

[Cite as *State v. Cardamone*, 2011-Ohio-818.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 94405

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JOSEPH CARDAMONE**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED IN PART;  
REVERSED AND REMANDED IN PART**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-512606

**BEFORE:** Jones, J., Celebrezze, P.J., and Cooney, J.

**RELEASED AND JOURNALIZED:** February 24, 2011

## **APPELLANT**

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## **ATTORNEYS FOR APPELLEE**

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Joseph Cardamone, appeals from the trial court's November 25, 2009 judgment of conviction, issued upon remand from this court. We affirm in part and reverse and remand in part.

### **I. Procedural History and Facts**

{¶ 2} The history and facts of this case are summarized as follows from this court's opinion in the first appeal.<sup>1</sup> In 2008, Cardamone was convicted after a jury trial of two counts of robbery. He was sentenced that same year to eight years on each count, to be served concurrently. The facts giving rise to the conviction involved Cardamone waiting in his vehicle while his codefendant stole items from a drug store. A law enforcement

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<sup>1</sup>*State v. Cardamone*, Cuyahoga App. No. 92235, 2009-Ohio-5361, ¶1-6.

official chased the codefendant as she escaped to Cardamone's vehicle; the officer tried to grab the codefendant as she got into the vehicle, but his arm got stuck between the vehicle's door and passenger seat. Cardamone drove the vehicle, and the officer jogged alongside. Cardamone eventually stopped the vehicle and put his hands on his head, but the codefendant pushed the accelerator with her hand. The officer was dragged; he was freed when the car made a sharp turn. Cardamone then sped away.

{¶ 3} This court upheld Cardamone's convictions against sufficiency and weight of the evidence challenges. This court found, however, that the convictions should have merged at sentencing. Accordingly, the judgment of conviction was reversed and the case was remanded to the trial court for the state to elect which charge would merge into the other, and for the trial court to then resentence on the single conviction.

{¶ 4} Resentencing was had on remand. The state elected to merge Count 1 into Count 2, and the trial court sentenced Cardamone to eight years on that count. The court advised Cardamone that he would be subject to five years of postrelease control and ordered him to pay court costs.

{¶ 5} By and through counsel, Cardamone raises two assignments of error for our review. In the first assignment, he contends that he is subject to three, not five, years of postrelease control and, therefore, his sentence is illegal and he is entitled to a resentencing hearing.

{¶ 6} In the second assigned error, Cardamone contends that the trial court failed, as required by statute, to notify him that his failure to pay court costs could result in his being

ordered to perform community service. Cardamone contends that this failure requires that his sentence be vacated and the case remanded for resentencing.

{¶ 7} The state concedes the errors in the first two assignments, but disagrees with Cardamone about the remedy.

## II. Law and Analysis

### A. Postrelease Control Notification

{¶ 8} In regard to the improper advisement about postrelease control,<sup>2</sup> the state contends that R.C. 2929.191 and the Ohio Supreme Court's decision in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, require only that the trial court issue a corrected judgment of conviction, without holding a new hearing.

{¶ 9} In *Singleton*, the court held that “for criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191.” *Id.* at ¶1.

{¶ 10} R.C. 2929.191(C) provides as follows:

{¶ 11} “(C) On and after the effective date of this section, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section *shall not issue the correction until after the court has conducted a hearing* in accordance with this division. Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing, the prosecuting

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<sup>2</sup>Cardamone was indeed improperly advised. Cardamone's conviction was a second degree felony. R.C. 2967.28 provides for three years of postrelease control for second degree felonies,

attorney of the county, and the department of rehabilitation and correction. The offender has the right to be physically present at the hearing, except that, upon the court's own motion or the motion of the offender or the prosecuting attorney, the court may permit the offender to appear at the hearing by video conferencing equipment if available and compatible. An appearance by video conferencing equipment pursuant to this division has the same force and effect as if the offender were physically present at the hearing. At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction.” (Emphasis added.)

{¶ 12} Thus, the trial court can issue a corrected judgment of conviction, but only after it holds a hearing, for which the defendant must be given notice and the right to be present. Accordingly, the first assignment of error is sustained, and the case is remanded for a hearing for the purpose of proper postrelease control notification.

#### B. Court Costs

{¶ 13} In regard to the trial court's lack of notice to Cardamone that his failure to pay court costs can result in his being ordered to perform community service,<sup>3</sup> the state contends that Cardamone's entire sentence is not void and he should not be entitled to a de novo sentencing hearing. We agree.

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except for sexually-oriented offenses.

<sup>3</sup>R.C. 2947.23(A)(1) requires that at the time the trial court imposes sentence, the court “shall” notify the defendant that if he fails to pay, or make timely payments against, the judgment of court costs rendered against him, the court “may order the defendant to perform community service \* \* \*.” Cardamone was not advised of this.

{¶ 14} Accordingly, we vacate the portion of the trial court’s entry relative to court costs and remand for notification to Cardamone as to that issue. In doing so, we rely on the following cases: *State v. Moss*, 186 Ohio App.3d 787, 2010-Ohio-1135, 930 N.E.2d 838, ¶22; *State v. Burns*, Gallia App. Nos. 08CA1, 08CA2, and 08CA3, 2009-Ohio-878, ¶12, 14; and *State v. Dansby*, Tuscarawas App. No. 08 AP 06 0047, 2009-Ohio-2975, ¶21-23.

{¶ 15} Accordingly, the second assignment of error is sustained and the case is remanded for a hearing for the purpose of proper notification to Cardamone on the imposition of court costs.

{¶ 16} Pro se, Cardamone raises the following additional assignments of error for our review:

{¶ 17} “[III.] The trial court abused its discretion and committed plain error in violation of the Ohio and United States Constitutions R.C. §2945.75(A)(2), *State v. Pelfrey*, 112 Ohio St.3d 422, 860 N.E.2d 735 and sentenced the appellant for felonies of the second degree when the jury verdict forms only found the appellant guilty of the lesser included offense a misdemeanor of the first degree.

{¶ 18} “[IV.] The trial court is divested of jurisdiction to resentence the appellant based on the delay in sentencing, pursuant to *State v. Owens*, 181 Ohio App.3d 725, 910 N.E.2d 1059, Crim.R. 32.”

### C. Jury Verdict Forms

{¶ 19} In the third assignment of error, Cardamone challenges the validity of the jury verdicts, contending that they did not state a verdict of guilt on robbery. This

argument is barred by the doctrine of res judicata. Under the doctrine, “a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment.” *State v. Perry* (1967), 10 Ohio St.2d 175, 180, 226 N.E.2d 104.

{¶ 20} Further, the Ohio Supreme Court recently held in *State v. Fischer*, Slip Opinion No. 2010-Ohio-6238, that “[t]he scope of an appeal from a resentencing hearing in which a mandatory term of postrelease control is imposed is limited to issues arising at the resentencing hearing.” *Id.* at paragraph four of the syllabus.

{¶ 21} Cardamone could have, but did not, raise this issue in his direct appeal. This court already upheld the convictions, and the remand was for the limited purpose of merger of allied offenses and resentencing, which is the only issue properly before this court.

{¶ 22} In light of the above, the third assignment of error is overruled.

#### D. Delay in Sentencing

{¶ 23} In his fourth assignment of error, Cardamone contends that the trial court was “divested” of jurisdiction upon remand because of the “delay” in sentencing due to the error in the imposition of postrelease control. We disagree.

{¶ 24} Cardamone was originally sentenced in September 2008. The case was remanded for resentencing by this court in October 2009. In early November 2009, the trial court set the resentencing date and ordered Cardamone from the institution for same.

The resentencing was had in late November 2009. On this record, there was no unreasonable delay, and the fourth assignment of error is overruled.

### III. Conclusion

{¶ 25} The judgment is affirmed in part and reversed and remanded in part. On remand, a hearing shall be held for only the proper postrelease control notification and notification of penalty for failure to pay court costs.

It is ordered that appellee and appellant equally share 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.

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LARRY A. JONES, JUDGE

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

