

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
VINTON COUNTY

STATE OF OHIO,	:	
	:	Case No. 16CA704
Plaintiff-Appellee,	:	
	:	
vs.	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
THOMAS E. CRAFT,	:	
	:	
Defendant-Appellant.	:	Released: 12/28/17

APPEARANCES:

Thomas E. Craft, Chillicothe, Ohio, Pro Se Appellant.

Trecia Kimes-Brown, Vinton County Prosecutor, and William L. Archer, Jr., Assistant Vinton County Prosecutor, McArthur, Ohio, for Appellee.

McFarland, J.

{¶1} Thomas E. Craft appeals from a judgment denying his post-conviction “Verified Motion to Correct Sentence,” which he filed thirteen years after he was convicted and sentenced for murder and a firearm specification, convictions which were directly appealed to this Court and affirmed in 2005. Appellant raises one assignment of error on appeal, contending that the trial court erred and abused its discretion when it overruled his verified motion without an evidentiary hearing, and by

incorrectly ruling that the sentences imposed were not contrary to law and that his claims are barred by res judicata.

{¶2} Because Appellant's nonconstitutional claims, which involve allegations that the trial court failed to make the required statutory findings before imposing mandatory and consecutive prison terms and allegations that the trial court failed to advise him of his right to appeal his sentence, are barred by res judicata, we reject his assertions. Further, to the extent his verified motion raised constitutional claims, it should have been construed as an untimely petition for post-conviction relief that the trial court lacked jurisdiction to address. As such, Appellant's sole assignment of error is overruled and the judgment of the trial court is affirmed, with the exception of the portion of the trial court's judgment which this Court modifies to reflect dismissal of his constitutional claims.

FACTS

{¶3} In April of 2004, Appellant was found guilty by a jury of one count of murder, in violation of R.C. 2903.02(A), along with a firearm specification, in violation of R.C. 2941.145. The trial court sentenced Appellant to an indefinite prison term of fifteen years to life on the murder conviction and a mandatory, stated prison term of three years on the firearm specification, to be served consecutively.

{¶4} Appellant filed a direct appeal from his convictions claiming they were against the manifest weight of the evidence, and also raising various claims of ineffective assistance of counsel and other constitutional claims. This Court found no merit to any of the assignments of error raised by Appellant and affirmed the judgment of the trial court. *State v. Craft*, 4th Dist. Vinton No. 04CA589, 2005-Ohio-3944. Then, in 2016, Appellant filed a pro se “Verified Motion to Correct Sentence.” His motion contended that his claims were not barred by waiver or res judicata, and that his sentences were contrary to law. He argued that the trial court erred in imposing mandatory and consecutive sentences, failed to advise of him of his right to appeal his sentences, and that these failures deprived him of procedural due process. Appellant’s motion requested that the trial court issue an order of resentencing after holding a hearing, “that the Judgment Entry be corrected to reflect a corrected factual basis; that he is actually guilty of a lesser included [offense,]” and to impose a “non-mandatory and concurrent sentence that; leaves him eligible for Judicial Release and the ability to get Earned Credit * * *.” The trial court denied Appellant’s motion. It is from the denial of this motion that Appellant now brings his appeal, setting forth a single assignment of error for our review.

ASSIGNMENT OF ERROR

“I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT OVERRULED AND DENIED DEFENDANT’S PROPERLY FILED VERIFIED MOTION TO CORRECT SENTENCE, ALLEGING SENTENCING ERRORS, WITHOUT ANY REAL REVIEW OR HOLDING A HEARING, INCORRECTLY RULING THAT THE SENTENCE IMPOSED WAS NOT CONTRARY TO LAW AND FURTHER INCORPORATING THE STATE’S FLAWED ARGUMENT THAT THESE ERRORS CAN ONLY BE RAISED ON DIRECT APPEAL AND ARE BARRED FROM REVIEW UNDER PRINCIPLES OF RES JUDICATA.”

STANDARD OF REVIEW

{¶5} When reviewing a felony sentence, we apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016–Ohio–1002, 59 N.E.3d 1231, ¶ 22. Under R.C. 2953.08(G)(2), an appellate court may increase, reduce, or modify a sentence or may vacate the sentence and remand the matter to the sentencing court if it clearly and convincingly finds either “[t]hat the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant” or “[t]hat the sentence is otherwise contrary to law.” *See State v. Mullins*, 4th Dist. Scioto No. 15CA3716, 2016–Ohio–5486, ¶ 25.

LEGAL ANALYSIS

{¶6} As set forth above, in his sole assignment of error, Appellant contends that the trial court erred and abused its discretion in denying his “Verified Motion to Correct Sentence” without holding a hearing. Appellant further contends that the trial court erred in determining that his sentences were not contrary to law and that his arguments were barred by res judicata. The State contends that the trial court’s decision should be upheld under theories of res judicata and by application of the post-conviction relief statute of limitations.

{¶7} A review of the trial court’s decision reveals that Appellant’s motion was, contrary to Appellant’s arguments, denied on the merits. It does not appear that the trial court denied Appellant’s motion based upon the doctrine of res judicata, nor did it deny Appellant’s motion as an untimely petition for post-conviction relief. However, as urged by the State, we conclude the trial court should have construed Appellant’s motion, in part, as an untimely petition for post-conviction relief, and should have applied the principles of res judicata to bar Appellant’s remaining claims.

{¶8} With regard to Appellant’s nonconstitutional claims, which assert that the trial court erred 1) in imposing mandatory and consecutive sentences; 2) in failing to generally consider the principles and purposes of

felony sentencing (which he claims would have supported the imposition of a reduced sentence); and 3) in failing to advise Appellant of his right to appeal his sentences, we note that “ ‘[u]nder the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or claimed lack of due process that was raised or could have been raised by the defendant at the trial, * * * or on appeal from that judgment.’ ” *State v. Szefcyk*, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996); quoting *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus (1967); see also *State v. Davis*, 139 Ohio St.3d 122, 2014–Ohio–1615, 9 N.E.3d 1031, ¶ 28. “ ‘Res judicata does not, however, apply only to direct appeals, but to all postconviction proceedings in which an issue was or could have been raised.’ ” *State v. Heid*, 4th Dist. Scioto No. 15CA3710, 2016–Ohio–2756, ¶ 18; quoting *State v. Montgomery*, 2013–Ohio–4193, 997 N.E.2d 579, ¶ 42 (8th Dist.).

{¶9} Appellant claims that res judicata does not bar the claims alleged in his verified motion because his sentences were contrary to law, essentially arguing that his sentences are void. The Supreme Court of Ohio has at times held that “a sentence that is not in accordance with statutorily mandated terms is void,” which “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.” *State v. Fischer*, 128 Ohio St.3d 92, 2010–Ohio–6238, 942 N.E.2d 332, ¶ 8 and paragraph one of the syllabus. “ ‘In general, a void judgment is one that had been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act. Unlike a void judgment, 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.’ ” *Id.* at ¶ 6; quoting *State v. Simpkins*, 117 Ohio St.3d 420, 2008–Ohio–1197, 884 N.E.2d 568, ¶ 12, superseded on other grounds by statute as stated in *State v. Holdcroft*, 137 Ohio St.3d 526, 2013–Ohio–5014, 1 N.E.3d 382.

{¶10} Generally, however, “sentencing errors are not jurisdictional and do not render a judgment void.” *Id.* at ¶ 7. Further, this Court noted in *State v. Berecz*, 4 Dist. Washington No. 16CA15, 2017-Ohio-266, at ¶ 16, as follows:

“In *State v. Holdcroft*, 137 Ohio St.3d 526, 2013–Ohio–5014, 1 N.E.3d 382, at ¶ 8, the Supreme Court of Ohio emphasized that the language in *Fischer* noting the inapplicability of res judicata, ‘does not apply to most sentencing challenges’ and instead applied ‘only in a limited class of cases—all three cases to which we have applied the Fischer rule have in common the crucial feature of a void *sanction*.’ (Emphasis added.)”

{¶11} Here, Appellant claims that his sentences are contrary to law because the trial court failed to make certain statutory findings before imposing mandatory and consecutive sentences. He also seems to claim that his sentences are contrary to law because the trial court failed to generally consider the principles and purposes of felony sentencing before imposing sentence, including any mitigating factors which would support imposition of a reduced sentence for a “lesser inclusive offense.” A review of the record indicates that the trial court sentenced Appellant to an indefinite term of imprisonment of fifteen years to life on the murder conviction, and a stated term of three years on the firearm specification, to be served consecutively. Although the trial court stated on the record in the sentencing hearing that the sentence for the firearm specification was mandatory, the trial court’s judgment entry of conviction and sentence did not expressly state that the sentence for the firearm specification was mandatory. Further, a review of the record reveals that the trial court did not make any statutory findings prior to imposing the consecutive and purported mandatory sentences.

{¶12} This Court was presented with very similar arguments and nearly verbatim assignments of error in *State v. Berecz, supra*, and *State v. Hamilton*, 4th Dist. Hocking No. 16CA17, 2017-Ohio-1294. Berecz filed an

initial appeal from his conviction and sentences, originally arguing that the trial court erred in imposing numerous consecutive prison terms, which resulted in what he claimed was an excessive sentence. *Id.* at ¶ 4. We denied that argument on appeal, holding there was no legal error in the imposition of the consecutive sentences. *Id.* Berecz then filed a “Verified Motion to Correct Sentence,” much like Appellant herein, contending that his sentences were void because the trial court failed to make the requisite findings under R.C. 2929.14(C)(4) before imposing consecutive sentences. We rejected Berecz’s argument, noting that “ ‘[t]he Supreme Court of Ohio has declined to find sentences void based on the court’s failure to comply with certain sentencing statutes, including the consecutive sentencing statute.’ ” *Id.* at ¶ 18; quoting *State v. Chapin*, 10th Dist. Franklin No. 14AP-1003, 2015-Ohio-3013, ¶ 9; citing *State v. Sanders*, 9th Dist. Summit No. 27189, 2014-Ohio-5115, ¶ 5; citing *State v. Holdcroft*, *supra*, at ¶ 8. In reaching our decision in *Berecz*, we noted our prior holdings indicating “successful challenges to the imposition of consecutive sentences do not render the sentence void and are thus barred by res judicata.” *Berecz* at ¶ 19; citing *State v. Phippen*, 4th Dist. Scioto No. 16CA3727, 2016-Ohio-7105, ¶ 20; quoting *State v. Butcher*, 4th Dist. Meigs No. 14CA7, 2015-Ohio-4249, ¶ 27.

{¶13} The same reasoning applies to Appellant’s argument that the trial court’s imposition of a mandatory stated prison term for the firearm specification, and his argument that the trial court failed to generally consider the principles and purposes of felony sentencing before imposing sentence. *Berecz* at ¶ 19; citing *In re A.M.*, 4th Dist. Athens No. 14CA49, 2015-Ohio-5610, ¶ 13; quoting *Holdcroft, supra*, at ¶ 8 (“ ‘res judicata still bars “most sentencing challenges,” such as whether a trial court complied with R.C. 2929.11 and 2929.12 * * *”).’ ” Further, in *Hamilton, supra*, at ¶ 17, we rejected the appellant’s claim that the trial court did not make the required findings before imposing mandatory and more than minimum sentences, holding that “[b]ecause Hamilton either raised or could have raised [the arguments] in his prior direct appeal, * * * res judicata barred Hamilton’s statutory sentencing claims, which if meritorious would only render his sentence voidable, rather than void.”

{¶14} Appellant also contends that the trial court failed to advise him of his right to appeal his sentences. A review of the record reveals that the trial court advised Appellant, both orally during the sentencing hearing and in writing in the judgment entry, that he had the right to appeal the court’s judgment. The notice provided said nothing about specifically appealing the

sentence. At this juncture, we note our prior discussion in *Berecz*, which addressed an identical argument and stated as follows:

“Although R.C. 2953.08 confers on a defendant the right to appeal from the sentence, it contains no requirement that the court notify the defendant of that right. And any purported failure by the trial court in its notification obligations under Crim.R. 32 could not render his sentence void. *See, e.g., State v. Gannon*, 4th Dist. Lawrence No. 15CA16, 2016-Ohio-1007, ¶ 17 (‘because the error here resulted from the court’s failure to comply with Crim.R. 11(C)(2)(a) requirements for accepting a plea, rather than as a result of ignoring a statutory mandate for imposing sentence, the plea was merely voidable and not void.’)” *Berecz* at ¶ 23; *see also State v. Barnes*, 12th Dist. Warren No. CA2014-03-049, 2015-Ohio-651, ¶ 27 (trial court’s failure to advise defendant of his right to appeal under Crim.R. 32(B)(2) does not render conviction void); *State v. Hamilton, supra*, at ¶ 18.

This Court ultimately found *Berecz*’s claim to be barred by res judicata. Our prior reasoning set forth in both *Berecz* and *Hamilton* lead us to the same conclusion here, which dictates that Appellant’s claim related to the trial court’s failure to advise him of his right to appeal his sentence is barred by res judicata.

{¶15} Finally, Appellant raised additional constitutional claims in his motion, purportedly grounded in due process. Appellant argued that he was deprived of his right to procedural due process by the trial court’s failure to make findings prior to imposing mandatory and consecutive sentences, as well as its failure to advise him of his right to appeal his sentences. “ [I]f a

criminal defendant, subsequent to his or her direct appeal, files a motion seeking the vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, then such a motion is a petition for postconviction relief.’ ” *Berecz* at ¶ 25; quoting *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus. Thus, to the extent that Appellant’s motion raised constitutional claims, it constituted an untimely petition for postconviction relief that the trial court could not address. R.C. 2953.23(A)(1) and (2); *Berecz* at ¶ 25; citing *State v. McDougald*, 4th Dist. Scioto No. 16CA3736, 2016–Ohio–5080, ¶ 22–23; *see also Hamilton, supra*, at ¶ 20. As a result, Appellant has not established that the trial court erred by not granting his motion to correct his sentence. We therefore overrule his sole assignment of error.

{¶16} In conclusion, because we determined that Appellant was not entitled to the relief requested in his “Verified Motion to Correct Sentence,” we conclude the trial court correctly denied his motion to the extent he raised nonconstitutional claims, as they were barred by principles of res judicata. However, to the extent Appellant’s motion raised constitutional claims, it constituted a time-barred petition for postconviction relief and, as such, the trial court had no jurisdiction to address it. *Berecz* at

¶ 22; *Hamilton* at ¶ 27. Having found no merit in the assignment of error presented for review and based upon the authority of App.R. 12(A)(1)(a), we modify the judgment of the trial court to reflect dismissal of the “Verified Motion to Correct Sentence,” insofar as it raised constitutional claims and should have been construed as an untimely petition for post-conviction relief. *Id.* As such, we affirm the judgment of the trial court, as modified.

JUDGMENT AFFIRMED AS MODIFIED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED AS MODIFIED and that costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Vinton County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, J.: Concurs in Judgment and Opinion.

Hoover, J.: Concurs in Judgment Only.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.