

[Cite as *State v. Webb*, 2009-Ohio-6127.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
DARKE COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 08-CA-1745
Plaintiff-Appellee	:	
	:	Trial Court Case No. 03-CR-12875
v.	:	
	:	(Criminal Appeal from
RANDALL L. WEBB	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 20<sup>th</sup> day of November, 2009.

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Courthouse, 504 South Broadway, Third Floor, Greenville, Ohio 45331  
Attorney for Plaintiff-Appellee

RANDALL L. WEBB, #498-637, London Correctional Institution, P.O. Box 69,  
London, Ohio 43140  
Defendant-Appellant, *pro se*

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FAIN, J.

{¶ 1} Defendant-appellant Randall L. Webb appeals from a sentence imposed by the trial court, pursuant to a mandate from this court, upon Webb's guilty plea to one count of Theft, By Deception, from an Elderly Person, in violation of R.C. 2913.02(A)(3), (B)(3). Webb contends that: (1) the trial court was without jurisdiction

to impose the sentence, in view of the fact that he had already completed the two-year sentence previously imposed; (2) the trial court erred by imposing more than the minimum prison term without complying with the statutory requirements for doing so, because *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, in which the Supreme Court of Ohio severed the part of the statute upon which Webb relies, itself violates the constitutional separation of powers doctrine; (3) the trial court erred by imposing a sentence that is grossly disproportionate to sentences imposed in similar circumstances; and (4) the trial court erred by refusing to allow Webb to withdraw his guilty plea.

{¶ 2} We conclude that: (1) the trial court had jurisdiction to comply with our mandate and re-sentence Webb, in view of the fact that his original sentence was reversed and any sentence would necessarily include a provision for a period of post-release control, which had not expired; (2) we have no authority to determine that a decision of the Supreme Court of Ohio violates either the Ohio or United States constitutions; (3) there is nothing in the record to support Webb's contention that his sentence is grossly disproportionate to sentences imposed in similar circumstances, Webb not having made a record on that issue; and (4) Webb's contention that the trial court erred by refusing him to withdraw his guilty plea is barred by res judicata, this court having previously determined that issue adversely to Webb.

{¶ 3} Accordingly, the judgment of the trial court from which this appeal is taken is Affirmed.

I

{¶ 4} This case has been before this court upon a number of occasions.

{¶ 5} In 2003, Webb was charged by indictment with one count of Theft, by deception, from an Elderly Person, a felony of the second degree under R.C. 2913.02(A)(3), (B)(3). After numerous continuances, the case was set for trial on June 1, 2005. On that date, a negotiated plea of guilty, with a protestation of innocence, was entered in accordance with *North Carolina v. Alford* (1970), 400 U.S. 25, 27 L.Ed.2d 162, 91 S.Ct. 160, to the lesser-included offense of Theft, by deception, from an Elderly Person as a felony of the third degree. Sentencing was set for July 14, 2005.

{¶ 6} The day before sentencing, Webb filed a motion to withdraw his plea. The trial court conducted an evidentiary hearing on Webb's motion on July 14, 2005, the day set for sentencing. Webb was the sole witness. Following the hearing, the trial court denied the motion, and proceeded to sentence Webb to two years in prison and restitution in the amount of \$80,000.

{¶ 7} Webb appealed, contending that the trial court had erred by denying his motion to withdraw his plea. We affirmed. *State v. Webb*, Darke App. No. 1667, 2006-Ohio-3512..

{¶ 8} Webb sought to re-open his appeal. We concluded that *State v. Foster*, supra, required re-sentencing, and remanded for that limited purpose. On remand, the same sentence was imposed. Webb appealed from that sentence. We concluded that Webb had not waived counsel in open court for that re-sentencing, reversed the new sentence, and remanded this cause for yet another

re-sentencing. *State v. Webb*, 177 Ohio App.3d 289, 2008-Ohio-3719.

{¶ 9} While that appeal from his first re-sentencing was pending, Webb filed a petition for post-conviction relief, contending that his trial counsel was ineffective for not having elicited certain evidence at a hearing on his motion to withdraw his guilty plea. We concluded that Webb had failed to demonstrate that any prejudice had resulted from his trial counsel's alleged deficiency, and affirmed. *State v. Webb*, Darke App. No. 1694, 2007-Ohio-3446.

{¶ 10} On remand following the reversal of Webb's first re-sentencing, the trial court imposed, once again, a two-year sentence of imprisonment. It is from this, second re-sentencing that the appeal currently before us was taken.

## II

{¶ 11} Webb's First Assignment of Error is as follows:

{¶ 12} "TRIAL COURT ERRED IN RESENTENCING DEFENDANT-APPELLANT BECAUSE IT LACKED JURISDICTION TO DO SO AFTER THE ORIGINALLY IMPOSED SENTENCE HAD EXPIRED."

{¶ 13} As a result of the lengthy history of this case chronicled in Part I, above, by the time the trial court re-sentenced Webb, for the second time, in compliance with our mandate following our reversal of his sentence in *State v. Webb*, 177 Ohio App.3d 289, 2008-Ohio-3719, Webb had actually served two years on this conviction. He contends that the trial court therefore lost jurisdiction to re-sentence him, citing for that proposition a number of unreported Ohio appellate decisions, copies of which he has not seen fit to attach to his appellate brief, as required by Loc. R. 9 of this court.

{¶ 14} The first of the cases cited by Webb is *State v. Ayers*, Erie App. No. E-05-079, 2006-Ohio-5108. That opinion cited *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, to which we shall return later. In *Ayers*, the court of appeals not only did not hold that the trial court was without authority to re-sentence the defendant, it remanded the cause to the trial court for the express purpose of re-sentencing the defendant, so that anything said therein about a trial court's lacking jurisdiction to re-sentence once the existing sentence has been completed is necessarily dictum.

{¶ 15} The second case Webb cites is *State v. Phillips*, Logan App. No. 8-06-14, 2007-Ohio-686, ¶ 25, for the proposition that “‘a trial court may only resentence an offender if the offender's sentence has not yet expired.’” To begin with, ¶ 25 actually states: “However, a trial court may only re-sentence an *offender to give the required notice of post-release control* if the offender's sentence has not yet expired.” (Emphasis added.) Furthermore, the actual holding in *State v. Phillips*, supra, was that the trial court properly re-sentenced the defendant to add a notice of post-release control (the defendant's four-year sentence of incarceration not yet having expired), so that any language in the opinion concerning possible infirmities in the trial court's jurisdiction to re-sentence under different contingencies was necessarily dictum.

{¶ 16} Both *State v. Ayers*, supra, and *State v. Phillips*, supra, rely upon *Hernandez v. Kelly*, supra. In *Hernandez v. Kelly*, the Supreme Court of Ohio was at pains to articulate that the challenge in that habeas corpus original action was *not* to the sentencing entry – the challenge was to the authority of the Adult Parole Authority

to sanction an offender for violation of the terms of post-release control when the offender's sentence did not include notification to the offender that he would be subject to post-release control. *Id.*, at ¶¶ 12 and 18. To the respondent's proposition that the proper remedy for the sentencing trial court's error in not having notified the petitioner-offender of the existence and terms of post-release control sanctions would be to re-sentence the offender, with the inclusion of notice of post-release control sanctions, the Supreme Court of Ohio said that an after-the-fact notification, to an offender who has already served his sentence of incarceration, would circumvent the objective underlying the requirement of notice, which is to notify offenders of post-release control requirements at the time of their sentencing. *Id.*, at ¶ 28. Thus, the Supreme Court of Ohio proclaimed that the policy underlying notification of post-release control sanctions at sentencing militates against upholding the belated notification of post-release control sanctions after a sentence of incarceration has been completed. But there is nothing in this proclamation to implicate the jurisdiction of a trial court to re-sentence a criminal defendant when a voidable sentence has been reversed (and thereby vacated), and the cause has been remanded to the trial court for re-sentencing.

{¶ 17} Indeed, the Supreme Court of Ohio in *Hernandez* explained the rationale for its decision – that notification of post-release control sanctions, missing from the original sentence, could not be supplied in a new sentencing entry once the original sentence had been served – by quoting from its decision in *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, ¶ 33:

{¶ 18} “ ‘When a trial court makes an error in sentencing a defendant, the

usual procedure is for an appellate court to remand to the trial court for resentencing.

In community control sentencing cases in which the trial court failed to comply with [the statutory notice requirement], however, a straight remand can cause problems. Due to the particular nature of community control, any error in notification cannot be rectified by “renotifying” the offender. When an offender violates community control conditions and that offender was not properly notified of the specific term that would be imposed, an after-the-fact reimposition of community control would totally frustrate the purpose behind [statutory] notification, which is to make the offender aware *before a violation* of the specific prison term that he or she will face for a violation. Consequently, *where no such notification was supplied*, and the offender then appeals after a prison term is imposed under R.C. 2929.15(B), the matter must be remanded to the trial court for a resentencing under that provision with *a prison term not an option*. In this case, since the prison term has already been served, there will be no remand for resentencing.’ ” *Hernandez v. Kelly*, supra, ¶ 29, quoting from *State v. Brooks*, supra. (Emphasis and bracketed material in original.)

{¶ 19} The above-quoted rationale makes it clear to us that the problem the Supreme Court of Ohio was concerned with was the fundamental unfairness of adding post-release control sanction provisions, even when they are required by statute, to a sentence of incarceration that has already been completed. The case before us involves no similar unfairness. Webb’s sentence included notification of post-release control sanctions both before that sentence was reversed on appeal, and after it was re-imposed on remand after reversal on appeal.

{¶ 20} Considerations of double jeopardy may well preclude a re-sentencing

that increases the severity of a sentence that has already been served. There is, of course, nothing of that kind involved in the case before us, since the same sentence has been reimposed, with a full credit, against the sentence, for all time spent in jail or in prison on the charge.

{¶ 21} Webb's First Assignment of Error is overruled.

### III

{¶ 22} Webb's Second Assignment of Error is as follows:

{¶ 23} "TRIAL COURT ERRED IN SENTENCING DEFENDANT-APPELLANT TO A TERM OF INCARCERATION WHICH IS MORE THAN THE MINIMUM AND MAXIMUM PRISON TERM BASED ON THE OHIO SUPREME COURT'S SEVERANCE OF THE OFFENDING PROVISIONS UNDER *FOSTER*, WHICH WAS AN ACT IN VIOLATION OF THE PRINCIPLE OF SEPARATION OF POWERS."

{¶ 24} In this assignment of error, Webb relies upon the requirement in R.C. 2929.14(B), before the decision in *State v. Foster*, supra, that a trial court must make certain findings before imposing more than the minimum sentence for a felony provided by statute. Of course, the Supreme Court of Ohio in *State v. Foster*, supra, found this part of the statute to be in violation of the right to jury trial established in the Sixth and Fourteenth Amendments to the Constitution of the United States, and severed it from the statute.

{¶ 25} Webb argues that the decision of the Supreme Court of Ohio in *State v. Foster* violates the separation-of-powers doctrine and numerous other provisions in the Ohio and federal constitutions. While we do not find Webb's argument to be persuasive, it is unnecessary for us to consider that argument at all. As the State

correctly points out, we lack the authority to determine that decisions of the Supreme Court of Ohio violate state or federal constitutional provisions, or are otherwise erroneous, since we are a court “inferior to the supreme court.” Ohio Constitution, Article IV, Section 1. See *State v. Burkhart*, Champaign App. No. 06-CA-18, 2007-Ohio-3436.

{¶ 26} Webb’s Second Assignment of Error is overruled.

#### IV

{¶ 27} Webb’s Third Assignment of Error is as follows:

{¶ 28} “TRIAL COURT ERRED BY IMPOSING A SENTENCE CONTRARY TO LAW FOR FAILURE TO FULFILL A STATUTORILY MANDATED OBLIGATION BY NOT CONDUCTING A CONSISTENCY ANALYSIS TO ASSURE THE SENTENCE IS CONSISTENT WITH LIKE OFFENSES COMMITTED BY LIKE OFFENDERS AND THEREBY VIOLATING WEBB’S RIGHTS OF DUE PROCESS AND EQUAL PROTECTION.”

{¶ 29} Webb relies upon that part of R.C. 2929.11(B) that requires that a felony sentence shall be “consistent with sentences imposed for similar crimes committed by similar offenders.”

{¶ 30} “The party claiming that a sentence is inconsistent with sentences given in other cases bears the burden of providing the court with sentences imposed for similar crimes by similar offenders which [sic] validate the claim of inconsistency.’ [State v.] *Agner*[, Logan App. No. 8-02-28, 2003-Ohio-5458]. To show that his sentence is inconsistent, that is, contrary to law within the meaning of R.C. 2929.11(B), [the defendant] must show that ‘the trial court failed to properly consider

the factors and guidelines contained in the statutes, or that substantially similar offenders, committing substantially similar offenses, and having substantially similar records, behavior and circumstances, received grossly disproportionate sentences.’ [State v.] Coburn[, Adams App. No. 03CA774, 2004-Ohio-2997].” State v. Spradling, Montgomery App. No. 20960, 2005-Ohio-6683, ¶ 6.

{¶ 31} Webb made no showing in the trial court that the sentence he received – two years’ imprisonment – is grossly disproportionate to sentences imposed in similar circumstances. Therefore, the record does not support the error claimed. Webb’s Third Assignment of Error is overruled.

V

{¶ 32} Webb’s Fourth Assignment of Error is as follows:

{¶ 33} “THE TRIAL COURT ERRED WHEN IT REFUSED TO ALLOW DEFENDANT-APPELLANT TO WITHDRAW HIS ‘ALFORD PLEA’ PRIOR TO SENTENCING AND DENYING THE DEFENDANT’S RIGHT OF DUE PROCESS.”

{¶ 34} When Webb originally pled guilty, in 2005, to Theft by Deception of an Elderly Person, he did it in the form of an “Alford” plea, after *North Carolina v. Alford* (1970), 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162, in which he pled guilty despite his protestation of innocence. Before sentencing, he moved to withdraw his plea. The trial court overruled his motion to withdraw his plea, and proceeded to sentence him.

{¶ 35} Webb appealed from the denial of his motion to withdraw his plea, contending that the trial court abused its discretion in doing so. We rejected his contention, and affirmed. *State v. Webb*, Darke App. No. 1667, 2006-Ohio-3512.

{¶ 36} In *State v. Webb*, 177 Ohio App.3d 289, 2008-Ohio-3719, we reversed

a re-sentence that had been imposed in this case, upon the ground that there was no effective waiver of counsel, and remanded for yet another sentencing. The sentence that was imposed pursuant to that mandate is the sentence currently on appeal. There is nothing in the record to suggest that Webb moved to withdraw his plea after our mandate requiring the latest sentencing. Nor is there anything in the record to suggest that Webb filed any motion to withdraw his plea other than the one filed and overruled in 2005, the overruling of which we affirmed in Darke App. No. 1667, 2006-Ohio-3512.

{¶ 37} Any claim that the trial court erred in overruling Webb's 2005 motion to withdraw his guilty plea is barred by the doctrine of res judicata. *State v. Perry* (1967), 10 Ohio St.2d 175.

{¶ 38} Webb's Fourth Assignment of Error is overruled.

VI

{¶ 39} All of Webb's assignments of error having been overruled, the judgment of the trial court from which this appeal is taken is Affirmed.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

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Randall L. Webb  
Hon. Jonathan P. Hein