

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-04-062
- vs -	:	<u>OPINION</u>
	:	2/17/2015
ANTHONY GRAHAM,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 07 CR 24552

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Madden & Oswall Co., LPA, Stephen D. Madden, 810 Sycamore Street, Fifth Floor, Cincinnati, Ohio 45202, for defendant-appellant

PIPER, P.J.

{¶ 1} Defendant-appellant, Anthony Graham, appeals a decision of the Warren County Court of Common Pleas denying his motion for resentencing.

{¶ 2} In 2007, Graham was pulled over on Interstate 71 for committing a traffic violation. During the officer's investigation of the traffic violation, several indications arose that Graham's rented vehicle contained drugs. The officer, who was also a canine handler,

walked his canine partner around Graham's vehicle. The dog alerted to the presence of drugs, and a search revealed that the vehicle contained approximately 313 pounds of marijuana. Graham and his passenger were arrested for possession and trafficking in marijuana.

{¶ 3} Graham moved the trial court to suppress the marijuana, arguing that the stop was unconstitutional. The trial court denied the motion to suppress, and Graham was later found guilty on both counts by a jury. The trial court merged the possession charge into the trafficking charge, and sentenced Graham to a mandatory eight-year-sentence. Graham then appealed his conviction and sentence in 2009, raising 11 assignments of error.

{¶ 4} The assignments of error raised in Graham's direct appeal implicated issues regarding (1) Graham's motion to suppress, (2) the trial court admitting lay opinion testimony during the trial, (3) the trial court not permitting exculpatory evidence during trial, (4) prosecutorial misconduct, (5) insufficient evidence to support the convictions, (6) convictions being against the manifest weight of the evidence, (7) jury instructions, (8) the mandatory nature of the sentence, (9) Confrontation Clause issues, (10) ineffective assistance of counsel, as well as (11) cumulative error. This court overruled each of Graham's assignments of error and affirmed his conviction. *State v. Graham*, 12th Dist. Warren No. CA2008-07-095, 2009-Ohio-2814.

{¶ 5} In 2014, five years after his conviction and sentence were affirmed, Graham filed a pro se motion for resentencing and a request for return of personal property seized from him after his arrest. Within his motion, Graham argued that his sentence was void because the trial court had not informed him that he would possibly face the imposition of community service upon nonpayment of mandatory court costs, and because the trial court's sentencing entry did not address the possession charge. Graham also asked the trial court to order the state to return multiple items of personal property Graham claimed were seized

from him during the investigation and after his arrest. The trial court denied Graham's motion, finding some arguments barred by res judicata. Graham now appeals the trial court's denial of his motion, raising the following assignments of error. For ease of discussion and because the first two issues require the same analysis, we will address Graham's first two assignments of error together.

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE TRIAL COURT ERRED BY FAILING TO NOTIFY DEFENDANT-APPELLANT THAT FAILURE TO PAY COURT COSTS COULD RESULT IN AN ORDER TO PERFORM COMMUNITY SERVICE.

{¶ 8} Assignment of Error No. 2:

{¶ 9} THE TRIAL COURT ERRED BY FAILING TO COMPLY WITH CRIMINAL RULE 32(C).

{¶ 10} Graham argues in his first two assignments of error that the trial court should have granted his motion for resentencing regarding mandatory court costs and the trial court's sentencing entry. However, we find Graham's arguments barred by res judicata.

{¶ 11} Pursuant to the doctrine of res judicata,

a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at trial, which resulted in that judgment of conviction, or on an appeal from that judgment.

State v. Perry, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus.

{¶ 12} The record is clear that Graham was represented in the proceedings below, and that he did not appeal the issues he now raises through his motion for resentencing.¹

1. The trial court addressed the merits of Graham's motion for resentencing rather than treating the motion as a petition for postconviction relief. The trial court could have treated the motion as a petition for postconviction relief and found such to be untimely filed. R.C. 2953.21; *State v. Reynolds*, 79 Ohio St.3d 158, 160 (1997).

Despite alleging 11 separate errors in his 2009 direct appeal, Graham did not raise as error the issues regarding the imposition of court costs or the trial court's sentencing entry. As Graham could have raised these issues on direct appeal, he is barred by res judicata from raising them now.

{¶ 13} Specific to the court cost issue, and at the time Graham was sentenced, R.C. 2947.23(A)(1)(a) required a trial court to notify the defendant at sentencing that failure to pay mandatory court costs could result in the trial court ordering the defendant to perform community service. The state concedes that the trial court did not inform Graham of the possibility of community service, but argues that Graham cannot raise the issue because he failed to appeal it in his 2009 direct appeal. Graham asserts that res judicata is inapplicable because the trial court's failure to advise him about the imposition of community service upon nonpayment of court costs rendered his sentence void.² We disagree.

{¶ 14} This court has previously misstated that a trial court's failure to advise a defendant of mandatory court cost issues can render a portion of the sentence void. *State v. Collins*, 12th Dist. Warren No. CA2012-11-115, 2013-Ohio-3485. In *Collins*, this court was asked to determine whether a defendant who was entitled to resentencing pursuant to R.C. 2947.23(A)(1) should be resentenced according to the changes made effective by H.B. 86. Within *Collins*, in which we held that the defendant was not subject to H.B. 86's changes, we noted that a trial court's failure to inform of the possibility of community service did not render the entire sentence void, but rather "only the portion of [appellant's] sentence related to the

Even so, neither party raised an issue regarding the way in which the trial court chose to address Graham's motion, and neither party alleges error in the trial court's classification of the motion. As this issue was not briefed by the parties, we decline to sua sponte consider the motion as a petition for postconviction relief.

2. Graham cites two cases from this court for the proposition that failure of a trial court to advise of the possibility for community service renders the sentence void. *State v. Cobb*, 12th Dist. Butler No. CA2012-07-132, 2013-Ohio-2390; and *State v. Brown*, 12th Dist. Butler No. CA2013-03-043, 2014-Ohio-1317. However, neither of these cases indicates that failure to inform of community service renders a sentence void. Instead, the cases indicate that such failure can be reversible error.

court costs was rendered void as a result of the trial court's error." *Collins* at ¶ 19. This statement, while not requiring us to overturn *Collins*, is incorrect. We therefore take this opportunity to correct that misstatement and reiterate that a failure to advise of mandatory court costs does not render a sentence, even a portion of it, void.

{¶ 15} The Ohio Supreme Court has held that a failure of the trial court to notify a defendant of court cost issues does not render the sentence void, but rather only constitutes reversible error. *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954; *State v. Harris*, 132 Ohio St.3d 318, 2012-Ohio-1908, ¶ 11. As expressly stated by the *Joseph* court, "while the failure of the court to orally notify [appellant] that it was imposing court costs on him does not void [appellant's] sentence, it was error." *Joseph* at ¶ 22. Other courts have interpreted these cases to establish that a sentence is not void for failure to notify a defendant of mandatory court cost issues. See, e.g., *State v. Liuzzo*, 8th Dist. Cuyahoga No. 99545, 2014-Ohio-3030, ¶ 16 (finding that the "failure to provide the * * * statutory notification under the former version of the law does not render the sentence void and that the remedy is a limited remand for the trial court to provide the proper notification").

{¶ 16} For that reason, this court and others have held that res judicata bars a defendant from arguing that he is entitled to resentencing for not being informed of the possibility of community service if that defendant did not raise the issue on direct appeal. *State v. McCord*, 12th Dist. Clermont No. CA2013-12-096, 2014-Ohio-3187; *State v. Strickland*, 11th Dist. Trumbull No. 2014-T-0049, 2014-Ohio-5622; *State v. Haynie*, 3d Dist. Marion No. 9-13-18, 2013-Ohio-3777; *State v. Huddleston*, 10th Dist. Franklin No 12AP-512, 2013-Ohio-2561. Moreover, the Ohio Supreme Court has specifically held that "the time to appeal a trial court's failure to provide the notice required by R.C. 2947.23(A)(1) begins to run from the date of the trial court's sentencing entry." *State v. Smith*, 131 Ohio St.3d 297, 300, 2012-Ohio-781, ¶ 10.

{¶ 17} As such, Graham had 30 days from the date of the trial court's sentencing entry to address the mandatory court cost issue, and he should have assigned as error in his 2009 appeal the trial court's failure to advise him that he could be subject to community service upon failure to pay mandatory court costs. While Graham challenged the mandatory nature of his sentence, he did not raise any other argument specific to his sentence, and is therefore barred from asserting this error now.

{¶ 18} Regarding the sentencing entry and the trial court's treatment of Count 1 of the indictment, we also find Graham's argument barred by res judicata. Graham argues that the trial court's entry did not address Count 1 specific to the possession charge. However, Graham could have raised this argument on his direct appeal, but did not, thus he is now barred by res judicata from raising the argument.

{¶ 19} However, and even if we were to assume arguendo that Graham's argument is not barred by res judicata, we would still affirm the trial court's denial of Graham's motion. The record is clear that the trial court's entry did address both counts of the indictment, thus complying with Crim.R 32(C)'s requirement that the trial court's judgment entry set forth the conviction and sentence.

{¶ 20} According to the Ohio Supreme Court, Crim.R. 32(C) "clearly specifies the substantive requirements that must be included within a judgment entry of conviction to make it final for purposes of appeal and that the rule states that those requirements 'shall' be included in the judgment entry of conviction." *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, ¶ 11. The *Lester* Court went on to list the Crim.R. 32(C) requirements as including "the *fact* of the conviction, the sentence, the judge's signature, and the entry on the journal by the clerk." *Id.* (Emphasis sic.)

{¶ 21} After reviewing the record, we find that the trial court's sentencing entry comports with the Crim.R. 32(C) requirements. In pertinent part, the trial court's entry

provides,

On July 11, 2008 the Defendant appeared in Court with his attorney * * * to be sentenced for the following offense(s): Possession of Marijuana, violation of R.C. 2925.11(A) felony of [sic] second degree, and Trafficking in Marijuana, violation of R.C. 2525.03(A)(2), felony of [sic] second degree. The Court having merged the counts, the State elected to proceed on Count 2, Trafficking in Marijuana, violation of R.C. 2925.03(A)(2), a felony of the second degree.

The Defendant was previously found guilty pursuant to a trial by jury.

* * *

It is hereby ORDERED that Defendant serve a term of (8) eight years in prison, of which (8) eight years is a mandatory terms pursuant to R.C. §2929.13(F), §2929.14(D)(3) or Chapter 2925.

(Emphasis sic.)

{¶ 21} The record clearly indicates that the trial court's entry addressed both counts of Graham's indictment, and disposed of the Count 1 possession charge by merging it with the second count specific to trafficking. The trial court's entry then imposes a mandatory eight-year-sentence for the trafficking conviction, the entry was file-stamped, and included the trial court's signature. As such, and even if Graham's argument was not barred by res judicata, the trial court's entry complies with Crim.R. 32(C).

{¶ 22} Having found that Graham's arguments are barred by res judicata, his first and second assignments of error are overruled.

{¶ 23} Assignment of Error No. 3:

{¶ 24} THE TRIAL COURT ERRED BY DENYING DEFENDANT-APPELLANT'S MOTION FOR RETURN OF HIS PROPERTY.

{¶ 25} Graham argues in his third assignment of error that the trial court erred by not ordering a return of his property.

{¶ 26} After filing his direct appeal, but before this court had ruled on the 2009 appeal, Graham moved the trial court for a return of the property seized from him during the search and after his arrest. The trial court denied Graham's motion, noting that it lacked jurisdiction to issue orders while Graham's appeal was pending. Graham then waited approximately six years before moving the court again for a return of his property. In his 2014 motion, Graham requested return of his passport, a flip phone, music CDs, a leather jacket, a pair of boots, a sweatshirt, a pair of blue jeans, a dress shirt, a book, a bag of store receipts, jewelry, and cash from his wallet.

{¶ 27} In response to Graham's motion, the state informed the trial court that the only property still in its possession was the \$129 seized from Graham's wallet upon his arrest. The state offered to return the money to Graham, but requested a court order and valid mailing address so that the county auditor could disburse a check to Graham. The trial court, however, denied Graham's motion for return of property because it claimed to be unaware as to what, if any, property Graham was permitted to receive in prison.

{¶ 28} Criminal forfeiture proceedings are governed by R.C. 2981.04, which provides that property can be forfeited if the indictment contains a specification as to the nature and extent of the defendant's interest in the property, a description of the property, and an indication as to whether the property was used in the commission or facilitation of the charged offense. R.C. 2981.04(A)(2) further permits forfeiture if the property was not listed in the indictment so long as such property was "not reasonably foreseen to be subject to forfeiture at the time of filing the indictment" and "if the prosecutor, upon discovering the property to be subject to forfeiture, gave prompt notice of this fact to the alleged offender * * * under Criminal Rule 7(E) * * *." None of Graham's property that he sought to regain was forfeited according to above-stated forfeiture proceedings.

{¶ 29} The state does not dispute that \$129 in cash was seized from Graham's wallet

at the time of his arrest. The state, however, did not seek a forfeiture order pertaining to this cash in the indictment, nor was the cash identified in the bill of particulars as being an item subject to forfeiture. Therefore, the cash is not subject to criminal forfeiture proceedings and should be returned to Graham.

{¶ 30} The state concedes that Graham is entitled to a return of the \$129. However, the state clearly expressed that the other property requested by Graham is not in its possession. As such, the trial court should have ordered the return of the \$129 to Graham, but was otherwise correct in denying Graham's motion as it pertained to the items of personal property that are not in the state's possession.

{¶ 31} As such, we sustain, in part, Graham's third assignment of error, in so much as the trial court erred in not ordering the return of Graham's \$129. We overrule, in part, Graham's third assignment of error to the extent the trial court properly denied Graham's motion for the return of the property that is no longer in the state's possession.

{¶ 32} Judgment affirmed in part, reversed in part, and the cause is remanded for further proceedings consistent with this opinion.

RINGLAND and M. POWELL, JJ., concur.