

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 25085

Appellee

v.

DUANE P. GIBSON

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 00 03 0517

Appellant

DECISION AND JOURNAL ENTRY

Dated: February 9, 2011

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Duane Gibson pleaded guilty to aggravated arson and burglary. The trial court sentenced him to 14 years in prison, and this Court affirmed his convictions on appeal. In 2009, the court ordered Mr. Gibson to be returned for resentencing because it had not properly imposed post-release control. Before the resentencing hearing, Mr. Gibson moved to withdraw his plea. At the hearing, the trial court received evidence from Mr. Gibson regarding his motion to withdraw his plea, but denied his motion. It resentenced him to 14 years in prison. Mr. Gibson has appealed, arguing that the trial court improperly exercised its discretion when it denied his motion to withdraw his plea, that it incorrectly imposed non-minimum and consecutive sentences for his offenses, and that his lawyer was ineffective for not raising due process and ex post facto challenges at the resentencing hearing. We affirm the denial of Mr. Gibson's motion to withdraw because the trial court did not have jurisdiction to consider it. We vacate the trial

court's resentencing entry to the extent it addressed aspects of Mr. Gibson's sentence other than post-release control.

FIRST APPEAL

{¶2} Mr. Gibson's first assignment of error is that, because the trial court did not properly impose post-release control in his original sentence, his sentence was void and his direct appeal from that sentence was invalid. He has argued that, because this is his first appeal from a valid sentence, he should be able to raise any and all errors in his brief.

{¶3} In *State v. Bezak*, 114 Ohio St. 3d 94, 2007-Ohio-3250, the Ohio Supreme Court held that, "[w]hen a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense." *Id.* at syllabus. Following the Supreme Court's logic, this Court subsequently determined that, "regardless of whether a defendant has already appealed his conviction, if the order from which the first appeal was taken is not final and appealable, he is entitled to a new sentencing entry which can itself be appealed." *State v. Harmon*, 9th Dist. No. 24495, 2009-Ohio-4512, at ¶6. The Ohio Supreme Court, however, has recently modified its holding in *Bezak*. See *State v. Fischer*, ___ Ohio St. 3d ___, 2010-Ohio-6238 at ¶27. In *Fischer*, the Supreme Court clarified that, "when 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. "[R]es judicata still applies to the other aspects of the merits of [the] conviction, including the determination of guilt and the lawful elements of the ensuing sentence." *Id.* at paragraph three of the syllabus. The only issues a defendant can raise on appeal after the resentencing hearing to correctly impose post-release control are "issues arising

at the resentencing hearing.” *Id.* at paragraph four of the syllabus. Mr. Gibson’s first assignment of error is overruled.

MOTION TO WITHDRAW PLEA

{¶4} Mr. Gibson’s second assignment of error is that the trial court exercised improper discretion when it denied his motion to withdraw his guilty plea. Under Rule 32.1 of the Ohio Rules of Criminal Procedure, “[a] motion to withdraw a plea of guilty . . . may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.”

{¶5} The Ohio Supreme Court has held that a trial court does not have jurisdiction to consider a motion to withdraw a guilty plea once an appeal has been taken and the defendant’s conviction has been affirmed. *State, ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St. 2d 94, 97 (1978). According to the Supreme Court, it is inappropriate for a trial court to consider a motion to withdraw a guilty plea after a defendant’s conviction has been affirmed because permitting the withdrawal would be inconsistent with the judgment of the appellate court. *Id.*

{¶6} This Court affirmed Mr. Gibson’s convictions in April 2001. Under *State v. Fischer*, ___ Ohio St. 3d ___, 2010-Ohio-6238, that opinion has res judicata effect. The trial court, therefore, did not have jurisdiction to consider Mr. Gibson’s motion to withdraw his guilty plea. *State, ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St. 2d 94, 97 (1978). Mr. Gibson’s second assignment of error is overruled.

UNAUTHORIZED SENTENCE

{¶7} Mr. Gibson’s third assignment of error is that the trial court incorrectly imposed non-minimum and consecutive sentences when it resentenced him, in violation of the due

process and ex post facto clauses of the United States Constitution. His fourth assignment of error is that his trial counsel was ineffective for not objecting to the trial court's retroactive application of the remedy in *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856 at the resentencing hearing.

{¶8} Initially, we must consider whether the trial court had authority to resentence Mr. Gibson. At the time the trial court ordered Mr. Gibson to be returned to court for resentencing, its decision was correct under *State v. Bezak*, 114 Ohio St. 3d 94, 2007-Ohio-3250, at syllabus. In *State v. Fischer*, ___ Ohio St. 3d ___, 2010-Ohio-6238, however, the Ohio Supreme Court overruled part of *Bezak*. *Id.* at ¶36. Under *Fischer*, the trial court only had the authority to hold a resentencing hearing on the void part of Mr. Gibson's sentence, which was the part regarding post-release control. *Id.* at paragraph two of the syllabus, ¶36. The trial court did not have authority to change the length of Mr. Gibson's sentence, or modify any other aspects of the sentence except post-release control. *Id.* at paragraph two of the syllabus, ¶28, ¶36.

{¶9} Because the trial court did not have authority to modify Mr. Gibson's sentence except to properly impose post-release control, Mr. Gibson's arguments that *Foster* can not be applied retroactively and that his lawyer was ineffective for not objecting on that basis are without merit. Mr. Gibson's third and fourth assignments of error are overruled. Because the trial court exceeded its authority when it attempted to resentence Mr. Gibson on aspects of his sentence that were not void, those parts of the resentencing entry that addressed anything other than post-release control must be vacated.

CONCLUSION

{¶10} The trial court correctly denied Mr. Gibson's motion to withdraw his guilty plea. It incorrectly reconsidered aspects of Mr. Gibson's sentence that were not void. The judgment of the Summit County Common Pleas Court is affirmed in part and 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.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
MOORE, J.
CONCUR

APPEARANCES:

RONALD T. GATTS, attorney at law, for appellant.

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