

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 18CA19
	:	
vs.	:	
	:	
MELODY D. CURTIS,	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	

APPEARANCES:

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

James K. Stanley, Meigs County Prosecuting Attorney, Pomeroy, Ohio, for Appellee.

Smith, P.J.

{¶1} This is an appeal from a Meigs County Common Pleas Court judgment entry finding Appellant, Melody Curtis, guilty of violating the terms of her community control and ordering her to successfully complete the STAR Community Justice Program. On appeal, Appellant contends 1) that her original, underlying sentence of community control is void; 2) that the trial court erred in finding she had violated the terms of her community control by ingesting a drug of abuse; and 3) that the trial court erred in imposing a more restrictive community control sanction under R.C. 2929.15(B). Because we determined in a prior appeal

of this matter that the trial court erred in failing to hold a mandatory hearing on Appellant's pre-sentence motion to withdraw her guilty plea, and because we reversed the decision of the trial court and remanded the matter to a pre-sentencing stage of the proceedings for a hearing to be held, Appellant's original, underlying community control sentence has been vacated by this Court. As a result, we find the arguments raised under her first assignment of error have been rendered moot. Thus, we will not address them.

{¶2} Further, because the underlying community control sentence upon which Appellant's current violation is based upon has been vacated, we conclude the judgment finding Appellant had violated her community control has been rendered void. As such, we believe the arguments raised under Appellant's second and third assignments of error have also been rendered moot and we will not address them on the merits. However, because this case is currently still pending at the trial court as a direct result of our prior remand order, and to avoid any confusion at the trial court level, we not only conclude Appellant's sentence for her community control violation has been rendered void, we hereby vacate it. Accordingly, Appellant must be re-sentenced below.

FACTS

{¶3} On July 12, 2017, Appellant was indicted by the Meigs County Grand Jury on two felony counts as follows: 1) illegal cultivation of marijuana, a fifth-

degree felony in violation of R.C. 2925.04(A) & (C)(5)(c); and 2) one count of possession of marijuana, a fifth-degree felony in violation of R.C. 2925.11(A) & (C)(3)(c). Appellant initially pleaded not guilty to the charges, but then entered into a plea agreement with the State whereby she would plead guilty to one count of illegal cultivation of marijuana in exchange for the dismissal of the possession of marijuana charge. A change of plea hearing was held on December 14, 2017, where the trial court accepted Appellant's guilty plea to illegal cultivation of marijuana. A sentencing hearing was then scheduled for January 24, 2018.

{¶4} A review of the record reveals that although both parties appeared for the scheduled sentencing hearing on January 24, 2018, the hearing was rescheduled by the trial court due to the court's desire to obtain more information about Appellant and the charges filed against her prior to imposing sentence. The transcript from the January 24th hearing demonstrates there was a discussion between the court and counsel regarding the number of marijuana plants that were recovered at the time Appellant was arrested. The sentencing hearing was ultimately rescheduled for February 21, 2018.

{¶5} Appellant, however, filed a motion to withdraw her guilty plea just prior to the start of the rescheduled sentencing hearing on February 21st. Appellant's motion alleged the affirmative defense of personal use in regard to the charges contained in the indictment. The trial court verbally denied the motion

without holding a hearing and then proceeded to sentence Appellant to a five-year term of community control with an underlying sentence of twelve months. In sentencing Appellant to community control, the trial court placed Appellant under “the general supervision and control of the Meigs County Community Corrections Program under any terms and conditions that they deem appropriate including that the Defendant shall be prohibited from leaving the state without permission of the Court or the Meigs County Community Corrections Program.” The trial court’s order further provided that Appellant “shall abide by all laws related to firearms and dangerous ordinance.”

{¶6} Appellant directly appealed her conviction, arguing that the trial court erred in failing to conduct a mandatory hearing on her pre-sentence motion to withdraw her guilty plea. We found her argument to be meritorious and, as a result, we reversed the decision of the trial court and remanded the matter for further proceedings, namely for a hearing to be held on Appellant’s pre-sentence motion to withdraw her guilty plea. That decision was issued on March 20, 2019. *State v. Curtis*, 4th Dist. Meigs No. 18CA12, 2019-Ohio-1108. A review of the trial court’s online docket indicates that hearing was held pursuant to our remand

order on June 12, 2019. Furthermore, the trial court issued an entry denying Appellant's motion on August 8, 2019.¹

{¶7} While this matter was previously pending on appeal, a motion to revoke Appellant's community control was filed on May 10, 2018. The motion alleged Appellant had "violated the conditions of Community Control by testing positive for Methamphetamine and Amphetamine during a drug screen given by the Probation Department" on April 30, 2018. The motion was supported with the affidavit of Courtney Bullington, Compliance Officer with the Meigs County Community Corrections Program. Hearings on the alleged violation were held on July 11, 2018 and August 1, 2018. The trial court ultimately found Appellant had violated the terms and conditions of her community control, but rather than revoking her community control, the trial court allowed Appellant to continue on community control "with the special condition that she enter into and successfully complete the STAR Community Justice Program."

{¶8} Appellant now appeals the trial court's judgment entry finding she had violated the terms and conditions of her community control. Her brief sets forth three assignments of error for our consideration, as follows.

¹ This Court is permitted to take judicial notice of the trial court's online docket as pertains to the matters contained in this appeal. *State v. Kempton*, 4th Dist. Ross No. 15CA3489, 2018-Ohio-928. (internal citations omitted).

ASSIGNMENTS OF ERROR

- I. “DEFENDANT-APPELLANT’S SENTENCE OF COMMUNITY CONTROL SANCTION IS VOID.”
- II. “THE TRIAL COURT ERRED IN FINDING DEFENDANT-APPELLANT HAD VIOLATED HER COMMUNITY CONTROL SANCTION BY INGESTING A DRUG OF ABUSE.”
- III. “THE TRIAL COURT ERRED IN IMPOSING A MORE RESTRICTIVE COMMUNITY CONTROL SANCTION UNDER R.C. 2929.15(B).”

ASSIGNMENT OF ERROR I

{¶9} In her first assignment of error, Appellant contends that her original, underlying sentence of community control is void. Appellant primarily argues that the trial court’s judgment “placing her under the unfettered supervision of the county Community Corrections Program” did not constitute “community control” as contemplated by R.C. 2929.17(E) and (F) and, as such, was not provided for by law. Appellant further argues that a sentence not provided for by law is void. The State counters by arguing that this assignment of error and all other associated issues presented in this appeal are now moot in light of the fact that this Court already reversed and remanded Appellant’s underlying case based upon the trial court’s failure to hold a mandatory hearing on Appellant’s presentence motion to withdraw her guilty plea. The State contends that regardless of whether the trial court grants or denies the motion on remand, Appellant will subsequently either be acquitted or sentenced anew. Thus, the State’s position is that even if this Court

were to find her original sentence void, the outcome of this appeal does not matter because the sentence has already been vacated. For the following reasons, we agree with the State.

{¶10} “The determination of whether a judgment is void is a question of law.” *State v. McNamara*, 4th Dist. Pickaway No. 17CA13, 2018-Ohio-2880, ¶ 4, citing *Blaine v. Blaine*, 4th Dist. Jackson No. 10CA15, 2011-Ohio-1654, ¶ 19; *see also State v. Jones*, 9th Dist. Summit No. 26854, 2013-Ohio-3710, ¶ 6. Appellate courts apply a de novo standard of review when reviewing questions of law. *McNamara* at ¶ 4; citing *State v. Blake*, 10th Dist. Franklin No. 10AP-992, 2011-Ohio-3318, ¶ 17.

{¶11} “ ‘ “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.” ’ ” *State v. Cupp*, 2016-Ohio-8462, 75 N.E.3d 940, ¶ 14 (4th Dist.), quoting *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 6, quoting *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 12. Sentencing errors are generally not jurisdictional and thus do not render a judgment void. *Cupp* at ¶ 14; citing *Fischer* at ¶ 7. However, as explained in *Fischer* at ¶ 8, “a sentence that is not in accordance with statutorily mandated

terms is void.” A void sentence “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.” *Id.* at paragraph one of the syllabus.

{¶12} We initially observe that Appellant’s original sentence to a term of community control was erroneous, and therefore voidable, rather than void. As explained by the Supreme Court of Ohio in *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 28:

[I]n those cases in which a trial court has jurisdiction but
“ ‘erroneous[ly] exercise[s] * * * jurisdiction, * * * the
[sentence] * * * is not void,’ ” and the sentence can be set
aside only if successfully challenged on direct appeal. [*State v.*
Filiaggi, 86 Ohio St.3d 230,] 240, 714 N.E.2d 867, quoting
In re Waite (1991), 188 Mich.App. 189, 200, 468 N.W.2d 912,
quoting *Jackson City Bank & Trust Co. v. Fredrick* (1935), 271
Mich. 538, 544–546, 260 N.W. 908.

Here, the trial court possessed subject matter jurisdiction as well as the authority to act, however, it erroneously imposed sentence without holding a mandatory hearing on Appellant’s motion to withdraw her plea. Appellant’s presentence motion to withdraw her guilty plea invoked her constitutional right to trial by jury. *State v. Barnett*, 73 Ohio App.3d 244, 251, 596 N.E.2d 1101 (2d. Dist. 1991),

citing *State v. Taylor*, 2d Dist. Montgomery No. 11220, 1989 WL 68470 (June 15, 1989) (“A motion to withdraw also invokes a defendant’s right to trial by jury and requires the same full and fair consideration given to his plea.”). Thus, Appellant was deprived of her right to due process in that she was not afforded an opportunity to be heard on her motion. This sentencing error, while erroneous and voidable, did not render her sentence void until it was challenged on appeal and vacated.

{¶13} Our decision in Appellant’s prior appeal held that the trial court erred in failing to hold a mandatory hearing on Appellant’s presentence motion to withdraw her guilty plea. As a result, we reversed the judgment of the trial court convicting and sentencing Appellant and remanded the matter for further proceedings consistent with our opinion. Although our prior decision did not expressly vacate Appellant’s sentence, because the case was reversed and remanded for further proceedings that must occur prior to the imposition of sentence, the sentence was, in effect, vacated. *See State v. Barnett*, supra, at 251 (reversing and remanding for further proceedings and also vacating sentence). As set forth in Black’s Law Dictionary, the term “reversal” is defined as “[a]n annulling or setting aside.” Black’s Law Dictionary (11th Ed.2019). Further, “vacate” means “[t]o nullify or cancel; make void; invalidate.” *Id.* Although the trial court’s erroneous imposition of sentence resulted in a voidable judgment that

ultimately ended upon being void by virtue of the fact that we reversed and vacated it, the concept of voidness at play here lends itself to more traditional understandings of the voidness doctrine, rather than the more recent “void sentence jurisprudence” line of cases that have been issued by the Supreme Court of Ohio. *See State v. Pulliam*, 4th Dist. No. 16CA3759, 2017-Ohio-127, ¶ 16; citing *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 21.²

{¶14} As stated, Appellant already filed an initial, direct appeal of her conviction and sentence. In her direct appeal, she did not argue that her community control sentence was void for the reasons set forth above. Instead, she argued the trial court erred in failing to conduct a mandatory hearing on her presentence motion to the withdraw her guilty plea prior to imposing sentence. Nonetheless, as noted above, a void sentence may be reviewed at any time, even by collateral attack, and is not barred by the principles of res judicata. However, regardless of whether Appellant’s original community control sentence may have been void for the reasons currently argued in her brief, we find the issue is moot in light of our disposition of Appellant’s prior appeal.

²In Justice Lanzinger’s dissenting opinion in *State v. Williams*, *supra*, she drew a distinction between the Court’s more recent void sentence jurisprudence and “traditional jurisprudence” where “sentencing errors were not jurisdictional.” *Id.* at ¶ 40. In discussing this distinction, she explained that historically, erroneous sentences were voidable, not void. *Id.* at ¶ 41.

{¶15} Moreover, Appellant has cited this Court to no authority demonstrating that the trial court's imposition of community control resulted in a void sentence. As this Court explained in *State v. Pulliam, supra*:

In the recent Supreme Court of Ohio case of *State v. Williams, supra*, the Court discussed the evolution of its 'void sentence jurisprudence,' and noted its prior determinations that failure to impose a statutorily mandated term of post-release control, failure to include a mandatory driver's license suspension in the offender's sentence, and failure to include a mandatory fine in the sentence all result in the sentence being void. *State v. Williams* at ¶ 21; citing *State v. Singleton*, 124 Ohio St.3d 173, 2009–Ohio–6434, 920 N.E.2d 958, ¶ 18, 23, 36; *State v. Harris*, 132 Ohio St.3d 318, 2012–Ohio–1908, 972 N.E.2d 509, paragraph one of the syllabus; *State v. Moore*, 135 Ohio St.3d 151, 2010–Ohio–5479, 985 N.E.2d 432, syllabus. As noted above, the Supreme Court in *Williams* further extended its 'void sentence jurisprudence' to scenarios where a trial court determines prior to sentencing that offenses constitute allied offenses of similar import, but then fails to merge them for purposes of sentencing and imposes sentences on all counts. *Williams* at ¶ 29.

{¶16} More recently, the Supreme Court of Ohio further extended its “void sentence jurisprudence” to a situation where a trial court sentences a defendant to community control without first obtaining a pre-sentence investigation report, as required by both R.C. 2951.03(A)(1) and Crim.R. 32.2. Thus, there are limited situations which result in a determination that a sentence, or part of a sentence, is void. And again, Appellant has provided us with no authority and we are aware of no authority which states a trial court’s sentence of community control, which subjects an offender to the general terms and conditions (including random drug testing) of a county community corrections program, violates any statutory sentencing requirement or does not constitute community control as contemplated by the felony sentencing statutes. Thus, we decline to further engage in the purely academic analysis of whether Appellant’s original community control sentence was void, voidable, or valid due to the fact that, in the end, it does not ultimately make a difference in light of the fact that the community control sanction has already been vacated. Because Appellant’s community control sentence was reversed, and in effect vacated and thus rendered void, the arguments raised under her first assignment of error have been rendered moot.

{¶17} However, prior to concluding our analysis, we note that the State has represented to this Court that our prior remand order remains pending in the trial court. A review of the online docket indicates a hearing was held on Appellant’s

presentence motion to withdraw her guilty plea on May 29, 2019. According to the online docket, the trial court issued an entry denying Appellant's pre-sentence motion to withdraw her guilty plea on August 8, 2019. Because our prior decision vacated Appellant's original, underlying sentence, she will need to be re-sentenced.

ASSIGNMENTS OF ERROR II AND III

{¶18} Because we believe our disposition of Appellant's first assignment of error controls the disposition of her second and third assignments of error, we address them in conjunction with one another. In her second assignment of error, Appellant contends that the trial court erred in finding she had violated her community control sanction by ingesting a drug of abuse. Appellant's third assignment of error contends the trial court erred in imposing a more restrictive community control sanction under R.C. 2929.15(B). However, for the following reasons and without reaching the merits of the arguments raised under these assignments of error, we conclude the sentence imposed for Appellant's community control violation is void.

{¶19} As explained in *Williams, supra*, "if the sentencing court had jurisdiction and statutory authority to act, sentencing errors do not render the sentence void, and the sentence can be set aside only if successfully challenged on direct appeal." *Williams* at ¶ 23. As discussed at length above, Appellant filed a direct appeal of her conviction and sentence which resulted in her original

underlying sentence being vacated, or set aside. Thus, although the sentence was not void ab initio, it was subsequently rendered void.

{¶20} However, before we conclude we must briefly address two pending procedural issues consisting of Appellant's Motion to Strike the attachments to Appellee's answer brief and references thereto, as well as Appellee's Application to Supplement the Record. Appellee filed its brief and attached thereto several documents including: 1) an entry filed in the Meigs County Court of Common Pleas styled In the Matter of the Adoption of Standard Terms of Probation, which purports to demonstrate the trial court's blanket adoption of the standard terms and conditions of probation as to all defendants with an effective date of February 15, 2013; 2) a document entitled Meigs County Community Corrections Program Conditions of Supervision, which was signed by Appellant on February 23, 2018; 3) a document entitled Acknowledgment of Zero Tolerance Policy on Drugs and Alcohol, which was signed by Appellant on February 23, 2018; 4) a document containing drug screen results indicating the presence of Amphetamine, Buprenorphine and Methamphetamine, which was signed by Appellant on April 30, 2019; and 5) a document that appears to contain drug screen results from Cordant Forensic Solutions. Appellant filed a motion to strike the first three attachments and any reference thereto in Appellee's brief, arguing the documents were not part of the record according to the appellate rules.

{¶21} Thereafter, Appellee filed its application to supplement the record with the three disputed documents. In support of its application, Appellee attached the affidavit of probation officer, Cassady Wolford, which was signed on June 19, 2019. In her affidavit, Wolford averred, among other things, that the standard terms and conditions of probation adopted by the trial court and signed by Appellant contained a prohibition against the use of illegal drugs, as did the Acknowledgment of Zero Tolerance Policy on Drugs and Alcohol, which was also signed by Appellant.

{¶22} Rather than ruling on the pending procedural issues administratively, the matter was submitted to this panel for determination in conjunction with the issuance of the decision on the merits. However, in light of the fact that we disposed of both of Appellant's assignments of error without resort to any of the disputed documents, we find the pending procedural dispute is no longer a live controversy and thus it is moot. Accordingly, we need not address it.

{¶23} Having determined that Appellant's underlying community control sentence was ultimately rendered void as a result of our disposition of Appellant's initial direct appeal, we find the Appellant was not properly on community control at the time of her violation. *State v. Burns*, 4th Dist. Highland No. 11CA19, 2012-Ohio-1626, ¶ 11. We therefore conclude the sentence imposed for her community control violation is also void. As such, the judgment currently being appealed

from, which found Appellant had violated the terms and conditions of her community control and imposing sentence, is hereby reversed and vacated.

JUDGMENT REVERSED AND VACATED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND VACATED and costs be assessed to Appellee.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs 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. & McFarland, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Jason P. Smith, Presiding 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.