[Cite as *State v. Davic*, 2019-Ohio-1320.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 18AP-569
v.	:	(C.P.C. No. 10CR-6766)
Bradford S. Davic,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 12, 2019

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

On brief: *Bradford S. Davis*, pro se.

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Defendant-appellant, Bradford S. Davic, appeals a decision of the Franklin County Court of Common Pleas, denying his latest motion to correct his sentence. The errors Davic alleges do not render the prior decisions in his case void, and we affirm. We also deny Davic's request for oral argument.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On November 19, 2010, a Franklin County Grand Jury indicted Davic on five counts of rape (each with sexually violent predator specifications), one count of importuning, and one count of gross sexual imposition, all arising from a sexual liaison he arranged and consummated with a 12-year old girl. (Nov. 19, 2010 Indictment.) On April 13, 2011, he pled guilty to all counts as indicted except for one count of rape (Count 2) and all specifications, which were dismissed in exchange for his plea. (Plea & Sentencing Tr. at 2-11, filed Sept. 13, 2011; Apr. 19, 2011 Plea Form.) Based on his plea, the trial court

sentenced Davic to 10-years to life for each of the four rapes, 8 years on the importuning count, and 5 years for the gross sexual imposition, with each rape sentence running consecutively to the other rapes but concurrently with the other offenses. (Plea & Sentencing Tr. at 31; May 24, 2011 Jgmt. Entry at 2.) Davic's total prison term was 40-years to life.

{¶ 3} Davic appealed, arguing that the rape offenses were allied offenses and that his guilty plea was not entered knowingly, intelligently, and voluntarily because he had been under the impression that his plea deal was for a sentence of 10-years to life. *State v. Davic*, 10th Dist. No. 11AP-555, 2012-Ohio-952, ¶ 6 ("*Davic I*"). This Court overruled each of those arguments and affirmed. *Id.* at ¶ 7-16.

{¶ 4} Two years later, in November 2014, Davic moved the trial court to have the judgment entry of his sentence corrected to reflect that he was not apprised of the fact that he would be a tier III sex offender at the time the trial court accepted his plea (notwithstanding the fact that a statement to that effect existed in his sentencing entry). (Nov. 18, 2014 Mot. to Correct at 2.) Between Davic's original trial judge leaving the bench and the seat being filled by a new trial judge, several years elapsed before his motion was decided.

{¶ 5} The following year, on August 6, 2015, Davic moved for resentencing on numerous grounds including an allegation of improper use of the sentencing-package doctrine and an argument that Davic's sentences were void due to a failure to notify him of his sex offender classification as to each count, along with improper notification of post-release control. (Aug. 6, 2015 Mot. for Resentencing at 1.) The trial court denied Davic's motion on October 14, 2015. (Oct. 14, 2015 Decision.) We affirmed that decision, addressing each of the grounds Davic raised. *State v. Davic*, 10th Dist. No. 15AP-1000, 2016-Ohio-4883 ("*Davic II*").

{¶ 6} In April 2017, the trial court denied Davic's prior motion filed in November 2014 in which he sought to correct his judgment entry. (Apr. 26, 2017 Decision & Entry.) Davic appealed this decision, this time arguing that the trial court did not properly note his sex offender status in its judgment entry and that, as a result, the judgment entry had not been final and appealable and therefore would affect our decision in *Davic I*. *State v. Davic*, 10th Dist. No. 17AP-354, ¶ 8 (Dec. 26, 2017) (memorandum decision) ("*Davic III*"). In

Davic III, we acknowledged that the trial court did not explicitly journalize Davic's sex offender tier, but we found that the original judgment entry had been final in the sense that it could be appealed for such an error. *Davic III* at ¶ 9-18. In our decision, we additionally noted that the trial court incorrectly stated that Davic was notified of his sex offender tier during the plea hearing when, in fact, the first mention of that matter was during sentencing. *Id.* at ¶ 19. We found the error to be harmless but remanded Davic's sentencing entry to the trial court so that it could, nunc pro tunc, correct its entry to accurately reflect Davic's status as a tier III sex offender and remove the incorrect statement that Davic was informed of his tier III sex offender status during the plea hearing. *Id.* at ¶ 22.

{¶ 7} On remand, the trial court made the changes to its entry as instructed, nunc pro tunc. (January 5, 2018 Nunc Pro Tunc Jgmt. Entry; July 9, 2018 Nunc Pro Tunc Jgmt. Entry.) Following the trial court's first nunc pro tunc entry of January 5, 2018, on May 24, 2018, Davic filed a motion arguing that the judgment entry was not a final appealable order toward the end of vitiating our prior appellate decision in *Davic I*, this time on the grounds that the trial court failed to impose a sex offender classification and a term of post-release control separately as to each count for which he was sentenced. (May 24, 2018 Mot. to Correct at 1.) In early July 2018, the trial court denied the motion and Davic again appealed. (July 5, 2018 Decision & Entry; July 19, 2018 Notice of Appeal.) It is this appeal, we review in this decision.

II. ASSIGNMENTS OF ERROR

{¶ 8} Davic alleges six assignments of error in this appeal:

> [1.] The trial court erred in relying upon the law of the case doctrine to procedurally deny Davic's Motion to Correct Registration and Classification Scheme and for a Final, Appealable Order, in violation of his Due Process protections under the Fourteenth Amendment to the U.S. Constitution and Article I, Section §[sic] 10 of the Ohio Constitution.
>
> [2.] The trial court erred and violated the *Saxon*[1] prohibition against use of the sentencing-package doctrine in imposing only one collective sex offender registration sanction, instead of separately imposing a separate registration sanction to each of the six counts to which Davic pled guilty. This violated Davic's rights to Equal protection and Due Process under the

[1] Davic is referring here to *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245.

> Fourteenth Amendment to the U.S. Constitution and Article I, Section §[sic] 10 of the Ohio Constitution.
>
> [3.] The trial court erred in imposing a Tier III sex offender classification to Davic's Count One offense of importuning and Count Seven offense of gross sexual imposition, in violation of Davic's Due Process protections under the Fourteenth Amendment to the U.S. Constitution and Article I, Section §[sic] 10 of the Ohio Constitution.
>
> [4.] The trial court erred and violated the *Saxon* prohibition against use of the sentencing-package doctrine in imposing only one collective term of post-release control, instead of separately imposing post-release control to each of the six counts to which Davic pled guilty. This violated Davic's rights to Equal Protection and Due Process under the Fourteenth Amendment to the U.S. Constitution and Article I, Section §[sic] 10 of the Ohio Constitution.
>
> [5.] Davic's sentencing entry is not a final, appealable order pursuant to Crim.R. 32(C), in violation of his Due Process protections under the Fourteenth Amendment to the U.S. Constitution and Article I, Section § [sic] 10 of the Ohio Constitution, and this Court lacked jurisdiction to hear his appeal in Appellate Case No. 11AP-555.
>
> [6.] Because this Court had no jurisdiction to hear Davic's appeal in Appellate Case No. 11AP-555, its decision is a nullity and a violation of Davic's his [sic] Due Process protections under the Fourteenth Amendment to the U.S. Constitution and Article I, Section § [sic] 10 of the Ohio Constitution.

Because these assignments of error are interrelated, we address them simultaneously.

III. DISCUSSION

A. Res Judicata

{¶ 9} In criminal cases res judicata generally bars a defendant from litigating claims in a proceeding subsequent to the direct appeal "if he or she *raised or could have raised* the issue at the trial that resulted in that judgment of conviction or on an appeal from that judgment." (Emphasis sic.) *State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707, ¶ 92; *see also State v. Szefcyk*, 77 Ohio St.3d 93, 95-96 (1996). Unlike issue preclusion in civil cases, in criminal cases res judicata may preclude issues, arguments, or positions that could have been (even if they were not actually) litigated. *See State v. Breeze*,

10th Dist. No. 15AP-1027, 2016-Ohio-1457, ¶ 7-9; *State v. Banks*, 10th Dist. No. 15AP-653, 2015-Ohio-5372, ¶ 13.

{¶ 10} Our recitation of the procedural history in this decision demonstrates that Davic's piecemeal motion and appeal practice are subject to res judicata. That is, he has had ample opportunity to raise issues relating to his judgment entry and sentence before now. While res judicata would operate to preclude him from raising such matters now, Davic argues against this conclusion on the grounds that the errors he points out render his original judgment entry void and thereby make legally invalid our appellate decisions concerning that judgment entry. (Davic's Brief at 2-34.) *Davic III* at ¶ 9-18; *see also Davic I*; *Davic II*.

{¶ 11} Davic is correct that void sentences are subject to correction at any time irrespective of the principles of res judicata or law of the case doctrine. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 27, 30. He is likewise correct that under the current jurisprudence of the Supreme Court of Ohio there are errors (other than a lack of jurisdiction) that render a sentence void or partially void. *See Fischer* at ¶ 27, 30 (holding that a sentence is void in part and subject to correction at any time irrespective of the principles of res judicata or law of the case doctrine, where an offender is not properly sentenced so as to be subject to a period of post-release control); *see also State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, ¶ 2 (extending *Fischer* voidness to judgments improperly imposing separate sentences for allied offenses); *State v. Harris*, 132 Ohio St.3d 318, 2012-Ohio-1908, paragraph one of the syllabus (extending *Fisher* to driver's license suspensions).[2] The questions before us are simply whether the errors Davic alleges were

[2] We and others have previously noted that this broad view of voidness is problematic:

> The Supreme Court previously recognized 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" while 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. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶ 12, 884 N.E.2d 568. The high court has also recognized that "we commonly hold that sentencing errors are not jurisdictional and do not necessarily render a judgment void." *Id.* at ¶ 13. Yet, in cases such as *Williams*, the Supreme Court has embraced exceptions that threaten to swallow the rule and lead to a situation where virtually any allegedly serious error in sentencing can be revived time and time again without being foreclosed by res judicata. This Court and others have expressed concerns about the legal basis and limits of the "voidness" doctrine that the Supreme Court has created in this context. *State v. Banks*,

actually errors and, if they were, whether they rendered the judgment void in whole or in part.

B. Whether the Trial Court was Required to Impose and Notify Davic of Post-Release Control and Sex Offender Tier for Each Count

{¶ 12} Davic's assignments of error collectively allege essentially two errors in the judgment and sentence: first, that rather than a blanket tier III notification, the trial court should have imposed and notified Davic of a sexual offender tier count-by-count, and second, when the trial court notified Davic of and imposed as part of his sentence a period of five years mandatory period of post-release control, whether it should have done so separately for each offense. (Davic's Brief in passim.)

{¶ 13} With respect to the argument that the trial court should have articulated post-release control as to each offense, Davic's argument seems to be literally and textually based on language appearing in the Revised Code. R.C. 2967.28(B) provides, for example, "**[e]ach sentence** to a prison term * * * shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment." (Emphasis added.) However, R.C. 2967.28(F)(4)(c) provides, "[i]f an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last, as determined by the parole board or court. Periods of post-release control shall be served concurrently and shall not be imposed consecutively to each other." We have previously considered Davic's argument in this respect and held, "the trial court need not announce at the sentencing hearing nor include in the sentencing judgment the applicable postrelease control sanction for each individual offense irrespective of whether the terms of control are identical or different." *State v. Darks*, 10th Dist. No. 12AP-578, 2013-Ohio-176, ¶ 11, quoting *State v. Reed*, 6th Dist. No. E-11-049, 2012-Ohio-5983, ¶ 12.

10th Dist. No. 15AP-653, 2015-Ohio-5372, ¶ 16, fn. 1; *see also State v. Grimes*, 151 Ohio St.3d 19, 2017-Ohio-2927, ¶ 34-39, 85 N.E.3d 700 (DeWine, J., concurring in judgment only); *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 41-57, 942 N.E.2d 332 (Lanzinger, J., dissenting).

State v. Steele, 10th Dist. No. 18AP-187, 2018-Ohio-3950, ¶ 11, fn. 1. The Supreme Court has also previously noted, "the doctrine of res judicata would be abrogated if every decision could be relitigated on the ground that it is erroneous, and there would be no stability of decision, or no end to litigation." *La Barbera v. Batsch*, 10 Ohio St.2d 106, 110 (1967).

{¶ 14} And there is no support for Davic's argument in either statute or caselaw that the trial court should have separately articulated a sex offender tier for each of his offenses. The statutes prescribing and governing sex offender registration place a single duty to register on an individual who has been convicted of one or more of the qualifying offenses, not multiple duties to register for each such offense. For example, R.C. 2950.01(G)(1)(a) defines a tier III sex offender as anyone who has been convicted of one of a variety of offenses, including rape. It does not suggest that such an individual has to register separately for each offense or count; there is no provision for a different type of registration for one such as Davic who has been convicted of multiple counts. And importantly, R.C. 2929.19(B)(3)(a)(ii) requires a sentencing court to include in the person's sentence "**a statement** that the offender is a tier III sex offender." (Emphasis added.) There is no requirement in statute or case law that an offender be notified multiple times or that the offender's sentencing entry include a separate statement in connection with every count of conviction.

{¶ 15} Davic's argument that he was made a tier III sex offender with respect to his convictions for importuning and gross sexual imposition is also misplaced. Davic is correct that, were a person solely convicted of importuning or gross sexual imposition, that offender could be classified to a lower tier than tier III. *See, e.g.*, R.C. 2950.01(E)(1)(a) and (c) and (F)(1)(c). But that does not mean that Davic should be or that the trial court erred in not assigning those counts as a separate, different tier. It is the *offender* that is classified as tier I, II, or III, not the offense. *See, e.g.*, R.C. 2950.01(G)(1)(a) (defining a tier III sex offender as "[a] sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to * * * [a] violation of section 2907.02 [rape]").

{¶ 16} Davic assigns error to matters undertaken by the trial court in its sentence that were not in fact errors. As a result, we find Davic's arguments not to be well-taken. We find that his judgment of conviction is not void in whole or in part and thus there is no effect to the validity of our prior appellate judgments concerning his sentence. All of Davic's six assignments of error are overruled.

C. Oral Argument

{¶ 17} Though it is not an assignment of error, Davic's brief points out that App.R. 21(A) requires the scheduling of oral argument in "all cases" and he has requested it in this case. (Davic's Brief at 34-35.) He claims it is a violation of Equal Protection to permit oral

argument for parties fortunate enough to be able to afford counsel but to deny it to indigent pro se prisoners who have already litigated their direct appeal. *Id*.

{¶ 18} We recognize that App.R. 21(A) requires the scheduling of oral argument in all cases. However, the rule also includes an exception, "[n]otwithstanding any of the foregoing, the court is not required to schedule oral argument, even if requested, if any of the parties is both incarcerated and proceeding pro se." *Id*.; *see also* Loc.R. 11 of the Tenth District Court of Appeals. We decline to find in this case that the issue rises an Equal Protection violation and observe that no court in Ohio has ever held that App.R. 21 violates any constitution. Davic has been afforded ample and considerable opportunities to litigate his case (both with and without counsel) and the detriment of not being permitted 15 minutes to address the panel orally does not to any appreciable degree diminish that fact. The appellate procedural rule does not single out Davic from appearing pro se for the sake of making a 15-minute oral argument based on his brief. Instead, it permits an appellate court to decline to schedule oral argument altogether, thus denying the State the same opportunity to appear for a 15-minute oral argument, when a particular class of individuals would be appearing opposite the State. Without going into extensive discussion for the rational basis of the classification, suffice it to say that we believe a rational basis exists, but we decline to discuss it at length because Davic has not raised it as an assignment of error.

IV. CONCLUSION

{¶ 19} The errors Davic alleges are not errors and do not render the prior decisions in his case void. Davic's six assignments of error are overruled. Davic is pro se and incarcerated; thus, his request that oral argument be scheduled in this case is denied. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT, P.J., and MCGRATH, J., concur.

McGRATH, J., retired, formerly of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).