

[Cite as *State v. Thomas*, 2011-Ohio-1331.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-100411
		C-100412
Plaintiff-Appellee,	:	TRIAL NOS. B-0801083
		M-0800313
vs.	:	
AKO THOMAS,	:	<i>DECISION.</i>
Defendant-Appellant.	:	

Criminal Appeals From: Hamilton County Court of Common Pleas

Judgments Appealed From Are: Affirmed in Part as Modified and Cause Remanded
in C-100411; Appeal Dismissed in C-100412

Date of Judgment Entry on Appeal: March 23, 2011

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Ako Thomas, pro se.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} Defendant-appellant Ako Thomas has taken these consolidated appeals from the Hamilton County Common Pleas Court’s judgments overruling his “Motion For Resentencing to Correct a Void Sentence,” his “P[re]sentence Motion to Withdraw Guilty Plea,” and his “Motion for Relief from Judgment Pursuant to Civ.R. 60(B)(3,5).” We dismiss as abandoned Thomas’s appeal from the judgment overruling his motion for relief from judgment. And we affirm, as modified, the court’s judgment overruling Thomas’s motion to withdraw his plea. But we remand this case to the trial court for the proper imposition of postrelease control.

{¶2} Thomas was convicted in 2008 upon his guilty plea to cocaine trafficking, and he was sentenced to four years in prison. He unsuccessfully challenged his conviction in an appeal to this court,¹ in an R.C. 2953.21 postconviction petition, and in postconviction motions for resentencing and to withdraw his plea.²

{¶3} In June 2009, while his direct appeal was pending before this court, Thomas filed with the common pleas court a Civ.R. 60(B) motion seeking relief from an order disposing of unclaimed and/or abandoned currency. In January 2010, he moved for resentencing and to withdraw his plea. The court overruled the motions, and these appeals followed.

Appeal No. C-100412

{¶4} We note preliminarily that, in the appeal numbered C-100412, Thomas appeals from the judgment entered in the case numbered M-080313 overruling his Civ.R. 60(B) motion. But in his brief, he does not assign as error the overruling of the motion. We, therefore, dismiss as abandoned the appeal numbered C-100412.³

¹ See *State v. Thomas* (Oct. 7, 2009), 1st Dist. No. C-080940.

² See *State v. Thomas*, 1st Dist. Nos. C-090716 and C-090463, 2010-Ohio-4856.

³ See *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693, ¶8.

Appeal No. C-100411

{¶5} In the appeal numbered C-100411, Thomas appeals from the overruling of his motion for resentencing and his motion to withdraw his plea. On appeal, he advances two assignments of error.

{¶6} *Thomas’s cocaine-trafficking sentence is void.* We address first Thomas’s second assignment of error, in which he contends that the common pleas court erred in overruling his motion seeking resentencing on the ground that his sentence is void. We agree.

{¶7} Thomas was found guilty of trafficking in cocaine, a first-degree felony. Therefore, the trial court was required, by statute, to notify Thomas at sentencing that, upon his release from prison, he would be subject to a mandatory five-year period of postrelease-control supervision.⁴ But the court failed to specify the duration of Thomas’s postrelease-control supervision. Therefore, to the extent that Thomas was not adequately notified concerning postrelease control, his sentence is void.⁵

{¶8} Thomas did not assign this matter as error in his direct appeal from his conviction. He instead presented the challenge in his postconviction motion for resentencing. But when a sentence is void to the extent that it was not imposed in conformity with the statutory mandates concerning postrelease control, and the matter has come to the attention of a court, either on direct appeal or in a collateral challenge, the court “cannot ignore” the matter,⁶ and “the offending portion of the sentence is subject to review and correction.”⁷

⁴ See R.C. 2929.19(B)(3)(c); *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraph one of the syllabus.

⁵ See *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶69; *State v. Gorassi*, 1st Dist. No. C-090292, 2010-Ohio-2875, ¶13.

⁶ *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, ¶12; accord *State v. Holcomb*, 184 Ohio App.3d 577, 2009-Ohio-3187, 921 N.E.2d 1077, ¶17-20; *State v. Long*, 1st Dist. No. C-100285, 2010-Ohio-6115, ¶5.

⁷ *State v. Fischer*, ___ Ohio St.3d ___, 2010-Ohio-6238, ___ N.E.2d ___, paragraph one of the syllabus and ¶27.

{¶9} Thomas’s cocaine-trafficking sentence is void to the extent that he was not adequately notified concerning postrelease control. Because his motion for resentencing brought this matter to the attention of the common pleas court, the court should have reviewed the matter. And because Thomas was sentenced after July 11, 2006, the court erred when it failed to correct the offending portion of the sentence by applying the procedures prescribed by R.C. 2929.191.⁸ Accordingly, we sustain the second assignment of error.

{¶10} *The common pleas court had no jurisdiction to entertain Thomas’s motion to withdraw his guilty plea.* In his first assignment of error, Thomas assails the overruling of his Crim.R. 32.1 motion to withdraw his guilty plea. The challenge is untenable.

{¶11} In his motion, Thomas insisted that, because his sentence was void for inadequate postrelease-control notification, his motion was reviewable under the “liberal[]” standard applicable to a presentence motion to withdraw a guilty plea.⁹ And he argued that he was entitled to relief under Crim.R. 32.1 because the trial court, in accepting his plea, had not substantially complied with Crim.R. 11(C)(2)(a)’s requirement that he be advised of the maximum penalty involved, when the court failed to inform him that he was subject to a mandatory driver’s license suspension.

{¶12} We note at the outset that the entry overruling Thomas’s Crim.R. 32.1 motion did not set forth the standard of review that the common pleas court had applied in deciding the motion. In any event, the motion, filed after Thomas had

⁸ See *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph two of the syllabus; accord *Gorassi*, supra, at ¶13; *State v. Williams*, 1st Dist. No. C-081148, 2010-Ohio-1879, ¶23-24; see, also, *State v. Conway*, 2nd Dist. No. 2010-CA-50, 2011-Ohio-24, ¶27 (after the supreme court’s decision in *Fischer*, “elect[ing]” to take the “clear [step]” of “revers[ing] the [offending] post-release control aspects of the sentence and remand[ing] * * * for a hearing under R.C. 2929.191[C],” because “it is not clear” from the holding in *Fischer* that an appeals court “may take the alternative step of ignoring R.C. 2929.191[C] and making the correction to the sentence that the trial court should have made”); accord *State v. Nicholson*, 8th Dist. No. 95327, 2011-Ohio-14; *State v. Samples*, 5th Dist. No. 2010-CA-00122, 2011-Ohio-179, ¶27.

⁹ See *State v. Xie* (1992), 62 Ohio St.3d 521, 527, 584 N.E.2d 715.

been sentenced, was not reviewable as a presentence motion. And it was subject to dismissal because the common pleas court had no jurisdiction to entertain it.

{¶13} In support of his argument that his Crim.R. 32.1 motion was reviewable as a presentence motion, Thomas cites the Ohio Supreme Court’s 2009 decision in *State v. Boswell*. In *Boswell*, the court held that “[a] motion to withdraw a plea of guilty * * * made by a defendant who has been given a void sentence must be considered as a presentence motion under Crim.R. 32.1.”¹⁰ The court based its holding on the principle, derived from its 1967 decision in *Romito v. Maxwell*¹¹ and reaffirmed in 2007 in *State v. Bezak*,¹² that the effect of vacating a void sentence is to place the parties in the same position “*as if there had been no sentence.*”¹³

{¶14} The supreme court had applied this principle in *Bezak* to hold, in its syllabus, that when a sentence is void due to inadequate postrelease-control notification, the defendant is entitled to “a new sentencing hearing.”¹⁴ But in 2010, in *State v. Fischer*, the supreme court, in the course of holding that a direct appeal from a resentencing ordered under *Bezak* constituted a first appeal of right, revisited the law underlying its decision in *Bezak*.¹⁵ The court looked to a second principle, overlooked in *Bezak*, that “only the portion [of a sentence] that is void may be vacated or otherwise amended.”¹⁶ Applying this principle, the court modified the *Bezak* syllabus by adding the “proviso that only the offending portion of the sentence is subject to review and correction”¹⁷ and by holding that “[t]he new sentencing hearing to which an offender is entitled under *State v. Bezak* is limited to proper imposition of postrelease control.”¹⁸ And the court held that “[a]lthough the doctrine

¹⁰ *Boswell*, 121 Ohio St.3d 575, syllabus.

¹¹ (1967), 10 Ohio St.2d 266, 227 N.E.2d 223 117 Ohio St.3d 420, 2008-Ohio-1197, 884, N.E.2d 568, ¶20.

¹² 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961.

¹³ *Id.* at ¶13, citing *Romito*, 10 Ohio St.2d at 267 (emphasis in original); see *Boswell*, 121 Ohio St.3d 575, at ¶8.

¹⁴ *Id.*, syllabus.

¹⁵ See *Fischer*, 2010-Ohio-6238, at ¶5 and 18.

¹⁶ *Id.* at ¶28.

¹⁷ *Id.* at ¶27.

¹⁸ *Id.*, paragraph two of the syllabus.

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.”¹⁹

{¶15} Thus, the supreme court in *Fischer* qualified the principle, underlying *Bezak* and *Boswell*, that the effect of vacating a void sentence is to place the parties in the same position as if there had been no sentence. The court instead declared that improper postrelease-control notification renders void, and subject to “review and correction,” only the “offending” portion of the sentence. The “lawful” aspects of the sentence that are unrelated to the imposition of postrelease control remain unaffected by the offending portion of the sentence; they are final and appealable when imposed, and the doctrine of res judicata operates to preclude their review in other than a direct appeal.

{¶16} The *Fischer* court’s qualification of the operative principle in *Bezak* and *Boswell*, that a void sentence leaves “no sentence,” led it to limit resentencing under *Bezak* to the proper imposition of postrelease control. We believe that, had the issue been before it, the *Fischer* court’s qualification of that principle would also have led it to overrule its holding in *Boswell* that a Crim.R. 32.1 motion is reviewable as a presentence motion when it has been submitted after the imposition of a sentence that is void only for improper postrelease-control notification.²⁰ We, therefore, hold that, because Thomas’s sentence was void only to the extent that postrelease control was not properly imposed, his Crim.R. 32.1 motion, filed after he was sentenced, was reviewable not as a presentence motion, but as a postsentence motion to withdraw his guilty plea.

{¶17} And we hold that the common pleas court had no jurisdiction to entertain the motion. Thomas’s direct appeal of his conviction to this court had

¹⁹ Id., paragraph three of the syllabus.

²⁰ Accord *State v. Christie*, 3rd Dist. No. 4-10-04, 2011-Ohio-520, ¶20-25.

divested the common pleas court of jurisdiction in his case.²¹ Because our disposition of his direct appeal did not require us to remand the case, the common pleas court did not regain jurisdiction after we had decided the appeal.²² And although a trial court retains jurisdiction to correct a void judgment,²³ Thomas's judgment of conviction is void only to the extent that he was not adequately notified concerning postrelease control.²⁴ Thus, Thomas's Crim.R. 32.1 motion was subject to dismissal by the common pleas court for lack of jurisdiction.

¶18 **Conclusion.** We dismiss as abandoned the appeal numbered C-100412.

¶19 In the appeal numbered C-100412, upon our determination that Thomas's 2008 cocaine-trafficking sentence is void to the extent that it was not imposed in conformity with the statutory mandates concerning postrelease control, we remand this case to the common pleas court for correction of the offending portion of the sentence pursuant to R.C. 2929.191. Upon our determination that Thomas's Crim.R. 32.1 motion to withdraw his guilty plea was subject to dismissal for lack of jurisdiction, we modify the judgment in the case numbered B-0801083 to reflect the dismissal of the motion. In all other respects, we affirm, as modified, the common pleas court's judgment.

Judgment accordingly.

DINKELACKER, P.J., HENDON and FISCHER, JJ.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

²¹ See *In re Kurtzhalz* (1943), 141 Ohio St. 432, 48 N.E.2d 657, paragraph two of the syllabus; accord *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207; *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94, 97, 378 N.E.2d 162.

²² See *State ex rel. Special Prosecutors*, 55 Ohio St.2d at 97.

²³ See *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶18-19.

²⁴ See *Thomas*, 2010-Ohio-4856, at ¶11 (holding that the trial court's omission of a statutorily mandated driver's license suspension did not render Thomas's sentence void).