

[Cite as *State v. Wells*, 2011-Ohio-723.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94956

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EARL WELLS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-383388

BEFORE: Keough, J., Gallagher, P.J., and Rocco, J.

RELEASED AND JOURNALIZED: February 17, 2010

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KATHLEEN ANN KEOUGH, J.:

{¶ 1} Defendant-appellant, Earl Wells (“Wells”), appeals from the sentence imposed by the trial court on resentencing. Finding no merit to the appeal, we affirm.

{¶ 2} In 2000, Wells was found guilty of three amended counts of gross sexual imposition (Counts 1, 7, and 49). The court sentenced Wells to a prison term of three years each on counts 1 and 7, and a prison term of four years on Count 49. All counts were ordered to run consecutive to each other, for a total prison term of ten years.

{¶ 3} On March 8, 2010, approximately three weeks prior to Wells’s release from prison, the trial court conducted a resentencing hearing to impose the mandatory term of postrelease control that the original sentence did not include. At the hearing, the trial court imposed the same sentence as originally imposed in 2000, a total prison term of ten years.

{¶ 4} When the court advised Wells of the mandatory term of postrelease control, the trial court stated that a violation of postrelease control could subject him to “a prison term of up to one-half of the stated prison term originally imposed upon you.” However, in the court’s sentencing journal entry, it recognized that Wells had already served his sentences for Counts 1 and 7. Therefore, it only imposed the mandatory five-year postrelease control term on

{¶ 5} Count 49, and stated that if Wells violated postrelease control, he could be subject to imprisonment “for up to one-half of the 4-year sentence for gross sexual imposition in Count 49.”

{¶ 6} Wells appeals, raising four assignments of error, which will be addressed together where appropriate.

De Novo Resentencing

{¶ 7} In his first assignment of error, Wells argues that the trial court erred by failing to conduct a de novo resentencing hearing.

{¶ 8} If a defendant is subject to postrelease control, the trial court must notify him of postrelease control at the sentencing hearing, and must include the postrelease

control terms in the sentence, or the sentence is void. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, at the syllabus; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864. In *Bezak*, the court held that when postrelease control is not properly imposed, the defendant is entitled to a de novo sentencing hearing.

{¶ 9} Recently, in *State v. Fischer*, __ Ohio St.3d __, 2010-Ohio-6238, the Ohio Supreme Court limited its holding in *Bezak* and concluded that when postrelease control is not properly imposed the defendant is only entitled to a hearing for the proper imposition of postrelease control. *Id.*, __29. The defendant is not entitled to be resentenced on the entire sentence.

{¶ 10} Accordingly, Wells was not entitled to a de novo sentencing hearing and his first assignment of error is overruled.

Overstatement of Postrelease Control

{¶ 11} In his second and fourth assignments of error, Wells argues that the trial court incorrectly advised him about the consequences of violating postrelease control and that the trial court's sentencing journal entry does not reflect what took place in open court at the resentencing hearing.

{¶ 12} At the resentencing hearing, the trial court imposed the same sentence originally imposed in 2000: three years on Count 1, three years on Count 7, and four years on Count 49, all ordered to run consecutively, for a total prison term of ten years. The court noted that Wells's sentence was about to expire on April 1, 2010. In imposing the term of postrelease control, the trial court stated at the hearing: "when you get out,

you will be subject to a mandatory term of post release control under Revised Code 2967.28. If and when this period of mandatory post release control is imposed following your release from prison and if you violate conditions of that supervision, the Parole Board may impose a prison term of up to one-half of the stated prison term originally imposed upon you. Just so you know, you'll be under mandatory post release control for 5 years, since you pled guilty to a sex offense.”

{¶ 13} However, in the court’s sentencing journal entry, the court recognized that the sentences for Counts 1 and 7 had expired, and it therefore imposed postrelease control only on the 4-year sentence in Count 49: “[P]ost release control shall not be imposed for the convictions in Count[s] [sic] 1 and 7. But Wells is required to serve, upon his release from prison, a mandatory term of 5-years postrelease control for the gross sexual imposition conviction in Count 49. Violations of the conditions of postrelease control may result in more restrictive sanctions including reincarceration for up to one-half of the 4-year sentence for gross sexual imposition in Count 49.”

{¶ 14} Wells claims that his sentence is void because the trial court informed him at the sentencing hearing that a violation of his postrelease control would result in “up to one-half of the stated prison term originally imposed,” i.e. five years, when it would actually result in only up to two years of imprisonment. Wells claims that although the court corrected itself in its journal entry, his sentence is void because the court’s sentencing entry does not conform with what occurred in open court at the sentencing hearing.

{¶ 15} The State argues, however, that the sentence is not void and the imposition of postrelease control should not be vacated because “it complies with the law, does not prejudice Wells, and actually provides a benefit to Wells.” We agree.

{¶ 16} We addressed this issue in *State v. Cromwell*, Cuyahoga App. No. 91452, 2010-Ohio-768, wherein we concluded that when a trial court overstates the penalty for violating postrelease control at the sentencing hearing, but remedies such overstatement in the journal entry, the error is harmless, and, unless the defendant can demonstrate prejudice, the sentence will not be rendered void. *Cromwell* at __8-11, citing *State v. Spears*, Medina App. No. 07CA0036-M, 2008-Ohio-4045.

{¶ 17} In the instant case, the trial court told Wells that if he violated postrelease control he could be subject to reincarceration for “up to one-half of the stated prison term originally imposed.” However, the trial court corrected the overstatement in its journal entry, ordering that the penalty for violating postrelease control could be “up to one-half of the 4-year sentence for gross sexual imposition in Count 49.”

{¶ 18} Although a court’s journal entry must conform to the record at the sentencing hearing and must correctly reflect what occurred at the sentencing hearing, we find that Wells has not demonstrated how he was prejudiced by the trial court’s overstatement.

{¶ 19} Accordingly, Wells’s second and fourth assignments of error are overruled.

Consecutive Sentence Findings

{¶ 20} In his third assignment of error, Wells argues that the trial court erred by imposing consecutive sentences without making the findings required by R.C. 2929.14(E)(4) and asserts that the holding in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, that the statute was unconstitutional, is no longer valid in light of *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517.

{¶ 21} The Ohio Supreme Court recently rejected this argument in *State v. Hodge*, ___ Ohio St.3d ___, 2010-Ohio-6320. The court concluded that *Ice* did not require it to depart from its holding in *Foster* because “there is no constitutional requirement that a judge make findings of fact before imposing consecutive sentences” and requiring resentencing to include findings of fact would “disrupt reasonable and settled expectations of finality,” and impose an “undue burden on the judicial system.” *Hodge* at __30-32.

{¶ 22} Accordingly, Wells’s third assignment of error is overruled.

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.

KATHLEEN ANN KEOUGH, JUDGE

SEAN C. GALLAGHER, P. J., and
KENNETH A. ROCCO, J., CONCUR