

ORIGINAL

**IN THE SUPREME COURT OF OHIO
2011**

STATE OF OHIO,

Case No. 2011-0722

Plaintiff-Appellee,

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

-vs-

CHRISTOPHER MULLINS,

Court of Appeals

Defendant-Appellant.

Case No. 09AP-1185

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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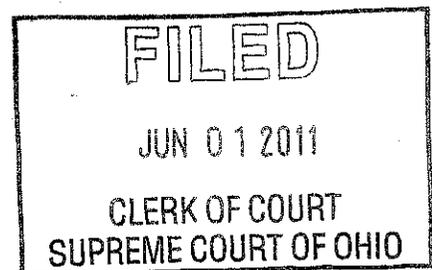


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Recently, this Court predicted that its work in the void-sentence, postrelease control (PRC) area is “likely * * * drawing to a close.” *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 31. Defendant Christopher Mullins, however, asks this Court to accept yet another PRC-correction case. But unlike this Court’s prior PRC cases, this case involves no novel legal issues and does not seek to resolve any conflict among the lower courts. Rather, defendant merely claims that the Tenth District misapplied existing law to the specific facts of this case, so any ruling from this Court would yield no new law of Statewide interest.

Regarding defendant’s first proposition of law, this Court has repeatedly held that the failure to object to the lack of physical presence under Crim.R. 43(A) waives all but plain error. *State v. Phillips* (1995), 74 Ohio St.3d 72, 92-93; *State v. Roe* (1989), 41 Ohio St.3d 18, 27. This Court has also held that the presence of a defendant is a condition of due process “to the extent that a fair and just hearing would be thwarted by his absence, *and to that extent only.*” *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶ 139, quoting *Snyder v. Massachusetts* (1934), 291 U.S. 97, 108 (emphasis in *Frazier*); see, also, see, also, *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 100; and *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶ 90.

Applying these principles, the Tenth District correctly concluded that, although defendant did not *waive* his right to physical presence, he forfeited all but plain error by failing to timely object and that he failed to show any plain error because he did not articulate sufficient prejudice. Opinion, at ¶¶ 6-11.

Regarding defendant’s second proposition of law, the general standards governing ineffective-assistance claims are of course well established. *Strickland v. Washington* (1984), 466 U.S. 668, 687. The Tenth District correctly applied the *Strickland* test and held that

defendant was not prejudiced by trial counsel's decision not to object to the alleged lack of notice or to defendant's appearance via video conference. Opinion, at ¶¶ 14-15.

In the end, this case presents no issues of such constitutional significance or Statewide importance as would warrant this Court's review. For this reason, and because the Tenth District correctly affirmed the trial court's judgment, the State respectfully requests that this Court decline review.

STATEMENT OF THE CASE AND FACTS

Defendant was indicted in November 2003 on three counts of rape. The indictment alleged that defendant engaged in sexual conduct with a girl who was under 13 years old at the time, and that he purposely compelled the girl by force or threat of force.

The following March, defendant pleaded guilty to one count of rape without the "force or threat of force" allegation. The plea form indicates that, by pleading guilty to a felony sex offense, defendant was subject to a mandatory five-year term of PRC.

A couple months later, in May 2004, defendant was found to be a sexually oriented offender and was sentenced to six years in prison. The trial court imposed no fine and suspended payment of court costs. Regarding PRC, the sentencing entry states: "After the imposition of sentence, the Court notified the Defendant, orally and in writing, of the possibility of the applicable periods of post-release control pursuant to R.C. 2929.19(B)(3)(c), (d) and (e)." At the sentencing hearing, defendant signed a "Notice (Prison Imposed)" form, which states: "After you are released from prison, you [will] have a period of post-release control of [5] years following your release from prison."

In November 2009, the trial court held a resentencing hearing via video conference. At the outset of the hearing, the trial court discussed defendant's Tier III status under S.B. 10 (defendant had a S.B 10 petition pending at the time). The trial court found defendant to be a

Tier III offender under S.B. 10 and again imposed a six-year prison term, imposed no fine, and suspended payment of court costs.¹ The trial court further notified defendant that “there is a mandatory five years of post-release control” and explained the consequences of violating PRC. The entry contains language imposing the five-year mandatory PRC term and explaining the consequences of violating PRC.

Defendant thereafter appealed to the Tenth District, claiming that his lack of physical presence at the resentencing hearing violated Crim.R. 43(A) and that his trial counsel was ineffective by not raising various objections. The Tenth District affirmed. Defendant now seeks discretionary review.

ARGUMENT

Response to First Proposition of Law: A defendant’s failure to object to his lack of physical presence forfeits all but plain error.

Defendant’s first proposition of law claims that the trial court violated his right to physical presence under Crim.R. 43(A) by having defendant appear at the resentencing hearing by video conference. Although defendant did not *wave* his right to physical presence, he did not object to his appearance by video conference or otherwise suggest to the trial court that he wished to appear at the resentencing hearing in person. Defendant therefore forfeited all but plain error. Crim.R. 52(B); *Phillips*, 74 Ohio St.3d at 92-93; *Roe*, 41 Ohio St.3d at 27; *State v. Williams* (1983), 6 Ohio St.3d 281, 286; see, also, *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 22 (“The distinction between [waiver and forfeiture] is critical.”).

¹ Consistent with this Court’s precedents at the time, the trial court held a de novo resentencing hearing. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, paragraph one of the syllabus. But in *Fischer*, which was decided about a month after the resentencing hearing, this Court held that, where the original sentence omits PRC, “[t]he new sentencing hearing to which an offender is entitled under *State v. Bezak* is limited to proper imposition of postrelease control.” *Fischer*, 128 Ohio St.3d 92, paragraph two of the syllabus, modifying *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, syllabus.

For an error to be plain, it must be an “obvious” defect in the trial proceedings. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. Moreover, the error must be such that, “but for the error, the outcome of the trial clearly would have been otherwise.” *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus. Even if an error meets these conditions, “Crim.R. 52(B) states only that a reviewing court ‘may’ notice plain forfeited errors; a court is not obliged to correct them.” *Barnes*, 94 Ohio St.3d at 27. “Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Long*, 53 Ohio St.3d 91, paragraph three of the syllabus.

Defendant fails to show that any error was clearly outcome determinative. “An accused’s absence [] does not necessarily result in prejudicial or constitutional error. “[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, *and to that extent only.*” *Frazier*, at ¶ 139, quoting *Snyder*, 291 U.S. at 107-08 (emphasis in *Frazier*).

Defendant’s rights were not “appreciably impaired” by his appearance at the hearing by video conference rather than by physical presence. *Williams*, 6 Ohio St.3d at 286. Defendant’s “interests were more than adequately represented by his attorney who was present at the [sentencing hearing].” *Id.* This is especially so, considering that defendant himself appeared by video conference and thus could see and hear what transpired at the hearing. Plus, defendant’s attendance by physical presence rather than by video conference “would have contributed little to his defense.” *Id.* at 287. Defendant fails to show that his appearance by video conference rather than by physical presence amounted to a “manifest miscarriage of injustice.” *Long*, 53 Ohio St.3d 91, paragraph three of the syllabus.

That defendant stated a desire to appeal did not preserve this issue. The purpose of requiring a contemporaneous objection is to give the trial court an opportunity to correct any error. Merely stating a desire to appeal is thus insufficient. *State v. Lipsey*, 10th Dist. No. 08AP-822, 2009-Ohio-3956, ¶ 18 (“Because trial counsel failed to state on the record the specific grounds for the objection, admission of the testimony will not be reversible error unless the admission constitutes plain error.”).

That defendant was sentenced the day before his scheduled release is also immaterial. A trial court may resentence a defendant to add PRC even when a defendant has completed the “vast majority of his sentence.” *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶ 34; *State v. Ramey*, 10th Dist. No. 06AP-245, 2006-Ohio-6429 (defendant resentenced the day before scheduled release).

In short, even if defendant did not waive his right to physical presence under Crim.R. 43(A)(3), he forfeited all but plain error by not objecting—and defendant fails to show plain error.

For the foregoing reasons, defendant’s first proposition of law warrants no further review.

Response to Second Proposition of Law: To prevail on an ineffective-assistance claim, a defendant must show (1) that his trial counsel’s performance fell below an objective level of reasonable representation, and (2) that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.

Defendant’s second proposition of law claims that his counsel was ineffective. To prevail on an ineffective-assistance claim, a defendant must show (1) that his trial counsel’s performance fell below an objective level of reasonable representation, and (2) that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687.

Applying this test, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101. “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 689. The question is whether counsel acted “outside the wide range of professionally competent assistance.” *Id.* at 690. In assessing the competence of counsel, every effort must be made to avoid the distorting effects of hindsight. *Id.*

Moreover, the United States Supreme Court has explained that ineffective-assistance claims are generally unreviewable on direct appeal because of inadequacies of the appellate record. *Massaro v. United States* (2003), 538 U.S. 500, 504-05 (citations omitted).

Defendant claims that trial counsel was ineffective in (1) not arguing that the defense received inadequate notice of the hearing, (2) not insisting on defendant’s physical presence, and (3) not objecting to the lack of opportunity to consult privately with defendant. But the record contains no evidence that the notice of the hearing was adequate. And although the record does not affirmatively state that counsel privately consulted with defendant, the record contains no evidence that counsel was denied an opportunity to do so. For all that appears in the record, counsel had more than adequate notice of the hearing and had ample opportunity to consult with defendant prior to the hearing. Likewise, even if counsel insisted on compliance with the waiver procedures in Crim.R. 43(A)(3), there is no evidence in the record that defendant would not have simply complied with the rule and waived his right to physical presence.

Finally, defendant’s claim that, had counsel raised any of these objections, the State would have been “unable to rectify the problems” before defendant’s release is purely speculative.

For the foregoing reasons, defendant's second proposition of law warrants no further review.

CONCLUSION

For the foregoing reasons, the State respectfully submits that the within appeal presents no questions of such constitutional substance or of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, June 1, 2011, to DAVID H. THOMAS, 511 South High Street, Columbus, OH 43215; Counsel for Defendant-Appellant.



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