

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

BRUCE HAMMOCK

Defendant-Appellant

: JUDGES:

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

: Case No. 18CA27

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Richland County Court
of Common Pleas, Case No. 15-CR-
0858D

JUDGMENT:

AFFIRMED IN PART, REVERSED IN
PART, AND REMANDED FOR
RESENTENCING

DATE OF JUDGMENT ENTRY:

September 26, 2018

APPEARANCES:

For Plaintiff-Appellee:

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RICHLAND CO. PROSECUTOR
JOSEPH C. SNYDER
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For Defendant-Appellant:

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Delaney, J.

{¶1} Appellant Bruce Hammock appeals from the March 15, 2018 judgment entry of the Richland County Court of Common Pleas overruling his motion for resentencing. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} A statement of the facts underlying appellant's criminal convictions is not necessary to our resolution of this appeal. In 2015, appellant was charged by indictment with cocaine possession with a firearm specification, having weapons while under disability with a forfeiture specification, fleeing and eluding with a firearm specification, two counts of improper handling of a firearm in a motor vehicle, carrying a concealed weapon, and OVI.

{¶3} On February 8, 2016, appellant entered pleas of guilty. On April 11, 2016, the trial court sentenced appellant to an aggregate prison term of 4 years in addition to a term of community control. Appellant was advised he was subject to 5 years of mandatory post-release control.

{¶4} On July 8, 2016, we denied appellant's motion for delayed appeal in Case No. 16-CA-37. Appellant's motion for reconsideration was overruled and his appeal to the Ohio Supreme Court was declined. *State v. Hammock*, 147 Ohio St.3d 1438, 2016-Ohio-7677, 63 N.E.3d 157.

{¶5} On December 4, 2017, appellant filed a "Motion for Resentencing" in the trial court and made the following arguments: 1) the sentencing entry was not a final appealable order because the trial court failed to impose a separate sentence on each individual offense; 2) the trial court erred in ordering the community-control sanction to be

served consecutively to the prison term; and 3) post-release control was not properly imposed.

{¶6} The trial court overruled the motion on March 15, 2018, finding the motion was an untimely petition for post-conviction relief.

{¶7} Appellant now appeals from the trial court's judgment entry overruling his motion for resentencing.

{¶8} Appellant raises four assignments of error:

ASSIGNMENTS OF ERROR

{¶9} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY SENTENCING HAMMOCK TO COMMUNITY CONTROL ON A MATTER THAT THE GENERAL ASSEMBLY HAS CLEARLY DECLARED TO BE A NONPROBATIONABLE OFFENSE."

{¶10} "II. THE TRIAL COURT ERRED BY FAILING TO IMPOSE A [SEPARATE] SENTENCE ON EACH INDIVIDUAL OFFENSE, THERE HAS BEEN A JUDGMENT WHICH IS NOT A FINAL APPEALABLE ORDER FROM WHICH HAMMOCK COULD NOT FILE A DIRECT APPEAL (S/C THROUGHOUT)."

{¶11} "III. THE TRIAL COURT ERRED BY ORDERING HAMMOCK'S COMMUNITY CONTROL SANCTION TO BE SERVED CONSECUTIVE TO HIS PRISON TERM."

{¶12} "IV. THE TRIAL COURT ERRED BY NOT PROPERLY NOTIFYING HAMMOCK OF POST-RELEASE CONTROL, AND THE DETAILS OF POST-RELEASE CONTROL AND THE CONSEQUENCES OF VIOLATING POST-RELEASE CONTROL."

ANALYSIS

{¶13} We will address appellant's assignments of error out of order.

IV.

{¶14} We begin with appellant's fourth assignment of error: he argues the trial court failed to properly advise him of the consequences of violating post-release control. We agree.

{¶15} The caption of a pro se pleading does not define the nature of the pleading. *State v. Reynolds*, 79 Ohio St.3d 158, 160, 679 N.E.2d 1131 (1997). Thus, if the pleading meets the definition of a petition for post-conviction relief, it must be treated as such, regardless of the manner in which appellant actually presents the motion to the court. *State v. Green*, 5th Dist. Knox No. 15-CA-13, 2015-Ohio-4441, ¶ 13. A motion meets the definition of a motion for post-conviction relief set forth in R.C. 2953.21(A)(1), despite the caption or manner in which a defendant presents a motion to the court, if it is (1) filed subsequent to direct appeal; (2) claims a denial of constitutional rights; (3) seeks to render the judgment void; and (4) asks for vacation of the judgment and sentence. *Reynolds*, supra, 79 Ohio St.3d at 160.

{¶16} We find the trial court erred in treating appellant's motion for resentencing as a petition for post-conviction relief as to this claim. A claim that an appellant was not properly informed of post-release control is based solely on state statutory requirements and is not a constitutional claim. *State v. Smith*, 5th Dist. Fairfield No. 14-CA-18, 2014-Ohio-4657, ¶ 17. Further, the Ohio Supreme Court has held that where a trial court did not properly impose post-release control, the sentence is void, and principles of res judicata do not preclude appellate review. *State v. Fischer*, 128 Ohio St.3d 92, 2010-

Ohio–6238, 942 N.E.2d 332, ¶ 30. The sentence may be reviewed at any time, on direct appeal or by collateral attack. *Id.* The trial court therefore erred in converting this portion of appellant's motion to vacate a void sentence into a petition for post-conviction relief. *Smith*, supra, 2014-Ohio-4657 at ¶ 17.

{¶17} Although the sentencing entry recites that appellant was informed of post-release control, the transcript of the sentencing hearing reflects that the trial court failed to inform appellant of the consequences of violating post-release control. A trial court may correct its omission to inform a defendant about post-release control sanctions by complying with R.C. 2929.191 and issuing a corrected sentence. *State v. Alexander*, 5th Dist. Stark No. 13–CA–151, 2014–Ohio–2351, ¶ 21.

{¶18} However, in cases where no corrected entry is necessary, only a hearing is required. *Id.* Because the trial court did not verbally inform appellant of mandatory post-release control sanctions at sentencing, his fourth assignment of error is sustained, and appellant is entitled to a new limited sentencing hearing during which the court will explain the mandatory period of post-release control included in his sentence, including the consequences of violating post-release control. *Smith*, supra, 2014-Ohio-4657, ¶ 25.

{¶19} This matter is remanded to the trial court for the limited purpose of holding a sentencing hearing to address appellant in regard to his post-release control sanction. *Smith*, supra, 2014-Ohio-4657 at ¶ 26.

III.

{¶20} In his third assignment of error, appellant argues the trial court erred in sentencing him to a term of community control to be served consecutive to his prison

term. We disagree because appellant's community-control sanction does not include a term in a CBCF.

{¶21} We recently noted in *State v. Weber*, 5th Dist. Fairfield No. 17-CA-36, 2018-Ohio-3174, our authority on this issue is at odds with decisions from other Courts of Appeal, specifically the Eighth and Twelfth Districts.¹ We certified a conflict to the Ohio Supreme Court in *State v. Hitchcock*, 5th Dist. Fairfield No. 16-CA-41, 2017-Ohio-8255, motion to certify allowed, 152 Ohio St.3d 1405, 2018-Ohio-723, 92 N.E.3d 877, and the Court stayed briefing pending a decision in *State v. Paige*, — Ohio St.3d —, 2018-Ohio-813.² The *Paige* decision has now been announced although *Hitchcock* remains pending. The split in authority will be further discussed infra.

{¶22} In *Weber*, we found this issue is not res judicata because it presents a split of authority among the Courts of Appeal and is presently pending before the Ohio Supreme Court. *State v. Weber*, 5th Dist. Fairfield No. 17-CA-36, 2018-Ohio-3174, ¶ 19. Because this appeal raises the issue of the trial court's statutory authority to sentence appellant in a certain way, we find the sentence is not res judicata. *Id.* We further found

¹ *State v. Anderson*, 2016-Ohio-7044, 62 N.E.3d 229, ¶ 12 (8th Dist.) ["Because there is no statutory authority for the imposition of community control sanctions to be served consecutive to, or following the completion of, a prison or jail term or other sentence of imprisonment, the trial court was without authority to impose the same."]; *State v. Ervin*, 12th Dist. No. CA2016-04-079, 2017-Ohio-1491, 89 N.E.3d 1, ¶ 23 ["Moreover, because there is no statutory authority for the imposition of community control sanctions to be served consecutive to, or following the completion of, a prison or jail term or other sentence of imprisonment, the trial court was without authority to impose the same. The community control sanctions are therefore void and must be vacated."]

² The following issue of law was certified for review and final resolution: "Whether a trial court may impose a term of residential or nonresidential community control sanctions on one felony count, to be served consecutively to a term of imprisonment imposed on another count."

that in accord with *Paige*, supra the trial court did not have statutory authority to order, as part of the original sentence, appellant's placement into a CBCF as part of her community-control sanction after her completion of the separate prison term. *Id.* at ¶ 28.

{¶23} In the instant case, we have reviewed the “Community Control Sanctions” portion of the trial court’s Sentencing Entry of April 13, 2016. We note appellant’s community-control sanction does **not** require him to complete a term in a CBCF. We therefore find the trial court had authority to order him to complete a term of community control after completion of his prison term. See, *Weber*, supra, 2018-Ohio-3174, ¶ 29.

{¶24} Appellant’s third assignment of error is therefore overruled.

II.

{¶25} Next, appellant argues the trial court erred in imposing a “lump sentence” upon Counts II through VII. We disagree on the basis of res judicata.

{¶26} This argument could have been raised on direct appeal and is barred by res judicata. *State v. Smith*, 5th Dist. Fairfield No. 14-CA-18, 2014-Ohio-4657, ¶ 19, citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967); see also, *State v. Houston*, 73 Ohio St.3d 346, 347, 652 N.E.2d 1018 (1995), citing *Perry*, supra. “A defendant who fails on direct appeal to challenge the sentence imposed on him for an offense is barred by res judicata from appealing that sentence * * *.” *State v. Lindsay*, 5th Dist. Richland No. 16CA39, 2017–Ohio–595, ¶ 30.

{¶27} Therefore, the trial court properly denied appellant's motion on the basis of res judicata. “Otherwise, appeals could be filed indefinitely.” *State v. Henley*, 2d Dist. Montgomery No. 26604, 2015–Ohio–4113, ¶ 11; *State v. Isa*, 2nd Dist. Champaign No. 2015-CA-44, 2016-Ohio-4980, ¶ 9 [res judicata prevents appellant from raising sentence-

packaging issue now, as it could have been previously litigated and raised in prior appeal]; See also, *State v. Selmon*, 5th Dist. Richland No. 15 CA 83, 2016–Ohio–723; *State v. Lynch*, 5th Dist. Muskingum No. CT2017-0040, 2017-Ohio-8642.

{¶28} The remand for resentencing upon appellant’s fourth assignment of error does not entitle him to resentencing on all offenses. When a defendant fails to appeal the sentence for a certain offense, he cannot take advantage of an error in the sentence for an entirely separate offense to gain a second opportunity to appeal upon resentencing. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 19. To hold otherwise would essentially abrogate the doctrine of res judicata for multicount sentences and precludes finality in sentencing. *Id.* Accordingly, a defendant who fails on direct appeal to challenge the sentence imposed on him for an offense is barred by res judicata from appealing that sentence following a remand for resentencing on other offenses. *Id.*

I.

{¶29} In his first assignment of error, appellant argues the trial court erred in sentencing him to a term of community control on a “nonprobationable offense.” We disagree because appellant raises this argument for the first time on appeal.

{¶30} Appellant failed to present this argument to the trial court and raises it for the first time on appeal. He has therefore waived review of this issue. *State v. Churchill*, 5th Dist. Delaware No. 17 CAA 10 0068, 2018-Ohio-1031, ¶ 19, citing *State v. Green*, 5th Dist. Stark No. 2011 CA 00127, 2011–Ohio–5611, ¶ 28–29; see also, *State v. Lane*, 5th Dist. Licking No. 98 CA 75, 1998 WL 918257, *2, citing *State v. Williams*, 51 Ohio St.2d 112, 364 N.E.2d 1364 (1977), paragraph one of the syllabus [appellate court need not

consider error which party could have called to trial court's attention when such error could have been avoided or corrected by trial court].

{¶31} Appellant's first assignment of error is therefore overruled.

CONCLUSION

{¶32} Appellant's fourth assignment of error is sustained and the remaining assignments of error are overruled. This matter is remanded to the trial court for the limited purpose of holding a sentencing hearing to address appellant in regard to his post-release control sanction. *State v. Smith*, 5th Dist. Fairfield No. 14-CA-18, 2014-Ohio-4657, ¶ 26.

By: Delaney, J.,

Gwin, P.J. and

Hoffman, J., concur.