[Cite as *State v. Hairston*, 2010-Ohio-4014.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94112

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ALAFIA HAIRSTON

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTIONS AFFIRMED;
REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-477293

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

RELEASED AND JOURNALIZED: August 26, 2010

FOR APPELLANT

Alafia Hairston (pro se)
Inmate No. 542-087
Richland Correctional Institution
P.O. Box 8107
Mansfield, Ohio 44901

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: T. Allan Regas
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Alafia Hairston, appeals the denial of his pro se motion for resentencing, arguing that his sentence failed to include proper notification of postrelease control. He also asks this court to take notice that his convictions were allied offenses of similar import and should have merged. After a review of the record and based on the following law, we affirm appellant's convictions but remand this case to the trial court so that it may properly inform appellant of postrelease control pursuant to R.C. 2929.191(C).

{¶ 2} Appellant was convicted of felonious assault on August 7, 2006. The facts of this case have previously been recited by this court in *State v. Hairston*, Cuyahoga App. No. 88738, 2007-Ohio-3650, ¶2-7. Appellant was sentenced on September 11, 2006, at which time the trial court notified him that three years of postrelease control was a part of his sentence, but the journal entry failed to specify any term of incarceration that could be imposed should appellant violate the terms of postrelease control. Appellant was granted an appellate bond pending the decision of this court in the above case. On August 2, 2007, this court affirmed appellant's conviction and he began serving his sentence.

{¶ 3} Appellant was not properly informed of postrelease control at his various sentencing hearings. At the September 11, 2006 sentencing hearing, the trial judge neglected to mention postrelease control at all; at the December 17, 2007 hearing, where appellant's sentence was imposed following his unsuccessful appeal, the trial court indicated that postrelease control "may" be a part of his sentence.

Law and Analysis

Postrelease Control

{¶ 4} After appellant's second motion for resentencing was denied, he filed the present appeal arguing that "the trial court committed reversible

error when it denied [appellant's] motion for sentencing when the record clearly failed to properly inform him of post-release control."

{¶ 5} 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. According to R.C. 2967.28, appellant's sentence was required to include a mandatory period of three years of postrelease control. The General Assembly provided courts with a mechanism to correct errors regarding the imposition of postrelease control. R.C. 2929.191 allows a trial court to forgo the traditional remedy of a de novo sentencing hearing by correcting the journal entry and informing defendant that postrelease control is a part of his sentence. See *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958.

Allied Offenses

{¶ 6} In a supplemental brief, appellant asks this court to take judicial notice of his convictions for felonious assault and that they resulted from conduct involving a single victim and were committed with a single animus, making them allied offenses, which should have merged at sentencing. Appellant relies on Crim.R. 52(B), plain error.

{¶ 7} Ohio's allied offenses statute provides that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." R.C. 2941.25(A). It is well established that a two-step analysis is required to determine if two offenses are allied offenses of similar import. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶14. "'In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.' (Emphasis sic.)" Id. at ¶14, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

{¶ 8} Appellant has failed to properly brief this issue and has failed to provide this court with a trial transcript. This precludes analyzing his conduct as the trial court had the opportunity to do in finding that appellant's convictions for felonious assault under R.C. 2903.11(A)(1) [1] and R.C.

[1]"Cause serious physical harm to another or to another's unborn[.]"

2903.11(A)(2)[2] were not allied offenses.[3] Without a trial transcript, "this record is inadequate to permit a review of the claimed error because we are unable to review [appellant's] conduct to determine whether [appellant's] offenses * * * were committed separately or with a separate animus as to each. R.C. 2941.25(B)[.]" *State v. Barber*, Montgomery App. No. 22929, 2010-Ohio-831, ¶29. "Under those circumstances, we must presume the regularity and validity of the trial court's proceedings and affirm its judgment." Id. citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 400 N.E.2d 384; *Crosby v. Butcher* (Sept. 28, 1995), Cuyahoga App. No. 68808.

{¶ 9} Because appellant has precluded meaningful review, we need not address whether this issue could have been raised in his prior appeal, and thus would be barred by res judicata, as some Ohio district courts have held. See *State v. Dillard*, Jefferson App. No. 08 JE 35, 2010-Ohio-1407, ¶20.[4]

---

[2]"Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

[3]The trial court did merge the firearm specifications, so the issue of merger was considered on the record.

[4]As the Seventh District noted, "[t]here is not a complete consensus among the Ohio Districts as to whether the issue of merger can be raised for the first time on a resentencing appeal. The majority of Ohio's Appellate Districts believe that the issue of merger must be raised in an appellant's first direct appeal, or else it is barred by res judicata." An appeal in *State v. Fischer*, 123 Ohio St.3d 1410, 2009-Ohio-5031, 914 N.E.2d 206, is currently pending where one proposition of law accepted for review is "[a] direct appeal from a void sentence is a legal nullity; therefore, a criminal defendant's appeal following a * * * resentencing is the first

Conclusion

{¶ 10} Based on R.C. 2929.191 and the holding in *Singleton*, this case should be remanded to the trial court for the limited purpose of the proper imposition of postrelease control.

{¶ 11} This cause is remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said 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.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., CONCURS;
ANN DYKE, J., CONCURS IN JUDGMENT ONLY.

---

direct appeal as of right from a valid sentence."