

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24953

Appellee

v.

FERNANDO SPEARS

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 06 01 0101(A)

DECISION AND JOURNAL ENTRY

Dated: May 5, 2010

CARR, Judge.

{¶1} Appellant, Fernando Spears, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On March 1, 2006, Fernando Spears pleaded guilty to aggravated robbery with a firearm specification, as well as having weapons while under disability. On June 8, 2006, Spears was given a sentence by the trial court which did not properly impose a term of post-release control. Because Spears had pleaded guilty to aggravated robbery, a felony of the first degree, he should have received a mandatory term of five years post-release control pursuant to R.C. 2967.28(B)(1). Instead, the journal entry stated that Spears was “subject to post-release control to the extent the parole board [] determine as provided by law.” At that time, Spears did not appeal his conviction.

{¶3} On July 2, 2009, Spears filed a motion for a final appealable order and re-sentencing. Spears argued among other things that he was not properly advised of post-release control at the plea colloquy. In light of the error in the journal entry regarding post-release control, the State agreed that the sentence was void. However, the State opposed the implied motion to withdraw the plea on the basis that there was no evidence that the plea was defective. Subsequently, on July 13, 2009, the trial court denied the motion to withdraw the plea and set the matter for re-sentencing.

{¶4} Spears was re-sentenced on August 6, 2009. On that same day, Spears filed a pro se motion to dismiss the action for lack of jurisdiction. In his motion, Spears contended that he could not be sentenced because of unreasonable delay. The State opposed the motion on the basis that Spears had been sentenced and the motion was moot. Spears' motion was denied by the trial court on August 19, 2009.

{¶5} On appeal, Spears raises three assignments of error.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRORED (sic) WHEN IT HELD A RE-SENTENCING HEARING AND IMPOSED THE SAME SENTENCE AND ADDED P.R.C.”

{¶6} In his first assignment of error, Spears argues that the trial court erred by re-sentencing him without first vacating his prior sentence. This Court disagrees.

{¶7} Spears argues that because his “void sentence was never vacated,” the trial court could not impose a proper sentence. In support of this position, Spears relies on the Supreme Court of Ohio's ruling in *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, for the proposition that when a trial court fails to notify an offender that he or she may be subject to post-release control, the sentence is void and, therefore, must be vacated.

{¶8} The Supreme Court of Ohio has stated, “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 *Bezak* at ¶12. When dealing with a void sentence, this Court has noted that we “must act as if the journal entry containing [a] void sentence ‘had never occurred’ and ‘as if there had been no judgment.’” *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972, at ¶10, quoting *Bloomer* at ¶27.

{¶9} In this case, Spears’ original sentence did not properly impose a term of post-release control. Spears pleaded guilty to aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree. Pursuant to R.C. 2967.28(B), “[e]ach sentence to a prison term for a felony of the first degree *** shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender’s release from imprisonment.” For a felony of the first degree, the period is five years. R.C. 2967.28(B)(1). Here, the trial court indicated in its June 8, 2006 journal entry that Spears was “subject to post-release control to the extent the parole board [] determines as provided by law.” The Supreme Court of Ohio has held that a trial court’s failure to properly impose a mandatory term of post-release control renders a sentence void. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at syllabus. As noted above, a void judgment “is a mere nullity and the parties are placed in the same position as if there had been no judgment.” *Bloomer* at ¶27, quoting *Bezak* at ¶12. The Supreme Court’s reasoning emanates from “the fundamental understanding that no court has the authority to substitute a different sentence for that which is required by law.” *Simpkins* at ¶20, citing *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438. Therefore, because a void judgment is

a mere nullity, it was unnecessary for the trial court in this case to vacate Spears' void sentence prior to imposing a sentence according to law in August 2009.

{¶10} Spears further argues that because he already served his three-year prison sentence for the firearm specification, the trial court could not re-sentence him in order to impose post-release control. R.C. 2967.28 applies only to felonies classified by degrees. The gun specification that accompanied his charge for aggravated robbery was not itself a separate felony charge. In this case, the gun specification was linked to the charge of aggravated robbery which is a felony of the first degree. Pursuant to R.C. 2967.28(B)(1), it is the aggravated robbery conviction to which post-release control is applied. Therefore, the fact that Spears completed his prison term for the gun specification does not impact the trial court's authority to impose post-release control. The Supreme Court of Ohio has held that a trial court has the authority to re-sentence a defendant subject to a void sentence in order to impose post-release control at any point prior to the expiration of the journalized sentence. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 535, 2006-Ohio-5795, at ¶28 and 32. As Spears has not completed his sentence for aggravated robbery, the trial court retained jurisdiction to re-sentence Spears and to impose post-release control.

{¶11} Spears' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRORED (sic) WHEN IT ACCEPTED MR. SPEARS' GUILTY PLEA PURSUANT TO STATE V. SARKOZY, 2008, 117 OHIO ST.3D, 86, 881, N.E. 2d 1224." (sic)

{¶12} In his second assignment of error, Spears argues the trial court erred when it accepted his guilty plea. This Court disagrees.

{¶13} “When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution.” *State v. Engle* (1996), 74 Ohio St.3d 525, 527; see, also, *Boykin v. Alabama* (1969), 395 U.S. 238. The Supreme Court of Ohio has further held that if a “trial court fails during the plea colloquy to advise a defendant that a sentence will include a mandatory term of postrelease control, the court fails to comply with Crim.R. 11, and the reviewing court must vacate the plea and remand the cause.” *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, at ¶25.

{¶14} Spears argues that because the trial judge provided him with “substantial misinformation” regarding the imposition of post-release control at the plea colloquy, he could not have entered his plea knowingly, intelligently, and voluntarily. The record in this case does not contain a transcript from the plea colloquy. This Court has repeatedly held, “[I]t is the duty of the appellant to ensure that the record on appeal is complete.” *State v. Daniels*, 9th Dist. No. 08CA009488, 2009-Ohio-1712, at ¶22, quoting *Lunato v. Stevens Painton Corp.*, 9th Dist. No. 08CA009318, 2008-Ohio-3206, at ¶11. “When portions of the transcript which are necessary to resolve assignments of error are not included in the record on appeal, the reviewing court has ‘no choice but to presume the validity of the [trial] court’s proceedings, and affirm.’” *Cuyahoga Falls v. James*, 9th Dist. No. 21119, 2003-Ohio-531, at ¶9, quoting *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Because a review of the transcript from the plea colloquy is necessary to resolve Spears’ second assignment of error, this Court must presume regularity in the trial court’s proceedings and affirm the judgment of the trial court. See *Knapp*, 61 Ohio St.2d at 199.

{¶15} It follows that Spears’ second assignment of error is overruled.

ASSIGNMENT OF ERROR III

“THE TRIAL COURT LACKED JURISDICTION TO CORRERT (sic) A VOID SENTENCE, AND CLAIMING FAVOR OF CRIM.R. 32(A)(1)(3).”

{¶16} In his third assignment of error, Spears claims that the trial court lacked jurisdiction to correct his void sentence. This Court disagrees.

{¶17} On July 2, 2009, Spears filed a pro se motion for a “final appealable order and resentencing.” On July 13, 2009, the trial court issued a journal entry which granted the motion for re-sentencing and, in light of that ruling, found the motion for a final appealable order to be moot. The trial court set the matter for re-sentencing on August 6, 2009, at 9:00 a.m. The sentencing entry which was journalized on August 10, 2009, indicated that Spears appeared in court for re-sentencing on August 6, 2009. Also on August 6, 2009, Spears filed a pro se motion to dismiss for lack of jurisdiction which was time-stamped by the Clerk of Courts at 10:33 a.m. In this motion, Spears argued the trial court did not have jurisdiction in the case due to undue delay in imposing a sentence. Because the record does not contain a transcript from the August 6, 2009 sentencing hearing, it is unclear whether Spears brought his motion to dismiss to the attention of the trial court prior to being re-sentenced. On August 19, 2009, the trial court denied Spears’ motion to dismiss for lack of jurisdiction on the basis that it was moot.

{¶18} The argument Spears presents on appeal is two-fold. Spears first contends that because his original 2006 sentence was void, he effectively had to wait more than three years to be lawfully sentenced. It follows, according to Spears, that the trial court was without jurisdiction to impose a sentence in August 2009, because there had been unnecessary delay in imposing a sentence pursuant to Crim.R. 32(A).

{¶19} Crim.R. 32(A) states that a sentence “shall be imposed without unnecessary delay.” The Supreme Court of Ohio has recognized that delay for a reasonable time does not

invalidate a sentence. *Neal v. Maxwell* (1963), 175 Ohio St. 201, 202. The Eighth District has held that Crim.R. 32(A) does not apply in cases where an offender must be re-sentenced. *State v. Huber*, 8th Dist. No. 85082, 2005-Ohio-2625, ¶8, citing *State v. Taylor* (Oct. 29, 1992), 8th Dist. No. 63295. This logic, as it relates to Crim.R. 32(A), recognizes the distinction between a trial court refusing to sentence an offender and a trial court improperly sentencing an offender. Furthermore, the Supreme Court of Ohio has held that a trial court retains continuing jurisdiction to correct a void sentence. *Cruzado*, at ¶19, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 75.

{¶20} In this case, Spears was originally sentenced on June 8, 2006. He later moved the trial court for re-sentencing on July 2, 2009. The trial court issued a journal entry on July 17, 2009, which directed the Sheriff to bring Spears back to Summit County “for re-sentencing in this case set for August 6, 2009 at 9:00 AM.” This case does not present a situation where there was unnecessary delay between the time Spears entered his plea and the time he was sentenced. After pleading guilty on March 1, 2006, Spears was sentenced on June 8, 2006, and he began to serve his prison term. When Spears put the trial court on notice that his original sentence was void, the trial court promptly re-sentenced him on August 6, 2009. The circumstances in this case, whereby the trial court exercised its jurisdiction to correct a void sentence, do not implicate Crim.R. 32(A). Therefore, Spears’ third assignment of error is overruled.

III.

{¶21} Spears’ 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.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

FERNANDO SPEARS, pro se, Appellant.

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