[Cite as *State v. Gilmore,* 2014-Ohio-5059.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 11 MA 30
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION AND
	)	JUDGMENT ENTRY
MARLON GILMORE	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Appellant's Motion to Reconsider or, in the Alternative, To Certify a Conflict
Case No. 91 CR 177

JUDGMENT: Denied.

APPEARANCES:

For Plaintiff-Appellee:

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Mahoning County Prosecutor
Atty. Ralph M. Rivera
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For Defendant-Appellant:

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Office of the Ohio Public Defender
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JUDGES:
Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated:

[Cite as *State v. Gilmore,* 2014-Ohio-5059.]
WAITE, J.

{¶1} Appellant Marlon Gilmore seeks reconsideration of our decision in his underlying appeal in *State v. Gilmore*, 7th Dist. No. 11 MA 30, pursuant to App.R. 26(A). Appellant contends that we incorrectly held that alleged errors in his original sentencing entry and in his resentencing did not operate to make his sentence void. In the alternative, Appellant asks that we certify a conflict in his case with three decisions from the Fourth District Court of Appeals. "The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *Columbus v. Hodge*, 37 Ohio App.3d 68, 523 N.E.2d 515 (1987), paragraph one of the syllabus. Section 3(B)(4), Article IV, of the Ohio Constitution governs motions to certify a conflict. It provides:

> Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

{¶2} Before a reviewing court may certify a conflict, "there must be an actual conflict between appellate judicial districts on a rule of law before certification of a case to the Supreme Court for review and final determination is proper." *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 1993-Ohio-223, 613 N.E.2d 1032, paragraph one of the syllabus. The Supreme Court requires, and we have adopted:

> [A]t least three conditions must be met before and during the certification of a case to this court pursuant to Section 3(B)(4), Article IV of the Ohio Constitution. First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law-not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. (Emphasis sic.).

Id. at 596; *State v. Parks*, 7th Dist. No. 08 CA 857, 2009-Ohio-5284, ¶4 ("[a]t least three preconditions must be met before a conflict can be certified") and *State v. Wright*, 11 MA 14, 2013-Ohio-4445, ¶3. Appellant is mistaken both in his belief that a *nunc pro tunc* entry is insufficient to correct his alleged sentencing errors and in the legal and factual relationship between this matter and the decisions of the Fourth District.

{¶3} Of the three cases cited by Appellant, only two can be found on the Ohio Supreme Court's website: *State v. Savage*, 4th Dist. No. 11 CA 7, 2012-Ohio-2276 and *State v. Thompson* 10CA3177, 2011-Ohio-1564. The third, *State v. Lemaster*, 4th Dist. No. 12 CA1, 2012-Ohio- (Oct. 29, 2012), is not available in any publically accessible database. The case corresponding to Appellant's citation is completely unrelated. While, according to the Ohio Supreme Court's website, the

Fourth District did decide one case on October 29, 2012, that case is also unrelated. Nevertheless, a review of the accurately cited cases provided by Appellant reveals a telling factual distinction. In each of the Fourth District cases, unlike the proceedings in this matter, the trial court failed to hold a complete sentencing hearing and failed to draft a complete sentencing entry. Those omissions resulted in the failure of the trial courts to enter a final, appealable order in those cases.

{¶4} The trial court in *Savage*, *supra*, did not issue a complete sentencing entry. Instead, the court specifically deferred the issue of restitution until the defendant had completed a "SEPTA program at the SEPTA Correctional Facility in Nelsonville." *Id.* at ¶2. Because the resulting entry did not include the amount of restitution, the Fourth District Court of Appeals concluded that it was incomplete. The trial court did hold a second hearing, but at that time the court addressed only the amount of restitution. The resulting entry from his restitution hearing did not include the necessary findings or restate the entirety of the defendant's sentence as to his single conviction for fifth degree theft. The Fourth District found that it was improper to attempt to combine the incomplete July entry with the subsequent, and also incomplete, September entry in order to create a single final appealable order. Hence, as there was no final order that was appealable, it dismissed the appeal.

{¶5} In *Thompson*, *supra*, just as in *Savage*, the trial court separated sentencing and restitution. The initial sentencing order again failed to include the amount of restitution and instead set a date for hearing a month later to determine this amount. A subsequent, separate entry established the amount of restitution, but

once again failed to include the necessary elements of a complete sentencing entry. As in *Savage*, the Fourth District held that it did not have jurisdiction over the matter due to the absence of a final appealable order, and dismissed the case.

{¶6} In each of the cases cited by Appellant there were substantive defects in both the sentencing hearing and the resulting orders because neither order included the necessary elements of the sentence. Instead, they contemplated further action and then failed to incorporate all of the required elements of a final, appealable order into a coherent further entry. The result of these defects was the dismissal of each defendant's initial appeal. These factual situations are wholly different from Appellant's situation, because Appellant was given a complete sentencing hearing that established his entire sentence on each of his convictions. After this hearing the trial court issued complete sentencing entries on each offense in the conviction, all of which were journalized the same day. Each of these individually constituted a final appealable order. Hence, appellate jurisdiction was clearly appropriate and Appellant did file an appeal. In his 1993 appeal, *State v. Gilmore*, 7th Dist. No. 91 CA 93, 1993 WL 78793 (March 15, 1993), Appellant challenged his convictions but did not raise any issue concerning his sentencing or sentencing entries.

{¶7} Our resolution of his appeal was followed by multiple petitions for postconviction and *habeas* relief. The first of which, filed on September 23, 1996, included "complaints concerning his sentence." *State v. Gilmore*, 7th Dist. 04 MA 214, 2005-Ohio-2936, ¶3 ("*Gilmore I*"). We denied the petition, holding that later changes in the sentencing scheme on which Appellant relied were prospective and

did not apply to his sentence. *Id.* A habeas challenge, *State ex rel. Gilmore v. Mitchell*, 5th Dist. No. 99 CA 13 (Richland County) was dismissed by the Fifth District. On review by the Supreme Court, the Court notes that among the other defects in the petition, Appellant "failed to attach the common pleas court's sentencing entries on his complicity to aggravated murder and firearm convictions." *State ex rel. Gilmore v. Mitchell*, 86 Ohio St.3d 302, 303, 1999-Ohio-166. The Ohio Supreme Court dismissed Appellant's petition for *habeas* relief *sua sponte. Gilmore v. Mitchell*, 90 Ohio St.3d 1412 (2000).

{¶8} In 2005, we heard Appellant's subsequent petition for postconviction relief and affirmed the trial court's decision dismissing his due process challenges to his sentence because his petition was successive and untimely. We noted that Appellant recognized "that the doctrine of res judicata prohibits raising issues in a post-conviction petition that could have been raised in the direct appeal" *Gilmore I*, ¶6 and concluded:

> Here, appellant was not unavoidably prevented from discovering the facts surrounding his convictions and the sentence entered thereon. See R.C. 2953.23(A)(1)(a). In fact, he filed a prior petition for post-conviction relief concerning a sentencing issue. In the alternative, he does not direct this court to a new, relevant and retroactive federal or state right recognized by the United States Supreme Court. See R.C. 2953.23(A)(1)(b). Thus, the trial court was not permitted to entertain his successive and untimely petition.

Id. at ¶11. Despite the substantive completeness of his sentencing hearing and the resulting entries; his completed appeal as of right; the decisions of two appellate districts and the Ohio Supreme Court regarding those entries and his numerous opportunities to raise alleged sentencing defects in his various challenges, Appellant argues that we should now find that his original sentencing entries were not final, appealable orders.

{¶9} Appellant is essentially making the same argument, under similar circumstances, that the Supreme Court rejected in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332. In *Fischer*, the appellant was sentenced in 2002 and filed a timely direct appeal in which his convictions were affirmed. Then, several years later,

> Fischer successfully moved pro se for resentencing after [the Supreme Court] issued its decision in *State v. Bezak* * * * (holding that a sentence that omits a statutorily mandated postrelease term is void) because he had not been properly advised of his postrelease-control obligations. Thereafter, the trial court properly notified Fischer of those obligations and reimposed the remainder of the sentence. Fischer appealed.
>
> On appeal, he asserted that because his original sentence was void, his first direct appeal was "not valid" and that [his subsequent appeal of the trial court's attempt to correct his sentence] is in fact "his first direct appeal" in which he may raise any and all issues relating to his

> conviction. The court of appeals rejected his claim, holding that the appeal was precluded by the law-of-the-case doctrine.
>
> [The Ohio Supreme Court] granted discretionary review of a single proposition arising from the appeal: whether a direct appeal from a resentencing * * * is a first appeal as of right. We hold that it is not. (Citations omitted.)

Id. at ¶2-5.

{¶10} The Supreme Court explained in *Fischer*: "In general, 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. 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." (Internal citations omitted). *Id.* at ¶6. "[I]n the normal course, sentencing errors are not jurisdictional, and do not render a judgment void," and "void sentences are typically those in which a court lacked subject-matter jurisdiction over the defendant." *Id.* at ¶7. We do note that more recent Ohio caselaw has recognized a narrow exception to the general rule: "a sentence that is not in accordance with statutorily mandated terms is void." *Id.* at ¶8. The remedy the court prescribes for sentences that are void due to the absence of a statutorily mandated term is resentencing. *Id.*

{¶11} In this instance, however, the alleged error in Appellant's sentencing is not the omission of a statutorily mandated term, it is purely the form of his sentencing entries. Appellant contends that because the trial court conducted a single

sentencing hearing and then simultaneously issued entries on each count that, as we noted in our original Opinion in this matter, each separately comply with the requirements of *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330 as they pertain to the individual counts, the judgment should be considered void. Appellant believes his sentencing was required to have been encapsulated into but one entry. As we explained in our original Opinion, Appellant has the opposite problem of *Savage* and *Thompson*. Appellant's multiple entries each, singly, contained all of the necessary elements necessary to make them final, appealable orders. As we previously stated, Appellant is correct that he is entitled to an entry that accurately states the fact and manner of his conviction as well as his sentences on each count of the conviction, in compliance with *Baker* and with *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142. Appellant is mistaken, however, that the finality of his original sentencing entries is voided or disturbed by a defect in form. Finality was established in his original appeal as of right. The appellate decision is *res judicata* as to the issue in this matter. The principle of "*[r]es judicata* may be applied to bar further litigation of issues that were raised previously or could have been raised previously in an appeal." *State v. Houston*, 73 Ohio St.3d 346, 347, 652 N.E.2d 1018 (1995), citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

{¶12} A successful motion for reconsideration must call to our attention an obvious error in our decision or raise an issue that was either not considered or not fully considered when it should have been. Appellant bases his motion on matters never raised on appeal and which now are *res judicata*. For this reason, Appellant's

request for reconsideration is hereby denied. *Hodge*, *supra.* Similarly, Appellant's request for the certification of a conflict does not raise an actual conflict between our decision and decisions from the Fourth District and instead reflects diverging results driven by divergent facts. Appellant's motion to certify a conflict is likewise denied.

Waite, J., concurs.

Donofrio, J., concurs.

DeGenaro, P.J., concurs.