

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 25453

Appellee

v.

SILVER J. POWELL

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 99 11 2495 (A)

Appellant

DECISION AND JOURNAL ENTRY

Dated: September 28, 2011

WHITMORE, Judge.

{¶1} Defendant-Appellant, Silver Powell, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms in part and vacates in part.

I

{¶2} In 2001, this Court affirmed Powell’s convictions for gross sexual imposition, felonious assault, and child endangering on direct appeal. *State v. Powell* (Oct. 3, 2001), 9th Dist. No. 20067. Powell’s original sentencing entry ordered him to “pay all prosecution costs, including any fees permitted pursuant to O.R.C. 2929.18(A)(4).” In 2009, Powell filed a motion for sentencing, arguing that his prior sentence was void due to an error in his post-release control notification. The trial court conducted a de novo resentencing in December 2009 and journalized a new sentencing entry on December 18, 2009. The 2009 sentencing entry orders Powell to pay court costs.

{¶3} Powell now appeals from the trial court’s sentencing entry and raises two assignments of error for our review. We consolidate the assignments of error.

II

Assignment of Error Number One

“THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR IN ASSESSING COURT COSTS AGAINST DEFENDANT WITHOUT COMPLYING WITH R.C. 2947.23(A).”

Assignment of Error Number Two

“DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHEN HIS TRIAL COUNSEL FAILED TO ARGUE THAT THE TRIAL COURT’S IMPOSITION OF COURT COSTS UNDER R.C. 2947.23(A) WAS DEFECTIVE.”

{¶4} In his assignments of error, Powell argues that his sentence must be vacated because the trial court failed to comply with R.C. 2947.23(A)(1) at his sentencing hearing. Specifically, he argues that the court could not impose court costs against him without first informing him that his failure to pay those costs could result in an order to perform community service. He further argues that his trial counsel was ineffective for failing to challenge the court’s imposition of costs. We need not address the merits of Powell’s assignments of error, based on our application of *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238.

“*Fischer* dictates that an invalid post-release control notification does not taint the entirety of an offender’s sentence. Instead, ‘when a judge fails to impose statutorily mandated post[-]release control as part of a defendant’s sentence, [only] that part of the sentence is void and must be set aside.’ *Fischer* at ¶26. A resentencing must be limited to the imposition of post-release control. *Id.* at ¶27-28. *** [T]his Court has recognized that a trial court exceeds its sentencing authority when it conducts a de novo sentencing to correct a post-release control error. *State v. Cool*, 9th Dist. Nos. 25135 & 25214, 2011-Ohio-1560, at ¶4-6. Because resentencing is limited to the imposition of post-release control, any additional action taken by the trial court with respect to the sentence is a nullity. *Id.*” *State v. Stiggers*, 9th Dist. No. 25486, 2011-Ohio-4225, at ¶6.

In post-*Fischer* cases where a trial court has erroneously conducted a de novo resentencing to remedy a post-release control error, this Court has excised the proper post-release control notification portion of the new sentencing entry and vacated the remainder of the entry. *Cool* at ¶5.

{¶5} The trial court here conducted a de novo sentencing hearing to correct Powell’s post-release control error. Pursuant to *Fischer*, it lacked the authority to do so. *Fischer* at ¶26-28. Yet, the post-release control portion of the court’s December 2009 sentencing entry is correct, and Powell concedes that the court properly advised him of his mandatory post-release control obligations. Accordingly, to the extent the court’s December 18, 2009 sentencing entry imposes post-release control upon Powell, it is affirmed. “The remainder of the trial court’s action in resentencing [Powell] exceeded the trial court’s jurisdiction and is a nullity. Accordingly, this Court vacates the remainder of the trial court’s [December 18, 2009] judgment[.]” *Cool* at ¶5. Accord *State v. Stallworth*, 9th Dist. No. 25461, 2011-Ohio-4492, at ¶35-36. Powell’s original sentence remains intact, including the order that he “pay all prosecution costs, including any fees permitted pursuant to O.R.C. 2929.18(A)(4).” Based on our application of *Fischer*, Powell’s assignments of error are moot and we decline to address them. App.R. 12(A)(1)(c).

III

{¶6} Powell’s assignments of error are moot. The trial court’s December 18, 2009 sentencing entry is vacated with the exception of the post-release control portion of the entry. Powell’s original sentencing entry remains valid. The judgment of the Summit County Court of Common Pleas is affirmed in part and vacated in part, consistent with the foregoing opinion.

Judgment affirmed in part,
and vacated in part.

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.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

NEIL P. AGARWAL, Attorney at Law, for Appellant.

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