

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

State of Ohio

Court of Appeals Nos. L-11-1267
L-11-1268

Appellee

Trial Court Nos. CR0200301510
CR0200203515

v.

Chuckie Thomas Unsworth

DECISION AND JUDGMENT

Appellant

Decided: November 9, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeffrey D. Lingo, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

Chuckie Unsworth, pro se.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals an order of the Lucas County Court of Common Pleas on a limited resentencing hearing pursuant to *State v. Fisher*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332.

{¶ 2} Appellant's appointed counsel has requested leave to withdraw in accordance with the procedure set forth in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

{¶ 3} In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the appeal, determines it to be wholly frivolous he should so advise the court and request permission to withdraw. *Id.* at 744. The request shall include a brief identifying anything in the record that could arguably support an appeal. *Id.* Counsel shall also furnish his client with a copy of the request to withdraw and its accompanying brief, and allow the client sufficient time to raise any matters that he chooses. *Id.* The appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 4} Here, appointed counsel has met the requirements set forth in *Anders*. Counsel also informed appellant of his right to file his own, additional assignments of error and appellate brief. Appellant has filed his own brief and assigned additional assignments of error. Accordingly, this court shall proceed examining the potential assignments of error set forth by counsel and appellant and the entire record below to determine whether this appeal lacks merit deeming it wholly frivolous.

{¶ 5} In 2003, appellant, Chuckie Thomas Unsworth, was convicted of aggravated burglary and two counts of rape in the home invasion of an 81-year-old woman. At trial the woman's identification of appellant was supported by fingerprint and DNA evidence. A jury found appellant guilty. The trial court imposed the maximum sentence, ten years imprisonment, for each count and ordered the terms of imprisonment served consecutively. The judgment of conviction was affirmed on appeal. *State v. Unsworth*, 6th Dist. Nos. L-03-1189, L-04-1165, *review denied*, 108 Ohio St.3d 1416, 2006-Ohio-179, 841 N.E.2d 320. Appellant's subsequent motion for a new trial was denied and that decision was affirmed on appeal. *State v. Unsworth*, 6th Dist. Nos. L-09-1205, L-09-1206, 2010-Ohio-398, *review denied*, 125 Ohio St.3d 1442, 2010-Ohio-2212, 927 N.E.2d 12.

{¶ 6} In 2011, appellant moved to correct his sentence on the ground that the trial court failed to inform him of the mandatory term of postrelease control that he would be obligated to serve after his release from prison. He also moved for a full sentencing rehearing. The trial court held a limited resentencing hearing, advised appellant of his postrelease control obligations and denied appellant's request at that hearing that his sentences be merged. It is from this judgment that appellant brings this appeal.

{¶ 7} Appellate counsel sets forth a single potential assignment of error:

- 1) The Trial Court erred by not conducting a de novo sentencing hearing.

{¶ 8} Appellant, in his pro se brief, interposes the following three assignments of error:

#1 Appellant counsel erred and violated appellant's Ohio and United States Constitutional rights to Due Process of Law and for being ineffective assistance of appellant counsel's when counsel in 2005 and 2012 filed Anders brief claiming no merits to appeal from in his past direct appeal and in his direct appeal now. [sic]

#2 The trial court committed plain error at the resentencing hearing by not finding that all three charges were allied offenses and should be merged pursuant to R.C. 2941.25.

#3 Trial court erred in denying appellant/defendant a full de novo hearing and applying *State v. Fisher* and *State v. Singleton* against him, when in fact, neither case's apply to the defendant at all. [sic]

{¶ 9} Appellate counsel's sole potential assignment of error and appellant's third assignment of error each address whether appellant was entitled to a de novo sentencing hearing.

{¶ 10} If an offender is subject to postrelease control subsequent to a period of incarceration, he or she must be so informed during his sentencing hearing. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraphs one and two of the syllabus. When a sentencing court fails to do so, the sentence is void and the offender is entitled to a new sentencing hearing for that particular offense. *State v. Bezak*, 114

Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, syllabus. Since the sentence is void, review is not precluded by the doctrine of res judicata. *Fisher*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, at paragraph one of the syllabus. Nevertheless, the new sentencing hearing is limited to the proper imposition of postrelease control, *id.* at paragraph two of the syllabus, and “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. Any appeal from a resentencing hearing that remedies a defect in imposing postrelease control is limited to issues arising out of the resentencing hearing. *Id.* at paragraph four of the syllabus.

{¶ 11} Appellant received the resentencing hearing to which he was entitled. Accordingly, appellate counsel’s sole potential assignment of error and appellant’s third assignment of error are without merit. Since the resentencing hearing was limited to the subject of postrelease control and appeal is limited to issues properly arising from the resentencing hearing, issues of merger of allied offenses and the ineffectiveness of appellant’s original appellate counsel are not properly before us. Accordingly, appellant’s second assignment of error and his first assignment of error as it relates to his 2005 appeal are without merit.

{¶ 12} Appellant’s sole assertion of ineffectiveness with respect to appellate counsel in the present appeal is that he improperly filed an *Anders* brief. Upon this record, we concur with appellate counsel that appellant’s appeal is without merit. Moreover, upon our own independent review of the record, we find no other grounds for

meritorious appeal. Consequently, the remaining portion of appellant's first assignment of error is without merit.

{¶ 13} Accordingly, this appeal is found to be without merit, and wholly frivolous. Counsel's motion to withdraw is found well-taken and is, hereby, granted.

{¶ 14} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Arlene Singer, P.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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