

[Cite as *State v. Pearson*, 2011-Ohio-245.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO

:

Plaintiff-Appellee

:
C.A. CASE NO.
23974

v.

: T.C. NO.
04CR2137

ERIC C. PEARSON

:

(Criminal appeal from
Common Pleas Court)

Defendant-Appellant

:

:

.....

OPINION

Rendered on the 21st day of January, 2011.

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R. LYNN NOTHSTINE, Atty. Reg. No. 0061560, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

TYLER D. STARLINE, Atty. Reg. No. 0078552, 260 North Detroit Street, Xenia, Ohio 45385
Attorney for Defendant-Appellant

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FROELICH, J.

{¶ 1} Eric C. Pearson appeals from a judgment of the Montgomery County Court of Common Pleas, which resentenced him on a 2005 conviction so as to

impose a mandatory term of post-release control and reclassified him as a Tier III sex offender.

I

{¶ 2} In 2005, Pearson was convicted by a jury of attempted rape, kidnapping, gross sexual imposition, and felonious assault. He was sentenced to an aggregate term of five years in prison, was advised that he would serve “up to five years” of post-release control, and was classified as a sexually-oriented offender. Pearson appealed from his conviction, and we affirmed the trial court’s judgment. *State v. Pearson*, Montgomery App. No. 21203, 2006-Ohio-5585.

{¶ 3} In March 2010, as Pearson neared the end of his prison sentence, the trial court ordered him to appear for a “re-sentencing” hearing. The trial court subsequently imposed a five-year mandatory term of post-release control, correcting its prior order that Pearson serve “up to five years” of post-release control. In its Amended Termination Entry, the court also reclassified Pearson as a Tier III sex offender.^{1, 2}

{¶ 4} Pearson appeals from the trial court’s Amended Termination Entry, raising one assignment of error.

¹The Adam Walsh Act was enacted in 2007. R.C. 2950.01, et seq. Under the Adam Walsh Act, an offender who was convicted of an attempted rape would be classified as a Tier III sex offender, whereas, under the prior law, Pearson was classified as a sexually-oriented offender.

²The trial court’s Amended Termination Entry stated that Pearson was reclassified as a Tier II sex offender, but its Explanation of Duties to Register as a Sex Offender form, which was filed the next day, classified him as a Tier III sex offender. Pearson’s brief acknowledges that this “appears to be a clerical mistake” and that Tier III would have been the appropriate category based on Pearson’s offenses. R.C. 2950.01(G)(1)(a).

II

{¶ 5} Pearson's assignment of error states:

{¶ 6} "THE TRIAL COURT PREJUDICIALLY ERRED BY PROCEEDING WITHOUT JURISDICTION TO NOTIFY APPELLANT PEARSON THAT HE HAD BEEN 'RE-CLASSIFIED' AS A TIER III SEX OFFENDER UNDER THE PROVISIONS OF THE OHIO 'ADAM WALSH ACT.'"

{¶ 7} Pearson contends that the trial court lacked jurisdiction to conduct a new sentencing hearing sua sponte and to amend a "final and already-appealed judgment." At oral argument, Pearson's attorney stated that Pearson objected only to his reclassification as a Tier III sex offender, and not to the imposition of the mandatory term of post-release control.

{¶ 8} The Supreme Court of Ohio has held that, "in cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have the postrelease control imposed on the defendant unless the defendant has completed his sentence." *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶6. The Supreme Court reasoned that a trial court's failure to impose a sentence required by law results in a void sentence, rather than a voidable one, because "no court has the authority to substitute a different sentence for that which is required by law. *** Because no judge has the authority to disregard the law, a sentence that clearly does so is void." *Id.* at ¶20, citing *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438. The Supreme Court recognized, as Pearson does, that a trial court's jurisdiction over a criminal

case is limited after it renders judgment, but it concluded that a trial court retains jurisdiction to correct a void judgment and is authorized to do so. *Id.* at ¶23.

{¶ 9} In 2007, the Supreme Court had held that, where a sentence was void because the trial court improperly imposed post-release control, the trial court was required to afford the defendant a “full de novo sentencing hearing as if the original sentence had never been imposed.”³ *State v. Winston*, 182 Ohio App.3d 306, 2009-Ohio-2171, ¶12, citing *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250. Accordingly, the trial court did not lack jurisdiction to conduct a new sentencing hearing. It conducted such a sentencing hearing on March 18, 2010. At that time, believing that it was required to resentence Pearson de novo, the trial court reclassified him as a Tier III sex offender under the Adam Walsh Act. Pearson claims that the new sentencing hearing necessitated by the trial court’s failure to impose the proper term of post-release control should not have subjected him to the heightened reporting requirements contained in the Adam Walsh Act, which was enacted after his original sentence was imposed.

{¶ 10} We addressed the issue of reclassification in *State v. Gibson*, Champaign App. No. 2009 CA 47, 2010-Ohio-3447. In *Gibson*, the defendant was sentenced for rape in 2001, prior to the enactment of the Adam Walsh Act, but he challenged the validity of his sentence to post-release control after the Act was in effect. We held that, although a defendant is informed of his sex offender

³R.C. 2929.191 sets forth a mechanism for correcting a sentence that fails to properly impose post-release control; however, that statute applies prospectively to sentences entered on or after July 11, 2006. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, at ¶¶35-36.

classification at sentencing and it is included in the trial court's judgment entry, his classification "is a separate and distinct proceeding, which is not affected by the validity of his sentencing." *Id.* at ¶22. Thus, we concluded that the validity of a sentence, including whether the sentence was void because post-release control had not been properly imposed, "would not affect the validity of [a defendant's] classification as a sexual predator." *Id.* at ¶28. See, also, *State v. Williams*, 177 Ohio App.3d 865, 2008-Ohio-3586, ¶11-12; *State v. Hudson*, Montgomery App. No. 23776, 2010-Ohio-5386; *State v. Poissant*, Fairfield App. No. 08 CA7, 2009-Ohio-4235, ¶45. Pearson's classification as a sexually-oriented offender was likewise unaffected by the error that rendered the post-release control portion of his sentence void. Thus, the trial court erred in attempting to reclassify Pearson as a Tier III sex offender under the Adam Walsh Act.

{¶ 11} Our conclusion that Pearson's sex offender classification should not have been reconsidered at the 2010 sentencing hearing is also supported by the Supreme Court's recent decision in *State v. Fischer*, _____ Ohio St.3d _____, 2010-Ohio-6238, which narrowed the scope of resentencing required to correct an improperly-imposed term of post-release control. In *Fischer*, the Supreme Court concluded that the required resentencing when a term of post-release control was not properly imposed "does not permit reexamination of all perceived errors at trial or in other proceedings prior to sentencing." *Id.* at ¶25. "[W]hen a judge fails to impose a statutorily mandated postrelease control as part of a defendant's sentence, that *part* of the sentence is void and must be set aside. Neither the Constitution nor common sense commands anything more." (Emphasis sic.) *Id.* at ¶26. In other words, the

Supreme Court has modified its view that a full, de novo sentencing hearing is required in such a situation; only the portion of the sentence related to post-release control is void, and only that portion “may be vacated or otherwise amended.” *Id.* at ¶28. Pursuant to *Fischer*, it is now apparent that the trial court’s re-sentencing should have been confined to the imposition of a proper term of post-release control.

{¶ 12} Pearson’s assignment of error is sustained.

III

{¶ 13} The judgment of the trial court will be affirmed with respect to the imposition of the mandatory term of post-release control. The judgment will be reversed insofar as it reclassified Pearson under the Adam Walsh Act, and his prior classification as a sexually-oriented offender will remain in effect.

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GRADY, P.J. and FAIN, J., concur.

Copies mailed to:

R. Lynn Nothstine
Tyler D. Starline
Hon. Steven K. Dankof