[Cite as *State v. Samples*, 2011-Ohio-179.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	
-vs-	:	
	:	Case No. 2010-CA-00122
DOUGLAS SAMPLES	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Stark County Court of Common Pleas, Case No. 2007-CR-1287
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 18, 2011
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO PROSECUTING ATTORNEY BY: KATHLEEN O. TATARSKY 110 Central Plaza South, Ste. 510 Canton, OH 44702	JENNIFER A. ROBERTS P.O. Box 20227 Canton, OH 44701

Gwin, J.

{¶1} Appellant Douglas Samples appeals his conviction for aggravated robbery and burglary in the Stark County Court of Common Pleas. The relevant facts underlying appellant's case, which involves two separate crimes, are set forth in *State v. Samples*, Stark App. No. 2008-CA-00027, 2009-Ohio-1043.

STATEMENT OF THE CASE

{¶2} Appellant was indicted on a charge of aggravated robbery with a firearm specification and a charge of burglary. After hearing the evidence and receiving instructions from the trial court, the jury returned a verdict finding appellant guilty as charged in the indictment. Appellant received a sentence of ten years for the aggravated robbery conviction, along with three years on the gun specification. For the burglary conviction, appellant received a prison term of three years. Thus, appellant was sentenced to an aggregate term of sixteen years.

{¶3} At both his sentencing hearing held December 20, 2007, and in the resulting Judgment Entry filed January 3, 2008 appellant was advised that he was subject to "up to a mandatory five years post release control."

{¶4} On February 1, 2008, appellant filed a notice of appeal alleging *Colon* errors, failure to give limiting instructions, prosecutorial misconduct, ineffective assistance of counsel and sufficiency of the evidence. His conviction and sentence were affirmed by this Court, *State v. Samples,* Stark App. No. 2008CA00027, 2009--Ohio-1043, appeal allowed by 122 Ohio St.3d 1477, 2009-Ohio-3525, 910 N.E.2d 477, appeal not allowed by 123 Ohio St, 3d 1524, 2009-Ohio-6487, 918 N.E.2d 526, judgment affirmed by 124 Ohio St.3d 120, 2009-Ohio-6542, 919 N.E.2d 737.

{¶5} As the result of appellants' original sentencing entry stating that post release control is mandatory "up to" a maximum of 5 years, he was returned to the trial court for a clarification of post release control on March 11, 2010. At that hearing held via video conference, post release control was imposed as follows:

{¶6} "[COURT] But pursuant to Ohio Revised Code Section 2929.191 in that your sentence was imposed after July 11, 2006, any sentence imposed after that date I am required to follow the procedures set forth in Ohio Revised Code Section 2929.191.

{¶7} And pursuant to that code section, I am advising you that upon your release from prison you will face mandatory post release control for a period of 5 years." (T., March 11, 2010, at 9).

{¶8} The current Notice of Appeal was then timely filed. In his present appeal appellant has raised the following seven (7) assignments of error for our consideration[1]:

{¶9} "I. APPELLANT'S SENTENCE DATED APRIL 16, 2010 IS VOID BECAUSE THE TRIAL COURT FAILED TO CONDUCT A DE NOVO SENTENCING HEARING.

{¶10} "II. APPELLANT IS ENTITLED TO AN APPEAL OF RIGHT DUE TO THE TRIAL COURT'S VOID SENTENCE IN DECEMBER 2007.

{¶11} "III. THE APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THE INDICTMENT FAILED TO STATE A *MENS REA*.

{¶12} "IV. THE TRIAL COURT ERRED IN NOT GIVING A LIMITING INSTRUCTION AFTER THE PROSECUTOR IMPLIED THE ACCUSED HAD CONVICTIONS THAT WERE WITHHELD FROM THE JURY.

[1] We note that appellant's assignments of error numbers three through seven, inclusive, are simply restatements of the assignments of error appellant had previously raised in his direct appeal, Stark App. No. 2008 CA 00027, 2009-Ohio-1043.

{¶13} "V. THE APPELLANT WAS DENIED HIS RIGHT TO FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT.

{¶14} "VI. THE APPELLANT WAS DENIED HIS EFFECTIVE ASSISTANCE OF COUNSEL.

{¶15} "VII. THE TRIAL COURT'S FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

II, III, IV, V, VI & VII.

JURISDICTION TO CONSIDER APPELLANT'S THIRD THROUGH SEVENTH ASSIGNMENTS OF ERROR

{¶16} Appellant argues that a direct appeal from a void sentence is a legal nullity and a defendant's appeal following resentencing is actually a defendant's first appeal as of right. Therefore, appellant argues that, even though this Court reviewed the merits of the arguments that he had raised in his first direct appeal relating to his conviction[2], he now has the right to assert additional arguments relating to his conviction following his resentencing on September 11, 2010. The State disagrees citing *State v. Fischer* (2009), 181 Ohio App.3d 758, 910 N.E.2d 1083.[3] In *Fisher* the Ninth District Court of Appeals held that, despite the fact that the original appeal arose from a void sentence, the law of the case doctrine still applied to the decision reached in that proceeding. Thus, the defendant was precluded from asserting additional arguments relating to his

[2] *See, State v. Nichols,* Richland App. No.2006CA0077, 2007-Ohio-3257.

[3] The state further informs us that the Ninth District, which decided *Fischer*, later reversed its holding in *State v. Harmon* (9th Dist.), 2009 Ohio 4512, 2009 Ohio App. LEXIS 3809. Both cases are currently on appeal to the Supreme Court of Ohio. Oral Arguments were held in the *Fischer* case on March 30, 2010.

conviction following his resentencing. *Fischer,* 181 Ohio App.3d at 760-761. (Citations omitted).

{¶17} However, the Ninth District, which decided *Fischer*, later reversed its holding in *State v. Harmon* (9th Dist.), 2009 Ohio 4512, 2009 Ohio App. LEXIS 3809. Both cases are currently on appeal to the Supreme Court of Ohio. Oral Arguments were held in the *Fischer* case on March 30, 2010. See, *State v. Nichols*, Richland App. No. 2009CA0111, 2010-Ohio-3104.

{¶18} Recently, the Ohio Supreme Court has rejected the argument that a void sentence is a legal nullity and a defendant's appeal following resentencing for post release control errors was his first appeal as of right. In *State v. Ketterer,* Donald Ketterer had been convicted of capital and noncapital offenses. 126 Ohio St.3d 448, 935 N.E.2d 9, 2010-Ohio-3831. The Ohio Supreme Court held that the trial court properly denied the motion to withdraw Ketterer's guilty pleas. Because mandatory post release control was not properly imposed, however, the Court remanded the case for the trial court to conduct a hearing under R.C. 2929.191. While the case was on remand for resentencing, Ketterer filed a motion to withdraw his guilty pleas. (Id. at ¶55). In response, the state argued that res judicata barred Ketterer's motion to withdraw his guilty pleas because on the first appeal, the Supreme Court rejected his attacks on his pleas. (Id. at ¶59).

{¶19} The Court agreed noting, “In Ketterer's first appeal, this court considered most of the claims that Ketterer raised on remand as a basis to withdraw his guilty pleas…Thus, res judicata was a valid basis for rejecting these claims.” (Id. at ¶60). Furthermore, the Court found, “In addition, the state invokes *State ex rel. Special*

Prosecutors v. Judges, Belmont Cty. Court of Common Pleas (1978), 55 Ohio St.2d 94, 97-98, 9 O.O.3d 88, 378 N.E.2d 162, to argue that the court lacked jurisdiction to vacate Ketterer's guilty pleas. In *Special Prosecutors*, this court held that 'Crim.R. 32.1 does not vest jurisdiction in the trial court to maintain and determine a motion to withdraw the guilty plea subsequent to an appeal and an affirmance by the appellate court. While Crim.R. 32.1 apparently enlarges the power of the trial court over its judgments without respect to the running of the court term, it does not confer upon the trial court the power to vacate a judgment which has been affirmed by the appellate court, for this action would affect the decision of the reviewing court, which is not within the power of the trial court to do.' Id. at 97-98, 9 O.O.3d 88, 378 N.E.2d 162.

{¶20} "On appeal, this court affirmed Ketterer's convictions and death sentence. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 12. Ketterer's appeal was later reopened and his case was remanded for the limited purpose of resentencing him on his noncapital offenses, 113 Ohio St.3d 1463, 2007-Ohio-1722, 864 N.E.2d 650. Under the authority of *Special Prosecutors*, the panel had no authority to consider Ketterer's motion to withdraw his guilty pleas, let alone grant him a new trial." *Ketterer* 126 Ohio St.3d at 460, 935 N.E.2d at 22, 2010-Ohio-3831 at ¶ 61-62.

{¶21} We note that in the case at bar, the trial court originally sentenced appellant on December 20, 2007 after the effective date of R.C. 2929.191. See, *State v. Nichols*, supra at ¶15.

{¶22} In the case at bar, we find as we did in *Nichols,* supra, "that an appeal from a re-sentencing entry for sentences imposed after July 11, 2006, is limited to issues concerning the re-sentencing procedure. Under these circumstances, we find

that an appellant may not raise additional arguments relating to his conviction following his resentencing." (Id. at ¶19). Res judicata is a valid basis for rejecting these claims. *Ketterer,* supra. Accordingly, appellant is not entitled to a second appeal as of right from the trial court original sentencing entry filed January 3, 2008.

{¶23} Accordingly, appellant's second, third, fourth, fifth, sixth and seventh assignments of error are dismissed. However, this does not end our inquiry in the case at bar. Appellant's first assignment of error concern the trial court's resentencing hearing which occurred on April 16, 2010.

I.

{¶24} In his first assignment of error, appellant claims that the post release control notification hearing held March 11, 2010 and journalized April 16, 2010 was void because the trial court failed to conduct a de novo sentencing hearing. We disagree.

{¶25} "[W]ith R.C. 2929.191, the General Assembly has now provided a statutory remedy to correct a failure to properly impose post-release control. Effective July 11, 2006, R.C. 2929.191 establishes a procedure to remedy a sentence that fails to properly impose a term of post-release control. It applies to offenders who have not yet been released from prison and who fall into at least one of three categories: those who did not receive notice at the sentencing hearing that they would be subject to post-release control, those who did not receive notice that the parole board could impose a prison term for a violation of post-release control, or those who did not have both of these statutorily mandated notices incorporated into their sentencing entries. R.C. 2929.191(A) and (B). For those offenders, R.C. 2929.191 provides that trial courts may, after conducting a hearing with notice to the offender, the prosecuting attorney, and the

Department of Rehabilitation and Correction, correct an original judgment of conviction by placing on the journal of the court a nunc pro tunc entry that includes a statement that the offender will be supervised under R.C. 2967.28 after the offender leaves prison and that the parole board may impose a prison term of up to one-half of the stated prison term originally imposed if the offender violates post release control." *State v. Singleton*, 124 Ohio St. 3d 173, 179, 920 N.E. 2d 958, 963, 2009-Ohio-6434 at ¶ 23. See, *State v. Nichols*, supra at ¶16.

{¶26} The Supreme Court further noted, "R.C. 2929.191(C) prescribes the type of hearing that must occur to make such a correction to a judgment entry "[o]n and after the effective date of this section." The hearing contemplated by R.C. 2929.191(C) and the correction contemplated by R.C. 2929.191(A) and (B) pertain only to the flawed imposition of post release control. R.C. 2929.191 does not address the remainder of an offender's sentence. Thus, the General Assembly appears to have intended to leave undisturbed the sanctions imposed upon the offender that are unaffected by the court's failure to properly impose post-release control at the original sentencing." *State v. Singleton*, supra 124 Ohio St.3d at 179-180, 920 N.E.2d at 964, 2009-Ohio-6434 at ¶ 24.

{¶27} The Court in *Singleton* concluded, "Based upon the foregoing, the de novo sentencing procedure detailed in the decisions of the Ohio Supreme Court is the appropriate method to correct a criminal sentence imposed prior to July 11, 2006, that lacks proper notification and imposition of post release control. However, because R.C. 2929.191 applies prospectively to sentences entered on or after July 11, 2006, that lack proper imposition of post release control, a trial court may correct those sentences in

accordance with the procedures set forth in that statute." *Singleton* at 182, 920 N.E.2d at 966, 2009-Ohio-6434 at ¶ 35. In the case at bar, appellant was originally sentenced in the trial court on December 19, 2007. The Judgment Entry reflecting appellant's sentence was filed on January 3, 2008. A video conference from the prison is an acceptable method of holding the hearing, R.C. 2929.191(C). *Singleton* makes clear that a de novo hearing was not necessary in the case at bar.

{¶28} Appellant was given a R.C. 2929.191 hearing by the trial court on March 11, 2010. Therefore, appellant's first assignment of error is overruled.

{¶29} Based upon the foregoing, the judgment of the Stark County Court of Common Pleas is affirmed.

By Gwin, J.,

Edwards, P.J., and

Hoffman, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. WILLIAM B. HOFFMAN

WSG:clw 1210

[Cite as *State v. Samples*, 2011-Ohio-179.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DOUGLAS SAMPLES	:	
Defendant-Appellant	:	CASE NO. 2010-CA-00122

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. WILLIAM B. HOFFMAN