

[Cite as *State v. Coleman*, 2009-Ohio-3250.]

STATE OF OHIO, HARRISON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

STEVEN COLEMAN

DEFENDANT-APPELLANT

CASE NO. 08 HA 3

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from the Court of
Common Pleas of Harrison County, Ohio
Case No. 2002-0405-CR

JUDGMENT:

Reversed and Vacated.

APPEARANCES:

For Plaintiff-Appellee:

Atty. T. Shawn Hervey
Harrison County Prosecutor
111 W. Warren Street
P.O. Box 248
Cadiz, Ohio 43907

For Defendant-Appellant:

Atty. Timothy Young
Ohio Public Defender
Atty. Kelly K. Curtis
Assistant State Public Defender
Office of the Ohio Public Defender
8 East Long Street, 11th Floor
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JUDGES:

Hon. Cheryl L. Waite

Hon. Gene Donofrio

Hon. Joseph J. Vukovich

Dated: June 26, 2009

[Cite as *State v. Coleman*, 2009-Ohio-3250.]
WAITE, J.

{¶1} Appellant, Steven Coleman, appeals the judgment entry of the Harrison County Court of Common Pleas filed on July 1, 2008 sentencing him to mandatory post-release control for a period of five years upon completion of his prison term imposed by the trial court on January 23, 2003. Because the trial court failed to conduct a de novo sentencing hearing pursuant to *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, and violated Appellant's right to counsel at the second sentencing hearing, the judgment of the trial court is reversed.

{¶2} On January 23, 2003, Appellant pleaded guilty to one count of aggravated robbery, in violation of R.C. 2911.01(A)(1), a felony of the first degree, one count of domestic violence, in violation of R.C. 2919.25(A), a felony of the fifth degree, and one count of grand theft, in violation of R.C. 2913.02(A)(1)(4), a felony of the fourth degree. (1/23/03 J.E., p. 1.) On that same date, he was sentenced to a six-year term of incarceration for the aggravated robbery conviction, a twelve-month term for the domestic violence conviction, and a twelve-month term for the grand theft conviction. All the prison terms were to run concurrently. According to the July 1, 2008 judgment entry, the trial court addressed the issue of post-release control at the original sentencing hearing, but failed to include any notice of post-release control in the original judgment entry.

{¶3} Appellant did not appeal his conviction or sentence. However, pursuant to the Supreme Court of Ohio's directive in *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, the trial court held a second sentencing hearing on June 30, 2008 in

order to correct the error in the original judgment entry. The trial court did not conduct a de novo sentencing hearing, choosing instead to simply inform Appellant that he was subject to a mandatory five-year term of post-release control.

{¶14} Appellant was not represented by counsel at the second sentencing hearing. At the beginning of the hearing, the trial court explained that Appellant's trial counsel had contacted the court and, "it was determined that it was not necessary for [Appellant's trial counsel] to be [at the second sentencing hearing.]" (Tr., p. 1.) The judgment entry reads, "[t]he Court determined that it could complete the sentencing process by providing Defendant with the notification concerning post-release control in the absence of Defendant's court-appointed counsel." (7/1/08 J.E., p. 1.) Appellant filed his notice of appeal on July 24, 2008.

{¶15} On August 22, 2008, Appellant completed his term of incarceration and the Ohio Department of Rehabilitation and Correction released him subject to post-release control pursuant to the July 1, 2008 judgment entry. (Appellant's Brf., p. 2.)

{¶16} In his brief, Appellant asserts three assignments of error. His third assignment of error was premised upon the trial court's failure to comply with Crim.R. 32(C). Based upon the third assignment of error, we remanded the matter to the trial court to correct the error in its judgment entry. The trial court entered a corrected order on June 2, 2009. Consequently, two assignments of error remain for our review.

ASSIGNMENT OF ERROR I

{¶7} “The trial court erred when it added a term of mandatory post-release control to Mr. Coleman’s sentence without conducting a de novo resentencing hearing.”

{¶8} R.C. 2929.14(F)(1) governs prison terms. This section provides that, if the trial court imposes a prison term for a felony, the sentence shall include a requirement that the offender be subject to a period of post-release control after the offender’s release from imprisonment. Additionally, R.C. 2929.19(B)(3) requires that the sentencing court notify the offender that he will be supervised under R.C. 2967.28 after he leaves prison.

{¶9} The Supreme Court of Ohio has held that these statutes mandate a trial court to give notice of post-release control both at the sentencing hearing and by incorporating it into the sentencing entry. *Jordan* at ¶11. Where the trial court fails to do both, it fails to comply with R.C. 2929.19(B)(3)(c) and (d), requiring the sentence to be vacated and the matter remanded for resentencing. *Id.*

{¶10} In *Bezak*, *supra*, the Supreme Court explained that, when resentencing pursuant to statute, “the trial court may not merely inform the offender of the imposition of postrelease control and automatically reimpose the original sentence. Rather, the effect of vacating the trial court’s original sentence is to place the parties in the same place as if there had been no sentence.” *Id.* at ¶13. Accordingly, “[t]he trial court must resentence the offender as if there had been no original sentence.” *Id.* at ¶16.

{¶11} Thus, the trial court in the case sub judice erred when it did not conduct a de novo sentencing hearing on the aggravated robbery conviction. See *State v. Bruner*, 11th Dist. No. 2007-A0012, 2009-Ohio-4767; *State v. Smalls*, 5th Dist. No. 2008 CA 00164, 2009-Ohio-832. Accordingly, Appellant's first assignment of error is sustained.

{¶12} Since Appellant has completed his prison term, he is no longer amenable to resentencing. In *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, the Supreme Court granted a writ of habeas corpus to compel the defendant's release from prison where he was being held for violating his post-release control. The trial court did not notify Hernandez at his sentencing hearing that he would be subject to mandatory post-release control and did not incorporate post-release control into its sentencing entry. As a consequence, the Supreme Court released Hernandez from prison and did not permit resentencing, because his only journalized sentence had expired. *Id.* at ¶30. Like Hernandez, Appellant has completed his term of incarceration. Therefore, he is not subject to resentencing.

ASSIGNMENT OF ERROR II

{¶13} "Mr. Coleman was deprived of his right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution when the trial court denied Mr. Coleman legal representation during a critical stage of the proceedings."

{¶14} The Sixth Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, and Section 10, Article I of

the Ohio Constitution provide that a defendant shall have the right to have the assistance of counsel for their defense. Pursuant to Crim.R. 44(A), a defendant has the right to counsel at every stage of the proceedings.

{¶15} It is axiomatic that the right to counsel extends to sentencing. *State v. Muniz*, 6th Dist. No. WD-03-032, 2004-Ohio-1659, ¶29 citing *Mempa v. Rhay* (1967), 389 U.S. 128, 134, 88 S.Ct. 254, 19 L.Ed.2d 336; *State v. Pepper*, 9th Dist. No. 03CA0003-M, 03CA0004-M, 2003-Ohio-5615, ¶5 citing *U.S. v. Saenz* (6th Cir.1990), 915 F.2d 1046, 1048. “Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel.” *Gardner v. Florida* (1977), 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393, citing *Mempa*, supra.

{¶16} A defendant may waive his right to counsel when the waiver is voluntary, knowing, and intelligent. *State v. Gibson* (1976), 45 Ohio St.2d 366, 345 N.E.2d 399, paragraph one of the syllabus citing *Faretta v. California* (1975), 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562. However, in the case sub judice, Appellant did not waive counsel. Instead, the trial court opined that counsel was not necessary in order to resentence Appellant.

{¶17} A defendant has a legitimate interest in the character of the procedure which leads to the imposition of his sentence even if he has no right to object to a particular result of the sentencing process. See *Witherspoon v. Illinois* (1968), 391 U.S. 510, 521-523, 88 S.Ct. 1770, 1776-1778, 20 L.Ed.2d 776. Because the trial

court resentenced Appellant without the benefit of counsel, Appellant's second assignment of error is sustained.

{¶18} Based on the above, the judgment entry sentencing Appellant to a five-year term of post-release control is reversed and vacated. Because Appellant's only journalized sentence has expired, he is no longer subject to resentencing. Accordingly, the Ohio Department of Rehabilitation and Correction is ordered to terminate Appellant's post-release control.

Donofrio, J., concurs.

Vukovich, P.J., concurs.