

[Cite as *State v. Love*, 2018-Ohio-1140.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	CASE NO. 17 MA 0039
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	OPINION
	)	
CHRISTOPHER LOVE,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 1999 CR 645 A
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JUDGMENT:	Affirmed.
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APPEARANCES:

For Plaintiff-Appellee:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. Ralph M. Rivera Assistant Prosecuting Attorney 21 West Boardman St., 6 <sup>th</sup> Floor Youngstown, Ohio 44503
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For Defendant-Appellant:	Christopher Love, <i>pro se</i> #440-875 5701 Burnett Road P.O. Box 901 Leavittsburg, Ohio 44430
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JUDGES:

Hon. Carol Ann Robb  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite

Dated: March 16, 2018



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ROBB, P.J.

{¶1} Defendant-Appellant Christopher Love appeals the decision of the Mahoning County Common Pleas Court denying his motion to vacate his conviction as void on the basis of subject matter jurisdiction. Appellant claimed an internal inconsistency between the caption and the body of the indictment rendered his aggravated murder conviction void. The court dismissed the motion to vacate a void judgment and found the motion untimely under the postconviction relief statutes. For the following reasons, the trial court's judgment is affirmed.

#### STATEMENT OF THE CASE

{¶2} On July 15, 1999, a direct presentment joint indictment was filed against Appellant and a co-defendant. The body of the indictment, located on the second page, charged: "on or about July 5, 1999 at Mahoning County, [the named defendants] did purposely and with prior calculation and design, cause the death of Olivia Hubbert. In violation of Ohio Revised Code Section 2903.01(A)(F), a Felony \* \* \*." Division (F) of the cited statute (R.C. 2903.01) states whoever violates this section is guilty of aggravated murder and shall be punished as provided in R.C. 2929.02. Division (A) sets forth the elements as quoted in the indictment. The caption of the indictment, located on the first page, stated, "MURDER R.C. 2903.02(A)(B) Felony/Life"; this statute defines the offense of murder.

{¶3} Before convicting Appellant of aggravated murder, the jury heard the following testimony. Appellant approached the victim on a sidewalk near the Victory Estates housing projects in Youngstown. The co-defendant had just been involved in a physical altercation with the victim, but this appeared to be over. Nevertheless, Appellant punched the victim hard in the face, which knocked her out. He then repeatedly kicked, stomped, and jumped on her; he stood on her at one point pronouncing he was "the king of this mountain." Appellant carried the unconscious victim who was breathing with great difficulty; after a short distance, he threw her to the ground. He then carried her to her apartment and left her there where she was found dead with her pants pulled down to her ankles and her shirt pulled up to her neck. The victim's cause of death was asphyxia due to beating with strangulation; the victim had a broken hyoid bone and broken cartilage in her neck.

{¶14} Appellant's shoes tested positive for blood. Appellant testified he approached the victim and co-defendant who were arguing. He said the victim yelled at him causing spit to land on his face. This prompted him to push the victim in the face which resulted in her falling to the ground. Appellant claimed it was the co-defendant who then "started kicking the hell out of her." He stated he did not participate in kicking the victim. He admitted he carried the victim but said he did not mean to drop her. He thereafter helped carry the victim to her apartment.

{¶15} The court provided jury instructions on aggravated murder, murder, and involuntary manslaughter. The jury found Appellant guilty of aggravated murder. The co-defendant was acquitted. At the sentencing hearing, defense counsel argued in support of a motion for new trial or in the alternative modification of the verdict to a lesser offense. He argued the state failed to prove prior calculation and design (for aggravated murder); he alternatively argued the state failed to prove purpose (for murder) for an amendment of the verdict to involuntary manslaughter.

{¶16} The court denied his motion and recited: "The Court finds the defendant was found guilty by a jury of his peers of aggravated murder, a violation of Section 2903.02(A), and that on or about the 5th day of July, 1999, at Mahoning County, Ohio, Christopher Love, also known as Christopher Loma, did purposely, and with prior calculation and design, cause the death of Olivia Hubbert." The statute recited in this portion of the transcript was the murder statute instead of the aggravated murder statute, but the quoted elements were those corresponding to aggravated murder. *Compare* R.C. 2903.02(A) ("No person shall purposely cause the death of another"). The court thereafter announced the sentence by stating: "It is hereby ordered that the defendant serve a term of life in prison for aggravated murder with parole eligibility after 20 years in accordance with Section 2929.03(A)." This cited statute provided for a mandatory life sentence with parole eligibility after 20 years for an aggravated murder conviction. See Former R.C. 2929.03(A) (if the indictment did not contain specifications for aggravating circumstances, sexual motivation, or sexually violent predator). See *also* R.C. 2929.02, citing R.C. 2929.03.

{¶17} Both of these quoted statements were repeated in the trial court's November 27, 2002 sentencing entry. Appellant filed a timely direct appeal. The

transcripts were filed in this court on February 3, 2004, starting the time for a timely postconviction relief petition. Appellant was represented by a different attorney on appeal who raised twelve assignments of error. The trial court's judgment was affirmed by this court. *State v. Love*, 7th Dist. No. 02 CA 245, 2006-Ohio-1762.

{¶18} On October 31, 2008, Appellant filed a motion to vacate a void judgment for lack of subject matter jurisdiction, which the trial court overruled on November 10, 2008. (The court ordered the clerk to serve the defendant with the judgment, but the docket does not evince service by the clerk.) In 2010, Appellant filed a motion seeking to have his sentence declared void as impermissible by statute, claiming the charge and conviction should be construed as murder and he should be resentenced to fifteen years to life; he filed another sentencing motion in 2011. These two motions were never addressed.

{¶19} On February 2, 2017, Appellant filed the motion at issue in this appeal. He called it a motion to vacate a void judgment for lack of subject matter jurisdiction. He argued a defendant cannot be charged with one offense and convicted of a different offense, citing the Ohio Constitution, Article I, Section 10. He claimed the indictment failed to adequately inform him he was charged with aggravated murder (even though the body of the indictment set forth the elements of this offense and cited the aggravated murder statute) because the caption stated only murder and cited the murder statute. He pointed out the trial court at sentencing said he was convicted of the offense of aggravated murder and set forth the elements for aggravated murder but cited the murder statute. He claimed his attorney, the co-defendant's attorney, and the prosecution all filed documents in the years prior to trial mentioning the offense of murder, suggesting they did not know what charge he was facing.

{¶10} Contrary to the latter contention, the record demonstrates the parties were aware of the charge. At voir dire: the prosecutor advised the potential jurors the defendants were charged with aggravated murder involving purpose to cause the death with prior calculation and design (Tr. 23); the co-defendant's attorney explained the state had to prove he purposely and with prior calculation and design caused the death (Tr. 276) and acknowledged the charge was aggravated murder (Tr. 286); and

Appellant's attorney explained the state had to "prove each and every element of the charge against my client, which is aggravated murder" (Tr. 302) and said those elements were "with prior calculation and design, purposely caused the death \* \* \*." (Tr. 320). References to the offense of aggravated murder and its elements were made throughout trial by all parties with no objections. (Tr. 392, 1231-1231, 1236-1237, 1282). For instance, Appellant filed a motion for acquittal based on the sufficiency of the evidence on prior calculation and design without protesting any lack of notice due to the indictment's caption. (Tr. 1122). Likewise, no objections were entered to charging the jury on aggravated murder. (Tr. 1302-1307).

{¶11} On February 13, 2017, the trial court issued a judgment stating: "The Pro Se Motion to Vacate a Void Judgment for Lack of Subject Matter Jurisdiction filed by the Defendant on the 2nd day of February, 2017 is hereby **dismissed**. The Motion was untimely filed pursuant to R.C. 2953.21 and 2953.23." (Emphasis original). (The clerk noted service of this judgment on Appellant.) Appellant filed a timely notice of appeal. He filed his brief in November 2017, and the state responded.

#### ASSIGNMENT OF ERROR

{¶12} Appellant's sole assignment of error provides:

"The Trial Court erred in dismissing Defendant-Appellant's Motion to Vacate a Void Judgment for Lack of Subject Matter Jurisdiction."

{¶13} Appellant argues a judgment is void if the trial court lacked subject matter jurisdiction and a void judgment can be attacked at any time without regard to waiver principles. He emphasizes a motion to vacate a void judgment due to lack of subject matter jurisdiction is distinct from a postconviction relief petition and is not subject to the statutes providing for a timely petition and the requirements for an untimely petition.

{¶14} The state responds by quoting from the postconviction relief statute: "Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States \* \* \* may file a petition in the

court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief.” R.C. 2953.21(A)(1). There are time deadlines for filing this petition. Under the prior version of the statute, a petition had to be filed no later than 180 days after the date the trial transcripts were filed in the court of appeals in the direct appeal. See Former R.C. 2953.21(A)(2) (unless no direct appeal was filed, in which case the time started from the day the time expired for filing the appeal). Effective March 23, 2015, the number of days changed from 180 to 365. R.C. 2953.21(A)(2).

**{¶15}** As further stated in R.C. 2953.21(A)(2), there is an exception provided in R.C. 2953.23 for an untimely petition. Pertinent to this case, R.C. 2953.23(A)(1) provides a court may not entertain an untimely petition unless: (a) the petitioner shows he was unavoidably prevented from discovering the facts upon which he must rely to present the claim for relief, or after the time expired, the United States Supreme Court recognized a new federal or state right that applies retroactively to his situation and the petition asserts a claim based on that right; and (b) the petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found him guilty of the offense.

**{¶16}** The state points out Appellant filed his motion 13 years after the trial transcripts were filed in the direct appeal. The state urges Appellant failed to make the statutory showings or even allege his petition meets the requirements necessary for filing an untimely postconviction relief petition. Appellant does not contend otherwise. Nor does Appellant contest the state’s observations that: he relies on items apparent in the trial record; he could have raised his arguments on direct appeal; and he failed to raise the argument in his direct appeal.

Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment.

*State v. Perry*, 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967). “Where defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence dehors the record, res judicata is a proper basis for dismissing defendant's petition for postconviction relief.” *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982), syllabus. In accordance, the state concludes Appellant’s argument is not only untimely but is also barred by res judicata.

{¶17} Appellant does not contest that his argument could have been raised at trial and in the direct appeal of his conviction. Appellant is unconcerned with the general legal principles and statutory requirements associated with a postconviction relief petition and focuses on the exception or alternative available where a judgment is void (as opposed to voidable) for a lack of subject matter jurisdiction. Outlining distinct options, he quotes: “Ohio's Criminal Rules and statutes provide for the direct review of criminal judgments through appeal, and collateral attacks through postconviction petitions, habeas corpus, and motions to vacate.” *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, ¶ 44.

{¶18} The authority to vacate a void judgment is “an inherent power possessed by Ohio courts.” *Patton v. Diemer*, 35 Ohio St.3d 68, 518 N.E.2d 941 (1988), paragraph four of syllabus. See also *Lingo*, 138 Ohio St.3d 427 at ¶ 48. A judgment rendered by a court lacking subject matter jurisdiction is void ab initio. *Id.* at paragraph three of the syllabus; *State v. Wilson*, 73 Ohio St.3d 40, 44, 652 N.E.2d 196 (1995) (general division lacked subject matter jurisdiction to convict where transfer from the juvenile court never occurred), citing *Patton*, 35 Ohio St.3d 68 at paragraph three of syllabus and *Perry*, 10 Ohio St.2d 175 at paragraph five of syllabus. See also *State ex rel. Johnson v. Timmerman–Cooper*, 93 Ohio St.3d 614, 617, 757 N.E.2d 1153 (2001) (when a judgment is void for lack of subject matter jurisdiction, habeas corpus can be an appropriate remedy despite the availability of appeal).

{¶19} When a judgment is void ab initio, the issue can be raised at any time. *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 17 (describing a common law motion to vacate for lack of subject matter jurisdiction),



citing *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11; *Lingo*, 138 Ohio St.3d 427 at ¶ 44 (“A void judgment is a nullity and open to collateral attack at any time.”). In other words, this inherent power of a court is not subject to a time limitation. Furthermore, the doctrine of res judicata can be surmounted where a judgment is void for lack of subject matter jurisdiction. See *Kuchta*, 141 Ohio St.3d 75 at ¶ 17; *Wilson*, 73 Ohio St.3d at 44-45, fn. 6 (lacking subject matter jurisdiction cannot be defeated by res judicata, waiver, or lack of prejudice); *Perry*, 10 Ohio St.2d at 178-79 (prefacing the res judicata bar with a requirement that the judgment of conviction was rendered by a court with subject matter jurisdiction).

{¶20} Appellant suggests the trial court’s statement that his motion was untimely under the postconviction relief statutes shows the court was unaware it had power to vacate a void judgment without regard to the time requirements of these statutes. As Appellant assumes the trial court did not consider whether his argument established his conviction was void, his appellate brief does not address the merits of the motion he filed in the trial court. Instead, he concludes we should remand to the trial court with orders to rule on the merits of his motion.

{¶21} However, a court faced with a motion filed after a conviction can proceed to analyze the motion under the postconviction relief statutes where the defendant’s voidness argument fails. Disposal of a defendant’s voidness argument can be found implicit in the dismissal of a motion to vacate a void judgment. Additionally, the trial court here specifically recognized it was dismissing a motion to vacate a void judgment for the lack of subject matter jurisdiction. In a separate sentence, the court found the motion untimely under the statutes governing postconviction relief petitions. The trial court implicitly disagreed with Appellant’s contention that the court lacked subject matter jurisdiction to convict him of aggravated murder and additionally found the motion did not qualify for consideration as an untimely postconviction relief petition. The trial court’s use of the word “dismissed” does not imply the court failed to recognize Appellant’s argument. Furthermore, an appellate court can review an argument presented below that a conviction is void even if the trial court overlooked the argument or believed even a void judgment is subject to statutory time limits.

{¶22} As such, Appellant should have fully briefed the law supporting the merits of his motion to vacate filed in the trial court. We do notice Appellant's brief refers to Article I, Section 10 of the Ohio Constitution, which provides: "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury." This guarantees the essential facts constituting the offense to be tried will be found in the indictment issued by the grand jury. *State v. Pepka*, 125 Ohio St.3d 124, 2010-Ohio-1045, 926 N.E.2d 611, ¶ 14. Pursuant to Crim.R. 7: the indictment's statement of a public offense "may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged"; each count "shall state the numerical designation of the statute that the defendant is alleged to have violated"; "[e]rror in the numerical designation or omission of the numerical designation shall not be ground for dismissal of the indictment or information, or for reversal of a conviction, if the error or omission did not prejudicially mislead the defendant"; the court can strike surplusage; and the court can amend an indictment at any time if it does not change the name or identity of the crime charged. Crim.R. 7(B)-(D).

{¶23} In a direct appeal of a conviction, a court rejected an argument of improper amendment where the body of the indictment correctly set forth the elements and degree of the offense but the caption contained a typographical error stating a lower degree of felony. *State v. Hughes*, 4th Dist. No. 08CA19, 2010-Ohio-2969, ¶ 23 (finding no objection or prejudice). Even an indictment which does not contain all the essential elements of an offense may be amended to include an omitted element if the name or the identity of the crime is not changed and the defendant was not misled or prejudiced. *State v. O'Brien*, 30 Ohio St.3d 122, 508 N.E.2d 144 (1987), paragraph two of syllabus. Here, the body of the indictment contained the essential elements of aggravated murder and cited the corresponding statute.

{¶24} Regardless, "[t]he fact that the return of an indictment to charge one with a crime is a constitutional right does not prevent its waiver. Constitutional rights,

as any other rights, may be waived.” *Stacy v. Van Coren*, 18 Ohio St.2d 188, 190, 248 N.E.2d 603 (1969). For instance, a failure to timely object to a defect in an indictment waives all but plain error on direct appeal. *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, paragraph three of syllabus, overruling *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917. In *Whitt*, the court found an unauthorized amendment would not deprive the trial court of subject matter jurisdiction and res judicata applies if the issue could have been raised on direct appeal. *State v. Whitt*, 5th Dist. No. 2017CA0007, 2017-Ohio-7549, ¶ 7, 10-11. See also *State v. Ford*, 9th Dist. No. 26480, 2012-Ohio-4384, ¶ 5-6. The Supreme Court regularly rejects arguments from habeas defendants who claim the trial court lacked subject matter jurisdiction due to a deficient indictment. *Payne v. Jeffreys*, 109 Ohio St.3d 239, 2006-Ohio-2288, 846 N.E.2d 1248, ¶ 5 (validity and sufficiency of the indictment must be raised on direct appeal); *VanBuskirk v. Wingard*, 80 Ohio St.3d 659, 660, 687 N.E.2d 776 (1998); *In re Bryant*, 171 Ohio St. 16, 167 N.E.2d 500 (1960) (where a prisoner sought release by habeas corpus on the ground the indictment did not charge an offense, the Court concluded the allegation did not implicate subject matter jurisdiction).<sup>1</sup>

{¶25} A defendant cannot couch his arguments in subject matter jurisdiction language in order to avoid res judicata principles and statutory time requirements for a postconviction relief petition. Merely because a defendant discovers (or believes he discovered) an error in his criminal case does not make the conviction void. The general term “jurisdiction” can lead to confusion as it has been used to refer to various distinct concepts, including jurisdiction over the subject matter, jurisdiction over the person, and jurisdiction over a particular case. *Kuchta*, 141 Ohio St.3d 75 at ¶ 18. “Subject-matter jurisdiction is the power of a court to entertain and adjudicate a particular class of cases. \* \* \* If a court possesses subject-matter jurisdiction, any error in the invocation or exercise of jurisdiction over a particular case causes a

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<sup>1</sup> Defendants also often argue they were not properly indicted for offenses after pleading guilty; in an attempt to avoid the state’s waiver argument, they argue the issue is jurisdictional and can be raised at any time. This argument is regularly rejected. *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, 844 N.E.2d 307, ¶ 73; *Midling v. Perrini*, 14 Ohio St.2d 106, 107, 236 N.E.2d 557 (1968) (holding defendant cannot collaterally attack conviction because indictment fails to state an essential element and prior cases should have used the word “voidable” instead of “void”).

judgment to be voidable rather than void.” *Id.* at ¶ 19. “[T]he court of common pleas is a court of general jurisdiction, with subject-matter jurisdiction that extends to ‘all matters at law and in equity that are not denied to it.’” *Id.* at ¶ 20.

{¶26} Appellant’s 1999 indictment charges an offense. The indictment states the essential elements of aggravated murder by tracking the language of the aggravated murder statute and provides the numerical designation of the statute defining aggravated murder and its punishment. It charged Appellant “did purposely and with prior calculation and design, cause the death of Olivia Hubbert. In violation of Ohio Revised Code Section 2903.01(A)(F), a Felony \* \* \*.” Therefore, an indictment issued by the grand jury provided the essential facts constituting the offense to be tried. Appellant was tried by jury who convicted him of aggravated murder in 2002, even upon being provided with the lesser options of murder and involuntary manslaughter.

{¶27} A typographical error in the caption of the indictment did not cause the trial court to lose subject matter jurisdiction and render Appellant’s conviction void. As his conviction was not void, the trial court properly denied the motion to vacate a void judgment for lack of subject matter jurisdiction. As the motion did not raise an issue that would void the conviction, the motion could then be evaluated as a postconviction relief petition. The trial court properly found the 2017 motion untimely under the postconviction relief statutes as Appellant did not satisfy or even discuss the exceptions to untimeliness. Accordingly, Appellant’s assignment of error is overruled.

{¶28} For the foregoing reasons, the trial court’s judgment is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.