[Cite as *State v. Love*, 2009-Ohio-5216.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-040**
- vs -	:	
MICHAEL K. LOVE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 98 CR 000458.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Michael K. Love, pro se, PID: 368-723, Grafton Correctional Institution, 2500 South Avon Belden Road, Grafton, OH 44044 (Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Michael K. Love appeals from the February 19, 2009 judgment entry of the Lake County Court of Common Pleas, denying his "Motion to Vacate the Void Judgment." Finding no error, we affirm.

{¶2} September 25, 1998, the Lake County Grand Jury indicted Mr. Love on two counts of murder, in violation of R.C. 2903.02(A) and (B), each carrying a firearm specification. *State v. Love* (May 11, 2001), 11th Dist. No. 99-L-051, 2001 Ohio App. LEXIS 2147, at 1 ("*Love* I"). The predicate offense for the felony murder count was

felonious assault, in violation of R.C. 2903.11. The charges stemmed from an altercation occurring at the Argonne Arms apartment complex in Painesville, Ohio, on or about August 22, 1998, during which Mr. Love allegedly shot and killed one Kenneth Johnson. Id. at 1-5. The matter came on for jury trial commencing February 22, 1999; and, February 25, 1999, the jury found Mr. Love not guilty of murder pursuant to R.C. 2903.02(A), but guilty of murder pursuant to R.C. 2903.02(B), along with the attendant firearm specification. Mr. Love was sentenced to a term of imprisonment of fifteen years to life, with three years for the firearm specification. *Love* I at 6.

{¶3} Mr. Love appealed; and in *Love* I, we affirmed the judgment of the trial court. Cf. id. at 12. April 26, 2006, Mr. Love moved the trial court for a new trial, pursuant to Crim.R. 33. May 2, 2006, he further moved the trial court for findings of fact and conclusions of law. By a judgment entry filed May 23, 2006, the trial court denied both motions.

{¶4} November 9, 2006, and December 1, 2006, Mr. Love filed two, seemingly identical petitions for postconviction relief with the trial court. By a well-reasoned and convincing judgment entry filed January 18, 2007, the trial court, construing Mr. Love's petitions as one, denied them as untimely, or alternatively, as barred by res judicata.

{¶5} Mr. Love appealed, assigning five errors:

{¶6} "[1.] Love was denied equal protection under the law when the State was allowed to add Attempt on to the jury instructions broadening the indictment thereby prosecuting Love twice for the same offense using the same animus in violation of Amendment V and XIV of the U.S.C.Amend., O. Const. I Sec.10.

{¶7} "[2.] Trial court committed error as Love's conviction was against the manifest weight of the evidence violating Love's constitutional right to due process under Amendment XIV and XIII of the U.S.C.Amend., O. Const. I Sec.6, along with violating Ohio Rules of Court EC 7-13 (3).

{¶8} "[3.] The State committed plain error in its instruction to the jury of the state not having to prove "intent" for the predicate felony under O.R.C. 2903.02(B) violating Love's due process rights Amendment XIV of the U.S.C.Amend., O. Const. I Sec.18.

{¶9} "[4.] Love was denied effective assistance of trial counsel guaranteed him violating his due process rights under Amendment VI and XIV of the U.S.C.Amend., O. Const. I Sec.10, along with violating Ohio Rules of Court R. 1.3, DR 1-102(A)(4); DR 6-101; DR 7-101(A)(3); DR 7-106(C)(1); EC 4-5, 5-1, 7-9, 7-24, 7-25, 7-26.

{¶10} "[5.] Love was denied effective assistance of appellate counsel guaranteed him violating his due process rights under Amendment VI and XIV of the U.S.C.Amend., O. Const. I Sec.10, along with violating Ohio Rules of Court. R. 1.3, EC 2-30; EC 4-5; EC 5-1; EC 7-4; EC 7-9."

{¶11} By a decision announced November 21, 2007, we affirmed the decision of the trial court. See, e.g., *State v. Love*, 11th Dist. No. 2007-L-030, 2007-Ohio-6256, at ¶20 ("*Love* II"). Regarding the first four assignments of error, we held that the errors alleged were evident at the time of trial, and could not be raised by way of petition for postconviction relief. Id. at ¶12-17. Regarding the fifth assignment of error, we noted that claims of ineffective assistance of appellate counsel are not cognizable in

postconviction relief proceedings, but rather, must be raised by an application for reopening pursuant to App.R. 26(B). Id. at ¶18.

{¶12} January 8, 2008, Mr. Love applied to reopen his appeal. He assigned four errors:

{¶13} "[1.] Love was denied his substantive due process rights when the state wilfully withheld critical exculpatory evidence that would have or could have changed the outcome of the trial that is a direct violation of Love's Fifth, Sixth and Fourteenth Amendments of the United States Constitutions and Article I, Section(s) 10 and 16 of the Ohio Constitutions.

{¶14} "[2.] Love was denied his substantive due process rights when the state wilfully elicited and skillfully applied perjured testimony and presented it as truthful and reliable information violating Love's Fifth, Sixth and Fourteenth Amendments to the United States Constitutions, Article I, Section(s) 10 and 16 of the Ohio Constitutions.

{¶15} "[3.] Love's substantive due process rights were violated when the trial court committed Plain Error by allowing the state to constructively amend his indictment taking away the right to plead jeopardy in a subsequent prosecution violating Love's Fifth, Sixth and Fourteenth Amendments to the United States Constitutions, Article I, Section(s) 10 and 16 of the Ohio Constitutions.

{¶16} "[4.] Love was denied his substantive due process rights when trial court denied trial counsel's motion for acquittal based on the lack of evidence violating Love's Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Section(s) 10 and 16 of the Ohio Constitution."

{¶17} We denied the application for reopening by a judgment entry filed on or about July 1 or 2, 2008. Thereafter, Mr. Love applied to us for reconsideration. We denied this application by a judgment entry filed on or about October 27 or 28, 2008.

{¶18} December 12, 2008, Mr. Love filed the motion subject of this appeal. As the trial court stated in its February 19, 2009 judgment entry denying the motion:

{¶19} "In support of his Motion, Defendant argues: (1) that the State committed fraud upon the Court when it sought an indictment using an all uppercase name to identify the defendant, which was a complete misidentification of the Defendant; and (2) that the State committed fraud upon the Court when it sought to amend an already void indictment by constructively adding an allied offense of similar import."

{¶20} In its February 19, 2009 judgment entry, the trial court found both of these arguments could have been raised previously, and thus, were barred by res judicata.

{¶21} Mr. Love timely noticed this appeal, assigning two errors:

{¶22} "[1.] TRIAL COURT [JUDGE] JOE GIBSON ABUSED HIS DISCRETION BY DISMISSING LOVE'S COMMON LAW MOTION TO VACATE HIS VOID SENTENCE WITHOUT DETERMINING WHETHER OR NOT LOVE'S SENTENCE IS VOID OR VOIDABLE, OR IF THE COURT/STATE ESTABLISHED PERSONAM (PERSONAL) AND/OR SUBJECT MATTER JURISDICTION OVER LOVE.

{¶23} "[2.] THE STATE'S PROSECUTION COMMITTED FRAUD UPON THE COURT WHEN THE STATE'S PROSECUTION SOUGHT TO AMEND AN ALREADY VOID INDICTMENT BY CONSTRUCTIVELY ADDING AN OFFENSE OF VIOLENCE ALREADY INCORPORATED WITHIN THE DEFINITION OF §2903.02(B) AS A COURSE OF CRIMINAL CONDUCT, AS HAVING §2903.11(A)(2) OF THE OHIO

REVISED CODE WHICH IS AN ALLIED OFFENSE OF SIMILAR IMPORT TO §2923.02. THIS AMENDMENT CHANGED THE FACE AND IDENTITY OF THE CRIME CHARGED IN THE INDICTMENT, TOOK AWAY LOVE'S RIGHT TO FAIR NOTICE OF THE CHARGE AND BECAME DUAL ACTS OF THE SAME OFFENSE TO COUNT TWO, WHERE THE STATE LACKED THE SUBJECT-MATTER JURISDICTION TO ACT MAKING THE INDICTMENT MULTIPLICIOUS AND A CONVICTION A CONTRADICTION."[1]

{¶24} "A void judgment is one rendered by a court lacking subject-matter jurisdiction or the authority to act. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, at ¶12, ***; *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, ***. A voidable judgment, on the other hand, is a judgment rendered by a court having jurisdiction/authority and, although seemingly valid, is irregular and erroneous. *State v. Montgomery*, Huron App. No, H-02-039, 2003-Ohio-4095, at ¶9." *State v. Peeks*, 10th Dist. No. 05AP-1370, 2006-Ohio-6256, at ¶10. (Parallel citations omitted.)

{¶25} In support of his first assignment of error, Mr. Love contends his conviction and/or sentence cannot stand since the indictment brought against spelled his name out in uppercase letters. He further seems to argue that he was never properly served with the indictment. Consequently, he contends the trial court was deprived of either personal jurisdiction over him, or subject matter jurisdiction over his case, that his

1. We note that the briefing in this case has been haphazard, as Mr. Love's various briefs and motions have not entirely comported with the rules. By a long judgment entry filed on or about August 26, 2009, we decided to accept all of Mr. Love's briefs heretofore filed, and granted the state leave to further respond. It did so; and, on or about September 14, 2009, Mr. Love filed yet another brief, in which he presents an alternate version of his second assignment of error. The arguments presented under this alternate assignment of error appear largely the same as in that set forth in this opinion. In the interests of substantial justice, we accept this September 14, 2009 brief, and have considered it in rendering our decision.

conviction and/or sentence are void, and that res judicata does not apply.

{¶26} This is incorrect. Nothing in the statute controlling the sufficiency of indictments indicates that a defendant's name cannot be spelled out in uppercase letters. See, e.g., R.C. 2941.03. Mr. Love cites no relevant case law to us on this point. And the record clearly shows that Mr. Love appeared before the trial court October 21, 1998, waived the reading of the indictment and any defect in its service, and entered his not guilty plea.

{¶27} The first assignment of error lacks merit.

{¶28} Mr. Love appears to raise two arguments in support of his second assignment of error. He seems to argue that murder pursuant to R.C. 2903.02(A) – i.e., willful murder – with a firearm specification, is an "allied offense of similar import" to murder pursuant to R.C. 2903.02(B) – felony murder, predicated upon felonious assault – with a firearm specification. Since he was found not guilty of willful murder pursuant to R.C. 2903.02(A), he contends he could not be found guilty of felony murder with a firearm specification.

{¶29} Mr. Love misapprehends the concept of "allied offenses of similar import." In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, at paragraph one of the syllabus, the court held:

{¶30} "In determining whether offenses are allied offenses of similar import ***, courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in

commission of the other, then the offenses are allied offenses of similar import." (*State v. Rance* (1999), 85 Ohio St.3d 632, ***, clarified.) (Parallel citation omitted.)

{¶31} Quite clearly, murder pursuant to R.C. 2903.02(A) and (B) are different crimes, and not allied offenses of similar import, as they require different intents. Committing murder pursuant to R.C. 2903.02(A) means the culprit intended to kill, and did so. Committing murder pursuant to R.C. 2903.02(B) means the culprit intended to commit another felony of violence – in this case, felonious assault – and ended up committing homicide. The mere fact that a defendant, such as Mr. Love, chose to commit his deadly felonious assault with a gun does not render it the same as murder pursuant to R.C. 2903.02(A). Felonious assault might as well be committed with a knife or baseball bat, and still result in felony murder.

{¶32} Mr. Love also seems to contend that the trial court altered the crimes for which he was indicted by instructing the jury on attempted murder as a lesser included offense of the murder charge brought against him pursuant to R.C. 2903.02(A), and that this renders his conviction void. This is incorrect. Attempted murder is a lesser included offense to murder. Cf. *State v. Ikner* (1975), 44 Ohio St.2d 132, 139 (Stern, J., dissenting). A trial court must give an instruction on a lesser included offense if the evidence at trial would support acquittal on the greater crime, and conviction on the lesser. Cf. *State v. Oviedo* (July 30, 1999), 6th Dist. No. WD-98-061, 1999 Ohio App. LEXIS 3478, at 8. The evidence in Mr. Love's case supported the instruction given.

{¶33} The second assignment of error lacks merit. For the foregoing reasons, Mr. Love's assignments or error are not well-taken. His conviction and sentence are not

void, and res judicata applies, since each of these arguments could have been raised by way of direct appeal.

{¶34} The judgment of the Lake County Court of Common Pleas is affirmed.

{¶35} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.