

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 10CA0022

Appellee

v.

DARIUS JONES

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 06-CR-0467

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 28, 2011

DICKINSON, Judge

INTRODUCTION

{¶1} Darius Jones pleaded no contest to two counts of possession of drugs and one count of falsification. The trial court convicted him on all counts. After multiple resentencings and an appeal on the merits, Mr. Jones filed a motion for sentencing. His motion alleged that his sentence was void because the trial court did not impose or excuse the mandatory fines for his possession convictions and it did not impose mandatory prison terms. The trial court denied his motion, and Mr. Jones has appealed. We affirm the trial court's denial of his motion to the extent it related to parts of his sentence other than post-release control because those parts are not void, but we remand for proceedings consistent with Section 2929.19.1 of the Ohio Revised Code for the proper imposition of post-release control.

BACKGROUND

{¶2} Mr. Jones pleaded no contest to two counts of possession of drugs and one count of falsification. The trial court convicted him, and Mr. Jones attempted to appeal. This Court dismissed his appeal because he failed to supplement the record with a judgment or final appealable order. Subsequently, the trial court resentenced Mr. Jones, and he appealed from that sentencing entry, arguing that the trial court erred by denying his motion to suppress and by ordering him to forfeit the money he had in his possession at the time of his arrest. We overruled both assignments of error.

{¶3} Mr. Jones then moved the trial court for a new sentencing hearing, arguing that it had failed to properly impose post-release control. The trial court resentenced him to seven years in prison and “to serve up to five (5) years mandatory post-release control” Mr. Jones attempted to appeal again, but we dismissed his appeal as untimely.

{¶4} He then filed a motion for sentencing with the trial court, arguing that his sentence was void because the court had failed to impose or excuse the mandatory fines required by Section 2925.11(E)(1)(a) of the Ohio Revised Code. He also argued that his sentence was void because the court had failed to state that his prison term was mandatory. The trial court denied his motion, and Mr. Jones has appealed.

MOTION FOR SENTENCING

{¶5} Mr. Jones’s sole assignment of error is that the trial court improperly denied his motion for sentencing. He has argued that his sentence is void because the trial court failed to impose a mandatory fine on him or to find him indigent. Additionally, he has argued that the trial court was required to sentence him to a mandatory prison term.

MANDATORY FINE

{¶6} Mr. Jones pleaded no contest to two counts of violating Section 2925.11(A) of the Ohio Revised Code by possessing drugs. The counts were first and third-degree felonies, and the trial court convicted him. Section 2925.11(E)(1)(a) provides that, “[i]f the violation [of Section 2925.11(A)] is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense . . . unless . . . the court determines that the offender is indigent.” In its sentencing entry, the trial court did not impose a fine and did not find Mr. Jones to be indigent.

{¶7} In *State v. Joseph*, 125 Ohio St. 3d 76, 2010-Ohio-954, the Ohio Supreme Court held that “a court errs in imposing court costs without so informing a defendant in court but that error does not void the defendant’s entire sentence.” *Id.* at ¶1. The Court concluded that the error did not render the sentence void, unlike an error in imposing post-release control, because court costs differed from post-release control in three significant ways: (1) they could be waived; (2) “[n]o other entity derives its jurisdiction from the court’s imposition of costs[;]” and (3) “costs are not punishment, but more akin to a civil judgment for money.” *Id.* at ¶18-20 (quoting *State v. Threatt*, 108 Ohio St. 3d 277, 2006-Ohio-905, at ¶15).

{¶8} Unlike court costs, the mandatory fine for a violation of Section 2925.11(A) of the Ohio Revised Code is a punishment, but it does share the other attributes that distinguish court costs from post-release control. As with the court costs in *Joseph*, the trial court is required by statute to impose the fine, but there exists a mechanism by which the fine may be waived. See R.C. 2929.18(B)(1). Further, failure to impose a mandatory fine does not affect the powers of other branches of government. Accordingly, while the trial court erred in not imposing a

mandatory fine, or making a finding of indigency, this error does not render Mr. Jones's sentences void.

MANDATORY PRISON TERM

{¶9} Mr. Jones has also argued that “[t]he trial court failed to regard the . . . statutory mandates when imposing [his] sentence” Specifically, he has mentioned that Section 2929.13(F) of the Ohio Revised Code required the trial court to sentence him to a mandatory prison term. The trial court sentenced him to serve “a stated term of seven (7) years in prison under Count 1 . . . ; three (3) years in prison under Count 2 . . . ; and six (6) months in jail under Count 3” The trial court ordered that all sentences be served concurrently.

{¶10} While Mr. Jones's argument is unclear, it is presumably that, because his sentencing entry does not include the word “mandatory” when describing his prison term, his sentence is void. He has not cited any authority supporting his position. We have previously noted that “the Ohio Supreme Court has applied its void-sentence analysis in limited circumstances[,] [and] [we] will not extend its reach without clear direction from the Supreme Court.” *State v. Culgan*, 9th Dist. No. 09CA0060-M, 2010-Ohio-2992, at ¶20. Mr. Jones pleaded no contest to first-and third-degree felony possession of drugs, both of which carried a mandatory prison term. R.C. 2925.11(C)(4). As the sentences were within the statutory ranges provided by Section 2929.14(A) of the Ohio Revised Code, and absent authority to the contrary, the absence of “mandatory” regarding Mr. Jones's prison terms for possession of drugs does not render his sentence void. Mr. Jones's assignment of error is overruled.

POST-RELEASE CONTROL

{¶11} Although Mr. Jones has not raised the issue in his brief, we note that his sentencing entry provides that he is subject to “up to five (5) years mandatory post-release

control” Mr. Jones was convicted of a first-degree felony and sentenced to prison. Section 2967.28(B)(1) of the Ohio Revised Code requires that he serve a mandatory five-year period of post-release control when he finishes his prison term, not a mandatory period “up to” five years. The trial court improperly imposed his post-release control at his most recent resentencing as it implied that his period of post-release control could be less than five years. See *State v. Whitehouse*, 9th Dist. No. 09CA009581, 2009-Ohio-6504, at ¶6.

{¶12} The Ohio Supreme Court recently held that, “[a]lthough the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence.” *State v. Fischer*, 128 Ohio St. 3d 92, 2010-Ohio-6238, at paragraph three of the syllabus. “[W]hen a judge fails to impose statutorily mandated postrelease control as part of a defendant’s sentence, that part of the sentence . . . is void and must be set aside.” *Id.* at ¶26 (emphasis omitted). Since Mr. Brown was sentenced after the effective date of Section 2929.19.1 of the Ohio Revised Code, Section 2929.19.1 provides the method for correcting his sentence. *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434, at ¶35.

CONCLUSION

{¶13} The trial court did not err in denying Mr. Jones’s motion for sentencing to the extent that motion related to parts of his sentence other than post-release control because those parts were not void. The trial court’s sentencing entry, however, did not properly impose post-release control, and we vacate that part. Accordingly, we affirm the judgment of the Wayne County Common Pleas Court in part, vacate it in part, and remand for proceedings consistent with Section 2929.19.1 of the Ohio Revised Code.

Judgment affirmed in part,
vacated in part,
and cause remanded.

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 Wayne, 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 both parties equally.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

DARIUS JONES, pro se, Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.