

[Cite as *State v. Benford*, 2010-Ohio-54.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24828

Appellee

v.

WILLIAM P. BENFORD

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 2007 11 3884 (A)

Appellant

DECISION AND JOURNAL ENTRY

Dated: January 13, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} A jury found William Benford guilty of murder and felonious assault. The trial court sentenced him to fifteen years to life in prison, and he appealed. He also petitioned for post-conviction relief. The trial court dismissed Mr. Benford’s petition for post-conviction relief because it concluded that he waited too long to file it. Mr. Benford has appealed the order dismissing his petition. This Court affirms on different grounds, concluding that, because the trial court’s sentencing entry is void, there is no judgment from which Mr. Benford can seek post-conviction relief.

PREMATURE PETITION

{¶2} Mr. Benford’s first assignment of error is that the trial court incorrectly failed to hold a hearing on his petition for post-conviction relief. His second assignment of error is that

the trial court incorrectly dismissed his petition. Because Mr. Benford's petition is premature, the court correctly dismissed it without holding a hearing.

{¶3} Section 2953.21(A)(1)(a) of the Ohio Revised Code provides that “[a]ny person who has been convicted of a criminal offense . . . and who claims that there was such a denial or infringement of the person’s rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States . . . may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief.” Accordingly, under the plain language of the statute, a person cannot petition for post-conviction relief unless he “has been convicted” and there is a “judgment.” R.C. 2953.21(A)(1)(a).

{¶4} “[A] judgment of conviction requires a sentence, and a defendant is not convicted until sentenced.” *State v. Haley*, 2d Dist. No. 94-CA-107, 1995 WL 418739 at *1 (July 7, 1995) (quoting *State v. Boyd*, 95 Ohio App. 3d 679, 686 (1994)). On September 3, 2009, this Court determined in Mr. Benford’s attempted direct appeal that, because the trial court’s sentencing entry did not correctly impose post-release control, Mr. Benford’s sentence was void. This Court vacated the entry and remanded for resentencing. The parties did not appeal this Court’s decision, therefore, its conclusion that Mr. Benford’s sentence was void became the law of the case. *Nolan v. Nolan*, 11 Ohio St. 3d 1, 3 (1984) (“[T]he doctrine of ‘law of the case’ . . . provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.”).

{¶5} “The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in

the same position as if there had been no judgment.” *State v. Bloomer*, 122 Ohio St. 3d 200, 2009-Ohio-2462, at ¶27 (quoting *State v. Bezak*, 114 Ohio St. 3d 94, 2007-Ohio-3250, at ¶12). Accordingly, because the trial court’s sentencing entry is void and Mr. Benford has not been resentenced, his petition for post-conviction relief is premature. See *State v. Gross*, 5th Dist. No. CT2002-0037, 2003-Ohio-6295, at ¶4, 20-21 (concluding that petition for post-conviction relief was premature because the Ohio Supreme Court had vacated the defendant’s sentence and resentencing had not taken place). The trial court, therefore, correctly dismissed Mr. Benford’s petition. Mr. Benford’s assignments of error are overruled.

{¶6} It is important to explain how this case is different from *State v. O’Neal*, 9th Dist. No. 08CA0028-M, 2008-Ohio-6572. In 2005, William O’Neal pleaded guilty to kidnapping, felonious assault, carrying a concealed weapon, and illegal possession of a firearm. *Id.* at ¶3. The trial court sentenced him to thirteen years in prison. This Court reversed his sentence under *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856. *Id.* at ¶3-4. Following resentencing, this Court dismissed Mr. O’Neal’s appeal because the trial court’s journal entry was not a final appealable order under Rule 32(C) of the Ohio Rules of Criminal Procedure. *State v. O’Neal*, 9th Dist. No. 06CA0056-M, 2007-Ohio-2266, at ¶16. After the trial court entered a judgment that complied with Rule 32(C), Mr. O’Neal appealed and sought post-conviction relief. *O’Neal*, 2008-Ohio-6572, at ¶5.

{¶7} The trial court denied Mr. O’Neal’s post-conviction relief petition as untimely. *State v. O’Neal*, 9th Dist. No. 08CA0028-M, 2008-Ohio-6572, at ¶5. Mr. O’Neal appealed its decision, arguing that the deadline for his petition did not begin to run until after the transcripts were filed in his most recent direct appeal. *Id.* at ¶10. This Court rejected his argument, explaining that “[t]he prevailing case law indicates that the time limit for a PCR petition runs

from the original appeal from the conviction.” *Id.* at ¶12. It concluded that the resentencing hearing did not restart the clock for post-conviction relief purposes. *Id.* at ¶13.

{¶8} Although the nature of the journal entries was not discussed in *O’Neal*, the journal entry that Mr. O’Neal first appealed from was voidable, not void. *State v. Payne*, 114 Ohio St. 3d 502, 2007-Ohio-4642, at ¶29 (“pre-*Foster* sentences imposed after judicial fact-finding and falling within the statutory range are voidable.”). Accordingly, there was a judgment from which he could appeal and an event that triggered the 180-day deadline for filing a post-conviction relief petition under Section 2953.21(A)(2). R.C. 2953.21(A)(2) (providing that a petition for post-conviction relief “shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction . . .”). In this case, because the trial court’s sentencing entry is void, there has been no judgment from which Mr. Benford could file a direct appeal. See *State v. Bloomer*, 122 Ohio St. 3d 200, 2009-Ohio-2462, at ¶27. The time period in which he can file for post-conviction relief, therefore, has not begun to run.

CONCLUSION

{¶9} Mr. Benford’s post-conviction relief petition is premature. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCURS

APPEARANCES:

WILLIAM P. BENFORD, pro se, appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellee.