

[Cite as *State v. Houston*, 2019-Ohio-355.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 107538

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**WILBURT HOUSTON**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
REVERSED AND REMANDED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-93-303894-C

**BEFORE:** E.T. Gallagher, P.J., Blackmon, J., and Keough, J.

**RELEASED AND JOURNALIZED:** January 31, 2019

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EILEEN T. GALLAGHER, P.J.:

{¶1} This cause came to be heard on the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Defendant-appellant, Wilburt Houston, appeals the denial of a motion to vacate his sentence and claims the following error:

1. The trial court erred in denying defendant's motion to void sentence where defendant's sentence is void as a matter of law.

We find merit to the appeal and reverse and remand for resentencing.

### **I. Facts and Procedural History**

{¶2} In November 1993, Houston was charged with a single count of aggravated murder that included a three-year firearm specification. Houston was found guilty by a jury, and the court sentenced him to life in prison in addition to three years on the firearm specification, to be

served consecutively. Houston's conviction and sentence were affirmed on direct appeal. *See State v. Houston*, 8th Dist. Cuyahoga No. 67049, 1995 Ohio App. LEXIS 1737 (Apr. 27, 1999).

{¶3} In April 2015, Houston filed a pro se motion to vacate a void sentence. The court did not rule on the motion before Houston filed another pro se motion to dismiss and to vacate a void sentence in October 2016. The trial court issued a judgment denying Houston's October 2016 motion, but the April 2015 motion remained pending. Thereafter, Houston, through counsel, filed a memorandum in support of the April 2015 motion, arguing that Houston's sentence is void because it was not authorized by law. The trial court subsequently denied Houston's April 2015 motion to vacate his sentence. Houston now appeals the trial court's judgment.

## **II. Law and Analysis**

{¶4} In the sole assignment of error, Houston argues the trial court erred in denying his motion to vacate his sentence because his sentence is void as a matter of law. He contends his sentence is contrary to law because the court failed to include parole eligibility in his sentence as required by the relevant sentencing statute in effect when he was sentenced in 1994.

{¶5} Houston did not challenge his sentence on direct appeal. Sentencing errors not raised on direct appeal are generally barred by the doctrine of res judicata. *State v. Willard*, 8th Dist. Cuyahoga No. 101055, 2014-Ohio-5278, ¶ 10; *State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707, 23 N.E.3d 1023, ¶ 92. However, "[n]o court has the authority to impose a sentence that is contrary to law." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 23. A trial court is only authorized to impose a sentence that is prescribed by statute. *Id.* at ¶ 22. Therefore, "[a]ny attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." *State v. Williams*,

148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 20, quoting *State v. Beasley*, 14 Ohio St.3d 74, 75, 471 N.E.2d 774 (1984).

{¶6} R.C. 2929.03(A), in effect at the time of Houston’s sentencing, stated, in relevant part:

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 of 2929.04 of the Revised Code, then following a verdict of guilty to 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.

{¶7} The indictment charging Houston with aggravated murder did not allege “one or more specifications of aggravating circumstances listed in division (A) of section of 2929.04 of the Revised Code.” Yet, the sentencing entry states, in relevant part:

It is, therefore, ordered and adjudged by the court that said defendant, Wilbert Houston, is sentenced to the Lorain Correctional Institution for life and three (3) years to run consecutive for gun specifications, and pay court costs. Defendant read his rights to appeal.

Clearly, the trial court neglected to include parole eligibility after serving 20 years of imprisonment in the sentence as mandated by R.C. 2929.03(A). The sentence is, therefore, contrary to law and void because the trial court imposed a sentence that was not authorized by law.

{¶8} The state argues that even if we find Houston’s sentence is void, we should affirm it because Houston has been receiving parole hearings. However, we have no evidence of parole hearings in the record, and even if we did, the fact that Houston may have had the benefit of parole hearings does not change the fact that his sentence is void.

{¶9} The state also asserts that we can modify Houston’s sentence by inserting parole eligibility into it instead of remanding the case to the trial court for a de novo resentencing. But

a void sentence is a nullity. *State v. Studgions*, 8th Dist. Cuyahoga No. 103546, 2016-Ohio-5236, ¶ 10. We cannot modify a void sentence because “[i]t is as though such proceedings had never occurred \* \* \* and the parties are in the same position as if there had been no judgment.” *State v. Billiter*, 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960, ¶ 10, quoting *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 12, *overruled on other grounds*, *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332.

{¶10} Therefore, the sole assignment of error is sustained.

{¶11} The trial court’s judgment is reversed. We remand the case to the trial court for resentencing on Houston’s aggravated murder conviction.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and  
KATHLEEN ANN KEOUGH, J., CONCUR