

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

State of Ohio

Court of Appeals No. L-12-1077

Appellee

Trial Court No. CR0200701266

v.

John F. Jackson

DECISION AND JUDGMENT

Appellant

Decided: April 12, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
J. Christopher Anderson, Assistant Prosecuting Attorney, for appellee.

Scott J. Hoffman, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} John F. Jackson appeals a March 5, 2012 judgment of the Lucas County
Court of Common Pleas resentencing him to correct a sentencing error with respect to

imposition of postrelease control. The original sentencing judgment was filed August 1, 2007.

{¶ 2} In 2007, appellant was convicted of two counts of aggravated robbery (violations of R.C. 2911.01(A)(1)). One of the counts also included an R.C. 2941.145 firearm specification. Appellant pled no contest to the charges. The trial court conducted a sentencing hearing on July 31, 2007, and filed the sentencing judgment on August 1, 2007.

{¶ 3} Appellant appealed his conviction and sentence to this court. On December 19, 2008, we affirmed the trial court's judgment. *State v. Jackson*, 6th Dist. No. L-07-1281, 2008-Ohio-6805, *affirmed*, 124 Ohio St.3d 117, 2009-Ohio-6541, 919 N.E.2d 735.

{¶ 4} On September 11, 2009, appellant filed a Crim.R. 32.1 motion to withdraw his no contest plea. The trial court denied the motion in a judgment filed on October 4, 2010. Appellant did not appeal the judgment.

{¶ 5} On November 22, 2011, appellant filed a motion in the trial court for resentencing based upon claimed sentencing error with respect to imposition of postrelease control. In the motion appellant argued that his sentence was void and that he was entitled to resentencing *de novo*. The trial court conducted a hearing pursuant to R.C. 2929.191. In a judgment filed on March 5, 2012, the court granted the motion for resentencing, but limited resentencing to imposition of postrelease control. Appellant appeals the March 5, 2012 judgment to this court.

{¶ 6} Pursuant to procedures announced in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), counsel for appellant states that he is unable to find meritorious grounds for this appeal. Counsel filed an appellate brief and, pursuant to *Anders*, asserted potential assignments of error. Counsel has requested leave of court to withdraw as counsel for appellant.

{¶ 7} Counsel mailed a copy of the appellate brief including counsel's request to withdraw as counsel to appellant and advised appellant of his right to file his own brief. Appellant has not filed his own appellate brief.

{¶ 8} The potential assignments of error asserted include:

(1) whether the trial court erred denying Jackson's Motion for Resentencing and only addressing the portion of the sentence pertaining to his term of postrelease control,

(2) whether a defendant should be permitted to withdraw his plea any time prior to a Court's issuing a nunc pro tunc entry to correct a legally incomplete sentence pursuant to *State v. Singleton*, 2009-Ohio-6434, 920 N.E.2d 958 for failure to properly impose postrelease control sanctions, and

(3) whether a Defendant's time period within which to file a notice of appeal should be tolled when a trial court denies a motion to withdraw a plea despite there being a legally insufficient sentence in place for failure to properly impose postrelease control sanctions, such that Jackson would be permitted to now appeal the denial of his motion to withdraw his plea.

{¶ 9} The Ohio Supreme Court’s decision in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, governs the issues raised in this appeal. Prior to *Fischer*, the court recognized that where a trial court fails to properly impose postrelease control as part of a criminal sentence, the sentence is void and the defendant is entitled to a resentencing hearing to correctly impose postrelease control. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 6. In *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, the court stated that the resentencing hearing to be conducted to correct sentencing errors in the imposition of postrelease control is to be a new sentencing hearing in its entirety, rather than a hearing limited to reimposing the original sentence with proper notice of postrelease control. *Fischer* at ¶ 12; *Bezak* at ¶ 6.

{¶ 10} In *Fischer*, the court modified its decision in *Bezak* and held that the resentencing hearing considered in *Bezak* is to be limited to proper imposition of postrelease control. *Fischer* at paragraph two of the syllabus. A complete resentencing is not required. *Id.* at ¶ 17. The court held that sentencing errors with respect to imposition of postrelease control void only the postrelease control aspect of the sentence. *Id.* “The remainder of the sentence, which the defendant did not successfully challenge remains valid under the principles of res judicata.” *Id.*

{¶ 11} Accordingly, under the Ohio Supreme Court’s decision in *Fischer* the trial court properly limited resentencing in this case to proper imposition of postrelease control. *See State v. Hicks*, 6th Dist. No. WD-10-024, 2012-Ohio-1878, ¶ 6-7. We find potential assignment of error No. 1 not well-taken.

{¶ 12} Crim.R. 32.1 motions to withdraw guilty or no contest pleas in judgments subject to attack for failure to comply with statutory requirements for imposition of postrelease control are treated as postsentence motions under Crim.R. 32.1. *State v. Beachum*, 6th Dist. Nos. S-10-041 and S-10-042, 2012-Ohio-285, ¶ 21; *State v. Gonzalez*, 193 Ohio App.3d 385, 2011-Ohio-1542, 952 N.E.2d 502, ¶ 34 (6th Dist.). Such motions may only be granted to correct a manifest injustice. *Beachum* at ¶ 23. Accordingly, we find appellant's Potential Assignment of Error No. 2 not well-taken.

{¶ 13} Appellant failed to appeal the trial court's March 5, 2012 judgment denying his Crim.R. 32.1 motion to withdraw his no contest plea. Under *Fischer*, even where a trial court committed sentencing errors with respect to imposition of postrelease control voiding that aspect of the sentence, the principles of res judicata continue to apply to the remainder of the case. *Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332 at ¶ 17. Appellant is barred by res judicata from challenging the trial court's judgment denying his motion to withdraw his no contest plea now because the issue could have been raised in a direct appeal of the judgment. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

{¶ 14} We find Potential Assignment of Error No. 3 not well-taken.

{¶ 15} This court, as required under *Anders*, has undertaken its own independent examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we find this appeal is without merit and wholly frivolous under *Anders*. We grant the motion of appellant's counsel to withdraw

as counsel in this appeal and affirm the judgment of the Lucas County Court of Common Pleas. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. The clerk is ordered to serve all parties, including John F. Jackson, with notice of this decision, if appellant notified the court of his address.

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, 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>
