[Cite as *State v. Harmon*, 2009-Ohio-4512.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. JIMMY L. HARMON Appellant	C.A. No. 24495 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 04 02 0547(C)

DECISION AND JOURNAL ENTRY

Dated: September 2, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Jimmy L. Harmon, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} In 2004, a jury found Harmon guilty of engaging in a pattern of corrupt activity, a first-degree felony, and two counts of trafficking in cocaine, a third-degree felony. The trial court sentenced him to an aggregate prison term of nine years. During sentencing, the trial court did not inform Harmon of his obligations regarding postrelease control, and the trial court's sentencing entry provided that Harmon would be "subject to post-release control to the extent the parole board may determine as provided by law." Harmon appealed to this Court, and we affirmed his convictions on July 20, 2005. *State v. Harmon*, 9th Dist. No. 22399, 2005-Ohio-3631.

{¶3} Later, both Harmon and the State filed motions for resentencing based on the trial court's failure to inform Harmon of his postrelease control obligations. On November 4, 2008, however, Harmon moved to "dismiss" the resentencing hearing, arguing that the trial court lacked jurisdiction to resentence him with the addition of postrelease control. The trial court conducted a second sentencing hearing on November 7, 2008, then denied Harmon's motion to dismiss, permitted him to withdraw his own motion for resentencing, and resentenced him to the same sentence previously imposed. The trial court informed Harmon of his postrelease control obligations during the sentencing hearing and included postrelease control notification in the new sentencing entry. Harmon timely appealed. He has raised seven assignments of error for this Court's review, some of which have been rearranged for ease of disposition.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING DEFENDANT'S RIGHT TO FULLY CROSS-EXAMINE AND IMPEACH A STATE'S WITNESS ABOUT HIS PREVIOUS CONVICTIONS WHEN IT REFUSED TO PERMIT DEFENDANT TO QUESTION THE WITNESS ABOUT THE CIRCUMSTANCES OF HIS PREVIOUS CONVICTIONS."

{¶4} As an initial matter, this Court must determine whether Harmon's first assignment of error can be considered in the context of this appeal. The State argues that prior decisions of this Court limit our review to errors arising out of the resentencing. See *State v. Fischer*, 9th Dist. No. 24406, 2009-Ohio-1491; *State v. Ortega*, 9th Dist. No. 08CA009316, 2008-Ohio-6053. This Court must revisit this issue, however, in light of *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, and *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972.

Finality and Crim.R. 32(C)

{¶5} In *Culgan*, the Supreme Court of Ohio considered whether Culgan, whose convictions in 2002 had been affirmed by this Court in a direct appeal, was entitled to writs of mandamus and procedendo compelling the Medina County Court of Common Pleas to enter a judgment on his convictions that complied with Crim.R. 32(C). Despite Culgan's direct appeal from that conviction, the Court observed:

> "[I]f Culgan is correct that appellees' sentencing entry violated Crim.R. 32(C), *which would render the entry nonappealable*, his claims for writs of mandamus and procedendo would have merit, and the court of appeals erred in sua sponte dismissing his complaint." (Emphasis added.) *Culgan*, 2008-Ohio-4609, at ¶9.

The Court concluded that Culgan's sentencing entry did not, in fact, comply with Crim.R. 32(C) and granted a writ compelling the court of common pleas to issue a final appealable order. Id. at ¶10-11. Two justices dissented, emphasizing that Culgan had already appealed and, therefore, obtained the relief that he requested. Id. at ¶16.

{¶6} The implication of the Supreme Court's opinion in *Culgan* is that regardless of whether a defendant has already appealed his conviction, if the order from which the first appeal was taken is not final and appealable, he is entitled to a new sentencing entry which can itself be appealed. Although the connection between *Culgan* and cases involving postrelease control has not yet been explicitly stated, the logic inherent in recent Supreme Court cases regarding postrelease control leads to a similar result. See *Fischer*, 2009-Ohio-1491, at ¶15 (Dickinson, J., concurring) (observing that two of the appellant's assignments of error, which challenged his underlying conviction and the continuing viability of this Court's earlier opinion in his direct appeal, were "the logical extension of the Ohio Supreme Court's decisions in *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, and *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250.").

Finality and Postrelease Control

{¶7} In *Bedford*, this Court considered the implications of the Supreme Court's holdings that failure to notify a defendant of postrelease control renders a sentence void rather than voidable. Bedford was misinformed regarding his postrelease control obligations and assigned the trial court's error on direct appeal. This Court concluded that, while Bedford's sentencing order complied with Crim.R. 32(C), both the sentence and the journal entry in which the trial court attempted to impose the sentence were void. *Bedford*, 2009-Ohio-3972, at ¶8. We then considered our jurisdiction in light of the void sentencing entry:

> "The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment." *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, at ¶ 27 (quoting *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at ¶ 12). Taking the Supreme Court at its word, this Court must act as if the journal entry containing Mr. Bedford's void sentence 'had never occurred' and 'as if there had been no judgment.' Id. (quoting *Bezak*, 2007-Ohio-3250, at ¶ 12).
>
> "*** While a judgment of conviction qualifies as a final order if it contains the requirements identified in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, if there has been no judgment then there is no final order." *Bedford* at ¶10-11.

Because the order from which Bedford had appealed was void, this Court exercised its inherent power to vacate the order despite the fact that we lacked jurisdiction to review the merits of his appeal. Id. at ¶14-15.

{¶8} In this case, the trial court failed to inform Harmon of his postrelease control obligations in its 2004 sentencing entry. Although he appealed that entry, *Bezak* and *Simpkins* require the conclusion that his original sentence – and the journal entry in which the trial court attempted to impose that sentence – are void. See *Bedford* at ¶8. "Taking the Supreme Court at its word," as this Court did in *Bedford*, the journal entry that purported to impose sentence upon

Harmon in 2004 must be considered as if no judgment had been entered. Id. at ¶10. "[I]f there has been no judgment then there is no final order." Id. at ¶11.

Final, Appealable Order

{¶9} Harmon was entitled to be resentenced to correct the error in notification of postrelease control and to a final order that, once issued, could be appealed notwithstanding his direct appeal in 2005. See *Culgan* at ¶9-11. In light of *Culgan* and *Bedford*, therefore, this Court is reluctantly compelled to address Harmon's first assignment of error.

Merits of the Appeal

{¶10} Harmon's first assignment of error is that the trial court erred by limiting his cross-examination of a witness against him at trial. Specifically, Harmon argues that Evid.R. 609(A)(1) permitted him to inquire into the facts surrounding the prior criminal convictions of Kevin Reynolds, who testified that he purchased drugs from Harmon twice as part of an undercover operation.

{¶11} Evid.R. 609(A)(1) permits evidence that a witness has been convicted of a crime punishable by death or more than one year of imprisonment for purposes of attacking the witness's credibility, subject to Evid.R. 403. Evid.R. 609 does not require unlimited cross-examination with respect to facts surrounding a prior conviction. See *State v. Robb* (2000), 88 Ohio St.3d 59, 71. Instead, "[u]nder Evid.R. 609, a trial court has broad discretion to limit any questioning of a witness on cross-examination which asks more than the name of the crime, the time and place of conviction and the punishment imposed, when the conviction is admissible solely to impeach general credibility." *State v. Amburgey* (1987), 33 Ohio St.3d 115, syllabus. Because "Evid.R. 609 must be read in conjunction with Evid.R. 403," trial courts consider all of the factors set forth in Evid.R. 403 to determine the extent to which cross-examination should be

permitted. *State v. Wright* (1990), 48 Ohio St.3d 5, 7. A trial court's decision to limit the scope of cross-examination in light of Evid.R. 609(A)(1) and Evid.R. 403 is reviewed for abuse of discretion. *Amburgey* at 117.

{¶12} Evid.R. 403 limits the admissibility of *relevant* evidence. In this case, we need look no further into the Rule. The State elicited testimony from Reynolds during his direct examination that described his prior convictions. In addition, Reynolds testified about his discussions with police and his agreement to perform controlled drug buys from Harmon, including the reduction in sentence that he hoped to obtain. During cross-examination, Harmon tried to question Reynolds regarding the details of his convictions not to further undermine his credibility as a witness, but to elicit testimony that Reynolds believed he had been "convicted for a crime that he did not commit." As Harmon's attorney explained during a proffer related to the cross-examination, he hoped to raise the specter of unfair treatment by the police to bolster Harmon's own claim "that the police are trying to pin something on Mr. Harmon that he did not do[.]" Testimony about Reynolds' perception that he was treated unfairly by police in connection with his own convictions does not have "any tendency to make the existence of any fact that is of consequence *** more probable or less probable" with respect to Harmon's case. Evid.R. 401. See, also, *Robb*, 88 Ohio St.3d at 71. Because this testimony was irrelevant, the trial court did not abuse its discretion by limiting the scope of cross-examination under Evid.R. 609(A)(1). Harmon's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING DEFENDANT'S U.S. CONST. AMEND V RIGHTS WHERE HIS SENTENCE HAS BEEN INCREASED AFTER HE HAD ALREADY COMMENCED SERVICE OF HIS SENTENCE."

{¶13} In his second assignment of error, Harmon argues that the trial court violated his constitutional right to be free from double jeopardy by enhancing his prison sentence through the addition of postrelease control. In *Simpkins*, however, the Supreme Court of Ohio concluded that when a trial court omits to inform a criminal defendant of his postrelease control obligations, the sentence is issued "without the authority of law" and the defendant does "not have a legitimate expectation of finality in his sentence." *Simpkins*, 2008-Ohio-1197, at ¶37.

{¶14} As in *Simpkins*, Harmon had no expectation of finality in a void sentence, and the constitutional prohibition against double jeopardy does not apply. "Because jeopardy does not attach to a void sentence, the subsequent imposition of the statutorily required sentence cannot constitute double jeopardy." *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, at ¶27, citing *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, at ¶25. Harmon's second assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> "DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN THE TRIAL COURT FAILED TO APPLY THE DOCTRINE OF RES JUDICATA TO CLAIMS WHERE A SENTENCE HAS BEEN INCREASED BY ADDING A TERM OF POSTRELEASE CONTROL."

{¶15} Harmon's fourth assignment of error is that the trial court erred by imposing a sentence including postrelease control when the State's motion to resentence was barred by application of res judicata. The Supreme Court of Ohio also considered, and rejected, this argument in *Simpkins*. Id. at ¶24-36. Harmon's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "DEFENDANT HAS BEEN DENIED HIS CONSTITUTIONAL RIGHT WHEN THE TRIAL COURT APPLIED A STATUTE ENACTED IN 2006 IN AN EX POST FACTO AND RETROACTIVE MANNER TO A CONVICTION AND SENTENCE THAT WAS ORIGINALLY IMPOSED IN 2004."

ASSIGNMENT OF ERROR V

"AM SUB. H.B. 137 VIOLATES THE SINGLE SUBJECT RULE UNDER OHIO CONST. ART. II, §15(D)."

ASSIGNMENT OF ERROR VI

"AM. SUB. H.B. 137 RENDERS POSTRELEASE CONTROL UNCONSTITUTIONAL BECASE IT PERMITS THE EXECUTIVE TO IMPOSE THE SANCTION WITHOUT A COURT ORDER."

ASSIGNMENT OF ERROR VII

"ORC §2929.191 IS UNCONSTITUTIONAL UNDER THE SEPARATION OF POWERS DOCTRINE CONTAINED IN OHIO CONST. ART. IV, §5(B)."

{¶16} Harmon's third assignment of error argues that R.C. 2929.191 is unconstitutionally retroactive in effect and operates as an ex post facto law because, by its terms, it applies to criminal defendants who were sentenced before the effective date of the statute. Harmon's fifth, sixth, and seventh assignments of error argue that the remedy created by R.C. 2929.191 violates the single subject rule and separation of powers provisions of the Ohio Constitution. This Court need not address Harmon's constitutional arguments with respect to R.C. 2929.191, however, because the trial court did not proceed under the statute in this case.

{¶17} As this Court recently recognized in *State v. Holcomb*, 9th Dist. No. 24287, 2009-Ohio-3187, the Supreme Court of Ohio has created a remedy in cases in which the failure to notify a defendant of his postrelease control obligations is apparent from the record. Id. at ¶13-14, citing *Simpkins*. In such cases, the trial court must resentence the defendant, an obligation that arises not by statute but by virtue of the fact that the trial court is both authorized and obligated to correct a void sentence. *Holcomb* at ¶14. In *Simpkins*, the Supreme Court explicitly concluded that when there has been an error in postrelease control notification, "*the state* is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence." (Emphasis added.) Id. at syllabus. In *Holcomb*, this

Court recognized that a defendant may also move the trial court for resentencing under the authority of the Supreme Court's recent cases regarding postrelease control. *Holcomb* at ¶19-21.

{¶18} In this case, both Harmon and the State moved the trial court for resentencing under the authority of *Simpkins* without reference to R.C. 2929.191. The trial court permitted Harmon to withdraw his motion prior to the resentencing hearing, but the hearing proceeded on the State's motion without amendment. Because Harmon was not resentenced pursuant to R.C. 2929.191, he does not have standing to challenge the constitutionality of the statute. See *Bloomer*, 2009-Ohio-2462, at ¶31 (concluding that the defendant lacked standing to challenge the constitutionality of R.C. 2929.191 because, in that case, he was resentenced before July 11, 2006). Harmon's third, fifth, sixth, and seventh assignments of error are overruled.

III.

{¶19} Harmon's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
DICKINSON, J.
CONCUR

APPEARANCES:

NEIL P. AGARWAL, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.