

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-991
v.	:	(C.P.C. No. 01CR-06-3742)
	:	
Richard Cochrane,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 11, 2012

Ron O'Brien, Prosecuting Attorney, and *Michael P. Walton*,
for appellee.

Shaw & Miller, and *Mark J. Miller*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendant-appellant, Richard Cochrane ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas imposing a sentence on appellant's conviction for murder pursuant to a de novo resentencing hearing. Because we conclude that the claims in the present appeal are barred by res judicata, we affirm.

{¶ 2} In November 2001, appellant was convicted of the murder of Heather Stambaugh. The trial court sentenced appellant to a term of imprisonment of 15 years to life. The trial court also advised appellant that, if he was released from prison, he would be subject to a five-year term of postrelease control. Appellant appealed his conviction, and this court affirmed the conviction. *State v. Cochrane*, 10th Dist. No. 01AP-1440, 2002-Ohio-4733.

{¶ 3} In June 2011, appellant filed a motion for a de novo resentencing hearing, arguing that the trial court improperly included a term of postrelease control in his original sentence. The trial court conducted a de novo resentencing hearing and entered a judgment imposing a term of imprisonment of 15 years to life and providing that appellant was not subject to postrelease control.

{¶ 4} Appellant appeals from the common pleas court's judgment, asserting three errors for this court's review:

1. Appellant is not barred from bringing this appeal by either *res judicata* or the Ohio Supreme Court's decision in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332.
2. The trial court violated Appellant's due process rights guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution and thus denied Appellant his right to a fair trial by requiring him to remain shackled throughout trial without justification.
3. The trial court abused its discretion in denying Appellant's motion for a mistrial based on the State's failure to disclose a letter written by a witness to the prosecuting attorney.

{¶ 5} Appellant's purported first assignment of error is not a proper assignment of error because it does not relate to any alleged error committed by the trial court. "An assignment of error is designed to clearly state the claim of error that the appellant believes took place at the trial level and state the portions of the record where the appellant believes the error took place." *Jenkins v. Jenkins*, 10th Dist. No. 06AP-652, 2007-Ohio-422, ¶ 7. *See also State v. Brown*, 9th Dist. No. 25077, 2010-Ohio-4453, ¶ 9 ("The purpose of an assignment of error is to focus the attention of an appellate court upon a potential error that occurred at the trial level."). However, in the purported first assignment of error, appellant raises the issues that are dispositive of the present appeal. Accordingly, we will address these issues together with appellant's second and third assignments of error.

{¶ 6} In appellant's second assignment of error, he asserts that the trial court violated his rights to due process by requiring him to remain shackled throughout the trial without proper justification. Similarly, in his third assignment of error, appellant claims

that the trial court abused its discretion by denying his motion for a mistrial based on the state's alleged failure to disclose a letter written by one of the testifying witnesses to the prosecuting attorney. It is undisputed that both of these assignments of error relate to appellant's original criminal trial conducted in November 2001. Appellant took a direct appeal from his conviction at that trial. In the direct appeal of his conviction, appellant asserted that his conviction was based on insufficient evidence and was against the manifest weight of the evidence. *Cochrane* at ¶ 3-4. He also claimed prosecutorial misconduct during discovery and that the trial court abused its discretion by admitting certain evidence. *Id.* at ¶ 5-6. Appellant did not raise any issues related to the use of shackles during his trial or the state's alleged failure to disclose the letter written by a testifying witness. This court overruled the assignments of error presented in appellant's direct appeal and affirmed his conviction. *Id.* at ¶ 28.

{¶ 7} "Pursuant to the doctrine of res judicata, a final judgment of conviction precludes a defendant from raising and litigating in any proceeding, except a direct appeal from that judgment, any defense or claimed lack of due process that the defendant raised or could have raised on direct appeal from his conviction." *State v. Slager*, 10th Dist. No. 11AP-794, 2012-Ohio-3584, ¶ 11, citing *State v. Szefcyk*, 77 Ohio St.3d 93 (1996), syllabus. See also *State v. Jama*, 10th Dist. No. 11AP-210, 2012-Ohio-2466, ¶ 44 ("In Ohio, res judicata bars consideration of issues that could have been raised on direct appeal."). The issues appellant raises in his second and third assignments of error relate to events that occurred during his original trial, which he failed to assert in his direct appeal from the conviction following that trial. Because appellant could have, but did not, raise these issues in his direct appeal, they are barred by res judicata.

{¶ 8} Appellant seeks to avoid the effect of res judicata through the arguments presented in his purported first assignment of error. He asserts that the present appeal is not barred by res judicata because the trial court erred by imposing a five-year postrelease control period as part of his original sentence. Appellant argues that the trial court's original sentence was void due to this error and that the original sentencing order was not a final, appealable order. Thus, appellant argues in effect that the present appeal should be treated as his first direct appeal.

{¶ 9} Appellant was convicted of murder, an unclassified felony to which the postrelease control statute does not apply. *See State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶ 36. However, as noted, the trial court imposed a five-year term of postrelease control as part of appellant's sentence. Due to this error, the trial court granted appellant's request for a de novo resentencing hearing and entered a judgment imposing the same prison term but removing the reference to postrelease control that was contained in the original sentencing entry.

{¶ 10} The Supreme Court of Ohio has wrestled with the validity and application of the postrelease control statute in a series of cases, beginning with *Woods v. Telb*, 89 Ohio St.3d 504 (2000). Many of these cases addressed a trial court's failure to impose a required term of postrelease control. *See, e.g., State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, overruled in part by *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 36. In *Fischer*, the court clarified this line of cases, holding that "when a judge fails to impose a statutorily mandated postrelease control as part of a defendant's sentence, that *part* of the sentence is void and must be set aside." (Emphasis sic.) *Fischer* at ¶ 26. Accordingly, "the new sentencing hearing to which an offender is entitled * * * is limited to proper imposition of postrelease control." *Id.* at ¶ 29. Further, the court held that a direct appeal from a resentencing order is *not* considered a first appeal as of right. *Id.* at ¶ 5. Thus, while a sentence that does not include a statutorily mandated term of postrelease control is not precluded from appellate review by res judicata, "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." *Id.* at ¶ 1.

{¶ 11} Appellant argues that *Fischer* only applies in cases where a trial court fails to impose a statutorily mandated term of postrelease control, not in cases such as this appeal, where a trial court errs by imposing postrelease control without statutory authorization. It is true that the *Fischer* court stated that its decision was limited to cases in which a court did not properly impose a statutorily mandated period of postrelease control. *Id.* at ¶ 31. However, applying the reasoning in *Fischer*, this court has previously ruled that erroneous inclusion of postrelease-control language in a sentencing entry does not render the entire sentence void and that a de novo resentencing hearing is not

required to correct the error. *State v. Silguero*, 10th Dist. No. 11AP-274, 2011-Ohio-6293, ¶ 8. In *Silguero*, the defendant had been convicted of murder and kidnapping, and this court affirmed his convictions on direct appeal. *Id.* at ¶ 2-3. Several years later, the defendant filed a motion for a de novo sentencing hearing, arguing that his sentence was void because it improperly included language referring to postrelease control. *Id.* at ¶ 4-5. This court affirmed the trial court's denial of the motion for a de novo sentencing hearing, concluding that "[p]ursuant to *Fischer*, and also [*State v. Evans*, 8th Dist. No. 95692, 2011-Ohio-2153] and [*State v. Lawrence*, 2d Dist. No. 24513, 2011-Ohio-5813], it is clear that [inclusion of postrelease control in a sentence after conviction of the unclassified felony of murder] does not render appellant's entire sentence void, nor does it require a de novo sentencing hearing." *Id.* at ¶ 16.

{¶ 12} In this case, unlike *Silguero*, the trial court granted appellant's motion for a de novo resentencing hearing. However, under *Fischer* and *Silguero*, the only portion of the original sentence that was void was the reference to postrelease control. The fact that the trial court conducted a de novo resentencing hearing does not render void the remaining portions of the original sentence and does not eliminate the res judicata effect arising from appellant's direct appeal from the original conviction and sentence. Therefore, because appellant's second and third assignments of error assert errors that appellant could have raised in his original direct appeal, they are barred by res judicata.

{¶ 13} Accordingly, we overrule appellant's purported first assignment of error because it is not a proper assignment of error and is without merit. We overrule appellant's second and third assignments of error because they are barred by res judicata.

{¶ 14} For the foregoing reasons, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
