

[Cite as *State v. Cowan*, 2015-Ohio-2271.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101995

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CRAIG A. COWAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-11-550536-A

BEFORE: Kilbane, J., Jones, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: June 11, 2015

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Craig Cowan (“Cowan”), appeals from the trial court’s September 2014 hearing held for “the sole purpose of advising Cowan of postrelease control requirements.” For the reasons set forth below, we affirm in part, reverse in part, and remand solely for proper postrelease control notification.

{¶2} On May 31, 2011, Cowan was indicted in a nine-count indictment arising from a May 19, 2011 altercation. He was charged with three counts of felonious assault, three counts of kidnapping with firearm and other specifications, and one count each of having a weapon while under disability, improperly handling a firearm in a motor vehicle, and discharge of a firearm on or near a prohibited premises. On January 11, 2012, a jury convicted Cowan of one count each of felonious assault, having a weapon while under disability, improperly handling firearms in a motor vehicle, discharging a firearm on or near a prohibited premises, and various specifications. Cowan was sentenced to consecutive terms of imprisonment for the offenses and received a total of 18 years. *See State v. Cowan*, 8th Dist. Cuyahoga No. 97877, 2012-Ohio-5723, ¶ 4-12 (“*Cowan I*”).

{¶3} On direct appeal, this court upheld the convictions but remanded the case “for the trial court to consider whether consecutive sentences are appropriate under H.B. 86, and if so, to enter the proper findings on the record.” *Cowan I* at ¶ 46.

{¶4} On February 8, 2013, the trial court held a resentencing hearing and imposed the same 18-year sentence. Cowan again appealed, and this court again reversed for a “new sentencing hearing” in order for the trial court to “strictly comply

with the requirements of R.C. 2929.14(C)(4) prior to the re-imposition of consecutive sentences.” See *State v. Cowan*, 8th Dist. Cuyahoga No. 99566, 2013-Ohio-4475, ¶ 3, 16 (“*Cowan II*”).

{¶5} A subsequent resentencing hearing was held on November 22, 2013, and the trial court reimposed the same consecutive sentence. Cowan again appealed and asserted: (1) the trial court erroneously imposed postrelease control and consecutive sentences; (2) he had been subjected to double jeopardy; and (3) the sentence was disproportionate to his offenses. This court concluded that the trial court failed to properly reimpose postrelease control, and that the remaining assignments of error were barred by res judicata. *State v. Cowan*, 8th Dist. Cuyahoga No. 100741, 2014-Ohio-3593, ¶ 18. (“*Cowan III*”). This court remanded for “the sole purpose of advising Cowan of postrelease control requirements and memorializing same in a judgment entry.” *Cowan III* at ¶ 18.

{¶6} Another hearing occurred on September 16, 2014. At this time, the trial court stated:

THE COURT: All Right. Well, this is a resentence. And at this time[,] I want to remind you that beyond that sentence you’re also subject to what we call post-release control. So upon your release from prison, you will be subject to what is called post-release control, which is like parole, for a period of up to five years, reducible at the discretion of the Parole Board. And if you violate that post-release control, they can take you back for an *additional nine months without a trial*. That’s all. You have a right to appeal if you want

(Emphasis added.) (Tr. 4-5.)

{¶7} The sentence was then journalized as follows:

Defendant is sentenced to LCI. Consecutive sentence imposed. Count 2: 8 years plus 3-year firearm spec; count 7: 3 years; count 8: 1 year; count 9: 3 years. All sentences run consecutive to each other. See transcript of record. Defendant advised of postrelease control for up to 5 years mandatory. Defendant advised that if/when post release control supervision is imposed following his/her release from prison and if he/she violates that supervision or condition of postrelease control under R.C. 2967.131(B), 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 offender.

{¶8} Cowan now appeals from the September 16, 2014 hearing and order. We note, however, that during the pendency of the instant appeal, on April 7, 2015, the trial court held an additional hearing in which it again advised Cowan of postrelease control. Also during the pendency of this appeal, Cowan filed another appeal from the April 7, 2015 hearing, which has been assigned 8th Dist. Cuyahoga No. 102398.

{¶9} Cowan assigns two errors for our review:

Assignment of Error One

The [trial court] violated Appellant's constitutional rights under the Ohio and U.S. Constitution when it journalized [findings] not stated in open court or part of the record at the September 16, 2014 * * * resentencing hearing, and again [in the journal entry] violated the requirements of *State v. Bonnell* [140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659].

Assignment of Error Two

Appellant is entitled to a new sentencing hearing as the trial court failed to again properly impose a period of postrelease control at the resentencing hearing.

{¶10} In his first assignment of error, Cowan complains that the September 16, 2014 resentencing hearing dealt only with the issue of postrelease control and the

sentences were not addressed. He further complains that the journal entry “set forth many things that were not even mentioned or talked about at the September 16, 2014 hearing in open court.” Insofar as Cowan challenges the trial court’s findings in relation to the imposition of consecutive sentences, these challenges, as explained in *Cowan III*, are barred by res judicata. Thus, the only issue before us following our remand in *Cowan III*, is the imposition of postrelease control. In *Cowan III*, we remanded the matter for “the sole purpose of advising Cowan of postrelease control requirements and memorializing same in a judgment entry.” See *Cowan III* at ¶ 18. As a result, the new requirements for journal entries as set forth in *Bonnell* do not apply to this matter because Cowan’s consecutive sentences were not the subject of the remand in *Cowan III*. See generally *State v. Randlett*, 10th Dist. Franklin No. 06AP-1073-1076, 2007-Ohio-3546, ¶ 14-15 (new ruling may not be applied retroactively to final order).

{¶11} This assignment of error is therefore without merit.

{¶12} In his second assignment of error, Cowan argues that he is entitled to a new sentencing hearing because the trial court failed to properly impose postrelease control.

{¶13} R.C. 2967.28(F)(3) sets forth sanctions that may be imposed in the event of a violation of postrelease control and provides in relevant part as follows:

If after the hearing the board or court finds that the releasee violated the sanction or condition, the board or court may increase the duration of the releasee’s post-release control up to the maximum duration authorized by division (B) or (C) of this section or impose a more restrictive post-release

control sanction. When appropriate, the board or court may impose as a post-release control sanction a residential sanction that includes a prison term. * * * Unless a releasee's stated prison term was reduced pursuant to section 5120.032 of the Revised Code, the period of a prison term that is imposed as a post-release control sanction under this division shall not exceed nine months, and the maximum cumulative prison term for all violations under this division shall not exceed one-half of the stated prison term originally imposed upon the offender as part of this sentence.

{¶14} A sentence that fails to comply with the statutory requirements of postrelease control is void only as to postrelease control and must be rectified only in that aspect. *State v. Fischer*, 128 Ohio St.3d 92, 97, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 17. The *Fischer* court stated:

In this situation, the postrelease-control component of the sentence is fully capable of being separated from the rest of the sentence as an independent component, and the limited resentencing must cover only the postrelease control. It is only the postrelease-control aspect of the sentence that is void and that must be rectified. The remainder of the sentence, which the defendant did not successfully challenge, remains valid under the principles of res judicata.

Fischer at ¶ 17. *Accord Strong v. Ohio State Adult Parole Auth.*, 10th Dist. Franklin No. 11AP-52, 2011-Ohio-5615, ¶ 18.

{¶15} In this matter, the trial court stated:

Well, this is a resentence. And at this time[,] I want to remind you that beyond that sentence you're also subject to what we call post-release control. So upon your release from prison, you will be subject to what is called post-release control, which is like parole, for a period of up to five years, reduceable at the discretion of the Parole Board. And if you violate that post-release control, they can take you back for an *additional nine months without a trial*. That's all. You do have a right to appeal if you want.

(Emphasis added.) (Tr. 4-5.)

{¶16} The state of Ohio concedes that the trial court should have said that Cowan “could have received an additional nine years” rather than “an additional nine months.” The state maintains, however, that the error is harmless. We cannot accept the state's assertion. Under R.C. 2967.28(F)(3), Cowan was subject to an additional term of up to one-half of his original prison term, or nine years of imprisonment as a sanction for violating postrelease control. The matter must be remanded for the sole purpose of advising Cowan of the proper postrelease control requirements and memorializing those requirements into a judgment entry. The sentence is affirmed in all other respects.

{¶17} Judgment is affirmed in part, reversed in part, and remanded for postrelease control notification.

It is ordered that appellee and appellant share the 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, JUDGE

LARRY A. JONES, SR., P.J., and
TIM McCORMACK, J., CONCUR