

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 09CA009732

Appellee

v.

TREMONT L. MALONE

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 09CR078917

Appellant

DECISION AND JOURNAL ENTRY

Dated: November 22, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Tremont Malone pleaded guilty to tampering with records, forgery, identity fraud, falsification, and driving while under suspension, and the trial court sentenced him to one year in prison. The court told Mr. Malone that, upon his release from prison, he could be placed on post-release control for three years. It gave him two weeks to report to begin his sentence. When Mr. Malone did not report on the assigned date, he was arrested and taken to prison. Two weeks later, the trial court ordered Mr. Malone to be transported to the courthouse for resentencing because it had not properly imposed post-release control. The court resentenced him to three years in prison. Mr. Malone has appealed, arguing that the trial court violated his right to be free from double jeopardy when it resentenced him to a longer prison term and that it incorrectly ordered him to pay court-appointed attorney fees without finding that he has the ability to pay them. We affirm in part because the trial court did not violate Mr. Malone's

Double Jeopardy rights when it resentenced him, but reverse in part because the court did not make a finding regarding whether Mr. Malone is able to pay the court-appointed attorney fees.

DOUBLE JEOPARDY

{¶2} Mr. Malone’s first assignment of error is that the trial court violated the United States and Ohio Constitutions’ Double Jeopardy Clauses when it resentenced him. He has argued that, because he was taken to prison after being arrested, the trial court had no authority to increase his sentence.

{¶3} Under the Fifth Amendment to the United States Constitution, “[n]o person . . . shall . . . be subject for the same offense to be twice put in jeopardy of life or limb” Similarly, Article 1 Section 10 of the Ohio Constitution provides that “[n]o person shall be twice put in jeopardy for the same offense.” The double jeopardy clauses were “designed, in part, to preserve the finality and integrity of judgments.” *State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197, at ¶32, limited on other grounds by *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434. A sentence, however, “does not have the qualities of constitutional finality that attend an acquittal.” *Id.* (quoting *United States v. DiFrancesco*, 449 U.S. 117, 134 (1980)). “Application of the double jeopardy clause to a change in a sentence is dependent upon the extent and legitimacy of a defendant’s expectation of finality.” *State v. Dawkins*, 8th Dist. No. 88022, 2007-Ohio-1006, at ¶10; *In re Conley*, 9th Dist. No. 20654, 2002 WL 431994 at *1 (Mar. 20, 2002).

{¶4} As a general rule, “once a valid sentence has been executed, a trial court no longer has the power to modify the sentence except as provided by the General Assembly.” *State v. Hayes*, 86 Ohio App. 3d 110, 112 (1993). If the “sentence involves imprisonment, the execution of the sentence is commenced when the defendant is delivered from the temporary detention

facility of the judicial branch to the penal institution of the executive branch.” *City of Columbus v. Messer*, 7 Ohio App. 3d 266, 268 (1982).

{¶5} The Ohio Supreme Court has recognized two exceptions to the general rule. “First, a trial court is authorized to correct a void sentence.” *State ex rel. Cruzado v. Zaleski*, 111 Ohio St. 3d 353, 2006-Ohio-5795, at ¶19. “Second, a trial court can correct clerical errors in judgments.” *Id.*

{¶6} The trial court determined that its first attempted sentence of Mr. Malone was void because it had incorrectly imposed post-release control. Its analysis was correct under the precedent of this Court and the Ohio Supreme Court at the time. See *State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197, at syllabus (“In cases in which a defendant . . . pleads guilty to[] an offense for which postrelease control is required but not properly included in the sentence, the sentence is void . . .”), limited by *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434; *State v. Wesemann*, 9th Dist. No. 24588, 2009-Ohio-5168, at ¶1 (“Because the trial court made a mistake regarding post-release control at Mr. Wesemann’s sentencing hearing and in its sentencing entry, the sentencing entry is void.”).

{¶7} A month after the trial court resentenced Mr. Malone, the Ohio Supreme Court determined that sentences imposed on or after July 11, 2006, are not void just because the trial court failed to properly impose post-release control. *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434, at ¶27. Mr. Malone has argued that his original sentence, therefore, was not void and did not fall within one of the finality of sentence exceptions identified by the Ohio Supreme Court in *State ex rel. Cruzado*.

{¶8} Mr. Malone’s argument fails because *Singleton* does not apply retroactively. *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434, at ¶36 n.1. In *Singleton*, the Supreme

Court recognized that some courts, in reliance on its prior decisions, had conducted de novo sentencing hearings in cases in which the original sentence was imposed after July 11, 2006. *Id.* It wrote that their actions should not be disturbed. *Id.* Accordingly, we conclude that the trial court correctly determined that it had the authority to conduct a de novo sentencing hearing in light of its determination that its original sentencing entry was void.

{¶9} We further conclude that, under the particular facts of this case, even if Mr. Malone’s original sentence was not void, the trial court did not violate his double jeopardy rights when it resentenced him. The court told Mr. Malone at his first sentencing hearing that, although it was sentencing him to only one year in prison, if he did not report on time, “we will be talking about that four years again.” Mr. Malone indicated that he understood the trial court’s warning and agreed that they were on the “same page.” In light of the trial court’s warning that it might increase Mr. Malone’s sentence if he did not report, when he did not report, he lost any legitimate expectation of finality that he otherwise had in the trial court’s original sentence. The fact that the sheriff’s department mistakenly took him to prison instead of the Lorain County Correctional Facility did not change that. See *State v. Dawkins*, 8th Dist. No. 88022, 2007-Ohio-1006, at ¶11 (“[I]t stands to reason that where a sentence is conditioned upon some action by the defendant, and the execution of that sentence is delayed pursuant to that condition, the defendant can have no legitimate expectation of finality in the original sentence where [he] fails to act in compliance with the terms of the condition.”). Mr. Malone’s first assignment of error is overruled.

ATTORNEY FEES

{¶10} Mr. Malone’s second assignment of error is that the trial court incorrectly ordered him to pay court-appointed attorney fees. He has argued that the court did not find that he is able to pay the fees, which was required before it imposed them.

{¶11} Under Section 2941.51(D) of the Ohio Revised Code, “[t]he [attorney] fees and expenses approved by the court under this section shall not be taxed as part of the costs and shall be paid by the county. However, if the person represented has, or reasonably may be expected to have, the means to meet some part of the cost of the services rendered to the person, the person shall pay the county an amount that the person reasonably can be expected to pay.” “[T]he court must make a determination that the defendant is financially capable of paying for his appointed counsel before assessing court-appointed attorney fees.” *State v. Warner*, 9th Dist. No. 96CA006534, 2001 WL 1155698 at *3 (Sept. 21, 2001).

{¶12} The trial court did not make an ability-to-pay finding at either of Mr. Malone’s sentencing hearings or in either of its sentencing entries. It, therefore, incorrectly ordered Mr. Malone to pay the court-appointed attorney fees. Mr. Malone’s second assignment of error is sustained.

CONCLUSION

{¶13} Because the trial court did not properly impose post-release control, it correctly held a de novo resentencing hearing. The trial court, however, incorrectly ordered Mr. Malone to pay court-appointed attorney fees without making a finding that he is able to pay them. The judgment of the Lorain County Common Pleas Court is affirmed in part and reversed in part, and this matter is remanded for a hearing on whether Mr. Malone is able to pay the court-appointed attorney fees.

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 Lorain, 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.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR

APPEARANCES:

TIMOTHY YOUNG, state public defender, and MELISSA M. PRENDERGAST, assistant state public defender, for appellant.

DENNIS WILL, prosecuting attorney, and MARY R. SLANCZKKA, assistant prosecuting attorney, for appellee.