

[Cite as *State v. Mays*, 2011-Ohio-1565.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95115

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRIAN MAYS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-424093

BEFORE: Sweeney, P.J., Cooney, J., and Rocco, J.

RELEASED AND JOURNALIZED: March 31, 2011
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JAMES J. SWEENEY, P.J.:

{¶ 1} Defendant-appellant Brian Mays (“defendant”) appeals the court’s resentencing him to 14 years in prison, upon request for a new sentencing hearing based on the improper imposition of postrelease control. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On December 18, 2002, defendant pled no contest to multiple drug related charges, and on January 10, 2003, the court sentenced him to 14 years in prison. Defendant filed a direct appeal, and this court affirmed his conviction. *State v. Mays*, Cuyahoga App. No. 82474, 2003-Ohio-6949.

{¶ 3} In October of 2009, defendant filed a pro se motion for resentencing, based on the failure to properly include postrelease control pursuant to *State v. Bloomer*, 122 Ohio St.3d

200, 2009-Ohio-2462, 909 N.E.2d 1254. The state filed a brief concurring with defendant's position. On February 18, 2010, the court held a hearing and resentenced defendant to 14 years in prison, this time properly including both three-year and five-year terms of mandatory postrelease control.

{¶ 4} Defendant appeals and raises two assignments of error for our review.

{¶ 5} “I. The trial court committed reversible error by denying Appellant a full sentencing hearing and by failing to consider factors related to events which occurred between the time of his original sentencing and his resentencing seven years later, e.g. his good behavior in prison and his expression of remorse at the sentencing hearing.”

{¶ 6} “II. On re-sentencing, the trial court denied Appellant his right of allocution and committed reversible error by announcing Appellant's sentence without first giving Appellant an opportunity to address the court and then, after the omission was brought to the attention of the court, by failing to consider the statements made by Appellant and his counsel when sentence was imposed.”

{¶ 7} The Ohio Supreme Court's recent holding in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶129, governs this case: “the new sentencing hearing to which an offender is entitled [for failure to properly include postrelease control] is limited to proper imposition of postrelease control.” See, also, R.C. 2929.191. Defendant was not entitled to a “full” or de novo resentencing hearing, and the court was not required to consider

events or statements in mitigation of punishment. See *Fischer, State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶100 (holding that “trial courts * * * are no longer required to make findings or give their reasons for imposing [felony] sentences”).

{¶ 8} Pursuant to *Fischer*, “the postrelease control component of the sentence is fully capable of being separated from the rest of the sentence as an independent component, and the limited resentencing must cover only the postrelease control. * * * The remainder of the sentence, which the defendant did not successfully challenge, remains valid under the principles of res judicata.” *Fischer*, ¶17 (quoting *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶22 (O’Connor, J., dissenting, joined by Lundberg Stratton, J.)).

{¶ 9} In the instant case, defendant did not challenge the length of his sentence on direct appeal, and a “back-door” challenge of this issue during his postrelease control resentencing hearing is out of place. Although the court’s reimposing defendant’s original 14-year sentence was superfluous, defendant was not prejudiced because the court did not modify the prison term, which was a valid portion of the sentence.

{¶ 10} Additionally, this court has held that Crim.R. 32(A)(1), which requires courts to afford a defendant “an opportunity * * * to make a statement in his or her own behalf or present any information in mitigation of punishment,” does not apply to resentencing. See, e.g., *State v. Craddock*, Cuyahoga App. No. 94387, 2010-Ohio-5782, ¶13.

{¶ 11} Accordingly, defendant's assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, PRESIDING JUDGE

COLLEEN CONWAY COONEY, J., and
KENNETH A. ROCCO, J., CONCUR