

[Cite as *State v. Brown*, 2010-Ohio-4863.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 25206

Appellee

v.

DEVIN DEMAR BROWN

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 97 01 0181

Appellant

DECISION AND JOURNAL ENTRY

Dated: October 6, 2010

MOORE, Judge.

{¶1} Appellant, Devin Demar Brown, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms in part, reverses in part, and remands this matter to the trial court.

I.

{¶2} On May 28, 1997, a jury found Brown guilty of aggravated robbery with a firearm specification, a first-degree felony, felonious assault with a firearm specification, a second-degree felony, attempted murder with a firearm specification, a first-degree felony, attempted murder with a firearm specification, a first-degree felony, murder with a firearm specification, a special felony, and carrying a concealed weapon, a fourth-degree felony.

{¶3} This case has previously been before this Court. At that time we stated the facts as follows:

“Defendant’s convictions stem from two separate incidents, the first of which occurred on the night of January 20, 1997. Michael Higgins was walking with his

girlfriend when four men in a Chevy Blazer pulled along side them and stopped. One of the men, later identified as defendant, attempted to negotiate the purchase of the green Nautica jacket Mr. Higgins had just received from his girlfriend. When Mr. Higgins refused to sell the jacket, defendant pointed a gun at his head and threatened to 'blow [his] brains out' if he did not give it to him. After Mr. Higgins surrendered the jacket, he attempted to follow defendant, despite defendant's order that he not do so. Mr. Higgins followed the Chevy Blazer, attempting to ascertain its license number, until defendant started shooting at him. Although Mr. Higgins was unable to get the license number, he was able to see that the vehicle had Georgia license plates.

"The second incident occurred on the night of January 22, 1997, at the apartment of Charles Frazier. Dwayne Sawyer and Joseph Richardson were there visiting Mr. Frazier. Defendant, who had come to the apartment with three other men, knocked at the door. Mr. Frazier answered the door and let in defendant and one of the others after defendant stated that he was 'the guy that was here the other day.' The door to the outside was either left open or, at some point, someone opened it. Consequently, one of the other two men who had come to the apartment with defendant was able to see much of what transpired.

"Once inside the apartment, defendant immediately approached Mr. Richardson and asked him whether he remembered him. After Mr. Richardson responded in the negative, defendant removed his baseball cap and asked, 'Do you remember me now?' Mr. Richardson indicated that he recognized defendant as 'the dude we was fighting on Fess,' referring to a fight that had occurred approximately one year earlier. Defendant asked Mr. Sawyer his name and whether he had also been involved in the fight, and Mr. Sawyer indicated that he had. Defendant asked the two why they had tried to jump him and, without waiting to hear a response, pulled a gun from his jacket and shot Mr. Sawyer in the face. While standing in the same spot, defendant turned and shot Mr. Richardson in the head and, after he fell to the ground, shot him again in the back. Although Mr. Richardson had sustained serious injuries, he was able to see defendant then shoot Mr. Frazier. Mr. Frazier died from the injuries he sustained.

"Mr. Sawyer, lying on the floor near the door with his hands over his face, heard the men leave. He felt one of them step over him. Although he had sustained serious injuries, he was able to walk. Mr. Sawyer went outside and saw all four men getting into a dark colored Chevy Blazer. He reached into his coat, attempting to create the impression that he was reaching for a gun. His gesture apparently fooled the men, because he heard one of them say, 'He's shooting,' and the four men drove off.

"Because the surviving victims of the shooting described their assailant as a man matching the physical description given by Mr. Higgins and who wore a green Nautica jacket and fled in a dark Chevy Blazer, the police suspected that the same man was responsible for both crimes. Coincidentally, on January 23, 1997, defendant was brought into the police station as a result of a traffic stop. Because

defendant was wearing a green Nautica jacket, matched the physical description given by the victims of both incidents, and had been riding in a gray Blazer with Georgia license plates, the police showed defendant's photograph, displayed in a six-man photo array, to Mr. Higgins, Mr. Sawyer, and Mr. Richardson. Each victim identified defendant.

"Defendant was indicted on charges of aggravated murder with capital specifications, two counts of attempted aggravated murder, carrying a concealed weapon, aggravated robbery and felonious assault, with firearm specifications attached to the offenses of aggravated murder, attempted aggravated murder, felonious assault, and aggravated robbery. Defendant was also indicted on an additional charge of aggravated robbery, stemming from a third incident that had occurred before the other two. Pursuant to defendant's request for relief from prejudicial misjoinder, however, that charge was tried separately and is not at issue in this appeal." *State v. Brown* (Aug. 19, 1998), 9th Dist. No. 18591, at *1-2.

{¶4} At sentencing and in its June 19, 1997 journal entry, the trial court failed to notify Brown that he would be subject to post-release control. On December 23, 2009, the trial court held a de novo sentencing hearing and properly notified Brown that upon release he would be subject to post-release control. The trial court sentenced Brown to six years in prison on the aggravated robbery charge, six years in prison on the felonious assault charge, 10 years in prison on each attempted murder charge, 15 years to life imprisonment on the murder charge and one year in prison on the carrying a concealed weapon charge. The trial court further ordered that the sentences for aggravated robbery and felonious assault run concurrently with each other but consecutively with the charges for attempted murder and murder. The trial court ordered that the sentence for murder and both sentences for attempted murder run consecutively with each other. The trial court ordered that the sentence for the carrying a concealed weapons charge run concurrently with the other counts. Finally, the trial court merged the firearm specifications on the aggravated robbery and felonious assault charges, as well as the firearm specifications to the murder charge and both attempted murder charges, for a total of two three-year prison terms, which were to be served first and consecutively to all other counts. In all, the trial court

sentenced Brown to 47 years to life imprisonment. The only disparity in prison terms from the 1997 sentencing journal entry is that the 1997 journal entry did not merge the firearm specifications to the murder charge and both attempted murder charges. Accordingly, the 1997 journal entry sentenced Brown to 53 years to life imprisonment.

{¶5} Brown timely filed a notice of appeal from his resentencing. He raises four assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR IN SENTENCING [BROWN] AS IT LACKED JURISDICTION TO SENTENCE [BROWN] DUE TO UNDUE DELAY IN SENTENCING[.]”

ASSIGNMENT OF ERROR II

“THE TRIAL COURT COMMITTED REV[ER]SIBLE AND PLAIN ERROR IN SENTENCING [BROWN] AS AN 11-YEAR DELAY IN SENTENCING VIOLATED DEFENDANT’S SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL[.]”

{¶6} Because he addressed his first and second assignments of error together, we address them together, as well. In his first and second assignments of error, Brown contends that the trial court erred in sentencing him because the trial court lacked jurisdiction over him due to an undue delay in sentencing and that the delay between conviction and sentencing violated his Sixth Amendment right to speedy trial. We do not agree.

{¶7} A trial court’s ruling on a motion to dismiss on speedy trial grounds presents a mixed question of law and fact. *State v. Murray*, 9th Dist. No. 03CA008330, 2004-Ohio-4966, at ¶13. When reviewing Brown’s claim that the trial court erred in denying his motion to dismiss, this Court applies the de novo standard of review to questions of law. *State v. Davis*,

9th Dist. No. 08CA009412, 2008-Ohio-6741, at ¶22; *State v. Thomas* (Aug. 4, 1999), 9th Dist. No. 98CA007058, at *4.

{¶8} Brown's sentence, handed down on June 17, 1997, failed to properly impose post-release control. See R.C. 2967.28. The sentence was contrary to law and thus void and a nullity. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at ¶13, citing *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267. Therefore, the trial court was required to conduct a de novo sentencing hearing. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, at ¶35. More than 12 years later, the trial court held a sentencing hearing and on December 23, 2009, filed a journal entry, which included a term of post-release control.

{¶9} Brown cites *Warren v. Ross* (1996), 116 Ohio App.3d 275, 277; *Willoughby v. Lukehart* (1987), 39 Ohio App.3d 74, 76; and *State v. Johnson*, 12th Dist. No. CA2002-07-016, 2003-Ohio-6261, for the proposition that after a multi-year delay between conviction and sentencing, the trial court loses jurisdiction over the matter and can no longer impose a sentence. These cases are distinguishable. *Johnson* involved a defendant who was out on bond while awaiting sentencing. He then became incarcerated in Kentucky. The appellate court held that *Johnson's* incarceration in Kentucky did not excuse the trial court's failure, under Crim.R. 32(A), to sentence him within six and one-half years of his conviction. In *Ross*, more than four years after the defendant's conviction for vehicular homicide the trial court attempted to permanently suspend *Ross's* driver's license. The appellate court held, under Crim.R. 32(A), that the trial court had lost jurisdiction to permanently revoke *Ross's* driver's license. In *Lukehart*, the trial court inexplicably delayed the sentencing on *Lukehart's* disorderly conduct conviction for over a year. The appellate court determined, again under Crim.R. 32(A), that the time lapse was unreasonable, causing the trial court to lose jurisdiction. These cases were all decided under

Crim.R. 32(A) and involved situations where the trial court never attempted to sentence the defendants until after a reasonable time had passed. We have recently held that Crim.R. 32(A) does not apply to defendants who must be resentenced because the sentence the trial court originally attempted to impose was void. See *State v. Spears*, 9th Dist. No. 24953, 2010-Ohio-1965, at ¶19. In this case, the trial court timely attempted to enter a legal sentence but failed to mention the imposition of post-release control. Further, the Supreme Court of Ohio observed in *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, that a trial court retains continuing jurisdiction to correct a void sentence. *Id.* at ¶19, citing *State v. Garretson* (2000), 140 Ohio App.3d 554, 559, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 75. Accordingly, the trial court had jurisdiction to resentence Brown.

{¶10} In the portion of his brief addressing his speedy trial rights, Brown cites *Euclid v. Brackis* (1999), 135 Ohio App.3d 729 and *State v. Owens*, 181, Ohio App.3d 725, 2009-Ohio-1508. *Owens*, like *Johnson* above, involved a situation where a defendant pled guilty to an offense and then became incarcerated outside of the state prior to any sentencing hearing in Ohio. That situation is inapplicable to this matter. The *Brackis* case relies, as do the cases above, upon Crim.R. 32(A), which is inapplicable when defendants are resentenced after a void sentence. *Spears*, *supra*. Accordingly, Brown has failed to provide this Court with any authority indicating that his Sixth Amendment speedy trial rights are implicated in the case at bar. App.R. 16(A)(7). Moreover, we are unaware of any court in Ohio that has extended Sixth Amendment speedy trial protections to vacate a new sentence that properly imposes post-release control upon remand from an appellate court. In fact, the Supreme Court has sanctioned long intervals between an original, void sentence and a proper entry resulting from a resentencing hearing. See *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671 (in which the Supreme

Court, in 2010, ordered that a trial court properly issue a sentencing entry that includes post-release control when Carnail was originally sentenced in 1999); *Zaleski*, supra (defendant resentenced to include post-release control shortly prior to expiration of three-year prison sentence). Accordingly, the trial court did not violate Brown's Sixth Amendment speedy trial rights when it resentenced him. Brown's first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

“THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR IN SENTENCING [BROWN] AS IT LACKED JURISDICTION TO SENTENCE OR RE-SENTENCE [BROWN] ON THE FIREARM SPECIFICATION CHARGES AS HE HAD SERVED THE SENTENCE ON THE FIREARM SPECIFICATIONS[.]”

{¶11} In his third assignment of error, Brown contends that the trial court lacked jurisdiction to resentence him on the firearm specifications because he had already served the sentences specific to those charges. We do not agree.

{¶12} In support of his contention, Brown cites *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, and *Bezak*, supra, for the proposition that once a sentence has been served, the trial court lacks jurisdiction to resentence a defendant on that charge. As a result, Brown contends that any sentence specifically relating to the gun specifications must be vacated. Brown does not cite any authority in support of his argument that the gun specification sentences must be vacated. App.R. 16(A)(7).

{¶13} It appears that Brown contends that because he has served the sentence originally ordered on his gun specification convictions prior to receiving a sentence that properly included post-release control, the trial court has no jurisdiction to impose a sentence on those charges and any penalty disappears. *Bezak* and *Harrison* actually stand for the proposition that when a trial court, prior to July 11, 2006, fails to properly impose post-release control, the court cannot

resentence the defendant to properly add post-release control for any offenses on which the defendant has fully served his prison term. *Bezak*, at ¶18; *Harrison*, at ¶36, citing *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, at ¶32. Brown, however, objects to the sentences relating specifically to the gun specifications. The gun specifications are not separate felony charges subject to separate imposition of post-release control under R.C. 2967.28. *Spears*, at ¶10. Moreover, although Brown once appealed the 1997 journal entry, “his original sentence- and the journal entry in which the trial court attempted to impose that sentence-are void.” *State v. Harmon*, 9th Dist. No. 24495, 2009-Ohio-4512, at ¶8, citing *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972, at ¶8. As of the October 15, 2009 hearing, it was “as if the journal entry containing [Brown’s] void sentence had never occurred and as if there had been no judgment.” (Citations and quotations omitted.) *Harmon*, at ¶7. Therefore, the trial court had jurisdiction to conduct a de novo sentencing hearing, including Brown’s gun specification sentences. Brown’s third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

“[BROWN’S] CONVICTION FOR CARRYING CONCEALED WEAPONS, A FELONY OF THE FOURTH DEGREE, VIOLATED R[.]C[.] §2945.75(A)(2) AND STATE V. PELFREY [] BECAUSE THE JURY VERDICT DID NOT INCLUDE THE DEGREE OF THE OFFENSE, NOR ANY AGGRAVATING ELEMENTS[.]”

{¶14} In his fourth assignment of error, Brown contends that the jury verdict form for count seven of the indictment, carrying concealed weapons, was insufficient to convict him of a crime greater than a misdemeanor of the first degree. In its brief, the State concedes that the relevant verdict form was insufficient to convict Brown of an offense greater than a misdemeanor of the first degree. We agree.

{¶15} The sufficiency of a jury verdict form to justify convicting a defendant of a greater degree of a criminal offense presents a question of law, which this Court reviews de novo. *State v. Wells*, 9th Dist. No. 24460, 2009-Ohio-2673, at ¶5.

{¶16} R.C. 2945.75(A)(2) provides:

“When the presence of one or more additional elements makes an offense one of more serious degree:

“ * * *

“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.”

{¶17} In *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, the Supreme Court of Ohio held that pursuant to the clear language of R.C. 2945.75(A)(2), “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.” *Id.* at ¶14. In this case, the trial court treated Brown’s conviction as a fourth-degree felony conviction for carrying a concealed weapon in violation of R.C. 2923.12. At the time of the offense, R.C. 2923.12(A) provided that: “No person shall knowingly carry or have, concealed on his or her person or concealed ready at hand, any deadly weapon or dangerous ordnance.” Violation of the statute was a misdemeanor of the first degree. R.C. 2923.12(D). If the weapon was a firearm that was loaded or for which the defendant had ammunition close at hand, or if the weapon was dangerous ordnance, a violation of the statute was a felony of the fourth degree. *Id.*

{¶18} Brown observed, and the State conceded, that the verdict form for the carrying concealed weapons charge does not include the degree of the offense or any aggravating

elements. Therefore, Brown was convicted of the lowest degree of the offense, a misdemeanor of the first degree. Brown's fourth assignment of error is sustained.

III.

{¶19} Brown's first, second and third assignments of error are overruled. Brown's fourth assignment of error is sustained. We reverse Brown's fourth-degree felony conviction for carrying a concealed weapon and remand the cause to the trial court with instructions to enter a judgment convicting Brown of carrying a concealed weapon as a misdemeanor of the first degree.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

CARLA MOORE
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

SHUBHRA N. AGARWAL, Attorney at Law, for Appellant.

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