

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95061

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAMIEN PETERSON

DEFENDANT-APPELLANT

JUDGMENT:
SENTENCE VACATED IN PART;
REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-471307

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

RELEASED AND JOURNALIZED: January 27, 2011

APPELLANT

Damien Peterson, Pro Se
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ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Mary McGrath
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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Damien Peterson appeals pro se the sentence imposed by the trial court. He assigns the following error for our review:

“The trial court erred when denying appellant’s motion for sentencing.”

{¶ 2} Having reviewed the record and pertinent law, we vacate Peterson’s sentence in part and remand for resentencing. The apposite facts follow.

Facts

{¶ 3} On April 27, 2006, a jury convicted Peterson of aggravated robbery and felonious assault, with one and three-year firearm specifications attached. Peterson stipulated to the notices of prior conviction, repeat violent offender specifications, and having a weapon while under disability.

{¶ 4} On May 1, 2006, the trial court sentenced Peterson to a total of 15 years in prison and five years of postrelease control. Peterson appealed; this court affirmed Peterson's convictions; we remanded the case to the trial court to correct the sentencing entry because Peterson could not be sentenced to an additional term for a repeat violent offender specification unless the court imposed the maximum term for the underlying offense, which it did not. *State v. Peterson*, Cuyahoga App. No. 88248, 2007-Ohio-1837. On remand the trial court entered an order amending Peterson's prison term to 12 years.

{¶ 5} On November 19, 2009, Peterson filed a motion for resentencing, claiming he was entitled to a de novo sentencing hearing due to the trial court's failure to advise him at the sentencing hearing of the consequences of violating post-release control. The trial court denied the motion.

Void Sentence

{¶ 6} In his assigned error, Peterson argues that he is entitled to be resentenced at a de novo sentencing hearing because the trial court failed to advise him at his original sentencing hearing the consequences for violating

the terms of postrelease control. The state concedes the trial court erred and that Peterson is entitled to the hearing. However, we conclude that Peterson is not entitled to a de novo sentencing hearing.

{¶ 7} Under R.C. 2929.19(B)(3)(e), a trial court must notify a defendant at sentencing that if he violates a condition of postrelease control, the parole board may impose a prison term as part of the sentence of up to one-half of the stated prison term originally imposed upon the defendant. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶2. Failure to do so renders the sentence void and requires vacating the sentence and remanding for resentencing. *Id.* at ¶27. See, also, *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 trial court failed to advise Peterson at the sentencing hearing of the consequences for violating postrelease control. Thus, we must remand for the trial court to properly advise Peterson.

{¶ 8} In *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, the Ohio Supreme Court held that when postrelease control is not properly imposed, the defendant is entitled to a de novo sentencing hearing. Recently, the Ohio Supreme Court in *State v. Fischer*, Slip Opinion No.

2010-Ohio-6238, limited its holding in *Bezak* and concluded that the defendant is only entitled to a hearing for the proper imposition of postrelease control. The defendant is not entitled to be resentenced on the entire sentence. Therefore, on remand, the trial court is instructed to conduct a resentencing hearing limited to the proper imposition of postrelease control. Accordingly, Peterson's sole assigned error is sustained in part.

{¶ 9} Sentence vacated in part and case remanded for resentencing.

It is ordered that appellant recover of appellee his 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.

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

PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR