[Cite as *State v. Dresser*, 2009-Ohio-2888.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92105

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

KENNETH DRESSER

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-384324

BEFORE: Blackmon, J., Rocco, P.J., and Dyke, J.

RELEASED: June 18, 2009
JOURNALIZED:

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PATRICIA ANN BLACKMON, J.:

{¶ 1} The State of Ohio appeals the trial court's decision to not impose postrelease control on appellee Kenneth Dresser. The State argues that this court in our remand order required the trial court to impose postrelease control at Dresser's resentencing hearing. The State assigns the following two errors for our review:

> "I. The trial court erred by not imposing postrelease control upon sentencing on counts 39 and 40 as it has a statutory duty to do so."
>
> "II. The trial court erred by not imposing postrelease control because this court ordered the trial court impose postrelease control in sentencing on counts 39 and 40."

{¶ 2} Having reviewed the record and pertinent law, we affirm Dresser's sentence. The apposite facts follow.

Procedural History

{¶ 3} In 2000, Dresser pled guilty to two counts of rape and two counts of pandering sexually-oriented material involving a minor. The trial court imposed an indefinite concurrent sentence of ten years to life on the rape charges and a concurrent sentence of five years on the pandering charges. The trial court further provided that the concurrent rape sentence was to run consecutive to the five-year concurrent sentence for pandering. The trial court failed to impose postrelease control on the pandering counts. Postrelease control was not

necessary for the rape counts because they are indefinite sentences that carry a life parole tail.[1]

{¶ 4} In May 2007, the Ohio Bureau of Sentence Computation notified the trial court that it failed to notify Dresser that the pandering counts required the imposition of postrelease control. The trial court ordered Dresser's return from the penal institution to notify him of postrelease control. In July 2007, the trial court held a hearing at which Dresser and his counsel were present. The trial court did not conduct a de novo sentencing hearing but instead merely advised Dresser that the court was adding five years of postrelease control to the pandering sentence. Dresser objected to the trial court's imposition of postrelease control.

{¶ 5} Dresser filed an appeal arguing the trial court improperly imposed postrelease control because although he was still in prison on the rape charges, he had already served the five-year sentence for the pandering charges; he also argued the trial court erred by failing to conduct a de novo hearing. This court concluded that because Dresser failed to file the original sentencing transcript there was no evidence as to which order the offenses were to be served; we concluded that in the absence of evidence to the contrary, the sentence for the rape charges was to be served first.[2] However, this court also concluded the trial court erred by failing to conduct a de novo hearing and remanded the matter for a new sentencing hearing.

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[1]*State v. Linen* (Dec. 15, 2000), Cuyahoga App. Nos. 74070 and 74071; R.C. 2967.28(F)(4).

[2]Cuyahoga App. No. 90305, 2008-Ohio-3541 (*Dresser* I).

{¶ 6} On remand, the trial court conducted a de novo hearing. It ordered the concurrent five-year sentence on the pandering charges be served prior to the indefinite rape sentence. The court concluded that because Dresser had completed serving the five-year sentence on the pandering charges, postrelease control could not be imposed.

Postrelease Control

{¶ 7} In its first assigned error, the State contends Dresser's sentence for the pandering charges does not contain the mandatory imposition of postrelease control as mandated by law. We agree that postrelease control is mandatory for the pandering charges, which are second degree felonies.[3] However, at the resentencing hearing, the trial court ordered the pandering charges to be served first; consequently, since Dresser had completed his sentence on those charges, therefore, the trial court could not retroactively impose postrelease control.

{¶ 8} As the Ohio Supreme Court in *State v. Simpkins*[4] held, "[i]n 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

[3]R.C. 2967.28(B).

[4]117 Ohio St.3d 420, 2008-Ohio-1197.

his sentence."[5] Once an offender has served the prison term ordered by the trial court, he or she cannot be subject to resentencing in order to correct the trial court's failure to impose postrelease control at the original hearing.[6] Here, Dresser had completed his sentence; consequently, the trial court could not impose postrelease control, after the fact, on the pandering charges.

{¶ 9} The State also argues, however, that the trial court can impose postrelease control because Dresser is still in prison on the rape charges. In support of its argument, the State cites to R.C. 2967.28(D)(1), which states in pertinent part:

> "*Before* the prisoner is *released from imprisonment*, the parole board shall impose upon a prisoner *** one or more postrelease control sanctions upon a prisoner." (Emphasis added).

{¶ 10} This section dictates when the parole board must advise the defendant of the length of his postrelease control, not when the court must notify the defendant that postrelease control is part of the sentence. The prisoner obviously must be informed prior to being released of the length of his or her postrelease control. However, unless a trial court includes notice of postrelease control in its sentence, the Adult Parole Authority is without authority to impose

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[5]Id. at syllabus.

[6]*State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250.

it.[7] Consequently, we conclude this section does not impact the holding set forth by the Ohio Supreme Court that for the sentence to be valid, the trial court must notify the defendant of postrelease control at the sentencing hearing and include postrelease control in the sentencing entry, prior to the completion of the sentence.[8]

{¶ 11} Although this is the first time this district has addressed this issue, other districts have also considered this issue and have concluded that it is the expiration of the prisoner's journalized sentence, rather than the offender's ultimate release from prison that is determinative of the trial court's authority to resentence.[9] Accordingly, the State's first assigned error is overruled.

Sentence Violates Remand Order

{¶ 12} In its second assigned error, the State contends the trial court violated the remand order in *Dresser* I by ordering the pandering charges be served first. As a result, the State argues because Dresser completed serving the five-year sentence for the pandering charges, the trial court circumvented our remand to impose postrelease control.

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[7] *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171.

[8] *State ex rel Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795; *State v. Bezak*, supra; *State v. Simpkins*, supra.

[9] *State v. Bristow*, 6th Dist. No. L-06-1230, 2007-Ohio-1864; *State v. Turner*, 10th Dist. No. 06AP-491, 2007-Ohio-2187; *State v. Ferrell*, 1st Dist. No. C-070799, 2008-

{¶ 13} In *Dresser* I, we concluded that because Dresser failed to file the original sentencing transcript, and because there was no evidence to the contrary, the five-year concurrent sentence for the pandering charges was to be served after the indefinite sentence for rape. Thus, our conclusion was based on the state of the record. We then remanded the matter for a de novo sentencing hearing in order for the court to impose mandatory postrelease control on the pandering charges. Upon remand, the trial court clarified that it entered the definite sentence for the pandering charges prior to the indefinite sentence for the rape charges. Because more than eight years had elapsed, the trial court concluded it could no longer impose postrelease control on Dresser's five-year sentence for pandering.

{¶ 14} We conclude the trial court did not violate our remand order by ordering the pandering charges to be served prior to the rape charges. Once we declared the sentence was void in *Dresser* I, it was as if the sentence was never entered. "'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.'"[10]

Ohio-5280.

[10]*Bezak*, supra at ¶12, 13, quoting *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268.

Thus, our conclusion in *Dresser* I regarding the order in which the charges were to be served was mere dicta, as the prior void sentence no longer exists.

{¶ 15} The State contends *Dresser* I constitutes the "law of the case." Under the law-of-the-case doctrine, the decision of a reviewing court in a case remains the law of the case on legal questions involved for all subsequent proceedings at both trial and reviewing levels.[11] The law-of-the-case doctrine is a rule of practice, rather than a binding rule of substantive law, and will not be applied so as to achieve an unjust result.[12]

{¶ 16} In *Dresser* I, our conclusion that the pandering charges should be served prior to the rape charges was not based upon a legal point of law, but was based upon the fact there was an insufficient record on appeal. Requiring the trial court to impose the sentence in the order directed in *Dresser* I would violate the principles of a de novo sentencing hearing because the sentence would be dependent on the previous sentence, which is now null and void. Thus, even if our directive mandated the imposition of the sentence in a certain order, we

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[11] *State, ex rel. Dannaher v. Crawford,* 78 Ohio St.3d 391, 394, 1997-Ohio-72.

[12] *Porter v. Litigation Mgmt., Inc.*, 146 Ohio App.3d 558, 2001-Ohio-4298; *State v. Tanner* (1993), 90 Ohio App.3d 761, 767.

conclude applying the law-of-the-case doctrine would be counter-intuitive to our remand for a "de novo" hearing.[13]

{¶ 17} Accordingly, we conclude the trial court did not violate our remand order by conducting a de novo hearing. The State's second assigned error is overruled.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., and
ANN DYKE, J., CONCUR

[13]But, see, *State v. Moore*, Cuyahoga App. No. 83703, 2004-Ohio-6303, affirmed by and remanded by *State v. Moore*, 113 Ohio St.3d 100, 2007-Ohio-861 in which this court held that the law of the case applied to cases in which the matter is remanded for resentencing for an incorrectly imposed specification, i.e. repeat violent offender specification, as the court can only resentence on the invalid specification and does not conduct a de novo resentencing. This case is different because the Ohio Supreme Court has held the failure to include postrelease control constitutes a "void" sentence requiring a de novo resentencing hearing. *State v. Simpkins*, supra; *State v. Bezak*, supra; *State ex. rel. Cruzado v. Zaleski*, supra.