

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio

Court of Appeals No. OT-09-029

Appellee

Trial Court No. 03-CR-092

v.

Craig S. Hruby

DECISION AND JUDGMENT

Appellant

Decided: July 30, 2010

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

Ron Nisch, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Craig Hruby, appeals to this court from the September 18, 2009 denial of his motion for "Sentencing" by the Ottawa County Court of Common Pleas. Appellant was indicted on four counts of gross sexual imposition, felonies of the third degree, and was found guilty by a jury as to two counts. On June 8,

2004, appellant was sentenced to consecutive four year prison terms. At the sentencing hearing, appellant was informed that after being released from prison he would be subject to five years of postrelease control. On direct appeal, this court affirmed the trial court's judgment. See *State v. Hruby*, 6th Dist. No. OT-04-026, 2005-Ohio-3863.

{¶ 2} Appellant filed a motion for re-sentencing which was denied on September 18, 2009. On appeal from that denial, appellant raises one assignment of error:

{¶ 3} "The September 18, 2009 Decision of the Trial Court Denying Appellant's Motion for Re-sentencing was in Error, and the Appellant's Sentence Must be Vacated and the Matter Remanded to the Trial Court for Re-sentencing de novo."

{¶ 4} At his May 27, 2004 sentencing hearing, after being informed that he would be subject to five years of postrelease control, appellant was told:

{¶ 5} "The Court: While on parole, if you violate the conditions of your parole, you could be sent back to prison for an additional nine-month period of time.

{¶ 6} "If you commit further offenses while on Post Release Control, then you could be given additional time of twelve months or whatever remaining control period you had left, whichever of those two figures is greater. And obviously, you will receive whatever penalty would be appropriate for the additional felony that you might commit."

{¶ 7} Appellant argues that the trial court failed to properly notify him, pursuant to R.C. 2929.19(B)(3)(e), that any violation of his postrelease control could bring a sentence of up to one-half of the stated prison term originally imposed. The trial court, as

previously stated, did not inform appellant of the possible penalty and instead told appellant of a possible nine-month sentence with an additional sentence of 12 months or the remaining time of postrelease control for subsequent violations. R.C. 2929.19(B)(3)(e) states in pertinent part:

{¶ 8} "(3) * * * [I]f the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

{¶ 9} "* * *

{¶ 10} "(e) Notify the offender that, if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of this section, and if the offender violates that supervision or a condition of postrelease control imposed under division (B) of section 2967.131 of the Revised Code, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term and failed to notify the offender pursuant to division (B)(3)(e) of this section regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of postrelease control."

{¶ 11} Appellant was sentenced on May 27, 2004, which was prior to July 11, 2006, and therefore R.C. 2929.191 applies. R.C. 2929.191 states:

{¶ 12} "(B) (1) If, prior to the effective date of this section, a court imposed a sentence including a prison term and failed to notify the offender pursuant to division

(B)(3)(e) of section 2929.19 of the Revised Code regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of postrelease control or to include in the judgment of conviction entered on the journal a statement to that effect, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of section 2929.19 of the Revised Code, and if the offender violates that supervision or a condition of postrelease control imposed under division (B) of section 2967.131 of the Revised Code the parole board may impose as part of the sentence a prison term of up to one-half of the stated prison term originally imposed upon the offender.

{¶ 13} "* * *

{¶ 14} "(C) On and after the effective date of this section, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division. * * * At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction."

{¶ 15} When a trial court fails to notify an offender that he may be subject to postrelease control or that for any violation he may be sentenced up to one-half of his

original prison term "the sentence is void; the sentence must be vacated and the matter remanded to the trial court for resentencing." *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, ¶ 16. R.C. 2929.191 creates a procedure for courts to add postrelease control to sentences imposed; however, for sentences imposed before July 11, 2006, the statute's effective date, there is no judgment to correct because the sentence is void. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, ¶ 26. So any criminal sentences where the trial court failed to properly impose postrelease control must be subject to a de novo sentencing hearing. *Id.*

{¶ 16} The state argues that an offender who has been convicted after a jury trial is distinguishable from an offender who has pled guilty when determining whether a re-sentencing hearing should be required. However, the Supreme Court of Ohio in *Bezak* stated: "[w]hen a defendant is *convicted of or pleads guilty* to one or more offenses and postrelease 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." (Emphasis added.) *Bezak* at ¶ 16.

{¶ 17} When a trial court does not follow statutory mandates the sentence is found to be a nullity and void and must be vacated. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶ 22. The effect of such a vacated sentence places the parties in the exact same position they were before sentencing. *Id.* At the re-sentencing hearing a court must not merely inform the offender of postrelease control, but must actually

conduct a de novo sentencing hearing. *State v. Frymier*, 5th Dist. No. 2008-CA-96, 2009-Ohio-2475, ¶ 10.

{¶ 18} In the present case, appellant was not notified that any violation of his postrelease control could bring a sentence of up to one-half of his original sentence as required by R.C. 2929.19(B)(3)(e) and, therefore, he is entitled to a de novo sentencing hearing. Appellant's assignment of error is well-taken.

{¶ 19} On consideration whereof, we find that appellant was prejudiced or prevented from having a fair proceeding and the judgment of the Ottawa County Court of Common Pleas is reversed and the matter is remanded for a full re-sentencing hearing. Pursuant to App.R. 24, the state is ordered to pay the costs of this appeal.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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