

[Cite as *State v. Hazel*, 2011-Ohio-4427.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 10AP-1013
Plaintiff-Appellee,	:	(C.P.C. No. 05CR-10-7105)
v.	:	No. 10AP-1014
	:	(C.P.C. No. 06CR-06-4742)
Corey M. Hazel,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 1, 2011

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellant.

Corey M. Hazel, pro se.

APPEALS from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Defendant-appellant, Corey M. Hazel, appeals from judgments of the Franklin County Court of Common Pleas, re-sentencing him after this court remanded for failure to properly notify him as to post-release control in common pleas case Nos. 05CR-7105 and 06CR-4742.

{¶2} On October 19, 2005, appellant was indicted in case No. 05CR-7105 on one count of engaging in a pattern of corrupt activity, two counts of theft, seventeen counts of forgery, fifteen counts of securing writings by deception, and thirteen counts of

money laundering. On June 27, 2006, appellant was indicted in case No. 06CR-4742 on two counts of forgery, one count of theft, one count of money laundering, and one count of securing writings by deception.

{¶3} On March 1, 2007, appellant entered a guilty plea in case No. 05CR-7105 to one count of engaging in a pattern of corrupt activity, one count of forgery, and one count of securing writings by deception; the trial court ordered a nolle prosequi as to the remaining counts. Also on that date, appellant entered a guilty plea in case No. 06CR-4742 to one count of forgery, and the court entered a nolle prosequi on the remaining counts of that indictment.

{¶4} The trial court sentenced appellant in both cases by judgment entries filed on March 15, 2007. In case No. 05CR-7105, the trial court sentenced appellant to six years incarceration on Count 1 (engaging in a pattern of corrupt activity), two years incarceration on Count 15 (forgery), and two years incarceration on Count 29 (securing writings by deception). Pursuant to a joint recommendation of the parties, the trial court ordered Counts 1, 15, and 29 to be served concurrently, for a total sentence of six years incarceration. In case No. 06CR-4742, the trial court sentenced appellant to two years incarceration, with the sentence to run concurrently with the sentence in case No. 05CR-7105.

{¶5} On May 31, 2007, appellant filed pro se motions for leave to file delayed appeals in case Nos. 05CR-7105 and 06CR-4742, which this court denied by decision filed August 16, 2007. On September 4, 2007, appellant filed with the trial court motions for post-conviction relief in the two cases. On April 9, 2008, appellant filed motions with the trial court to withdraw his guilty pleas in both cases. The trial court denied appellant's motions by entries filed August 27, 2008. On August 14, 2008, appellant again filed

motions to withdraw his guilty pleas in both cases. On October 17, 2008, the trial court filed entries dismissing his successive motions to withdraw the guilty pleas.

{¶6} Appellant appealed from the trial court's entries of August 27 and October 17, 2008. By decision filed February 26, 2009, this court affirmed the trial court's decisions denying appellant's petitions for post-conviction relief, and his motions to withdraw his guilty pleas filed on April 9, 2008. *State v. Hazel*, 10th Dist. No. 08AP-789, 2009-Ohio-880 ("*Hazel I*"). By decision filed May 7, 2009, this court affirmed the judgments of the trial court denying appellant's motions to withdraw guilty pleas filed on August 14, 2008. *State v. Hazel*, 10th Dist. No. 08AP-1002, 2009-Ohio-2144 ("*Hazel II*").

{¶7} On November 2, 2009, appellant filed with the trial court motions for re-sentencing in case Nos. 05CR-7105 and 06CR-4742, which the trial court subsequently denied. On November 30, 2009, appellant filed motions to correct a clerical mistake in both cases, which the trial court also denied. By decision filed on March 31, 2010, this court remanded the matter for re-sentencing on the grounds that the trial court had failed to properly notify appellant during the sentencing hearing that he was subject to terms of post-release control in case Nos. 05CR-7105 and 06CR-4742; further, this court found that the trial court's sentencing entry in case No. 05CR-7105 contained erroneous language.

{¶8} On April 5, 2010, appellant filed motions in both cases to withdraw his guilty pleas. On April 16, 2010, the trial court filed entries denying those motions. On September 29, 2010, the trial court held a new sentencing hearing. During the hearing, appellant renewed his motions to withdraw his guilty pleas, which the court denied. The trial court filed a nunc pro tunc entry on October 20, 2010, sentencing appellant in case No. 05CR-7105 to six years incarceration on Count 1, two years incarceration on Count

15, and two years incarceration on Count 29, with the counts to be served concurrently. In case No. 06CR-4742, the trial court sentenced appellant to two years incarceration, to be served concurrently with the sentence in case No. 05CR-7105.

{¶9} On appeal, appellant sets forth the following five assignments of error for this court's review:

FIRST ASSIGNMENT OF ERROR FOR REVIEW

The Trial Court committed reversible error in accepting [Hazel's] guilty plea on the grounds that under *State v. Sarkozy* (2008), 117 Ohio St.3d 86, the trial court failed to comply with Crim.R. 11 during [Hazel's] plea colloquy by not advising [him] that his sentence would include a mandatory term of postrelease control.

SECOND ASSIGNMENT OF ERROR FOR REVIEW

The Trial Court abused its discretion when it overruled Appellant's presentence motion to withdraw guilty plea.

THIRD ASSIGNMENT OF ERROR FOR REVIEW

The Trial Court erred to the prejudice of Appellant on the grounds that under *State v. Veney*, 120 Ohio St.3d 176, 897 N.E.2d 621, during the plea hearing it did not inform him of his Constitutional right to "Compulsory Process", thereby failing to "strictly comply" with Ohio Crim.R. 11(C)(2)(c) in violation of the Sixth and Fourteenth amendments to the U.S. Constitution, and Article I Section 10 of the Ohio Constitution.

FOURTH ASSIGNMENT OF ERROR FOR REVIEW

The Trial Court abused its discretion when it denied Appellant the opportunity to present his ineffective assistance of trial counsel argument that pursuant to *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715, counsel's performance was deficient and that but for counsel's errors he would not have plead [sic] guilty.

FIFTH ASSIGNMENT OF ERROR FOR REVIEW

Prior to imposing consecutive non-minimum terms of incarceration for felony convictions, a trial court must

overcome the statutory presumption favoring concurrent minimum sentences by finding the factors contained in R.C. 2929.14(E)(4) to be present. *State v. Foster* (2006), 109 Ohio St.3d 1, reversed in part, pursuant to *Oregon v. Ice* (2009), -- U.S. --, 129 S.Ct. 711, 172 L.Ed.2d 517.

{¶10} Appellant's first and second assignments of error will be considered together. Under his first assignment of error, appellant seeks to challenge his guilty pleas entered in 2007, arguing that the trial court committed reversible error by failing to advise him, during the March 1, 2007 plea colloquy, that he was subject to a mandatory term of post-release control. Under his second assignment of error, appellant argues that the trial court erred in overruling his "presentence" motions to withdraw his guilty pleas.

{¶11} As noted, following this court's March 31, 2010 decision remanding both cases to the trial court for re-sentencing for failure to provide proper notification of post-release control, appellant filed motions to withdraw his guilty pleas, which the court denied. During the new sentencing hearing, appellant renewed his motions to withdraw his guilty pleas, and the court denied that request.

{¶12} In arguing that the trial court should have granted the motions to withdraw, appellant relies upon the Supreme Court of Ohio's decisions in *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, ¶25 (holding that "if a trial court fails during a plea colloquy to advise a defendant that the sentence will include a mandatory term of postrelease control, the defendant may dispute the knowing, intelligent, and voluntary nature of the plea either by filing a motion to withdraw the plea or upon direct appeal"), and *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, ¶13 (holding that the effect of vacating a void sentence "is to place the parties in the same place as if there had been no sentence"). Appellant further argues that the motion to withdraw his guilty plea was reviewable as a pre-sentence motion, citing *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577,

syllabus (holding that "[a] motion to withdraw a plea of guilty or no contest made by a defendant who has been given a void sentence must be considered as a presentence motion under Crim.R. 32.1").

{¶13} In response, the state argues that, pursuant to *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, the scope of the re-sentencing hearing was limited to the proper imposition of post-release control, and that appellant's claims with respect to the trial court's rulings on the motions to withdraw his guilty pleas are barred by the doctrine of res judicata. We agree.

{¶14} Prior to the enactment of R.C. 2929.191 (effective July 11, 2006), a trial court's failure to properly impose post-release control in a criminal sentence required the court to vacate the sentence and conduct a de novo sentencing hearing. *State v. Carnail*, 8th Dist. No. 95580, 2011-Ohio-3464, ¶14. For sentences imposed after July 11, 2006, R.C. 2929.191 establishes the procedures to correct sentences in which post-release control was not properly imposed, and the statute "authorizes the trial court, after a hearing, to 'prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison.'" *State v. Minkner*, 2d Dist. No. 2010 CA 8, 2011-Ohio-3106, ¶15, quoting *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, ¶23.

{¶15} In *Fischer*, the Supreme Court of Ohio held that when a defendant receives a sentence that does not properly include post-release control, "that *part* of the sentence is void and must be set aside. Neither the Constitution nor common sense commands anything more." *Fischer* at ¶26. (Emphasis sic.) Thus, the Supreme Court modified its earlier decision in *Bezak* to clarify that "only the offending portion of the sentence is

subject to review and correction." *Fischer* at ¶27. See also *State v. Thomas*, 1st Dist. No. C-100411, 2011-Ohio-1331, ¶15 (the Supreme Court in *Fischer* "qualified the principal, underlying *Bezak* and *Boswell*, that the effect of vacating a void sentence is to place the parties in the same position as if there had been no sentence"); *State v. Roop*, 9th Dist. No. 25685, 2011-Ohio-3670, ¶9 (noting that *Fischer* "clarified that when a sentence is void in part, 'only the portion that is void may be vacated or otherwise amended' "). Pursuant to *Fischer*, "[t]he new sentencing hearing to which an offender is entitled * * * is limited to proper imposition of postrelease control." *Fischer* at paragraph two of the syllabus.

{¶16} The court in *Fischer* also addressed application of the principle of res judicata, holding that: "[a]lthough the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence." *Fischer* at ¶40. The *Fischer* court reasoned that "the postrelease-control component of the sentence is fully capable of being separated from the rest of the sentence as an independent component, and the limited resentencing must cover only the postrelease control." *Id.* at ¶17. Thus, "only the postrelease-control aspect of the sentence * * * is void and * * * must be rectified," and "[t]he remainder of the sentence, which the defendant did not successfully challenge, remains valid under the principles of res judicata." *Id.*

{¶17} In the present case, during the September 2010 re-sentencing hearing, appellant sought to characterize his motion to withdraw as a pre-sentence motion on the premise that the entire sentence was void; in a similar vein, appellant argued that the doctrine of res judicata was not applicable because of the void sentence. Pursuant to *Fischer*, however, appellant's arguments are without merit. See also *State v. Reyes*, 3d

Dist. No. 10-10-20, 2011-Ohio-3525, ¶12 (defendant's motion to withdraw guilty plea was a "post-sentence" motion where substantial part of sentence was final and unaffected by "void" portion of sentence relating to post-release control; trial court correctly denied defendant's motion to withdraw his plea on the basis of res judicata); *State v. Hall*, 3d Dist No. 12-10-11, 2011-Ohio-659, ¶9 (rejecting defendant's argument that motion to withdraw guilty plea, made during new sentencing hearing to correct post-release control, should be considered a "presentencing" motion on the grounds original sentence was "void"); *Thomas* at ¶16 ("because Thomas's sentence was void only to the extent that postrelease control was not properly imposed, his Crim.R. 32.1 motion, filed after he was sentenced, was reviewable not as a presentence motion, but as a postsentence motion to withdraw his guilty plea").

{¶18} We now turn to the issue of res judicata and its effect on the instant case. Ohio courts, including the Supreme Court, "have applied res judicata to bar the assertion of claims in a motion to withdraw a guilty plea that were or could have been raised at trial or on appeal." *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, ¶59 (holding that doctrine of res judicata was a valid basis for rejecting defendant's claims seeking to withdraw his guilty pleas). See also *State v. Gates*, 6th Dist. No. L-10-1163, 2011-Ohio-3492, ¶14 (where appellant failed to timely appeal his original 2003 sentencing, appellant's motion to withdraw original pleas, made in conjunction with request for re-sentencing on the basis of incomplete post-release control notification, was barred on the basis of res judicata); *Hall* at ¶14 (defendant's sentencing hearing to correct the portion of the sentence pertaining to post-release control "cannot be used as a vehicle to reopen all of the other aspects of his case"; defendant's appeal from that hearing was limited to the

subject of post-release control, and res judicata was still applicable to other issues raised on appeal, including defendant's attempt to withdraw his guilty plea).

{¶19} In the present case, because appellant's original sentencing entries did not properly inform him of post-release control, that part of the sentence was void, and the trial court was required to conduct a limited re-sentencing hearing to correct the post-release control error. *Fischer*. However, the most recent attempt by appellant to withdraw his guilty pleas, made subsequent to this court's remand for re-sentencing, is barred by the doctrine of res judicata. As noted under the facts, appellant failed to timely appeal from the trial court's entries of conviction entered on March 15, 2007.¹ Appellant subsequently filed petitions for post-conviction relief and successive motions to withdraw his guilty pleas, including claims challenging the trial court's notice of post-release control at the plea hearing.² The trial court denied those motions, and this court affirmed on appeal. Specifically, in appellant's appeal following the trial court's denial of his first motion to withdraw his guilty pleas, this court found on review that "[n]o manifest injustice occurred here." *Hazel I* at ¶19. In appellant's subsequent appeal of the trial court's denial of his successive motions to withdraw, this court held in part that "res judicata bars him from raising the issue in his motion to withdraw his guilty plea." *Hazel II* at ¶11.

{¶20} Upon review, appellant was precluded from bringing subsequent motions to withdraw his guilty pleas under the doctrine of res judicata, and the trial court did not err in denying his motions to withdraw. Accordingly, appellant's first and second assignments of error are without merit and are overruled.

¹ We note that the record indicates that appellant's guilty pleas were made on the record, and that the plea forms signed by appellant in 2007 notified him of post-release control in both cases; thus, any error by the court with respect to the plea colloquy would have been apparent on the face of the record.

² This claim was raised by appellant in his April 9, 2008 motion to withdraw guilty plea.

{¶21} Appellant's third and fourth assignments of error will be addressed together. Under these assignments of error, appellant argues that the trial court erred in denying him the opportunity, during the 2010 re-sentencing hearing, to challenge his 2007 pleas on the basis of ineffective assistance of counsel and an alleged violation of his right to compulsory process. However, as previously noted, the re-sentencing hearing was "limited to proper imposition of postrelease control." *Fischer* at paragraph two of the syllabus. Further, because appellant previously raised the issue of ineffective assistance of counsel,³ or could have raised these issues on direct appeal, the arguments under these assignments of error are barred by res judicata.

{¶22} Appellant's third and fourth assignments of error are without merit and are overruled.

{¶23} Under his fifth assignment of error, appellant argues that the trial court erred in failing to engage in necessary judicial fact finding prior to imposing "consecutive non-minimum terms of incarceration" pursuant to the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711. In *Ice*, the Supreme Court held that state sentencing provisions requiring judicial fact finding prior to the imposition of consecutive sentences did not violate the Sixth Amendment.

{¶24} As noted by the state, however, in the instant case appellant did not receive consecutive sentences. Moreover, the Supreme Court recently rejected the argument advanced by appellant, holding that trial courts are not required to engage in judicial fact finding prior to imposing consecutive sentences. *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, paragraph two of the syllabus (the decision in *Ice* "does not revive Ohio's

³ This court addressed and rejected appellant's claim of ineffective assistance of counsel in his appeal of the trial court's denial of his petition seeking post-conviction relief. See *Hazel I* at ¶10 ("Nothing in the record before us supports even a hint that defense counsel was less than capable").

former consecutive-sentencing statutory provisions * * * which were held unconstitutional in *State v. Foster*").

{¶25} Accordingly, appellant's fifth assignment of error is overruled.

{¶26} Based upon the foregoing, appellant's first, second, third, fourth, and fifth assignments of error are overruled, and the judgments of the Franklin County Court of Common Pleas are hereby affirmed.

Judgments affirmed.

FRENCH and DORRIAN, JJ., concur.
