

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

State of Ohio

Court of Appeals No. L-10-1163

Appellee

Trial Court No. CR0200302239

v.

John B. Gates

**DECISION AND JUDGMENT**

Appellant

Decided: July 15, 2011

\* \* \* \* \*

Julia R. Bates, Lucas County Prosecuting Attorney, and  
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Spiros P. Cocoves, for appellant.

\* \* \* \* \*

OSOWIK, P.J.

{¶ 1} This is an appeal from a resentencing judgment of the Lucas County Court of Common Pleas. On April 27, 2010, appellant was resentenced pursuant to *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, in order to correct an initial failure to include the requisite notice of postrelease control in the original August 5, 2003 sentencing entry.

{¶ 2} In the course of the *Bezak* resentencing, the trial court judgment addressed several postfactum motions bearing no correlation to the postrelease control purpose of

the resentencing. These motions were filed approximately seven years after the conclusion of the underlying 2003 case. The case was not appealed. For the reasons set forth below, this court affirms that portion of the judgment pertaining to postrelease control and vacates the remainder of the judgment as res judicata.

{¶ 3} Appellant, John B. Gates, sets forth the following two assignments of error:

{¶ 4} "FIRST ASSIGNMENT OF ERROR THAT: The Court of Common Pleas abused its discretion in denying appellant's motion to withdraw his appeal [sic].

{¶ 5} "SECOND ASSIGNMENT OF ERROR: The Court of Common Pleas erred in overruling appellant's motion to dismiss the indictment on grounds that it failed to set forth an essential element of the charged offense, to wit that defendant committed robbery knowingly."

{¶ 6} The following undisputed facts are relevant to this appeal. On May 30, 2003, appellant was indicted on one count of receiving stolen property, in violation of R.C. 2913.51, a felony of the fourth degree, one count of failure to comply with the signal of a police officer, in violation of R.C. 2921.331, a felony of the third degree, and one count of robbery, in violation of R.C. 2911.02, a felony of the second degree. These offenses stemmed from appellant's robbery of a Charter One Bank in Toledo in April 2003, and his May 2003 theft of a Honda Civic in Marion, Ohio, and a subsequent high speed pursuit of appellant while he was driving the stolen vehicle in central Toledo.

{¶ 7} On July 22, 2003, pursuant to a negotiated plea agreement, appellant pled no contest to the charges. In exchange, appellee agreed to dismiss additional robbery

charges pending against appellant. On August 5, 2003, appellant was sentenced to a total term of incarceration of nine years. The case was not appealed.

{¶ 8} On October 1, 2009, approximately six years after the conclusion of the case, appellant filed a motion to withdraw his pleas in conjunction with a request for resentencing on the basis of incomplete postrelease control notification. On February 25, 2010, approximately seven years following the conclusion of the case, appellant filed a motion to dismiss the robbery indictment to which he had confessed and been convicted in 2003.

{¶ 9} In April 2010, a hearing was held on appellant's postrelease control resentencing motion. Appellant was fully resentenced and the original incomplete postrelease control notification was rectified. In addition, the trial court denied appellant's motion to withdraw his original pleas and simultaneously denied the motion to dismiss the 2003 robbery indictment. This appeal ensued.

{¶ 10} The outcome of this appeal is determined and controlled by the recent Supreme Court of Ohio ruling set forth in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, and its progeny. In *Fischer*, the court held in relevant part, "We hold that the new sentencing hearing to which an offender is entitled under *Bezak* is limited to proper imposition of postrelease control. In so holding, we come more into line with legislative provisions concerning appellate review of criminal sentences."

{¶ 11} In conjunction with this, the court expressly authorized appellate courts to directly correct such sentencing defects without remanding for resentencing. The court

went on to summarize the essence of its ruling in establishing, "We similarly hold that when a judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, that *part* of the sentence is void and must be set aside. Neither the Constitution nor common sense commands anything more."

{¶ 12} A wealth of consistent post-*Fischer* appellate rulings is illustrative of its impact on determinations such as that currently pending before this court. In a recent Ninth District Court of Appeals case, which similarly included a disputed motion to withdraw guilty plea accompanying a *Bezak* postrelease control resentencing, the court held in relevant part, "In accordance with *Fischer*, the postrelease control portion was the only portion of his sentence subject to review and correction. *Id.* The new sentencing hearing should have been limited to notifying Lewis of postrelease control and including it in his sentence. The trial court, however, exceeded the limited scope of the hearing and attempted to reimpose the original sentence. Because the trial court exceeded its authority when it attempted to resentence Lewis on aspects of his sentence that were not void, we vacate those parts of the resentencing entry that address anything other than postrelease control. Lewis' original consecutive sentences remain valid, as does the portion of the appealed resentencing judgment that addresses post release control." *State v. Lewis*, 9th Dist. No. 25080, 2011-Ohio-2014.

{¶ 13} Similarly, in a recent Eighth District Court of Appeals case, the court rejected efforts by the appellant on a postrelease control resentencing to raise for the first time the issue of merger of allied offenses from his original 1999 case that, like the

instant case, had never been properly appealed. The court held in relevant part, "In *Fischer*, the Ohio Supreme Court limited the holding in *Bezak* and held that the new sentencing hearing to which an offender is entitled under *Bezak* is limited to proper imposition of postrelease control \* \* \*. The court concluded, 'Although 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. The scope of an appeal from a resentencing hearing in which a mandatory term of postrelease control is imposed is limited to issues arising at the resentencing hearing.' *Fischer* at ¶ 40. In the present case, appellant did not bring a direct appeal from his original 1999 sentencing challenging the issue of merger of allied offenses. Nor did appellant seek a delayed appeal on this matter \* \* \*. Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial that resulted in that judgment of conviction or on an appeal from that judgment. *State v. Perry* (1967), 10 Ohio St.2d 175, 180." *State v. Padgett*, 8th Dist. No. 95065, 2011-Ohio-1927. See, also, *State v. Triplett*, 6th Dist. No. L-10-1158, 2011-Ohio-1713.

{¶ 14} In conformity with the foregoing controlling case law, we decline to address the merits of the assignments of error as they stem from the court's void actions at resentencing that are unrelated to the imposition of postrelease control. In the present

case, appellant did not file a timely appeal from his original 2003 sentencing. These matters are now barred on the basis of res judicata and in conformity with *Fischer* and its progeny.

{¶ 15} Wherefore, solely that portion of the appealed resentencing judgment addressing postrelease control is hereby affirmed. Those portions of the resentencing judgment that address anything other than postrelease control are res judicata, void, and hereby vacated. Pursuant to App.R. 24, costs of this appeal are to be divided equally between the parties.

JUDGMENT AFFIRMED, IN PART,  
AND VACATED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Thomas J. Osowik, P.J.  
CONCUR.

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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>.