

[Cite as *State v. Reed*, 2010-Ohio-5819.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-1164
v.	:	(C.P.C. No. 99CR-04-1955)
	:	
Kenneth Reed,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 30, 2010

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Timothy Young, Ohio Public Defender, and *Stephen P. Hardwick*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Kenneth Reed, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court found him guilty of aggravated possession of drugs without specification, in violation of R.C. 2925.11, which is a felony of the first degree.

{¶2} On January 24, 2001, after the trial court found him guilty, pursuant to a bench trial, appellant was sentenced to a mandatory minimum ten-year imprisonment term for aggravated possession of drugs. However, the trial court failed to notify appellant

that the post-release control ("PRC") term would be five years, and the sentencing entry did not specify any PRC.

{¶3} In March 2007, the state of Ohio, plaintiff-appellee, filed a motion for resentencing, pursuant to R.C. 2929.191, and *State v. Beasley* (1984), 14 Ohio St.3d 74. The trial court held a resentencing hearing on November 13, 2009. Appellant was not physically present at the resentencing hearing, but participated via video conference. Appellant's counsel, who had not spoken with appellant prior to the hearing, spoke with appellant for approximately six minutes before the hearing commenced. The trial court resentenced appellant to the same mandatory minimum ten-year prison sentence, imposed no fine, and advised appellant that a term of five years of mandatory PRC would attach to his sentence. On November 13, 2009, the court issued a nunc pro tunc entry memorializing the sentence. Appellant has appealed the judgment of the trial court and asserts the following assignments of error:

[I.] The trial court erred by failing to conduct a de novo sentencing hearing.

[II.] The trial court's imposition of postrelease control by videoconference violated Crim.R. 43(A) and Mr. Reed's Due Process right to be physically present at every stage of his criminal proceeding.

[III.] Appellant was constructively denied the right to counsel as provided by the Sixth Amendment.

[IV.] The trial court denied Mr. Reed his right of allocution.

[V.] The trial court's addition of postrelease control to Mr. Reed's original sentence violated his right to be free from Double Jeopardy.

[VI.] Trial counsel was ineffective.

{¶4} Appellant argues in his first assignment of error that the trial court erred by failing to conduct a de novo sentencing hearing. R.C. 2929.191 sets forth a statutory remedy for a trial court to employ to correct an error in failing to properly impose post-release control upon a defendant, including the issuance of a nunc pro tunc order. However, this statute applies only to sentences imposed on or after July 11, 2006. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434. For sentences handed down prior to the effective date of R.C. 2929.191, those are to be reviewed under the prior line of cases holding that such sentences are void and require the court to engage in a de novo resentencing. See *id.*, paragraph one of the syllabus. See also *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, ¶12 (when a trial court fails to inform the defendant of PRC, the sentence is void, and the defendant is entitled to a de novo resentencing hearing). Therefore, appellant's original sentence in the present case was void, and the trial court was required to conduct a de novo sentencing hearing.

{¶5} Initially, we note that appellant failed to raise this argument at the time of the hearing. Failure to object results in a waiver of the issue on appeal. *State v. Carr* (1995), 104 Ohio App.3d 699, 703. Therefore, our review must proceed under a plain-error analysis. Plain error does not exist unless it can be said that, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Long* (1978), 53 Ohio St.2d 91.

{¶6} As indicated above, appellant argues the trial court did not conduct a de novo sentencing hearing. However, after reviewing the facts and circumstances in the present case, we conclude the trial court did, in fact, hold a de novo sentencing hearing. The trial had several characteristics of a de novo hearing. The state initially told the trial

court at the hearing: "We're asking the Court to conduct a de novo resentencing hearing. That is, reimpose the original prison term and advise the defendant of PRC and all the other things that go along with a typical sentencing hearing." Also, when the trial court announced its sentence, the trial court did more than merely append PRC to appellant's original sentence. The trial court also fully spelled out terms for appellant's prison sentence, fine, and costs, as a court would normally do in a de novo sentencing hearing.

{¶7} Appellant, however, points out several ways in which he believes the trial court's hearing lacked the indicia of a de novo sentencing hearing. Appellant first points to the state's request that the "original sentence" be reimposed with the addition of PRC. However, we see nothing that would prohibit a prosecutor from recommending a sentence to the court in a de novo hearing, even if it were requesting the same sentence that the court originally imposed. Indeed, that the state sought to have the "original" sentence imposed further supports the view that the purpose of the resentencing hearing was to order an entirely new sentence and not merely carry over the previous sentence with the addition of PRC.

{¶8} Appellant also points to the fact the court did not indicate at the hearing that it considered the factors in R.C. 2929.11 and 2929.12. However, the trial court's failure to do so, even under normal circumstances, does not necessitate reversal. When the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶18, fn. 4. Further, the trial court states in its journal entry that it did consider the factors set forth in R.C. 2929.11 and 2929.12. Therefore, we cannot find that the trial court's failure to recite the factors in R.C. 2929.11 and 2929.12

raises a presumption that it did not consider those statutes and does not support the argument that a de novo sentencing hearing was not held.

{¶9} Appellant additionally points out that the entry was labeled "nunc pro tunc," which is a correction of a prior order and not a new order, and indicated that sentence was imposed pursuant to R.C. 2929.191. At the time of the hearing, before *Singleton* had been released, it was this court's view that R.C. 2929.191 applied to all cases regardless of when the original sentence occurred, and the resentencing hearing was to be de novo. See *State v. Bock*, 10th Dist. No. 07AP-119, 2007-Ohio-6276 (under R.C. 2929.191, a trial court must conduct an entirely new sentencing hearing when seeking to add the PRC notification to a sentence that originally lacked such). Therefore, even if the trial court was incorrectly proceeding under R.C. 2929.191 and the "nunc pro tunc" procedure described in that provision, the trial court was bound to follow this court's precedent and conduct a de novo hearing. Although *Singleton* may have clarified that R.C. 2929.191 should not have applied to the current case, the trial court still reached the proper result when it conducted a de novo hearing under our then current precedent.

{¶10} In support of its contention that the trial court did not conduct a de novo hearing, appellant also points out that the court did not provide him an opportunity for allocution. Although the trial court was required to provide appellant an opportunity for allocution, as discussed further in this decision, we cannot say its failure to do so was necessarily indicative of a non-de novo hearing, given the above indications to the contrary. For these reasons, we find the trial court conducted a de novo hearing.

{¶11} Importantly, in order to find plain error, appellant must show that the outcome would have clearly been different, but for the claimed error. Appellant here fails

to do so. Appellant received the minimum sentence in all respects. The trial court sentenced appellant to the minimum prison term permitted, ordered any costs waived, and imposed no fine. Appellant does not explain what he could have done to affect any of these aspects of his sentence. Therefore, even if the trial court committed error by failing to hold a de novo hearing, appellant cannot show that the outcome could have been any different had a full hearing been held. For these reasons, appellant's first assignment of error is overruled.

{¶12} Appellant argues in his second assignment of error that the trial court's imposition of PRC by video conference violated Crim.R. 43(A) and his due process right to be physically present at every stage of his criminal proceeding. Appellant further urges that, although R.C. 2929.191(C) "permits" the offender to appear at the hearing by video conference upon the motion of the court, the prosecuting attorney, or the offender, an offender must still waive his right to physically appear. Appellant points out that the Supreme Court of Ohio has held that R.C. 2929.191 does not apply to defendants like him who were originally sentenced before the effective date of the statute.

{¶13} The state argues that, even if physical presence is required by Crim.R. 43, appellant forfeited all but plain error by failing to raise the issue at the hearing, and there existed no plain error here. As explained above, plain error does not exist unless it can be said that, but for the error, the outcome of the trial clearly would have been otherwise. *Long* at 97. We agree with the state that appellant has failed to demonstrate any plain error, as the outcome of the trial would not clearly have been otherwise, but for the error. It is axiomatic that a criminal defendant has a fundamental right to be present at all critical stages of his criminal trial. Section 10, Article I, Ohio Constitution; Crim.R. 43(A); *State v.*

Hale, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶100. "An accused's absence, however, does not necessarily result in prejudicial or constitutional error." *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶90. " '[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.' " *Id.*, quoting *Snyder v. Massachusetts* (1934), 291 U.S. 97, 107-08, 54 S.Ct. 330, 333, overruled on other grounds, *Duncan v. Louisiana* (1968), 391 U.S. 145, 154, 88 S.Ct. 1444, 1450. Thus, the defendant's absence in violation of Crim.R. 43(A), although improper, can constitute harmless error where she suffers no prejudice. *State v. Williams* (1983), 6 Ohio St.3d 281, 285-87. See also *State v. Armas*, 12th Dist. No. CA2004-01-007, 2005-Ohio-2793 (a violation of Crim.R. 43(A) is not a structural error; therefore, it is subject to the harmless-error analysis).

{¶14} Initially, we note that appellant's rights were adequately protected. Appellant was represented by counsel. See *Williams* at 286 (absence during proceedings was not a violation of due process when defendant's interests were adequately represented by his attorney). Appellant also cannot show that his counsel was defective in any manner, as discussed *infra*. Furthermore, appellant suffered no prejudice by not being physically present and being present only via remote video. The trial court resentenced appellant to the same sentence as originally ordered, and the five-year period of PRC ordered by the trial court was mandatory. Appellant does not claim that his physical presence could have changed the outcome of the trial, and we fail to see how his physical presence could have made any difference. See *id.* at 286 (no prejudice resulted from absence when there was no evidence that defendant's attendance at the proceedings would have contributed little to his defense). Therefore, we find that a fair and just hearing was not in any way

thwarted by appellant's physical absence, and his rights were adequately represented by counsel at the hearing. Therefore, appellant's second assignment of error is overruled.

{¶15} Appellant argues in his third assignment of error that he was constructively denied the right to counsel as provided by the Sixth Amendment. Appellant points out that he did not meet his attorney before the hearing, and he only consulted with him for six minutes before the sentencing hearing commenced. Appellant argues that these circumstances constituted constructive denial of his right to counsel, and, when a defendant's access to counsel is significantly impeded, prejudice is presumed. We disagree. Appellant presents no evidence that his access to counsel was "impeded." From all appearances in the record, appellant's time with counsel was sufficient to discuss the pertinent issues. There is no evidence that the trial court rushed the parties to complete their communications or placed a time restriction on the duration of the meeting. There is also no evidence that appellant's counsel ever sought more time or a continuance of the matter. The issues before the trial court were straightforward, and we have no reason to suspect that appellant's counsel could not communicate to appellant the legal ramifications of the hearing in the elapsed time.

{¶16} Appellant does claim that his counsel could have done a number of things if he would have had more time. For example, appellant claims his counsel could have filed a motion for new trial challenging the weight of the seized cocaine, requested an updated pre-sentence investigation report to discover information relevant to the weight of the cocaine, demanded exculpatory evidence under Crim.R. 16(B)(1)(f), investigated the facts and appellant's prison record to negotiate an agreed new trial motion and plea to a lesser offense, and conducted legal research concerning the errors to which the state

claims that counsel failed to object. However, appellant presents nothing to support these claims or to demonstrate they had any chance of success, and they are purely speculative. Therefore, appellant's third assignment of error is overruled.

{¶17} Appellant argues in his fourth assignment of error that the trial court denied him his right of allocution pursuant to Crim.R. 32(A). Appellant asserts the trial court never addressed him and allowed him to make a statement, and he never otherwise had the opportunity to address the court. The state concedes that the trial court did not address appellant or allow him to make a statement; however, the state argues that any error was harmless.

{¶18} Crim.R. 32(A)(1) governs a defendant's right to allocution. Pursuant to Crim.R. 32(A)(1), before imposing sentence, a trial court must address the defendant personally and ask whether he or she wishes to make a statement on his or her own behalf or present any information in mitigation of punishment. See Crim.R. 32(A)(1). "In a case in which the trial court has imposed sentence without first asking the defendant whether he or she wishes to exercise the right of allocution created by Crim.R. 32(A), resentencing is required unless the error is invited error or harmless error." *State v. Campbell* (2000), 90 Ohio St.3d 320, 326.

{¶19} In the present case, although the trial court erroneously failed to give appellant an opportunity for allocution, the error was harmless. As indicated above, the trial court sentenced appellant to the minimum prison term allowed, imposed no fines, waived costs, and ordered the mandatory period of PRC. Any allocution by appellant could have had no positive effect on the results of the proceeding. Therefore, appellant's fourth assignment of error is overruled.

{¶20} Appellant argues in his fifth assignment of error that the trial court's addition of PRC to his original sentence violated his right to be free from double jeopardy. Appellant contends that, if this court determines that his sentence was merely a "correction" of his sentence, pursuant to R.C. 2929.191, that sentence correction violated the Double Jeopardy and Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitutions and Article I, Section 10 of the Ohio Constitution. Appellant maintains that, although the Double Jeopardy Clause would not necessarily prevent the correction of a void sentence, it prohibits the addition of further punishment to a sentence that is otherwise valid. Appellant asserts only a de novo sentencing proceeding is consistent with the prohibition against double jeopardy, but the court here simply issued a nunc pro tunc order.

{¶21} Appellant failed to raise this issue before the trial court; therefore, any error must be plain error. Nevertheless, as we have found under appellant's first assignment of error that the sentencing proceeding was, in fact, de novo, there was no double jeopardy violation. The Supreme Court of Ohio has found that a de novo resentencing to include statutorily mandated periods of PRC does not offend the Double Jeopardy Clause or Due Process Clause. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197. For these reasons, appellant's fifth assignment of error is overruled.

{¶22} Appellant argues in his sixth assignment of error that his trial counsel was ineffective. Appellant does not specify in what way his trial counsel was ineffective, but merely argues that, to the extent his trial counsel may have waived any of the errors raised in the brief by failing to properly object, his performance was defective.

{¶23} It is well-established that, in order to prevail on a claim of ineffective assistance of counsel, appellant must demonstrate that trial counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 2064. The standard of proof requires appellant to satisfy a two-pronged test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second, appellant must show by a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Id.* Further, in Ohio, a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 156.

{¶24} Although we have found in several instances above that appellant waived all but plain error due to his counsel's failure to raise certain issues at the time of the hearing before the trial court, we cannot find that, but for counsel's failure to raise the issues, the results of the proceeding would have been different. As shown above, many of the issues raised by appellant in his appeal had no merit, and counsel could have reasonably believed that the trial court would have overruled the arguments. Furthermore, because the trial court gave appellant the minimum prison term, imposed no fines, waived any costs, and ordered the mandatory period of PRC, appellant's counsel could have reasonably believed that any arguments he raised would not have been able to reduce any part of appellant's sentence. Therefore, because appellant has failed to show any prejudicial impact from his attorney's alleged failures, we find he was not provided ineffective assistance of trial counsel. Appellant's sixth assignment of error is overruled.

{¶25} Accordingly, appellant's six assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

FRENCH and HENDERICKSON, JJ., concur.

HENDRICKSON, J., of the Twelfth Appellate District, sitting by assignment in the Tenth Appellate District.
