[Cite as *State v. Darby*, 2015-Ohio-2076.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 14CA80
	:	
ARTHUR DARBY	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 92-CR-455H
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	May 26, 2015

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
BAMBI S. COUCH-PAGE RICHLAND COUNTY PROSECUTOR	ARTHUR DARBY, PRO SE Inmate # 600-254 Richland Correctional Inst.
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Delaney, J.

{¶1} Defendant-Appellant Arthur Darby appeals the October 7, 2014 judgment entry of the Richland County Court of Common Pleas. Plaintiff-Appellee is the State of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} The underlying facts are not relevant for this appeal.

{¶3} On April 29, 1992, Darby was charged in Case No. 92-CR-455H with five counts of aggravated trafficking of a scheduled II controlled substance in violation of R.C. 2925.03(A)(1). Because Darby had been previously convicted of a felony drug abuse offense in Case No. 88-CR-248, his violations of R.C. 2925.03(A)(1) were felonies of the second degree. Darby pled guilty to the charges. On May 7, 1993, the trial court sentenced Darby to serve five to fifteen years in prison on count one and to serve three to fifteen years in prison on counts two through five. The prison term for count one was to be served consecutively to the prison terms for counts two through five, for a total sentence of eight to fifteen years.

{¶4} Darby did not appeal his sentence.

{¶5} On July 8, 1994, the trial court considered a motion filed by Darby for suspension of his sentence pursuant to R.C. 2947.061. The trial court granted the motion and Darby's sentence was suspended. The trial court placed Darby on shock probation for five years. Darby and the State did not appeal the trial court's order granting shock probation.

{¶6} Darby's shock probation was unsatisfactorily terminated on June 7, 1996.

{¶7} On September 9, 2013, Darby filed a Petition to Vacate or Set Aside Judgment of Conviction or Sentence. He argued his sentence in 92-CR-455H was void because the trial court was statutorily prohibited from granting Darby shock probation. Darby stated the federal government was considering his sentence in 92-CR-455H in a federal pre-sentencing report.

{¶8} The State filed a response to Darby's petition for post-conviction relief. The State argued Darby's petition for post-conviction relief was untimely and should be denied. Darby filed a reply on September 20, 2013. On September 20, 2013, the trial court denied Darby's petition for post-conviction relief. Darby filed an appeal of the September 20, 2013 judgment entry. This court dismissed Darby's appeal on January 21, 2014 for failure to prosecute.

{¶9} On September 8, 2014, Darby filed a Motion to Correct a Void or Voidable Sentence. Darby raised the same arguments in his motion as he did in his petition for post-conviction relief. The State filed a response on September 29, 2014. The State argued Darby's arguments were barred by res judicata.

{¶10} The trial court denied Darby's motion on October 7, 2014.

{¶11} It is from this judgment Darby now appeals.

ASSIGNMENTS OF ERROR

{¶12} Darby raises three Assignments of Error in his amended appellant's brief:

{¶13} "I. TRIAL COURT IMPROPERLY DENIED APPELLANTS SECOND MOTION FOR POST-CONVICTION RELIEF WHEN IT WAS NOT TIME BARRED …WHEN IT FAILED FAILED [SIC] TO MAKE A DETERMINATION AS TO WHETHER CONVICTION IN CASE NO 1992-CR-455, WAS VOID BECAUSE IT HAD

STATUTORILY PROHIBITED TERM OF PROBATION, THUS RENDERING ENTIRE CONVICTION VOID OR VOIDABLE …INVALID AS A MATTER OF RECORD…

{¶14} "II. UNDER STATE AND FEDERAL LAWS, A STATUTORILY PROHIBITED SENTENCE OF CONVICTION CAN NOT BE USED TO ENHANCE A FUTURE SENTENCE…

{¶15} "III. APPELLANT ASK [SIC] THIS COURT TO MAKE A DETERMINATION, AS TO WHETHER A STATUTORILY PROHIBITED SENTENCE OF CONVICTION THAT IS OVER TWENTY YEARS OLD CAN BE USED TO ENHANCE A FUTURE SENTENCE…"

ANALYSIS

{¶16} Darby argues his sentence in Case No. 92-CR-455H for five counts of aggravated trafficking is void or voidable because the trial court improperly granted him shock probation pursuant to R.C. 2947.061. We disagree.

{¶17} In May 1992, Darby was indicted on five counts of violating R.C. 2925.03(A)(1) by knowingly selling or offering to sell crack cocaine, a schedule II controlled substance, in an amount less than the minimum bulk amount. The version of R.C. 2925.03(A)(1) in effect when Darby was charged stated as follows:

> (A) No person shall knowingly do any of the following:
>
> (1) Sell or offer to sell a controlled substance in an amount less than the minimum bulk amount;
>
> * * *

> (C) If the drug involved is any compound, mixture, preparation, or substance included in schedule I, with the exception of marihuana, or in schedule II, whoever violates this section is guilty of aggravated trafficking.
>
> (1) Where the offender has violated division (A)(1) of this section, aggravated trafficking is a felony of the third degree, except that aggravated trafficking is a felony of the second degree, if any of the following apply:
>
> (a) The offender commits the offense on school premises, in a school building, or within one thousand feet of the boundaries of any school premises;
>
> (b) The offender commits the offense within one hundred feet of any juvenile or within the view of any juvenile, whether or not the offender knows the age of the juvenile, the offender knows the juvenile is within one hundred feet or within view of the commission of the offense, or the juvenile views the commission of the offense;
>
> (c) The offender previously has been convicted of a felony drug abuse offense.

{¶18} Because Darby had been previously convicted of a felony drug abuse offense in Case No. 88-CR-248, his violation of R.C. 2925.03(A)(1) was a felony of the second degree. R.C. 2925.03(C)(1).

{¶19} Darby pled guilty to the charges. On May 7, 1993, the trial court sentenced Darby to serve five to fifteen years in prison on count one and to serve three to fifteen years in prison on counts two through five. The prison term for count one was

to be served consecutively to the prison terms for counts two through five, for a total sentence of eight to fifteen years.

{¶20} On July 8, 1994, the trial court considered a motion filed by Darby for suspension of sentence pursuant to R.C. 2947.061. Shock probation pursuant to R.C. 2947.061 was available to defendants who committed their crimes prior to July 1, 1996. *State v. Coffman*, 91 Ohio St.3d 125, 126 742 N.E.2d 644 (2001). The General Assembly repealed the statute and the current judicial release statute, R.C. 2929.20, became effective via Senate Bill 2 on July 1, 1996. *State v. Moore*, 2013-Ohio-4454, 999 N.E.2d 223, ¶ 19 (7th Dist.).

{¶21} The former shock probation statute stated:

> Subject to sections 2951.02 to 2951.09 of the Revised Code and notwithstanding the expiration of the term of court during which the defendant was sentenced, the trial court, upon the motion of the defendant, may suspend the further execution of the defendant's sentence and place the defendant on probation upon the terms that the court determines, if the defendant was sentenced for an aggravated felony of the first, second, or third degree, is not serving a term of actual incarceration, is confined in a state correctional institution, and files the motion at any time after serving six months in the custody of the department of rehabilitation and correction.

{¶22} The trial court granted Darby's motion and further execution of Darby's sentence was suspended. The trial court placed Darby on shock probation for five years.

{¶23} Darby's argument in his motion to correct a void or voidable sentence is as follows: (1) the trial court was required to impose a sentence of actual incarceration under R.C. 2925.03(C) based on his conviction under R.C. 2925.03(A)(1); (2) because the trial court was required to impose a sentence of actual incarceration, Darby was not eligible for shock probation pursuant to R.C. 2947.061; (3) therefore, when the trial court granted his motion for suspension of sentence pursuant to R.C. 2947.061, this rendered his sentence in 92-CR-455H void or voidable.

{¶24} A review of R.C. 2925.03(C) demonstrates that Darby's argument to render his sentence in 92-CR-455H void is an incorrect interpretation of the statute. A conviction under R.C. 2925.03(A)(1) does not require the trial court to impose a sentence of actual incarceration. R.C. 2925.03(C)(1). R.C. 2925.03(C)(1), unlike R.C. 2925.03(C)(3) through (10), does not authorize the imposition of a term of actual incarceration upon the offender. *State v. Michael D. Larry*, 10th Dist. Franklin No. 95APA11-1418, 1996 WL 362090, *6 (June 25, 1996).

{¶25} The trial court did not commit an error when it granted Darby's motion for shock probation. Darby's sentence in Case No. 92-CR-455H was proper under the law. Accordingly, the trial court did not err in denying his motion to correct a void or voidable sentence.

{¶26} Darby's three Assignments of Error are overruled.

CONCLUSION

{¶27} The judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J.,

Wise, P.J. and

Baldwin, J., concur.