

[Cite as *State v. Hunter*, 2011-Ohio-1682.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 95111, 95112, and 95113

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY HUNTER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-411627, CR-411611, and CR-415551

BEFORE: Boyle, P.J., Celebrezze, J., and Sweeney, J.

RELEASED AND JOURNALIZED: April 7, 2011

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MARY J. BOYLE, P.J.:

{¶ 1} Following a remand for resentencing, defendant-appellant, Anthony Hunter, appeals his sentence and again attacks the trial court's denial of his motion to withdraw his guilty pleas. Finding no merit to the appeal, we affirm.

Procedural History and Facts

{¶ 2} This case has a lengthy procedural history that we address only as necessary for the resolution of this appeal. In January 2002, Hunter pleaded guilty to the following

offenses in the three underlying cases: aggravated burglary with repeat violent offender and prior conviction specifications in CR-411611; aggravated burglary and felonious assault in CR-415551; and receiving stolen property in CR-411627. He was subsequently sentenced to an aggregate term of 20 years in prison. We affirmed Hunter’s convictions and sentences in *State v. Hunter*, 8th Dist. No. 81006, 2003-Ohio-994 (“*Hunter I*”).

{¶ 3} Following our affirmance, and relying on the Ohio Supreme Court’s holdings in *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, and *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, Hunter filed a pro se motion with the trial court to vacate and correct a void sentence in each of his cases. He argued that the trial court failed to notify him and properly impose postrelease control on each of his offenses. The trial court granted the motion and, on December 8, 2008, the trial court reimposed its original sentences, including the appropriate amount of postrelease control for each offense. At the hearing, the trial court also denied Hunter’s motion to vacate his guilty pleas.

{¶ 4} Hunter appealed from his resentencing and the denial of his motion to vacate his guilty pleas, which this court heard in *State v. Hunter*, 8th Dist. No. 92626, 2010-Ohio-657 (“*Hunter II*”). We found error in the sentencing hearing and remanded again for resentencing. *Id.*

{¶ 5} Based on our remand, the trial court held another sentencing hearing in April 2010. Prior to sentencing, Hunter again moved the court to vacate his guilty pleas on the

basis that he was never properly informed of postrelease control and the ramifications of violating it at his original plea hearing in 2002. He contended that he would not have entered his plea if he knew that he could be subject to the additional time. The court again denied his motion and proceeded to sentencing, imposing the same aggregate term of 20 years in prison. The court further properly imposed the applicable amount of postrelease control for each of the offenses.

{¶ 6} From this judgment, Hunter appeals, raising the following five assignments of error:

{¶ 7} “I. The trial court erred and abused its discretion when it denied Mr. Hunter’s motion to vacate his plea without a hearing thereby denying him due process in violation of U.S. Constitution Amendments V and XIV, and Ohio Constitution Article One, Sections 10 and 16.

{¶ 8} “II. The trial court erred when it denied Mr. Hunter’s motion to vacate his plea denying him due process in violation of U.S. Constitution Amendments V and XIV, and Ohio Constitution Article One, Sections 10 and 16.

{¶ 9} “III. The trial court was divested of jurisdiction to impose sentence upon Mr. Hunter due to the inexcusable delay between Hunter’s plea and finding of guilt in January of 2002 and his subsequent sentencing more than eight years later.

{¶ 10} “IV. The trial court erred in sentencing Mr. Hunter after he had served more than seven years of his prison term despite Mr. Hunter’s expectation of finality in violations of the Fifth and Fourteenth Amendments to the United States Constitution, and Ohio Constitution Article I, Section 10.

{¶ 11} “V. The trial court erred to the prejudice of Mr. Hunter when it improperly imposed consecutive sentences in violation of R.C. 2929.14 and 2929.41, United States Constitution Amendments V and XIV, and Ohio Constitution Article I, Sections 10 & 16.”

{¶ 12} Because some of these assignments of error involve the same application of law and fact, we will address them together where appropriate.

Motion to Withdraw Guilty Plea

{¶ 13} In his first two assignments of error, Hunter argues that the trial court erred and abused its discretion in failing to hold a hearing on his motion to vacate his guilty pleas and in denying such motion. We disagree.

{¶ 14} Initially, we note that since the time the parties have briefed this issue, the Ohio Supreme Court has recently modified its holding in *Bezak* as it relates to the finality of the trial court’s judgment when postrelease control was not properly imposed. See *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332. In *Fischer*, the Supreme Court clarified that, “when a judge fails to impose statutorily mandated postrelease control as part of a defendant’s sentence, that part of the sentence is void and must be set aside.” *Id.*

at ¶26. “[R]es judicata still applies to the other aspects of the merits of [the] conviction, including the determination of guilt and the lawful elements of the ensuing sentence.” *Id.* at paragraph three of the syllabus. The only issues a defendant can raise on appeal after the resentencing hearing to correctly impose postrelease control are “issues arising at the resentencing hearing.” *Id.* at paragraph four of the syllabus.

{¶ 15} In light of *Fischer*, we cannot say that the trial court erred in denying Hunter’s motion to vacate; our decision in *Hunter I* has res judicata effect on any claim that his plea should be vacated. The Ninth District recently addressed the same issue and concluded the same in *State v. Gibson*, 9th Dist. No. 25085, 2011-Ohio-566. The court further reasoned as follows:

{¶ 16} “The Ohio Supreme Court has held that a trial court does not have jurisdiction to consider a motion to withdraw a guilty plea once an appeal has been taken and the defendant’s conviction has been affirmed. *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97, 378 N.E.2d 162. According to the Supreme Court, it is inappropriate for a trial court to consider a motion to withdraw a guilty plea after a defendant’s conviction has been affirmed because permitting the withdrawal would be inconsistent with the judgment of the appellate court. *Id.*” *Id.* at ¶15.

{¶ 17} Accordingly, after our decision in *Hunter* I, and even after our remand in *Hunter* II, the trial court did not have jurisdiction to consider Hunter’s motion to withdraw his guilty pleas, which was fully decided in his first direct appeal. See *Gibson*, *supra*.

{¶ 18} The first two assignments of error are overruled.

Inexcusable Delay and Finality of the Judgment

{¶ 19} In his third and fourth assignments of error, Hunter argues that the delay in resentencing was improper, and the trial court was without jurisdiction to impose sentence after such a lengthy delay. We disagree.

{¶ 20} The record reveals that Hunter was first resentenced in 2008 to properly impose postrelease control — an aspect of his sentence that was void and needed to be rectified. In *Simpkins*, 117 Ohio St.3d 420, the Ohio Supreme Court specifically rejected any claim that the trial court loses jurisdiction to correct a void judgment. It further recognized that there is no reasonable, legitimate expectation in the finality of a void sentence. *Id.* at ¶30, 37.

{¶ 21} To the extent that we specifically remanded for a resentencing hearing in *Hunter* II based on errors that arose in the second sentencing hearing, we find that the trial court timely complied with our remand.

{¶ 22} The third and fourth assignments of error are overruled.

Consecutive Sentences

{¶ 23} In his final assignment of error, Hunter argues that the trial court failed to make the necessary required findings to justify the imposition of consecutive sentences. Although he recognizes that the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, excised those statutory provisions that required judicial fact finding before imposing consecutive sentences, he argues that the United State's Supreme Court decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, essentially overruled *Foster*. But the Ohio Supreme Court recently rejected this argument and held that trial courts are not obligated to engage in judicial fact finding prior to imposing consecutive sentences. See *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768.

{¶ 24} The final assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of 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. 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.

MARY J. BOYLE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
JAMES J. SWEENEY, J., CONCUR