

mccraeCOURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

TWAN E. MCCRAE

Defendant-Appellant

: JUDGES:

:
: Hon. Patricia A. Delaney, P.J.
: Hon. W. Scott Gwin, J.
: Hon. William B. Hoffman, J.

: Case No. CT2017-0008

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Muskingum Court of
Common Pleas, Case No. CR99-0092

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

May 18, 2017

APPEARANCES:

For Plaintiff-Appellee:

D. MICHAEL HADDOX
MUSKINGUM COUNTY PROSECUTOR

GERALD V. ANDERSON, II
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For Defendant-Appellant:

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London Correctional Institution
P.O. Box 69
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Delaney, P.J.

{¶1} Defendant-Appellant Twan E. McCrae appeals the January 19, 2017 judgment entry of the Muskingum County Court of Common Pleas. Plaintiff-Appellee is the State of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} In February of 2000, a jury found McCrae not guilty of aggravated murder, but guilty of the lesser included offense of murder and of two counts of having a weapon while under disability. By entry filed on April 3, 2000, the trial court sentenced McCrae to an indefinite term of fifteen years to life on the murder count, plus a mandatory three-year prison term for a firearm specification, to be served consecutively. As for the weapons charges, the trial court merged the two counts and sentenced McCrae to five years in prison, to be served consecutively to the other sentences. In the sentencing entry and at the sentencing hearing, the trial court provided post-release control was “mandatory up to a maximum of five years.” In the entry, the trial court also stated it informed McCrae of the consequences for violating post-release control. McCrae is currently incarcerated and serving his original sentence.

{¶3} McCrae filed a direct appeal and argued the trial court erred in admitting a firearm into evidence that was not the actual firearm used on the evening in question. In *State v. McCrae*, 5th Dist. Muskingum No. CT2000–0012, 2000 WL 1884829 (Dec. 20, 2000), we overruled McCrae's assignment of error and affirmed his conviction.

{¶4} On June 17, 2016, McCrae filed a motion for resentencing to vacate void sentence pursuant to R.C. 2967.28. McCrae argued the trial court failed to properly impose post-release control and requested a de novo sentencing hearing. The State filed

a response on June 26, 2016 and stated the term of post-release control given to McCrae at the sentencing hearing and in the original sentencing entry was incorrect. Rather than five years mandatory post-release control, McCrae should have been given three years of optional post-release control. However, the State argued the trial court should not hold a de novo sentencing hearing, but should hold a resentencing hearing only on the issue of post-release control.

{¶5} On August 8, 2016, the trial court issued a nunc pro tunc sentencing entry changing the language contained in the sentencing entry regarding post-release control from a mandatory five year term to an optional term for up to three years.

{¶6} McCrae appealed the August 8, 2016 judgment entry. He argued the trial court erred when it issued a nunc pro tunc sentencing entry and failed to hold a de novo sentencing hearing. In *State v. McCrae*, 5th Dist. Muskingum No. CT2016-0047, 2016-Ohio-8182, we agreed with McCrae that the trial court erred in resentencing McCrae through a nunc pro tunc journal entry. *Id.* at ¶ 12. We found, however, McCrae was not entitled to a de novo sentencing hearing. We stated:

In *State v. Fisher*, 128 Ohio St.3d 92, 2010–Ohio–6238, 942 N.E.2d 332, the Ohio Supreme Court held, “only the offending portion of the sentence is subject to review and correction” and thus the “new sentencing hearing to which an offender is entitled * * * is limited to proper imposition of post-release control.” Therefore, while appellant's sentence is void with respect to post-release control, the remainder of his sentence is valid under the principles of res judicata. *Id.* This Court has applied *Fisher* to cases in which defendants were sentenced prior to July 11, 2006, and affirmed decisions

in which the trial court denied the defendant a de novo sentencing hearing. *State v. Minor*, 5th Dist. Richland No. 15CA81, 2016–Ohio–914; see also *State v. Bunting*, 5th Dist. Stark Nos.2011 CA 00112, 2011 CA 00130, 2011 CA 00131. Accordingly, appellant is not entitled to a de novo sentencing hearing.

Id. at ¶ 13.

{¶7} We remanded the matter to the trial court to conduct a limited resentencing hearing to cover only the imposition of post-release control. *Id.* at ¶ 14. We held the remainder of the sentence was valid under the principle of res judicata. *Id.*

{¶8} The trial court held a limited resentencing hearing pursuant to our remand on January 17, 2017. At the hearing, McCrae argued the sentencing hearing was a de novo sentencing hearing and accordingly, the trial court should reduce his sentence under HB 86. The trial court overruled his request and imposed the correct post-release control.

{¶9} It is from this judgment McCrae now appeals.

ASSIGNMENTS OF ERROR

{¶10} McCrae raises two Assignments of Error:

{¶11} “I. THE TRIAL COURT ERRED BY FAILING TO SENTENCE DEFENDANT TO THE REDUCE [SIC] MINIMUM SENTENCE OF FELONY 3 OF THREE YEARS AND NOT FIVE YEARS PURSUANT TO H.B. 86 AMENDMENT.

{¶12} “II. TRIAL COURT FAILED TO ADVISE DEFENDANT OF HIS RIGHT TO APPEAL PURSUANT TO CRIM.R. 32(A) AFTER RESENTENCING AND FURTHER FAILED TO INCORPORATE THAT IN ITS JOURNAL ENTRY ISSUED JANUARY 19TH 2017.”

ANALYSIS

I. Limited Resentencing

{¶13} McCrae argues in his first Assignment of Error that the trial court erred when it failed to reduce McCrae's sentence pursuant to H.B. 86.

{¶14} We stated in *McCrae II* that only the offending portion of the sentence is subject to review and correction. *McCrae II* at ¶ 13 citing *State v. Fisher*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332. In this case, the offending portion of the sentence was the imposition of an incorrect term of post-release control. The offender is entitled to a new sentencing hearing limited to the proper imposition of post-release control. *Id.* The remainder of the original sentence is valid under the principle of res judicata. *Id.*

{¶15} On January 17, 2017, the trial court conducted a sentencing hearing limited to the proper imposition of post-release control. The trial court correctly overruled McCrae's request to conduct a de novo sentencing hearing.

{¶16} McCrae's first Assignment of Error is overruled.

II. Notification of Right to Appeal

{¶17} McCrae argues in his second Assignment of Error that the trial court did not inform him of his right to appeal his resentencing.

{¶18} Any error in failing to inform McCrae of his appellate rights under Crim.R. 32(B) was harmless because McCrae filed a timely appeal and has not shown any prejudice. See *State v. Fryer*, 2015-Ohio-4573, 48 N.E.3d 962, ¶20 (5th Dist.).

{¶19} McCrae's second Assignment of Error is overruled.

CONCLUSION

{¶20} The judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Gwin, J. and

Hoffman, J., concur.