

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

State of Ohio

Court of Appeals No. E-11-034

Appellee

Trial Court No. 2005-CR-463

v.

Shaunsay J. Gowdy

DECISION AND JUDGMENT

Appellant

Decided: November 30, 2012

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Loretta A. Riddle, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Shaunsay Gowdy, appellant, appeals an April 13, 2011 judgment of the Erie County Court of Common Pleas. The judgment resentenced appellant to correct sentencing error with respect to imposition of postrelease control in sentences imposed upon appellant in 2006 on convictions of multiple drug offenses. The convictions were a result of guilty verdicts returned by a jury at trial in May 2006.

{¶ 2} Appellant filed his motion for resentencing on April 16, 2010. The trial court conducted a hearing on the motion on April 11, 2011. Citing the Ohio Supreme Court's decision in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332 as authority, the trial court granted the motion to resentence, but limited resentencing to the imposition of postrelease control.

{¶ 3} Appellant appeals that judgment and assigns as error on appeal a wide range of claimed trial court errors occurring both before and during his May 2006 jury trial:

Assignment of Error No. 1. The trial court committed prejudicial error and plain error when the court gave an improper jury instruction on prima facie evidence and by instructing the jury that a Bureau of Criminal Identification and Investigation laboratory report is prima facie evidence of the content, weight and identity of the substance when the chemist testifies.

Assignment of Error No. 2. In a drug trial, a trial court violates a defendant's due process rights and commits plain error and reversible error when the trial court fails to instruct a jury on the role of opinion and expert testimony.

Assignment of Error No. 3. The verdicts on weapons under disability and firearm specifications were against the manifest weight of the evidence and insufficient as a matter of law.

Assignment of Error No. 4. The court committed prejudicial error by interjecting itself as a witness.

Assignment of Error No. 5. The trial court erred by not allowing a non-jury trial and/or allowing a no contest pleas on gun charges.

Assignment of Error No. 6. The court erred by not suppressing the evidence based on the search warrant which failed to articulate probable cause.

{¶ 4} The original trial court sentencing hearing proceeded on May 11, 2006. The court filed its judgment entry of conviction and sentence on May 12, 2006. The May 12, 2006 judgment, however, was not journalized until June 13, 2006. Appellant filed a notice of appeal to this court on June 12, 2006. The direct appeal was dismissed on October 26, 2006, due to appellant's failure to file assignments of error and an appellate brief.

{¶ 5} Appellant filed an App.R. 26(B) application for reopening of the direct appeal on January 26, 2007, based upon claimed ineffective assistance of appellate counsel. On February 28, 2007, this court granted appellant 20 days to file an addendum to the application. The court recognized that the application was untimely under App.R. 26 and directed appellant to demonstrate in the addendum good cause for the delay. Appellant did not file any addendum or additional materials with the court to show good cause for the failure to meet time requirements under the rule. Due to the failure, this court denied the application to reopen direct appeal in a judgment issued on April 19, 2007.

{¶ 6} The state contends that all of appellant's assignments of error are barred by res judicata under the Ohio Supreme Court's decision in *Fischer*. In *Fischer*, the Ohio Supreme Court modified *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, and held that a complete, de novo resentencing is not required for postrelease control sentencing errors. *Fischer* at ¶ 29; *State v. Harris*, 132 Ohio St.3d 318, 2012-Ohio-1908, 972 N.E.2d 509, ¶ 12. Where a defendant prevails in showing errors with respect to postrelease control in his sentence, those errors void only the postrelease control aspect of the case. *Fischer* at ¶ 17. "The remainder of the sentence, which the defendant did not successfully challenge, remains valid under the principles of res judicata." *Id.*

{¶ 7} Appellant challenges the validity of the judgment dismissing his direct appeal on jurisdictional grounds and argues that no res judicata bar exists as to the judgment. Appellant filed a notice of appeal on June 12, 2006 with respect to a May 12, 2006 judgment of conviction and sentence. The May 12, 2006 judgment, however, was not journalized until June 13, 2006. Appellant contends that his premature filing of the notice of appeal prevented this court from acquiring jurisdiction over the original direct appeal.

{¶ 8} In *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, the Ohio Supreme Court restated the requirements for a judgment entry of conviction to become a final appealable order:

Crim.R. 32(C) clearly specifies the substantive requirements that must be included within a judgment entry of conviction to make it final for purposes

of appeal and that the rule states that those requirements “shall” be included in the judgment entry of conviction. These requirements are the *fact* of the conviction, the sentence, the judge’s signature, and the entry on the journal by the clerk. All of these requirements relate to the essence of the act of entering a judgment of conviction and are a matter of substance, and their inclusion in the judgment entry of conviction is therefore required. Without these substantive provisions, the judgment entry of conviction cannot be a final order subject to appeal under R.C. 2505.02. *Id.* at ¶ 11.

{¶ 9} Under *Lester*, the May 12, 2006 judgment entry of conviction was not a final appealable order until journalized. The Rules of Appellate Procedure provide, however, that premature notices of appeal become effective upon journalization of judgment entry appealed:

App.R. 4

* * *

(C) Premature notice of appeal

A notice of appeal filed after the announcement of a decision, order, or sentence but before entry of the judgment or order that begins the running of the appeal time period is treated as filed immediately after the entry.

{¶ 10} In our view, pursuant to App.R. 4(C), the judgment entry of May 12, 2006, became a final appealable order immediately after its journalization on June 13, 2006. *See Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 527, 709 N.E.2d 1148 (1999).

{¶ 11} Appellant argues that the trial court lacked authority to journalize the judgment entry after the notice of appeal was filed. We disagree. Under the Ohio Rules of Superintendence, trial courts have a duty to journalize judgment entries of conviction within 30 days. *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, 895 N.E.2d 805, ¶ 8; Sup.R. 7(A). Appellant contends that the May 12, 2006 judgment entry was not a final appealable order because it was not journalized. We agree with the Tenth District Court of appeals that in such circumstances, “[b]ecause there was no final appealable order * * *, nothing precluded the trial court from carrying out its duty to journalize that decision.” *State v. Ronan*, 10th Dist. No. 06AP-63, 2007-Ohio-168, ¶ 17.

{¶ 12} In our view appellate jurisdiction in the direct appeal existed immediately upon journalization of the entry of conviction on June 13, 2012. This court had jurisdiction to consider and dismiss the appeal at the time of its judgment of October 26, 2006. Accordingly, res judicata applies to the October 26, 2006 judgment on direct appeal on issues unrelated to postrelease control and bars appellant from now litigating claimed error that was raised or could have been raised at trial or on direct appeal:

Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising

and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

{¶ 13} We conclude that res judicata bars appellant from litigating in this appeal claimed trial court error occurring during or before the May 2006 trial. Accordingly, we find each of appellant's assignments of error not well-taken.

{¶ 14} We conclude that justice was afforded the party complaining. We affirm the judgment of the Erie County Court of Common Pleas and order appellant 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, 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>
