

[Cite as *State v. Jackson*, 2009-Ohio-4995.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92365

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

BARRON JACKSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-380490

BEFORE: Stewart, J., Cooney, A.J., and Rocco, J.

RELEASED: September 24, 2009

JOURNALIZED:

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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).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Barron Jackson, appeals from a de novo resentencing to correct his judgment of conviction by imposing a term of postrelease control that should have been imposed at the original sentencing pursuant to R.C. 2929.19(B)(3)(c) and 2967.28(B). Jackson argues that he was denied the right to counsel because his attorney lacked an ability to prepare for resentencing and further, that the court erred in resentencing him one week before his prison term was completed.

{¶ 2} The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution guarantee the right to counsel at all critical stages of a criminal proceeding. Sentencing is a “critical stage” of a criminal proceeding. *Gardner v. Florida* (1977), 430 U.S. 349, 358. In *United States v. Cronin* (1984), 466 U.S. 648, the United States Supreme Court held that a defendant is entitled to a presumption of prejudice from the right to counsel where circumstances arising in a criminal prosecution “are so likely to prejudice the accused that the costs of litigating their effect in a particular case is unjustified.” *Id.* at 658. The court identified three situations in which a defendant is entitled to a presumption of prejudicial impact: (1) where the defendant is subject to a “complete denial of counsel,” including those situations where a defendant was denied the presence of counsel at a “critical stage”; (2) where defense counsel “entirely fails to subject

the prosecution's case to meaningful adversarial testing"; and (3) in situations where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." *Id.* at 659-660.

{¶ 3} Jackson claims that the court failed to give defense counsel adequate time to prepare for resentencing, and thus Jackson focuses on the third situation identified in *Cronic*: the likelihood that any lawyer could have provided effective assistance.

{¶ 4} The record shows that when the court convened for resentencing, the court asked defense counsel if he objected to the state's motion for resentencing. Defense counsel replied "no," but Jackson said, "[y]es. Yes we do, Your Honor." The court asked Jackson if he objected, and Jackson replied, "[y]eah. I really don't understand what's going on right now. I might need more counseling or something because I don't know what's going on right now."

{¶ 5} The court allowed defense counsel to take a "moment to explain where we are." After an off-the-record discussion, defense counsel told the court:

{¶ 6} "Your Honor. Mr. Jackson is objecting to being present here before you with regard to the resentencing in this case. Your Honor, he believes that what the prosecutor's office is asking you to do in this case is not

appropriate under the law. He has done what appears to be a fairly extensive amount of research into the case law surrounding how issues of this nature should be handled in court. He believes this is not an appropriate way for it to be handled. So for that reason, he wants it noted on the record that he objects before you today.”

{¶ 7} Defense counsel went on to note that Jackson objected to resentencing under *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, in which the syllabus states: “When 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.” Defense counsel told the court that Jackson had conducted an extensive amount of research and concluded that “this is not an appropriate way for it to be handled.” Defense counsel told the court that he tried to explain to Jackson that *Bezak* mandated a resentencing, but that Jackson “does not want to be cooperative to make this actual hearing take place.” It appeared that Jackson objected to being resentenced just days before the expiration of his prison term because he believed that he would be released from prison with no restrictions.

{¶ 8} Jackson told the court “it’s an inconvenience for me right now. *

* * I was willing to leave out the prison door after doing my time and willing

for PRC. Now they have brought me back. And I had did [sic] a lot of extensive research on this PRC stuff, and I feel it's unjust, unjust right now."

{¶ 9} "The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment." *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268. When the court fails to impose a mandatory term of postrelease control, the sentence is void and the court is required to resentence the offender "*as if there had been no sentence.*" *Bezak* at ¶13. (Emphasis sic.)

During a de novo resentencing, "* * * the trial court is free to impose the identical sentence that was originally imposed, or a greater or lesser sentence within its discretion * * *." *State v. Cook*, Cuyahoga App. No. 91487, 2008-Ohio-4246, ¶10; *State v. Gaston*, Portage App. Nos. 2006-P-0071 and 2006-P-0072, 2007-Ohio-6251, ¶23.

{¶ 10} A *Bezak* resentencing might, under certain circumstances, entail more than the reimposition of the earlier, void sentence. Given the court's discretion to impose any sentence within the statutory range, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶100, it is possible that an offender's conduct while in prison might constitute a substantial factor in how the court exercises its discretion to impose sentence. Although we have rejected the argument that the court *must* consider an offender's prison record in a de

novo resentencing, *State v. Smith*, Cuyahoga App. No. 91346, 2009-Ohio-1610, ¶27, we have held that the court may consider a defendant's uncharged yet undisputed conduct when determining an appropriate sentence. *State v. Edwards*, Cuyahoga App. No. 89181, 2007-Ohio-6068, ¶6. Certainly, prison behavior, whether exemplary or not, could be among the factors the court chooses to consider at resentencing. If an offender has made significant progress towards rehabilitation while serving a prison term, he might be a candidate for a shorter term within the applicable statutory range.

{¶ 11} When confronted with a request to delay resentencing due to an offender's request for additional time in which to investigate factors in mitigation of sentence, the court should exercise its discretion to delay the proceedings by balancing the need for the delay against the probability that those factors will actually result in mitigation of the original sentence. But this is not a case where the offender could plausibly maintain that additional time to prepare for resentencing might have resulted in a shorter sentence.

{¶ 12} Defense counsel told the court that resentencing was mandated under *Bezak* for the sole purpose of imposing a term of postrelease control. Defense counsel properly objected to the resentencing, voicing at length all of Jackson's concerns. But apart from objecting to the resentencing, there was little more counsel could do under the circumstances. Jackson had served all

but a few days of his originally-imposed term of imprisonment, so exploring any colorable issues of mitigation would not have resulted in a shorter term of incarceration. And with Jackson's release from prison imminent, counsel had no demonstrable need to obtain a presentence investigation report or prison history that might substantiate a claim of lenity. We therefore find that Jackson failed to show what purpose might have been served by the court granting a continuance so that he could confer with defense counsel.

{¶ 13} Finally, we reject Jackson's argument that he had an expectation of finality in his sentence. As Jackson concedes, the supreme court has held that when "the sentence imposed was unlawful and thus void, there can be no reasonable, legitimate expectation of finality in it." See *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶36. The assigned errors are overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MELODY J. STEWART, JUDGE _____

COLLEEN CONWAY COONEY, A.J., and
KENNETH A. ROCCO, J., CONCUR