[Cite as *State v. Riggenbach*, 2010-Ohio-3392.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- SHANE RIGGENBACH Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. Sheila G. Farmer, J. Case No. 09CA121 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case 2004-CR-776D
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	July 19, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAMES J. MAYER, JR. PROSECUTING ATTORNEY RICHLAND COUNTY, OHIO BY: KIRSTEN L. PSCHOLKA-GARTNER Assistant Richland County Prosecutor 38 South Park Street Mansfield, Ohio 44902	JOHN SPIEGEL P.O. BOX 1024 222 West Charles St. Bucyrus, Ohio 44820-1024

Hoffman, J.

{¶1} Defendant-appellant Shane Riggenbach appeals the September 15, 2009 Amended Resentencing Entry entered by the Richland County Court of Common Pleas resentencing him to include a term of postrelease control. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE

{¶2} On September 17, 2004, the Richland County Grand Jury indicted Appellant on one count of aggravated arson, in violation of R.C. 2909.02. Said charge arose from a fire at the home of Kerry Snyder.

{¶3} A jury trial commenced on June 30, 2005. The jury found Appellant guilty as charged. By sentencing entry filed July 7, 2005, the trial court sentenced Appellant to eight years in prison.

{¶4} On May 31, 2006, Appellant's conviction was affirmed by this Court in *State v. Riggenbach*, 2006-Ohio-2725. On appeal, Appellant assigned as error due process violations, trial court err in admission of witness testimony and ineffective assistance of counsel based on the admission of the witness testimony.

{¶5} On January 15, 2009, Appellant filed a motion for resentencing arguing he was not advised of his postrelease control obligations. As a result, the trial court conducted a resentencing hearing, and advised Appellant he would be subject to a five year mandatory postrelease control term. On September 15, 2009, the trial court resentenced Appellant imposing a condition of postrelease control in addition to the original sentence imposed.

{¶6} Appellant now appeals, assigning as error:

{¶7} "I. THE TRIAL COURT ERRED IN FINDING DEFENDANT GUILTY OF A FIRST DEGREE FELONY, WHEN THE VERDICT FORM SUPPORTED ONLY A VERDICT OF A SECOND DEGREE FELONY.

{¶8} "II. THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO FILE A MOTION TO DISMISS THE INDICTMENT AGAINST DEFENDANT FOR VIOLATION OF THE SPEEDY TRIAL STATUTES OF OHIO, OHIO REV. CODE 2945.71 TO 2945.73.

{¶9} "III. THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, WHERE COUNSEL FAILED TO MOVE FOR MISTRIAL, WHERE THE STATE'S AGENTS VOLUNTEERED INFORMATION THAT THE DEFENDANT HAD SUPPOSEDLY DONE OTHER BAD ACTS."

{¶10} Appellant argues a direct appeal from a void sentence is a legal nullity and a defendant's appeal following resentencing is actually a defendant's first appeal as of right. Therefore, even though this Court reviewed the merits of the argument raised in his first direct appeal relating to his conviction, Appellant maintains he now has the right to assert additional arguments relating to his conviction following resentencing.

{¶11} The Ohio Supreme Court has consistently held when a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void and the state is entitled to a new sentencing hearing to have postrelease control imposed unless the defendant has completed his sentence. *See State v. Beasley* (1984), 14 Ohio St.3d 74 (any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity and void); *Woods v. Telb* (2000), 89 Ohio St.3d 504; *State*

v. Jordan 104 Ohio St.3d 21, 2004-Ohio-6085 (any sentence imposed without postrelease control notification is contrary to law); *State ex rel. Cruzado v. Zaleski* 111 Ohio St.3d 353, 2006-Ohio-5795 (the trial court did not patently and unambiguously lack jurisdiction to correct the sentence); *State v. Bezak* 114 Ohio St.3d 94, 2007 Ohio 3250 (an offender is entitled to a de novo sentencing hearing for the trial court to correct a sentence that omitted notice of postrelease control); *State v. Simpkins* 117 Ohio St.3d 420, 2008-Ohio-1197 (sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence); *State v. Boswell* 121 Ohio St.3d 575, 2009-Ohio1577.

{¶12} In *State v. Fischer* the Ninth District Court of Appeals addressed the issue raised by Appellant herein, holding:

{¶13} "Specifically, Fischer contends that because his original sentence did not include a notice of postrelease control, it was void pursuant to *State v. Bezak,* 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, at syllabus. While we agree with this statement of law, we do not agree with Fischer's contention that due to this defect, his original direct appeal is invalid and therefore he can now 'raise any and all trial errors cognizable on direct appeal.'

{¶14} "***

{¶15} "As applied to the facts before the court in *Ortega,* we determined that when a ' 'court affirms the convictions in the First Appeal, the propriety of those convictions becomes the law of the case, and subsequent arguments seeking to overturn them become barred. Thus, in the Second Appeal, only arguments relating to the resentencing are proper.' Id. at ¶ 7, quoting *State v. Harrison,* 8th Dist. No. 88957,

2008-Ohio-921, 2008 WL 596528, at ¶ 9. Accordingly, Fischer's contention that he may raise any and all issues relating to his conviction in this appeal is without merit."

{¶16} We agree with the Ninth District's holding in *Fischer* and find the law of the case doctrine applies to this Court's May 31, 2006 disposition of Appellant's original appeal even though the appeal arose from a void sentence.[1] As set forth in the case law cited above, the Ohio Supreme Court has consistently held only the sentence is void for failure to properly impose the mandatory term of postrelease control, not the conviction. Therefore, we find Appellant is precluded from asserting additional arguments relating to his conviction following his resentencing.

{¶17} R.C. 2929.191(C) prescribes the type of hearing that must occur to make such a correction to a judgment entry "[o]n and after the effective date of this section." The hearing contemplated by R.C. 2929.191(C) and the correction contemplated by R.C. 2929.191(A) and (B) pertain only to the flawed imposition of postrelease control.

{¶18} However, Appellant's original resentencing occurred prior to the effective date of R.C. 2929.19. The statute does not apply retroactively. Therefore, Appellant was entitled to a de novo sentencing hearing in accordance with the decisions of the Supreme Court binding at the time of the resentencing. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434.

[1] Having initiated appellate review from his original conviction, we believe Appellant is judicially estopped under the invited error doctrine to circumvent the law of the case doctrine. To hold otherwise would allow Appellant the proverbial "second bite at the apple." We are aware the Ninth District reversed itself in regard to this issue in *State v. Harmon*, 2009-Ohio-4512.

I.

{¶19} Appellant's first assignment asserts the trial court erred in finding him guilty of a first degree felony and sentencing him accordingly when the verdict form supported only a verdict of a second degree felony.

{¶20} R.C. Section 2945.75 provides:

{¶21} "(A) When the presence of one or more additional elements makes an offense one of more serious degree:

{¶22} "(1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise, such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.

{¶23} "(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

{¶24} In *State v. Pelfrey* 112 Ohio St.3d 422, 2007-Ohio-256, the Ohio Supreme Court held, "a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense." The Court held the defendant did not waive the error by failing to raise it in the trial court. Id.

{¶25} Appellant herein asserts his sentence is invalid because it is not based upon the jury verdict forms. Pursuant to *Pelfrey*, Appellant's failure to raise the issue in

the trial court does not excuse failure to comply with the statute. Therefore, we will address Appellant's first assignment of error as it relates to the sentence imposed.

{¶26} The July 1, 2005 jury verdict form herein states Appellant is "guilty of the crime of aggravated arson." R.C. 2909.02 sets forth the offense:

{¶27} "(A) No person, by means of fire or explosion, shall knowingly do any of the following:

{¶28} "(1) Create a substantial risk of serious physical harm to any person other than the offender;

{¶29} "(2) Cause physical harm to any occupied structure;

{¶30} "(3) Create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of physical harm to any occupied structure.

{¶31} "(B)(1) Whoever violates this section is guilty of aggravated arson.

{¶32} "(2) A violation of division (A)(1) or (3) of this section is a felony of the first degree.

{¶33} "(3) A violation of division (A)(2) of this section is a felony of the second degree."

{¶34} Upon review, we find the elements set forth in section (A)(1) are different than the elements necessary to convict under subsection (A)(2). A defendant can violate subsection (2) without violating subsection (1). The verdict form fails to state the degree of the offense of which the Appellant was convicted or a finding of an element differentiating whether Appellant is convicted under subsection (A)(1) or (A)(2). Therefore, we conclude the trial court could only impose a sentence consistent with a conviction of the lesser degree.

{¶35} Appellant's first assignment of error is sustained, and the matter remanded to the trial court for resentencing.

II, III.

{¶36} Based upon our analysis set forth supra, we find Appellant's second and third assignments of error are barred by the law of the case as they relate to his conviction and not his sentence and could have been raised on direct appeal.

{¶37} The judgment of the Richland County Court of Common Pleas is reversed and the matter remanded for resentencing consistent with the law and this opinion.

By: Hoffman, J.

Gwin, P.J. and

Farmer, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
SHANE RIGGENBACH	:	
	:	
Defendant-Appellant	:	Case No. 09CA121

For the reasons stated in our accompanying Opinion, the judgment of the Richland County Court of Common Pleas is reversed and the matter remanded for resentencing consistent with the law and our opinion. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER