

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

LAWRENCE E. ROSS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0139

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 96 CR 192

BEFORE:

David A. D'Apolito, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:

Dismissed and Vacated.

Atty. Paul J. Gains, Mahoning County Prosecutor, and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Lawrence E. Ross, Pro Se, #A332-055, Marion Correctional Institution, P.O. Box 57, Marion, Ohio 433301, Defendant-Appellant.

Dated: June 23, 2021

D’Apolito, J.

{¶1} Appellant Lawrence Edward Ross appeals the judgment entry of the Mahoning County Court of Common Pleas overruling his pro se “Motion to Correct Void Sentence under the Fischer rule.” For the following reasons, we find that the trial court was without jurisdiction to consider the motion because it constitutes an untimely and successive petition for postconviction relief. In the alternative, we find that the motion is barred by res judicata.

FACTS AND PROCEDURAL HISTORY

{¶2} According to a judgment entry of sentence filed on November 22, 1996 (“1996 sentencing entry”), Appellant was convicted and sentenced for one count of aggravated murder with a firearms specification (life imprisonment with the possibility of parole in thirty years, plus three years), one count of aggravated robbery with a firearms specification (not less than ten years nor more than twenty-five years, plus three years), and one count of having a weapon while under a disability with a firearms specification (not less than three nor more than five, plus three years). The trial court merged the third firearms specification with the first two, and imposed the individual prison terms to be served consecutively. Appellant did not challenge his sentence in his direct appeal. See *State v. Ross*, 7th Dist. Mahoning No. 96 C.A. 247 & 251, 1999 WL 826223.¹

{¶3} Relevant to the current appeal, on December 20, 2010, Appellant, acting pro se, filed a petition for a resentencing hearing pursuant to R.C. 2929.19(B)(3), in which he argued that his sentence was void for lack of proper notification regarding post-release

¹ In the years following his direct appeal, Appellant has filed seven post-conviction appeals in addition to the appeal currently before this Court: *State v. Ross*, 7th Dist. Mahoning No. 96 C.A. 0247 & 251, 2003-Ohio-4889; *State ex. rel. Ross v. Krichbaum*, 7th Dist. Mahoning No. 07 MA 0151, 2007-Ohio-7198; *State ex. rel. Ross v. Vivo*, 7th Dist. Mahoning No. 08 MA 0157, 2008-Ohio-4819; *State ex. rel. Ross v. Krichbaum*, 7th Dist. Mahoning No. 09 MA 0142, 2009-Ohio-5514; *State v. Ross*, 7th Dist. Mahoning No. 11 MA 0032, 2012-Ohio-2433; *State v. Ross*, 7th Dist. Mahoning No. 16 MA 0180, 2017-Ohio-9408; *State v. Ross*, 7th Dist. Mahoning No. 17 MA 0156, 2018-Ohio-2783.

control based on the Ohio Supreme Court's decision in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, overruled by *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248.

{¶4} On December 22, 2010, Appellant filed an "objection in opposition for a resentencing hearing," in which he argued that the 1996 sentencing entry did not comply with *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163. In *Baker*, the Ohio Supreme Court held that a judgment of conviction is not a final appealable order unless it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court. *Id.* at the syllabus; Crim.R. 32(C).

{¶5} In *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, 916 N.E.2d 1038, the Ohio Supreme Court modified *Baker* by holding that a judgment of conviction need not state the manner of conviction, a plea or a verdict, in order to be a final appealable order. Instead, the judgment need only set forth (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp by the clerk. *Id.*

{¶6} The 1996 sentencing entry reads that Appellant waived a jury trial on the third count of the indictment and was convicted of that charge following a bench trial. The 1996 sentencing entry does not include similar language describing the manner of conviction for counts one and two. However, the actual imposition of sentence for counts one and two is preceded by the phrase "pursuant to the recommendation of the trial jury."

{¶7} With respect to Appellant's petition for a resentencing hearing, the trial court found that Appellant was not entitled to notification of mandatory post-release control because he committed his crimes on February 5, 1996, prior to the effective date of Senate Bill 2, which was enacted on July 1, 1996. Because Appellant was subject to pre-Senate Bill 2 law, which required the imposition of an indeterminate prison term, and rendered Appellant subject to release from prison on parole as set forth by law and within the defined discretion of the parole board, the trial court overruled the petition for a resentencing hearing.

{¶8} With respect to Appellant's objection in opposition for a resentencing hearing, the trial court found that the 1996 sentencing entry complied with *Baker*, citing the phrase "pursuant to the recommendation of the trial jury." Nevertheless, in order to

clarify the manner of conviction on counts one and two, the trial court issued a nunc pro tunc judgment entry of sentence February 4, 2011 (“2011 sentencing entry”) pursuant to *State ex rel. DeWine v. Burge*, 128 Ohio St.3d 236, 2011–Ohio–235, 943 N.E.2d 535.

{¶9} In *DeWine*, the Ohio Supreme Court held that the remedy for a failure to comply with Crim.R. 32(C) is a revised sentencing entry, not a new hearing. The *Burge* Court plainly stated that “the technical failure to comply with Crim.R. 32(C) by not including the manner of conviction in [a] sentence is not a violation of a statutorily mandated term, so it does not render the judgment a nullity.” *Id.* at ¶ 19.

{¶10} Appellant filed a timely appeal of both motions. *State v. Ross*, 7th Dist. Mahoning No. 11-MA-32, 2012-Ohio-2433. In his third assignment of error in his 2012 appeal, Appellant alleged a violation of his right to effective assistance of counsel based upon his trial counsel’s failure to challenge the *Baker* violation in the 1996 sentencing entry. *Id.* at ¶ 24.

{¶11} We found that the 1996 sentencing entry “did not comply with *Baker/Lester* or Crim.R. 32(C),” because the entry “failed to set forth the fact of [Appellant’s] conviction on the aggravated murder and aggravated burglary counts and the accompanying firearms specifications.” *Id.* at ¶ 30. However, we further found that the 2011 sentencing entry “corrected” the 1996 sentencing entry based on the Ohio Supreme Court’s holding in *DeWine supra*. We wrote:

In this case, the trial court issued a nunc pro tunc sentencing entry that complied with Crim.R. 32(C) by setting out the fact and manner of the conviction along with the other requirements. A defendant is entitled to a sentencing entry that complies with Crim.R. 32(C). *DeWine*, at ¶ 18, citing, *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, 895 N.E.2d 805, ¶ 10-11. Appellant now has such an entry.

Id. at ¶ 32.

{¶12} Appellant predicates the current motion on appeal on the void/voidable distinction articulated by the Ohio Supreme Court in *State v. Fischer, supra*. The *Fischer*

Court held that a sentence that does not include the statutorily mandated term of post-release control is void, rather than voidable. A void sentence, the *Fischer* Court opined, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack. *Id.* at paragraph two of the syllabus. Pro se prisoners frequently rely on *Fischer* to argue that their sentence is void, as opposed to voidable, to avoid res judicata.

{¶13} However, the Ohio Supreme Court “realigned” its “void-sentence jurisprudence” last year in *State v. Harper, supra*, and *State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776. In *Harper* and *Henderson*, the Ohio Supreme Court held that erroneous sentences are merely voidable, rather than void, unless the court imposing the sentence does not have jurisdiction over the case and the defendant. *Henderson* at ¶ 1; see also *Harper* at ¶ 4.

{¶14} Therefore, if a trial court with jurisdiction over the case and the defendant commits a sentencing error, the sentence is voidable and the error must be challenged on direct appeal, or the sentence is subject to res judicata. *Harper* at ¶ 43. In *Harper* and *Henderson*, the Ohio Supreme Court made clear that voidable sentences cannot be challenged via a post-conviction proceeding. *Harper* at ¶ 5; see also *Henderson* at ¶ 1. In fact, the Ohio Supreme Court cautioned prosecuting attorneys, defense counsel, and pro se defendants that they must challenge sentencing errors on direct appeal from the judgment of conviction or the sentence will be subject to res judicata. *Harper* at ¶ 43.

{¶15} In Appellant’s motion, he argues that his “multiple count prison sanctions, which forms [sic] the basis of his 49 year [sic] minimum prison term for aggravated murder, is [sic] unauthorized by Ohio law and must be considered void.” (Mot., p. 1.) In the motion, Appellant misapplies *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, which prohibits the application of the sentence-packaging doctrine in Ohio, and misconstrues the impact of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The trial court summarily overruled the motion.

{¶16} This timely appeal followed.

ANALYSIS

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN MODIFYING APPELLANT'S SENTENCE TO CORRECT A CRIMINAL RULE 32(C) VIOLATION, AS THE COURT WAS WITHOUT JURISDICTION TO DO SO.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN NOT ADVISING [SIC] APPELLANT OF HIS RIGHT TO APPEAL PURSUANT TO CRIM.R. 32, AFTER MODIFYING THIS JUDGMENT ENTRY OF CONVICTION AND SENTENCE THROUGH WAY OF A NUNC PRO TUNC.

{¶17} In this appeal, Appellant abandons the arguments advanced in his motion before the trial court, and contends in his first assignment of error that the trial court was without jurisdiction to enter the 2011 sentencing entry. In his first assignment of error, Appellant again misstates Ohio law by arguing that the sole remedy for a Crim.R. 32(C) violation is resentencing, rather than the issuance of a corrected judgment entry. He further argues that the 2011 sentencing entry imposes a different sentence, which it does not. In Appellant's second assignment of error, he argues that the 1996 sentencing entry was not a final appealable order, and he should have been notified of his right to appeal the 2011 sentencing entry. It is important to note that Appellant filed a direct appeal of the 1996 sentencing entry.

{¶18} However, we need not reach the merits of Appellant's appeal, because it must be dismissed on procedural grounds. In Ohio, motions to correct a void sentence are construed as petitions for postconviction relief under R.C. 2953.21(A)(1) where the motion: (1) is filed subsequent to a direct appeal, (2) claims a denial of constitutional rights, (3) seeks to render the judgment void, and (4) asks for a vacation of the judgment and sentence. *State v. Reynolds*, 79 Ohio St.3d 158, 160-161, 679 N.E.2d 1131 (1997). A defendant's petition for postconviction relief is a collateral civil attack on his or her criminal conviction. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 48.

{¶19} Typically, an appellate court reviews a trial court's decision granting or denying a petition for postconviction relief for an abuse of discretion. *Id.* at ¶ 58. However,

the question of whether the trial court possessed subject matter jurisdiction to entertain an untimely petition for postconviction relief is a question of law, which an appellate court reviews de novo. *State v. Apanovitch*, 155 Ohio St.3d 358, 2018-Ohio-4744, 121 N.E.3d 351, ¶ 24.

{¶20} R.C. 2953.21(A)(2) provides that a petition for postconviction relief must be filed within 365 days from the filing of the trial transcripts in the petitioner's direct appeal or, if a direct appeal was not pursued, 365 days after the expiration of the time in which a direct appeal could have been filed. Here, Appellant filed the petition more than twenty years after his direct appeal was resolved. Thus, his petition is untimely. Furthermore, Appellant filed his first post-conviction petition on February 7, 2001, which was dismissed because it was untimely filed, so the motion currently on appeal constitutes a successive petition.

{¶21} R.C. 2953.23(A)(1)(a) permits a trial court to entertain an untimely or successive petition only if:

(1) the petitioner was unavoidably prevented from discovering the facts on which the petition is predicated, or (2) the United States Supreme Court has recognized a new federal or state right that applies retroactively to the petitioner and the petition asserts a claim based on that new right.

If the petitioner can satisfy one of these threshold conditions, he or she must then demonstrate that, but for the constitutional error at trial, no reasonable factfinder would have found him guilty of the offenses of which he was convicted. R.C. 2953.23(A)(1)(b).

{¶22} Where a petitioner fails to make the showings required by R.C. 2953.23(A), the trial court lacks jurisdiction to consider either an untimely or successive petition for postconviction relief. *State v. Panezich*, 7th Dist. Mahoning No. 20 MA 0077, 2021-Ohio-1165, ¶ 21. Because Appellant has failed to establish either of the alternative conditions, we find that the trial court was without jurisdiction to consider his petition.

{¶23} Even assuming that the trial court had jurisdiction over the petition, Appellant neither demonstrates nor even asserts that the trial court did not have subject-matter jurisdiction over this case or personal jurisdiction over Appellant when it sentenced him in 1996. Accordingly, any alleged error would render Appellant's sentence voidable,

not void, and he cannot challenge it through a postconviction motion for resentencing. Therefore, his petition is barred by res judicata.

{¶24} In summary, we find that the trial court did not have jurisdiction to consider the motion at issue in this appeal. In the alternative, we find that res judicata bars the motion. Accordingly, the judgment entry of the trial court overruling the motion on the merits is vacated.

Donofrio, P.J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, this motion is dismissed for lack of subject matter jurisdiction and the judgment of the Court of Common Pleas of Mahoning County, Ohio, is vacated. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.