

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94732

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GREGORY SMITH (n.k.a.) DEDONNO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-362460

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

RELEASED AND JOURNALIZED: December 23, 2010

APPELLANT

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ATTORNEYS FOR APPELLEE

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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Gregory Smith, n.k.a. Gregory DeDonno (“Smith”) appeals pro se the sentence imposed by the trial court at a resentencing hearing. He assigns the following four errors for our review:

“I. The trial court committed reversible error when it held a partial sentencing hearing under R.C. 2929.191, when Gregory Smith’s original sentence of October 13, 1998 continued to be void, in contravention to *State v. Singleton*, 2009-Ohio-6434, and in violation of appellant’s Sixth and Fourteenth Amendment rights under the U.S. Constitution.”

“II. The trial court was without authority to resentence Gregory Smith to post-release control on Count 1, where at the time of this resentencing that sentence had expired almost two years prior to the hearing. *State v. Dresser*, 2009-Ohio-2888.”

“III. The twelve-year delay between the time of appellant’s plea to the time the trial court attempted to pronounce final judgment, divested the trial court of jurisdiction to impose judgment. *State v. Mack*, 2009-Ohio-6460, and *Artiaga v. Money*, N.D. Ohio No. 3:04CV7121.”

“IV. Gregory Smith’s indictment for kidnapping is facially void, warranting automatic vacation of his conviction. R.C. 2905.01(B), *State v. Carter*, 2009-Ohio-226, *Bousley v. United States*, 523 U.S. 614, 620-621.”

{¶ 2} Having reviewed the record and relevant law, we affirm the trial court’s judgment. The apposite facts follow.

Facts

{¶ 3} On September 22, 1998, Smith pled guilty to amended counts of rape of a child under 13 years of age and one count of kidnapping a child for purposes of engaging in sexual conduct. The trial court sentenced him to ten years for the rape and nine years for the kidnapping, to be served consecutively for a total of 19 years. Thereafter, Smith filed numerous motions to modify his sentence, for early judicial release, and to withdraw his

guilty plea. This court affirmed the trial court's denial of Smith's motions in *State v. Smith* (Mar. 9, 2000), Cuyahoga App. No. 75512, and *State v. Smith*, Cuyahoga App. No. 82062, 2003-Ohio-3675.

{¶ 4} On January 25, 2008, Smith filed another motion to withdraw his guilty plea, which the court denied. He also filed a motion to vacate his sentence based on the trial court's failure to advise him that his sentence included a mandatory five years of postrelease control. On February 27, 2008, the trial court granted Smith's motion to vacate and conducted a hearing on April 1, 2008, at which the court advised Smith of the mandatory five years of postrelease control and entered a judgment including postrelease control. Smith filed a direct appeal of his resentencing and denial of his motion to withdraw his plea. This court affirmed the trial court's decision in *State v. Smith*, Cuyahoga App. No. 91346, 2009-Ohio-1610.

{¶ 5} On January 14, 2010, Smith filed another motion for resentencing in which he argued that, based on the Supreme Court's opinion in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, his sentence was void because the sentencing entry did not provide notice of the consequences for violating postrelease control. The trial court granted Smith's motion and conducted a sentencing hearing on February 10, 2010, at which it advised Smith regarding the possible penalty for violating his postrelease control. The court then issued a nunc pro tunc sentencing entry

in which it advised Smith of the consequences for violating his postrelease control.

{¶ 6} Prior to the court conducting the hearing, Smith filed a motion to dismiss his convictions based on undue delay in imposing a valid sentence and the fact that he had served his time on one of the counts. He also claimed the indictment for the kidnapping count was facially deficient, requiring the court to dismiss that count. The trial court subsequently denied the motion.

Sentencing Hearing Erroneous

{¶ 7} We will address Smith's first and second assigned errors together as they both concern the resentencing hearing conducted in February 2010.

{¶ 8} Smith contends the trial court should have conducted a de novo sentencing hearing. The state argues that the court is only required to conduct a hearing if the trial court failed to advise the defendant at the hearing of the consequences of violating postrelease control. The Ohio Supreme Court in *State v. Singleton* stated that R.C. 2929.191 requires the journal entry to contain both the order of postrelease control and notice regarding the consequences should the defendant violate the postrelease control. R.C. 2929.191 also explicitly requires a hearing be conducted prior to correcting the journal entry to include the notice regarding the

consequences should the defendant violate postrelease control. Thus, a hearing was required.

{¶ 9} However, we do not agree with Smith that a de novo sentencing hearing was required. Whether a de novo sentence is required is determined by the date the sentence occurred. In *State v. Singleton*, the Supreme Court addressed R.C. 2929.191, the statutory remedy to correct the trial court's failure to properly impose postrelease control, and held, in relevant part, as follows:

“For criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191.”

Id. at paragraph two of the syllabus.

{¶ 10} The *Singleton* Court in the opinion stated:

“Effective July 11, 2006, R.C. 2929.191 establishes a procedure to remedy a sentence that fails to properly impose a term of postrelease control. It applies to offenders who have not yet been released from prison and who fall into at least one of three categories: those who did not receive notice at the sentencing hearing that they would be subject to postrelease control, *those who did not receive notice that the parole board could impose a prison term for a violation of postrelease control, or those who did not have both of these statutorily mandated notices incorporated into their sentencing entries.* (Emphasis added.) R.C. 2929.191(A) and (B). For those offenders, R.C. 2929.191 provides that trial courts may, after

conducting a hearing with notice to the offender, the prosecuting attorney, and the Department of Rehabilitation and Correction, correct an original judgment of conviction by placing on the journal of the court a nunc pro tunc entry that includes a statement that the offender will be supervised under R.C. 2967.28 after the offender leaves prison and that the parole board may impose a prison term of up to one-half of the stated prison term originally imposed if the offender violates postrelease control.”

Id. at ¶23.

{¶ 11} The Court further held that the R.C. 2929.191 hearing pertains only to the “flawed imposition of postrelease control” and that the legislature intended to “leave undisturbed the sanctions imposed upon the offender that are unaffected by the court’s failure to properly impose postrelease control at the original sentencing.” Id. Because the subject of the recent hearing was Smith’s claim that the trial court’s journal entry from April 1, 2008, failed to set forth the consequences for violating postrelease control, a hearing pursuant to R.C. 2929.191 was the appropriate remedy, not a de novo hearing. See *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, at ¶69, 73 (Court found resentencing date was the date used to determine whether R.C. 2929.191 hearing).

{¶ 12} Smith argues that at the time of the resentencing hearing in February 2010, he had already served his time for rape; therefore, the court could not impose postrelease control as to that count and relies on this court’s decision in *State v. Dresser*, Cuyahoga App. No. 92105, 2009-Ohio-2888.

However, *Dresser* is distinguishable because *Dresser* concerned the trial court's failure to include postrelease control at all. Here, the court did impose postrelease control at the February 2008 hearing, it merely failed to include in its journal entry the consequences for violating postrelease control.

At that time, Smith's rape sentence had not expired. Although we agree that R.C. 2929.191 requires the imposition of postrelease control and notice of the violation thereof, no court has held the failure to state in the journal entry the consequences of violating postrelease control results in a void sentence. This court in *State v. Holloway*, Cuyahoga App. No. 93809, 2010-Ohio-3315, addressed the situation in which the journal entry did not contain the notification of the consequences for violating postrelease control. We held:

“Even though we affirm the trial court’s judgment, we must nevertheless remand pursuant to R.C. 2929.191 for the court to conduct a limited hearing and issue a correction of the judgments of convictions in these cases before the appellant is released from prison. The hearing and corrected journal entry are necessary to correct omissions in the journal in imposing postrelease control. Though we are reluctant to remand the cases again, we do so in an abundance of caution because, although the

omissions *do not void* the sentences, they must be correct before the appellant is released from prison.”

Id. at ¶3.

{¶ 13} See, also, *State v. James*, Cuyahoga App. No. 94400, 2010-Ohio-5361, where, relying on *Holloway*, we remanded the matter to the trial court to correct the journal entry pursuant to R.C. 2929.191 for failing to include notice of the consequences for violating postrelease control in the journal entry.

{¶ 14} We have only held that the failure to advise the defendant at the sentencing hearing of the consequences of violating postrelease control results in a void judgment. *State v. Samilton*, Cuyahoga App. No. 92823, 2010-Ohio-439; *State v. McKissic*, Cuyahoga App. Nos. 92332 and 92333, 2010-Ohio-62; *State v. Hairston*, Cuyahoga App. No. 94112, 2010-Ohio-4014; *State v. White*, Cuyahoga App. No. 92056, 2009-Ohio-4371; *State v. Cook*, Cuyahoga App. No. 90487, 2008-Ohio-4246. Here, the record does not include a transcript of the April 2008 sentencing hearing. Therefore, we are unable to determine whether the trial court informed Smith at the initial resentencing hearing that if he violated the conditions of his postrelease control a term of incarceration could be imposed. Nor does Smith contend the trial court failed to so advise him at the hearing.

{¶ 15} Also, contra to Smith's argument, the trial court did have jurisdiction to proceed even though Smith filed a writ of prohibition with the appellate court. No stay was requested or ordered pending the court's decision on the writ. See *Thomas v. McGinty*, Cuyahoga App. No. 87051, 2005-Ohio-6481 (Appellate court determined writ of prohibition was moot once the trial court resentenced the defendant while the writ was pending). Accordingly, Smith's first and second assigned errors are overruled.

Twelve-Year Delay

{¶ 16} In his third assigned error, Smith argues that the 12-year delay between the time the court originally sentenced him and when the court entered a valid sentence deprived the trial court of jurisdiction.

{¶ 17} Based on our above discussion, the sentence became valid when the court resentenced Smith in 2008. We conclude this delay did not deprive the trial court of jurisdiction because a trial court has the authority to correct a void sentence while the offender remains in prison. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568. Accordingly, Smith's third assigned error is overruled.

Kidnapping Indictment Invalid

{¶ 18} In his fourth assigned error, Smith contends that because his indictment for kidnapping did not include the mens rea, "knowingly," it was structurally defective; therefore, he could not be convicted of this count.

{¶ 19} In *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d. 26, paragraph one of the syllabus states: “An indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state. (*State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162, reaffirmed; *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, overruled; *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, overruled in part.)”

{¶ 20} Smith pled guilty to the third count of kidnapping, not the second count as Smith contends. Because the indictment charging the third count of kidnapping tracked the language in the statute, it was not defective. *Id.* Accordingly Smith’s fourth assigned error is 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 be sent to said court 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.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, J., CONCUR