

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 10CA009819

Appellee

v.

REGINALD SMITH, JR.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 99CR053478

Appellant

DECISION AND JOURNAL ENTRY

Dated: January 31, 2011

WHITMORE, Judge.

{¶1} Defendant-Appellant, Reginald Smith, Jr., appeals from the sentencing entry correcting his judgment of conviction in the Lorain County Court of Common Pleas. This Court affirms in part and vacates in part.

I

{¶2} In August 1999, a jury found Smith guilty of one count of engaging in a pattern of corrupt activity, four counts of trafficking in cocaine, one count of permitting drug abuse, two counts of possession of drug paraphernalia, and possession of criminal tools. The trial court sentenced Smith to a total of nineteen years in prison. Smith appealed from his convictions, and this Court affirmed. *State v. Smith* (Jan. 17, 2001), 9th Dist. No. 99CA007451. On August 8, 2008, Smith filed a motion for resentencing, arguing that his sentencing entry failed to properly inform him that he was subject to a mandatory term of post-release control. The trial court agreed and scheduled the matter for resentencing on February 5, 2009. The record reveals that

counsel for the State and Smith appeared before the court on February 5, 2009, and agreed to a briefing schedule to address matters related to Smith's resentencing. Both parties timely submitted sentencing memoranda and reply briefs in response. On November 12, 2009, Smith filed a motion for hearing. The matter was scheduled for resentencing in January, which was ultimately rescheduled and took place on April 23, 2010.

{¶3} Following the hearing, the trial court resentenced Smith to a total of nineteen years in prison. Smith timely appealed, asserting four assignments of error for our review.

II

Assignment of Error Number One

"THE TRIAL COURT UNLAWFULLY SENTENCED MR. SMITH BEYOND THE 10-YEAR MAXIMUM FOR A 1ST DEGREE FELONY."

Assignment of Error Number Two

"THE TRIAL COURT IS REQUIRED, POST-FOSTER, TO MAKE THE STATUTORILY-MANDATED FINDINGS, SUPPORTED BY APPROPRIATE REASONS, JUSTIFYING THE IMPOSITION OF CONSECUTIVE SENTENCES."

Assignment of Error Number Three

"THE UNREASONABLE DELAY BETWEEN CONVICTION AND SENTENCING AND BETWEEN SENTENCE VACATION AND RESENTENCING DIVESTED THE TRIAL COURT OF JURISDICTION UNDER RULE 32(A) TO SENTENCE MR. SMITH."

Assignment of Error Number Four

"MR. SMITH IS ENTITLED TO A NEW SENTENCING HEARING BECAUSE HE WAS NOT AFFORDED AN OPPORTUNITY TO SPEAK AT HIS SENTENCING HEARING IN VIOLATION OF RULE 32(A)."

{¶4} In his first assignment of error, Smith argues that the trial court erred at his resentencing hearing by sentencing him to a period of incarceration that is longer than the maximum period permitted by statute for his conviction. In his second assignment of error,

Smith argues that the trial court erred by imposing consecutive sentences for multiple offenses following the Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In his third and fourth assignments of error, Smith argues the trial court violated his rights under Crim.R. 32(A) because of the lengthy delay before the court imposed a proper sentence upon him and because he was denied his right to allocution at his April 2009 resentencing.

{¶5} Recently, the Supreme Court addressed a trial court's authority to resentence a defendant where there has been improper post-release control notification at the time of sentencing. *State v. Fischer*, Slip Opinion No. 2010-Ohio-6238. There, the Supreme Court chronicled the recent line of cases in which it addressed void sentences stemming from a trial court's failure to properly impose post-release control and a trial court's need to resentence defendants in certain cases. *Id.* at ¶8-18. The Court acknowledged, however, that it had failed to properly address the scope and contours of a defendant's resentencing hearing in such circumstances or the defendant's ability to later challenge other matters unrelated to correcting his or her void sentence at the point of resentencing. *Id.* at ¶18, 26-27. Specifically, the Court noted that its holding in *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, which required the trial court conduct a de novo sentencing hearing in such cases, left these questions unanswered. *Id.* at ¶18, 27. Therefore, the Court clarified that under *Bezak*, "only the offending portion of [a] sentence is subject to review and correction" where "a defendant is convicted of or pleads guilty to one or more offenses and post[-]release control is not properly included in a sentence for a particular offense[.]" (Internal quotations omitted.) *Id.* at ¶27. The Court went further to modify the second sentence of the *Bezak* syllabus to specify that, "when an appellate court concludes that a sentence imposed by a trial court is in part void, only the portion that is void may be vacated or otherwise amended." *Id.* at ¶28. Accordingly, the *Fischer* Court held that

“[t]he new sentencing hearing to which an offender is entitled under *State v. Bezak* is limited to proper imposition of post[-]release control.” *Id.* at paragraph two of the syllabus.

{¶6} Much like the defendant in *Fischer*, Smith was sentenced in 1999, well before the self-correcting provisions of R.C. 2929.191 were enacted. *Fischer* at ¶2. Both Fischer and Smith timely appealed, and this Court affirmed their convictions on direct appeal. *Id.* at ¶2. Additionally, both sentences were final, appealable orders, at the time they were imposed. *Id.* at ¶36-39. Both of their sentences, however, lacked proper notification of post-release control, which led the trial court to hold resentencing hearings in each instance. *Id.* at ¶2. See, also, *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, paragraph one of the syllabus; *Fischer* at ¶55 (Lanzinger, J., dissenting). At the resentencing hearings for both Fischer and Smith, the trial court imposed the same sentence upon the defendant as was originally ordered, in addition to imposing the requisite term of post-release control based on the defendant’s offense. *Fischer* at ¶3.

{¶7} Consistent with the Supreme Court’s analysis in *Fischer*, however, Smith’s sentencing hearing should have been “limited to [the] proper imposition of post[-]release control” only. *Id.* at paragraph two of the syllabus. The trial court lacked the authority to conduct a de novo sentencing hearing in Smith’s case because “only the portion [of Smith’s sentence] that [was] void [could] be vacated or otherwise amended.” *Id.* at ¶28. That is, the trial court’s authority at resentencing was limited to the imposition of post-release control only, and it was without the authority to revisit Smith’s sentence in any manner otherwise. *Id.* at ¶28. Thus, we are unable to reach the merits of Smith’s assertions that the trial court failed to comply with Crim.R. 32(A) or that his sentence runs afoul of the sentencing statutes post-*Foster*, as the trial

court lacked the authority at resentencing to do anything other than correctly impose post-release control upon Smith. *Id.* at paragraph two of the syllabus.

{¶8} Based on the foregoing, we conclude that this Court is unable to address the merits of Smith's four assignments of error, as they all stem from the court's actions at resentencing that were unrelated to the imposition of post-release control. Smith has not challenged the trial court's imposition of post-release control upon resentencing. Thus, we affirm the trial court's judgment with respect to its imposition of a mandatory five-year term of post-release control. To the extent the trial court conducted a *de novo* sentencing hearing and reissued a sentence to Smith, its judgment in that respect is vacated.

III

{¶9} The judgment of the Lorain County Court of Common Pleas is vacated to the extent the court exceeded its authority and resentenced Smith. The trial court's decision to properly impose a mandatory five-year period of post-release control to Smith's sentence is affirmed.

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 Lorain, 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.

BETH WHITMORE
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

JACK W. BRADLEY, and BRIAN DARLING, Attorneys at Law, for Appellant.

DENNIS WILL, Prosecuting Attorney, and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for Appellee.