

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 25233

Appellee

v.

MONTE D. PITTS

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 01 01 0169

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 16, 2011

MOORE, Judge.

{¶1} In 2001, a jury convicted Monte D. Pitts of multiple felonies and the trial court sentenced him to 10 years in prison. In July 2009, he sought to be resentenced because he had not been told of postrelease control at the time of his sentencing hearing. The trial court granted his motion and sentenced him to the same 10-year sentence, properly advising him of postrelease control. Based on the Supreme Court of Ohio’s recent holding in *State v. Fischer*, Slip Opinion No. 2010-Ohio-6238, this Court affirms the trial court’s new sentence to the extent it addressed the imposition of postrelease control. The remainder of the order is vacated and the original sentence remains in effect.

I.

{¶2} A jury found Defendant Monte D. Pitts guilty in 2001 of Possession of Cocaine with a Major Drug Offender Specification for crack cocaine in an amount exceeding 100 grams, Failure to Comply with Order or Signal of Police Officer, and Possession of Marijuana. That

case had been consolidated with another for trial and Mr. Pitts was found guilty on those charges, as well.

{¶3} The trial court sentenced him, in part, to prison for 10 years, which was a mandatory term pursuant to R.C. 2929.13(F), 2929.14(D)(3), or 2925.01. The trial court sentenced him for the other case and imposed consecutive sentences. This Court affirmed the convictions but remanded the case for a new sentence because the trial court did not make the required findings necessary to impose consecutive sentences under then existing Ohio law. *State v. Pitts* (Nov. 20, 2002), 9th Dist. No. 20976. In a journal entry filed February 4, 2003, Mr. Pitts was resentenced for the same length of time on each count, but his sentences were to be served concurrently rather than consecutively. That sentence was not appealed.

{¶4} Mr. Pitts then filed a series of motions for resentencing in the trial court. The first two were denied. Both were appealed. Mr. Pitts voluntarily dismissed the first appeal and in the second appeal we affirmed the trial court. In his next motion, Mr. Pitts filed a Motion for Sentencing in which he claimed his 2003 sentence was void because the trial court did not specifically advise him of postrelease control. On October 7, 2009, the trial court filed a journal entry in which it held that the 2003 sentence was void.

{¶5} After a hearing, the trial court sentenced Mr. Pitts to the same 10-year sentence, which it again concluded was a mandatory term. Mr. Pitts appealed from that order in *State v. Pitts*, 9th Dist. No. 25101, but the appeal was dismissed pursuant to *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. On January 22, 2010, the trial court issued a journal entry correcting the omissions of the prior journal entry as required by *Baker*. On February 5, 2010, Mr. Pitts filed a notice of appeal from that nunc pro tunc sentencing entry. This Court consolidated the record with Case Number 25101 for purposes of appeal.

{¶6} Mr. Pitts has raised four assignments of error. The Supreme Court of Ohio’s holding in *Fischer* controls our decision. To facilitate our analysis we will discuss the first, third, and fourth assignments of error together. Because the second assignment of error involves a claim of lack of jurisdiction, we will discuss it separately.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED BY SENTENCING [PITTS] TO A ‘MANDATORY’ TEN YEARS, WHEN THE UNITED STATES SUPREME COURT IN KIMBROUGH V. UNITED STATES HAD RULED THAT A JUDGE MAY CONSIDER THE DISPARITY BETWEEN THE SENTENCING GUIDELINES TREATMENT OF CRACK AND POWDER COCAINE OFFENSES PRIOR TO THE OCTOBER 2009 SENTENCING HEARING.”

ASSIGNMENT OF ERROR III

“[PITT’S] RIGHTS TO DUE PROCESS WERE VIOLATED AND THE TRIAL COURT ABUSED ITS DISCRETION BY SENTENCING [HIM] WITHOUT CONSIDERING THE RELEVANT FACTORS EXISTING AT THE TIME OF SENTENCING.”

ASSIGNMENT OF ERROR IV

“STATE STATUTES THAT DIFFERENTIATE BETWEEN CRACK AND POWDER COCAINE ARE UNCONSTITUTIONAL.”

{¶7} In his assignments of error, Mr. Pitts has argued that the trial court incorrectly imposed the original sentence. Specifically, he has argued that the trial court failed to properly consider the disparity in sentencing for crack cocaine offenses versus powder cocaine offenses, it failed to consider “relevant factors” at the time of sentencing, and the statute under which he was indicted is unconstitutional. Because these arguments do not relate to that portion of the sentence regarding the imposition of postrelease control, this Court is barred from addressing their merits.

{¶8} In *Fischer*, the Supreme Court of Ohio addressed questions arising from a trial court's failure at sentencing to properly advise the defendant of postrelease control as mandated by the General Assembly. Prior to the decision in *Fischer*, the Court had held that if a judge failed to impose statutorily mandated postrelease control as part of the sentence, an offender was entitled to a new sentencing hearing. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, syllabus. This led to questions whether the entire sentence was void and what remedies were available to the trial court, including the scope of the new sentencing hearing.

{¶9} The Court modified *Bezak* in *Fischer*. It declared that only part of the sentence was void, specifically, the failure to address postrelease control. Therefore, the scope of the new sentencing hearing was limited to proper imposition of postrelease control. *Fischer*, at paragraph two of the syllabus. In so holding, the Court reasoned that the decision in *Bezak* had overlooked the principle that if a sentence "is in part void, only the portion that is void may be vacated or otherwise amended." *Id.* at ¶28. It held that res judicata would prohibit a trial court from reviewing the other aspects of a conviction, including the determination of guilt or the lawful elements of the sentence. *Id.* at paragraph three of the syllabus. Therefore, the scope of an appeal from a resentencing hearing based on postrelease control notification is limited to only those issues arising from that hearing. *Id.* at paragraph four of the syllabus.

{¶10} In his appeal, Mr. Pitts did not argue that there was error in the portion of the sentence addressing postrelease control. Rather, he has argued the trial court erred in granting the same sentence as the original sentence. The claims in Mr. Pitts' first, third, and fourth assignments of error are barred by res judicata. To the extent that the 2010 entry imposed postrelease control, it is affirmed. Its remaining portions are vacated. The 2003 sentence remains in effect.

ASSIGNMENT OF ERROR II

“THE EIGHT YEAR LAPSE BETWEEN THE TIME [PITTS] WAS CONVICTED UNTIL THE TIME HE WAS SENTENCED DIVESTED THE TRIAL COURT OF JURISDICTION TO RENDER ANY SENTENCE.”

{¶11} In his second assignment of error, Mr. Pitts has argued that the trial court lacked jurisdiction to render any sentence because of an 8-year lapse between sentences. In *Fischer*, the Ohio Supreme Court confirmed its holding that any part of a sentence imposed without statutory authority is void, but there is nothing in the opinion to support a finding that the trial court is somehow divested of jurisdiction. In fact, the Court expressly stated that the “offending portion of the sentence is subject to review and correction.” *Id.* at ¶27. Further, it stated that “the new sentencing hearing to which an offender is entitled under *Bezak* is limited to proper imposition of postrelease control.” *Id.* at ¶29. In light of this language, there can be no doubt that the trial court retains jurisdiction to correct postrelease control notification in these cases.

Conclusion

{¶12} The Court affirms the portion of trial court’s order of January 22, 2010, that imposed postrelease control, and vacates the remainder of that order. Similarly, the October 7, 2009, journal entry declaring that the sentence set January 23, 2003, was void is vacated to the extent it acted upon anything other than the postrelease control issue. The balance of the original sentence entered on January 23, 2003, remains in effect.

III.

{¶13} The first, third, and fourth assignments of error are barred by *res judicata*. The second assignment of error is overruled. To the extent that the January 22, 2010 entry imposed postrelease control, it is affirmed. Its remaining portions are vacated. Judgment affirmed in part, vacated in part.

Judgment affirmed in part,
and vacated in part.

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

CARR, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

JAMES W. ARMSTRONG, Attorney at Law, for Appellant.

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