

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

State of Ohio

Court of Appeals No. WD-10-050

Appellee

Trial Court No. 2005CR0434

v.

Bryan Kerr

DECISION AND JUDGMENT

Appellant

Decided: January 20, 2012

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Gwen Howe-Gebbers, Assistant Prosecuting Attorney, for appellee.

William F. Hayes, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas that resentenced appellant for his conviction on one count of rape in violation of R.C. 2907.02(A)(1)(b). For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} Following a plea of guilty entered on November 29, 2005, appellant was convicted of one count of rape in violation of R.C. 2907.02(A)(1)(b), and sentenced to serve a prison term of five years. Because the trial court failed to comply with the provisions of R.C. 2929.191 regarding notification of postrelease control, appellant was resentenced on March 27, 2008. In order to bring appellant's sentence in compliance with R.C. 2929.191 following the amendment of R.C. 2967.28 in April 2009, appellant was again brought before the trial court for resentencing on July 6, 2010. At that time, the trial court again imposed a sentence of five years as well as five years postrelease control.

{¶ 3} The transcript of appellant's July 6, 2010 resentencing hearing reflects that the trial court confirmed that appellant had initialed and signed the appropriate "Notice to Offender" and that appellant understood the information contained therein. The trial court then stated that the notice explains that appellant would be subject to postrelease control after his release from prison and that the purpose of the hearing was to advise appellant of that. The trial court then imposed appellant's five-year sentence and advised him that he was subject to five years postrelease control, with certain terms and conditions.

{¶ 4} In its sentencing judgment entry journalized July 15, 2010, the trial court stated that it had reviewed "the record, all oral statements, the presentence investigation report, the victim impact statement if one was received, the purposes and principles of sentencing as well as the seriousness and recidivism factors * * *." The trial court found

that a five-year sentence was “appropriate.” As to the issue of postrelease control, the sentencing entry contains the following language:

The Court again advised the offender, as was stated in the Notice to Offender previously received by the Defendant, which the Defendant reviewed with his counsel, and which the Defendant signed, that he will be subject to five years of post release control as well as the consequences for violating the conditions of post release control imposed by the Parole Board pursuant to R.C. 2967.28, that if the offender violates a post release control sanction, the Adult Parole Authority, or the Parole Board may impose a more restrictive sanction, may increase the duration of the post release control or may impose a prison term, which may not exceed nine (9) months. The maximum cumulative prison term imposed for violations during post release control may not exceed one-half of the stated prison term. (Emphasis added.)

{¶ 5} The entry continued with further details as to possible prison terms for any violations of postrelease control. It is from that judgment that appellant now appeals.

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

I. The trial court erred to the prejudice of defendant/appellant in failing to conduct a full resentencing hearing and consider the provisions of 2929.13(B) at the resentencing hearing.

II. The trial court erred in failing to impose the mandatory post release control mandated by R.C. 2929.191.

III. The trial court erred to the prejudice of defendant/appellant in failing to adequately inform and include in the sentencing judgment entry the mandatory post release control language mandated by R.C. 2929.191.

{¶ 7} Appellant argues that the trial court failed to adequately and properly impose postrelease control and that, since he is now released from his incarceration, the trial court has lost its authority to resentence him. Appellant asks, first, that this court modify the July 6, 2010 sentencing order by striking all references to postrelease control and, second, that he be released from such control retroactively to the date of his release from prison. Since all of appellant's assignments of error challenge the adequacy of his resentencing hearing with regard to postrelease control, we will address them together.

{¶ 8} Appellant first asserts that he did not have a “full” resentencing hearing because the trial court failed to consider the provisions of R.C. 2929.13(B). In support, appellant argues that the only “consideration” expressed by the trial court during the “strikingly brief” hearing was evidenced by the court's statement that it had previously imposed a five-year sentence and that it found that to be the appropriate sentence. Appellant does, however, concede that the trial court referenced the required statutory language in its judgment entry.

{¶ 9} When resentencing a defendant, the trial court must conduct a full hearing. *See, e.g., State v. Barnes*, 122 Ohio St.3d 200, 215, 2009-Ohio-2462. The record in this

case reflects that trial counsel, when asked by the court whether he wished to be heard on sentencing again, declined, thereby waiving a “full” hearing. At that point, the trial court proceeded to notify appellant of the length of his sentence as well as the terms and conditions of postrelease control as summarized above.

{¶ 10} Accordingly, we find that, although a “full” hearing was waived by his attorney, appellant was not prejudiced thereby.

{¶ 11} Appellant next argues that the trial court did not actually “impose” the mandatory postrelease control. Appellant's postrelease control was set forth, however, in the “Plea of Guilty to Indictment and Waiver of Trial by Jury” which he signed on October 31, 2005, as well as in the “Notice to Offender” which he signed on December 2, 2005. Among other details relating to the conditions of supervision, appellant's guilty plea clearly states that five years postrelease control after his release from prison is mandatory. The “Notice to Offender” which appellant signed at sentencing states:

{¶ 12} “POST RELEASE CONTROL

{¶ 13} “You are being sentenced for a felony of the first degree. The parole board may be required to subject you to a period of post release control pursuant to R.C. 2967.28.”

{¶ 14} As discussed above, appellant was notified of mandatory postrelease control at his resentencing. Additionally, the record contains yet another “Notice to Offender” signed by appellant at his July 6, 2010 resentencing hearing which contains the same language as the original notice.

{¶ 15} Appellant asserts that while the trial court “advised” him that he was subject to five years of postrelease control the court did not make postrelease control an order of the court. This argument is contradicted by the record. First, the hearing transcript and the resentencing judgment entry reflect that appellant was told he was “*subject to*” five years of postrelease control. We note that R.C. 2929.191 does not set forth any mandatory language to be used regarding notification of postrelease control. Furthermore, and most importantly when considering appellant's claim, at the conclusion of the resentencing hearing, the trial court stated, “*That will be the order of the Court.*” (Emphasis added.)

{¶ 16} Based on the foregoing, we find that appellant's claim that the trial court “failed to impose the mandatory postrelease control” is wholly without merit.

{¶ 17} Next, appellant asserts that the trial court erred because it did not inform him that *postrelease* control would begin *after he was released from prison*. Appellant poses the argument that because the Supreme Court of Ohio used the words “after leaving prison” when discussing the adequacy of a trial court's judgment of conviction in a recent opinion, trial courts which do not use the same language are not in compliance with the law. *State v. Barnes, supra*. *Barnes*, however, imposes no requirement that a trial court use the words “after leaving prison” when imposing a period of postrelease control. Additionally, the July 6, 2010 hearing transcript reflects that the trial court addressed appellant at the outset and referenced the “Notice to Offender,” confirming that the signature and initials on the form were indeed appellant's. The court then stated, “[The

form] explains to you in more detail than what was previously done due to the new case that you would be subject to five years of Post Release Control *after your release*, which I anticipate is going to be soon. You are here for us to advise you of that.” (Emphasis added.) This argument is wholly without merit.

{¶ 18} As to appellant's argument that the trial court has lost jurisdiction to resentence him with regard to postrelease control since he has been released from prison, we note, first, that there is no evidence in the record as to his having been released from custody. Further, even if appellant has been released at this time, that argument is moot in light of our finding that there was no error in appellant's resentencing and that he is in fact subject to five years postrelease control.

{¶ 19} Upon consideration of the foregoing, we find appellant's first, second and third assignments of error not well-taken.

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

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:
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