

[Cite as *State v. Brown*, 2014-Ohio-5832.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 14 MA 37
PLAINTIFF-APPELLEE,)	
)	
VS.)	O P I N I O N
)	
JAMES BROWN,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 95CR776.

JUDGMENT: Affirmed.

APPEARANCES:
For Plaintiff-Appellee:

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For Defendant-Appellant:

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JUDGES:
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 29, 2014

{¶1} Defendant-appellant James Brown appeals the decision of the Mahoning County Common Pleas Court overruling various post-conviction motions he filed. Appellant argues that he is entitled to a new sentencing entry that complies with Crim.R. 32(C) based upon his position that a date-stamp is insufficient and that a stamp showing the precise time of day is required. He similarly states that the time of day was required to have been stamped on the indictment and jury verdicts. These arguments are without merit.

{¶2} Appellant also argues that a sentence to “life” in prison was unauthorized by law as the court was required to sentence him to life with possibility of parole after twenty years. He urges that this issue is not barred by *res judicata* as the sentence is void for exceeding the court’s statutory authority. Although the mandatory sentence was life with eligibility for parole after twenty years, the failure to specify parole eligibility does not render the sentence void as the court did not attempt to impose life without parole. In any event, the life sentence in appellant’s case is necessarily read as life with eligibility after twenty years; it cannot be read in any other manner under the applicable statutes, and there is no indication that it will be. The judgment of the trial court is affirmed.

STATEMENT OF THE CASE

{¶3} On October 27, 1995, appellant was indicted for aggravated murder for purposely causing the death of Richard Taylor with prior calculation and design in violation of R.C. 2903.01(A), (C). He was also indicted for a firearm specification. A jury found him guilty as charged. The jury verdicts are date-stamped March 21, 1996 and were journalized at J1152, p. 232.

{¶4} A March 22, 1996 judgment entry stated that a jury found appellant guilty of aggravated murder with a firearm specification and then sentenced appellant to life imprisonment with a consecutive sentence of three years on the firearm specification to be served prior to the life sentence. The entry was signed by the trial court, date-stamped, and journalized at J1152, p. 312.

{¶15} This court affirmed appellant's conviction in *State v. Brown*, 7th Dist. No. 96CA64 (Mar. 26, 1999). He filed a petition to vacate his sentence, which was denied on March 18, 1998. His appeal of that order, resulting in 7th Dist. No. 08CA78, was dismissed in 1999 for failure to file a brief.

{¶16} On August 23, 2013, appellant filed a motion for the issuance of a final appealable order in compliance with Crim.R. 32(C). He asserted in pertinent part that the sentencing entry was devoid of a time-stamp. He also claimed that the indictment and jury verdicts were not properly filed as they had no time-stamp.

{¶17} On August 26, 2013, appellant filed a motion for an oral hearing and motion for sentencing pursuant to R.C. 2929.03(A)(1). He urged that the trial court's sentence to "a term of life imprisonment pursuant to R.C. 2929.03(A)" was unauthorized by law and thus void because said statute required the imposition of an indeterminate sentence of life with parole eligibility after twenty years. His motions suggested that the sentencing order was not a final appealable order due to these issues.

{¶18} As to the time-stamp argument, the state responded that the sentencing entry fully complied with Crim.R. 32(C) as it was file-stamped. As to the argument under R.C. 2929.03, the state responded that appellant was mistaken in his belief that he cannot be sentenced to life imprisonment where aggravating circumstances are not listed in the indictment. The state did not address the specific parole eligibility argument but instead asserted that R.C. 2929.03 and the statute cited within it (R.C. 2929.04) deal with death penalty cases.

{¶19} The court overruled appellant's motions on March 19, 2014. A timely notice of appeal was filed. Appellant lists the following two assignments of error:

{¶10} "The filing procedures enumerated in: O.R.C. § 2303.08; and, O.R.C. §2303.10 are 'mandatory' for the purpose of a final appealable order as defined in: Crim.R. 32(C); *State v. Lester*, 130 Ohio St.3d 303; *State v. Baker*, 119 Ohio St.3d 197; and, Ohio Const. Art. IV, Section 3(B)(2)."

{¶11} “A judgment which does not constitute a final appealable order implicates the underlying conviction * * * and is not subject to application of the doctrine of res judicata.” (Citations omitted).

{¶12} Appellant scatters separate arguments throughout his brief. There are two threshold issues: (1) whether a date-stamp qualifies as a time-stamp or whether the lack of a stamp providing the exact time of day fails to satisfy Crim.R. 32(C), and (2) whether a life sentence is void where it does not specifically express appellant’s eligibility for parole after twenty years. We will divide our analysis accordingly.

TIME-STAMP

{¶13} Crim.R. 32(C) provided that: “A judgment of conviction shall set forth the plea, the verdict or findings, and the sentence. * * * The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.” See Former Crim.R. 32(C) (the first sentence of the rule has been changed to eliminate the manner of conviction and now provides: “A judgment of conviction shall set forth the fact of conviction and the sentence.”). See *also* Former Crim.R. 32(B) (as it was numbered at the time of appellant’s sentence).

{¶14} In *Baker*, the Supreme Court held that a judgment of conviction is a final appealable order when it sets forth: (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court. *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, ¶ 18. This first element was modified in *Lester* so that the substantive requirements for a final order are *the fact* of the conviction (rather than the manner of conviction), the sentence, the judge’s signature, and the entry on the journal by the clerk. *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 11 (manner of conviction is clerical which can be corrected nunc pro tunc).

{¶15} The Court then stated in other language: “We hold that a judgment of conviction is a final order subject to appeal under R.C. 2505.02 when the judgment entry sets forth (1) the fact of the conviction, (2) the sentence, (3) the judge’s

signature, and (4) *the time stamp* indicating the entry upon the journal by the clerk.” (Emphasis added). *Id.* at ¶ 14.

{¶16} Appellant emphasizes the words “time stamp” and argues that the sentencing order was not final due to the lack of a stamp indicating the precise time of day. He urges that he is not precluded by *res judicata* from raising the issue now due to the jurisdictional nature of the problem. He compares R.C. 2303.08 and R.C. 2303.10 in support of his argument that the time of day is a necessary part of the file-stamp. He attempts to attack the indictment and jury verdicts on this basis as well.

{¶17} R.C. 2303.08, which outlines the general duties of the clerk, provides in pertinent part: “The clerk of the court of common pleas shall indorse on each pleading or paper in a cause filed in the clerk's office *the time of filing*, enter all orders, decrees, judgments, and proceedings of the courts of which such individual is the clerk * * *.” (Emphasis added). Thereafter, R.C. 2303.10, which deals with indorsement of papers, provides in relevant part: “The clerk of the court of common pleas shall indorse upon every paper filed with him *the date of the filing* thereof * * *.” (Emphasis added).

{¶18} Appellant believes that “time of filing” means “time of day.” However, the law traditionally speaks of time in terms of days passed, and this court has already disposed of this “time of day” argument. We have essentially ruled that a date-stamp sufficiently complies with the requirement to indorse the “time of filing.” See *State v. Moore*, 7th Dist. No. 12MA197, 2013-Ohio-0400, ¶ 30-36 (holding that the day of filing is all that is required in file-stamp). That is, the clerk’s indorsement need not specify the exact time of day. See *id.* See also *Rogers v. Fuerst*, 8th Dist. No. 100670, 2014-Ohio-2774, ¶ 8, 10 (defendant misconstrues statutory language as clerk need not provide the exact time of day).

{¶19} Clearly, a date-stamp indicates entry upon the journal by the clerk as required by Crim.R. 32(C). See, generally, *State ex rel. Untied v. Ellwood*, 131 Ohio St.3d 37, 959 N.E.2d 1048, 2011-Ohio-6343, ¶ 3 (defendant not entitled to a writ of mandamus to compel clerk of common pleas court to date-stamp and time-stamp all documents filed with the court, because “[t]he applicable entries were all stamped with the date of filing. This is all that the pertinent provisions require.”), citing Sup.R. 44(E)

(defining the word “file” as meaning “to deposit a document with a clerk of court, upon the occurrence of which the clerk time or date stamps and docket the document”).

{¶20} In fact, the Supreme Court has ruled that even a lack of a date-stamp does not void a filing that was actually filed with the clerk. *Zanesville v. Rouse*, 126 Ohio St.3d 1, 2010-Ohio-2218, 929 N.E.2d 1044, ¶5-8 (the lack of a date or time stamp is not a jurisdictional issue). See also *State v. Adams*, 7th Dist. No. 12MA26, 2013-Ohio-1433, ¶ 32 (“the indictment, sentencing entries, and other pleadings contain a date-stamp by the Mahoning County Clerk of Courts. Based on the reasoning in *Rouse*, it appears that this certification demonstrates that these documents were filed with the clerk, regardless of the fact that they do not contain a time-stamp. Thus, the trial court had subject matter jurisdiction over the case”); *State v. Morris*, 11th Dist. No. 2013-T-0019, 2013-Ohio-5485, ¶ 28-34 (holding that an argument on the lack of a “time stamp” fails to show document irregularity or lack of jurisdiction).

{¶21} Consequently, appellant’s initial arguments regarding the lack of the exact time of day within the file-stamp are without merit.

LIFE SENTENCE

{¶22} Appellant was indicted for aggravated murder in violation of R.C. 2903.01(A) for causing a death purposely and with prior calculation and design. “Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.” Former R.C. 2903.01(C). See also Current R.C. 2903.01(F). The referred to statute of R.C. 2929.02 provided (and still provides) in pertinent part that whoever is convicted of aggravated murder in violation R.C. 2903.01 “shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022, 2929.03, and 2929.04 of the Revised Code * * *.” R.C. 2929.02(A).

{¶23} The March 22, 1996 sentencing entry stated that the jury found appellant guilty of “Aggravated Murder, R.C. 2903.01(A), (C)” and sentenced appellant “to serve a term of life imprisonment pursuant to R.C. 2929.03(A)” (plus three years for the firearm specification to be served prior and consecutive to that term of imprisonment). The latter statutory provision directed:

If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

R.C. 2929.03(A).¹

{¶24} The statute likewise provided that if the indictment charging aggravated murder does contain a specification for aggravating circumstances under R.C. 2929.04(A) but the defendant is found not guilty of the specification (after being convicted of the charge), the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender. R.C. 2929.03(C)(1). For comparison purposes, we also note that if the indictment contained a specification for aggravating circumstances under R.C. 2929.04(A) and the offender is found guilty of both the charge and the specification, then the penalty to be imposed on the offender was to be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment. R.C. 2929.03(C)(2).

{¶25} Contrary to the state's suggestion below, R.C. 2929.03 does not deal only with indictments and sentences of death. Rather, the statute defining aggravated

¹In 1997, life without parole was added to R.C. 2929.03(A) for certain sexual specifications. Effective March, 25, 2005, the pertinent portion of the statute was amended as follows:

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:

(1) Except as provided in division (A)(2) of this section, the trial court shall impose ~~a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment~~ *one of the following sentences on the offender:*

(a) Life imprisonment without parole;

(b) Life imprisonment with parole eligibility after serving twenty years of imprisonment;

(c) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(d) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

R.C. 2929.03(A) (strike out shows legislatively deleted portion and italics show added portion).

murder specifically refers to R.C. 2929.02 for sentencing which in turn refers to other statutes, including R.C. 2929.03. And, R.C. 2929.03(A) specifically stated that where a person is indicted for aggravated murder but is not indicted with a death specification, then the sentence shall be life with parole eligibility after twenty years. In point of fact, the court's sentencing entry expressly names R.C. 2929.03(A) as the statute under which the life sentence was being imposed.

{¶26} The state's response below seemed to misunderstand appellant's argument and did not address whether appellant's entry should have specified that the life sentence had parole eligibility after twenty years. And, the state's brief on appeal does not address the issue concerning the life sentence at all.

{¶27} At the March 20, 1996 sentencing hearing, the state explicitly declared that life with parole eligibility after twenty years was the mandatory sentence. (Tr. 2). The court merely stated life when imposing sentence at the hearing and in the entry. Again, the entry specified that the life sentence was imposed pursuant to R.C. 2929.03(A), which division specified that said life sentence contained parole eligibility after twenty years.

{¶28} We recognize that, in a direct appeal, the Eighth District remanded a life sentence with a failure to specify eligibility for parole after twenty years with orders to conform the entry to R.C. 2929.03. *State v. Shugar*, 8th Dist. No. 45311 (Apr. 7, 1983). However, the contention in *Shugar* was presented in the appeal as of right. Here, we have a very late post-conviction request for correction of the sentence.

{¶29} Contrary to appellant's contention, this does not present a Crim.R. 32(C) issue as there was a sentence provided in the judgment entry. See *State v. Platt*, 11th Dist. No. 2012-P-0046, 2012-Ohio-5443, ¶ 25 (sentence to life without stating parole eligibility after twenty years satisfies the requirement of Crim.R. 32(C) concerning the imposition of a sentence). This leads to appellant's argument that res judicata is inapplicable because his sentence was unauthorized by law and void.

{¶30} The Second District has addressed a defendant's argument in a motion for resentencing that the imposition of a life sentence instead of an indeterminate life sentence was void. See *State v. Johnston*, 2d Dist. No. 25652, 2013-Ohio-4401. The

Johnston court stated that a judgment is void if it was imposed by a court that lacks subject matter jurisdiction over the case or the authority to act. *Id.* at ¶ 15, citing *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 12. The appellate court then concluded that the sentencing court had jurisdiction over the case and authority to impose the sentence. *Id.* at ¶ 16. The court thus found that the defendant's argument regarding the "life" sentence was res judicata as it could have been raised in the direct appeal. *Id.* at ¶ 13, 16, citing *State v. Perry*, 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967). The Eleventh District has ruled similarly with regards to the oral sentence. *Platt*, 11th Dist. No. 2012-P-0046 at ¶ 26 (holding that sentence was not void where court failed to mention parole eligibility after twenty years under same former statute when imposing life imprisonment at sentencing hearing).

{¶31} The *Perry* case contains the general doctrine that res judicata bars the defendant from raising in any proceeding, except an appeal, any defense or claimed lack of due process that was raised or could have been raised by the defendant on an appeal of the judgment. *Perry*, 10 Ohio St.2d at 180. An exception to the doctrine exists where the sentence or the sanctions involved in the sentence are void. See *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 7, 9. The exception is very limited and has been applied sparingly. *Id.* at ¶ 8, citing *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 27 (when judge fails to impose statutorily-mandated post-release control, that part of sentence is void), *State v. Harris*, 132 Ohio St.3d 318, 2012-Ohio-1908, 972 N.E.2d 509, ¶ 18 (failure to include mandatory driver's license suspension as part of sentence), and *State v. Moore*, 135 Ohio St.3d 151, 2012-Ohio-5479, 985 N.E.2d 432, ¶ 12, 17 (failure to include mandatory fine as part of sentence).

{¶32} It has been stated that a motion to correct a void sentence can be used to correct a facially invalid portion of a sentence. *Fischer*, 128 Ohio St.3d 93 at ¶ 25. As it appears from appellant's filings that he raises his contentions in order to eventually re-present his appellate case in general, we note that even if one sanction within a sentence is considered void, the proceedings cannot be used to challenge other alleged errors in the proceedings, i.e. res judicata would still apply to other

aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence. *Id.* at ¶ 25, 31, 40.

{¶33} We understand appellant's concern that where the entry merely states life and there are statutorily various types of life sentences, there could appear to be an uncertain sentence as a bystander to the law may need to research the former sentencing statute in order to ascertain that the life sentence carried with it eligibility for parole after twenty years.

{¶34} Nevertheless, we are not presented with a case where the court attempted to expressly impose a life sentence with no chance of parole. When appellant was sentenced, the sentencing statutes for aggravated murder with no capital specification provided no sentencing options for the trial court; there was one mandated sentence: life (and that came with parole eligibility after twenty years). See R.C. 2903.01(C), citing R.C. 2902.02, citing R.C. 2909.03.

{¶35} Notably, the Ohio Administrative Code provides that a life sentence imposed via R.C. 2929.03 for aggravated murder shall be presumed to be a sentence of life imprisonment with parole eligibility after twenty years, subject to certain diminutions, unless the sentencing entry specifies parole eligibility is to be after twenty full years or thirty full years. 5120-2-10(B). That rule begins by noting the number of amendments to the Revised Code over the years and by pointing out how the provisions for diminution of sentence and eligibility for parole are affected by the language in the sentencing entry concerning the crime and the sentence imposed as well as the date on which the crime was committed. Ohio Adm. Code 5120-2-10(A). ("The purpose of this rule is to explain diminution of sentence and eligibility for release for persons serving life sentences as established by the Revised Code.").

{¶36} Contrary to appellant's concern, the parole board and prison system are unlikely to proceed under the impression that he was sentenced to life without parole. Rather, it is likely that the system will proceed as though he was sentenced to life with parole eligibility after twenty years as mandated by the applicable statute at the time of sentencing. Moreover, there is no indication that the sentencing entry will be read as imposing a definite life sentence with no chance of parole (or something other than life

with eligibility after twenty years). Therefore, the life sentence in appellant's case must necessarily read as life with eligibility after twenty years and cannot be read in any other manner under the applicable statutes.

{¶37} Here, the sentence to life without specifying eligibility for parole was entered at a time when the mandated sentence was life with parole eligibility after twenty years. It cannot be read to conclude it was an attempt to impose life without parole. Therefore, it was not beyond the court's authority and did not present a matter of voidness. Accordingly, we affirm the trial court's judgment upholding the denial of appellant's motion for (re)sentencing.

Waite, J., concurs.

DeGenaro, P.J., concurs in judgment only.