

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

State of Ohio

Court of Appeals No. S-10-022

Appellee

Trial Court No. 06 CR 948

v.

Travis J. Tucker

DECISION AND JUDGMENT

Appellant

Decided: February 18, 2011

* * * * *

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

Loretta A. Riddle, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Travis J. Tucker, appellant, appeals a judgment of the Sandusky County Court of Common Pleas resentencing him to correct sentencing errors as to postrelease control. The original sentencing judgment was issued on November 29, 2007.

{¶ 2} Tucker pled guilty to the offense of attempted possession of crack cocaine, a violation of R.C. 2925.11(A)(C)(4)(e) and 2923.02 and a second degree felony on October 23, 2007, in the Sandusky County Court of Common Pleas and was convicted of

the offense. In a judgment filed on November 29, 2007, the trial court sentenced appellant to serve a three year term of imprisonment, to pay a \$7,500 fine, and to pay costs. The court also ordered that appellant's driver's license be suspended for three years. The trial court provided notice to appellant of postrelease control at the time of plea, at the sentencing hearing and in the sentencing judgment.

{¶ 3} On November 12, 2009, appellant filed a "Motion for Sentencing pursuant to the provisions of *State v. Bezak*, 114 Ohio St.3d 94 * * *" with the trial court. Appellant asserted that the November 29, 2007 sentencing judgment was void due to errors as to postrelease control. The trial court appointed counsel for appellant and set the matter for hearing. The hearing proceeded on April 5, 2010. Appellant attended the hearing, with counsel. The state did not oppose the motion to resentence.

{¶ 4} The trial court conducted the hearing pursuant to R.C. 2929.191(C) and limited the hearing to the issue of postrelease control alone. At the hearing the trial court notified appellant that his sentence included a mandatory three year period of postrelease control to begin upon his release from prison upon completing his prison sentence. The court also advised appellant of the penalties that could be imposed upon violation of postrelease control.

{¶ 5} The trial court issued a corrected sentencing judgment on April 5, 2010, with respect to postrelease control. At the time of the hearing and the filing of the

corrected sentencing judgment, appellant remained in custody. He had not completed serving his prison sentence under the original sentencing judgment.

{¶ 6} Appellant asserts two assignments of error on appeal:

{¶ 7} "Assignment of Error No. I

{¶ 8} "The trial court erred by not properly conducting a hearing on defendant's motion to 'void or vacate' his sentence and improperly held a hearing pursuant to R.C. § 2929.191(C).

{¶ 9} "Assignment of Error No. II

{¶ 10} "A trial court errs by correcting a judgment entry where there is no motion before the court to correct a judgment entry and the state failed to appeal the improper judgment entry or sentence."

{¶ 11} Under Assignment of Error No. 1, appellant argues that the hearing on April 5, 2010, should have been limited to declaring his sentence void and that the trial court erred in conducting a hearing under R.C. 2929.191(C) to resentence. Appellant claims that he was not given notice that the hearing would proceed as a resentencing hearing under R.C. 2929.191(C). Appellant also argues that the hearing on his motion was improperly limited to postrelease control issues under R.C. 2929.191(C).

{¶ 12} In *State v. Fischer*, Slip Opinion No. 2010-Ohio-6238, the Ohio Supreme Court recognized that where a defendant prevails in showing errors with respect to postrelease control in his sentence, those errors void only the postrelease control aspect of

the case. *Fischer* at ¶ 17. "The remainder of the sentence, which the defendant did not successfully challenge, remains valid under the principles of res judicata." *Id.*

{¶ 13} In *Fischer*, the Ohio Supreme Court modified *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, and held that a complete, de novo resentencing is not required for postrelease control sentencing errors. *Fischer* at ¶ 26-29. Under *Fischer*, "the new sentencing hearing to which an offender is entitled under *Bezak* is limited to proper imposition of postrelease control." *Fischer* at ¶ 29.

{¶ 14} In our view the trial court properly proceeded under R.C. 2929.191(C) to correct the postrelease control error in the sentence. The resentencing hearing was scheduled at appellant's request, as his motion was a "Motion for Sentencing pursuant to the provisions of *State v. Bezak*, 114 Ohio St.3d 94 * * *." The hearing was originally scheduled for March 17, 2010, and then rescheduled for April 5, 2010. While appellant may disagree with the trial court's conclusions as to appropriate procedures for conducting a resentencing hearing to correct postrelease control sentencing errors, there is no reasonable basis to claim that he lacked notice that resentencing for that purpose would proceed on April 5, 2010.

{¶ 15} Under the Ohio Supreme Court's ruling in *Fischer*, the trial court properly limited the resentencing hearing to postrelease control alone. We find Assignment of Error No. I is not well-taken.

{¶ 16} Under Assignment of Error No. II, appellant argues first, that the trial court erred in proceeding to resentence him under R.C. 2929.191(C) as there was no motion for it to do so. Secondly, he argues that the state was barred under res judicata from seeking resentencing because it failed to pursue direct appeal from the November 29, 2007 original sentencing judgment. We disagree.

{¶ 17} The record reflects that appellant requested a resentencing hearing. Furthermore, R.C. 2929.191(C) provides that a trial court may choose to order resentencing under the statute sua sponte: "R.C. 2929.191(C) provides that '[o]n and after the effective date of this section,' a trial court 'that wishes to' may 'prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) and (B)(1) of this section' after a hearing accordance with division (C)." *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, ¶ 28.

{¶ 18} In *Fischer*, the Supreme Court of Ohio also rejected appellant's argument that correction of his sentence as to postrelease control is barred by res judicata:

{¶ 19} "A sentence that does not include the statutorily mandated term of postrelease control is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack."

Fischer at paragraph one of the syllabus.

{¶ 20} We find appellant's Assignment of Error No. II is not well-taken.

{¶ 21} We conclude that substantial justice was done the party complaining and affirm the judgment of the Sandusky County Court of Common Pleas. We order appellant to pay court costs, pursuant to App.R. 24.

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.

Mark L. Pietrykowski, 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>.