[Cite as *State v. Smith*, 2011-Ohio-1014.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2010-L-070**
DARNELL R. SMITH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 03 CR 000646.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Darnell R. Smith, pro se, PID: 463-784, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Darnell R. Smith, appeals the judgment of the Lake County Court of Common Pleas denying his motion for jail-time credit. At issue is whether the trial court erred in denying appellant's request to find a prior sentence imposed on him by the Cuyahoga County Court of Common Pleas to be void. This is appellant's third appeal following his conviction on his guilty plea. For the reasons that follow, we affirm.

{¶2} On October 17, 2003, Wickliffe Police attempted to stop appellant for speeding. Appellant failed to stop, forcing the officer to pursue him. The pursuit ended when appellant exited his car and fled on foot. Upon his apprehension, the officer seized from appellant 46 rocks of crack cocaine, seven chunks of cocaine, 91 bindles of heroin, drug paraphernalia, and $2,257 in cash.

{¶3} On January 12, 2004, the grand jury returned a six-count indictment against appellant, charging him with trafficking in cocaine, a felony of the second degree, in violation of R.C. 2925.03(A)(2); trafficking in heroin, a felony of the second degree, in violation of R.C. 2925.03(A)(2); possession of cocaine, a felony of the third degree, in violation of R.C. 2925.11; possession of heroin, a felony of the third degree, in violation of R.C. 2925.11; possession of cocaine, a felony of the fifth degree, in violation of R.C. 2925.11; and possession of criminal tools, a felony of the fifth degree, in violation of R.C. 2923.24.

{¶4} Appellant pled not guilty and filed a motion to suppress. On May 7, 2004, he withdrew the motion and entered a plea bargain with the state. He pled guilty to one count of possession of cocaine and one count of possession of heroin, both felonies of the third degree. Both counts contained forfeiture specifications regarding the $2,257 seized from appellant. Pursuant to the plea bargain, the trial court nolled the remaining counts in the indictment. Appellant waived his right to a presentence report, and the trial court immediately sentenced him to two years in prison for each of the offenses to which he pled guilty. The trial court ordered the sentences to be served concurrently to each other, but consecutively to a sentence previously imposed on appellant by the

Cuyahoga County Common Pleas Court. He was also ordered to forfeit the $2,257 found on him. Appellant was given three days credit for jail time already served.

{¶5} On May 9, 2005, appellant filed a motion for leave to file a delayed appeal, along with his notice of appeal, in which he argued that, pursuant to *Blakely v. Washington* (2004), 542 U.S. 296 and other decisions of the United States Supreme Court, his sentence was unlawful. He also argued that he had received ineffective assistance of trial counsel. This court granted appellant leave to file his delayed appeal on June 17, 2005. In *State v. Smith*, 11th Dist. No. 2005-L-070, 2006-Ohio-4541 ("*Smith I*"), this court reversed and remanded the case for resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

{¶6} While *Smith I* was pending, on February 13, 2006, appellant filed a motion to withdraw his guilty plea in the trial court. He argued the trial court violated Crim.R. 11 by allowing him to plead guilty despite his denial of certain facts surrounding the offenses. Due to his pending appeal, the trial court found that it lacked jurisdiction to rule on the motion and dismissed it.

{¶7} On October 20, 2006, appellant filed a second motion to withdraw his guilty plea, making the same argument asserted in his first motion. On November 27, 2006, appellant withdrew his motion to withdraw his guilty plea and asked the court to proceed with his resentencing. On November 30, 2006, appellant was resentenced pursuant to *Foster*, at which time the trial court imposed the same sentence appellant received on May 7, 2004. Once again, he was given credit for three days already served in jail.

{¶8} Thereafter, appellant again appealed his sentence, and on September 17, 2007, this court affirmed his sentence in *State v. Smith*, 11th Dist. No. 2006-L-261, 2007-Ohio-4777, discretionary appeal not allowed at 2007-Ohio-6803, 2007 Ohio LEXIS 3444 ("*Smith II*").

{¶9} Meanwhile, appellant also filed a petition for postconviction relief, challenging the legality of his traffic stop and the effectiveness of his trial counsel. On July 27, 2007, the trial court denied his petition, finding that appellant's arguments were barred by res judicata. Appellant did not appeal that ruling.

{¶10} Five and one-half years after appellant pled guilty, on November 9, 2009, appellant filed a third motion to withdraw his guilty plea, arguing the trial court failed to inform him of his right to a bench trial. On November 20, 2009, the trial court denied the motion, finding that Crim.R. 11 does not impose such requirement on trial courts and that appellant's argument was additionally barred by res judicata. Appellant did not appeal this ruling.

{¶11} Subsequently, on May 21, 2010, appellant filed a motion for jail-time credit. He asked the court to find that his Cuyahoga County sentence was void and to give him jail-time credit for all time served under that sentence. The trial court denied the motion. Appellant appeals the trial court's ruling, asserting the following as his sole assignment of error:

{¶12} "The trial court abused its discretion and committed plain error in violation of the Ohio and United States Constitutions by denying the appellant's motion for jail time credit nunc pro tunc as the trial court judgment ordering the sentence to be served consecutive to another sentence that was void rendered the judgment a nullity, requiring

the appellant's release, who had acquired [sic] a satisfaction of judgment and expiration of sentence in both cases[.]"

{¶13} Appellant alleges that in April 2004, prior to the trial court's imposition of sentence, he pled guilty and was sentenced in Cuyahoga County to drug trafficking, a felony of the first degree, and drug trafficking, a felony of the second degree. He alleges that the Cuyahoga County court sentenced him to six years on the first-degree felony and three years on the second-degree felony, both terms to be served concurrently to each other. He further alleges that he completed serving this sentence on April 21, 2010.

{¶14} Appellant alleges that at the sentencing hearing in Cuyahoga County, that court incorrectly advised him that, with respect to the first-degree felony, post-release control was optional for up to five years. He alleges that, with respect to the second-degree felony, the Cuyahoga County court incorrectly advised him that post-release control was optional for up to three years. Further, the copies of the Cuyahoga County entries he submitted do not specify the period of post-release control for either offense.

{¶15} Appellant argues that, because the Cuyahoga County court did not properly impose post-release control, its sentence is void. As a result, he argues that the trial court did not have authority to order its sentence to be served consecutively to it. He argues that because the trial court did so, its sentence is likewise void. He asks this court to: (1) take judicial notice that both sentences are void on their face; (2) vacate the trial court's sentence; and (3) remand the matter to the trial court with instructions that he be given credit for his time served on the Cuyahoga County sentence and immediately released from prison.

{¶16} Appellant's argument is flawed because it requires this court to determine that his sentence in Cuyahoga County is void due to that court's alleged failure to properly impose post-release control. However, this court does not have jurisdiction to review a judgment entered by the Cuyahoga County Court of Common Pleas.

{¶17} The Ohio Constitution expressly confers appellate jurisdiction over inferior courts of record based upon the location of the lower court. Section 3(A), Article IV of the Ohio Constitution provides that "[t]he state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals ***." The jurisdiction of an appellate district is described in Section 3(B)(2), Article IV as follows: "Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district ***."

{¶18} Further, R.C. 2501.02 codifies the constitutional provision that appellate jurisdiction is based on the location of the inferior court of record, as follows: "In addition to the original jurisdiction conferred by Section 3 of Article IV, Ohio Constitution, the court of appeals shall have jurisdiction *** to review *** judgments or final orders of courts of record inferior to the court of appeals within the district ***."

{¶19} In analyzing the foregoing provisions, the Supreme Court of Ohio, in *State v. Fawcett*, 91 Ohio St.3d 1, 2000-Ohio-195, held:

{¶20} "Both the relevant constitutional and statutory provisions describe the jurisdiction of a court of appeals as dependent upon *the location of the inferior court of record from which an order is being appealed*. Accordingly, we hold that courts of appeals have jurisdiction to review judgments entered by *those inferior courts located*

within the territorial boundaries of their appellate districts. See *Heckler Co. v. Napoleon* (1937), 56 Ohio App. 110, 118 (holding that, under constitutional and statutory provisions analogous to Section 3, Article IV of the Ohio Constitution and R.C. 2501.02, 'the jurisdiction of the Court of Appeals to review *** judgments of the common pleas court is limited to common pleas courts *within the appellate district*')." (Emphasis added.) *Fawcett*, supra, at 2.

{¶21} Applying *Fawcett* to the case sub judice, we note that R.C. 2501.01(K) provides that the counties constituting the Eleventh Appellate District are Lake, Ashtabula, Geauga, Trumbull, and Portage Counties. It is undisputed that appellant's previous sentence was imposed by the Cuyahoga County Court of Common Pleas, which is an inferior court of record located in the Eighth Appellate District. R.C. 2501.01(H). We therefore hold that appellate jurisdiction over appellant's sentence in Cuyahoga County does not rest in this district. It is undisputed that appellant's previous sentence in Cuyahoga County has never been reversed or modified. We therefore hold the trial court did not err in denying appellant's motion for jail-time credit.

{¶22} In any event, pursuant to the Supreme Court of Ohio's recent decision in *State v. Fischer*, ____ Ohio St.3d ____, 2010-Ohio-6238, even if appellant had successfully appealed the post-release control aspect of his Cuyahoga County sentence to the Eighth Appellate District, only that part of his sentence would have been void. Id. at ¶26. "*** [O]nly the offending portion of the sentence is subject to review and correction." Id. at ¶27. The new sentencing hearing to which he would have been entitled pursuant to *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, would have been "limited to proper imposition of postrelease control." *Fischer*, supra, at ¶29.

{¶23} Further, appellant did not file in the trial court a properly certified transcript or any evidence in support of his motion for jail-time credit. He merely attached an uncertified copy of an excerpt of his sentencing hearing in Cuyahoga County to his motion and uncertified copies of judgments on sentence purportedly entered by the Cuyahoga County court. For this additional reason, his assignment of error is not well taken. In determining the existence of error, an appellate court is limited to a review of the trial court record. *State v. Sheldon* (Dec. 31, 1986), 11th Dist. No. 3695, 1986 Ohio App. LEXIS 9608, *2; *Schick v. Cincinnati* (1927), 116 Ohio St. 16, paragraph three of the syllabus. Without any evidence in support of appellant's assignment of error, there is nothing for us to consider. On appeal it is the appellant's responsibility to support his argument by evidence in the trial court record that supports his assigned errors. *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, 68-69.

{¶24} Moreover, we note that in *State v. Caldwell*, 11th Dist. No. 2004-L-173, 2005-Ohio-6149, this court held that a defendant's failure to raise an issue regarding the calculation of his jail-time credit in a prior proceeding is barred by res judicata. Id. at ¶10. In *Caldwell*, this court stated:

{¶25} "Caldwell appealed the judgment entry of sentence. *** On his direct appeal, he did not raise any issue regarding the calculation of his jail-time credit. *** However, the trial court's judgment entry of sentence clearly provides that he was credited with eight days of jail time. Therefore, this was an issue that could have been raised in his direct appeal. In addition, in May 2003, the trial court denied a nearly identical motion for recalculation of jail time. Caldwell did not appeal the trial court's

May 1, 2003 judgment entry. Therefore, this issue has been previously litigated in a prior proceeding, which is final due to Caldwell's failure to appeal it." Id.

{¶26} Likewise, here, appellant was aware of the issue presented in his motion for jail-time credit by the time of his initial sentencing by the trial court because he had already been sentenced in his Cuyahoga County cases. Further, the trial court's sentencing entries provide that appellant was credited with three days of jail time. He therefore could have asserted the Cuyahoga County court's alleged error during his initial sentencing, during his resentencing, or in *Smith I* or *Smith II*, but failed to do so.

{¶27} For the reasons stated in the opinion of this court, the assignment of error is not well taken. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.