

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

State of Ohio

Court of Appeals No. S-10-051

Appellee

Trial Court No. 05 CR 641

v.

Ronald E. Hintz

DECISION AND JUDGMENT

Appellant

Decided: November 18, 2011

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Angela Wilson Miller, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the October 18, 2010 judgment of the Sandusky County Court of Common Pleas, which denied the motion of appellant, Ronald E. Hintz, to withdraw his no contest plea and to vacate his sentence. Upon consideration of the

assignments of error, we affirm in part and reverse in part the decision of the lower court.

Appellant asserts the following assignments of error on appeal:

{¶ 2} "ASSIGNMENT OF ERROR I

{¶ 3} "The trial court erred in denying Mr. Hintz's motion to withdraw his no contest plea. A plea that is based on misinformation concerning post release control is not knowing, voluntary and intelligent as the defendant does not understand the maximum sentence and violates the Fifth and Fourteenth Amendments of the United States Constitution, Sections 10 and 16 of the Ohio Constitution and Crim.R. 11(C)(2).

{¶ 4} "ASSIGNMENT OF ERROR II

{¶ 5} "The trial court erred when it ordered Mr. Hintz to pay court-appointed counsel fees without first determining his ability to pay these costs."

{¶ 6} Appellant was indicted in a multi-count indictment in 2005 and entered a plea of no contest in 2006 to the charge of involuntary manslaughter. The plea agreement and the court both advised appellant that if the court imposed a prison term, appellant was also " * * * subject to a period of Post Release Control for *up to 5 years*" after his release from imprisonment. (Emphasis added.) The trial court accepted appellant's no contest plea and sentenced appellant to a nine-year term of imprisonment.

{¶ 7} Appellant sought an appeal of the judgment of conviction and sentencing challenging the denial of appellant's motion to suppress. The judgment was affirmed in 2007. On March 5, 2010, appellant moved to vacate his sentence on the ground that the trial court had stated at the time of sentencing that appellant could be sentenced "up to"

five years of postrelease control when, in fact, he was subject to a mandatory five-year term of postrelease control. Appellant also moved in September 2010 to withdraw his guilty plea on the ground that his plea was not knowingly, voluntarily, and intelligently made because he was not notified of the mandatory term of postrelease control and was not fully advised of his right to compulsory process.

{¶ 8} Following a hearing pursuant to R.C. 2929.191(C), the trial court determined that the trial court had used erroneous language regarding the postrelease control sanction. The court re-advised appellant of the correct sanction and corrected the sentencing judgment. The court went on to resentence appellant to a nine-year term of imprisonment. The court also found that appellant "* * * has, or may reasonably be expected to have in the future, the means to reimburse Sandusky County for the fees and expenses." Therefore, the court ordered appellant to pay the costs of prosecution and for court appointed counsel pursuant to R.C. 2941.51(D).

{¶ 9} With respect to the motion to withdraw his plea, appellant stated that he was innocent and had only pled because the state threatened him with a 25-year sentence. The court found that: the trial court had substantially complied with Crim.R. 11; appellant had failed to assert any claim of coercion in his first appeal; the "up to five years" language at least put appellant on notice that he could be subject to postrelease control for five years; the extensive length of time since the crime occurred would make retrial difficult; and the entire issue could be barred under the doctrine of res judicata. Therefore, the court denied the motion to withdraw the plea.

{¶ 10} Appellant then sought an appeal from the October 18, 2010 judgment to this court. On appeal, appellant first argues that the trial court erred in denying appellant's motion to withdraw based upon the error in advising appellant of the five-year term of mandatory postrelease control.

{¶ 11} In the case before us, the trial court addressed the error in accepting appellant's plea and resentenced appellant to correct the error. However, appellant asserts that the failure to give a correct recitation of the penalty appellant faced affected the validity of his plea.

{¶ 12} We cannot address the merits of appellant's argument, however, because appellant is barred from asserting this claim under the doctrine of res judicata. This issue could have been raised on direct appeal and, therefore, is barred from being raised in a subsequent proceeding. *State v. Perry* (1967), 10 Ohio St.2d 175, at paragraphs seven and nine of the syllabus. Even though the doctrine cannot bar review of the legality of the sentence where a court allegedly failed to advise the defendant of mandatory postrelease control, the doctrine still applies to other aspects of the merits of the conviction. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 38-40. Appellant's first assignment of error is not well-taken.

{¶ 13} In his second assignment of error, appellant argues that the trial court erred when it ordered appellant to pay court-appointed counsel fees without first determining whether appellant had the ability to pay the costs. The state concedes that the trial court failed to make this preliminary inquiry.

{¶ 14} We need not reach this issue either because the trial court erred by imposing a new sentence in this case. Since the original sentence was imposed prior to July 11, 2006, the effective date of R.C. 2929.191, the statute is not applicable. The trial court erred in correcting its sentencing judgment entry in accordance with the statutory provisions. Instead, the trial court should have conduct a limited de novo sentencing hearing to properly impose the sanction of postrelease control. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, paragraph one of the syllabus, and *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, as modified by *State v. Fischer*, 128 Ohio St. 3d 92, 2010-Ohio-6238, paragraph two of the syllabus. The trial court exceeded its authority when it conducted a complete resentencing. *State v. Stallworth*, 9th Dist. C.A. No. 25461, 2011-Ohio-4492, ¶ 35, and *State v. Powell*, 9th Dist. No. 25453, 2011-Ohio-4935, ¶ 5. Therefore, that part of the judgment which imposed additional sanctions beyond the imposition of postrelease control is a nullity. Appellant's second assignment of error is rendered moot.

{¶ 15} Having found that the trial court did not commit error prejudicial to appellant in part, the judgment of the Sandusky County Court of Common Pleas is affirmed in part and vacated in part. That part of the judgment denying appellant's motion to withdraw his plea is affirmed. That portion of the judgment which resentenced appellant beyond advising him of the mandatory five-year term of postrelease control and specifically imposed further sanctions is vacated as a nullity. Appellee is ordered to pay

the court costs of this appeal pursuant to App.R. 24. The clerk is ordered to serve all parties with notice of this decision.

JUDGMENT AFFIRMED, IN PART,
AND VACATED, IN PART.

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

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, 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>.