

STATE OF OHIO                    )  
  )ss:  
COUNTY OF SUMMIT            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.       25104

Appellee

v.

BERNARD JOHNSON

Appellant

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     CR 01 03 0714

DECISION AND JOURNAL ENTRY

Dated: February 2, 2011

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DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} After serving eight years of his fourteen-year prison sentence, Bernard Johnson unsuccessfully moved the trial court to re-sentence him. Due to an error in the imposition of post-release control, this Court vacated his sentence. On remand, the trial court imposed the same sentence, but corrected the post-release control problem. Mr. Johnson, acting pro se, has appealed the new sentence, arguing that the trial court lacked jurisdiction to sentence him eight years after his guilty plea and that the trial court’s journal entry incorrectly referred to the hearing as a re-sentencing hearing. This Court affirms because the trial court had jurisdiction to correct the void sentence and the trial court did not erroneously refer to the hearing as a re-sentencing hearing.

## BACKGROUND

{¶2} In July 2001, Mr. Johnson pleaded guilty to three counts of rape of a child under the age of thirteen, all first-degree felonies. The trial court sentenced him to ten years in prison on one count and a consecutive four years on the other two to be served concurrently with one another, for a total of fourteen years. Mr. Johnson appealed, and this Court affirmed. *State v. Johnson*, 9th Dist. No. 20708, 2002-Ohio-1108. In January 2002, while his direct appeal was pending, the trial court denied Mr. Johnson's petition for post-conviction relief.

{¶3} In August 2008, Mr. Johnson moved the trial court for re-sentencing and to allow him to withdraw his guilty plea, arguing that the trial court had failed to notify him that he was subject to a mandatory five-year term of post-release control. The trial court denied his motion, and he appealed. This Court held that his sentence was void because the trial court had failed to include a statutorily mandated term of post-release control. *State v. Johnson*, 9th Dist. No. 24536, 2009-Ohio-3188, at ¶8. This Court vacated his sentence and remanded the matter for the trial court to hold a hearing on Mr. Johnson's motion to withdraw his plea. *Id.*

{¶4} On September 30, 2009, when the trial court held a de novo sentencing hearing for Mr. Johnson, he was represented by a lawyer. On the record, at the beginning of the hearing, Mr. Johnson withdrew his motion to withdraw his guilty plea. The trial court then sentenced him, de novo, to an aggregate term of fourteen years in prison on the three rape charges. The sentences were journalized on November 2, 2009. In the journal entry, the trial court referred to the September 30 hearing as a "re-sentencing hearing."

## JURISDICTION: DELAYED SENTENCING

{¶5} Mr. Johnson's second assignment of error is that the trial court violated his due process and equal protection rights by failing to sentence him until more than eight years after

his guilty plea. According to Mr. Johnson, the trial court lacked jurisdiction to correct his void sentence eight years after his plea because, under Rule 32(A) of the Ohio Rules of Criminal Procedure, a trial court “shall” impose sentence “without unnecessary delay.” The State has argued that Mr. Johnson forfeited this issue by failing to raise it in the trial court. At the sentencing hearing in September 2009, the trial court asked Mr. Johnson whether he wished to have a hearing on his motion to withdraw his guilty plea. Mr. Johnson told the judge that he did not wish to have a hearing, but wished to withdraw the motion and proceed with sentencing. Mr. Johnson did not raise any objection at that time based on jurisdiction or a delay in sentencing.

{¶6} “An appellate court need not consider an error which a party complaining of the trial court’s judgment could have called, but did not call, to the trial court’s attention at a time when such error could have been avoided or corrected by the trial court.” *State v. Williams*, 51 Ohio St. 2d 112, paragraph one of the syllabus (1977). In this case, Mr. Johnson forfeited all but plain error by failing to raise this argument before the trial court issued the corrected sentence on September 30, 2009. *State v. Payne*, 114 Ohio St. 3d 502, 2007-Ohio-4642, at ¶23. Rule 52(B) of the Ohio Rules of Criminal Procedure permits appellate courts to take notice of plain errors, but such notice is to be taken “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Long*, 53 Ohio St. 2d 91, 97 (1978).

{¶7} Rule 32(A) of the Ohio Rules of Criminal Procedure provides that “[s]entence shall be imposed without unnecessary delay.” This Court has held that Criminal Rule 32(A) does not apply to cases involving a sentence correction after an initial sentence is found to be void due to a post-release control problem. *State v. Jones*, 9th Dist. No. 25032, 2010-Ohio-4455, at ¶9. Moreover, the Ohio Supreme Court has held that a trial court retains continuing

jurisdiction to correct a void sentence. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St. 3d 353, 2006-Ohio-5795, at ¶19 (citing *State v. Beasley*, 14 Ohio St. 3d 74, 75 (1984)).

{¶8} In this case, Mr. Johnson had served approximately eight years of a fourteen-year prison term when the trial court corrected his sentence. The trial court retained jurisdiction to correct the void sentence. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St. 3d 353, 2006-Ohio-5795, at ¶19 (citing *State v. Beasley*, 14 Ohio St. 3d 74, 75 (1984)). Therefore, Mr. Johnson’s second assignment of error is overruled.

#### RE-SENTENCING

{¶9} Mr. Johnson’s first assignment of error is that the trial court incorrectly referred to his September 30, 2009, sentencing hearing as a “re-sentencing” hearing. According to Mr. Johnson, that is a clerical error in the journal entry that must be corrected under Rule 36 of the Ohio Rules of Criminal Procedure. Although he moved the trial court to correct the entry, the court did not rule on the motion before Mr. Johnson appealed. Mr. Johnson’s assignment of error does not include an argument regarding how the trial court’s choice of words caused him any prejudice.

{¶10} Even if the journal entry contained a clerical error, Mr. Johnson’s failure to indicate how he was prejudiced by the error would be fatal to his claim since this Court is required to disregard “[a]ny error, defect, irregularity, or variance which does not affect substantial rights . . . .” Crim. R. 52(A). This Court, however, does not believe that the trial court incorrectly referred to the September 30, 2009, hearing as a re-sentencing hearing.

{¶11} The Ohio Supreme Court has recently held that even those offenders sentenced before the effective date of Section 2929.19.1 of the Ohio Revised Code are not entitled to a de novo sentencing hearing due to a post-release control error. In *State v. Fischer*, the Supreme

Court held that, if a post-release control error occurred in sentencing, only the part of the sentence affected by the error may be vacated or otherwise amended and a new sentencing hearing is limited to proper imposition of post-release control. *State v. Fischer*, \_\_\_ Ohio St. 3d \_\_\_, 2010-Ohio-6238, at ¶28-29, 36, partially overruling *State v. Bezak*, 114 Ohio St. 3d 94, 2007-Ohio-3250. As the trial court correctly referred to the hearing as a re-sentencing hearing, Mr. Johnson's first assignment of error is overruled.

### CONCLUSION

{¶12} The trial court had jurisdiction to re-sentence Mr. Johnson after this Court determined that his sentence was void. The trial court correctly referred to the subsequent hearing as a re-sentencing hearing. Mr. Johnson's assignments of error are overruled. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

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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.

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CLAIR E. DICKINSON  
FOR THE COURT

MOORE, J.  
BELFANCE, J.  
CONCUR

APPEARANCES:

BERNARD JOHNSON, pro se, appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellee.