

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| STATE OF OHIO | : | JUDGES: |
| | : | |
| | : | Hon. Sheila G. Farmer, P.J. |
| Plaintiff-Appellee | : | Hon. John W. Wise, J. |
| | : | Hon. Patricia A. Delaney, J. |
| -vs- | : | |
| | : | Case No. 09-CA-42 |
| SIMON L. TOWNSEND | : | |
| | : | |
| | : | |
| Defendant-Appellant | : | <u>OPINION</u> |

CHARACTER OF PROCEEDING: Appeal from the Fairfield County Court of
Common Pleas Case No. 04-CR-444

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: October 21, 2009

APPEARANCES:

For Plaintiff-Appellee:

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Delaney, J.

{¶1} Defendant-Appellant, Simon Townsend, appeals from his jointly recommended sentence and the judgment entry of the Fairfield County Court of Common Pleas, convicting him of one count of burglary with specification, one count of theft of a firearm, and one count of having a weapon while under disability. The State of Ohio is Plaintiff-Appellee.

{¶2} On December 17, 2004, Appellant was indicted on one count of burglary, in violation of R.C. 2911.12(A)(2), a felony of the second degree; one count of theft of a firearm, in violation of R.C. 2913.02, a felony of the third degree; and one count of having a weapon while under a disability, in violation of R.C. 2923.13, a felony of the third degree. All counts contained one year firearm specifications, in violation of R.C. 2941.141.

{¶3} On August 4, 2005, Appellant entered pleas of not guilty at his arraignment to all counts in the indictment.

{¶4} On September 25, 2005, Appellant appeared before the trial court and withdrew his previously entered not guilty pleas and entered pleas of guilty to all counts in the indictment. The firearm specification on count one was included as part of the plea agreement; the specifications on counts two and three were dismissed as part of the negotiated plea agreement. The parties jointly recommended a sentence of five years in prison for count one, consecutive to the one year mandatory sentence for the firearm specification; a consecutive sentence of two years was also agreed upon on count two, and a consecutive sentence of two years was also agreed upon on count three. The four year prison sentence on counts two and three was suspended, per the

agreement of the parties, and a five year term of community control was imposed in lieu of prison on those counts. The trial court accepted the recommendation of the parties and sentenced Appellant to six years in prison, with five years of community control to commence once Appellant was released from prison.

{¶5} At the sentencing hearing, the trial court conducted a Rule 11 colloquy with Appellant, and explained to him the ranges of sentences that could be imposed. The court additionally informed Appellant that he would be subject to a maximum three year period of post-release control. Appellant signed a plea agreement form, which acknowledged the range of penalties for his crimes.

{¶6} At sentencing, the State further noted that Appellant had been to prison three times previously, and that he had prior convictions for burglary, theft of firearms, and other felonies, and that he was on post-release control at the time of the present offenses.

{¶7} The court indicated that it had considered the purposes and principles of sentencing, and that it considered the need to protect the public and hold Appellant accountable for his actions. The court considered Appellant's criminal history, and the fact that Appellant was on post-release control at the time of committing these offenses when sentencing Appellant. The court, however, failed to include the post-release control language for the offenses in the sentencing entry.

{¶8} On November 16, 2007, Appellant filed a Motion to Vacate Sentence based on the omission of the post-release control language in the original sentencing entry. A hearing was held on April 28, 2008, at which time the omission of the post-release control language was noted and corrected pursuant to R.C. 2929.191.

Appellant's motion was denied; the State's request to modify the sentence to correct the omission was granted. In a corrected entry, filed on May 1, 2008, the court included the required language, wherein Appellant was sentenced to a mandatory period of five years post-release control and was notified of the possible penalties for violating post-release control.

{¶9} Appellant appealed from the May 1, 2008, judgment entry, raising two assignments of error:

{¶10} "I. THE SENTENCING OF THE DEFENDANT-APPELLANT WAS UNCONSTITUTIONAL.

{¶11} "II. THE RESENTENCING OF THE APPELLANT WAS IN ERROR."

{¶12} This Court, in reversing the trial court's judgment, found with respect to the first assignment of error that the Appellant's original sentence from 2005 was based on an unconstitutional statute and that his sentence therefore was void based on the Ohio Supreme Court's holding in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Accordingly, this court vacated and remanded for a resentencing pursuant to *Foster*. See *State v. Townsend*, 5th Dist. No. 08-CA-37, 2008-Ohio-6783. We additionally found, with respect to Appellant's second assignment of error, that the trial court did not provide Appellant with notice of a resentencing hearing regarding post-release control as required by R.C. 2929.191, and that therefore his case should be reversed and remanded for the trial court to hold a full resentencing in accordance with R.C. 2929.191 so that the trial court could properly impose the correct post-release control conditions on Appellant.

{¶13} On March 13, 2009, a resentencing hearing was held and the trial court resentenced Appellant to an identical sentence, with the exception that it did not impose a fine upon Appellant for court costs. At the resentencing, the court stated with respect to post-release control:

{¶14} “Even after having completed the prison term which has been imposed in count one of this indictment, that is, the five-year term of imprisonment, plus the mandatory one-year term of imprisonment as to the firearm specification, you are subject to a mandatory period of post-release control for up to three years.

{¶15} “And during that period of time, if you violate the terms and conditions of post-release control, you could be sent to prison to serve up to one-half of the originally imposed prison sentence. Further, if, while on post-release control, you would violate the terms and conditions of post-release control by committing a new felony, the judge in that case could, in addition to any sentence imposed for the new felony, could order that you serve additional time in prison up to one-half of the remaining PRC time.

{¶16} “Further, you are subject to a possible period of post-release control with regard to counts two and three of this indictment in the event that you would be ordered to serve one or both of those sentences, you may be subject to a period of supervision by the Ohio Adult Parole Authority for up to three years. And during that period of time, if you violate the terms and conditions of post-release control, you could be sent back to prison to serve up to one-half of the originally ordered sentence.

{¶17} “Further, if you commit a new felony while on post-release control as to those matters, the sentencing Judge in the new case, wherein you would be convicted of a separate felony, could order that you serve that sentence consecutive to any

sentence imposed as a result of revocation of post-release control time, which could be up to the remaining time that you have left on your post-release control.”

{¶18} In the judgment entry from the resentencing, the court stated with respect to post-release control:

{¶19} “The Court further notified the Defendant that post-release control is mandatory in this case for a period of five (5) years, as well as the consequences for violating the conditions of post-release control imposed by the Parole Board. The Court further notified the Defendant of all the items contained in the Ohio Revised Code 2929.19(B)(3)(c), (d), (e), and (f). The Court further notified that if a period of supervision by the Parole Board is imposed following the Defendant’s release from prison and if the Defendant violates that supervision, or conditions of post-release control, that the Parole Board may impose a prison term as part of the sentence of up to one-half of the stated prison term originally imposed upon the Defendant. The Defendant is ordered to serve as part of his sentence any term of post-release control imposed by the Parole Board and any prison term for violation of that post-release control.”

{¶20} Appellant appeals from this judgment entry, raising two assignments of error, which are virtually identical to those raised in his 2008 appeal:

{¶21} “I. THE ORIGINAL SENTENCING OF THE DEFENDANT-APPELLANT WAS UNCONSTITUTIONAL.

{¶22} “II. THE RESENTENCING OF THE APPELLANT WAS IN ERROR.”

I.

{¶23} In his first assignment of error, Appellant argues that his original sentence was unconstitutional, as it was in violation of the Ohio Supreme Court's ruling in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. In support of that contention, Appellant relies heavily on this Court's December 17, 2008, opinion, wherein we stated, "In his first assignment of error, Appellant argues that the sentence imposed on him by the trial court is unconstitutional because it imposed more than the minimum sentence and ordered the sentences to run consecutive to one another. We agree." *State v. Townsend*, 5th Dist. No. 08-CA-37, 2008-Ohio-6783, ¶16.

{¶24} However, when viewing this paragraph in context, we did not determine that Appellant was entitled to a minimum, concurrent sentence. The rest of our opinion, following that paragraph, states:

{¶25} "Appellant argues that his sentence is unconstitutional pursuant to *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856. *Foster* addressed constitutional issues concerning felony sentencing and held that portions of Ohio's felony sentencing framework requiring judicial findings before imposition of more than the minimum, maximum, and consecutive sentences were unconstitutional and void. 109 Ohio St.3d at ¶ 100.

{¶26} "As Appellant's original sentence was imposed on September 27, 2005, pre- *Foster*, Appellant's sentence is based upon an unconstitutional statute which was deemed void.

{¶27} “While the trial court did hold a hearing on Appellant's Motion to Vacate his sentence pursuant to *Foster*, supra, we find the trial court failed to re-sentence Appellant at said hearing.

{¶28} “Appellant's first assignment of error is sustained. Accordingly, we vacate Appellant's sentence and remand the matter for re-sentencing in accordance with *Foster*, supra.” *Townsend*, supra, at ¶¶17-20.

{¶29} When viewing this opinion in context, it is clear that this Court merely ordered a resentencing of Appellant, in compliance with the Supreme Court's decision in *Foster*.

{¶30} The trial court properly resentenced Appellant in compliance with *Foster*.

{¶31} Moreover, Appellant is complaining about a jointly recommended sentence. It is not necessary for us to address these arguments, because the court's imposition of non-minimum, consecutive sentences in this case was done as part of a joint sentencing recommendation. *Blakely* and *Foster* do not apply to lawful sentences that were jointly recommended by the parties. *State v. Covington*, 5th Dist. No. CT2005-0038, 2006-Ohio-2700; *State v. Wyche*, 10th Dist. No. 06AP-1047, 2007-Ohio-2784, at ¶ 6; *State v. Hall*, 8th Dist. No. 87059, 2007-Ohio-414, discretionary appeal not allowed, 114 Ohio St.3d 1413, 2007-Ohio-2632; *State v. Dye*, 4th Dist. No. 06CA24, 2007-Ohio-3934.

{¶32} As such, Appellant's first assignment of error is overruled.

II.

{¶33} In his second assignment of error, Appellant argues that his resentencing was unconstitutional because “the ‘after the fact’ proceedings now at issue were

unconstitutional” and that Appellant “was not imprisoned under a sentence imposed by the trial court.” We disagree.

{¶34} We would first note that Appellant failed to raise the constitutionality argument at the trial court level and is raising it for the first time on appeal.

{¶35} It is well established that failure to raise an alleged error in the trial court, even an error of constitutional magnitude, results in the waiver of such issue on appeal. *State v. Williams* (1977), 51 Ohio St.2d 112, 117, 364 N.E.2d 1364.

{¶36} “The general rule is that ‘an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.’ *State v. Childs* (1968), 14 Ohio St.2d 56, 236 N.E.2d 545 paragraph three of the syllabus; *State v. Glaros* (1960), 170 Ohio St. 471, 166 N.E.2d 379 [11 O.O.2d 215], paragraph one of the syllabus; *State v. Lancaster* (1971), 25 Ohio St.2d 83, 267 N.E.2d 291 [54 O.O.2d 222], paragraph one of the syllabus; *State v. Williams* (1977), 51 Ohio St.2d 112, 117, 364 N.E.2d 1364 [5 O.O.3d 98]. Likewise, ‘[c]onstitutional rights may be lost as finally as any others by a failure to assert them at the proper time.’ *State v. Childs*, supra, 14 Ohio St.2d at 62, 236 N.E.2d 545, citing *State v. Davis* (1964), 1 Ohio St.2d 28, 203 N.E.2d 357 [30 O.O.2d 16]; *State, ex rel. Specht, v. Bd. of Edn.* (1981), 66 Ohio St.2d 178, 182, 420 N.E.2d 1004 [20 O.O.3d 191], citing *Clarrington v. Althar* (1930), 122 Ohio St. 608, 174 N.E. 251, and *Toledo v. Gfell* (1958), 107 Ohio App. 93, 95, 156 N.E.2d 752 [7 O.O.2d 437].FN1 Accordingly, the question of the constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution, this means in the trial court. See

State v. Woodards (1966), 6 Ohio St.2d 14, 215 N.E.2d 568 [35 O.O.2d 8]. This rule applies both to appellant's claim that the statute is unconstitutionally vague on its face and to his claim that the trial court interpreted the statute in such a way as to render the statute unconstitutionally vague. Both claims were apparent but yet not made at the trial court level." *State v. Awan* (1986), 22 Ohio St.3d 120, 122, 489 N.E.2d 277.

{¶37} The Supreme Court, in *Awan*, determined that although R.C. 2505.21 gives appellate courts discretion to review a claimed denial of constitutional rights not raised below, "that discretion will not ordinarily be exercised to review such claims, where the right sought to be vindicated was in existence prior to or at the time of trial." *Awan*, supra, at 123, citing *State v. Woodards*, supra, at 21, 215 N.E.2d 568. The *Awan* court determined that the appellate court did not abuse its discretion in refusing to review Awan's claim of unconstitutionality, finding "[t]he legitimate state interest in orderly procedure through the judicial system is well recognized as founded on the desire to avoid unnecessary delay and to discourage defendants from making erroneous records which would allow them an option to take advantage of favorable verdicts or to avoid unfavorable ones." Id., citing *State v. Childs*, supra, 14 Ohio St.2d at 62, 236 N.E.2d 545, citing *Douglas v. Alabama* (1965), 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934, and *Henry v. Mississippi* (1965), 379 U.S. 443, 855, Ct. 564, 13 L.Ed.2d 408.

{¶38} Appellant failed to object to the post-release control language, let alone challenge the constitutionality of the issue, at the resentencing hearing. As such, we find that he has waived any constitutional challenge on appeal.

{¶39} We will briefly address, however, whether the trial court properly resentenced Appellant regarding post-release control pursuant to R.C. 2929.191, which is the crux of Appellant's argument.

{¶40} When a trial court fails to notify an offender that he may be subject to post-release control at a sentencing hearing, as required by R.C. 2929.191, the sentence is void. Accordingly, the sentence must be vacated and the matter remanded to the trial court for resentencing, as if there had been no original sentence. When a defendant is convicted of or pleads guilty to one or more offenses and post-release control is not properly included in a sentence for a particular offense, the sentence for that offense is void. 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; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568; *State ex rel Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263.

{¶41} "A trial court retains jurisdiction to correct a void sentence and is authorized to do so when its error is apparent." *Simpkins*, supra, citing *Cruzado*, supra, at ¶19. Moreover, resentencing a defendant to add a mandatory period of post-release control does not violate due process. *Simpkins*, supra.

{¶42} "In cases in which a defendant is convicted of, or pleads guilty to, an offense for which post-release control is required but not properly included in the sentence, the sentence is void and the state is entitled to a new sentencing hearing in order to have post-release control imposed on the defendant unless the defendant has completed his sentence." *State v. Simpkins*, supra at ¶1 of the syllabus; See also, *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263. "In

such a re-sentencing hearing, the trial court may not merely inform the offender of the imposition of post-release control and automatically re-impose the original sentence. Rather, the effect of vacating the trial court's original sentence is to place the parties in the same place as if there had been no sentence." *State v. Bezak*, 114 Ohio St.3d at 95, 2007-Ohio-3250, 868 N.E.2d 961. Thus, the offender is entitled to a de novo sentencing hearing. *Id.*; See also, *State v. Bruner*, 11th Dist. No. 2007-A-0012, 2007-Ohio-4767.

{¶43} In the case at bar, the trial court held the de novo resentencing hearing and properly informed Appellant of the mandatory and discretionary post-release control conditions for his convictions. The trial court also resentedenced Appellant in accordance with the requirements of R.C. 2929.11 and R.C. 2929.12.¹

{¶44} Thus, we find that the trial court properly resentedenced Appellant, and that the court did not violate Appellant's rights in resentencing him and imposing the proper conditions for post-release control.

{¶45} Appellant's second assignment of error is overruled.

¹ The trial court did, however, in its judgment entry, state an incorrect mandatory post-release control period of five years, which it can remedy through a timely nunc pro tunc judgment entry.

{¶46} For the foregoing reasons, Appellant's assignments of error are overruled and the judgment of the Fairfield County Court of Common Pleas is affirmed.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| | : | |
| SIMON L. TOWNSEND | : | |
| | : | |
| Defendant-Appellant | : | Case No. 09-CA-42 |
| | : | |

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE