[Cite as *State v. Morris*, 2011-Ohio-5484.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-512 (C.P.C. No. 03CR-01-391)
Craig Morris,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on October 27, 2011

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Yavitch & Palmer Co., L.P.A., and *Mickey Prisley*, for appellant.

ON APPLICATION FOR RECONSIDERATION

CONNOR, J.

{¶1} Appellee, State of Ohio ("appellee"), has filed an application for reconsideration pursuant to App.R. 26(A), requesting that this court reconsider our decision and judgment entry in *State v. Morris*, 10th Dist. No. 10AP-512, 2011-Ohio-2226 ("*Morris* II"), in which we sustained an assignment of error advanced by appellant, Craig Morris ("appellant"), and reversed the judgment of the trial court. Appellant has offered no response to appellee's application for reconsideration.

{¶2} As background, appellant was convicted of four counts of felonious assault, all second degree felonies, along with accompanying firearm specifications. The trial court conducted a sentencing hearing on May 20, 2004 and journalized its judgment on May 24, 2004. According to the sentencing entry, appellant was sentenced to two years for each of the four counts of felonious assault, which were to be served consecutively. The court also imposed three years for the firearm specification. Therefore, the total period of incarceration was for eleven years.

{¶3} This court considered and rejected the substantive challenges to appellant's convictions. See *State v. Morris*, 10th Dist. No. 05AP-1139, 2009-Ohio-2396 ("*Morris* I").

{¶4} In 2009 and in early 2010, appellant filed motions asking the trial court to correct his sentence. Appellee acknowledged the need for a resentencing hearing in order to correctly impose a term of post-release control ("PRC") as a part of appellant's sentence. On May 26, 2010, the trial court conducted such a hearing, which occurred via videoconference.

{¶5} By way of its May 27, 2010 judgment entry, the trial court imposed a sentence of eight years on the second count, and two years on counts three, four, and five, all to be served concurrently to one another. The court also imposed a sentence of three years as to the firearm specification. Thus, the total period of incarceration was for eleven years. The May 27, 2010 entry also informed appellant that he was subject to three years of mandatory PRC.

{¶6} Appellant appealed and raised five assignments of error. In response, appellee conceded that appellant was denied his constitutional right to counsel during the resentencing hearing and acknowledged that a reversal was required. We reversed

based, in part, upon the conceded error. See *Morris* II at ¶7. However, by way of its application for reconsideration, appellee notes that it withdrew its concession because the Supreme Court of Ohio issued *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238.

{¶7} When presented with an application for reconsideration, an appellate court must determine whether the application calls to the court's attention an obvious error in its decision, or raises an issue for consideration that was either not considered at all or not fully considered by the court when it should have been. *State v. Rowe* (Feb. 10, 1994), 10th Dist. No. 92AP-1763, citing *Matthews v. Matthews* (1981), 5 Ohio App.3d 140. However, "[a]n application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *State v. Owens* (1997), 112 Ohio App.3d 334, 336. "App.R. 26 does not provide specific guidelines to be used by an appellate court when determining whether a decision should be reconsidered or modified." Id. at 335.

{¶8} We find that reconsideration is proper because we admittedly relied, in part, upon a concession that was withdrawn. Accordingly, we grant appellee's application. This decision shall therefore replace the decision rendered in *Morris* II.

{¶9} Upon granting reconsideration, we note that appellant has raised the following five assignments of error in regard to his resentencing:

> Assignment of Error No. 1:
>
> The trial court erred by failing to conduct a de novo sentencing hearing.
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> Assignment of Error No. 2:
>
> The trial court's imposition of post-release control by videoconference violated Crim.R. 43(A) and Mr. Morris' Due

> Process right to be physically present at every stage of his criminal proceeding.
>
> Assignment of Error No. 3:
>
> Appellant was constructively denied the right to counsel as provided by the Sixth Amendment.
>
> Assignment of Error No. 4:
>
> The trial court's addition of post-release control to Mr. Morris' original sentence violated his right to be free from Double Jeopardy.
>
> Assignment of Error No. 5:
>
> Trial counsel was ineffective.

For ease and convenience, we will address appellant's assignments of error out of order.

{¶10} By way of his first assignment of error, appellant argues he was entitled to a de novo resentencing hearing. According to recent case law, however, appellant was not entitled to such a hearing. See *Fischer* at paragraph two of the syllabus[1] ("The new sentencing hearing to which an offender is entitled under *State v. Bezak* [114 Ohio St.3d 94, 2007-Ohio-3250] is limited to proper imposition of postrelease control."); *State v. Williams*, 10th Dist. No. 10AP-674, 2011-Ohio-4653, ¶19; *State v. Carter*, 6th Dist. No. L-11-1017, 2011-Ohio-4688, ¶9; *State v. Deaver*, 4th Dist. No. 10CA7, 2011-Ohio-1393, ¶8 (holding that *Fischer* "specifically rejected the line of reasoning * * * that an offender who fails to receive notice of postrelease control is entitled to a de novo sentencing hearing."); *State v. Hall*, 1st Dist. No. C-100097, 2011-Ohio-2527, ¶11 (holding that the trial court only had the authority to correct the post-release control defect during the resentencing

[1] We note that the offender in *Fischer* was originally sentenced before July 11, 2006. *Fischer* at 93.

hearing); *State v. Marrero*, 8th Dist. No. 95859, 2011-Ohio-3587, ¶7. We therefore overrule appellant's first assignment of error.

{¶11} In his fourth assignment of error, appellant argues that the trial court's imposition of PRC violated his right to be free from double jeopardy. Again, we disagree.

{¶12} When a trial court fails to properly impose statutorily mandated PRC, that part of the sentence is void and must be set aside. *Fischer* at 99. Further, a trial court's correction of a statutorily incorrect sentence does not present double jeopardy implications. *State v. Borders*, 10th Dist. No. 07AP-17, 2007-Ohio-5800, ¶14. Therefore, no double jeopardy violations occur when a trial court correctly imposes PRC during a resentencing hearing under *Fischer*. See *Marrero* at ¶10, citing *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶37; and *State v. Beasley* (1984), 14 Ohio St.3d 74, 75. As a result, we overrule appellant's fourth assignment of error.

{¶13} In appellant's second assignment of error, he argues that he had a right to be physically present at the resentencing hearing. He argues that the process of conducting a resentencing via videoconference in accordance with R.C. 2929.191 is unconstitutional because it conflicts with Crim.R. 43 and the Ohio Constitution. Again, we reject these arguments.

{¶14} Initially, we note that appellant lacks standing to challenge the constitutionality of R.C. 2929.191 because it does not apply to him. See *State v. Addison*, 10th Dist. No. 10AP-554, 2011-Ohio-2113, ¶10 (holding that an offender lacked standing to challenge the constitutionality of R.C. 2929.191 where he was originally sentenced before July 11, 2006, and the statute did not apply to him).

{¶15} We next address appellant's other argument regarding his physical presence at the resentencing hearing. It is well-settled that a criminal defendant has a fundamental right to be present at all critical stages of his criminal trial. Section 10, Article I, Ohio Constitution; Crim.R. 43(A); *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3246, ¶100. An offender's absence, however, "does not necessarily result in prejudicial or constitutional error." *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶90. Due process concerns arise only to the extent that a fair and just hearing is thwarted by an offender's absence. Id., quoting *Snyder v. Massachusetts* (1934), 291 U.S. 97, 107-08, 54 S.Ct. 330, 333, overruled on other grounds, *Duncan v. Louisiana* (1968), 391 U.S. 145, 154, 88 S.Ct. 1444, 1450. Therefore, an offender's absence in violation of Crim.R. 43 can constitute harmless error when no prejudice results. See *State v. Williams* (1983), 6 Ohio St.3d 281, 286-87; see also *State v. Steimle*, 8th Dist. No. 95076, 2011-Ohio-1071, ¶17 ("a violation of Crim.R. 43 * * * can constitute harmless error where the defendant suffers no prejudice.").

{¶16} The Sixth Appellate District recently considered the alleged prejudice resulting from the use of videoconferencing for a resentencing hearing. It noted:

> [A]ny error in regard to notice or physical presence was manifestly harmless. The trial court reimposed the same sentence as originally ordered and, under Fischer, could not have done otherwise. The terms of postrelease control ordered by the court were mandatory. The trial court indicated that appellant "had several opportunities to speak with his attorney before we commenced this hearing," and appellant did not request to communicate privately with his counsel during the hearing. Appellant's counsel was permitted to make a statement on appellant's behalf with regard to punishment. Appellant was also afforded the opportunity to make a statement on his own behalf and declined. Nothing in the record indicates that any matter pertinent to the proceeding was left unaddressed or that any additional

> information could have been submitted on appellant's behalf. Under these circumstances, we fail to see how additional notice to appellant or his physical presence at the hearing would have made any difference whatsoever.

Carter at ¶12; see also *State v. Griffis*, 5th Dist. No. CT2010-57, 2011-Ohio-2955, ¶28-31 (where the mandatory nature and length of post-release control were governed by statute, the imposition of post-release control during a resentencing hearing was a ministerial act, rather than a critical stage, of the proceedings). This court has taken the same approach in similar circumstances. See *State v. Morton*, 10th Dist. No. 10AP-562, 2011-Ohio-1488, ¶19 ("Appellant has not demonstrated how his own physical presence could have changed the outcome of the hearing."); see also *State v. Mullins*, 10th Dist. No. 09AP-1185, 2011-Ohio-1256, ¶11 ("Appellant cannot demonstrate that the outcome would have been different had he been physically present.")

{¶17} In the instant matter, the scope of the resentencing hearing was limited to the imposition of statutorily mandated PRC. See *Hall* at ¶11. As such, the trial court had no discretion when it resentenced appellant. See *State v. Walker*, 11th Dist. No. 2009-L-170, 2011-Ohio-401, ¶29; see also *Morton* at ¶14; see also *Griffis* at ¶32 ("the court did not have the authority to make any other substantive changes to the already-imposed sentence."). Nowhere does appellant argue that PRC was imposed improperly. Indeed, the PRC portion of the sentence imposed on May 26, 2010 was proper. Appellant has offered no explanation as to how he suffered prejudice by his physical absence from the May 26, 2010 resentencing hearing. Indeed, a fair and just hearing occurred. Any error on the part of the trial court in conducting the resentencing hearing via videoconference was harmless. We accordingly overrule appellant's second assignment of error.

{¶18} In his third and fifth assignments of error, appellant argues that he was constructively denied his right to counsel and that he received ineffective assistance of counsel during the resentencing hearing. He argues that his counsel was not prepared to represent him for anything besides the issue of PRC. He argues that he lacked sufficient time to discuss the arguments he intended to advance before the hearing.

{¶19} With respect to appellant's third assignment of error, it is settled that a criminal defendant has the constitutional right to legal representation. *State v. Reddy*, 192 Ohio App.3d 108, 2010-Ohio-5759, ¶41. In criminal proceedings that may result in incarceration, "the defendant must either be afforded counsel or knowingly, voluntarily, and intelligently waive that right." *State v. Miyamoto*, 3d Dist. No. 14-05-43, 2006-Ohio-1776, ¶13, citing *Argersinger v. Hamlin* (1972), 407 U.S. 25, 37, 92 S.Ct. 2006.

{¶20} With respect to appellant's fifth assignment of error, it is well-settled that an attorney who is licensed in Ohio is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. Therefore, the burden of showing ineffective assistance of counsel is on the party asserting it. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675. Additionally, in fairly assessing counsel's performance, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶101.

{¶21} "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*

(1984), 466 U.S. 686, 104 S.Ct. 2052, 2064. In order to succeed on a claim of ineffective assistance of counsel, appellant must satisfy a two-prong test. First, he must demonstrate that his trial counsel's performance was deficient. Id., 466 U.S. at 687, 104 S.Ct. at 2064. If he can show deficient performance, he must next demonstrate that he was prejudiced by the deficient performance. Id. To show prejudice, he must establish there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one sufficient to erode confidence in the outcome. Id., 466 U.S. at 694, 104 S.Ct. at 2068.

{¶22} The arguments supporting appellant's third and fifth assignments of error all presuppose the idea that he was entitled to a de novo resentencing hearing. Based upon our resolution of the first assignment of error, the scope of the resentencing hearing was limited to the correct imposition of PRC. The extent of this appeal and our review is equally limited. *Fischer* at 99. According to the transcript from the hearing, appellant had the opportunity to confer with counsel before the hearing commenced. Counsel represented appellant with respect to PRC. Appellant fails to argue to the contrary. Additionally, appellant addressed the court on his own behalf in several other regards. Moreoever, appellant suffered no prejudice by any purported errors his counsel may have made during the resentencing hearing. Accordingly, we overrule appellant's third and fifth assignments of error.

{¶23} Based upon the foregoing, we find that reconsideration is proper and accordingly grant appellee's application. After having considered and rejected the positions advanced by appellant in this appeal, we overrule appellant's five assignments of error. Nevertheless, in its May 27, 2010 resentencing entry, the trial court improperly

modified appellant's original sentence. It had no authority to do so and instead should have imposed the same sentence that was imposed in the May 24, 2004 entry, along with the necessary PRC language. See *State v. Robb*, 1st Dist. No. C-100678, 2011-Ohio-4647, ¶6. We therefore remand this matter with instructions to vacate the May 27, 2010 resentencing entry and issue a corrected entry that reinstates the sentence imposed on May 24, 2004, while adding the necessary PRC language.

Application for reconsideration granted;
resentencing entry vacated;
cause remanded with instructions.

KLATT and SADLER, JJ., concur.

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