

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

THE STATE OF OHIO,	:	Case No. 18CA6
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
WESLEY D. LINCOLN,	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellant.	:	RELEASED: 07/30/2019

APPEARANCES:

Steven H. Eckstein, Washington Court House, Ohio, for appellant.

Nicole Tipton Coil, Washington County Prosecutor, Marietta, Ohio, for appellee.

Hess, J.

{¶1} Wesley D. Lincoln appeals his sentence for felonious assault in Washington County Court of Common Pleas Case No. 17 CR 124, asserting it is void to the extent the trial court ordered him to serve it consecutive to his original sentence in Washington County Court of Common Pleas Case No. 16 CR 52. After the trial court sentenced Lincoln in Case No. 17 CR 124, we reversed the trial court's judgment in Case No. 16 CR 52 and remanded for a new trial. *State v. Lincoln*, 2018-Ohio-1816, 111 N.E.3d 359, ¶ 38 (4th Dist.). That decision nullified Lincoln's original conviction and sentence in Case No. 16 CR 52, and the trial court later accepted a guilty plea in that case and imposed a new sentence, which it ordered him to serve concurrent with the felonious assault sentence in Case No. 17 CR 124. Because Lincoln cannot serve his felonious assault sentence consecutive to his original sentence in Case No. 16 CR 52 that no longer exists, we reverse the judgment of the trial court to the extent it ordered

him to do so and remand for further proceedings consistent with this opinion. We affirm the trial court's judgment in all other respects.

I. FACTS

{¶2} On March 24, 2016, Lincoln was indicted in Washington County Court of Common Pleas Case No. 16 CR 52 on one count each of possession of heroin and trafficking in heroin. A jury found him guilty on both counts and found he was on post-release control when he committed the offenses. In its April 14, 2017 sentencing entry, the trial court concluded the two counts were allied offenses of similar import and sentenced Lincoln to a definite period of eight years in prison for trafficking in heroin to run consecutive to a sentence of one year and 355 days for the post-release control specification. Lincoln appealed that decision.

{¶3} During the pendency of the appeal, Lincoln was indicted in Washington County Court of Common Pleas Case No. 17 CR 124 on one count of felonious assault. He pleaded guilty to that offense. In its April 6, 2018 sentencing entry, the trial court ordered Lincoln to serve a definite period of two years in prison “**consecutively** to the sentence the Defendant is currently serving.” That entry is the subject of the present appeal.

{¶4} On May 4, 2018, we reversed the trial court's judgment in Case No. 16 CR 52 and remanded the matter for a new trial. *Lincoln*, 2018-Ohio-1816, 111 N.E.3d 359, ¶ 38. On remand, Lincoln pleaded guilty to the trafficking count and the accompanying post-release control specification. In its August 28, 2018 sentencing entry, the trial court ordered Lincoln to serve a definite period of five years in prison for the trafficking count to run consecutive to a definite period of two years and four days in prison for the

post-release control specification. The court also ordered Lincoln to serve his aggregate sentence “**concurrently** to the sentence the Defendant is currently serving in case number 17 CR 124.” The August 28, 2018 sentencing entry is the subject of a pending appeal in Washington App. No. 18CA22.

II. ASSIGNMENT OF ERROR

{¶15} Lincoln assigns the following error for our review: “THE PORTION OF THE SENTENCE RUNNING THE SENTENCE CONSECUTIVELY IS VOID.”

III. LAW AND ANALYSIS

{¶16} Lincoln maintains the April 6, 2018 sentencing entry in Case No. 17 CR 124 is void to the extent the trial court ordered his sentence to run consecutive to the sentence he was previously serving in Case No. 16 CR 52. He asserts the August 28, 2018 sentencing entry in Case No. 16 CR 52, which orders his new sentence in that case to run concurrent with his sentence in Case No. 17 CR 124, is controlling.

{¶17} The state maintains Lincoln failed to show that the sentence in Case No. 17 CR 124 is void. The state also asserts R.C. 2953.08 governs appeals from a felony sentence, and pursuant to R.C. 2953.08(D)(1), Lincoln’s sentence in Case No. 17 CR 124 is not subject to review under that section because it was authorized by law, jointly recommended by the parties, and imposed by the sentencing judge. In addition, the state asserts Lincoln failed to demonstrate his sentence is improper under the standard of review in R.C. 2953.08(G)(2).

{¶18} “The determination of whether a judgment is void is a question of law. Appellate courts review questions of law under the de novo standard of review.” (Citations omitted.) *State v. Pierce*, 4th Dist. Meigs No. 18CA11, 2019-Ohio-467, ¶ 8.

{¶9} In the April 6, 2018 sentencing entry, the trial court ordered that the felonious assault sentence in Case No. 17 CR 124 be served consecutive to the sentence Lincoln was “currently serving,” i.e., his original sentence in Case No. 16 CR 52 which the court had imposed on April 14, 2017. However, our subsequent decision reversing the trial court’s judgment in Case No. 16 CR 52 and remanding for a new trial nullified Lincoln’s original conviction and sentence in that case. See *Lincoln*, 2018-Ohio-1816, 111 N.E.3d 359, ¶ 38; *Burns v. Daily*, 114 Ohio App.3d 693, 704, 683 N.E.2d 1164 (11th Dist.1996) (“Ordinarily, a reversal of a judgment on appeal nullifies the judgment below, leaving the case standing as if no judgment had been rendered”). On remand, the trial court accepted Lincoln’s guilty plea in Case No. 16 CR 52 and imposed a new sentence, which it ordered him to serve concurrent with the sentence in Case No. 17 CR 124.

{¶10} Lincoln cannot serve his felonious assault sentence consecutive to his original sentence in Case No. 16 CR 52 that no longer exists. Accordingly, we sustain the sole assignment of error, reverse the judgment of the trial court to the extent it ordered Lincoln to serve the felonious assault sentence consecutive to his original sentence in Case No. 16 CR 52, and remand for the trial court to strike the consecutive sentence language from the April 6, 2018 sentencing entry. We affirm the trial court’s judgment in all other respects.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART,
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the WASHINGTON COUNTY COURT OF COMMON PLEAS 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.

Smith, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Michael D. Hess, 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.