

[Cite as *State v. Sprauer*, 2011-Ohio-48.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-04-033
 :
 - vs - : OPINION
 : 1/10/2011
 :
 MATTHEW C. SPRAUER, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 04CR21626

Rachel A. Hutzel, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

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YOUNG, P.J.

{¶1} Defendant-appellant, Matthew C. Sprauer, appeals from a judgment of the Warren County Court of Common Pleas following a resentencing that correctly advised him of postrelease control.

{¶2} Following a jury trial in January 2005, appellant was convicted on one count of rape in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree, and

one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), a felony of the third degree. On February 15, 2005, the trial court sentenced him to life in prison on the rape charge and three years imprisonment on the gross sexual imposition charge, to run concurrently with the life sentence. Appellant timely appealed his conviction; on March 13, 2006, this court upheld the conviction. *State v. Sprauer*, Warren App. No. CA2005-02-022, 2006-Ohio-1146.

{13} On February 1, 2010, appellant moved the trial court to correct his sentence under R.C. 2929.191. Appellant asserted the trial court had not properly advised him of postrelease control; therefore, his sentence was void. On March 16, 2010, the trial court properly advised appellant of postrelease control and resentenced him to life in prison on the rape charge and to a concurrent three-year prison term on the gross sexual imposition charge.

{14} Appellant appeals, raising five assignments of error:

{15} Assignment of Error No. 1:

{16} "THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO VERBALLY AMEND THE BILL OF PARTICULARS AND THEN PROHIBITING TRIAL COUNSEL FROM ARGUING ABOUT THE CHANGE TO THE JURY."

{17} Assignment of Error No. 2:

{18} "THE TRIAL COURT ERRED IN DETERMINING A FIVE-YEAR-OLD CHILD COMPETENT TO TESTIFY DESPITE HER INABILITY TO ACCURATELY RELATE INFORMATION."

{19} Assignment of Error No. 3:

{110} "THE TRIAL COURT ERRED IN PREVENTING THE DEFENSE EXPERT FROM TESTIFYING AS TO APPELLANT'S SEXUAL ORIENTATION."

{¶11} Assignment of Error No. 4:

{¶12} "THE APPELLANT WAS DENIED A FAIR TRIAL DUE TO THE PROSECUTOR'S PREJUDICIAL REMARKS."

{¶13} Assignment of Error No. 5:

{¶14} "THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."

{¶15} The foregoing assignments do not challenge the propriety or validity of appellant's March 16, 2010 resentencing. Rather, they attack his 2005 jury conviction for rape and gross sexual imposition. For the following reasons, we decline to address appellant's five assignments of error.

{¶16} Appellant asserts that because his original sentence did not properly advise him of postrelease control, the sentence was void pursuant to *State v. Besak*, 114 Ohio St.3d 94, 2007-Ohio-3250. As a result, his original direct appeal was also invalid, and "he is free to pursue any assignments of errors [sic] that occurred in his jury trial as if this was his first appeal." In other words, appellant argues the instant appeal is his first direct appeal from a valid sentence.

{¶17} The exact same argument was first rejected by the Ninth Appellate District in *State v. Fisher*, 181 Ohio App.3d 758, 2009-Ohio-1491. Following a jury conviction in 2002, Fisher was sentenced to 14 years in prison. His conviction was affirmed by the court of appeals. Several years later, Fisher successfully moved to be resentenced on the ground he had not been properly advised of his postrelease control obligations. The trial court properly advised Fisher of those obligations and sentenced him to the same sentences it had previously imposed. Fisher appealed and argued that because his original sentence did not include a notice of postrelease

control and was therefore void, his original direct appeal was also invalid. As a result, he could now "raise any and all trial errors cognizable on direct appeal," and the instant appeal was his first valid appeal from a valid sentence.

{¶18} The Ninth Appellate District rejected Fisher's claim on the ground the appeal was precluded by the law of the case doctrine:

{¶19} "The law of the case doctrine 'provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.' Ultimately, 'the doctrine of law of the case precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal. New arguments are subject to issue preclusion, and are barred.'

{¶20} "[W]hen a 'court affirms the convictions in the First Appeal, the propriety of those convictions becomes the law of the case, and subsequent arguments seeking to overturn them become barred. Thus, in the Second Appeal, only arguments relating to the resentencing are proper.' Accordingly, Fisher's contention that he may raise any and all issues relating to his conviction in this appeal is without merit." *Fisher*, 181 Ohio App.3d at 761. (Internal citations omitted.) The Ninth Appellate District held that even though the original direct appeal arose from a void sentence, the law of the case doctrine still applied to the conviction. Thus, Fisher was precluded from asserting arguments relating to his conviction following his resentencing. *Id.*

{¶21} Fisher appealed to the Supreme Court of Ohio. The supreme court

upheld the decision of the Ninth Appellate District as follows:¹

{¶22} "The court of appeals correctly ruled that Fisher, having already had the benefit of one direct appeal, could not raise any and all claims of error in a second, successive appeal. The court of appeals based its decision on the law-of-the-case doctrine[.] ***

{¶23} "*** The doctrine retains its vitality in Ohio. In discussing the doctrine, we have held that it 'precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal' and noted that '[n]ew arguments are subject to issue preclusion, and are barred.'

{¶24} "The law-of-the-case doctrine is rooted in principles of res judicata and issue preclusion, and we have expressly disfavored applying res judicata to sentences that do not conform to statutory postrelease-control mandates. We also reject the application of issue preclusion to sentences that do not comply with statutory mandates, as such sentences are illegal and subject to collateral attack or direct appeal by any party.

{¶25} "*** [T]he court of appeals in this case correctly found that Fisher's remaining claims, which did not involve an [sic] void sentence or judgment, were

1. In its decision, the supreme court reiterated that in cases in which a trial judge does not impose postrelease control in accordance with statutorily mandated terms, the sentence is void. *State v. Fisher*, Slip Opinion No. 2010-Ohio-6238, ¶30. In those instances, the sentence 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. *Id.* at ¶1, 30, and 40. The supreme court also held that "when a judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, that *part* of the sentence that is void and must be set aside. *** Thus, we reaffirm the portion of the syllabus in *Besak* [2007-Ohio-3250] that states '[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,' but with the added proviso that only the offending portion of the sentence is subject to review and correction. However, we modify the second sentence in the *Besak* syllabus as ill-considered. *** Therefore, we hold that the new sentencing hearing to which an offender is entitled under *Besak* is limited to proper imposition of postrelease control." *Fisher* at ¶26-29.

barred by res judicata.

{¶26} "In so holding, we reject Fisher's claim that there was no final, appealable order in this case.

{¶27} "Fisher's theory is that because the trial court did not properly apply postrelease-control sanctions, his sentence was void under *Bezak* [2007-Ohio-3250]. Because his sentence was void, he contends, there was no sentence and without a sentence, no conviction and no final order. In Fisher's view, the absence of a conviction means the absence of a final, appealable order, and the absence of such an order deprived the court of appeals of its jurisdiction over the initial appeal, thereby rendering that appeal invalid. The argument, though creative, fails.

{¶28} "Nothing in *Baker* [*State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330] discusses void or voidable sentences. Rather, the syllabus speaks only to the requirement that the judgment of conviction set forth 'the sentence' in addition to the other necessary aspects of the judgment. The judgment in this case did set forth the sentence. The fact that the sentence was illegal does not deprive the appellate court of jurisdiction to consider and correct the error. In fact, R.C. 2953.08(G)(2)(b) expressly authorizes a reviewing court to modify or vacate any sentence that is 'contrary to law.' Clearly, no such authority could exist if an unlawful sentence rendered a judgment nonfinal and unappealable. Thus, *Baker* does not avail Fisher." *State v. Fisher*, Slip Opinion No. 2010-Ohio-6238, ¶33-39. (Internal citations omitted.)

{¶29} In conclusion, the supreme court held 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 ¶40.

{¶30} As stated earlier, appellant's five assignments of error do not challenge the propriety or validity of his March 16, 2010 resentencing, but rather, attack his 2005 jury conviction for rape and gross sexual imposition. In fact, the five assignments of error purely rehash the arguments appellant made in his original direct appeal and which we considered and overruled in *Sprauer*, 2006-Ohio-1146. Because we have already affirmed his conviction in his original appeal, appellant is precluded from attempting to overturn that conviction in this instant appeal following his resentencing, and is limited to setting forth arguments relating only to his resentencing. *Fisher*, 2010-Ohio-6238 at ¶40; *State v. Ortega*, Lorain App. No. 08CA009316, 2008-Ohio-6053, ¶8. Appellant's five assignments of error are accordingly overruled.

{¶31} Judgment affirmed.

POWELL and BRESSLER, JJ., concur.