

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

State of Ohio

Court of Appeals No. WM-11-009

Appellee

Trial Court No. 03CR000225
07CR000051

v.

Robert J. Moats

DECISION AND JUDGMENT

Appellant

Decided: November 30, 2012

* * * * *

Thomas A. Thompson, Williams County Prosecuting
Attorney, for appellee.

Karin L. Coble, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶1} Defendant-appellant, Robert Moats, appeals the June 7, 2011 judgment of the Williams County Court of Common Pleas which denied his motion to vacate void judgments. Because we find that appellant was improperly sentenced to postrelease control, his subsequent postrelease control violation conviction was void and we reverse.

{¶2} The relevant facts of this case are as follows. In April 2004, appellant was convicted of rape and sentenced to a three-year imprisonment term. In the sentencing judgment entry, appellant was sentenced to a maximum of up to five years of postrelease control. It is undisputed that no notice of postrelease control was given at the sentencing hearing. Appellant was also informed of his duty to register as a sex offender yearly for life and within five days of an address change.

{¶3} On April 18, 2007, appellant was charged with failure to notify of a change of address, in violation of R.C. 2950.05(E)(1), a third degree felony. On June 13, 2007, following a guilty plea, appellant was sentenced to four years of imprisonment for the failure to notify charge. After finding that appellant violated the terms of his postrelease control by committing a felony, appellant was sentenced to an additional three year imprisonment term, to be served consecutively. On appeal, this court affirmed the trial court's judgment. *See State v. Moats*, 6th Dist. No. WM-07-011, 2008-Ohio-3840.

{¶4} On January 6, 2011, appellant filed a pro se motion to vacate void judgments. Appellant argued that postrelease control was improperly imposed following his 2004 rape conviction. Appellant supported his argument with the Supreme Court of Ohio cases of *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961 and *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568. Appellant asserted that because postrelease control was improperly imposed, the 2004 judgment was void and that, as a result, appellant could not have been convicted of failure to register and a postrelease control violation.

{¶5} In response, the state argued that controlling law, *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, required only the portion of the sentence that was improperly imposed be set aside and resentencing be limited to only the issue of postrelease control. Alternatively, the state argued that postrelease control was, in fact, properly imposed.

{¶6} On June 7, 2011, the trial court denied appellant's motions. The court noted that even if there was an error in the imposition of postrelease control, it was "de minimis" and "cured" by the Supreme Court of Ohio's holding in *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d 78 and this court's holding in *State v. Carles*, 6th Dist. No. WD-05-0105, 2006-Ohio-3047, cases predating *Bezak* and its progeny. The court further found that an attack of the 2004 judgment was barred by the doctrine of res judicata. Appellant then filed a pro se notice of appeal and was subsequently appointed appellate counsel.

{¶7} Appellant now raises the following assignment of error for our review:

Assignment of Error: The trial court erred when it held that postrelease control was properly imposed in case No. 03CR225 and erred in imposing a judicial sanction in case No. 07CR51.

{¶8} In appellant's sole assignment or error he asserts that because he was improperly sentenced to postrelease control in 2004, his 2007 sentence for a postrelease control violation was void and, thus, attack is not barred by res judicata. Conversely, while the state acknowledges that the postrelease control portion of the 2004 sentence is

void, it asserts that because appellant is no longer subject to postrelease control, a resentencing hearing under, *Fischer*, supra, is unnecessary. The state further argued that the error in the 2004 sentencing may not be used to collaterally attack the sentence in the 2007 case.

{¶9} The Supreme Court of Ohio recently answered the question posed in this appeal. In *State v. Billiter*, Slip Opinion No. 2012-Ohio-5144, Billiter was improperly sentenced to postrelease control in 1998. In 2001, Billiter was released from prison. In 2004, while on postrelease control, he was indicted and entered a guilty plea to escape. Billiter was sentenced to six years of imprisonment. No direct appeal was filed.

Id. at ¶ 4.

{¶10} In 2008, Billiter filed a motion arguing that the postrelease portion of his sentence was contrary to law. *Id.* at ¶ 5. The motion was denied and its denial affirmed by the Fifth Appellate District pursuant to *Watkins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d 78. *Id.* Thereafter, in 2010, appellant filed a motion to withdraw his guilty plea to escape arguing that he had never been legally placed on postrelease control. The motion was denied and affirmed on appeal. *Id.* at ¶ 6. The case was then certified as being in conflict with the Second Appellate District. *Id.*

{¶11} Reversing the Fifth Appellate District, the court noted that “[a] sentence that does not include the statutorily mandated term of postrelease control is void, 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 ¶ 7, quoting *Fischer*, 128 Ohio

St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, paragraph one of the syllabus. The court then held “that if a trial court sentences a defendant to an improper term of postrelease control and the defendant subsequently pleads guilty to violating postrelease control, the defendant is not barred by the principles of res judicata from challenging his conviction.” *Id.* at ¶ 11.

{¶12} In the present case, the parties agree that postrelease control was improperly imposed. Thus, because the postrelease control portion of the 2004 sentence was void, the 2007 postrelease control violation conviction was based upon an invalid sentence. Appellant’s assignment of error is well-taken.

{¶13} On consideration whereof, we find that appellant was prejudiced from having a fair proceeding and the June 7, 2011 judgment of the Williams County Court of Common Pleas is reversed and, pursuant to App.R. 12(B), we vacate appellant’s conviction for postrelease control violation in case No. 07CR000051. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

Judgment Reversed.

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

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, 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:
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