[Cite as *State v. Stansell*, 2020-Ohio-3674.]

# COURT OF APPEALS OF OHIO

## EIGHTH APPELLATE DISTRICT
## COUNTY OF CUYAHOGA

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | No. 109023 |
| v. | | |
| MICHAEL STANSELL, | : | |
| Defendant-Appellant. | : | |

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JOURNAL ENTRY AND OPINION

**JUDGMENT:** VACATED AND REMANDED
**RELEASED AND JOURNALIZED:** July 9, 2020

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Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-97-356129-ZA

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***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Daniel T. Van, Assistant Prosecuting Attorney, *for appellee*.

Mark A. Stanton, Cuyahoga County Public Defender, and John T. Martin, Assistant Public Defender, *for appellant*.

LARRY A. JONES, SR., J.:

**{¶ 1}** This is defendant-appellant's, Michael Stansell, second appeal to this court over the issue of whether the trial court erred by not vacating his sexually

violent predator specifications. For the reasons that follow, we vacate the specifications and remand for resentencing.

I.

**{¶ 2}** In 1997, a 38-count indictment was filed against Stansell, charging him with sexually oriented crimes against two minor boys. In 1998, pursuant to a plea agreement, Stansell pleaded guilty to two counts of rape of a child under age 13, one count of rape with a sexually violent predator specification, two counts of corruption of a minor, one count of gross sexual imposition with a sexually violent predator specification, and one count of pandering obscenity.

**{¶ 3}** As part of the plea negotiation, Stansell and the state recommended an agreed sentence of 20 years to life to the trial court; the trial court imposed the recommended sentence and classified Stansell as a sexual predator. The "life tail" was purportedly mandatory due to the sexually violent predator specifications. Prior to this case, Stansell had never been convicted of a sexually oriented offense and, therefore, the sexually violent predator specifications were based on the charges contained in the indictment in this case. However, the version of R.C. 2971.01(H) defining sexually violent predator that was in effect at the time required that for an offender to be so labeled, he or she had to have had a prior sexually oriented conviction.

**{¶ 4}** Stansell filed a motion to withdraw his guilty plea on the ground that his counsel was ineffective because counsel failed to tell him about the allied offenses statute; the trial court denied the motion. This court upheld the denial of the motion

in *State v. Stansell*, 8th Dist. Cuyahoga No. 75889, 2000 Ohio App. LEXIS 1726 (Apr. 20, 2000). Stansell attempted to appeal to the Ohio Supreme Court, but the court declined jurisdiction. *State v. Stansell*, 91 Ohio St.3d 1527, 747 N.E.2d 252 (2001).

**{¶ 5}** In 2004, the Ohio Supreme Court issued a decision in a certified conflict case, *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283, holding that a "[c]onviction of a sexually violent offense cannot support the specification that the offender is a sexually violent predator as defined in R.C. 2971.01(H)(1) if the conduct leading to the conviction and the sexually violent predator specification are charged in the same indictment." *Id.* at syllabus.

**{¶ 6}** Four months after *Smith* was decided, the Ohio Legislature amended R.C. Chapter 2971, which governs "sentencing of sexually violent predators." The introduction to the bill which amended the statute states, in relevant part, that the amendment was made "to clarify that the Sexually Violent Predator Sentencing Law does not require that an offender have a prior conviction of a sexually violent offense in order to be sentenced under that Law." *See* 126 Am.Sub. H.B. 473.

**{¶ 7}** In 2013, Stansell filed his first motion to vacate the sexually violent predator specifications. The trial court denied the motion and Stansell appealed. This court, relying on the Ninth and Tenth Appellate Districts decisions, respectively, in *State v. Ditzler*, 9th Dist. Lorain No. 13CA010342, 2013-Ohio-4969, and *State v. Draughon*, 10th Dist. Franklin Nos. 11AP-703 and 11AP-995, 2012-

Ohio-1917, found that *Smith* did not have retroactive application. *State v. Stansell*, 8th Dist. Cuyahoga No. 100604, 2014-Ohio-1633, ¶ 14-16.

**{¶ 8}** Specifically, this court cited the Ninth District's reasoning as follows:

> The Supreme Court of Ohio has held that "[a] new judicial ruling may be applied only to cases that are pending on the announcement date." *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, ¶ 6, 819 N.E.2d 687, citing *State v. Evans*, 32 Ohio St.2d 185, 186, 291 N.E.2d 466 (1972). Thus, '[t]he new judicial ruling may not be applied retroactively to a conviction that has become final, i.e., where the accused has exhausted all of his appellate remedies.' *Ali* at ¶ 6.

*Stansell* at ¶ 15, quoting *Ditzler* at ¶ 11.

**{¶ 9}** Because Stansell's case was not pending at the time *Smith* was decided, this court held that it had no retroactive application. *Stansell* at ¶ 16. Stansell attempted to file a delayed appeal to the Ohio Supreme Court; the court denied the motion for delayed appeal. *State v. Stansell*, 140 Ohio St.3d 1413, 2014-Ohio-3785, 15 N.E.3d 882.

**{¶ 10}** In 2019, this court decided *State v. Frierson*, 8th Dist. Cuyahoga No. 106841, 2019-Ohio-317. In *Frierson*, in 2016, the defendant was charged with sexually oriented offenses that contained sexually violent predator specifications; the crimes were alleged to have occurred in 1997. The defendant did not have any prior convictions for sexually oriented offenses. The defendant was found guilty on several of the charges, as well as the sexually violent predator specifications. On appeal to this court, he challenged his convictions on the specifications, contending that they violated the Ex Post Facto Clause of the United States Constitution.

**{¶ 11}** This court agreed, reasoning as follows:

> Under the plain language in R.C. 2971.01(H)(1) as it existed at the time of Frierson's offenses, he was not eligible for the enhanced, indefinite sentencing under R.C. 2971.03 because he did not qualify as a sexually violent predator. As the Ohio Supreme Court stated in *Smith*, the words of R.C. 2971.01(H)(1) as it existed during the relevant periods clearly indicated that at the time of indictment, the person must have already been convicted of a sexually violent offense in order to be eligible for the specification. The legislature's subsequent amendment of the statute following *Smith* was not mere "clarification" as the state argues, but a significant and substantive change to the definition of "sexually violent predator," allowing, for the first time, the underlying conduct in an indictment to satisfy the specification without a prior conviction. As applied to Frierson, this amendment greatly enhanced his potential punishment by subjecting him to the indefinite sentencing found in R.C. 2971.03 whereas he was not subject to an enhanced sentence prior to the amendment. Therefore, we find that amended R.C. 2971.01(H)(1), as applied to Frierson, violates the Ex Post Facto Clause of the United States Constitution.

*Frierson* at ¶ 12.

**{¶ 12}** After *Frierson* was decided, Stansell filed his second motion to vacate the sexually violent predator specifications. The trial court denied the motion and this appeal ensues.

**{¶ 13}** Stansell's sole assignment of error reads: "The trial court erred as a matter of law in denying appellant's motion to vacate sexually violent predator specification and re-sentence defendant."[1]

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[1]After *Frierson*, this court reversed "life-tail" sentences on sexually violent predator specifications in two other cases: *State v. Townsend*, 8th Dist. Cuyahoga No. 107186, 2019-Ohio-1134, and *State v. Clipps*, 8th Dist. Cuyahoga No. 107747, 2019-Ohio-3569. *Frierson*, *Townsend*, and *Clipps* were all accepted by the Ohio Supreme Court upon the state's appeal, and are presently pending. *See State v. Frierson*, 131 N.E.3d 961, 2019-Ohio-3797; *State v. Townsend*, 131 N.E.3d 956, 2019-Ohio-3797; and *State v. Clipps*, 137 N.E.3d 1200, 2020-Ohio-122.

II.

**{¶ 14}** Initially, we note that the sentence imposed on Stansell was an agreed sentence. Under R.C. 2953.08(D)(1), "[a] sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge."

**{¶ 15}** In other words, a sentence that is "contrary to law" is appealable by a defendant; however, an agreed-upon sentence may not be appealed if (1) both the defendant and the state agree to the sentence, (2) the trial court imposes the agreed sentence, and (3) the sentence is authorized by law. R.C. 2953.08(D)(1). If all three conditions are met, the defendant may not appeal the sentence.

**{¶ 16}** In light of the above, we must determine whether Stansell's sentence is authorized by law. In *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, the Ohio Supreme Court held that "[a] sentence is 'authorized by law' only if it comports with all mandatory sentencing provisions." *Id.* at paragraph two of the syllabus.

**{¶ 17}** At the relevant time, Stansell did not, under R.C. 2971.01(H)(1), qualify for the enhanced, indefinite sentencing terms because he did not qualify as a sexually violent predator, that is, he did not have a prior conviction for a sexually oriented offense. Because his sentence was not authorized by law as it existed at the time of his sentencing, we are able to review it even though it was an agreed-upon sentence.

**{¶ 18}** We next consider the issues of res judicata and void sentences. The state contends that Stansell's challenge is barred under the doctrine of res judicata. Whether res judicata prevents Stansell from successfully appealing his sentence necessarily depends on the propriety of the sentence. "If a judge imposes a sentence that is unauthorized by law, the sentence is unlawful. 'If an act is unlawful it [is] not erroneous or voidable, but it is wholly unauthorized and void.'" *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 21, quoting *State ex rel. Kudrick v. Meredith*, 1922 Ohio Misc. LEXIS 262 (1922), 3.

**{¶ 19}** Because Stansell could not qualify as a sexually violent predator at the time he was sentenced, his "life tail" sentence was unlawful and res judicata does not apply. "If a judgment is void, the doctrine of res judicata has no application, and the propriety of the decision can be challenged on direct appeal or by collateral attack." *State v. Holmes*, 8th Dist. Cuyahoga No. 100388, 2014-Ohio-3816, ¶ 13. Thus, Stansell's failure to raise this issue in his direct appeal is irrelevant.

**{¶ 20}** Further, "when the trial court disregards statutory mandates, '[p]rinciples of res judicata, including the doctrine of the law of the case, do not preclude appellate review. The sentence may be reviewed at any time, on direct appeal or by collateral attack.'" *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 22, quoting *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 30. Consequently, this court's decision in Stansell's first appeal is not binding here.

**{¶ 21}** Moreover, we are not persuaded by the state's contention that former R.C. 2971.01(H)(1) was always written to mean that the indicted offense could be used to qualify a defendant for a sexually violent offender specification, and that the amendment to the statute was just a clarification. As this court stated in *Frierson*, 8th Dist. Cuyahoga No. 106841, 2019-Ohio-317, the amendment was "a significant and substantive change to the definition of 'sexually violent predator,' allowing, for the first time, the underlying conduct in an indictment to satisfy the specification without a prior conviction." *Id.* at ¶ 12.

**{¶ 22}** In light of the above, Stansell's convictions on the sexually violent predator specifications are vacated and the case is remanded for resentencing without those specifications.

**{¶ 23}** Vacated and remanded.

It is ordered that appellant recover from appellee 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 common pleas court to carry this judgment into execution.

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

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LARRY A. JONES, SR., JUDGE

MARY EILEEN KILBANE, J., CONCURS;
PATRICIA ANN BLACKMON, P.J., DISSENTS
WITH SEPARATE OPINION

PATRICIA ANN BLACKMON, P.J., DISSENTING

**{¶ 24}** I respectfully dissent from the majority opinion; I would find no error with the trial court's denial of Stansell's motion to vacate the sexually violent predator specification.

**{¶ 25}** In 2000, this court affirmed Stansell's plea and agreed-to sentence of 20 years to life in prison in *State v. Stansell*, 8th Dist. Cuyahoga No. 75889, 2000 Ohio App. LEXIS 1726 (Apr. 20, 2000) ("*Stansell I*"). I wrote that opinion in *Stansell I*. The sexually violent predator specification was not raised in that direct appeal, although the specification was noted and remained undisturbed. As stated in the majority opinion in this case, Stansell subsequently raised the issue in a postconviction action, and this court affirmed the specification in *State v. Stansell*, 8th Dist. Cuyahoga No. 100604, 2014-Ohio-1633 ("*Stansell II*"). Specifically, this court held that "the *Smith* decision has no retroactive application to Stansell's conviction on the sexually violent predator specification." *Id.* at ¶ 16.

**{¶ 26}** The majority opinion in the case bases its decision on *State v. Frierson*, 8th Dist. Cuyahoga No. 106841, 2019-Ohio-317, *State v. Townsend*, 8th Dist. Cuyahoga No. 107186, 2019-Ohio-1134, and *State v. Clipps*, 8th Dist. Cuyahoga No. 107747, 2019-Ohio-3569; in those cases this court found that amended R.C. 2971.01(H)(1) violates the Ex Post Facto Clause of the United States Constitution as applied to defendants who committed offenses prior to the date the statute was amended. In my opinion, the holdings in *Townsend*, *Frierson*, and *Clipps* directly conflict with the holding in *Stansell II.*

**{¶ 27}** *Townsend* was accepted for review by the Ohio Supreme Court on the following proposition of law, filed by the state as a cross-appellant: "The General Assembly legislatively clarified the definition of sexually violent predator through 150 H.B. 173. The Amendment's application to defendants who committed an offense prior to April 29, 2005 does not violate the Ex Post Facto Clause of the United States Constitution or Retroactivity Clause of the Ohio Constitution." *See State v. Townsend*, Ohio S.Ct. No. 2019-0606. *Frierson* and *Clipps* were also accepted for review by the Ohio Supreme Court and held for the decision in *Townsend*. *See State v. Frierson*, Ohio S.Ct. No. 2019-0899; *State v. Clipps*, Ohio S.Ct. No. 2019-1429. The Ohio Supreme Court heard argument in *Townsend* on June 16, 2020.

**{¶ 28}** The issue accepted for review by the Ohio Supreme Court is precisely the same issue on appeal in the case at hand. The Ohio Supreme Court could very well agree with this majority; however, until it does so, I would affirm the trial court's decision.