

[Cite as *State v. Foster*, 2009-Ohio-6648.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93029

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

NATHANIEL FOSTER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-370295

BEFORE: Sweeney, J., Rocco, P.J., and Celebrezze, J.

RELEASED: December 17, 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).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Nathaniel Foster (“defendant”), appeals the trial court’s resentencing him to 38 years in prison and notifying him that a mandatory five years of postrelease control is part of his sentence. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} In 1999, defendant was convicted of various crimes and sentenced to 38 years in prison. However, the court failed to include postrelease control as part of his sentence. On February 25, 2009, the court held a hearing and resentedenced defendant to 38 years in prison, adding that defendant was subject to mandatory postrelease control for five years upon his release from prison.

{¶ 3} Defendant appeals and raises one assignment of error for our review.

{¶ 4} “I. Although the trial court properly resentedenced the appellant and added a mandatory term of postrelease control, it did not afford the appellant his right of allocution.”

{¶ 5} Crim.R. 32(A)(1) governs a defendant’s right to allocution and the Ohio Supreme Court explained this right in *State v. Campbell* (2000), 90 Ohio St.3d 320, 326:

{¶ 6} “We therefore hold that pursuant to Crim.R. 32(A)(1), before imposing sentence, a trial court must address the defendant personally and ask whether he or she wishes to make a statement in his or her own behalf or present

any information in mitigation of punishment * * *.” The Court further held that “[I]n a case in which the trial court has imposed sentence without first asking the defendant whether he or she wishes to exercise the right of allocution created by Crim.R. 32(A), resentencing is required unless the error is invited error or harmless error.” *Id.* See, also, *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, at ¶136-137 (holding that when a defendant in a capital case “exercised the right to speak on his own behalf during the mitigation phase” of his trial, “the court’s failure to specifically advise him of his right of allocution prior to sentencing was harmless error”).

{¶ 7} A review of the transcript in the instant case shows that before resentencing defendant, the court asked if defense counsel had anything to say for the record. Defense counsel stated that defendant would like to address the court. Defendant requested a continuance to discuss matters with his counsel. The court denied the continuance, stating that the resentencing hearing was for the limited purpose of notifying defendant that mandatory postrelease control was part of his sentence.

{¶ 8} The court then asked defendant, “On your own behalf, is there anything you would care to say to the Court?” Defendant did not say anything; however, defense counsel noted a continuing objection to the resentencing. After the court resentedenced him, defendant asked if he could address the court, to which the court replied, “I asked you that before, Mr. Foster. We are done.”

{¶ 9} Defendant was given two opportunities to speak before he was resentenced: First, when the court asked if defense counsel had anything to say; and second, when the court asked if defendant personally had anything to say. We find that these opportunities meet the threshold requirements of Crim.R. 32(A)(1). The United States Supreme Court has stated the following regarding a criminal defendant's right to allocution: "Trial judges before sentencing should, as a matter of good judicial administration, unambiguously address themselves to the defendant. Hereafter, trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing." *Green v. U.S.* (1961), 365 U.S. 301, 305.

{¶ 10} Furthermore, even if we assume for argument's sake that the court did not comply with Crim.R. 32(A)(1), we find any error to be harmless at best. In *State v. Budreaux* (Sept. 16, 1993), Cuyahoga App. No. 63698, this Court held that "[t]he purpose of allocution is to allow the defendant an additional opportunity to state any further information which the judge may take into consideration when determining the sentence to impose * * *," citing *Defiance v. Cannon* (1990), 70 Ohio App.3d 821, 828. See, also, *State v. Smith* (Nov. 8, 1995), Greene App. No. 94-CA-86 (concluding that "a trial court does not err when it limits a defendant's pre-sentence statement to those issues that bear upon the impending punishment and that may carry mitigative weight").

{¶ 11} The court in the instant case was mandated to properly notify defendant that postrelease control was a part of his sentence, and there was

nothing defendant could have said to change this. Therefore, we find that defendant was not prejudiced. See *State v. Barnes*, Portage App. No. 2006-P-0089, 2007-Ohio-3362 (holding that a defendant's right to allocution is not affected during a resentencing hearing to notify him that postrelease control is part of his original sentence) (reversed on other grounds). Accord *State v. Huber*, Cuyahoga App. No. 85082, 2005-Ohio-2625, at ¶8 (holding that "Crim.R. 32(A) does not apply to resentencing").

{¶ 12} Accordingly, there is no reversible error in the court's resentencing defendant to his original prison term and notifying him that mandatory postrelease control is part of that sentence. Defendant's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from 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 Court of Common Pleas to carry this judgment into execution. 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.

JAMES J. SWEENEY, JUDGE

KENNETH A. ROCCO, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR