

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

WILLIAM BERNARD VORE,

Defendant-Appellant.

*
*
*
*
*
*
*
*
*
*

Case No. 2014-0817

On Appeal from the Warren
County Court of Appeals,
Twelfth Appellate District

Court of Appeals Case No.
CA2012-07-065

STATE OF OHIO'S RESPONSE TO THE DEFENDANT-APPELLANT'S MOTION AND
MEMORANDUM IN SUPPORT OF JURISDICTION

DAVID P. FORNSHELL, #0071582
Warren County Prosecuting Attorney
Michael Greer, #0084352 (Counsel of Record)
Assistant Prosecuting Attorney
Warren County Prosecutor's Office
500 Justice Drive
Lebanon, Ohio 45036
(513) 695-1325
Facsimile: (513) 695-2962
michael.greer@co.warren.oh.us

COUNSEL FOR PLAINTIFF-APPELLEE,
STATE OF OHIO

WILLIAM BERNARD VORE
Inmate No. A612862
c/o Richland Correctional Institution
P.O. Box 8107
1001 Olivesburg Road
Mansfield, Ohio 44905

PRO SE

RECEIVED
MAY 28 2014
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
MAY 28 2014
CLERK OF COURT
SUPREME COURT OF OHIO

EXPLANATION OF WHY THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

The Appellee, State of Ohio, herein responds to Appellant, William Bernard Vore, on the issue of jurisdiction, pursuant to S.Ct.Prac.R.¹ 3.2(A). This is not a case of public or great general interest. The Appellant is not a public figure, nor is this case in the public eye. In addition, this case does not pose any substantial constitutional question that would affect the public. Moreover, this Court should not grant leave to appeal this felony case since the Appellant's propositions of law simply lack merit.

STATEMENT OF THE CASE AND FACTS

In December 2010, the Appellant, William Bernard Vore, was indicted, in Count 1, for Robbery, R.C. 2911.02(A)(3), a third-degree felony, and, in Count 2, he was charged with Grand Theft, R.C. 2913.02(A)(1), a fourth-degree felony. Indictment, T.d. 01. After a two-day jury trial, the Appellant was convicted of both counts. See Verdict, Count One, T.d. 78, and Verdict, Count Two, T.d. 79. The Warren County Court of Common Pleas merged the offenses and sentenced the Appellant to serve five years in prison for Robbery. Second Day of Trial, 08/30/2011, T.p., p. 124, & Judgment Entry of Sentence, T.d.

The Appellant appealed his conviction to the Warren County Court of Appeals, Twelfth Appellate District. *State v. Vore*, 12th Dist. No. CA2011-08-093, 2012-Ohio-2431. The Twelfth District affirmed the Appellant's conviction but, *sua sponte*, reversed and remanded since the trial court had informed the Appellant that he was subject to optional post-release control for five years when the maximum term for post-release control was three years. *Id.* at ¶¶73-74.

On July 18, 2012, the Warren County Court of Common Pleas held a resentencing

¹ Rules of Practice of the Supreme Court of Ohio.

hearing. Hearing, 07/18/2012, T.p. At the hearing, the Appellant asked, *pro se*, for additional jail-time credit for time spent in the Warren County Jail while serving the remainder of a federal sentence. *Id.* at 6. The trial court denied the Appellant's request. *Id.* at 7. The trial court re-imposed a five-year sentence for the robbery charge and merged the theft offense. *Id.* at 7-8. The trial court informed the Appellant that he was subject to three years of mandatory post-release control. *Id.* at 8.

The Appellant filed an appeal but his appeal was dismissed by the Twelfth District for failure to file an appellant's brief. Judgment Entry of Dismissal, T.d. CA2012-07-065. The Appellant sought to reopen his direct appeal, and the Twelfth District reopened the Appellant's case on August 9, 2013. Entry Granting Application for Reopening, T.d. CA2012-07-065. The Twelfth District affirmed the trial court's decision resentencing the Appellant. *State v. Vore*, 12th Dist. No. CA2012-07-065, 2014-Ohio-1583, ¶1.

ARGUMENT

Response To Proposition Of Law I: The Appellant was not entitled to receive the benefit of a reduced punishment pursuant to House Bill 86.

In his first proposition of law, the Appellant claims that the Twelfth District erred when it affirmed his resentencing because the resentencing occurred after the effective date of House Bill 86 (H.B. 86), entitling the Appellant to receive the benefit of that bill's reduction in the sentencing range for third-degree felonies.

When reviewing a felony sentence, an appellate court applies the standard of review found in R.C. 2953.08(G)(2). *State v. Durham*, 12th Dist. No. CA2013-03-023, 2013-Ohio-4764, ¶41. When an appellate court reviews a trial court's sentencing decision, the appellate court may increase, reduce, or modify the sentence or may vacate and remand the matter for resentencing. *Id.* An appellate court may increase, reduce, modify, or vacate only if it clearly and convincingly finds either of the following: (1) the

record does not support the trial court's findings under R.C. 2929.13(B) or (D), under R.C. 2929.14(B)(2)(e) or (C)(4), or under R.C. 2929.20(l); or (2) the sentence is contrary to law. *Id.* at ¶42. If the trial court considered the purposes and principles of R.C. 2929.11, considered the factors listed in R.C. 2929.12, properly applied PRC, and sentenced the defendant within the permissible statutory range, then the sentence is not clearly and convincingly contrary to law. *Id.* The standard set forth by R.C. 2953.08(G)(2) is extremely differential to the trial court. *Id.* at ¶43.

Implicit in the Appellant's argument is the notion that his original sentence was void because he was not properly informed about post-release control at his original sentencing. The Appellant believes that his entire sentence was void and that he had no penalty or punishment imposed before he was resentenced. The Appellant is mistaken.

In *State v. Fischer*, 128 Ohio St. 3d 92, 2010-Ohio-6238, 942 N.E.2d 332, the defendant sought resentencing because he had not been properly advised of post-release control. *Id.* at ¶3. On appeal, the defendant argued that, since his original judgment entry of sentence was void, his first direct appeal was invalid and that the appeal from his resentencing regarding PRC was in fact his first direct appeal in which he could raise any and all issues relating to his conviction. *Id.* at ¶4. The Ninth Appellate District rejected the defendant's argument based on the doctrine of the law of the case. *Id.* This Court granted discretionary review on the single proposition of whether a direct appeal from a resentencing for PRC is a first appeal as a matter of right. *Id.* at ¶5.

In rejecting the defendant's argument, this Court reasoned that

[t]he law-of-the-case doctrine is rooted in principles of res judicata and issue preclusion, and we have expressly disfavored applying res judicata to sentences that do not conform to statutory postrelease-control mandates. *Simpkins*, 117 Ohio St.3d 420, 2008 Ohio 1197, 884 N.E.2d 568, P 30. We also reject the application of issue preclusion to sentences that do not comply with statutory mandates, as such sentences are illegal and subject to collateral attack or direct appeal by any party.

But other than *Bezak*, the case law has thus far focused only on whether a defendant is barred from raising claims about a void sentence rather than on the remedy therefor. We do not disturb that precedent. Instead, our decision today revisits only one component of the holding in *Bezak*, and we overrule only that portion of the syllabus that requires a complete resentencing hearing rather than a hearing restricted to the void portion of the sentence. In light of our holding, the court of appeals in this case correctly found that [the defendant's] remaining claims, which did not involve an void sentence or judgment, were barred by *res judicata*.

In so holding, we reject [the defendant's] claim that there was no final, appealable order in this case.

[The defendant's] theory is that because the trial court did not properly apply postrelease-control sanctions, his sentence was void under *Bezak*. Because his sentence was void, he contends, there was no sentence and without a sentence, no conviction and no final order. See *State v. Whitfield*, 124 Ohio St.3d 319, 2010 Ohio 2, 922 N.E.2d 182 (“a ‘conviction’ consists of a guilty verdict *and* the imposition of a sentence or penalty” (emphasis sic)); *State v. Baker*, 119 Ohio St.3d 197, 2008 Ohio 3330, 893 N.E.2d 163, syllabus (to be a final, appealable order, a judgment of conviction must include the sentence). In [the defendant's] view, the absence of a conviction means the absence of a final, appealable order, and the absence of such an order deprived the court of appeals of its jurisdiction over the initial appeal, thereby rendering that appeal invalid. The argument, though creative, fails.

Nothing in *Baker* discusses void or voidable sentences. Rather, the syllabus speaks only to the requirement that the judgment of conviction set forth “the sentence” in addition to the other necessary aspects of the judgment. The judgment in this case did set forth the sentence. The fact that the sentence was illegal does not deprive the appellate court of jurisdiction to consider and correct the error. In fact, R.C. 2953.08(G)(2)(b) expressly authorizes a reviewing court to modify or vacate any sentence that is “contrary to law.” Clearly, no such authority could exist if an unlawful sentence rendered a judgment nonfinal and unappealable. Thus, *Baker* does not avail [the defendant].

Fischer, 2010-Ohio-6238 at ¶¶35-¶39.

The reasoning of *Fischer* applies to this case as well. The Appellant implicitly argues that his sentence was void because he was improperly informed about post-release control at the original sentencing hearing. And, in fact, the trial court did err regarding PRC. As a result, his original sentence was void but only to the extent of post-

release control. In light of the holding in *Fischer*, while *res judicata* may not apply to a claim regarding PRC, it would apply to any other claim regarding the merits of the Appellant's conviction, including his claim that he was entitled to receive the benefit of H.B. 86 at the resentencing.

Further, in *State v. Clay*, 12th Dist. No. CA2011-12-016, 2012-Ohio-5011, the Twelfth District addressed the applicability of H.B. 86 to a criminal defendant, who was convicted and sentenced prior to effective date of H.B. 86 but was resentenced, upon remand, after that bill's effective date. In *Clay*, the defendant pled guilty to Robbery, Possession of Criminal Tools, and Vandalism. *Id.* at ¶¶2-3. The trial court sentenced the defendant to one year for Vandalism to be served concurrently to the one year for Possession of Criminal Tools but consecutively to the five-year sentence for Robbery. *Id.* at ¶3. The Twelfth District affirmed the trial court's decision to impose maximum, consecutive sentences but reversed the part of the defendant's sentence regarding Robbery and Possession of Criminal Tools, holding that those crimes were allied offenses of similar import. *Id.* The Twelfth District remanded the matter with instructions to merge those offenses. *Id.*

Upon remand, the prosecution opted to have the defendant sentenced on Robbery. *Id.* at ¶5. The trial court applied H.B. 86 and sentenced the defendant to 36 months. *Id.* The trial court sentenced the defendant to serve one year for Vandalism and ordered the 36-month sentence for Robbery to be served consecutively to the one-year sentence for Vandalism. *Id.* at ¶6.

On appeal, the defendant argued that the sentencing court improperly imposed maximum and consecutive sentencing in violation of H.B. 86. *Id.* at ¶12. The defendant also argued that the trial court erred when it sentenced him to serve one year for Vandalism because, pursuant to H.B. 86, that charge should have been a first-degree

misdemeanor. *Id.*

The Twelfth District held that, when it remanded the defendant's case for resentencing, it was for the limited purpose of correcting the allied-offense error in the original sentence. *Id.* at ¶19. The Twelfth District held that the trial court was not allowed to apply the amendments found in H.B. 86 since the defendant's sentence had previously been imposed, meaning that the defendant's sentence reverted to the day that the trial court had originally imposed it. *Id.* Thus, the trial court erred when it applied H.B. 86 and determined that the maximum penalty it could impose for Robbery was 36 months. *Id.* H.B. 86 did not apply to the defendant because his penalty for Robbery had already been imposed. *Id.*

Regarding the defendant's argument that H.B. 86 should have been applied to the vandalism charge, the Twelfth District noted that it had previously affirmed the defendant's sentence for Vandalism and that part of the defendant's sentence was not subject to its remand. *Id.* at ¶24. Thus, this Court held that the trial court did not have authority to resentence the defendant on Vandalism, but that the resentencing was harmless error since the trial court imposed the same sentence as the original one. *Id.*

Similar to the defendant's sentence in *Clay*, the Appellant's sentence was only remanded regarding post-release control, meaning that the remainder of his sentence was affirmed. In other words, the only thing the trial court was authorized to address was PRC. So, not only did the trial court have no need to apply any of the amendments found in H.B. 86, but it was also prohibited from applying it. The trial court had previously punished the Appellant for Robbery when it sentenced him to serve five years in prison on August 30, 2011, well before the effective date of H.B. 86. As the Twelfth District recognized in *Clay*, upon resentencing, the amended sentence reverted to the day that it was originally imposed.

Response To Proposition Of Law II: The Appellant was convicted of an offense that, during the commission thereof, he caused or threatened to cause physical harm to a person; thus, the Appellant was subject to a mandatory three-year period of post-release control.

In his second proposition of law, the Appellant argues that the trial court erred when it imposed three years of mandatory PRC because he did not cause or threaten to cause physical harm to another person when he committed Robbery.

According to R.C. 2967.28(B)(3), when a trial court sentences a criminal defendant to prison “for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person,” the trial court must inform the defendant that he is subject to a mandatory three-year period of post-release control. By statute, physical harm means “any injury, illness or other physiological impairment, regardless of its gravity or duration.” R.C. 2901.01(A)(3). As noted by the Twelfth District, “physiological impairment” has not been defined, thus, should be given its common, ordinary meaning and can be defined as damage to or a decrease in an individual’s normal physical functioning. *Vore*, 2014-Ohio-1583, at ¶17.

As the Twelfth District noted, the bank teller to whom the Appellant gave the demand note testified that, when the Appellant handed her the demand note, she froze and was unable to act until the Appellant demanded whether she understood. *Id.* at ¶18. After she handed the money to the Appellant, she froze again until her manager asked her what was wrong. *Id.* Based on the teller’s testimony, it is clear that the Appellant caused a significant impact on the teller’s ability to physically function. Thus, the Appellant committed an offense that caused or threatened physical harm to a person, requiring him to be placed on mandatory post-release control for three years under R.C. 2967.28(B)(3).

Response To Proposition Of Law III: Res judicata bars the Appellant's jail-time credit argument.

In his third proposition of law, the Appellant argues that the trial court violated his equal protection rights when it did not award him extra jail-time credit at the resentencing. Implicit in the Appellant's argument is that his entire sentence was void. However, the Appellant's entire sentence was not void.

As with the Appellant's first proposition, the reasoning of *Fischer*, 2010-Ohio-6238, applies to the Appellant's third proposition. The Appellant implicitly argues that his sentence was void due to an error regarding post-release control, but the Appellant's original sentence was only void as to PRC and nothing else. In light of the holding in *Fischer*, res judicata barred the Appellant's argument regarding jail-time credit.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Warren County Court of Appeals, Twelfth Appellate District, and neither accept jurisdiction nor grant leave for the appeal of William Bernard Vore since his propositions of law lack merit. Moreover, this Court should not accept jurisdiction over this appeal because the Appellant has neither raised a substantial constitutional question nor presented an issue of public or great general interest.

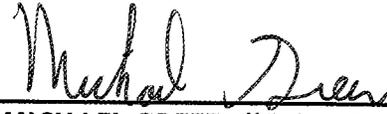
Respectfully submitted,



MICHAEL GREER, #0084352
Assistant Prosecuting Attorney
Warren County Prosecutor's Office
500 Justice Drive
Lebanon, Ohio 45036
(513) 695-1325

CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing was mailed by Ordinary mail to William Bernard Vore, Inmate No. A612862, c/o Richland Correctional Institution, P.O. Box 8107, 1001 Olivesburg Road, Mansfield, Ohio 44905 on this 29th day of May, 2014.



MICHAEL GREER, #0084352

Assistant Prosecuting Attorney