[Cite as *State v. Brito*, 2015-Ohio-1457.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101793

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOE BRITO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-05-464403-A

BEFORE: Blackmon, J., Kilbane, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: April 16, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Joe Brito ("Brito") appeals pro se his sentence and assigns the following two errors for our review:

> I. The trial court erred when it disregarded the statutory requirements of R.C. 2929.19(B)(3)(c) & (e). Therefore, postrelease control is not properly included in the sentence and the sentence is void.
>
> II. The trial court disregarded the mandatory provisions of R.C. 2941.25. As a result the sentence is contrary to law, and the trial court erred in denying the appellant's motion to correct illegal sentences by raising and resolving a res judicata defense where the injustice exception to the doctrine applied to the sentence.

{¶2} Having reviewed the record and pertinent law, we affirm but remand in part for the trial court to include postrelease controls via a nunc pro tunc entry. The apposite facts follow.

{¶3} In April 2005, the Cuyahoga County Grand Jury indicted Brito on a 37-count indictment. Counts 1 through 15 of the indictment charged him with rape; Counts 16 through 26 charged him with gross sexual imposition; and Counts 27 through 37 charged him with kidnapping.

{¶4} In January 2006, Brito entered into a plea agreement. As part of the agreement, Brito pled guilty to amended Counts 1 through 4 of the indictment. In return, the state agreed to nolle the remaining counts and to delete the specifications of force and age from Counts 1 through 4, thereby removing the potential for life imprisonment without parole. Because each count represented a different offense occurring on

different days, the counts did not merge for sentencing purposes. As part of the plea, Brito also stipulated to a sexual predator classification.

{¶5} On April 12, 2006, the trial court sentenced Brito to four years on each of Counts 1, 2, and 3, and three years on Count 4. The trial court ordered all terms to be served consecutively, for an aggregate sentence of 15 years in prison.

{¶6} Brito filed a direct appeal arguing that the trial court erred by sentencing him to consecutive sentences without making the necessary findings and that his plea was not knowingly, voluntarily, and intelligently made because the state of the law had changed with the then Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. We affirmed the sentence and plea. *State v. Brito*, 8th Dist. Cuyahoga No. 88223, 2007-Ohio-1311.

{¶7} On June 13, 2014, Brito filed a "motion to correct illegal sentence." Brito argued that the changes in law pertaining to determination of allied offenses required that the trial court conduct a hearing regarding whether the crimes constituted allied offenses. He also argued that the trial court failed to impose the "statutorily mandated term of postrelease control" in the sentencing entry. The trial court denied Brito's motion.

Postrelease Control

{¶8} In his first assigned error, Brito argues the trial court erred by failing to impose the term of postrelease control and failing to notify him of the consequences of violating postrelease control. The state concedes this error.

{¶9} Our review of the sentencing entry shows the trial court properly imposed five years of postrelease control pursuant to R.C. 2967.28. This is correct because each charge was a first-degree felony. Because Brito failed to make the sentencing transcript part of the record, we do not know whether the trial court advised him regarding postrelease control at the hearing. However, without a transcript, we must presume regularity; that is, that Brito was advised at sentencing of the specific period of postrelease control. *State v. Hill*, 8th Dist. Cuyahoga No. 96923, 2012-Ohio-2306; and *State v. Peterson*, 8th Dist. Cuyahoga No. 96958, 2012-Ohio-87.

{¶10} The Ohio Supreme Court in *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, held that a trial court "must provide statutorily compliant notification to a defendant regarding postrelease control at the time of the sentencing, including notifying the defendant of the details of postrelease control and the consequences of violating postrelease control." *Id.* at ¶ 18. If the trial court properly notifies the defendant about postrelease control at the sentencing hearing, but the notification is inadvertently omitted from the sentencing entry, the omission can be corrected with a nunc pro tunc entry, and the defendant is not entitled to a new sentencing hearing. *Id*. at the syllabus; *See also State v. Negron*, 8th Cuyahoga No. 100966, 2014-Ohio-5427; and *State v. Dines*, 8th Cuyahoga No. 100647, 2014-Ohio-3143.

{¶11} As we stated above, Brito failed to provide a transcript of the sentencing hearing; therefore, we presume that the trial court advised him of the consequences for violating postrelease control at the hearing. However, because the sentencing entry does not set forth the consequences, pursuant to *Qualls*, we remand the matter for the trial court to issue a nunc pro tunc order including the advisement of the consequences of violating postrelease control. Accordingly, Brito's first assigned error has merit in part.

Allied Offenses

{¶12} In his second assigned error, Brito argues the trial court failed to consider whether the offenses were allied offenses.

{¶13} It is well established that res judicata bars the consideration of issues that could have been raised on direct appeal. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 16-17; *State v. Hough*, 8th Dist. Cuyahoga Nos. 98480 and 98482, 2013-Ohio-1543, 990 N.E.2d 653, ¶ 29. This court has recognized that the issue of whether two offenses constitute allied offenses subject to merger must be raised on direct appeal from a conviction, or res judicata will bar a subsequent attempt to raise the issue. *State v. Poole*, 8th Dist. Cuyahoga No. 94759, 2011-Ohio-716, ¶ 13 (whether the verdicts on all counts can be used to support separate convictions for all offenses charged is decided by the trial court prior to its determination of a defendant's sentence; the time to challenge a conviction based on allied offenses is through a direct appeal).

{¶14} Brito failed to raise in his direct appeal the trial court's failure to consider whether the offenses were allied. Accordingly, his argument with respect to allied offenses is barred by the doctrine of res judicata because he could have raised this issue in his direct appeal.

{¶15} Moreover, although Brito failed to file a complete transcript of the proceedings, the excerpts from his plea hearing that he does include show that the prosecutor informed the court that because each offense occurred on a different date, they were not allied offenses. Therefore, there was consideration regarding whether the offenses would merge as part of the plea. Accordingly, Brito's second assigned error is overruled.

{¶16} Judgment affirmed and remanded for the trial court to issue a nunc pro tunc entry to include the consequences of noncompliance with postrelease control.

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 be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution. 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.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J. and
SEAN C. GALLAGHER, J., CONCUR