

[Cite as *State v. Smith*, 2017-Ohio-392.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104855

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EDWARD E. SMITH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-584597-A

BEFORE: Keough, A.J., Celebrezze, J., and Jones, J.

RELEASED AND JOURNALIZED: February 2, 2017

APPELLANT

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ATTORNEYS FOR APPELLEE

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KATHLEEN ANN KEOUGH, A.J.:

{¶1} Defendant-appellant, Edward E. Smith (“Smith”), appeals from the trial court’s decision denying his motion to vacate postrelease control. For the reasons that follow, we affirm.

{¶2} In August 2014, Smith pleaded guilty to domestic violence in violation of R.C. 2919.25, a felony of the third degree, and was sentenced to serve nine months in prison. Smith was also sentenced to a period of postrelease control “for up to 3 years.” The court notified him that if he violated 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.” Smith did not appeal his conviction or sentence.

{¶3} In July 2016, Smith filed a motion to vacate the period of postrelease control claiming that it was improperly imposed. Specifically, he argued that he was not properly notified either at the sentencing hearing or in the sentencing entry of the consequences for violating postrelease control. The state opposed the motion arguing that Smith was properly apprised of the consequences both at the sentencing hearing and in the court’s sentencing entry. The trial court summarily denied Smith’s motion.

{¶4} Smith now appeals, raising two assignments of error.

{¶5} In his first assignment of error, Smith contends that the trial court erred in denying his motion to vacate his improperly imposed postrelease control. Specifically, Smith argues that the court imposed an improper period of postrelease control — “up to 3 years” — rather than the mandatory term of three years as required under R.C.

2967.28(B)(3). Smith maintains that the court's failure to order the mandatory period of postrelease control renders this aspect of his sentence void.

{¶6} But the argument Smith now raises on appeal is not the argument he raised below with the trial court. In the trial court, Smith challenged the court's failure to properly advise him of the consequences of violating postrelease control — not whether the court imposed the appropriate period of the postrelease control. It is well-settled that arguments not raised below cannot be raised for the first time on appeal. *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177, 602 N.E.2d 622 (1992). Accordingly, Smith's first assignment of error is overruled.

{¶7} In his second assignment of error, Smith contends that the trial court erred in denying his motion to vacate postrelease control because he was not properly notified either at the sentencing hearing or in the sentencing entry of the consequences for violating postrelease control.

{¶8} In its current form, R.C. 2929.19(B)(2)(e) requires the sentencing judge to notify a defendant for whom a period of postrelease control is imposed that if the defendant violates 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 offender."

{¶9} The Ohio Supreme Court requires trial courts to give offenders notice of postrelease control both at the sentencing hearing and by incorporating it into the corresponding sentencing journal entry. *State v. Jordan*, 104 Ohio St.3d 21,

2004-Ohio-6085, 817 N.E.2d 864, paragraph one of the syllabus. “The failure to properly notify a defendant of postrelease control and to incorporate that notice into the court’s sentencing entry renders the sentence void.” *State v. Cash*, 8th Dist. Cuyahoga No. 95158, 2011-Ohio-938, ¶ 7, citing *Jordan* at *id.*

{¶10} As an initial matter, no transcript of the sentencing hearing was provided to this court. When there is no transcript of the proceedings below, an appellate court must presume regularity of the proceedings. *State v. Brown*, 8th Dist. Cuyahoga No. 95086, 2011-Ohio-345, ¶ 9, citing *State v. Estrada*, 126 Ohio App.3d 553, 556, 710 N.E.2d 1168 (7th Dist.1998). Because of the presumption of regularity, we must presume that the sentencing trial court properly notified Smith at sentencing of the possible consequences of violating postrelease control.

{¶11} Upon reviewing Smith’s sentencing entry, we find that the trial court properly included the consequences for violating postrelease control. The court notified Smith that “if he/she violates that supervision or condition of post[release] control under R.C. 2967.131(B), [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 offender.” This notification is precisely what R.C. 2929.19(B)(2)(e) requires.

{¶12} Accordingly, the trial court did not err in denying Smith’s motion to vacate his term of postrelease control. The assignment of error is overruled.

{¶13} 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. 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.

KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, SR., J., CONCUR