[Cite as *State v. Bailey*, 2010-Ohio-1874.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93994

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHARLES K. BAILEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-424092

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

RELEASED: April 29, 2010

JOURNALIZED:

FOR APPELLANT

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Charles Bailey, appeals the trial court's denial of his pro se "Motion for Sentence." Appellant argues that the trial court failed to properly inform him of the length of a mandatory term of postrelease control. For the following reasons, we reject appellant's arguments.

{¶ 2} In 2002, appellant was arrested and indicted on over 200 counts. He was found guilty of 34, including convictions for engaging in a pattern of corrupt activity, forgery, uttering, intimidation, falsification, theft, and possession of criminal tools. On June 13, 2003, appellant was sentenced to an aggregate prison term of ten years for one first degree felony; dozens of third, fourth, and fifth degree felonies; and one misdemeanor. Appellant was informed that "[u]pon completion of his prison terms, the defendant shall be subject to post-release control by the Ohio Adult Parole Authority for a period determined by the Ohio Parole Board that shall not exceed five years, subject to the authority of the Adult Parole Authority to increase or reduce any restrictions that the Parole Board may impose." The trial court journalized appellant's sentence noting that "post release control is a part of this prison sentence for the maximum period allowed for the above felony(s) under R.C. 2967.28."

{¶ 3} Appellant has previously challenged the validity of his sentence. Specifically, on August 24, 2005, the trial court dismissed his postconviction

relief motion wherein, relying on *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, he claimed the trial court erred when it made findings of fact and conclusions of law necessarily impinging upon the provenance of the jury. Appellant appealed this determination, and this court dismissed the appeal in Cuyahoga App. No. 87034, finding that, pursuant to R.C. 2953.21(A)(2) and R.C. 2953.22(A)(1), the time for appellant to properly bring a motion for postconviction relief had passed.

{¶ 4} In 2005, appellant filed a motion captioned "Motion to Correct Sentence," again claiming the trial court engaged in improper fact-finding. This motion was denied by the trial court, and an appeal from that determination was not taken.

{¶ 5} Then in 2009, appellant submitted a pro se motion captioned "Motion for Sentence," wherein he argued the sentence imposed by the trial court was void because the trial court failed to properly inform him of the length of postrelease control. The lower court denied appellant's motion, and this appeal timely followed.

Law and Analysis

Res Judicata and Timeliness

{¶ 6} Initially we must address the state's argument that appellant's motion is barred as untimely. In its journal entry denying the present motion, after an explanation of its rationale for its decision, the trial court stated that appellant's motion was also barred by res judicata. The state argues this on appeal.

{¶ 7} Appellant claims his sentence is void. The Supreme Court of Ohio has held that "[a]lthough res judicata applies to a voidable sentence and may operate to prevent consideration of a collateral attack based on a claim that could have been raised on direct appeal from the voidable sentence, we have not applied res judicata to cases in which the sentence was void. " (Internal citations omitted.) *State v. Simpkins,* 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶30. Because appellant claims that his sentence is void, we must address those arguments.

{¶ 8} The Tenth District has recognized that "[a] void judgment has no legal force or effect, and any party whose rights are affected may challenge its invalidity at any time and any place." *State v. Hairston*, Franklin App. No. 07AP-160, 2007-Ohio-5928, ¶35-37, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶33. Also, appellant is not challenging the validity of his conviction, so this is not a postconviction relief motion constrained by the time requirements of R.C. 2953.21 as the state argues. See *State v. Holcomb*, Summit App. No. 24287, 2009-Ohio-3187, ¶19. Since appellant can challenge a void sentence at any time, we must determine whether his sentence is void before ruling on whether the motion is barred by res judicata.

Validity of Notice of Postrelease Control

{¶ 9} Appellant argues in his sole assignment of error that "[t]he trial court committed plain error when it denied [appellant's] motion for sentencing when the record irrefutably demonstrate[d] his sentence [was] void under Ohio law."

{¶ 10} Postrelease control is a "'period of supervision by the adult parol authority after a prisoner's release from imprisonment[.]'" *Woods v. Telb*, 89 Ohio St.3d 504, 509, 2000-Ohio-171, 733 N.E.2d 1103, quoting R.C. 2967.01(N). The trial court must inform a defendant at his sentencing hearing that postrelease control is a part of his sentence. Id. at 513.

{¶ 11} "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." *State v. Bezak,* 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, at the syllabus.

{¶ 12} In the present case, appellant was convicted of a first degree felony, necessitating a period of postrelease control of five years. R.C. 2967.28(B)(1). The trial court informed appellant that he "shall be subject to postrelease control by the Ohio Adult Parole Authority for a period determined by the Ohio Parole Board that shall not exceed five years, subject to the authority of the Adult Parole Authority to increase or reduce any restrictions that the Parole Board may impose." Appellant argues that because he was not informed that he would face a mandatory period of five years of postrelease control, his sentence is void.

{¶ 13} The notice requirement is set forth in R.C. 2929.19(B)(3)(c), which instructs a trial court to "[n]otify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the first degree[.]"

{¶ 14} Postrelease control was a mandatory part of appellant's sentence pursuant to R.C. 2929.14(F)(1), which states: "If a court imposes a prison term for a felony of the first degree, * * * it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division."

{¶ 15} The duration of this mandatory term is set by R.C. 2967.28(B), stating, "[e]ach sentence to a prison term for a felony of the first degree * * * shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. * * * Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of post-release control required by this division for an offender shall be of one of the following periods: (1) For a felony of the first degree or for a felony sex offense, five years[.]"

{¶ 16} R.C. 2967.28(D)(2) further specifies: "At any time after a prisoner is released from imprisonment and during the period of post-release control applicable to the releasee, the adult parole authority or * * * the court may review the releasee's behavior under the post-release control sanctions imposed upon the releasee under this section. * * * The authority also may recommend that the parole board or court increase or reduce the duration of the period of post-release control imposed by the court."

{¶ 17} The Fourth District has held that statements similar to the one made by the trial court in the present case are insufficient notice of a mandatory term of postrelease control. See *State v. Berry*, Scioto App. No. 04CA2961, 2006-Ohio-244, citing *Woods v. Telb*, supra. However, the case law in this jurisdiction does not stretch the holdings in *Woods* and others this far. All *Woods* mandates is that "a trial court must inform the offender at sentencing or at the time of a plea hearing that post-release control is part of the offender's sentence." Id. at 513.

{¶ 18} In *State v. Johnson*, Cuyahoga App. No. 83117, 2004-Ohio-4229, ¶58, this court was offered a similar argument to that in *Berry* and the present case and declined to adopt it "when R.C. 2929.19 has so clearly stated what the notice requirements are and has not specified length of post-release control as one of them." See, also, *State v. Hill*, 160 Ohio App.3d 324, 2005-Ohio-1501, 827 N.E.2d 351, ¶54, quoting *Johnson*, supra; *State v. Taylor*, Cuyahoga App. No. 82572, 2003-Ohio-6861 (upholding a sentence when the trial court specifically stated to defendant that "up to five years post-release control" was part of his sentence). But, see, *State v. Bingham*, Cuyahoga App. No. 88080, 2007-Ohio-1161, ¶11 (determining that these holdings do not apply to pleas of guilty or no contest because a trial court must comply with Crim.R. 11, including informing a defendant of the maximum penalty before accepting a plea).

{¶ 19} Appellant was informed that he was subject to a period of postrelease control after release from prison. He was further informed that this

period of control would be determined by the parole board and last up to five years. Given that R.C. 2967.28(D) gives the court and the parole authority the ability to reduce the mandatory term of postrelease control, this was not an improper statement of the law. Appellant was provided with sufficient notice that postrelease control was mandatory since the journal entry stated as much, and appellant was informed orally at sentencing that he "*shall* be subject to postrelease control." (Emphasis added.)

Conclusion

{¶ 20} Appellant's sentence is not void as he claims. He was properly notified of postrelease control. Therefore, appellant's motion styled "Motion for Sentence" was properly denied by the trial court. Appellant's sole assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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.

FRANK D. CELEBREZZE, JR., JUDGE

PATRICIA ANN BLACKMON, P.J., and
ANN DYKE, J., CONCUR