

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

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| STATE OF OHIO, | : | OPINION |
| Plaintiff-Appellee, | : | |
| - vs - | : | CASE NO. 2012-P-0046 |
| MATTHEW D. PLATT, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 88 CR 0199.

Judgment: Affirmed.

Victor V. Viglucci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Matthew D. Platt, PID: A209181, pro se, Grafton Correctional Institution, 2500 South Avon Belden Road, Grafton, OH 44044 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Matthew D. Platt, pro se, appeals the judgment of the Portage County Court of Common Pleas denying his motion to correct a clerical error in his sentence following his guilty plea to aggravated murder and for the trial court to conduct a de novo resentencing hearing. At issue is whether the court's failure to reference appellant's eligibility for parole at his sentencing hearing rendered his sentence void. For the reasons that follow, we affirm.

{¶2} On November 15, 1987, appellant was arrested and charged with delinquency by reason of aggravated murder in the death of his girlfriend. The alleged offense occurred on November 13, 1987, at which time appellant was 17 years old. Both appellant and the victim were students at Ravenna High School. They had been involved in a relationship for approximately one and one-half years. Appellant was upset by the victim's attempts to end their relationship. On the night in question, he shot her six times and buried her in a shallow grave.

{¶3} The state filed a motion to transfer jurisdiction from the Portage County Juvenile Court to the common pleas court so that appellant could be tried as an adult. A preliminary hearing was held on February 16, 1988, at which time the juvenile court found probable cause, and bound appellant over to the Portage County Court of Common Pleas to be tried as an adult.

{¶4} Appellant was subsequently indicted. In Count One he was charged with aggravated murder, a felony, in violation of R.C. 2903.01(A) (prior calculation and design) and (B) (felony murder), with a capital offense specification that the offense was committed in the course of committing a felony, in violation of R.C. 2929.04(A)(7), and a firearm specification, in violation of R.C. 2941.141. In Count Two he was charged with kidnapping, an aggravated felony of the first degree, in violation of R.C. 2905.01, with a firearm specification.

{¶5} Appellant initially pled not guilty. On November 21, 1988, he changed his plea to not guilty by reason of insanity and filed a motion to determine his competency to stand trial.

{¶6} On February 17, 1989, appellant filed a motion to merge specifications and indictments.

{¶7} On February 23, 1989, the trial court held a hearing on the pending defense motions. Based on the parties' stipulation to the contents of the competency evaluation, the trial court found appellant competent to stand trial. Further, the trial court granted appellant's motion to merge specifications and indictments. Finding no separate animus for the charge of kidnapping, the trial court merged the felony murder alternative and the felony murder specification in Count One and the charge of kidnapping in Count Two into the remaining charge of aggravated murder with prior calculation and design with a firearm specification, a non-capital offense.

{¶8} Appellant then withdrew his previously entered pleas of not guilty and not guilty by reason of insanity, and entered a guilty plea to the charge of aggravated murder with prior calculation and design as charged in Count One and to the firearm specification to that count.

{¶9} On the same date, the court held a sentencing hearing at which the court sentenced appellant to prison "to serve a sentence of life imprisonment * * *. In addition to that there will be a sentence of three years on the gun specification of actual incarceration."

{¶10} In the court's judgment on sentence, filed on February 24, 1989, the court stated that appellant was sentenced to prison "for life, pursuant to the charge contained in the indictment, to wit: aggravated murder, a felony, * * * to be served consecutively to a three (3) year sentence of actual incarceration pursuant to the firearm specification to Count One of the indictment * * *." In the court's sentencing entry, the court also

referenced appellant's parole eligibility. The entry further stated, "pursuant to O.R.C. 2929.022(B) the defendant shall not be eligible for parole until he has served twenty (20) years of the sentence for aggravated murder."

{¶11} Thereafter, appellant filed a direct appeal, and this court unanimously affirmed his conviction in *State v. Platt*, 11th Dist. No. 89-P-2065, 1990 Ohio App. LEXIS 3508 (Aug. 17, 1990).

{¶12} Twenty-three years after appellant was sentenced, on February 23, 2012, he filed a motion for the trial court to correct a clerical error in his sentence pursuant to Crim.R. 36 and for the trial court to conduct a de novo resentencing hearing. Appellant argued his sentence was void because the court failed to advise him at his sentencing hearing that he was eligible for parole in 20 years, despite the fact that the court included this notice in appellant's sentencing entry. He therefore argued he was entitled to a de novo resentencing hearing. The state filed a brief in opposition.

{¶13} The trial court denied appellant's motion, finding there was no clerical error because the sentence set forth in the court's sentencing entry was the only sentencing option available to appellant. Thus, the trial court construed the sentence announced at the hearing to be consistent with the sentencing entry. The court also interpreted appellant's motion in part to be a petition for postconviction relief because he claimed a violation of his constitutional rights. The court found the motion, as construed, to be time-barred. Appellant appeals the trial court's ruling, asserting the following for his sole assignment of error:

{¶14} "The trial court committed plain error when it denied appellant's motion for trial court to correct clerical error in sentencing pursuant to Criminal Rule 36(A) [sic] and

for the trial court to conduct a de novo resentencing hearing as though sentencing had never previously occurred. With [sic] special appearance demanded and requested.”

{¶15} Before addressing the merits of appellant’s argument, we note that the trial court construed appellant’s motion in part as a petition for postconviction relief and, as such, found it was time-barred under R.C. 2953.21. However, appellant’s motion is more properly construed as a motion under the trial court’s inherent authority to vacate a void judgment since he argued his original sentence is void. Because a void judgment can be attacked at any time, appellant was not required to file his motion within the time constraints imposed by R.C. 2953.21 for a petition for postconviction relief.

{¶16} Appellant argues that his sentence is void because the trial court failed to advise him at his sentencing hearing that he would be eligible for parole after serving 20 years in prison. We note that appellant does not reference any authority for the proposition that a sentence of life imprisonment pursuant to a guilty plea is void simply because the trial court did not mention the defendant’s eligibility for parole at his sentencing hearing, as required by App.R. 16(A)(7). For this reason alone, appellant’s argument lacks merit.

{¶17} We note that *during the sentencing*, but before the court imposed sentence, appellant’s trial counsel stated in open court *in appellant’s presence* that “the Statute provides that the Court only has one choice in terms of sentencing and that is twenty years to life, plus three years on the specification of the gun.” Thus, appellant was advised during his sentencing that he was eligible for parole after serving 20 years in prison.

{¶18} Moreover, on appeal, appellant concedes that the sentence of life imprisonment with parole eligibility after 20 years plus an additional three years for the firearm specification was the only sentencing option available for him and that the court's judgment on sentence correctly imposed this sentence.

{¶19} We agree with the following finding by the trial court in its judgment denying appellant's motion to correct his sentencing:

{¶20} [A]t the time of Mr. Platt's sentencing, the only sentence option available to impose was life imprisonment with parole eligibility after twenty years, plus three consecutively on the gun specification. Thus, the Trial Court's pronouncement in open court can only be construed as imposing a sentence of life imprisonment with parole eligibility after twenty years, plus three years consecutively on the gun specification.

{¶21} In any event, any error in appellant's sentencing was corrected by the sentencing entry, which correctly sentenced him to life in prison with parole eligibility after serving 20 years, plus three years on the firearm specification to be served consecutively to the sentence for aggravated murder.

{¶22} Appellant argues that, although the court's sentencing entry correctly imposed his sentence of 20 years to life, this is irrelevant because the trial court failed to advise him regarding parole eligibility at his sentencing. As a result, he argues his sentence is void and the trial court should be required to conduct a de novo resentencing to announce the correct sentence and then to journalize the correct sentence so he can file another direct appeal. We do not agree.

{¶23} In arguing that his sentence is void because the trial court did not notify him about his parole eligibility at the sentencing hearing, appellant is confusing parole with postrelease control. Pursuant to R.C. 2929.12, a trial court must advise a defendant that postrelease control sanctions will be a part of his or her sentence at the sentencing hearing *and* journalize a similar notification in its judgment entry on sentence. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶17. The Supreme Court of Ohio held that the failure to do so renders a defendant's sentence void, entitling the defendant to a new sentencing hearing. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, syllabus.

{¶24} However, in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, the Supreme Court of Ohio held that when a judge fails to impose postrelease control as part of a defendant's sentence, only that part of the sentence is void and "only the offending portion of the sentence is subject to review and correction." *Id.* at ¶26-27. Further, the court overruled that portion of the syllabus in *Bezak* that required a complete resentencing hearing. *Fischer* at ¶36. Instead, the court in *Fischer* held that the resentencing hearing is restricted to correcting only the void portion of the sentence. *Id.* The court held that res judicata still applies to all other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence. *Id.* Thus, the court in *Fischer* rejected the defendant's claim that the sentence as a whole was void and that there was no final, appealable order in the case. *Id.* at ¶37.

{¶25} Further, appellant argues that his sentencing entry is not a final, appealable order because his sentence, as announced in open court, did not include a

reference to his parole eligibility after serving 20 years in prison. Appellant argues his sentencing entry fails to comply with Crim.R. 32(C). In explaining Crim.R. 32(C), the Supreme Court of Ohio held: “A judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court.” *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, syllabus, *modified by State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204. Thus, although the trial court did not personally advise appellant regarding his parole eligibility at the sentencing hearing, the court’s judgment on sentence satisfied each requirement of *Baker* and is a final order.

{¶26} We therefore hold that the trial court’s failure to personally advise appellant regarding parole at his sentencing hearing did not render his sentence void. Because appellant’s sentence is not void, he was required to raise this issue on direct appeal. Since he failed to do so, the argument is now barred by *res judicata*.

{¶27} For the reasons stated in this opinion, appellant’s assignment of error is overruled. It is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDALL, J.,

concur.