

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

State of Ohio

Court of Appeals No. L-10-1359

Appellee

Trial Court No. CR98-2941

v.

Darek Lathan

DECISION AND JUDGMENT

Appellant

Decided: August 19, 2011

* * * * *

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

Darek Lathan, pro se.

* * * * *

OSOWIK, P.J.

{¶ 1} This is a pro se appeal from a judgment of the Lucas County Court of Common Pleas that denied appellant's pro se petition for postconviction relief and his motion for "Immediate Remand and Release." For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} Appellant's criminal convictions dating back to 1999 have resulted in a plethora of appeals, motions requesting relief of many types and petitions for postconviction relief. The facts relevant to this appeal follow.

{¶ 3} Appellant was originally convicted and sentenced in 1999 on one count of aggravated robbery with a firearm specification and one count of robbery of a Toledo Rent-A-Center store. (Case No. CR199802941.) Appellant was sentenced to terms of five years on the first count and five years on the second count to be served concurrently, along with three years for the firearm specification, which was to be served consecutively to the sentence on the first count, for a total term of eight years. A 2010 trial court decision related to that case is the subject of the appeal before us and is discussed below. Appellant unsuccessfully appealed this conviction as well as the denial of his pro se motion for a new trial in *State v. Lathan* (May 12, 2000), 6th Dist. No. L-99-1101, L-99-1276.

{¶ 4} Also in 1999, appellant was convicted of one count of aggravated robbery and one count of kidnapping in connection with the robbery of TGI Friday's, a Toledo restaurant. Each count included a firearm specification. (Case No. CR00-1588.) On appeal, this court reversed the conviction and remanded to the trial court. *State v. Lathan*, 6th Dist. No. L-01-1030, 2002-Ohio-2686. After a second trial, appellant was again convicted of the same charges but without the firearm specifications. Appellant was sentenced to two concurrent six-year terms, to be served consecutively to the terms imposed in CR98-2941 (the Rent-A-Center case).

{¶ 5} Between 1999 and 2010, appellant filed an uninterrupted stream of motions for reconsideration, multiple miscellaneous motions, petitions for postconviction relief, appeals of various decisions and applications to reopen appeals, all stemming from his convictions in the Rent-A-Center and TGI Friday's cases. As a result, the cases bounced back and forth between the trial court and this court for years as issues raised by appellant were addressed. Only as much background as is necessary for consideration of this latest appeal will be set forth below.

{¶ 6} On September 2, 2010, appellant filed a pro se "Motion for Immediate Remand and Release" in which he asserted that the notice of postrelease control obligations in case No. CR98-2941 was improper because the notification, given at a re-sentencing hearing on May 19, 2010, was given after the eight-year sentence imposed in 1999 had expired. On October 26, 2010, appellant filed a postconviction relief petition based on the decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*").

{¶ 7} On November 23, 2010, the trial court denied the motion for release and the petition for postconviction relief. It is from that decision that appellant appeals.

{¶ 8} Appellant sets forth the following assignments of error:

{¶ 9} "Assignment of Error (I)

{¶ 10} "The trial court erred when it dismissed appellant post conviction after the appellant court vacated the denial of prior post conviction once it was predicated that appellant case was pending in 2008 when 'Colon I & II' was journalized.

{¶ 11} "Assignment of Error (II)

{¶ 12} "The trial court erred by not applying crim.R. 52(B) when it was predicated that appellant indictment for 'Robbery' lacked a 'mens rea.'

{¶ 13} "Assignment of Error (III)

{¶ 14} "The trial court erred by not applying the 'Plain Error' analysis pursuant to 'Colon II' and crim.R. 52(B).

{¶ 15} "Assignment of Error IV

{¶ 16} "The trial court erred by imposing post release control on appellant when appellant has completed the sentence."

{¶ 17} Appellant's first three assignments of error arise from the trial court's denial of his petition for postconviction relief. Appellant appears to argue that the trial court's denial was in error because appellant's 1998 indictment for robbery was invalid for failing to allege a mens rea of recklessness. The trial court concluded that the Ohio Supreme Court's decision in *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, lays to rest appellant's "oft asserted" argument that his 1998 indictment was defective for failure to charge a mens rea of recklessness. We agree.¹

{¶ 18} In *Horner*, the Ohio Supreme Court held that "* * * when an indictment fails to charge a mens rea element of the crime, but tracks the language of the criminal statute

¹The trial court noted, but chose not to address, the issue of whether previous rulings as to appellant's *Colon*-based arguments in his postconviction relief petitions serve as a bar to further litigation of the issues raised in such petitions based on the doctrines of res judicata, waiver and estoppel. Accordingly, we will review the trial court's decision based on the rationale upon which it relied.

describing the offense, the indictment provides the defendant with adequate notice of the charges against him and is, therefore, not defective. * * * *Colon I* is overruled, and *Colon II* is overruled to the extent that it holds that such an indictment is defective." *Horner* at ¶ 45.

{¶ 19} Count II of the indictment reads in relevant part that appellant, "* * * on or about the 15th day of October, 1998, in Lucas County, Ohio, in attempting or committing a theft offense, or in fleeing immediately after the attempt or offense, did inflict, attempt to inflict, or threaten to inflict physical harm on another, in violation of § 2911.02(A)(2) of the Ohio Revised Code, Robbery * * *."

{¶ 20} At the time of appellant's offense, R.C. 2911.02 read as follows: "(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: * * * (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another; * * *." It is clear that appellant's indictment for robbery tracked the language of R.C. 2911.02(A)(2).

{¶ 21} *Horner*, supra, further held that "[b]y failing to timely object to a defect in an indictment, a defendant waives all but plain error on appeal." *Id.* at paragraph three of the syllabus. Because the indictment was not defective, as discussed above, plain error cannot be applied herein.

{¶ 22} Based on the foregoing, we find that the trial court did not err by denying appellant's petition for postconviction relief and appellant's first, second and third assignments of error are not well-taken.

{¶ 23} In his fourth assignment of error, appellant asserts that the imposition of postrelease control in case No. CR98-2941 was improper because he had served out the aggregate eight-year term of imprisonment in that case by the time of the May 19, 2010 resentencing hearing. (Appellant remained incarcerated at the time of the hearing as he was serving the six-year sentence imposed in case No. CR03-1194.)

{¶ 24} The trial court herein based its decision on the language of R.C. 2929.14(E)(6), which provides that when consecutive prison terms are imposed on an offender for multiple offenses, the "term" to be served is the "aggregate of all of the terms so imposed." In this case, appellant was sentenced to eight years of incarceration in CR98-2941 and six years of incarceration in CR03-1194. The six-year term was ordered to be served consecutively to the eight-year term. The trial court therefore found that appellant's "term" of incarceration was 14 years, to end sometime in 2012 or 2013. Thus, the trial court found, the 2010 resentencing was held well before the expiration of appellant's term of incarceration.

{¶ 25} Ohio case law supports the conclusion that a journalized sentence that includes consecutive sentences does not expire until the aggregate time of the consecutive sentences expires. See *State v. Tharp*, 5th Dist. No. 07-CA-9, 2008-Ohio-3995, citing *State v. Bodiford*, 9th Dist. No. 10CA009770, 2010-Ohio-5923; *State v. Deskins*, 9th Dist. No. 10CA009875, 2011-Ohio-2605. In *Tharp*, *Bodiford* and *Deskins*, the defendants had served some portion of the sentences imposed but had not completed their prison terms at the time of their resentencing hearings; the appellate courts found that the trial court in

each case therefore had jurisdiction to resentence the defendants. *Tharp, Bodiford* and *Deskins* are consistent with the Ohio Supreme Court's decision in *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, which held that in cases where postrelease control is required but not included in the sentence, "* * * 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 syllabus. See, also, *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶ 70 (noting that a defendant cannot be subjected to another sentencing hearing after he "has completed the prison term imposed in his original sentence").

{¶ 26} Based on the foregoing, we find that appellant has not completed his prison term of 14 years or been released from prison. Therefore, the trial court had jurisdiction to resentence him in May 2010.

{¶ 27} Appellant continues to argue that the sentence in case No. CR98-2941 was void. According to appellant, this means that the sentence in case No. CR03-1194 would have begun running earlier and would have been complete well before the May 2010 resentencing hearing, which would result in his release from incarceration without an order for postrelease control. This court has already determined that appellant's sentence in case No. CR98-2941 was not void; therefore, this argument is without merit.

{¶ 28} Based on the law and the facts as set forth above, we find that appellant's fourth assignment of error is not well-taken.

{¶ 29} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant 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

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, 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: http://www.sconet.state.oh.us/rod/newpdf/?source=6.
