

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 25151

Appellee

v.

SAMUEL D. HOFFMEYER

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 05 09 3205(B)

DECISION AND JOURNAL ENTRY

Dated: March 2, 2011

BELFANCE, Presiding Judge.

{¶1} Appellant, Samuel D. Hoffmeyer, has appealed from the judgment of the Summit County Court of Common Pleas. For the reasons that follow, this Court affirms the judgment.

I.

{¶2} Samuel D. Hoffmeyer was convicted by a jury of one count of felonious assault on March 2, 2007. A month later, he was sentenced by the trial court to five years in prison. This Court upheld Mr. Hoffmeyer's conviction. *State v. Hoffmeyer*, 9th Dist. No. 23712, 2008-Ohio-2311, at ¶36.

{¶3} On September 8, 2009, Mr. Hoffmeyer, pro se, filed a motion to vacate his sentencing entry due to erroneous notification of post-release control. The trial court conducted a de novo sentencing hearing. On November 23, 2009, the trial court issued an entry in which it sentenced Mr. Hoffmeyer to five years in prison for his felonious assault conviction and properly informed him of post-release control.

{¶4} Mr. Hoffmeyer has appealed from the trial court's November 23, 2009 resentencing entry. He argues in his first assignment of error that because his original sentence was void due to a post-release control error, the instant appeal is his first appeal. Thus, Mr. Hoffmeyer contends he is permitted to raise issues relating to his conviction, which include the same issues this Court addressed in Mr. Hoffmeyer's prior appeal. Mr. Hoffmeyer's remaining assignments of error relate to alleged defects that occurred during his jury trial held in 2007.

II.

{¶5} Before addressing Mr. Hoffmeyer's assignments of error, we address a jurisdictional issue related to the trial court's November 2009 entry. Recently in *State v. Fischer*, Slip Opinion No. 2010-Ohio-6238, the Supreme Court of Ohio held that when the trial court must revisit a conviction to properly impose post-release control, the court's jurisdiction is limited to post-release control. *Fischer* at paragraph two of the syllabus. Thus, the trial court is without jurisdiction to revisit any other aspects of the offender's sentence. *Id.* at ¶28; *State v. Gibson*, 9th Dist. No. 25085, 2011-Ohio-566, at ¶8.

{¶6} In the case at bar, the trial court conducted a de novo sentencing hearing when Mr. Hoffmeyer appeared before the court to have the post-release control error corrected. As the trial court was without jurisdiction to do so, we must vacate the portions of the November 2009 order that do not relate to post-release control. *Gibson* at ¶9. The sentence originally imposed in April 2007, except for the improper imposition of post-release control, remains effective. *Id.*

ASSIGNMENT OF ERROR I

“AS MR. HOFFMEYER’S ORIGINAL SENTENCE WAS VOID, HIS INITIAL DIRECT APPEAL WAS ALSO INVALID. THE INSTANT APPEAL IS MR. HOFFMEYER’S FIRST DIRECT APPEAL FROM A VALID SENTENCE.”

{¶7} In his initial assignment of error, Mr. Hoffmeyer asserts that his prior appeal is a nullity because his original sentence was void due to an error in post-release control notification, thus, this is his first direct appeal as of right. Mr. Hoffmeyer's assignment of error fails to identify any error allegedly committed by the trial court. Accordingly, Mr. Hoffmeyer's first assignment of error is overruled. See *State v. Cook*, 9th Dist. No. 25276, 2010-Ohio-6524, at ¶2.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED [MR. HOFFMEYER'S] MOTION FOR JUDGMENT OF ACQUITTAL UNDER CRIM.R. 29."

ASSIGNMENT OF ERROR III

"[MR. HOFFMEYER'S] CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED THE BAT ALLEGEDLY USED BY MR. HOFFMEYER AGAINST [THE ALLEGED VICTIM] INTO EVIDENCE."

ASSIGNMENT OF ERROR V

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING [MR. HOFFMEYER'S] MOTION FOR A MISTRIAL DUE TO PROSECUTORIAL MISCONDUCT."

ASSIGNMENT OF ERROR VI

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING [MR. HOFFMEYER'S] INQUIRY INTO PRIOR VIOLENCE CONVICTIONS OF [THE ALLEGED VICTIM]."

ASSIGNMENT OF ERROR VII

"TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE DEFICIENTLY FAILED TO INVESTIGATE AND INTERVIEW STATE WITNESS [], WHO TESTIFIED THAT HE SAW MR. HOFFMEYER STRIKE [THE] ALLEGED VICTIM IN THE FACE WITH A BASEBALL BAT. TRIAL COUNSEL'S DEFICIENT PERFORMANCE DENIED MR. HOFFMEYER THE ABILITY TO ENGAGE IN PLEA

NEGOTIATIONS WITH FULL KNOWLEDGE OF THE EVIDENCE
AGAINST HIM IN VIOLATION OF HIS SIXTH AND FOURTEENTH
AMENDMENTS.”

{¶8} In *Fischer*, supra, the Supreme Court also considered the following issue: “[I]s a direct appeal from a resentencing on a remand from an appeal finding that a sentence was void the ‘first’ direct appeal as of right because the first appeal was a ‘nullity’?” *Fischer* at ¶32. The Supreme Court answered that question in the negative and determined that if a defendant has “already had the benefit of one direct appeal, [he cannot] raise any and all claims of error in a second, successive appeal[.]” id. at ¶¶32-33, errors are limited to those related to the imposition of post-release control. Id. at paragraph four of the syllabus.

{¶9} Mr. Hoffmeyer does not argue that the court committed reversible error with respect to his resentencing. Instead, Mr. Hoffmeyer’s remaining assignments of error raise issues that either were raised or could have been raised in his prior appeal before this Court. See, generally, *Hoffmeyer*, supra. As these issues are barred by res judicata, we overrule Mr. Hoffmeyer’s second through seventh assignments of error. *Fischer* at paragraphs three and four of the syllabus; *Cook* at ¶4.

III.

{¶10} Mr. Hoffmeyer’s assigned errors are overruled. The judgment of the Summit County Court of Common Pleas 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.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR

APPEARANCES:

RHONDA L. KOTNIK, Attorney at Law, for Appellant.

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