

[Cite as *State v. Murray*, 2014-Ohio-1898.]

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

State of Ohio

Court of Appeals No. L-10-1059

Appellee

Trial Court No. CR0200902197

v.

James Murray

DECISION AND JUDGMENT

Appellant

Decided: May 2, 2014

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Matthew B. Bryant, for appellant.

* * * * *

SINGER, J.

{¶ 1} This matter is before the court upon the reopening of this appeal to consider whether appellant's appointed appellate counsel rendered ineffective assistance by failing to supplement the record on appeal with copies of the transcripts from his prior criminal actions. Also before the court is appellant's motion to supplement the record with two

sentencing hearing transcripts from two prior criminal actions. Upon a review of the records and briefs, we find that the supplementation of the record with the sentencing hearing transcripts is improper and that appellant's appellate counsel did not render ineffective assistance of counsel.

{¶ 2} Appellant asserts the following assignments of error:

I. WHETHER THE TRIAL COURT IN THIS MATTER LACKED JURISDICTION TO IMPOSE POST RELEASE CONTROL FOR A CASE WHERE APPELLANT HAD ALREADY SERVED HIS SENTENCE IN ITS ENTIRETY AND WAS NEVER NOTIFIED OF POST RELEASE CONTROL AT THE TIME HE WAS SENTENCED; APPELLANT'S SENTENCE IS VOID AS A MATTER OF LAW.

II. WHETHER THE TRIAL COURT IN THIS MATTER FAILED TO SUBSTANTIALLY COMPLY WITH THE REQUISITES OF CRIMINAL RULE 11(C)(2)(a) BY FAILURE TO ACCURATELY ADVISE AN OFFENDER AS TO POSTRELEASE CONTROL; THEREBY, APPELLANT'S WRONGFUL SANCTION OF POST RELEASE CONTROL IN THIS CASE- AND PERSISTENT DETENTION- IS VOID AS A MATTER OF LAW

III. WHETHER MURRAY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, WHICH RESULTED IN THE IMPOSITION OF A PRC SANCTION THAT CONTRAVENES OHIO

LAW AND HAS RESULTED IN MURRAY'S UNJUST AND
ERRONEOUS CONTINUED IMPRISONMENT, TO MURRAY'S
SUBSTANTIAL DETRIMENT AND IN VIOLATION OF
APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

{¶ 3} To address the issue before us, an understanding of appellant's prior criminal actions is necessary. In 2005, appellant was convicted of two counts of gross sexual imposition. In that case, while appellant was notified in the sentencing judgment of the applicable postrelease control sanction statutes, he now asserts that he was never personally informed at the sentencing hearing of the postrelease control sanction as required by law. While he appealed his conviction, he did not allege that his sentence was void because he was not properly notified at his sentencing hearing of the applicable postrelease control sanction. *State v. Murray*, 6th Dist. Lucas No. L-05-1376, 2007-Ohio-4324. Appellant seeks to include a transcript of that sentencing hearing in the record of the current appeal, which stems from a later criminal action.

{¶ 4} Near the end of serving his prison sentence, appellant was granted judicial release and was ordered to serve three years of community control. Appellant repeatedly violated the terms of his community control and on July 20, 2007, the court finally revoked appellant's community control and ordered him to serve the remainder of his sentence. Appellant did not file an appeal from this judgment. When appellant had served his sentence, he was placed on postrelease control supervision.

{¶ 5} In 2008, while he was under postrelease control supervision in the 2005 case, appellant was convicted of attempted failure to notify the sheriff of a change of residence address and was sentenced to 5 years of community control, with a sanction of a prison term of 16 months for violation of the terms of his community control. Appellant was notified in the 2008 case that he was also subject to postrelease control. In early 2009, appellant was charged with a violation of his community control sentence in the 2008 case and he failed to appear at a hearing set for July 1, 2009. The hearing was continued for some time because appellant later faced charges from a June 17, 2009 indictment for possession of drugs and trafficking.

{¶ 6} On January 27, 2010, the court held a sentencing hearing. While the sentencing hearing transcript indicated it was a joint hearing of the 2008 case and the 2009 case, the court separated the hearings. Much of the confusion in this case stems from the court's statements made at the sentencing hearing in the 2009 case and in the court's judgment entries in both the 2008 and 2009 cases. The court found at the sentencing hearing that the 2009 conviction resulted in a violation of appellant's postrelease control (presumptively imposed in the 2005 case although that case number was not included in the transcript). The court stated that appellant was sentenced to 17 months of imprisonment for the 2009 violation to be served "consecutive to the sentence imposed for the post-release control." In its January 29, 2009 judgment entry, however, the court indicated that the 2009 sentence was to be "served consecutive with the imposed PRC sentence of 1258 days in re: CR200403611" (the 2005 case).

{¶ 7} The next day, on January 28, 2009, the court held a sentencing hearing on the community control violation related to the 2008 case. The court convicted appellant of the violation and sentenced him to 15 months imprisonment to be served consecutively with the sentence imposed in the 2009 case and the sentence for the violation of the postrelease control sanction imposed in the 2005 case, which were ordered to be served consecutive to each other. Appellant sought an appeal from this judgment, but the appeal was dismissed because it was untimely and a delayed appeal was not permitted. Appellant also seeks to include the January 28, 2009 sentencing hearing transcript in the current appeal of the 2009 case.

{¶ 8} Appellant filed the current appeal of the 2009 case arguing in part that the trial court erred as a matter of law by imposing a sentence for the violation of the 2005 postrelease control sanction when appellant had not been given proper notice of the sanction at his 2005 sentencing hearing. We considered this issue and found that we could not address the issue because the transcript from the 2005 case was not part of the record on an appeal in the 2009 case. We affirmed the trial court's decision on October 26, 2012. *State v. Murray*, 6th Dist. Lucas No. L-10-1059, 2012-Ohio-4996.

{¶ 9} However, on January 16, 2013, we granted appellant's motion to reopen this appeal to permit appellant to raise the issue of whether his appellate counsel rendered ineffective assistance of counsel by not providing the sentencing transcript from the prior criminal conviction so that this issue could be addressed.

{¶ 10} In his first assignment of error, appellant argues that the 2005 judgment was void because he was not properly notified of the postrelease control sanction at his sentencing hearing and, therefore, the court in the 2009 case could not impose a sentence for the violation of the 2005 postrelease control sanction. Furthermore, appellant argues he could not be resentenced because he had already served his full sentence in the 2005 case. The state argues that any alleged error would have presumptively been corrected at the sentencing hearing in the 2008 case.

{¶ 11} Upon further consideration of this issue, we find that we are unable to consider these issues because they require consideration of materials outside the appellate record. Appellant's trial counsel could have collaterally attacked the 2005 judgment in the 2009 case because the prison term imposed in the 2009 case relies upon the validity of the postrelease control sanction. *State v. Billiter*, 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960, syllabus. Having failed to do so, however, appellate counsel was unable to raise the issue on appeal because it would have been impossible to prove the alleged error without the 2005 sentencing hearing transcript having been made a part of the trial court record and appellate counsel had no basis for seeking to include the transcript in the appellate record. App.R. 9(A); *Isbell v. Kaiser Found. Health Plan*, 85 Ohio App.3d 313, 318, 619 N.E.2d 1055 (8th Dist.1993); and *State v. Prather*, 8th Dist. Cuyahoga No. 83227, 2005-Ohio-2710, ¶ 12. Appellant's first assignment of error is not well-taken.

{¶ 12} In his second assignment of error, appellant argues that the trial court failed to substantially comply with Crim.R. 11(C)(2)(a) by failing to accurately advise appellant of the postrelease control sanction in the 2005 case and, therefore, the 2005 sentence is void and the court in the 2009 case could not impose a prison term for the violation of the postrelease control sanction. We find appellant's argument lacks merit. Crim.R. 11(C) is not applicable to this case because appellant was found guilty by a jury. Appellant's second assignment of error is not well-taken.

{¶ 13} In his third assignment of error, appellant argues he was denied effective assistance of trial counsel because his trial counsel did not object to the sentence for the violation of the postrelease control sanction.

{¶ 14} The reopening of appellant's appeal can be based only on the claim of ineffective assistance of appellate counsel. App.R. 26(B). Furthermore, any claim of ineffectiveness of appellate counsel in failing to allege ineffectiveness of trial counsel must be based upon evidence in the record. *State v. Henricks*, 6th Dist. Wood No. WD-05-051 (Mar. 8, 2007) and *State v. O'Neal*, 8th Dist. Cuyahoga No. 83393, 2005-Ohio-3568, ¶ 6. As discussed above, there is no evidence in the record to support appellant's allegations. Appellant's third assignment of error is not well-taken.

{¶ 15} Accordingly, appellant's pending motions to supplement the record on appeal to include the sentencing hearing transcripts from the prior two criminal actions are found also found not well-taken and are denied. The prosecution also filed a motion

to supplement the record with additional materials from the prior cases, and this motion is found not well-taken and is denied as well.

{¶ 16} Having found that there is no evidence of ineffective assistance of appellate counsel in this case and that the trial court did not commit error prejudicial to appellant, the January 29, 2009 judgment of the Lucas County Court of Common Pleas convicting and sentencing appellant is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

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