

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

State of Ohio

Court of Appeals No. L-11-1174

Appellee

Trial Court No. CR0200603016

v.

Allen Reginald Walker

DECISION AND JUDGMENT

Appellant

Decided: June 22, 2012

* * * * *

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

Karin L. Coble, for appellant; Allen Reginald Walker, pro se.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas entered on April 3, 2007, which found appellant guilty of one count of aggravated robbery, in violation of R.C. 2911.01(A)(3), a felony of the first degree, one count of kidnapping, in violation of R.C. 2905.01(A)(2), a felony of the first degree, and one count

of aggravated burglary, a violation of R.C. 2911.11(A)(1), a felony of the first degree. Appellant was sentenced to three consecutive nine-year terms of incarceration, totaling 27 years of incarceration. For the reasons set forth below this court affirms the judgment of the trial court.

{¶ 2} Appellant's counsel submitted a request to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). In support of counsel's *Anders* request to withdraw, counsel states that, after reviewing the record and the proceedings of the trial court, counsel is unable to find any arguable issue for appeal. In counsel's brief filed upon appellant's behalf, counsel sets forth one proposed assignment of error:

1. R.C. 2929.191's procedures with respect to the accused attending the resentencing hearing via videoconference is unconstitutional.

{¶ 3} In appellant's pro se brief, he alleges three additional proposed assignments of error:

1. Whether or not Appellant's consecutive sentence violated Appellant's right to due process under the Sixth and Fourteenth Amendments of the United States Constitution and Section Five and Sixteen, Article I and Section Four, Article IV of the Ohio Constitution.

2. Whether or not the trial court abused its discretion and erred to the prejudice of the Appellant at sentencing by imposing a prison term in excess of the minimum, in violation of the Appellant's right to due process

under the Sixth and Fourteenth Amendment of the United States Constitution.

3. Whether or not the trial court abused its discretion and erred to the prejudice of Appellant by not merging his consecutive sentences.

{¶ 4} *Anders, supra*, and *State v. Duncan*, 57 Ohio App.2d 93, 385 N.E.2d 323 (1978), detailed the procedure to be followed by appointed counsel who wishes to withdraw upon determining there is a lack of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after conscientious examination of the case, believes any appeal to be wholly frivolous, counsel should so advise the court and request permission to withdraw. *Id.* at 744.

{¶ 5} This request to withdraw must be accompanied by a brief identifying anything in the record that could arguably support an appeal. *Id.* Counsel must furnish the client with a copy of the brief and request to withdraw. *Id.* Once these requirements have been satisfied, the appellate court then conducts a full examination of the proceedings held below to determine if the appeal is frivolous. If the appeal is frivolous, the appellate court may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits. *Id.*

{¶ 6} In the case before us, appointed counsel for appellant has satisfied the requirements set forth in *Anders, supra*. Accordingly, we shall proceed with an examination of the potential assignments of error set forth by counsel for appellant and

also by appellant in his pro se brief, review the record from below, and determine if this appeal is meritorious.

{¶ 7} The facts relevant to this appeal are as follows. On September 12, 2006, appellant was indicted for aggravated robbery, kidnapping, and aggravated burglary. Following a jury trial, appellant was found guilty on all charges. Appellant was sentenced to serve three consecutive nine-year terms of incarceration, totaling 27 years of incarceration. As a result of the convictions, appellant is also subject to five years of mandatory postrelease control. On September 12, 2008, the decision of the trial court was affirmed. Appellant requested certiorari by the Ohio Supreme Court. It was rejected.

{¶ 8} Between February 17, 2010, and September 1, 2010, appellant filed three motions, substantively nearly identical, claiming that his sentencing entry of April 6, 2007, did not properly inform him of postrelease control.

{¶ 9} On June 2, 2011, the trial court conducted a resentencing pursuant to R.C. 2929.191 via videoconference. During this time appellant was represented by his original trial counsel. No objections were made to the resentencing or to appellant's appearance via videoconference.

{¶ 10} The “nunc pro tunc” sentencing entry properly advised appellant of his postrelease control obligations. This appeal followed. Appellant has, through his counsel, filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

{¶ 11} Appellant's counsel argues in the proposed assignment of error that appellant's constitutional rights were violated because appellant was present via videoconference and not in present in person at his resentencing. Counsel argues that Crim.R. 43(A) and the Ohio Constitution, Article I, Section 10 state that a defendant has a fundamental right to be present during all critical stages of his criminal trial. Counsel argues that appellant's being present is critical to the outcome of the trial and may have frustrated the fairness of the proceedings.

{¶ 12} This proposed assignment of error is rejected on the grounds that, as counsel concedes in counsel's brief, appellant's resentencing hearing fully complied with R.C. 2929.191. R.C. 2929.191 states that effective July 11, 2006, criminal sentences imposed on or after July 11, 2006, in which the trial court failed to properly impose postrelease control, could do so through the application of R.C. 2929.191 which does not require the defendant to be physically present at the hearing.

{¶ 13} The Supreme Court of Ohio has held that the failure to include a mandatory postrelease control in the judgment made that judgment technically void. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961 (2007). In *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332 (2010), the Ohio Supreme Court held that when a judgment of a conviction is remanded for a *Bezak* resentencing the second appeal from the resentencing is not the first appeal of right. In the second appeal from resentencing, res judicata wholly applies to the determination of guilt and to all other lawful determinations of the sentence. *Id.*

{¶ 14} This assignment of error by appellant's counsel is rejected. There is no error in not having appellant physically present at the resentencing hearing. Having appellant attend the hearing via videoconference is not unconstitutional. The technical *Bezak* resentencing is not a critical stage of the criminal trial as all other issues in the case are already final. This assignment of error is not well-taken.

{¶ 15} Appellant's three pro se proposed assignments of error are moot. All matters raised are res judicata pursuant to the Ohio Supreme Court's ruling set forth in *Fischer*. The hearing was a limited, procedural *Bezak* resentencing. Therefore, appellant cannot raise for review any other substantive issues. Res judicata applies to the determination of guilt and all aspects of the sentence. Appellant's proposed assignments of error are thus moot and found not well-taken.

{¶ 16} Upon this record, we concur with appellate counsel that appellant's appeal is without merit. Moreover, upon our own independent review of the record, we find no other grounds for meritorious appeal. Accordingly, this appeal is found to be without merit, and wholly frivolous. Counsel's motion to withdraw is found well-taken and is, hereby, granted.

{¶ 17} On consideration whereof, 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. The clerk is ordered to serve all parties, including the defendant, with notice of this decision.

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, P.J.

JUDGE

Thomas J. Osowik, 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>.