[Cite as *State v. Coleman*, 2011-Ohio-341.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94866

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL R. COLEMAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-386306

BEFORE: Kilbane, A.J., Celebrezze, J., and Cooney, J.

RELEASED AND JOURNALIZED: January 27, 2011

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MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, Michael Coleman (a.k.a. Michael Stevens), appeals from the trial court's imposition of postrelease control in a resentencing proceeding conducted pursuant to R.C. 2929.191. For the reasons set forth below, we affirm.

{¶ 2} On January 27, 2000, defendant was indicted pursuant to a 20-count indictment in connection with alleged attacks upon a child under the age of 13 years old, in the time period from January 1999 through August 1999. The indictment charged defendant with ten counts of rape through the use of force or

threat of force, and ten counts of gross sexual imposition, all with sexually violent predator specifications, notice of prior conviction (from a 1979 aggravated burglary conviction), and a repeat violent offender specification.

{¶ 3} On July 28, 2000, defendant, represented by assistant public defender Christopher Roberson ("Roberson"), entered into a plea agreement whereby he pled guilty to the first rape charge as amended by deletion of the force and threat of force language and the sexually violent predator specification, and the remaining charges were dismissed. Also on July 28, 2000, the trial court sentenced defendant to ten years of imprisonment and determined that he is a sexual predator.[1]

{¶ 4} On September 24, 2001, defendant filed a pro se motion to reconsider and reduce sentence. The trial court denied this motion on October 9, 2001. On August 11, 2005, he filed a pro se motion for judicial release. The trial court denied this motion on December 27, 2005.

{¶ 5} On February 18, 2010, the State filed a motion for resentencing, noting that defendant's prison sentence was scheduled to end on March 1, 2010, and the previously entered sentencing journal entries did not provide for postrelease control. The trial court issued a journal entry ordering defendant to be returned to court immediately for a resentencing hearing.

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[1]In a sentencing addendum dated August 4, 2000, the trial court set forth the address registration and verification requirements.

{¶ 6} On February 25, 2010, the trial court held a hearing on the matter. At this time, Roberson appeared before the trial court. The record reflects the following colloquy:

> **"MR. ROBERSON: I just met with Mr. Coleman again this morning and he has told me that he does not want me to represent him at this hearing today, that he has the means to hire his own attorney. His case — his sentence expires on March 1st, but he told me to tell that to the Court before we proceed.**
>
> **THE COURT: Where is your attorney then, sir?**
>
> **THE DEFENDANT: I haven't had time to hire one. I didn't know this was going down until yesterday.**
>
> *** ***
>
> **MR. FREEMAN: * * * I understand this court is in a time crunch; I would ask this to be continued to his release date[,] which is March 1st on Monday.**
>
> **I would ask the Court order Mr. Roberson to return that day and if [defendant] doesn't have counsel, Mr. Roberson is appointed, [and] we [will] go forward with the re-sentencing hearing. I don't believe that he has money to retain counsel. I believe this is a delay tactic. I believe he probably knows what he is doing here. But other than that I would like this Court to give him the opportunity which would be four days to retain counsel.**
>
> **THE DEFENDANT: Your Honor, I've been locked up ten years and they just told me yesterday that I was coming back for court. I have not — I've got money to retain me an attorney, but I'm not going to be able to do it by Monday. Them bringing me back at the 11th hour like this at the last minute with three or four days of my out date, that don't give me time to get set for nothing."**

{¶ 7} The trial court advised defendant that various attorneys were present nearby and that he had four days to prepare for the hearing.

{¶ 8} The matter reconvened in the morning on March 1, 2010. At this time, defendant appeared without counsel, but the record reflects that Roberson was present in the courtroom. The following transpired:

> **"THE DEFENDANT: * * * I'm sorry I didn't get any attorney. I had half a day Friday, and I was in isolation. They locked up a whole pod in isolation all day Friday, and I got the paper here, but that's irrelevant.**
>
> **Saturday and Sunday, Your Honor, there was no way, you know and all the offices are closed. * * ***
>
> **And on my expiration stated term is 3-1-2010, which is — that's today, Your Honor.**
>
> **And in the Revised Code, the expiration date of the prison term imposed by the sentencing judge, reduced by jail time credit per ORC Section 2967.19.1, the date after, which is no longer in effect or valid.**
>
> **So today is the day after my prison term is up, as of 12:00 midnight last night, and I just wanted to get that so you would know.**
>
> *** ***
>
> **MR. FREEMAN: * * * 3-1-2010 is the expiration of the sentence. He said it himself. * * * 12 p.m., today."**

{¶ 9} The trial court subsequently determined that it had jurisdiction to resentence defendant in accordance with R.C. 2929.191. The trial court announced that the sentence would include a mandatory term of five years of postrelease control, as required under R.C. 2967.28, and also advised defendant

of the consequences of violating this provision. These terms were also included in a new sentencing journal entry filed with the clerk of courts on the same day of the hearing, at 9:54 a.m. Defendant now appeals and assigns three errors for our review.

{¶ 10} Defendant's first assignment of error states:

> **"The trial court violated Crim.R. 32 when there was an unnecessary delay in sentencing the appellant."**

{¶ 11} Crim.R. 32(A) states that a sentence "shall be imposed without unnecessary delay."

{¶ 12} The Supreme Court of Ohio has recognized, however, that delay for a reasonable time does not invalidate a sentence. *Neal v. Maxwell* (1963), 175 Ohio St. 201, 202, 192 N.E.2d 782. Further, Ohio courts have consistently recognized that Crim.R. 32(A) does not apply in cases where an offender must be resentenced. *State v. Craddock,* Cuyahoga App. No. 94387, 2010-Ohio-5782, citing to *State v. Huber,* Cuyahoga App. No. 85082, 2005-Ohio-2625, and *State v. Taylor* (Oct. 29, 1992), Cuyahgoa App. No. 63295. See *State v. Spears,* Summit App. No. 24953, 2010-Ohio-1965. In *Craddock,* as in this matter, the defendant was originally sentenced in 2000, but was later resentenced, inter alia, for failing to include mandatory information concerning postrelese control. In finding no violation of Crim.R. 32(A), this court held that Crim.R. 32(A) was not applicable.

{¶ 13} Defendant insists, however, that the matter must be reversed in accordance with the pronouncements of *State v. Mack,* Cuyahoga App.

No. 92606, 2009-Ohio-6460, and *State v. Owens,* 181 Ohio App.3d 725, 2009-Ohio-1508, 910 N.E.2d 1059. We find both of these cases distinguishable from this case, as the defendants in those matters, unlike defendant herein, were resentenced well after their release from confinement.

{¶ 14} In *Mack,* the defendant was convicted of vehicular assault, failure to stop after an accident and exchange identity and vehicle registration, and improperly handling a firearm in a motor vehicle. On August 15, 2006, he was sentenced to eight months of incarceration at the Lorain Correctional Institution. The trial court also ordered that, "[u]pon completion of sentence, [appellant] is ordered to be returned to Cuyahoga County jail for terms and condition of 5 years of community control sanctions as to Counts 2 [failure to stop] and 4 [improper handling of a firearm] to include treatment, drug and alcohol testing and restitution to victim. Post release control is part of this prison sentence for 3 years for the above felony(s) under R.C. 2967.28." On April 5, 2007, following the completion of his sentence at the correctional facility, defendant was released. The trial court subsequently scheduled a hearing for December 1, 2008, and then sentenced defendant on Counts 2 and 4. In light of the lengthy delay in resentencing the defendant following his release, this court concluded that the trial court violated Crim.R. 32(A).

{¶ 15} Similarly, in *Owens,* on February 23, 2006, the defendant pled guilty to one count of failure to comply with the order or signal of a police officer and one count of engaging in a pattern of corrupt activity. Two weeks later, while a

presentence investigation report was being compiled, the defendant committed crimes in Pennsylvania and was jailed in that state. No further action was taken on the Ohio case until he was apprehended by Ohio authorities on July 18, 2007, following his release from jail in Pennsylvania. He was finally sentenced on September 6, 2007, a delay which the reviewing court determined was unreasonable.

{¶ 16} In accordance with the foregoing, *Mack* and *Owens* are distinguishable from the instant matter. Moreover, Crim.R. 32(A) was not violated herein, and we find the first assignment of error is without merit.

{¶ 17} Defendant's second assignment of error states:

> **"The trial court erred in not permitting the appellant to retain counsel of his choice."**

{¶ 18} The right to counsel of one's choice is an essential element of the Sixth Amendment right to have the assistance of counsel for one's defense. *State v. Keenan,* Cuyahoga App. No. 89554, 2008-Ohio-807. The right is not absolute, however, and courts have "wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar." *United States v. Gonzalez-Lopez* (2006), 548 U.S. 140, 152, 126 S.Ct. 2557, 165 L.Ed.2d 409. Therefore, decisions relating to the substitution of counsel are within the sound discretion of the trial court. *Wheat v. United States* (1988), 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140. Thus, "[w]hile the right to select and be represented by one's preferred attorney is comprehended

by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate * * * rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Id.

{¶ 19} In order to justify the discharge of court-appointed counsel, an indigent defendant must show "good cause, such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict which leads to an apparently unjust result." *State v. Pruitt* (1984), 18 Ohio App.3d 50, 480 N.E.2d 499. Further, when the timing of a request for new counsel is an issue, a trial court may make a determination as to whether the appellant's request for new counsel was made in bad faith. *State v. Graves* (Dec. 15, 1999), Lorain App. No. 98CA007029. A motion for new counsel made on the day of trial "intimates such motion is made in bad faith for the purposes of delay." *State v. Haberek* (1988), 47 Ohio App.3d 35, 41, 546 N.E.2d 1361.

{¶ 20} In this matter, we find no abuse of discretion in connection with the trial court's refusal to continue the matter on March 1, 2010, so that defendant could retain counsel. First, the record indicates that defendant had appointed counsel initially and was then incarcerated for ten years. Although he stated that he would "get his brother and them to get some money up," there was no real indication that he had the means to retain counsel. Secondly, defendant failed to establish the necessary grounds for discharge of his court-appointed counsel under *Pruitt*. Finally, given the timing of the request and defendant's failure to

contact an attorney within the four days in which he was given to do so, the trial court could reasonably determine that the request was simply a delay tactic.

{¶ 21} The second assignment of error is without merit.

{¶ 22} Defendant's third assignment of error states:

> **"The trial court [erred in imposing] postrelease control after appellant had served an entire ten-year prison term."**

{¶ 23} A trial court is required to impose a five-year mandatory term of postrelease control in imposing a sentence for rape. R.C. 2967.28. Ohio courts have consistently held that when a trial court fails to sentence an offender to postrelease control, the sentence for that offense is void and the offender must be resentenced. *State v. Simpkins,* 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, syllabus.

{¶ 24} The Ohio State Supreme Court set out the proper remedy for this error in *State v. Singleton,* 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958. In *Singleton,* the Supreme Court observed that with R.C. 2929.191, the legislature provided a statutory remedy to correct a failure to properly impose postrelease control, and explained:

> **"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. 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. (Emphasis added.)**

{¶ 25} As to defendant's claim that the resentencing proceeding was conducted in error since it occurred on the last day of his imprisonment, we note that in *State v. White,* Cuyahoga App. No. 93732, 2010-Ohio-3607, this court held that the trial court did not commit prejudicial error by resentencing defendant to add a term of postrelease control on the last day of his imprisonment. Accord *State v. Arroyo,* Cuyahoga App. No. 90369, 2008-Ohio-3808.

{¶ 26} In addition, we note that pursuant to Ohio Adm. Code 5120-1-07(A), "[a]n inmate may be released *on or about* the date of his eligibility for release * * *." (Emphasis added.)

{¶ 27} In accordance with the foregoing, we find no prejudicial error. Defendant had not yet been released and was not held past his scheduled release time.

{¶ 28} The third assignment of error is without merit.

Judgment affirmed.

It is ordered that appellee recover from 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.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., and
COLLEEN CONWAY COONEY, J., CONCUR