

[Cite as *State v. Adams*, 2011-Ohio-1070.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 95042 and 95105

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EDWARD ADAMS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART;
REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-439069 and CR-437071

BEFORE: S. Gallagher, J., Celebrezze, P.J., and Jones, J.

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SEAN C. GALLAGHER, J.:

{¶ 1} Appellant Edward Adams brings this appeal challenging his sentence by the Cuyahoga County Court of Common Pleas. For the reasons set forth herein, we affirm in part, reverse in part, and remand the case to the trial court.

{¶ 2} On July 31, 2003, in Cuyahoga County Court of Common Pleas Case No. CR-437071, Adams pleaded guilty to one count of attempted unlawful sexual conduct

with a minor (F-5). On that same date, in Cuyahoga County Court of Common Pleas Case No. CR-439069, Adams pleaded guilty to two counts of aggravated robbery (F-1), both with three-year firearm specifications; one count of intimidation (F-3); and one count of possession of criminal tools (F-5).

{¶ 3} On August 19, 2003, in Case No. CR-437071, Adams was sentenced to 11 months. On that same date, in Case No. CR-439069, Adams was sentenced to three years on the firearm specification to be served prior to and consecutive to four years on each aggravated robbery count; three years for intimidation; and 11 months for possession of criminal tools. The court ordered all underlying prison terms in both cases to run concurrent, for a total of seven years. In Case No. CR-437071, the court ordered a mandatory period of five years of postrelease control as part of Adams's sentence. In Case No. CR-439069, the court stated only that "postrelease control is a part of this prison sentence for the maximum period allowed for the above felony(s) under R.C. 2967.28."

{¶ 4} On March 24, 2010, the trial court held a de novo sentencing to correct its improper imposition of postrelease control. By this date, Adams had served his entire sentence in Case No. CR-437071, and he had served his sentence for intimidation and possession of criminal tools in Case No. CR-439069. The trial court imposed identical terms of imprisonment in both cases, with credit for time served. The court ordered mandatory five years of postrelease control on Case No. CR-439069, and then ordered an

“optional” three years of postrelease control on Case No. CR-437071, which it noted would be part of the longer five-year mandatory period in Case No. CR-439069.

{¶ 5} Adams filed this appeal, citing four assignments of error for our review. Due to their relatedness, we address his first two assigned errors together.

{¶ 6} Adams’s first assignment of error provides as follows: “In CR 439069, Counts 1 and 2 are allied and the defendant cannot be convicted of both.” Adams’s second assignment of error provides the following: “In CR 439069, there can only be one firearm specification imposed for Counts 1 and 2.”

{¶ 7} We note at the outset that Adams’s claims are barred by the Ohio Supreme Court’s recent decision in *State v. Fischer*, ___ Ohio St.3d ___, 2010-Ohio-6238, ___ N.E.2d ___, at ¶ 40, which held “that although the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence. The scope of an appeal from a resentencing hearing in which a mandatory term of postrelease control is imposed is limited to issues arising at the resentencing hearing.”¹

¹ The head notes in *Fischer* are somewhat confusing because they suggest that res judicata both applies and does not apply to an appeal from an unlawful sentence. A careful analysis of the Supreme Court’s holding demonstrates that res judicata applies only to the non-postrelease control portions of a sentence.

{¶ 8} Adams did not previously file a direct appeal on the issues he raises in these two assignments of error, and therefore he is barred from raising them now. Adams's first and second assignments of error are overruled.

{¶ 9} Adams's remaining assignments of error relate to the imposition of postrelease control, and therefore we address them together. Adams's third assignment of error provides as follows: "In CR 439069, all sentences must be vacated because the trial court has failed to specify which counts carry post-release control." His fourth assignment of error provides as follows: "The trial court improperly imposed a three-year term of post-release control in CR 437071."

{¶ 10} Adams argues that at his resentencing, the trial court's imposition of postrelease control was improper because it did not indicate which offense it attached to. In its brief, the state argued that the imposition of five years of postrelease control attaches to Adams's convictions for aggravated robbery, since he was still serving his sentence for those crimes; however, at oral argument, the state conceded that the trial court failed to impose postrelease control for each count of aggravated robbery. The state also argues that the original sentencing in Case No. CR-437071 should stand because the trial court properly imposed five years of postrelease control when Adams was originally sentenced in 2003.

{¶ 11} The parties do not dispute that Adams was entitled to limited resentencing for the trial court's failure to properly impose postrelease control in Case No. CR-439069 when he was sentenced the first time. See *Fischer* at ¶ 10. Since Adams was originally

sentenced in 2003 and the trial court failed to properly impose postrelease control in Case No. CR-439069, the trial court was required to hold a de novo sentencing hearing, under the law in place at the time, which it did in March 2010. The first issue we must resolve is which prison terms had Adams completed on the date he was resentenced, and thus, which offenses did the trial court have authority to resentence him for.

{¶ 12} “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 sentencing hearing.” *State v. Marsh*, Cuyahoga App. No. 89281, 2007-Ohio-6491, ¶ 9, citing *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, at ¶ 18.

{¶ 13} As of March 24, 2010, Adams had served six years and nine-and-a-half months of his prison term.² The only sentence he received that exceeded six years was the four years he received on two counts of aggravated robbery with three-year firearm specifications; he had completely served the prison terms ordered by the court for his remaining convictions. Therefore, at the time Adams was resentenced, the trial court only had the authority to resentence him on the aggravated robbery convictions.

{¶ 14} The trial court imposed only one sentence of postrelease control, despite the fact that Adams was serving out his sentence on both counts of aggravated robbery. The trial court’s failure to specify which count of aggravated robbery it was imposing postrelease control on is fatal to its imposition. “The court must impose postrelease

² The record indicates Adams’s release date from prison was June 10, 2010.

control on each sentence. R.C. 2967.28(B).” *State v. Holloway*, Cuyahoga App. No. 93809, 2010-Ohio-3315, ¶ 10. Therefore, we find postrelease control was not properly imposed.³

{¶ 15} Adams’s third assignment of error is sustained.

{¶ 16} In his fourth assignment of error, the parties agree that the trial court’s improper imposition of postrelease control in Case No. CR-437071 in 2010 cannot be corrected here because Adams already served his sentence in that case. However, the state argues that because the trial court lacked authority to resentence, Adams’s 2003 sentence, which included properly imposed postrelease control, is still in effect. We find the state’s argument persuasive.

{¶ 17} Adams had completed his prison term in Case No. CR-437071 prior to his resentencing in 2010. Accordingly, the trial court lacked authority to resentence him for unlawful sexual conduct with a minor. His original sentence, imposed in 2003 and which included properly imposed postrelease control for five years, is still in effect.

{¶ 18} Adams’s fourth assignment of error is overruled.

Judgment affirmed in part and reversed in part, and case remanded.

It is ordered that appellant and appellee share costs herein taxed.

The court finds there were reasonable grounds for this appeal.

³ Since there is no evidence before us that suggests Adams was not released from prison in June 2010, the trial court does not presently have jurisdiction to resentence him.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

SEAN C. GALLAGHER, JUDGE

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