

[Cite as *State v. Cave*, 2021-Ohio-874.]

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. 20CA3921
 :
 vs. :
 :
 BARRY J. CAVE, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

Barry J. Cave, Marion, Ohio, pro se.

Shane A. Tieman, Scioto County Prosecuting Attorney, and Jay Willis, Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 3-10-21
ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment that overruled the request of Barry J. Cave, defendant below and appellant herein, to “correct or vacate” his sentence.

{¶ 2} Appellant assigns one error for review:

“TRIAL COURT ERRED WHEN IT DENIED APPELLANT’S
MOTION FOR RESENTENCING.”

This case history is taken directly from our prior decision in *State v. Cave*, 36 N.E.3d 732, 2015-Ohio-2233 (4th Dist.):

On March 15, 2013, appellant was indicted on four counts of trafficking in cocaine in

violation of R.C. 2925.03(A)(1), a fifth-degree felony (Counts Two, Three, Four, and Five); one count of trafficking in cocaine over 100 grams in violation of R.C. 2925.03(A), a first-degree felony, with an accompanying major drug offender specification (Count One); and one count of possessing criminal tools (a cell phone) in violation of R.C. 2923.24(A)/ (C), a fifth-degree felony (Count Six). The indictment also sought forfeiture of \$3,330, which appellant allegedly owned or possessed as a result of a felony drug offense or that appellant intended to use in the commission of a felony drug offense. Counts Two, Three, Four, and Five arose from a series of “controlled buys”, in which a confidential police informant allegedly purchased crack cocaine from the appellant at his house at 714 Brown Street, Portsmouth, Ohio. Counts One, Six, and the forfeiture specification arose after appellant's house was searched by law enforcement and a large quantity of crack cocaine, money, a cell phone, and drug paraphernalia were seized from the house.

Appellant pleaded not guilty to the charges and a jury trial was held on September 3 and 4, 2013. The confidential police informant did not testify at trial. However, Sergeant Joshua Justice of the Southern Ohio Drug Task Force testified, without objection from counsel, that on or about January 29, 2013, the informant stated, “they could buy crack cocaine off of Barry Cave.” [Tr. at 35.] According to Justice, the informant had agreed through the prosecutor's office to work off a misdemeanor charge in exchange for giving up a drug dealer. Sergeant Justice also testified that “this informant had gave us some estimates of how much dope they had seen with Barry Cave * * *.” [Tr. at 38.] Based on this information, the investigating officers decided to use the informant in a series of controlled buys. Sergeant Justice indicated that the informant, under his direction, contacted appellant via appellant's cellular phone on February 5, 2013, and ordered from appellant a half a gram of crack cocaine for \$50. Sergeant Justice listened to the phone call and testified that he recognized appellant's voice.

The State also utilized Sergeant Justice to introduce four recordings of the controlled buys. Sergeant Justice had procured the recordings by equipping the informant with an audio/video recording device. The jury heard and watched the four recordings; however, the court did not admit the recordings into evidence. The recordings, therefore, are not a part of the appellate record. We do have available, however, a transcript of the audio portions of the recordings. Sergeant Justice also provided a narration of the recordings, over the objections of defense counsel, while the recordings were played for the jury.

The first controlled buy occurred on February 5, 2013, following the informant's phone call to appellant. Sergeant Justice testified that in addition to wiring the informant with the recording device, he also provided the informant with a marked bill. The informant was also searched prior to the drug buy. While the recording apparently displayed a 6:14 p.m. recording time, Sergeant Justice clarified that the

buy actually occurred at 5:09 p.m. While we cannot actually see the recording, appellant agrees that the recording revealed him cutting a small portion of crack cocaine, placing it in a bag, and then giving the bag to the informant in exchange for cash. Stanton Wheasler, a forensic scientist with the Ohio Bureau of Criminal Identification and Investigation (“BCI & I”) testified that he weighed the contents of the bag and determined that the contents contained 0.5 grams of cocaine.

The second controlled buy occurred on February 7, 2013. The informant was wired with the recording device, given a marked bill, and searched prior to the buy. An officer purportedly appeared at the beginning of the recording and stated the date as February 7, 2013, and the time as 9:47 p.m. The recording time-stamp, however, apparently displayed a time of 11:20 p.m. The recording demonstrated appellant handling and bagging crack cocaine and giving the bag to the informant in exchange for money. Wheasler testified that he later determined the bag contained 0.2 grams of crack cocaine.

The third controlled buy occurred on February 11, 2013. The informant was given marked bills to make the purchase, wired with a recording device, and was searched prior to the buy. An officer appeared on the recording noting the date as February 11, 2013, and the time as 5:01 p.m. The recording, however, displayed a date of November 18, 2009, and a time of 1:24 a.m. The recording of this particular controlled buy does not show a drug exchange for money. Sergeant Justice testified, however, that when the informant returned from the residence he or she turned over a bag containing a white substance. Sergeant Justice also indicated that he recognized the appellant's voice on the recording. Wheasler testified that the contents of the bag were later determined to contain 0.3 grams of crack cocaine.

According to Sergeant Justice, the fourth controlled buy occurred on February 20, 2013, at 11:34 a.m. However, the date and time displayed on the video was apparently November 26, 2009, at around 8:00 p.m. The informant was searched prior to the drug buy, wired with a recording device, and given a \$50 marked bill. The video showed appellant smoking crack cocaine, exchanging crack cocaine for money, and also handling a large quantity of crack cocaine. Wheasler confirmed that the substance exchanged in the buy contained 0.5 grams of crack cocaine.

On the same day as the fourth controlled buy, Sergeant Justice secured a no-knock search warrant for the residence at 714 Brown Street, Portsmouth, Ohio. When executing the search warrant a total of five people were located in the residence, including three women, the appellant, and the appellant's brother. Officers also located over 100 grams of crack cocaine, cash (including the \$50 marked bill used in the earlier drug buy), a cell phone, and drug paraphernalia in the home. According to Justice, the occupants of the home were handcuffed, placed in the living room, and Mirandized. In response to a question from officers, appellant stated that the drugs

and cash belonged to him.

In addition to Sergeant Justice's testimony, the four recordings of the controlled buys, and Wheasler's testimony, the State also introduced the following evidence: the testimony of three other investigating officers, two maps, approximately 30 photographs, one cell phone, packages of crack cocaine, one ring box, one monitor, two bundles of cash, several BCI & I reports, one coat, and one inventory sheet. However, none of the exhibits were formally offered or admitted into evidence.¹

Ultimately, the jury returned guilty verdicts on all charges. However, the jury was precluded from deliberating on the forfeiture specification, which was eventually decided by the trial court at sentencing. On Count One, appellant was sentenced to a mandatory eleven-year term of imprisonment. On Counts Two, Three, Four, and Five, appellant was sentenced to a ten-month term of imprisonment on each count, with all sentences to run consecutively to each other but concurrent to Count One. On Count Six, appellant was sentenced to a 10-month term of imprisonment, also ordered to run concurrent to Count One. Thus, appellant received an aggregate prison sentence of eleven years. Additionally, appellant's license was suspended for one year; and the money seized during the execution of the search warrant was ordered forfeited to the State.²

State v. Cave, supra, at ¶ 2-11.

{¶ 3} This court affirmed in part, reversed in part, and remanded the cause to the trial court to vacate the \$3,350 forfeiture award and to order the return of the funds to appellant. *Cave* at ¶ 43.

{¶ 4} On March 30, 2020, appellant filed a “Motion to Correct Illegal Sentence” and argued that the original judgment is void because the trial court did not impose a fine of \$7,500, which appellant argued is mandatory. On June 18, 2020, the trial court denied appellant’s motion and determined that the request is an untimely postconviction petition pursuant to *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997). Thus, res judicata barred appellant’s petition because

¹ The appellate record does contain, however, copies of the maps, photographs, BCI & I reports, and inventory sheet.

² We note that the judgment entry states that \$3,350 is to be forfeited. However, the indictment sought forfeiture of \$3,330, and the trial court announced forfeiture of \$3,330 at the sentencing hearing.

appellant could have raised the issue on direct appeal. This appeal followed.

{¶ 5} In appellant's sole assignment of error, he asserts that the trial court erred when it denied his motion for resentencing. The determination of whether a judgment is void is a question of law. *State v. J.M.*, 148 Ohio St.3d 113, 2016-Ohio-2803, 69 N.E.3d 642, ¶ 9, citing *Ceccarelli v. Levin*, 127 Ohio St.3d 231, 2010-Ohio-5681, 938 N.E.2d 342, ¶ 8; *State v. McNamara*, 4th Dist. Pickaway No. 17CA13, 2018-Ohio-2880 at ¶ 4; *Blaine v. Blaine*, 4th Dist. Jackson No. 10CA15, 2011-Ohio-1654.

{¶ 6} Appellant contends that his drug trafficking offense carries a mandatory fine pursuant to R.C. 2925.03(D)(1):

In addition to any prison term authorized or required * * * the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of section 2929.18 of the Revised Code unless, as specified in that division, the court determines that the offender is indigent.

As appellant indicates, R.C. 2929.18(B)(1) sets forth the procedure:

For a first, second, or third degree felony violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code, the sentencing court shall impose upon the offender a mandatory fine of at least one-half of, but not more than, the maximum statutory fine amount authorized for the level of the offense pursuant to division (A)(3) of this section. If an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine upon the offender.

{¶ 7} Appellant thus argues that, because the trial court failed to impose a mandatory fine, his sentence is void. In *State v. Moore*, 135 Ohio St.3d 151, 2012-Ohio-5479, 985 N.E.2d 432, appellant contends that the Supreme Court of Ohio held that “[a] trial court’s failure to include the mandatory fine required by R.C. 2925.11(E)(1)(a) and 2929.18(B)(1), when an affidavit of indigency

is not filed with the court prior to the filing of the trial court's journal entry of sentencing, renders that part of the sentence void." *Moore*, syllabus. Further, the court held that "[r]esentencing is limited to the imposition of the mandatory fine." *Id.*

{¶ 8} This court examined the issue appellant raises in the case sub judice in *State v. Smith*, 4th Dist. Scioto No. 14CA3657, 2015-Ohio-841. In *Smith*, the defendant filed a motion for resentencing and claimed that his judgment was void because the trial court failed to impose a mandatory fine and a mandatory driver's license suspension. The state agreed that the trial court should modify Smith's sentence to include the missing mandatory sanctions. The trial court acknowledged its error, but denied Smith's motion. *Smith, supra*, ¶ 1. This court cited *State v. Moore, supra*, at ¶ 14 for the proposition that, when a trial court fails to include a mandatory fine or driver's license suspension as part of a defendant's sentence, that part of the sentence is void. *Smith* at ¶ 8. Following *Moore*, this court reversed the judgment that denied Smith's motion for resentencing and remanded the cause for resentencing limited to the imposition of the mandatory fine and driver's license suspension. *Smith* at ¶ 13. We further concluded that res judicata applied to the other parts of Smith's conviction and sentence, citing *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 7, quoting *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 27, 40 ("the void sanction 'may be reviewed at any time, on direct appeal or by collateral attack * * * but 'res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the unlawful elements of the ensuing sentence.'"). *Smith* at ¶ 9.

{¶ 9} However, as appellee points out, after this court decided *Smith*, the Supreme Court of Ohio in *State v. Henderson*, ___ Ohio St.3d ___, 2020-Ohio-4784, ___ N.E.3d ___, held that "sentences

based on an error, including sentences in which a trial court fails to impose a statutorily mandated term, are voidable if the court imposing the sentence has jurisdiction over the case and the defendant.” *Id.* at ¶ 1. *Henderson* also highlighted the court’s recent decision in *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, that signaled a return to the traditional view of a void sentence. *Henderson* at ¶ 25. The *Henderson* court explained that, under the court’s realigned precedent, “[a] judgement or sentence is void only if it is rendered by a court that lacks subject-matter jurisdiction over the case or personal jurisdiction over the defendant. If the court has jurisdiction over the case and the person, any error in the court’s exercise of that jurisdiction is voidable.” *Id.* at ¶ 34.

{¶ 10} In *Henderson*, the trial court erred both at the sentencing hearing and in its sentencing entry by sentencing Henderson to “15 years” rather than the proper indefinite sentence that included a life tail (a sentence that is indefinite in length, beginning with the mandatory minimum term the trial court imposes and extending up to a maximum term of life in prison; *see State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110, ¶ 22). Although *Henderson* concluded that no dispute exists whether the trial court issued an unlawful sentence, the court held that because the sentencing error rendered the sentence voidable, the attempt to correct the error in a postconviction motion for resentencing was improper. *Henderson* at ¶ 39-40. Thus, the court enforced the trial court’s original definite sentence. *Id.* at ¶ 44.

{¶ 11} Therefore, we indicate above, the recent decisions in *Harper* and *Henderson* concluded that neither the state nor the defendant can challenge a voidable sentence through a postconviction motion. *Henderson* at ¶ 43. In *State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304, 679 N.E.2d 1131, the Supreme Court interpreted R.C. 2953.21(A)(1) and held,

“[w]here a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21.” *Reynolds*, syllabus. In *Reynolds*, the court examined a “Motion to Correct or Vacate Sentence” and deemed it a postconviction motion.

{¶ 12} Consequently, because appellant’s “Motion to Correct Illegal Sentence” is a postconviction motion, *Henderson* requires us to treat the trial court’s sentencing error as voidable, rather than void, and instructs that appellant may not challenge the sentencing error through a postconviction motion. Therefore, res judicata bars appellant’s motion to correct sentence because he could have raised the issue on direct appeal.

{¶ 13} 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 Scioto County Common Pleas Court to carry this judgment into execution.

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

Smith, P.J. & Hess, 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.