

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

State of Ohio
Appellant

Court of Appeals No. WD-11-073

Trial Court No. 02 CR 140

v.

Fatjon Kazazi

DECISION AND JUDGMENT

Appellee

Decided: March 29, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
Gwen Howe-Gebers, Chief Assistant Prosecuting Attorney,
and David E. Romaker, Jr., Assistant Prosecuting Attorney,
for appellant.

Neil S. McElroy, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a sentencing judgment of the Wood County Court of Common Pleas, which conducted a resentencing hearing in order to properly notify appellee of postrelease control parameters. For the reasons set forth below, this court reverses, in part, and affirms, in part, the judgment of the trial court.

{¶ 2} Appellant, the state of Ohio, sets forth the following two assignments of error:

I. The trial court improperly modified Kazazi's sentence outside the parameters of *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238.

II. Applying House Bill 86 sentencing guidelines at a resentencing hearing after September 30, 2011, is improper, when the original sentence was prior to its effective date of September 30, 2011.

{¶ 3} The following undisputed facts are relevant to this appeal. On April 2, 2003, appellee pled no contest to one count of trafficking in marijuana, in violation of R.C. 2925.03, a felony of the second degree, and one count of possession of marijuana, in violation of R.C. 2925.11, a felony of the second degree. Appellee was sentenced to the statutorily mandated eight-year term of incarceration, stayed pending direct appeal to this court.

{¶ 4} On August 6, 2004, this court affirmed appellee's conviction and sentence on direct appeal. Accordingly, appellee was ordered to surrender on August 23, 2004, in order to begin serving his sentence. Appellee failed to surrender and the trial court issued a nationwide arrest warrant. Appellant fled the country.

{¶ 5} Approximately seven years later, appellee was arrested in Canada and extradited in connection to this matter. On November 23, 2011, the trial court conducted a resentencing hearing of appellee in order to comport with postrelease control notification requirements, as governed by *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868

N.E.2d 961. In the course of the *Bezak* resentencing, the trial court properly addressed the requisite postrelease control notification to appellee. However, the trial court also modified the term of incarceration from eight years as originally ordered, and affirmed on direct appeal, to a term of incarceration of five years at the postrelease control resentencing hearing. The trial court stated in pertinent part, “As a practical matter, I think five years of expense in housing this person is probably more practical than eight years.” This appeal ensued.

{¶ 6} We note that both assignments of error are rooted in the common premise that the trial court’s action in modifying the term of incarceration at a limited, *Bezak* resentencing hearing was improper. Accordingly, we shall address the assignments simultaneously.

{¶ 7} The Supreme Court of Ohio clearly defined the confines of a *Bezak* resentencing hearing by holding in relevant part, “[i]t is only the post release control aspect of the sentence that is void and that must be rectified. The remainder of the sentence * * * remains valid under the principles of res judicata.” *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 17.

{¶ 8} Contrary to the controlling legal principle referenced above, the record clearly reflects that the trial court not only furnished the proper postrelease control notification to appellee, but also modified appellee’s previously affirmed term of incarceration at the *Bezak* resentencing hearing.

{¶ 9} Consistent with this clear breach of the *Bezak* parameters, we note that appellee has directly acknowledged the resentencing error of the trial court in this case. Appellee’s brief states in relevant part, “Mr. Kazazi acknowledges that there was an error in this case; that is, there was a deviation from the legal rule. Additionally, he acknowledges that the error was plain.”

{¶ 10} Given these facts and circumstances, we find that the record clearly reflects that the trial court erred in addressing the term of incarceration at appellee’s *Bezak* resentencing hearing. Such action was barred by res judicata. Wherefore, the assignments of error are found well-taken. Accordingly, we reverse the imposition of the prison sentence portion of the November 23, 2011 resentencing judgment and reinstate the term of incarceration imposed on April 2, 2003, and affirmed on direct appeal. The balance of the November 23, 2011 resentencing judgment is affirmed.

{¶ 11} Wherefore, the judgment of the Wood County Court of Common Pleas is hereby reversed, in part, and affirmed, in part. Appellant and appellee are ordered to split the costs of this appeal pursuant to App.R. 24.

Judgment reversed, in part,
and affirmed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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