

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

State of Ohio

Court of Appeals No. L-11-1017

Appellee

Trial Court No. CR0199701111

v.

Willie James Carter, III

DECISION AND JUDGMENT

Appellant

Decided: September 16, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Stephen D. Long, for appellant; Willie James Carter, III, pro se.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Willie James Carter, III, appeals his resentencing on two counts of aggravated murder in violation of R.C. 2903.01(A), felonies of the first degree, and one count of burglary in violation of R.C. 2911.12(A)(3), a felony of the third degree. His appointed counsel has filed a "no-merit" brief and requested leave to withdraw as

counsel, pursuant to *Anders v. California* (1967), 386 U.S. 738. For the following reasons, we grant counsel's motion to withdraw and affirm the judgment of the Lucas County Court of Common Pleas.

{¶ 2} In 1997, the trial court sentenced appellant to a term of life with the possibility of parole after 20 years as to the counts of aggravated murder and a term of four years as to the count of burglary, and ordered that the sentences be served consecutively to each other and consecutively to a 12-month sentence imposed for carrying a concealed weapon in case No. CR199701330. This court affirmed appellant's convictions in *State v. Carter* (Mar. 10, 2000), 6th Dist. No. L-97-1334.

{¶ 3} On November 12, 2010, appellant moved pro se for resentencing pursuant to *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, on grounds that the original sentence was void for having omitted a statutorily mandated term of postrelease control. On December 20, 2010, the trial court held a resentencing hearing to inform appellant of his postrelease control responsibilities. Over the objection of appellant and his appointed trial counsel, the hearing was held by way of videoconferencing. At the hearing, the trial court properly notified appellant of his postrelease control sanctions and otherwise imposed the same sentence that it imposed in 1997. The trial court journalized its resentencing order on January 3, 2011, and this appeal followed.

{¶ 4} In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the case, determines it to be wholly frivolous, he or she should so advise the court and request permission to withdraw. *Id.*, 386 U.S. at 744.

This request must be accompanied by a brief identifying anything in the record that might arguably support the appeal. *Id.* Counsel must also furnish his or her client with a copy of the brief and allow the client sufficient time to raise any points that he or she chooses. *Id.* Once these requirements are satisfied, 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 running afoul of federal constitutional requirements, or it may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 5} In this case, appointed counsel for appellant has fully satisfied the requirements set forth in *Anders*. Counsel states that he has thoroughly examined the record and is unable to discover what he considers a meritorious, appealable issue. Counsel has requested permission to withdraw and has accompanied his request with a brief containing the following proposed assignments of error:

{¶ 6} "1. The trial court erred by resentencing appellant via video conference, in a summary hearing, with no prior notice, in violation of his due process rights.

{¶ 7} "2. The trial court erred in failing to conduct a *de novo* sentencing."

{¶ 8} Counsel served appellant with a copy of the brief and motion to withdraw, and appellant has submitted his own brief in which he argues the merits of the second proposed assignment of error. The state has filed a brief in response, stating that it agrees with appellant's counsel that there is no arguable basis for any valid assignment of error. This court will now proceed with an examination of the proposed assignments of error,

the points raised by appellant pro se, and the entire record of the proceedings below to determine whether an arguable issue exists that would require the appointment of new appellate counsel.

{¶ 9} Considering the issues in their logical order, we first address the second proposed assignment of error. Appellant argues that the trial court was required to hold a complete de novo resentencing hearing pursuant to *State v. Bezak*. However, in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 36, the Supreme Court of Ohio overruled that portion of its decision in *Bezak* that required a complete de novo resentencing in order to correct the failure to properly impose a mandatory term of postrelease control. Instead, the court held, "The new sentencing hearing to which an offender is entitled under *State v. Bezak* is limited to the proper imposition of postrelease control." *Id.*, paragraph two of the syllabus. Thus, pursuant to *Fischer*, the trial court has no authority at resentencing to revisit the terms of the original sentence or "do anything other than correctly impose post-release control upon [the defendant]." *State v. Smith*, 9th Dist. No. 10CA009819, 2011-Ohio-398, ¶ 7.

{¶ 10} In this case, appellant's resentencing hearing was held three days before *Fischer* was decided. Apparently following the dictates of *Bezak*, the trial court afforded appellant and his attorney an opportunity make a statement in regard to sentencing, reconsidered the presentence investigation report, the principles and purposes of sentencing under R.C. 2929.11, and the seriousness and recidivism factors listed in R.C. 2929.12, reimposed the terms of the original sentence, and imposed postrelease control.

Nevertheless, "[w]e apply *Fischer* retroactively because of the general rule that * * * a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation." *State v. Taylor*, 4th Dist. No. 10CA7, 2011-Ohio-1391, ¶ 14, fn. 2.

Regardless of whether appellant received a complete de novo sentencing as formerly required under *Bezak*, he certainly received more than he was entitled to under *Fischer*.

Appellant's second proposed assignment of error is, therefore, without any arguable merit.

{¶ 11} As to the first proposed assignment of error, a legitimate argument could be made that in spite of *Fischer*, a resentencing hearing to impose postrelease control may not be conducted by videoconference unless the trial court provides appropriate notice and obtains an express waiver of the defendant's right to be physically present in accordance with Crim.R. 43(A). See *State v. Steimle*, 8th Dist. No. 95076, 2011-Ohio-1071, ¶ 16. Nevertheless, it is well-established that "a violation of Crim.R. 43 is not structural error and can constitute harmless error where the defendant suffers no prejudice." *Id.* at ¶ 17. See, also, *State v. McCollins*, 8th Dist. No. 95486, 2011-Ohio-2398, ¶ 7; *State v. Coleman*, 10th Dist. Nos. 10AP-265, 10AP-266, 2011-Ohio-1889, ¶ 43; *State v. Morton*, 10th Dist. No. 10AP-562, 2011-Ohio-1488, ¶ 18; *State v. Reed*, 10th Dist. No. 09AP-1164, 2010-Ohio-5819, ¶ 13; *State v. Armas*, 12th Dist. No. CA2004-01-007, 2005-Ohio-2793, ¶ 25-27.

{¶ 12} In this case, any error in regard to notice or physical presence was manifestly harmless. The trial court reimposed the same sentence as originally ordered

and, under *Fischer*, could not have done otherwise. The terms of postrelease control ordered by the court were mandatory. The trial court indicated that appellant "had several opportunities to speak with his attorney before we commenced this hearing," and appellant did not request to communicate privately with his counsel during the hearing. Appellant's counsel was permitted to make a statement on appellant's behalf with regard to punishment. Appellant was also afforded the opportunity to make a statement on his own behalf and declined. Nothing in the record indicates that any matter pertinent to the proceeding was left unaddressed or that any additional information could have been submitted on appellant's behalf. Under these circumstances, we fail to see how additional notice to appellant or his physical presence at the hearing would have made any difference whatsoever. Accordingly, we find no arguable merit to appellant's first proposed assignment of error.

{¶ 13} Our own examination of the record reveals no other point of arguable merit. Thus, appellant's appeal is wholly frivolous. Appellate counsel's motion to withdraw is found well-taken and hereby granted.

{¶ 14} 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. The clerk is ordered to serve all parties, including Willie James Carter, III, with notice of this decision.

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

Arlene Singer, J.

JUDGE

Thomas J. Osowik, 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:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.