

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 25099

Appellee

v.

ADOLPH R. BROWN

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 06 07 2588(A)

Appellant

DECISION AND JOURNAL ENTRY

Dated: November 3, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} A jury convicted Adolph Brown of trafficking in cocaine, possession of cocaine, possession of marijuana, possession of criminal tools, and illegal use or possession of drug paraphernalia, and the trial court sentenced him to six years in prison. Mr. Brown appealed, and this Court affirmed his convictions and sentence. Mr. Brown petitioned for post-conviction relief, but the trial court dismissed his petition, and this Court affirmed its decision. Mr. Brown then filed a motion to dismiss for lack of jurisdiction and a motion for new trial. In October 2009, the trial court denied Mr. Brown’s motion to dismiss and motion for new trial, but resentenced him because it had imposed the incorrect term of post-release control. Mr. Brown has appealed, arguing that the trial court incorrectly denied the motions to suppress he filed before trial, that his trial lawyer was ineffective, that there was insufficient evidence to support his trafficking conviction, that the trial court incorrectly denied his motion to dismiss and motion

for new trial, and that the trial court incorrectly imposed post-release control when it resentenced him. This Court affirms because Mr. Brown is unable to attack his convictions in this appeal, the trial court correctly denied his motion to dismiss and motion for new trial, and the court imposed the correct term of post-release control.

PRIOR APPEALS

{¶2} Mr. Brown's first assignment of error is that the trial court incorrectly denied the motion to suppress he filed on September 6, 2006. His second assignment of error is that the trial court incorrectly denied the motion to suppress he filed on January 26, 2007. His third assignment of error is that his trial lawyer was ineffective, and his fourth assignment of error is that there was insufficient evidence to support his trafficking conviction. Mr. Brown has argued that, although he raised these issues in his prior appeals, he may argue them in this appeal because his original sentence was void.

{¶3} In *State v. Harmon*, 9th Dist. No. 24495, 2009-Ohio-4512, this Court determined that, if a defendant's sentence is void because the trial court did not properly impose post-release control, he may raise assignments of error regarding his convictions following his resentencing, notwithstanding having pursued a prior direct appeal. *Id.* at ¶9. According to Mr. Brown, because the trial court did not correctly impose post-release control in its original sentencing entry, the entry was void.

{¶4} The State has argued, and we agree, that this case is distinguishable because, unlike in *Harmon*, the trial court's sentencing entry was not void. In *State v Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434, the Ohio Supreme Court concluded that sentences imposed after July 11, 2006, are not void just because the trial court failed to properly impose post-release control. *Id.* at ¶27. Mr. Brown has counter-argued that, because the defendant in *Singleton* was

sentenced before July 11, 2006, the Ohio Supreme Court's statements regarding sentences imposed after that date are dicta. In *State v. Fuller*, 124 Ohio St. 3d 543, 2010-Ohio-726, however, the Ohio Supreme Court applied *Singleton* to a case in which the defendant was sentenced after July 11, 2006. *Id.* at ¶1. We are obliged to follow its precedent on that issue. *State v. Culgan*, 9th Dist. No. 09CA0060-M, 2010-Ohio-2992, at ¶15.

{¶5} Because the trial court's original sentencing entry was not void, Mr. Brown may not reassert issues in this appeal that were or could have been decided in his prior appeals. *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St. 3d 402, 404-05 (1996). Mr. Brown's first, second, third, and fourth assignments of error are overruled.

MOTION FOR NEW TRIAL

{¶6} Mr. Brown's fifth assignment of error is that the trial court incorrectly denied his motion for new trial. He has argued that he is entitled to a new trial for the same reason he is entitled to relief on his first and second assignments of error.

{¶7} Under Rule 33(B) of the Ohio Rules of Criminal Procedure, a defendant has 14 days to move for a new trial after his verdict was rendered, unless his motion is made on account of newly discovered evidence or he establishes by clear and convincing proof that he was unavoidably prevented from filing his motion. Mr. Brown moved for a new trial based on his assumption that his original sentence was void. Because it was not void, and he has failed to establish that he was otherwise unavoidably prevented from filing his motion, we conclude that the trial court correctly denied his motion for new trial. Mr. Brown's fifth assignment of error is overruled.

MOTION TO DISMISS

{¶8} Mr. Brown's sixth assignment of error is that the trial court incorrectly denied his motion to dismiss for lack of jurisdiction. His argument is that, because his original sentence was void, the trial court waited too long following his trial to sentence him. Mr. Brown's argument fails for the same reason as his previous assignments of error. His original sentence was not void. Mr. Brown's sixth assignment of error is overruled.

POST-RELEASE CONTROL

{¶9} Mr. Brown's seventh assignment of error is that the trial court incorrectly imposed post-release control at his resentencing hearing. He has argued that the court incorrectly told him that he would be subject to post-release control for sentences he had already completed.

{¶10} Under Section 2967.28(B) of the Ohio Revised Code, "[e]ach sentence to a prison term for a . . . felony of the second degree . . . shall include a requirement that the offender be subject to a period of post-release control . . . after the offender's release from imprisonment." "For a felony of the second degree that is not a felony sex offense," the period is three years. R.C. 2967.28(B)(2). Under Section 2967.28(C), "[a]ny sentence to a prison term for a felony of the third, fourth, or fifth degree . . . shall include a requirement that the offender be subject to a period of post-release control of up to three years . . . , if the parole board . . . determines that a period of post-release control is necessary for that offender."

{¶11} "If an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last, as determined by the parole board or court." R.C. 2967.28(F)(4)(c). For Mr. Brown, the period of post-release control that will expire last is the one for trafficking of cocaine,

which is a mandatory three-year period because it is for a felony of the second degree. R.C. 2967.28(B)(2).

{¶12} At Mr. Brown's resentencing hearing, the trial court told Mr. Brown his sentence for each count and the amount of post-release control that would or could be imposed for each offense. It determined that, because his most serious conviction, for trafficking, was a felony of the second degree and all of his sentences were running concurrently, the post-release control periods for the other convictions were moot. It made sure that Mr. Brown understood the consequences of post-release control, telling him that, because he had not completed his sentence for trafficking, he would have three years of mandatory post-release control after he finished serving his sentences. Mr. Brown told the court that he understood that he was subject to a mandatory period of three years post-release control on his trafficking conviction. The court also wrote in its journal entry that, after Mr. Brown left prison, he would be on post-release control for a mandatory three-year period.

{¶13} The trial court correctly noted that, because Mr. Brown had been convicted of a felony of the second degree, the post-release control terms for the less serious convictions were irrelevant. R.C. 2967.28(F)(4)(c). It correctly concluded that the post-release control term for the second-degree felony was the term for all of the convictions and correctly wrote that in its journal entry. Accordingly, Mr. Brown has not demonstrated that the trial court incorrectly imposed post-release control on resentencing. His seventh assignment of error is overruled.

CONCLUSION

{¶14} Because Mr. Brown's original sentence was not void, he can not raise the same arguments in this appeal that he raised in his prior appeals. The trial court correctly imposed

post-release control, even though Mr. Brown has completed his sentence on some of his convictions. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

APPEARANCES:

JAMES K. REED, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellee.