[Cite as *State v. Knuckles*, 2015-Ohio-2840.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. RODNEY KNUCKLES Appellant	C.A. No. 27571 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE Nos. CR 10 04 1130 CR 12 03 0729

DECISION AND JOURNAL ENTRY

Dated: July 15, 2015

WHITMORE, Judge.

{¶1} This appeal arises from orders of the Summit County Court of Common Pleas in two cases, CR 10-04-1130 and CR 12-03-0729, denying Appellant Rodney Knuckles' "Motion to Vacate Void Sentence" (the "Motion") filed in both actions. We affirm.

I

{¶2} In CR 10-04-1130, Mr. Knuckles pled guilty to burglary in violation of R.C. 2911.12(A)(3), a felony of the third degree, in October 2010. The trial court sentenced him to five years of imprisonment, suspended, with two years of community control. In April 2012, Mr. Knuckles pled guilty to violating the terms of his community control, and was sentenced to an additional two years of community control with all other terms of his sentence remaining in full effect. A few weeks later, Mr. Knuckles again violated the terms of his community control and pled guilty to the charges. In July 2012, the trial court sentenced him to a definite period of five years of imprisonment to run concurrently with the sentence imposed in CR 12-03-0729

(discussed below). Mr. Knuckles did not appeal from the October 2010, April 2012, or July 2012 judgment entries.

{¶3} In CR 12-03-0729, Mr. Knuckles pled guilty to breaking and entering, a felony of the fifth degree, and was placed on two years community control by court entry in April 2012. Mr. Knuckles violated the community control, and was sentenced in July 2012 to 12 months in prison to run concurrently with the five-year prison sentence in CR 10-04-1130. Mr. Knuckles did not appeal from the April 2012 or July 2012 entries.

{¶4} In two separate appeals from CR 10-04-1130, this Court affirmed the trial court's denials of Mr. Knuckles' post-sentence motions to: (1) withdraw his guilty plea based on manifest injustice; and (2) correct an improper sentence pursuant to Crim.R. 36. In both instances we affirmed, in part, because Mr. Knuckles could have raised the issues brought in his post-sentence motions in a timely direct appeal, but did not do so. Thus, the issues were barred by res judicata. *State v. Knuckles*, 9th Dist. Summit No. 26830, 2013-Ohio-4024, ¶ 8; *State v. Knuckles*, 9th Dist. Summit No. 26801, 2013-Ohio-4173, ¶ 10.

{¶5} Following his appeals, Mr. Knuckles filed a motion to vacate void sentence in each of the underlying criminal cases. He argued that his sentences to community control in October 2010 and April 2012 are void because the trial court did not order a presentence investigation report in violation of R.C. 2951.03(A)(1) and Crim.R. 32.2.

{¶6} The trial court denied Mr. Knuckles' Motion, holding that his claims were barred by res judicata. Mr. Knuckles now appeals, raising two assignments of error for our review. We will consider both assignments of error together for ease of analysis.

II

Assignment of Error Number One

> THE TRIAL COURT ERRED WHEN IT VIOLATED THE REQUIRED STATUTORY SENTENCNG MANDATES PURSUANT TO R.C. 2951.03(A)(1) AND CRIM. R. 32.2. WHEN IT PLACED APPELLANT ON COMMUNITY CONTROL WITHOUT FIRST ORDERING AND CONCERDING [sic] A PRE-SENTENCE INVESTIGATION REPORT.

Assignment of Error Number Two

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO VACATE VOID SENTENCE BY RES-JUDICATA AND COLLATERAL ESTOPPEL.

{¶7} There is no dispute that the trial court was required by R.C. 2951.03(A)(1) and Crim.R. 32.2 to order and consider a presentence investigation report prior to imposing community control for a felony offense. *State v. Amos*, 140 Ohio St.3d 238, 2014-Ohio-3160, ¶ 14-15. The record does not demonstrate that the trial court considered a presentence investigation report before sentencing Mr. Knuckles to community control. Accordingly, the trial court acted contrary to R.C. 2951.03(A)(1) and Crim.R. 32.2.

{¶8} Mr. Knuckles argues that, because the trial court acted contrary to law in imposing his sentences, they were void, and not merely voidable. Because a void sentence is treated as if it never was issued, res judicata does not apply, *State v. Burden*, 9th Dist. Summit No. 27298, 2014-Ohio-4456, ¶ 6, and it may be challenged at any time on direct appeal or by collateral attack. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 40. We disagree with Mr. Knuckles' argument that his sentences were void.

{¶9} The Ohio Supreme Court recently held that a trial court that fails to order a presentence investigation is not authorized to place an offender on a community-control sentence. *State v. Amos*, 140 Ohio St.3d 238, 2014-Ohio-3160, ¶ 14-15 (O'Neill, J., with three

Justices concurring in judgment only). The Court did not conclude that a community control sentence imposed in violation of R.C. 2951.03(A)(1) is void. Instead, the Court held that "A trial court acts contrary to law when it imposes a sentence of one or more community-control sanctions on a felony offender without first ordering and reviewing a presentence investigation report." *Amos* at ¶16.

{¶10} The Court's reference to the trial court's action being "contrary to law" does not suggest that the sentence is void. Rather, it is the standard that the Eighth District applied in the companion cases before the Supreme Court, *State v. Richmond*, 8th Dist.No. 97531, 2012-Ohio-3946 and *State v. Amos*, 8th Dist.No. 97719, 2012-Ohio-3954. Both *Amos* and *Richmond* reviewed the sentences according to the test set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, which requires, as a first step, to determine whether the trial court complied with the applicable sentencing statues to conclude whether the sentence is *contrary to law*. By affirming *Richmond*, and reversing *Amos*, the Supreme Court held that a sentencing court acts contrary to law when it imposes a community control sentence without a presentence investigation. In simpler terms, the sentencing court committed an error that results in a voidable, not a void, judgment.

{¶11} Neither the Supreme Court nor the Eighth District concluded that either sentence was void. A trial court's failure to order a presentence investigation report in violation of R.C. 2951.03(A)(1) makes the judgment imposing sentence merely voidable, rather than void. And the voidable judgment is subject to the limitations of res judicata. *See Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238 at ¶ 40.

{¶12} Because the trial court's violation of R.C. 2951.03(A)(1) made Mr. Knuckles' sentences imposing community control voidable, and not void, he was required to challenge his

sentences on direct appeal. He did not appeal from the judgment entries sentencing him to community control in 2010 and 2012. Thus, Mr. Knuckles' claim that his sentences to community control were contrary to law is barred by res judicata. Mr. Knuckles' assignments of error are overruled.

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(C). 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.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
SCHAFER, J.
CONCUR.

APPEARANCES:

RODNEY KNUCKLES, pro so, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.