

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-10-1121

Appellee

Trial Court No. CR0200801976

v.

Kevin Baker

**DECISION AND JUDGMENT**

Appellant

Decided: February 18, 2011

\* \* \* \* \*

Julia R. Bates, Lucas County Prosecuting Attorney, and  
Kevin A. Pituch, Assistant Prosecuting Attorney, for appellee.

Eric Allen Marks, for appellant.

\* \* \* \* \*

HANDWORK, J.

{¶1} This case comes before the court on appeal from a judgment of the Lucas County Court of Common Pleas. In December 2008, appellant, Kevin Baker, pled no contest to one count of attempted trafficking in cocaine in violation of R.C. 2903.02 and 2925.03(A)(1) and (C)(4)(g), a felony of the second degree. At his change of plea

hearing, appellant was provided with written notice of the fact that he would be subject to a period of postrelease control of "up to 3 years." In addition, the trial court verbally informed Baker that when he was released from prison he would be placed on postrelease control for a maximum of three years.

{¶2} On January 23, 2009, the court sentenced appellant to a mandatory three years in prison, imposed a mandatory fine in the amount of \$7,500, ordered Baker to pay the costs of prosecution, and ordered the forfeiture of \$89,621. Appellant also signed a document notifying him of the fact that the parole board "will/may" supervise him during "a 3/5 term of postrelease control under R.C. 2967.28." Noted at the end of this document under appellant's signature is the following:

{¶3} "5 year mandatory postrelease control[:]

{¶4} "Felony of the 1st or 2nd degree

{¶5} "Felony sex offense

{¶6} Felony of the 3rd degree in the commission of which the offender caused or threatened to cause physical harm to a person."

{¶7} Subsequently, appellant filed a pro se motion asserting that his sentence was void because, at his sentencing hearing, the trial court failed to inform him, either verbally or in writing, of the fact that he is subject to a mandatory three year, rather than a five year, period of postrelease control. Appellant therefore asked the court to vacate its sentence and to hold a new sentencing hearing.

{¶8} In January 2010, appellant also submitted a motion to withdraw his no contest plea. He argued that due to the fact that trial court failed to inform him of a mandatory period of postrelease control, his sentence was void; therefore, his motion to withdraw his plea was a presentence motion that should be liberally granted.

{¶9} On March 31, 2010, the trial court entered its judgment on appellant's motions, finding that, pursuant to *State v. Singleton*, 124 Oho St.3d 173, 2004-Ohio-6434, appellant's entire sentence was not void; therefore, Baker was not entitled to a de novo sentencing hearing. Based upon the foregoing, the common pleas judge denied appellant's motion to withdraw his guilty plea on the basis that it was not a presentence motion. Baker appeals these decisions and maintains that the following errors occurred in the proceedings below:

{¶10} "THE TRIAL COURT ERRED [sic] DENYING APPELLANT A DE NOVO SENTENCING HEARING.

{¶11} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO WITHDRAW HIS NO CONTEST PLEA WITHOUT A HEARING."

{¶12} Appellant argues that the holding in *Singleton* relied upon by the trial court in finding that he was not entitled to a de novo sentencing hearing is dicta. We disagree. In *Singleton*, at paragraph two of the syllabus, a plurality of the justices on the court held:

{¶13} "For criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191<sup>1</sup>."

{¶14} The Ohio Supreme Court followed *Singleton* in at least three other recent cases. See *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, ¶ 69 (holding that under *Singleton*, the defendant, who was resentenced after the effective date of the statute, was subject to resentencing under R.C. 2929.191); *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶ 214 (finding that the defendant, who was sentenced on the effective date of R.C. 2929.191, must be resentenced pursuant to that statute); *State v. Fuller*, 124 Ohio St.3d 543, 2010-Ohio-726 (reversing a judgment of the Second District Court of Appeals on the authority of *Singleton*). See, also, *State v. Fischer*, \_\_\_ Ohio St.3d \_\_\_, 2020-Ohio-6238, ¶ 26 (only the postrelease control aspect of the sentence is void and must be set aside).

{¶15} Accordingly, we find the law set forth by the Ohio Supreme Court in paragraph two of the syllabus in *Singleton* is not dictum. Consequently, because appellant was sentenced after the effective date of R.C. 2929.191, the trial court did not err in finding that appellant was not entitled to a de novo sentencing hearing. Rather, the trial judge correctly determined that Baker should be resentenced pursuant to the process set forth R.C. 2929.191. Appellant's first assignment of error is found not well-taken.

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<sup>1</sup>Under R.C. 2929.191, the remedial procedure includes a hearing limited to the imposition of postrelease control and a corrected judgment entry.

{¶16} Appellant's second assignment of error argues that because he has not been properly sentenced, the trial court erred in finding that his motion to withdraw his no contest plea was not a presentence motion. As stated above, the Ohio Supreme Court determined that, in cases such as this, only the postrelease portion of a criminal defendant's sentence is void; the sentence itself remains valid. Id. at ¶ 66. Thus, the trial court did not err in finding that appellant's motion to withdraw his guilty plea was not a presentence motion, and appellant's second assignment of error is found not well-taken. Based upon our disposition of appellant's first assignment of error, appellant's second assignment of error lacks merit and is, hereby, found not well-taken.

{¶17} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.