

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2009-0897
Plaintiff-Appellee,	:	
	:	On Appeal from the Summit
vs.	:	County Court of Appeals
	:	Ninth Appellate District
LONDEN K. FISCHER,	:	
	:	C.A. Case No. CA-24406
Defendant-Appellant.	:	

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**APPELLANT LONDEN K. FISCHER'S MOTION FOR RECONSIDERATION**

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**APPELLANT LONDEN K. FISCHER'S MOTION FOR RECONSIDERATION**

Appellant Londen K. Fischer respectfully moves this Court to reconsider its July 29, 2009 decision declining to grant jurisdiction to hear Mr. Fischer's discretionary appeal. S.Ct.Prac.R. XI(2)(A)(1). A memorandum in support is attached.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

This Court should reconsider its decision declining jurisdiction in Mr. Fischer's case. Specifically, this Court has rendered decisions in several postrelease control cases since Mr. Fischer's conviction was affirmed on direct appeal. Those decisions cast significant light on Mr. Fischer's first proposition of law:

A direct appeal from a void sentence is a legal nullity; therefore, a criminal defendant's appeal following a *Bezak* resentencing is the first direct appeal as of right from a valid sentence. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250.

This Court should accept Mr. Fischer's appeal to provide much needed clarification to this complex and nuanced area of the law.

1. This Court's recent decisions analyzing postrelease control provide a foundation for ruling on Mr. Fischer's first proposition of law.

In the court of appeals Mr. Fischer argued that his direct appeal following a *Bezak* resentencing was his first valid direct appeal as of right. *State v. Fischer*, 9<sup>th</sup> Dist No. 24406, 2009-Ohio-1491. Therefore, he should be allowed to raise any and all trial issues cognizable on direct appeal, as the direct appeal from his original void sentence was a legal nullity. See *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197. The Ninth District Court of Appeals disagreed, holding that Mr. Fischer was barred by the law-of-the-case doctrine from raising trial issues in the direct appeal of his resentencing. *Fischer*, at ¶8.

In the months following *Fischer*, this Court ruled on several cases that clarify postrelease control advisements and void sentences. In *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, this Court held that when a sentence is rendered void because of a failure to advise a defendant of postrelease control, not only must a defendant be resentenced but a motion to

withdraw his plea must be treated as a presentence motion. *Id.* at ¶1. In that holding, this Court highlighted the concept that a void sentence is a legal nullity, placing the parties in the same position that they would have been in had there been no sentence. *Id.* at ¶8, citing *Simpkins*, at ¶20, quoting *Bezak*, at ¶13. Under Crim.R. 32.1, a motion to withdraw a guilty plea can only be made before sentence is imposed, unless the defendant can show a manifest injustice. Because Mr. Boswell's original sentence was void under the *Bezak* line of cases, his motion to withdraw his plea – although filed after his original sentence was imposed – was a functional presentence motion. *Boswell*, at ¶1.

Moreover, in *State v. Harrison*, Slip Opinion No. 2009-Ohio-3547, this Court reviewed a case in which the defendant had served his entire sentence and then sought to withdraw his plea to avoid a *Bezak* resentencing. *Id.* at ¶27-34. This Court acknowledged that by granting Mr. Harrison's motion to withdraw his plea, the trial court allowed Mr. Harrison to appeal his entire prosecution, not just his resentencing. *Id.* at ¶34. But Mr. Harrison had served his entire sentence and was out of prison. *Id.* at ¶37. Therefore, “[t]he entire attempt at resentencing and the related plea withdrawal were nullities.” *Id.* Although *Harrison* is factually distinct from Mr. Fischer's case, it acknowledges that proceedings following an improperly imposed sentence are legal nullities.

Likewise, Mr. Fischer's original sentence was void. As a result, his original direct appeal did not stem from a final, appealable order and must be considered a legal nullity. Once Mr. Fischer was resentenced – which was the only valid sentence imposed on Mr. Fischer – his subsequent direct appeal was his one and only valid appeal as of right. As a result, Mr. Fischer must be allowed to raise any and all trial issues in that direct appeal.

Mr. Fischer's second proposition of law is a substantive and meritorious claim that should be litigated on appeal:

A criminal defendant is denied due process and a fair trial when the trial court admits lay witness opinion testimony that is unrelated to that witness' perceptions and calls for specialized knowledge. Evid.R. 701; Evid.R. 702(A); Section 16, Article I, Ohio Constitution; Fifth and Fourteenth Amendments, United States Constitution.

This Court must grant jurisdiction to explain the effect of void sentences on direct appeals from those sentences and to allow Mr. Fischer an opportunity to pursue his substantive claims on appeal.

Additionally, accepting Mr. Fischer's appeal will further bring home the importance of valid postrelease control advisements to the trial court and trial-level practitioners. While it may be true that ruling in Mr. Fischer's favor will generate additional direct appeals on postconviction issues, it would also hold trial courts and practitioners to the fire in terms of ensuring that advisements are statutorily proper and any errors are corrected at the trial level.

2. The Ninth District Court of Appeals has signaled a change in its analysis of postrelease control issues after *Fischer*.

In affirming Mr. Fischer's conviction, the Ninth District Court of Appeals held that Mr. Fischer was barred from raising trial issues following his *Bezak* resentencing by the law-of-the-case doctrine. *Fischer*, at ¶8, citing *State v. Ortega*, 9<sup>th</sup> Dist. No. 08CA009316, 2008-Ohio-6053. However, following *Fischer* and this Court's further clarification of postrelease control in *Boswell*, the Ninth District Court of Appeals decided *State v. Holcomb*, 9<sup>th</sup> Dist. No. 24287, 2009-Ohio-3187. *Holcomb* adopted the approach set out in *Boswell* for defendants seeking a resentencing because of the trial court's failure to properly advise the defendant about

postrelease control. *Id.* at ¶20. The *Holcomb* decision signals a shift in analysis of void sentences by the Ninth District Court of Appeals.

*Boswell* significantly clarified the operation of postrelease control advisements for the Ninth District, which held in *Holcomb*, “In *Boswell*, for the first time, the Supreme Court provided direction about how to raise or consider a void sentence.” *Id.* at ¶19. The *Holcomb* court stated that before *Boswell* the remedy to apply in postrelease control advisement cases was not always clear. *Id.* at ¶15. Additionally, Judge Carr wrote in her concurrence, “Courts around the State, including this Court, have struggled with how to apply the Ohio Supreme Court’s numerous decisions about postrelease control.” *Id.* at ¶27 (Carr, J. concurring). Judge Carr stated that different approaches could be taken to decide such issues and that “[r]easonable jurists disagree” about how to interpret and apply the *Bezak* line of cases. *Id.* at ¶28, 31.

The *Holcomb* decision was a major change in the way that the Ninth District Court of Appeals analyzes postrelease control cases. See *State v. Olah*, 9<sup>th</sup> Dist. No. 08CA009447, 2009-Ohio-3651. *Holcomb* is informed by this Court’s analysis in *Boswell*, which was decided after Mr. Fischer’s conviction was affirmed under the law-of-the-case doctrine. In light of the court of appeals’ change of perspective on postrelease control cases in *Holcomb*, this Court must accept Mr. Fischer’s appeal and clarify the operation of direct appeals from the first valid sentencing. In the alternative, this Court should reverse the Ninth District Court of Appeals’ decision in *Fischer* and remand the case for a decision in light of *Boswell* and the court of appeals’ understanding of postrelease control evidenced in *Holcomb*.

3. Other courts of appeals have treated direct appeals from a void sentence as legal nullities, allowing the appellant to raise any and all trial issues in a direct appeal stemming from a valid resentencing.

Ohio's courts of appeals continue to struggle with postrelease control issues, including how improper advisements affect subsequent procedure. While in Mr. Fischer's case the court of appeals declined to review his trial issues on his direct appeal stemming from a resentencing, other courts of appeals have recently analyzed the issue differently. In *State v. Jordan*, 8<sup>th</sup> Dist. No. 918869, 2009-Ohio-3078, the Eighth District Court of Appeals refused to find that the appellant's claim was barred by res judicata when he appealed his *Bezak* resentencing. *Id.* at ¶11-12. Specifically, the *Jordan* court held that, as Mr. Jordan's first sentence was void, "it is as if appellant's initial sentence and the issues he raised in his first appeal related to his sentence do not exist." *Id.* at 12, emphasis added. The language in *Jordan* implies that the first direct appeal was treated as a legal nullity under the *Bezak* line of cases and that the appeal at issue was treated as Mr. Jordan's first direct appeal as of right.

The *Jordan* decision was decided after Mr. Fischer's conviction was affirmed by the Ninth District and after this Court's decision was issued in *Boswell*. *Jordan* signals a departure from the reasoning in *Fischer* and more consistently applies this Court's precedent in the *Bezak* line of cases. For that reason, this Court must accept Mr. Fischer's appeal and provide the courts of appeals with guidance in reviewing direct appeals stemming from *Bezak* resentencing hearings.

**CONCLUSION**

This Court should reconsider its decision to decline jurisdiction in Mr. Fischer's case. Ohio's courts of appeals are inconsistently reviewing issues on direct appeal.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing **Appellant Londen K. Fischer's Motion for Reconsideration** was forwarded by regular U.S. Mail, postage pre-paid, to Heaven DiMartino, Summit County Assistant Prosecutor, 53 University Avenue, 7<sup>th</sup> Floor, Safety Building, Akron, Ohio 44308, on this 10th day of August, 2009.



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