is statutorily required by R.C. 2929.19(B)(3), appellant argued, and, pursuant to *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, failure to provide such notice voids his sentence and entitles him to be sentenced de novo. The trial court denied appellant's motion, but on appeal this court reversed and remanded for de novo sentencing. *State v. Hruby*, 6th Dist. No. OT-09-029, 2010-Ohio-3530, ¶ 18.

{¶ 4} On remand, appellant interposed a pro se motion in which he asserted that the trial court had been divested of jurisdiction of his case due to the six-year delay in sentencing after the original verdict. The trial court rejected this assertion and conducted a second sentencing hearing at which it again sentenced appellant to two consecutive four year terms of incarceration. From this judgment, appellant now brings this appeal. Appellant sets forth the following three assignments of error:

{¶ 5} "1. As a result of the six (6) year delay between conviction on April 1, 2004, and Sentencing on September 27, 2010, the Trial Court was divested of jurisdiction to

enter a sentence upon the Defendant under the Sixth and Fourteenth Amendments of the U.S. Constitution and Criminal Rule 32 (A) (1).

{¶ 6} "2. The Defendant was denied to his prejudice a 'de novo' sentencing as Ordered by this Appellate Court on July 30, 2010, and this Defendant is entitled to another 'de novo' Sentencing Hearing.

{¶ 7} "3. The Sentencing Entry of September 27, 2010, fails to comply with this Court's Order of July 30, 2010, in that it fails to include all of the required language regarding a violation of Post Release Control as required by O.R.C. 2929.19 (B) (3) (e)."

I. Unreasonable Delay

{¶ 8} In his first assignment of error, appellant suggests that the trial court was deprived of jurisdiction to perform sentencing, because of the unreasonable length of time between the verdict and his de novo sentencing. Citing *State v. Brown*, 152 Ohio App.3d 8, 2003-Ohio-1218, and *State v. Huber*, 8th Dist. No. 85082, 2005-Ohio-2625, appellant maintains that a court that unreasonably delays imposition of a criminal sentence following adjudication is divested of the authority to enter any sentence at all.

{¶ 9} In appellant's pro se motion, which appellate counsel has attached to his brief in lieu of detailed argument, appellant reasons that, pursuant to *State v. Bezak*, supra, as applied in the appeal that resulted in the vacation of appellant's sentence, *Hruby*, 2010-Ohio-3530, at ¶ 17, the trial court's failure to provide him with statutorily required notice during sentencing voids his sentence. A void sentence, appellant insists, is a nullity, leaving him in a position as if there had been no sentencing judgment at all.

Since appellant's original sentence was a nullity, he argues, there was a gap of more than six years between the jury's April 1, 2004 verdict and his September 27, 2010 sentencing. Appellant then cites numerous cases wherein substantially less delay resulted in reversal.

{¶ 10} As the court points out in *Brown*, supra, at ¶ 20, Ohio sentencing delay jurisprudence appears to be from language found in *Neil v. Maxwell* (1963), 175 Ohio St. 201, 202, that, "[i]t is well established that the time of pronouncing sentence is within the discretion of the trial court, and a delay for a reasonable time does not invalidate the sentence." From this, subsequent appellate decisions have concluded that, if a reasonable delay does not invalidate a sentence, a delay in sentencing must be reasonable to be valid.

{¶ 11} The *Brown* court also examined two of the cases appellant cites: *Willoughby v. Lukehart* (1987), 39 Ohio App.3d 74, and *Warren v. Ross* (1996), 116 Ohio App.3d 275. In *Lukehart*, at 75-76, the appeals court concluded that a 13 month delay in sentencing for disorderly conduct violated the Crim.R. 32(A) prohibition of "unnecessary delay" in sentencing and a municipal court rule of superintendence that mandated sentencing within 15 days of the determination of guilt. According to the *Lukehart* court, "the unjustified and lengthy delay deprived the trial court of jurisdiction to impose a sentence against appellant." Id. at 76. In *Ross*, citing Crim.R. 32(A) and *Lukehart*, the court held that a municipal court lost jurisdiction to impose a license suspension after a nearly five-year unexplained delay in sentencing. *Ross* at 277.

{¶ 12} Neither *Ross* nor *Lukehart*, nor most of the other cases appellant cites, involved sentencing after an original sentence was vacated on appeal. As appellee notes,

there is some authority that Crim.R. 32 does not apply to such sentencing. See *State v. Taylor* (Oct. 29, 1992), 8th Dist. No. 63295, citing *Booker v. Engle* (S.D. Ohio 1982), 535 F.Supp. 1300, 1302-1303; *State v. Huber*, supra, at ¶ 8. Contra, appellant directs our attention to *State v. Crosier* (May 31, 1988), 5th Dist. No. 87 AP 12-0098, in which the court applied Crim.R. 32(A) when a trial court delayed resentencing for 14 months after the Ohio Supreme Court denied a state's appeal of the appellate court's vacation of the defendant's reckless operation sentence. The court concluded that a 14-month delay was unreasonable within the meaning of the rule.

{¶ 13} Either line of authority is unavailing to this appellant. Under *Taylor*/*Huber*, Crim.R. 32 is inapplicable in resentencing. Since the entire line of authority appellant cites is, at least in part, premised on the application of this rule, these cases are inapplicable. In *Crosier*, the time computation began, not from the time of the original sentencing, but from the time the Ohio Supreme Court denied the state's appeal. Since no state's appeal was taken in this matter, time begins when this court issued its decision and mandate, July 30, 2010. Appellant's new sentencing hearing occurred on Sept. 27, 2010, less than 60 days after our decision. Given the logistics in arranging a new hearing for a defendant already imprisoned, we do not find this to be an unreasonable or unnecessary delay. Accordingly, appellant's first assignment of error is not well-taken.

II. De Novo Sentencing Hearing

{¶ 14} In his second assignment of error, appellant complains that the sentencing hearing he received was not the de novo hearing that was ordered. According to appellant, at the 2010 sentencing hearing the court relied on the same presentence investigation report that had been generated in 2004 for his original sentencing. No attempt was made to add new or updated information to this packet, favorable or unfavorable. This, appellant insists, was not the type of de novo hearing contemplated in *State v. Bezak*, and yet another de novo sentencing hearing should be afforded him.

{¶ 15} Appellant's characterization of that which the trial court considered at the 2010 sentencing hearing was not wholly accurate. While the court did not order a new presentence investigation, it did accept certificates of completion earned by appellant while imprisoned and allowed appellant and his counsel to put forth statements in regard to what appellant views as his rehabilitation in prison.

{¶ 16} In any event, although neither party to this appeal noted it, while the appeal was pending, the Ohio Supreme Court clarified the *Bezak* decision, holding that, "* * * when a judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, that *part* of the sentence is void and must be set aside." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 26. (Emphasis in original.) When, on appeal, it is determined that the sentence imposed is in part void, only that portion of the sentence that is void may be vacated. Id. at ¶ 28. In such a circumstance, "[t]he new

sentencing hearing to which an offender is entitled under *State v. Bezak* is limited to proper imposition of postrelease control." Id. at paragraph two of the syllabus.

{¶ 17} In this matter, the only infirmity in the trial court's imposition of postrelease control was its failure to inform him, as statutorily required, that a violation of the conditions of postrelease control could result in imposition of a prison term of up to one-half of the term originally imposed. *Hruby*, 2010-Ohio-3530 at ¶ 18. Pursuant to *Fischer*, the sentencing hearing was limited to rectifying this omission. As a result, there was no need for a new presentence investigation or the consideration of anything outside that which was necessary to remedy the improper imposition of postrelease control. Accordingly, appellant's second assignment of error is not well-taken.

III. Judgment Entry

{¶ 18} In his final assignment of error, appellant insists that, although at his sentencing the court orally informed him of the consequences of a postrelease control violation, the sentencing entry is devoid of any mention of such consequences. Since a court speaks only through its journal, appellant insists, the notice to him is still insufficient.

{¶ 19} R.C. 2929.19(B)(3)(e) provides, in material part:

{¶ 20} "[I]f the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

{¶ 21} "(a) Impose a stated prison term and, if the court imposes a mandatory prison term, notify the offender that the prison term is a mandatory prison term;

{¶ 22} "* * *

{¶ 23} "(e) Notify the offender that, if a period of supervision is imposed following the offender's release from prison * * * and if the offender violates that supervision or a condition of post-release control, * * * the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender. * * *."

{¶ 24} If a sentencing court imposes such a sentence after July 11, 2006, and fails to notify the offender of this provision or fails to include postrelease control in its judgment of conviction, it may correct this omission pursuant to the procedures defined in R.C. 2919.191. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, paragraph two of the syllabus. If the sentencing occurred prior to July 11, 2006, the remedy for such neglect is the de novo sentencing procedure prescribed by the Ohio Supreme Court. Id. at paragraph one of the syllabus. In either circumstance, if the trial court's failure to include the postrelease control terms in its sentencing entry is manifestly a clerical error, the court may correct such an error by a nunc pro tunc entry. *State ex rel. Womack v. Marsh*, 128 Ohio St.3d 303, 2011-Ohio-229, ¶ 13.

{¶ 25} Appellant does not dispute that, at the sentencing hearing, the trial court followed the dictates of our remand and notified him that, if he violated any condition of his postrelease control, the parole board may impose an additional prison term of as much as one-half of his original sentence. In its judgment of conviction, the court stated, with respect to postrelease control:

{¶ 26} "The Court explained the concepts of post-release control and that [appellant] is subject to a mandatory five (5) year period of post-release control. Further, [appellant] indicated in open court that he understood the conditions of post-release control."

{¶ 27} The inclusion in a judgment of conviction of postrelease control serves two purposes. First, it manifests through the court's journal compliance with the statutory requirement that an offender receive detailed notice of postrelease control. See *State v. Jordan*, 104 Ohio St.3d 22, 2004-Ohio-6085, ¶ 16. Perhaps equally as important, the inclusion of postrelease control in the entry is a grant of authority to the Adult Parole Authority to impose postrelease control, avoiding a separation of powers conflict. Id. at ¶ 19, citing *Woods v. Telb* (2000), 89 Ohio St.3d 504; see, also, *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, ¶ 20.

{¶ 28} The trial court's entry demonstrates that it has explained postrelease control to appellant. Appellant agrees that the court's oral presentation was sufficient. There is no requirement that the judgment entry be as detailed. A reference to such explanation is sufficient to memorialize the notice portion of the statutory requirement. The entry also states that appellant is "subject to a mandatory five (5) year period" of postrelease control. In our view, this is sufficient to convey the grant of authority function of the entry. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 29} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFRIMED.

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

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE