

[Cite as *State v. Harris*, 2010-Ohio-362.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92892

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KERMIT B. HARRIS

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-346368

BEFORE: Kilbane, P.J., McMonagle, J., and Boyle, J.

RELEASED: February 4, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Kermit Harris (“Harris”), appeals his resentencing hearing arguing that the trial court merely advised him of postrelease control, rather than by holding the appropriate de novo sentencing hearing. Further, Harris filed an additional pro se brief in which he maintains that his original conviction merits reversal because the indictment was defective. After a review of the record and applicable law, we reverse and remand for a de novo sentencing hearing.

{¶ 2} The following facts give rise to this appeal.

{¶ 3} On December 30, 1996, Harris robbed Joyce Boyd (“Boyd”) outside of the South Pointe Apartment Complex, located at 24900 Rockside Road, in Bedford Heights, Ohio. During the course of the robbery, Harris shot Bedford Heights police officer Robert Moore, striking him twice. Fellow Bedford Heights police officer Craig Sirna, responding to the scene, found Harris lying face down on the right side of the nearby I-271 entrance ramp and located Harris’s gun at the top of a nearby embankment.

{¶ 4} On January 8, 1997, Harris was charged with aggravated robbery, receiving stolen property, attempted murder, and felonious assault. The attempted murder and felonious assault counts both contained peace officer specifications.

{¶ 5} On May 6, 1997, a jury convicted Harris on all counts. He received an aggregate sentence of 24 years of imprisonment.

{¶ 6} Harris filed a direct appeal, and his convictions were ultimately affirmed. See *State v. Harris* (June 18, 1998), Cuyahoga App. No. 72687 (*Harris I*). Subsequently, Harris filed a writ of mandamus seeking a new trial, which this court subsequently denied. See *State ex rel. Harris v. Cuyahoga Cty. Common Pleas Court* (Dec. 24, 1998), Cuyahoga App. No. 75216 (*Harris II*).

{¶ 7} On December 18, 2008, the trial court sua sponte ordered that Harris be brought from Lake Erie Correctional Institution, where he was serving his sentence, for a resentencing hearing. On February 5, 2009, at the resentencing hearing, the trial court noted that, although Harris had been advised of postrelease control at his initial sentencing hearing, the notification was not documented in the sentencing entry. The trial court then advised Harris of his postrelease control responsibilities, stated that the original sentence would still apply, and issued a journal entry documenting Harris's original sentence and noting that he would be subject to five years of postrelease control.

{¶ 8} Harris was appointed counsel, who filed the instant appeal, asserting one assignment of error.

{¶ 9} ASSIGNMENT OF ERROR NUMBER ONE

“THE TRIAL COURT ERRED IN FAILING TO HOLD A DE NOVO SENTENCING HEARING.”

{¶ 10} Harris maintains that the trial court’s failure to properly document his postrelease control in the original sentencing entry required a de novo sentencing hearing. The State concedes this issue, stating that this court’s precedent mandated a de novo sentencing hearing.

{¶ 11} At his original sentencing hearing, Harris was informed that he would be subject to postrelease control; however, the postrelease notification was not documented in the sentencing entry. A trial court must not only orally inform a defendant of postrelease control at the sentencing hearing but must also specifically reference it in its journal entry. *Hernandez v. Kelly*, 108 Ohio St.3d 395, 397, 2006-Ohio-126, 844 N.E.2d 301; *State v. Cooper*, Cuyahoga App. No. 90144, 2008-Ohio-3469. Advising a defendant of postrelease control at the sentencing hearing is insufficient if the trial court fails to document it in its entry. *Id.*

{¶ 12} On February 5, 2009, the trial court held a hearing pursuant to R.C. 2929.191 for the limited purpose of advising Harris that he would be subject to postrelease control and recording that notification in its sentencing journal entry. (Tr. 4, 6.) The court issued a conforming nunc pro tunc journal entry. The trial court declined Harris’s request for a de novo sentencing hearing. (Tr. 7.)

{¶ 13} The Ohio Supreme Court recently decided *State v. Singleton*, Ohio St.3d _____, 2009-Ohio-6434, _____ N.E.2d _____, concluding that while R.C. 2929.191 allows a trial court to hold a hearing to only advise the defendant of postrelease control, the statute applies only to cases where the defendant was sentenced after its July 11, 2006 enactment. Harris was originally sentenced on May 7, 1997, prior to the enactment of the current version of R.C. 2929.191. Therefore, this court's precedent requiring a de novo hearing still applies in the instant case.

{¶ 14} Consequently, the sole assignment of error asserted by Harris's counsel is sustained, and the matter is remanded to the trial court for a de novo sentencing hearing.

{¶ 15} Harris also filed a pro se brief asserting two assignments of error, both of which deal with the January 8, 1997 indictment. These issues are barred by the doctrine of res judicata.

{¶ 16} The application of res judicata is a question of law that is reviewed by this court de novo. *Hempstead v. Cleveland Bd. of Edn.*, Cuyahoga App. No. 90955, 2008-Ohio-5350, at ¶6, citing *Gilchrist v. Gonsor*, Cuyahoga App. No. 88609, 2007-Ohio-3903, at ¶18. In *State v. Lawhill*, Cuyahoga App. No. 91032, 2009-Ohio-484, a factually identical case, the trial court ordered Lawhill back from the correctional facility where he was serving his sentence in order to conduct a resentencing hearing. After the

resentencing hearing, Lawhill appealed and asserted that his indictment was defective because it failed to state a mens rea. This court reasoned that because he could have raised this issue in his initial appeal, res judicata barred him from raising it on appeal after his resentencing hearing. In this case, Harris failed to raise his arguments in either *Harris I* or *Harris II*, and therefore, cannot now do so after the resentencing hearing.

{¶ 17} The Ohio Supreme Court has also addressed the issue, stating that “[u]nder the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant * * * on an appeal from that judgment.” *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, at ¶17, quoting *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

{¶ 18} Harris had the opportunity to raise his arguments regarding the 1997 indictment in both *Harris I* and *Harris II*, but failed to do so. He is therefore precluded from now raising these issues.

{¶ 19} Consequently, Harris’s two pro se assignments of error are overruled.

Judgment reversed and remanded.

It is ordered that appellant recover from appellee the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., and
MARY BOYLE, J., CONCUR