

[Cite as *State v. Steimle*, 2011-Ohio-1071.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95076

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHRIST STEIMLE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-376138

BEFORE: Blackmon, P.J., Boyle, J., and Cooney, J.

RELEASED AND JOURNALIZED: March 10, 2011

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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Christ Steimle appeals his resentencing and assigns the following errors for our review:

“I. Defendant was denied due process of law when the court conducted a resentencing hearing by video without an express waiver of consent.”

“II. Defendant was denied due process of law when the court imposed post-release control where the issue of post-release control was waived by the prosecution.”

“III. Defendant was denied due process of law when he was resentenced over 11 years after his original sentence.”

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

{¶ 3} On August 5, 1999, Steimle pleaded guilty to felonious assault and intimidation; the charges resulted from an assault on his wife and subsequent threats that she not testify against him. The trial court sentenced Steimle to a maximum term of eight years imprisonment for the felonious assault conviction, and five years for the intimidation conviction, which he was to serve consecutively.

{¶ 4} On Steimle’s direct appeal, we affirmed his convictions, but vacated the sentences and remanded for resentencing because the trial court failed to state the findings then required by R.C. 2929.14(E)(4) before imposing a consecutive sentence. *State v. Steimle* (Dec. 7, 2000), Cuyahoga App. Nos. 77005, 77006, 77302 and 77303 (“*Steimle I*”). On remand, the trial court resentenced Steimle to the same prison term and stated the findings supporting the consecutive sentence.

{¶ 5} Again, Steimle appealed alleging the trial court erred in resentencing him and in denying his oral motion to withdraw his guilty pleas.

We found that Steimle was denied effective assistance of counsel at his second resentencing hearing and that the trial court failed to conduct a new sentencing hearing. *State v. Steimle*, Cuyahoga App. Nos. 79154 and 79155,

2002-Ohio-2238 (“*Steimle II*”). Consequently, Steimle’s sentence was again vacated, and the case was remanded for a third sentencing hearing.

{¶ 6} On remand, the trial court sentenced Steimle to a term of seven years for felonious assault and four years for intimidation, for a total of 11 years. At the resentencing hearing, Steimle renewed his motion to withdraw his guilty plea. The trial court declined to revisit Steimle’s motion.

{¶ 7} Steimle appealed, but we affirmed the decision of the trial court that refused to consider his motion to withdraw his guilty plea. We held that the trial court lacked jurisdiction at Steimle’s resentencing hearing to address his motion to withdraw his guilty plea; we held the motion was filed after we had affirmed Steimle’s conviction and during the remand for sentencing only.

State v. Steimle, Cuyahoga App. Nos. 82183 and 82184, 2003-Ohio-4816 (“*Steimle III*”). Steimle appealed to the Ohio Supreme Court, which declined jurisdiction. *State v. Steimle*, 101 Ohio St.3d 1424, 2004-Ohio-123, 802 N.E.2d 155.

{¶ 8} Thereafter, Steimle filed an application to reopen our judgment on his direct appeal, which we denied. *State v. Steimle*, Cuyahoga App. Nos. 77005, 77006, 77302, and 77303, 2005-Ohio-3478. Steimle filed a motion for summary judgment, which the trial court denied. Steimle appealed the trial court’s denial of his motion for summary judgment and also challenged

his guilty plea. We dismissed the appeal on the grounds that Steimle’s arguments were barred by the doctrine of res judicata. *State v. Steimle*, Cuyahoga App. No. 85162, 2005-Ohio-4412 (“*Steimle IV*”).

{¶ 9} On March 3, 2010, the trial court sua sponte convened a resentencing hearing to impose postrelease control. Steimle appeared at the hearing by video conference from prison and objected to being represented by the court appointed attorney. The trial court explained postrelease control and adjourned the hearing.

{¶ 10} On April 1, 2010, the trial court convened a second hearing. Steimle again appeared at the hearing by video conference, but requested a continuance to hire an attorney of his choice. The trial court granted the continuance and adjourned the hearing.

{¶ 11} On April 13, 2010, the trial court convened a third hearing, and Steimle appeared by video conference with his retained counsel present in the courtroom. Steimle did not object to appearing by video, but objected to the purpose and to the timing of the hearing. Over his objections, the trial court resentenced Steimle and notified him that at the expiration of his prison term he would be placed on postrelease control for a period of three years.

Video Conference Sentencing Hearing

{¶ 12} In his first assigned error, Steimle argues the trial court erred when it conducted a resentencing hearing by video without his express waiver. Steimle only objects to the video conference; he does not claim that the court improperly imposed the postrelease control. In essence, he claims under Crim.R. 43 he has a right to physically appear at all critical proceedings unless expressly waived.

{¶ 13} The facts of this case are important to the resolution of this matter. Steimle was sentenced in 1999 to 13 years in prison; ultimately, in 2003, he was resentenced to 11 years in prison; thus, reducing the 13 years to 11 years. As Steimle was nearing the end of his sentence, the trial court was advised that postrelease control was never imposed. The trial court conducted three video conferences with Steimle. The first video conference was set sua sponte by the trial court; thereafter, the matter was continued. Nineteen days prior to Steimle completing his sentence, the trial court conducted the second video conference and the following colloquy took place:

“The Defendant: I’d like you to give me a continuance to hire Paul Mancino, my appellate lawyer. That was my court appointed counsel during my appeals. I’d like for him to set up some kind of telephone conference where I can talk to him on the phone about what — you know, about this whole thing. I don’t want to come back to county jail, that’s one thing I don’t want to do, * * *.

“The Court: * * * There’s no way for — I wasn’t intending to order you back to county jail to do this. That’s why I’m setting these up as teleconferences. I’m doing like four or five of these today, and then I’m done with them I think. I don’t mean to confuse you in any way or do anything you don’t understand which is why I have counsel for you here. I didn’t realize you had a preference. Last time you didn’t want to be represented at all or you definitely didn’t want Stu Lippe as your counsel and I understand that. I didn’t realize you had such a falling out. At the same time, I need to get this done because your out date is when?

“The Defendant: April 20th.

“The Court: Well, you know, it’s really up to you. I mean, that gives me a little bit of time, 19 days to do this. * * *” Tr. 8-9.

{¶ 14} On April 13, 2010, the third and final video conference was conducted. Steimle’s lawyer, who is also Steimle’s attorney in this appeal, was physically present at the hearing while Steimle appeared by video. Neither the attorney nor Steimle objected to the video conference or invoked Steimle’s right to personally appear for resentencing. In fact, as the above colloquy shows, Steimle made it clear at the second video conference hearing that he did not want to return to the county jail because he was due to be released from prison in 19 days.

{¶ 15} It is unclear whether the trial court in resentencing Steimle via video was proceeding under Crim.R. 43(A)(2),(3) or R.C. 2929.191; both of which allow sentencing via video under certain conditions. If the trial court was proceeding under Crim.R. 43(A)(2), or (3), it failed to obtain on the record an express waiver from Steimle.

{¶ 16} Since the Ohio Supreme Court decided *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, the conclusion has been that R.C. 2929.191 only applies to resentencing after July 11, 2006. In *State v. Reed*, 10th Dist. No. 09AP-1164, 2010-Ohio-5819, facts similar to this case, that court recognized that a defendant sentenced prior to July 11, 2006 was not subject to the video conference rule of R.C. 2929.191; accordingly, it held that under the circumstances, Crim.R. 43 applies. Thus, Steimle was entitled to physically appear at his resentencing unless he had expressly waived under Crim.R. 43(A)(3) in writing or on the record. Of course, we reach this conclusion with a degree of caution in view of *State v. Fischer*, Slip Opinion No. 2010-Ohio-6238. In *Fischer*, the Supreme Court held that when postrelease control resentencing is required, the original sentence is partially void; thus, the appellate court may correct and modify the sentence and impose postrelease control under R.C. 2953.08(G)(2). *Fischer* has made it unnecessary for a defendant to physically appear for postrelease control resentencing. See *State v. Christinger*, Cuyahoga App. No. 94632,

2011-Ohio-458. In *Christinger*, we followed *State v. Fischer* and imposed postrelease control. We returned that case to the trial court for a journal entry consistent with our opinion. We are, however, mindful that *State v. Conway*, 2d Dist. No. 2010-CA-50, 2011-Ohio-24, has held that in spite of *Fischer*, a hearing is still necessary because R.C. 2929.191(C) expressly requires a hearing.

{¶ 17} Regardless of *Fischer's* implication, we follow *State v. Reed* and resolve this assigned error under the harmless error doctrine. Steimle's failure to object to the video conference constitutes a waiver unless he prevails under plain error. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804; *State v. Warren*, 10th Dist. No. 10AP-376, 2010-Ohio-5718. Plain error does not exist unless it can be said that, but for the error, the outcome of the trial clearly would have been otherwise. *Long* at 95. In *Reed*, that court held, and we agree, that although the right to be present at all critical stages of a criminal trial is a fundamental right, a violation of Crim.R. 43 is not structural error and can constitute harmless error where the defendant suffers no prejudice.

{¶ 18} In this case, the trial court afforded every opportunity for Steimle to be represented and appear by video conference for the correction of his sentence. Steimle explained to the court that he did not want to return to county jail and neither he nor his attorney objected to appearing via video.

Steimle is not claiming that he was denied the safeguards necessary to receive notice and imposition of postrelease control. He has not alleged that he was prejudiced by the video proceeding.

{¶ 19} Therefore, Steimle has not shown plain error, which is his burden to demonstrate; consequently, any error in failing to obtain an express waiver under Crim.R. 43(A)(3), was harmless. We reiterate that this case may very well be controlled by *State v. Fischer* and physical appearance may be a nullity under the partially void doctrine of postrelease control. Accordingly, we overrule Steimle's first assigned error.

Sentencing Hearing Erroneous

{¶ 20} We will address Steimle's second and third assigned errors together as they both concern the resentencing hearing conducted in April 2010. Steimle argues the trial court could not resentence him to include postrelease control because the state had not previously appealed his sentence. Steimle's contention is without merit.

{¶ 21} 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. R.C. 2929.191(A) and (B).

{¶ 22} Here, despite the state's failure to appeal the sentence, the trial court had full authority to conduct the resentencing hearing to provide the required notification, because Steimle had not yet been released from prison. Further, a prosecutor cannot bind the people or a court to an unlawful or otherwise void sentence by failing to appeal it properly. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568.

{¶ 23} Steimle also argues the trial court violated his due process rights by resentencing him within days of his release from prison. This contention is also without merit. Based on our above discussion, a trial court has the authority to correct the sentence while the offender remains in prison. *State v. Smith*, Cuyahoga App. No. 94732, 2010-Ohio-6361, citing *Simpkins* supra.

As Steimle was still in jail, albeit days before his release, the trial court could still conduct the resentencing hearing. Accordingly, we overrule the second and third assigned errors.

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

MARY J. BOYLE, J., and
COLLEEN CONWAY COONEY, J., CONCUR