

[Cite as *State v. Griffin*, 2009-Ohio-4366.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 91845**

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**STATE OF OHIO**

PLAINTIFF-APPELLANT

vs.

**THERON GRIFFIN**

DEFENDANT-APPELLEE

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**JUDGMENT:**  
**REVERSED AND REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-505462

**BEFORE:** Boyle, J., Stewart, P.J., and Sweeney, J.

**RELEASED:** August 27, 2009

**JOURNALIZED:**

## **ATTORNEYS FOR APPELLANT**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellant, state of Ohio, appeals from an order dismissing an indictment charging defendant-appellee, Theron Griffin, with escape. The state presents one assignment of error for our review:

{¶ 2} “In case number CR 505462, when granting appellee’s motion to dismiss, the trial court incorrectly relied on *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250 as controlling authority.”

{¶ 3} Finding merit to the state’s argument, we reverse and remand.

#### Standard of Review on Motion to Dismiss an Indictment

{¶ 4} In *State v. Bess*, 8th Dist. No. 91429, 2009-Ohio 2254, this court set forth the standard of review on a motion to dismiss an indictment:

{¶ 5} “The Supreme Court of Ohio has explained that ‘any motion, however labeled, which, if granted, restricts the state in the presentation of certain evidence and, thereby, renders the state’s proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed, is, in effect, a motion to suppress. The granting of such order is a final order and may be appealed pursuant to R.C. 2945.67 and Crim.R. 12(J).’ *State v. Putich*, 8th Dist. No. 89005, 2008-Ohio-681, ¶13, quoting *State v. Davidson* (1985), 17 Ohio St.3d 132, syllabus (in *Putich*, defendant filed a motion to dismiss the complaint against him). See also *State v. Davis*, 11th Dist. No. 2008-L-021, 2008-Ohio-6991, ¶21 (citing *Putich*’s standard of review as the ‘standard of review for motion to dismiss

indictment'), and *State v. Bewley*, 9th Dist. No. 23693, 2007-Ohio-7026.” *Bess* at ¶21.

{¶ 6} A motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, \_8. “When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. \*\*\* Consequently, an appellate court must accept the trial court’s findings of fact if they are supported by competent, credible evidence. \*\*\* Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. \*\*\* ” (Internal citations omitted.) *Id.*

{¶ 7} Here, the facts are not in dispute, and thus, we are left with a question of law. Essentially, the only issue in this appeal is whether a trial court has the authority to impose a sentence anew upon a defendant who pleads guilty after his or her original plea was vacated. If the answer is yes, then *Bezak* does not apply.

### Background

{¶ 8} In January 2008, Griffin was indicted for escape in violation of R.C. 2921.34(A)(1) after he failed to report to his parole officer, which was a violation of the terms of his postrelease control. R.C. 2921.34(A)(1) provides that “[n]o person, knowing the person is under detention or being reckless in that regard, shall purposely break or attempt to break the detention, or purposely fail to return

to detention, either following temporary leave granted for a specific purpose or limited period, or at the time required when serving a sentence in intermittent confinement.”

{¶ 9} Griffin moved to dismiss the indictment under *Bezak*, arguing that since he had already served his prison term when he was “resentenced” pursuant to a remand by this court in *State v. Griffin*, 8th Dist. No. 83724, 2004-Ohio-4344, the trial court lacked jurisdiction to “resentence” him and subject him to postrelease control. Therefore, he maintains that he could not be charged with escape for violating the postrelease control. Because we find that the trial court was not “resentencing” him, but sentencing him anew, we disagree.

{¶ 10} Griffin was originally indicted on multiple counts in three separate cases in June 2003. He pled guilty to three counts of gross sexual imposition and one count of intimidation. See *Griffin* at \_5, 8, and 11. He appealed his convictions, arguing in part that his pleas were not knowingly entered into because the trial court did not correctly inform him of postrelease control. This court agreed and held that the trial court erred by accepting them. Accordingly, we vacated his guilty pleas and remanded for further proceedings. *Griffin* at \_13.

{¶ 11} While his appeal was pending, Griffin was released from prison on August 6, 2004. This court’s decision vacating his pleas was released on August 19, 2004.<sup>1</sup>

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<sup>1</sup>We note that although Griffin had been released from prison before we released a decision on his direct appeal, this court still had jurisdiction over his appeal. *Griffin*

{¶ 12} Upon remand, Griffin was subject to the same indictments in all three cases. He again entered guilty pleas to three counts of gross sexual imposition and one count of intimidation. The trial court gave him the same three-year prison term it originally had, but this time, it correctly advised him that he would be subject to five years of postrelease control upon his release from prison. Griffin was then given credit for jail time served, and since he had served his entire prison term, he was ordered released and placed on postrelease control.

{¶ 13} Subsequently, Griffin failed to report to his parole officer, violating the terms of his postrelease control. This led to the escape indictment at issue in this appeal.

*Hernandez, Bezak, and Simpkins*

{¶ 14} A trial court's power to resentence a defendant to include a term of postrelease control when it was not properly given at the original sentencing hearing ends once a defendant has served his entire sentence. As the Ohio Supreme Court stated in *State v. Harrison*, Slip Opinion No. 2009-Ohio-3547, ¶35, on this exact issue: "[t]his court's recent jurisprudence is unmistakable on

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was convicted of four felonies. "Given the numerous adverse collateral consequences imposed upon convicted felons, a person convicted of a felony has a substantial stake in the judgment of conviction which survives the satisfaction of the judgment imposed. *State v. Stewart*, 8th Dist. No. 86411, 2006-Ohio-813, ¶9, citing *State v. Golston*, 71 Ohio St.3d 224, 227, 1994-Ohio-109. Therefore, an appellate court has jurisdiction over an appeal challenging a felony conviction "even if the entire sentence has been satisfied before the matter is heard on appeal." *Stewart* at ¶9, citing *State v. Adams*, 8th Dist. No. 84180, 2004-Ohio-6630.

that point.” A cursory review of the Supreme Court’s “recent jurisprudence” on this issue will assist us in our analysis here.

{¶ 15} In *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, the Ohio Supreme Court granted a writ of habeas corpus to release a petitioner from prison after he had been sentenced to 160 days for violating the terms of his postrelease control. The Court held that since the trial court had not notified Hernandez about postrelease control at his sentencing hearing, the adult parole board had no authority to place him on postrelease control, and thus, he could not be punished for violating it. *Id.* at ¶18. And since he had already served his entire prison sentence, he could not be resentenced to correct the trial court’s failure to impose postrelease control. *Id.* at ¶29.

{¶ 16} In *Bezak*, the Ohio Supreme Court held that “[w]hen a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense.” *Id.* at the syllabus. But in *Bezak*, the Supreme Court held that since Bezak had already served his prison term, he could no longer be subject to resentencing to correct the trial court’s failure to impose postrelease control at his original sentencing hearing. *Id.* at \_18.

{¶ 17} In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, the Ohio Supreme Court held, “in cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly

included in the sentence, the sentence is void, and 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 ¶6.

*State v. Roberts*

{¶ 18} The state contends that *Bezak* does not apply because Griffin’s appeal was pending when he was released from prison.<sup>2</sup> Therefore, the state maintains Griffin should not have had “an expectation of finality.” The state relies on *State v. Roberts*, 119 Ohio St.3d 294, 2008-Ohio-3835, for this proposition. Although we agree that *Bezak* and its progeny do not apply here, it is not because of *Roberts*.

{¶ 19} In *Roberts*, the defendant was originally sentenced on August 12, 2004. He received a maximum sentence of eight years in prison. On appeal, the court found that Roberts’s sentence was unconstitutional because the trial court relied on judicial fact-finding and, therefore, it violated *Blakely v. Washington* (2004), 542 U.S. 296. The appellate court modified Roberts’s sentence to the minimum term of two years in prison. Id. at ¶2, 3. The state appealed to the Ohio Supreme Court, which accepted the state’s discretionary appeal and held the case for a decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

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<sup>2</sup>Bezak was also released from prison while his direct appeal was pending. He was convicted and sentenced to six months in prison in November 2003. This court did not release a decision on his direct appeal until December 9, 2004. See *State v. Bezak*, 8th Dist. No. 84008, 2004-Ohio-6623.



{¶ 20} On March 24, 2006, Roberts was released from prison, having served his two-year prison term.

{¶ 21} On May 3, 2006, the Ohio Supreme Court remanded Roberts's case for resentencing pursuant to *Foster. Roberts* at ¶7, citing *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109. On remand, the trial court again sentenced Roberts to eight years in prison, as it had originally done in August 2004. Roberts appealed, arguing that his sentence violated the Double Jeopardy Clause since he had already served his prison sentence. The court of appeals affirmed Roberts's eight-year sentence, and the Ohio Supreme Court accepted Roberts's discretionary appeal. *Id.* at ¶8, 9. Roberts argued that jeopardy attached because his prison term had expired, and the Ohio Department of Rehabilitation and Correction had released him from prison.

{¶ 22} The Ohio Supreme Court began its analysis by examining the Double Jeopardy Clauses at issue. It explained: "[t]he Double Jeopardy Clause protects persons from (1) 'a second prosecution for the same offense after acquittal,' (2) 'a second prosecution for the same offense after conviction,' and (3) 'multiple punishments for the same offense.' *North Carolina v. Pearce* (1969), 395 U.S. 711, 717. The rationale underlying double jeopardy protection 'is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for the alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility

that even though innocent he may be found guilty.’ *Green v. United States* (1957), 355 U.S. 184, 187-188. ‘A primary purpose served by [the Double Jeopardy Clause] is akin to that served by the doctrines of res judicata and collateral estoppel - to preserve the finality of judgments.’ *Crist v. Bretz* (1978), 437 U.S. 28, 33.” *Roberts* at ¶11.

{¶ 23} The *Roberts* court held that “[w]hen a defendant’s sentence is stayed on appeal, but the defendant is released from prison under the assumption that his sentence has been served, the defendant has no expectation of finality in that sentence for purposes of the Double Jeopardy Clause.” *Id.* at the syllabus.

{¶ 24} *Roberts*’s sentence had been stayed pending appeal. The Supreme Court reasoned that “the stay acted to temporarily suspend the two-year sentence and reinstate the original eight-year sentence.” *Roberts* at ¶28. Thus, the Court concluded that “*Roberts*’s sentence had not expired when he was released on March 24, 2006.” *Id.* It further explained, “the state timely appealed *Roberts*’s two-year sentence to this court under R.C. 2953.08(B)(2). And the court of appeals issued a stay of *Roberts*’s two-year sentence pending our resolution of the state’s appeal. [It] accepted the state’s appeal for review and ultimately reversed *Roberts*’s sentence. All these events occurred prior to *Roberts*’s release from prison. Any one of these events placed *Roberts* on notice that his sentence was subject to being overturned, and in fact, the decision in *Foster* did overturn *Roberts*’s sentence. Consequently, *Roberts* had no expectation of finality in the two-year sentence imposed by the court of appeals.

Therefore, the trial court's resentencing of Roberts on remand to eight years did not violate the Double Jeopardy Clause of either the United States or Ohio Constitutions, and Roberts's reincarceration was in accordance with the law." *Id.* at ¶29.

{¶ 25} Although *Roberts* sheds light on the issue of double jeopardy, we disagree with the state that its reasoning applies here.

### Analysis

{¶ 26} In the instant case, it was not only Griffin's sentence that was vacated; it was his plea that was vacated. When the case was remanded to the trial court, there was no conviction, let alone sentence. At that point, the trial court most certainly had jurisdiction over the case. Griffin could have exercised his constitutional right to go to trial and force the state to prove beyond a reasonable doubt that he committed the alleged acts. If Griffin had exercised his constitutional right to go to trial, he would have been facing three separate indictments with the following charges in each, respectively: 1) ten counts of gross sexual imposition with repeat violent offender and notice of prior conviction specifications, attempted rape, and two counts of intimidation; 2) six counts of gross sexual imposition and two counts of intimidation; and 3) sixteen counts of gross sexual imposition, one count of attempted rape with repeat violent offender and notice of prior conviction specifications, and six counts of intimidation.

{¶ 27} Moreover, if he had gone to trial and had been found guilty of all counts, he could have very well been sentenced to a much longer prison term

than he actually received by entering into a plea agreement. That means that if he had been convicted of all those counts in all three cases, the trial court's authority to sentence him anew to the maximum sentence allowed by law would not be an issue. And if he had been sentenced after a trial to more than three years, he still would have received credit for jail time served, just as he was given after he pled upon remand. And if the trial court sentenced him anew after a trial, it most certainly could have imposed the mandatory postrelease control that is required by law, just as it did after he pled.

{¶ 28} The fact that Griffin, upon remand, was again offered the same plea agreement, and chose to accept it, has no bearing on the matter. And the fact that Griffin received the same three-year prison sentence (with the addition of the postrelease control) does not change the fact that the trial court still had the authority to impose the sentence, which it did here, including the period of postrelease control.

{¶ 29} In *Bezak*, the defendant had served his entire sentence by the time he was resentenced and thus, the trial court had no authority to resentence him and subject him to postrelease control. Here, Griffin had not served his entire sentence, because his plea had been vacated; he had no conviction or sentence at that point. After he again pled guilty, the trial court had the authority to impose a new sentence, as well as postrelease control. Accordingly, when Griffin violated the terms of that postrelease control that was properly imposed, he most certainly could face sanctions, as well as escape charges.

{¶ 30} We find that a trial court can sentence a defendant anew, including a term of postrelease control, after his or her plea has been vacated in the direct appeal regardless of whether the defendant has served the original sentence. Thus, we find that *Bezak* is not applicable to the facts of this case.

{¶ 31} We further note the Ohio Supreme Court's recent holding in *Harrison* is not applicable here. Harrison and the state entered into a negotiated plea where Harrison pled guilty to six counts by way of information in exchange for his guilty pleas. Harrison was then sentenced to one year in prison. Over six months after Harrison had served his entire sentence, the state moved to resentence Harrison to impose postrelease control. The trial court granted the state's motion to resentence Harrison, but offered Harrison the opportunity to withdraw his plea, which Harrison did. The state then dismissed the original case against Harrison and presented a 23-count indictment to the grand jury based upon the same circumstances the original complaint was based on. The matter proceeded to a jury trial, where Harrison was found guilty of 18 counts. He was then sentenced to six years in prison and given one year of jail-time credit for time served.

{¶ 32} In *Harrison*, the Supreme Court noted that "[t]he journey this case has taken is lamentable." *Id.* at ¶34. The Court held that the trial court never had jurisdiction to resentence Harrison, let alone offer him the opportunity to withdraw his plea. It stated, "the second prosecution emanated from the trial court's improper assertion of jurisdiction, and that the plea agreement, guilty plea,

and completed sentence in the first prosecution ended the state's case against Harrison." Id.

{¶ 33} *Harrison* is distinguishable from the instant case, however, because as the Supreme Court explained: "[i]n a vacuum, the trial court could have accepted the withdrawal of Harrison's plea even after he had completed his sentence, had he shown the 'manifest injustice' required by Crim.R. 32.1." Id. at ¶37. But the Supreme Court further noted: "Crim.R. 32.1 applies in instances where defendants seek a plea withdrawal on their own volition. Here, the defendant was hauled into court and informed he would be resentenced unless he withdrew his plea. The trial judge presented Harrison with a Morton's Fork; whether Harrison chose the correct time upon which to be impaled is not the question. The question is whether the trial court had the authority to require Harrison to make a choice at all. Clearly, it did not." Id.

{¶ 34} Here, however, the trial court vacated Griffin's pleas pursuant to a mandate by this court. Griffin was not hauled into court as Harrison was; rather, Griffin sought to have his pleas vacated at his own volition.

{¶ 35} Accordingly, we conclude that the trial court erred when it dismissed the escape indictment against Griffin since he was properly subject to postrelease control when he violated it. The state's sole assignment of error is sustained.

{¶ 36} Judgment reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MARY J. BOYLE, JUDGE  
MELODY J. STEWART, P.J., and  
JAMES J. SWEENEY, J., CONCUR