

[Cite as *State v. Ward*, 2011-Ohio-1211.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.     25324

Appellee

v.

DESMOND WARD

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.    CR 06 09 3162(A)

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 16, 2011

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CARR, Presiding Judge.

{¶1} Appellant, Desmond Ward, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms, in part, and vacates, in part.

I.

{¶2} This case stems out of a series of events which transpired between August 30, 2006, and September 2, 2006, which resulted in Ward being charged with several criminal offenses.

{¶3} On October 1, 2007, the matter proceeded to a bench trial. The trial court found Ward guilty of assault on a police officer in violation of R.C. 2903.13(A), a felony of the fourth degree; possession of cocaine in violation of R.C. 2925.11(A), a felony of the first degree; and tampering with evidence in violation of R.C. 2921.12(A)(1), a felony of the third degree. Ward was sentenced to a five-year term of incarceration. The trial court also imposed upon Ward a

discretionary three-year term of post-release control. On December 6, 2007, the trial court's sentencing entry was journalized. Ward filed a notice of appeal on December 13, 2007.

{¶4} On December 21, 2007, this Court issued a journal entry indicating that the order from which Ward appealed did not dispose of all the counts in the indictment. Ward was given until January 11, 2008, to obtain a final, appealable order. On January 28, 2008, this Court issued a journal entry dismissing the appeal due to the fact that Ward had not responded to the previous journal entry. On February 4, 2008, the trial court issued a nunc pro tunc journal entry which imposed the same sentence and disposed of all the remaining counts levied against Ward. On February 29, 2008, Ward filed a notice of appeal. Ward's conviction was subsequently affirmed by this Court on November 26, 2008. *State v. Ward*, 9th Dist. No. 24105, 2008-Ohio-6133.

{¶5} On January 15, 2010, the trial court sua sponte issued a journal entry ordering the Summit County Sheriff to return Ward for resentencing on February 5, 2010. The resentencing hearing was later continued until March 12, 2010. Ward subsequently appeared for the resentencing hearing and the trial court issued a new sentencing entry on March 15, 2010. Ward was sentenced to a five-year term of incarceration as well as a mandatory period of five years post-release control. Ward filed a notice of appeal on March 29, 2010.

{¶6} On appeal, Ward raises two assignments of error.

## II.

### **ASSIGNMENT OF ERROR I**

“THE COURT ERRED WHEN IT VOIDED A VALID SENTENCE AND ORDERED APPELLANT TO BE RESENTENCED DE NOVO, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS TEN AND SIXTEEN OF THE OHIO CONSTITUTION, AND SECTION 2929.191 OF THE OHIO REVISED CODE.”

## ASSIGNMENT OF ERROR II

“APPELLANT WAS DEPRIVED OF HIS DUE PROCESS AND HIS SPEEDY TRIAL RIGHTS WHEN HE WAS NOT GIVEN A VALID SENTENCE UNTIL OVER TWO YEARS AFTER HE WAS FOUND GUILTY, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE ONE, SECTION SIXTEEN OF THE OHIO CONSTITUTION, AND CRIMINAL RULE 32(A).”

{¶7} In his first assignment of error, Ward argues that the trial court did not comport with the requirements of R.C. 2929.191 at the March 12, 2010 resentencing hearing. Ward contends that the trial court’s actions resulted in a violation of his due process rights, as well as his right against cumulative punishments for the same offense under the double jeopardy clause. In his second assignment of error, Ward argues that there was unreasonable delay between the time he was found guilty and the time the trial court imposed a lawful sentence.

{¶8} The Supreme Court of Ohio recently decided *State v. Fischer*, -- N.E.2d --, No. 2010-Ohio-6238, in which it addressed several questions arising from a sentencing court’s failure to impose post-release control as mandated by the Ohio General Assembly. The Supreme Court had previously held that “[w]hen a defendant is convicted of or pleads guilty to one or more offenses and post[-] release control is not properly included in a sentence for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense.” *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at syllabus. In *Fischer*, the Supreme Court specifically noted that its decision in *Bezak* left certain questions unanswered. *Fischer* at ¶18, 27. The Supreme Court in *Fischer* reaffirmed its position that “[a] sentence that does not include the statutorily mandated term of post[-]release control is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack.” *Fischer*, at paragraph one of the syllabus. The Supreme Court also modified a portion of the precedent established in *Bezak* by holding that

“[t]he new sentencing hearing to which an offender is entitled under *State v. Bezak* is limited to proper imposition of post[-]release control.” *Id.* at paragraph two of the syllabus. The Supreme Court also concluded that while “the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence.” *Id.* at paragraph three of the syllabus. The Supreme Court further held that “[t]he scope of an appeal from a resentencing hearing in which a mandatory term of post[-]release control is imposed is limited to issues arising at the resentencing hearing.” *Id.* at paragraph four of the syllabus.

{¶9} In this case, the trial court’s original sentencing entry which disposed of all the charges in the indictment was journalized on February 4, 2008. R.C. 2967.28(B)(1) mandates that an offender convicted of a felony of the first degree is subject to a mandatory five-year term of post-release control. The February 4, 2008 sentencing entry indicated that Ward was subject to a discretionary three-year term of post-release control. Ward timely appealed from the trial court’s February 4, 2008 sentencing entry, and this Court affirmed his conviction on November 26, 2008. *State v. Ward*, 9th Dist. No. 24105, 2008-Ohio-6133. Over a year later, on January 15, 2010, the trial court recognized the post-release control error and sua sponte issued a journal entry ordering that Ward be returned for resentencing. In accordance with *Fischer*, the scope of the new sentencing hearing to which Ward was entitled was limited to the proper imposition of post-release control. *Fischer*, at paragraph two of the syllabus. It follows that the trial court had authority to impose the proper term of post-release control on Ward at the March 12, 2010 hearing. As the lawful portion of Ward’s original sentence remained in place pursuant to *Fischer*, the trial court did not have authority to conduct a de novo sentencing hearing and reissue a sentence. Furthermore, as the lawful elements of Ward’s original sentence remained in

place, Ward cannot prevail on his argument that there was unreasonable delay in imposing a sentence. To the extent the trial court properly imposed a mandatory five-year period of post-release control upon Ward at the resentencing hearing, its judgment is affirmed. To the extent the trial court conducted a de novo sentencing hearing and reissued a sentence to Ward, its judgment in that respect is vacated.

### III.

{¶10} The judgment of the Summit County Court of Common Pleas is vacated to the extent the court exceeded its authority and resentenced Ward. The trial court's decision to properly impose a mandatory five-year period of post-release control to Ward's sentence is affirmed.

Judgment affirmed in part,  
and vacated in part.

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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 Appellant.

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DONNA J. CARR  
FOR THE COURT

DICKINSON, J.  
WHITMORE, J.  
CONCUR

APPEARANCES:

ADAM VAN HO, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.