

[Cite as *State v. Mcnamara*, 2018-Ohio-2880.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 17CA13
 :
 vs. :
 :
 ROBERT MCNAMARA, : DECISION & JUDGMENT ENTRY
 :
 :
 :
 :
 Defendant-Appellant. :

APPEARANCES:

Timothy Young, Ohio Public Defender, and Katherine A. Szudy, Assistant Public Defender, Columbus, Ohio, for appellant.

Judy C. Wolford, Pickaway County Prosecuting Attorney, Circleville, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:7-5-18
ABELE, J.

Robert McNamara, defendant below and appellant herein, appeals a Pickaway County Common Pleas Court judgment that overruled his motion to vacate his convictions and sentence.

Appellant assigns the following error for review:

“THE TRIAL COURT ERRED WHEN IT OVERRULED ROBERT MCNAMARA’S MOTION TO VACATE HIS VOID CONVICTION AND SENTENCE UNDER R.C. 2919.21(B). R.C. 2919.21(B); *STATE V. PITTMAN*, 150 OHIO ST.3D 113, 2006-OHIO-8314, 79

N.E.3D 531; *STATE V. NOLIN [SIC.]*, 141 OHIO ST.3D 454, 2014-OHIO-4800, 25 N.E.3D 1016.”

{¶1} On April 3, 2009, a Pickaway County Grand Jury returned an indictment that charged appellant with one count of nonsupport of dependents in violation of R.C. 2919.21(B), a fifth-degree felony. After appellant entered a guilty plea, the trial court: (1) sentenced appellant to serve twelve months of incarceration, to be served consecutively to Case Numbers 2009-CR-071, 2009-CR-103, and 2009-CR-180; and (2) notified appellant that he may be subject to a three year period of post release control. Subsequently, appellant filed a motion for judicial release. The trial court denied that motion.

{¶2} Some eight years later, appellant filed a motion to vacate void convictions and sentence on June 26, 2017. The trial court denied appellant’s request and noted that appellant did not timely file his petition. The court construed appellant’s motion as a petition for postconviction relief and held that the statute, in effect at the time of appellant’s conviction, authorized a court to consider a postconviction relief petition filed within 180 days after the expiration of the time for filing an appeal. R.C. 2953.21(A)(2). The court determined that appellant filed his petition beyond the 180 day time limit. Additionally, the trial court noted that appellant based his motion on *State v. Pittman*, 150 Ohio St.3d 113, 2016-Ohio-8314, 79 N.E.3d 531, but pointed out that *Pittman* has not been applied retroactively. As such, on July 31, 2017 the trial court concluded that appellant’s petition did not satisfy the requirements for a delayed petition for postconviction relief. This appeal followed.

{¶3} We first consider the proper standard of review. Generally, the “abuse of discretion” standard is used to review the dismissal of a petition for postconviction relief without a hearing.

State v. Waulk, 4th Dist. Ross No. 15CA3501, 2016-Ohio-5018, ¶ 4, citing *State v. Hicks*, 4th Dist. Highland No. 09CA15, 2010-Ohio-89, ¶ 10. Here, however, appellant asked the trial court to determine whether his conviction is void. The determination of whether a judgment is void is a question of law. *Blaine v. Blaine*, 4th Dist. Jackson No. 10CA15, 2011-Ohio-1654, ¶ 19; *see, also State v. Jones*, 9th Dist. Summit No. 26854, 2013-Ohio-3710, ¶ 6 (quoting *Blaine*). Appellate courts review questions of law under the de novo standard of review. *See State v. Blake*, 10th Dist. Franklin No. 10AP-992, 2011-Ohio-3318, ¶ 17.

{¶4} In the case sub judice, appellant pled guilty to one count of nonsupport of dependents in violation of R.C. 2919.21(B), a fifth-degree felony. That charge stemmed from appellant's nonpayment of child support from March 1, 2007 to March 1, 2009. Appellant subsequently filed a motion to vacate his conviction and sentence, but the trial court determined that appellant's petition is actually a motion for postconviction relief and had to be filed within 180 days after the expiration of the time for filing an appeal. Thus, the court concluded that appellant's petition is untimely.

{¶5} This court has held that courts may "recast irregular motions into whatever category is necessary to identify and to establish the criteria by which a motion should be evaluated." *State v. Eldridge*, 4th Dist. Scioto No. 13CA3584, 2014-Ohio-2250, ¶ 5; *State v. Sanders*, 4th Dist. Pickaway No. 13CA29, 2014-Ohio-2521, ¶ 6; citing *State v. Lett*, 7th Dist. Mahoning No. 09MA131, 2010-Ohio-3167, ¶ 15; *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12. Here, we agree with the trial court's conclusion that appellant filed his petition beyond the R.C. 2953.21(A) time requirements. Additionally, we also agree with the trial court's conclusion that the petition has no merit. R.C. 2919.21(B) provides, "No person shall abandon, or fail to provide

support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support.” The penalty section of R.C. 2919.21(B) provides: “If the offender previously has been convicted of or pleaded guilty to a violation of division (A)(2) or (B) of this section or if the offender has failed to provide support under division (A)(2) or (B) of this section for a total accumulated period of twenty-six weeks out of one hundred four consecutive weeks, whether or not the twenty-six weeks were consecutive, then a violation of division (A)(2) or (B) of this section is a felony of the fifth degree.” R.C. 2919.21(G)(1).

{¶6} Appellant argued that *State v. Pittman*, 150 Ohio St.3d 113, 2016-Ohio-8314, 79 N.E.3d 531, should apply here and the result is that his sentence is an illegal sentence for a void conviction. In *Pittman*, the Supreme Court of Ohio determined that a person is not subject to prosecution under R.C. 2919.21(B) for the nonpayment of an arrearage-only child support order when he or she has no current legal obligation to support an emancipated child. *Id.* at ¶ 22-23. The state, however, contends that because the Supreme Court did not indicate that *Pittman* should apply retroactively, it applies prospectively and is inapplicable to the case at bar.

{¶7} Appellant points out that S.M., born on April 8, 1989, reached 18 years of age on April 8, 2007. On August 6, 2007, S.M. also withdrew from high school, without graduating, and went to Tennessee. Thus, appellant reasons, because child support should have terminated on August 5, 2007, appellant did not fail to pay child support for more than 26 weeks under a valid order during the indictment period. After S.M. left high school, appellant had no obligation to pay child support and, at that point, he became subject to arrearage payments. Consequently, appellant argues that under *Pittman* his failure to make payments did not amount to a cognizable criminal offense and his

conviction and sentence should be deemed to be void.

{¶8} We recognize that the Ohio Supreme Court did determine that “a person is not subject to prosecution under R.C. 2919.21(B) for the nonpayment of a court’s order to pay a child-support arrearage when the person has no current obligation of support because the child who is the subject of the order is emancipated.” *Pittman* at ¶ 1. Because R.C. 2919.21(B) uses the present tense in the phrase “is legally obligated to support,” a person charged with a violation must be under a current obligation to provide support. *Id.* at ¶ 18. *Pittman* involved the nonpayment of an arrearage-only child support order, with no current legal obligation to support the emancipated child. However, in the case at bar the state asserts that this case is distinguishable from *Pittman* because this case is not an arrearage only case. Here, although S.M. reached 18 years of age on April 8, 2007 and withdrew from high school on August 5, 2007, the time frame for appellant’s failure to pay child support ran from March 1, 2007 to March 1, 2009. Consequently, appellant was obligated to pay support during the period of time that preceded the child’s emancipation.

{¶9} Once again, appellant asserts that the Ohio Supreme Court decision in *Pittman* renders his conviction void. The state, however, contends that “a void judgment is one that has been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act. Unlike a void judgment, a voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but the court’s judgment is invalid, irregular, or erroneous.” *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 27. “Any attempt by a court to disregard statutory requirements renders the attempted sentence a nullity or void.” *State v. Fischer*, 128 Ohio St.3d 92, 95, 2010-Ohio-6238, 942 N.E.2d 332.

{¶10} The state argues that because the trial court did have the authority to act at the time of

sentencing, its judgment is neither invalid, irregular, nor erroneous. The state notes that several courts, including the Supreme Court of Ohio, have held that a new judicial ruling may apply only to cases that are pending at the announcement date. *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, 819 N.E.2d 687; *State v. Smith*, 2d Dist. Montgomery No. 27294, 2017-Ohio-2684. Here, it is important to point out that appellant's case was not pending at the time that *Pittman* was decided. As the *Ali* court held, once a conviction becomes final and an accused has exhausted all appellate remedies, a new judicial ruling may not apply retroactively. *Id.*

{¶11} The Supreme Court of Ohio followed the *Ali* logic in *State v. Ketterer*, 140 Ohio St.3d 400, 2014-Ohio-3973, 18 N.E.3d 1199. In *Ketterer*, the defendant argued that his convictions for capital murder, aggravated robbery, and aggravated burglary should have merged at the time of sentencing in 2004. He based this argument on *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the case that redefined the test for allied offenses. The court concluded, however, that “[f]or purposes of retroactivity analysis, Ketterer’s convictions on the noncapital charges became final when this court issued its second decision, which occurred before *Johnson* was decided.” *Ketterer* at ¶ 13, citing *Ali v. State*, 104 Ohio St.3d 328 (2004). This court followed this precedent in *State v. Layne*, 4th Dist. Highland No. 11CA17, 2012-Ohio-1627. Layne challenged his conviction, based on *Johnson*, and claimed that his convictions should merge. However, this court held that “[a]ppellant’s underlying case was closed and there was nothing pending at the time *Johnson* was released. As such, the reasoning in *Johnson*, though current law, is inapplicable to the case sub judice. Accordingly, the law in effect at the time Appellant was originally sentenced must be applied.” *Layne* at ¶ 11.

{¶12} Appellant asserts that void judgments may be challenged at any time, and, in addition

to his reliance on *Pittman*, argues that his conviction and sentence are void because this scenario cannot be distinguished from *State v. Nolan*, 141 Ohio St.3d 454, 2014-Ohio-4800, 25 N.E.3d 1016. In *Nolan*, the court held that “the court of appeals correctly determined that it is impossible to purposely or knowingly cause an unintended death. Accordingly, we hold that attempted felony murder is not a cognizable crime in Ohio.” *Id.* at ¶ 10. Appellant points to an Eleventh District case that two years later applied *Nolan* and concluded that “[a]lthough the trial court had subject matter jurisdiction over the case, because attempted felony murder is not a cognizable crime in Ohio, the trial court lacked authority to sentence appellant and to enter an order of conviction on Count 2. Therefore, his conviction of that offense is void.” *State v. Bozek*, 11th Dist. Portage No. 2015-P-0018, 2016-Ohio-1305, ¶ 21; *see also State v. Brooks*, 8th Dist. Cuyahoga No. 102551, 2016-Ohio-489, ¶ 27. Here, however, we believe that appellant’s reliance on *Nolan* is misplaced. In *Nolan*, the court held that because attempted felony murder is not a recognized crime in Ohio, a conviction under that statute is void. *See also, State v. Sealey*, 11t Dist. Lake No. 2016-L-034, ¶ 34. However, in the case at bar appellant’s conviction was final prior to the *Pittman* decision and, once again, *Pittman* does not retroactively apply to his case.

Accordingly, based upon the foregoing reasons, we overrule appellant’s assignment of error and affirm the trial court’s judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Pickaway County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Hoover, P.J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

TOPICS & ISSUES

Trial court did not err in denying motion to vacate void convictions and sentence.