

[Cite as *State v. Grady*, 2010-Ohio-4667.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93548

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEMETRIUS GRADY

DEFENDANT-APPELLANT

JUDGMENT:
DISMISSED IN PART; REVERSED AND
REMANDED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-363870, CR-364232, CR-377606,
CR-378707, and CR-378708

BEFORE: Celebrezze, J., Kilbane, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: September 30, 2010

ATTORNEY FOR APPELLANT

David V. Patton
P.O. Box 39192
Solon, Ohio 44139-0192

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: T. Allan Regas
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ALSO LISTED

Demetrius Grady
Inmate No. 378-467
Richland Correctional Institution
P.O. Box 8107
Mansfield, Ohio 44901

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Demetrius Grady, appeals from the denial of his motions to withdraw his guilty pleas in five criminal cases. He argues that his trial counsel was ineffective; that his pleas were not knowingly, voluntarily, and intelligently made; that the trial court did not properly consider his motions; that the trial court breached its plea agreement with

him; and that the sentence imposed is contrary to law. Based on our review of the record and pertinent case law, we dismiss in part, reverse in part, and remand for proceedings consistent with this opinion.

{¶ 2} The trial court was in the unenviable position of determining what should happen when an improper sentence following a guilty plea is void and, ten years later when the defendant is to be resentenced, he files a motion to withdraw his plea. On one hand, a presentence motion to withdraw a guilty plea should be liberally granted. On the other, the state faces significant difficulties in the prosecution of a case after a ten-year period where it thought the case was closed.

{¶ 3} Appellant was indicted in several criminal cases in 1998 and 1999. As part of a plea agreement with the state, he pled guilty to felonious assault with a gun specification (CR-363870); drug possession and failure to comply with the order of a police officer (CR-364232); drug possession (CR-377606); felonious assault with a firearm specification (CR-378707); and felonious assault (CR-378708). Appellant was sentenced to a total of 15 years of incarceration.¹

¹Appellant's prison sentence consisted of four years in CR-363870; one year in CR-364232; one year in CR-377606; eight years in CR-378707; and three years in CR-378708. The four-, eight-, and three-year sentences were imposed consecutively to each other, but concurrently to the remaining terms of incarceration.

{¶ 4} The sentencing entries neglected to impose any period of postrelease control. After realizing he was to be resentenced, appellant filed motions to withdraw his guilty pleas in each case on April 23, 2009. At the May 27, 2009 resentencing hearing, the trial court imposed appellant's original sentence and added five years of postrelease control in all five cases. The court denied appellant's motions to withdraw his pleas, finding them untimely, but no journal entry reflecting this ruling is contained in the record before this court. Appellant then filed the instant appeal, citing five assignments of error.²

Law and Analysis

Lack of a Final, Appealable Order

{¶ 5} Appellant's first four assignments of error relate to the denial of his motions to withdraw his guilty pleas. The first two and the fourth deal with the reasons why appellant should be permitted to withdraw his pleas, and the third argues that the trial court failed to properly consider appellant's motions. This court cannot address these errors because there is no final, appealable order appellant can point to that denies this motion.

{¶ 6} Generally, "[a] trial court's order denying a Crim.R. 32.1 motion is a final appealable order, from which the defendant has thirty days to appeal, pursuant to App.R. 4(A)." *State v. Davis* (Apr. 20, 1999), Vinton App.

²Appellant's assignments of error are included in appendix A of this opinion.

No. 98CA523. However, “[a] court of record speaks only through its journal entries.” *City of Cuyahoga Falls v. Andy* (Sept. 27, 1996), Summit App. No. 17932, 1, quoting *Gaskins v. Shiplevy*, 76 Ohio St.3d 380, 382, 1996-Ohio-387, 667 N.E.2d 1194. Although appellant’s motion was denied, as evidenced by a reading of the transcript of the hearing, there is no journal entry reflecting this result.

{¶ 7} Because there is no journal entry denying appellant’s motion to withdraw his guilty plea, there is no final, appealable order. Therefore, appellant’s first four assignments of error cannot be addressed at this time.

Periods of Postrelease Control

{¶ 8} In appellant’s reply brief in regard to his fifth assignment of error, he makes the argument that the periods of postrelease control imposed are contrary to law. Appellant is correct.

{¶ 9} The trial court imposed five years of postrelease control in each of appellant’s five cases, even though only one case involved a conviction for which five years of postrelease control was mandatory. In CR-363870 and CR-378708, appellant was only subject to three years of postrelease control. R.C. 2967.28(B)(1). In two other cases, postrelease control was not mandatory, but left to the discretion of the parole board for a maximum period of three years. R.C. 2967.28(C). Therefore, appellant’s sentences in CR-363870, CR-378708, CR-364232, and CR-377606 are contrary to law and

must be corrected. See *State v. Holloway*, Cuyahoga App. No. 91005, 2009-Ohio-35, ¶35-38.

Conclusion

{¶ 10} Appellant's motions to withdraw his guilty pleas were never denied in a signed journal entry contained within the record in this appeal. Therefore, this court lacks jurisdiction to entertain errors related to that decision. Appellant's sentences are contrary to law because they impose inapplicable periods of postrelease control. Using the corrective procedure set forth in R.C. 2929.191, the trial court must properly inform appellant of postrelease control in four cases. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶35.

{¶ 11} This cause is dismissed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR

APPENDIX A

Appellant's assignments of error:

I. "Defense counsel rendered ineffective assistance of trial counsel in violation of [appellant's] federal and state constitutional rights because [appellant's] trial lawyers failed to notify him of the possibility of post-release control and failed to argue the correct legal standards on his motions to withdraw his guilty pleas."

II. "[Appellant's] guilty pleas were not knowing, intelligent, and voluntary because the trial court failed to notify him of the maximum penalty involved, including post-release control, when it accepted his guilty pleas."

III. "The trial court failed to properly consider [appellant's] motions to withdraw his guilty pleas as post-conviction relief petitions under R.C. §§2953-21 and 2953.23 and failed to consider [appellant's] motions to withdraw his guilty pleas under Crim.R. 32.1."

IV. "The trial court breached its plea agreement with [appellant] by unilaterally adding five years of post-release control to the agree-upon sentence."

V. "The trial court's sentencing orders are erroneous, and must be reversed, because they fail to comply with R.C. §2929.191."