

[Cite as *State v. Hunter*, 2010-Ohio-657.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92626

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY HUNTER

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-411611, CR-411627, and CR-415551

BEFORE: Kilbane, J., Gallagher, A.J., and McMonagle, J.

RELEASED: February 25, 2010

JOURNALIZED:

APPELLANT

Anthony Hunter
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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, J.:

{¶ 1} Appellant, Anthony Hunter (“Hunter”), pro se, appeals his December 2, 2008 resentencing. Hunter argues that the trial court erred by failing to inform him at his 2008 resentencing that mandatory terms of postrelease control were a part of his sentence, that the trial court was divested of jurisdiction to impose sentence because it unduly delayed sentencing him, and by not appointing him counsel to pursue the appeal of his resentencing.

{¶ 2} The cases at issue stem from a crime spree in which Hunter robbed and terrorized elderly women in their homes in the St. Clair/Superior neighborhood of Cleveland. At the outset, we note that Hunter’s findings of guilt have already been upheld on appeal in *State v. Hunter*, Cuyahoga App. No. 81006, 2003-Ohio-994 (*Hunter I*). After considering the appropriate law and facts, we reverse and remand for resentencing.

Facts and Procedural History

{¶ 3} This case has a lengthy procedural history that we address only as necessary for the resolution of this appeal.

{¶ 4} On September 18, 2001 and October 26, 2001, the Cuyahoga County Grand Jury indicted Hunter in Case Nos. CR-411611, CR-411627, and CR-415551 for the crimes mentioned above, the facts of which were outlined

extensively in *Hunter I*.

{¶ 5} On January 31, 2002, Hunter pled guilty.¹

{¶ 6} On February 27, 2002, Hunter was sentenced to an aggregate term of 20 years of incarceration.

{¶ 7} In March and April of 2002, Hunter timely filed separate appeals.

{¶ 8} On October 8, 2002, this court sua sponte consolidated Hunter's appeals into a single case: Case No. 81006 (*Hunter I*). On March 6, 2003, this court affirmed Hunter's convictions and sentences in their entirety in *Hunter I*.

{¶ 9} On July 7, 2008, Hunter filed a pro se motion with the trial court to vacate and correct a void sentence in each of his cases pursuant to Crim.R. 47. He argued that his sentence was void in light of the Supreme Court's holdings in *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, and *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, because the trial court "failed to notify him of and properly impose post-release control on each of his offenses * * *." The trial court ordered Hunter back from the institution, and on December 2, 2008, the trial court

¹In CR-411611, Hunter pled guilty to aggravated burglary in violation of R.C. 2911.11, a first degree felony with repeat violent offender and prior conviction specifications. In CR-411627, Hunter pled guilty to receiving stolen property, a fifth degree felony in violation of R.C. 2913.51. In CR-415551, Hunter pled guilty to aggravated burglary, a first degree felony in violation of R.C. 2911.11, and felonious assault, a second degree felony in violation of R.C. 2903.11.

granted the motions to vacate Hunter's void sentences. That same day, Hunter filed a "Notice of Defendant's Intention to File Motion to Withdraw Guilty Plea Pursuant to Crim.R. 32.1, Prior to Re-sentencing."

{¶ 10} On December 8, 2008, the trial court reimposed its original sentences, including the appropriate amount of postrelease control for each offense Hunter admitted committing. During the hearing the trial court denied Hunter's hand-delivered motion to "vacate" his guilty plea. (Tr. 8.)

{¶ 11} On January 2, 2009, Hunter filed the instant appeal challenging the trial court's 2008 denial of his motion to withdraw his guilty plea, the trial court's jurisdiction to impose sentence because of undue delay, and the court's failure to appoint counsel for direct appeal after resentencing to correct a void sentence.

{¶ 12} On October 5, 2009, we sua sponte remanded the case back to the trial court for compliance with *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163.

{¶ 13} On October 14, 2009, the trial court amended its sentencing entries in all of Hunter's underlying cases to comply with *Baker*.

{¶ 14} We address Hunter's fourth assignment of error because it is dispositive. It states:

“The trial court erred when it failed to appoint counsel for direct appeal of right following re-sentencing to correct void sentence, thereby denying Mr. Hunter due process and equal protection of the law in violation of the sixth and fourteenth amendments to the United States Constitution, Article IV, Section 3 of the Ohio Constitution, and R.C. §§ 2905.03 and 2953.02.”

{¶ 15} Appellate courts reviewing felony sentences must apply a two-step approach. First, they must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court’s decision in imposing the term of imprisonment shall be reviewed under an abuse of discretion standard. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at syllabus.² We find that the trial court failed to comply with Crim.R. 32 in sentencing Hunter. It has therefore failed the first prong of *Kalish*.

{¶ 16} “By definition, a void sentence means that no final judgment of

² Consistent with our other opinions in this area of law, “[w]e recognize *Kalish* is merely persuasive and not necessarily controlling because it has no majority. The Supreme Court split over whether we review sentences under an abuse-of-discretion standard in some instances.” See, e.g. *State v. McCombs*, Cuyahoga App. No. 91784, 2009-Ohio-4036.

conviction has been announced.” *State v. McGee*, Cuyahoga App. No. 91638, 2009-Ohio-3374, at ¶8. “The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment.” *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268, 227 N.E.2d 223.

{¶ 17} When applying the above law to the facts of this case, we conclude that while Hunter’s findings of guilt were upheld, the trial court effectively erased his sentences when it granted his motions to vacate. When the trial court resentenced Hunter, the record is clear that it failed to advise him of his right to appeal his sentence, and also failed to advise him of his right to counsel for that appeal. In so doing, it violated Crim.R. 32(B), which states in part:

“(B) Notification of right to appeal

After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.

After imposing sentence in a serious offense, the court shall advise the defendant of the defendant’s right, where applicable, to appeal or to seek leave to appeal the sentence imposed.

If a right to appeal or a right to seek leave to appeal applies under division (B)(1) or (B)(2) of this rule, the court also shall advise the defendant of all of the following:

That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;

That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;

That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;

That the defendant has a right to have a notice of appeal timely filed on his or her behalf.

Upon defendant's request, the court shall forthwith appoint counsel for appeal."

{¶ 18} The record reveals that, in resentencing Hunter, the trial judge imposed the same sentence as she imposed originally and advised him of the amount of postrelease control applicable in all cases. However, the record is devoid of any mention of Hunter's appellate rights, including the right to counsel. We realize that under Crim.R. 32, a trial court is not required to appoint counsel unless the defendant asks for it, but appointment of counsel is not the only issue in this matter. The issue is whether the trial court advised Hunter of his appellate rights at all, including the right to counsel, in light of the fact that its former sentence was void and a nullity under Ohio law. Based upon the record, it did not. Without such an advisement as required by Crim.R. 32, Hunter was unable to even request counsel to assist with his appeal.

{¶ 19} The trial court was required to advise Hunter of these rights even though he was already allowed an appeal in *Hunter I*, because his sentences stemming from those convictions were void and a nullity under Ohio law, thus placing the parties in the same position as if there had been no sentence. See *Romito*, supra; *McGee*, supra. The failure to advise Hunter of his appellate rights at the hearing to correct his void sentence violated Crim.R. 32.

{¶ 20} In Ohio, “[a] convicted defendant has a constitutional right to counsel on direct appeal to the Court of Appeals from his judgment of conviction.” *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, citing *State v. Catlino* (1967), 10 Ohio St.2d 183, 226 N.E.2d 109; Crim.R. 44(A). In order to be properly informed under Crim.R. 32, a defendant must be told of his right to appeal, apprised of procedures and time limits involved in proceeding with that appeal, and the right to have assistance of appointed counsel for that appeal. Crim.R. 32(B); see, e.g, *Wolfe v. Randle* (S.D. Ohio 2003), 267 F.Supp.2d 743.

{¶ 21} We find that the trial court erred when it failed to inform Hunter of his appellate rights under Crim.R. 32, including the right to counsel. Therefore, the appropriate avenue of relief is for the trial court to resentence Hunter advising him of these rights, thus reinstating the time within which he may file a timely notice of appeal on the resentencing.

{¶ 22} Accordingly, Hunter's fourth assignment of error is sustained.

{¶ 23} Judgment reversed. Hunter's sentence is vacated, and the matter is remanded for resentencing and compliance with Crim.R. 32. Our disposition of the fourth assignment of error renders any discussion of Hunter's other assignment of errors premature.

It is ordered that appellant recover from appellee 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, JUDGE

SEAN C. GALLAGHER, A.J., CONCURS IN JUDGMENT ONLY;
CHRISTINE T. McMONAGLE, J., CONCURS