

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 14CA3595
	:	
vs.	:	
	:	
DANIEL C. PIPPEN,	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
	:	
Defendant-Appellant.	:	Released: 09/30/14

APPEARANCES:

Daniel C. Phippen, Chillicothe, Ohio, Appellant, pro se.

Mark E. Kuhn, Scioto County Prosecutor, and Pat Apel, Assistant Scioto County Prosecutor, Portsmouth, Ohio, for Appellee.

McFarland, J.

{¶1} Daniel C. Phippen appeals from the Scioto County Court of Common Pleas' denial of his motion for re-sentencing, which was construed by the trial court as an untimely petition for post-conviction relief. On appeal, Appellant contends that 1) the trial court rendered a void judgment when it put in its judgment entry a driver's license suspension, which he claims was not stated during the sentencing hearing; 2) the trial court rendered a void judgment and non-final appealable order when it failed to state in the judgment entry or at sentencing that he was acquitted of counts five and six, and failed to include the manner of conviction as to counts one, two, three, four, seven, eight and nine; and 3) the trial

court rendered a void judgment when it failed to properly address post release control and include said requirements in the judgment entry.

{¶2} Because the trial court properly notified Appellant of the mandatory driver's license suspension at the sentencing hearing and properly incorporated that sanction into the sentencing entry, we find no merit to Appellant's first assignment of error and it is therefore overruled. Because the arguments raised under Appellant's second assignment of error are barred by res judicata, his second assignment of error is overruled. Because we have found merit to Appellant's argument that a portion of his sentence was rendered void by the failure of the trial court to properly notify him of the consequences for violating post release control, we sustain Appellant's third assignment of error, in part. Accordingly, the sentence imposed by the trial court is affirmed in part, vacated in part, and this matter is remanded for resentencing.

FACTS

{¶3} As we have previously noted in prior appeals related to this matter, on October 25, 2010, Officer Steve Timberlake was unloading items from his vehicle when an unknown male approached him. The male knew Timberlake by name and told him there were men from Detroit selling drugs out of Katherine Lansing's residence at 616 Sixth Street in Portsmouth, Ohio. The next morning, Timberlake found an anonymous note on his vehicle's windshield, addressed to him, indicating

there were “D-boys” at the house on Sixth Street, and illegal activity was occurring at another location in Portsmouth.

{¶4} After conducting an investigation which revealed that Lansing was on probation, law enforcement decided to conduct a search of the residence. Upon entering the residence, law enforcement found Daniel Phippen in the upstairs restroom and Tyrone Dixon, Evan Howard, and Eric Durr in a small upstairs bedroom. The bedroom had a dresser and a mattress in it, along with a pile of money on the floor. The money totaled \$3,090. At the conclusion of a contraband search, law enforcement found a total of \$16,803, 1,824 oxycodone pills, cocaine, heroin, marijuana, and two digital scales.

{¶5} Phippen along with the others were ultimately convicted of:

Count 1: “Trafficking in Drugs/Oxycodone/Vicinity of a School/Major Drug Offender.”

Count 2: “Possession of Drugs/Major Drug Offender.”

Count 3: “Trafficking in Drugs/Heroin/Within the Vicinity of a School.”

Count 4: “Possession of Drugs/Heroin.”

Count 7: “Trafficking in Drugs/Marijuana/Within the Vicinity of a School.”

Count 8: “Possession of Criminal Tools.”

Count 9: “Possession of Marijuana.”

Count 10: “Conspiracy to Traffic in Drugs, F2.”

{¶6} The trial court sentenced Pippen to 27 years in prison. Pippen appealed his convictions and sentences. In *Pippen I*, this Court affirmed in part, reversed in part, and remanded the matter for resentencing. Our decision in *Pippen I* was released on September 25, 2012. Subsequently, Appellant filed an application for reconsideration in this Court on October 5, 2012.¹ The trial court re-sentenced Appellant pursuant to our remand instructions on November 8, 2012. Appellant filed a second appeal from his re-sentencing, alleging additional sentencing errors and claiming that the trial court lacked jurisdiction to re-sentence him while a motion for consideration was pending in this Court. We found merit to part of Appellant’s argument and again remanded the case to the trial court for correction of the sentence imposed for count eight.

{¶7} Appellant subsequently appealed his case to the Supreme Court of Ohio, filed a series of motions to strike appeal rulings based upon lack of subject matter jurisdiction in this Court, and also filed another motion for reconsideration and en banc review.² The Supreme Court of Ohio declined to accept jurisdiction

¹ This Court issued a decision denying Appellant’s application for reconsideration on January 29, 2013.

² Appellant filed his “motion for reconsideration / and en banc review pursuant to App.R. 26(A)” in case no. 11CA3412 and filed his “motion to strike appeal ruling based on lack of subject matter jurisdiction on non-finale [sic] appealable order” in case no. 12CA3526.

over Appellant's appeal on November 6, 2013. This Court denied Appellant's initial motion to strike appeal rulings by entry dated December 24, 2013. Then, on March 13, 2014, this Court filed additional judgment entries denying Appellant's second motion to strike appeal rulings, and also denying Appellant's motion for reconsideration and/or en banc review.

{¶8} During this time, Appellant, it appears, also filed a "motion for resentencing based upon void judgment entry" on October 8, 2013, which was construed as an untimely petition for post-conviction relief by the trial court, and therefore was denied on December 20, 2012. It is from this entry which Appellant now brings his appeal, assigning the following errors for our review.

ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT RENDER [SIC] A VOID JUDGMENT, WHEN IT PUT IN ITS JUDGMENT ENTRY A DRIVER [SIC] LICENSE SUSPENSION WHICH WAS NEVER STATED DURING SENTENCING.
- II. THE TRIAL COURT RENDER [SIC] A VOID JUDGMENT AND NON FINAL APPEALALBE ORDER, WHEN IT FAILED TO STATE IN THE JUDGMENT ENTRY OR AT SENTENCING THAT THE APPELLANT WAS ACQUITTED OF COUNTS 5 AND 6 AND OF THE MANNER OF CONVICTION AS TO COUNTS 1, 2, 3, 4, 7, 8, AND 9 WHICH WAS A JURY VERDICT.
- III, THE TRIAL COURT RENDER [SIC] A VOID JUDGMENT, WHEN IT FAILED TO PROPERLY ADDRESS POST RELEASE CONTROL AND INCLUDE SAID REQUIREMENTS IN THE JUDGMENT ENTRY."

LEGAL ANALYSIS

{¶9} Before addressing the merits of Appellant's case, we must first consider whether the trial court properly categorized Appellant's motion. On October 8, 2013, Appellant filed a pro se "Motion for Resentencing Based On Void Judgment Entry." Appellant's motion alleged his sentences were void for a variety of reasons, including the reasons raised on appeal, which include the trial court's alleged failure to notify him during the sentencing hearing that his driver's license would be suspended and its alleged failure to properly impose post release control. Appellant also argued that the sentencing entry issued on November 9, 2012, was not a final, appealable order, claiming that it failed to properly dispose of counts five and six, and failed to include the manner of conviction for the remaining counts. The trial court denied Appellant's motion in a one-page entry filed on December 20, 2013, based upon its characterization of Appellant's motion as an untimely petition for post conviction relief. The trial court further held that Appellant's claims were barred by res judicata.

{¶10} This Court has noted that "[c]ourts may recast irregular motions into whatever category is necessary to identify and to establish the criteria by which a motion should be judged." *State v. Eldridge*, 4th Dist. Scioto No. 13CA3584, 2014-Ohio-2250, ¶5; *State v. Sanders*, 4th Dist. Pickaway No., 13CA29, 2014-Ohio-2521, ¶6; citing *State v. Lett*, 7th Dist. Mahoning No. 09MA131, 2010-Ohio-

3167, ¶15; *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶12. Petitions for post-conviction relief typically raise constitutional challenges to convictions and sentences. For instance, in *State v. Eldridge*, supra, we determined that the appellant's motion for resentencing, which was filed post-conviction and subsequent to his initial, direct appeal was properly treated as a petition for post-conviction relief brought pursuant to R.C. 2953.21, because it raised constitutional claims

{¶11} Here, however, Appellant's motion for resentencing fails to raise constitutional claims and instead argues that his sentences are void due to statutory sentencing errors, and that his sentencing entry is "non final." The Supreme Court of Ohio has held that if an imposed sentence is not authorized by law, it is void. *State v. Billiter*, 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960, ¶10. A sentence that is void is not subject to the limits of the doctrine of res judicata and may be reviewed at any time, either on direct appeal or by collateral attack. *Billiter*, supra at ¶10. If the sentence is void, then it can be raised at any time and is not a petition for post-conviction relief. *State v. Holcomb*, 184 Ohio App.3d 577, 2009-Ohio-3187, 921 N.E.2d 1077, ¶19 (9th Dist.) (citing *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, ¶13, holding that a trial court has an obligation to recognize a void sentence and to vacate it and may not ignore

it). See also *State v. Rogers*, 8th Dist. Cuyahoga No. 98059, 2012-Ohio-4598 and *State v. Thomas*, 1st Dist. Hamilton Nos. C-100411, C-100412, 2011-Ohio-1331.

{¶12} In light of the foregoing, we conclude that because Appellant's motion alleged that his sentences were contrary to law and void, the trial court improperly dismissed it as an untimely petition for post-conviction relief. In addition, as set forth above, the doctrine of res judicata would not apply if the sentence was void. Thus, we will proceed to address the merits of Appellant's argument.

ASSIGNMENT OF ERROR I

{¶13} In his first assignment of error, Appellant contends that the trial court rendered a void judgment when it put in its judgment entry a driver's license suspension which was never stated during sentencing. In *State v. Brewer*, 2014-Ohio-1903, 11 N.E.3d 317, ¶ 33 (4th Dist.) this Court recently held that when reviewing felony sentences, we apply the standard of review set forth in R.C. 2953.08(G)(2). *Id.* (“we join the growing number of appellate districts that have abandoned the Kalish plurality's second-step abuse-of-discretion standard of review; when the General Assembly reenacted R.C. 2953.08(G)(2), it expressly stated ‘[t]he appellate court's standard of review is not whether the sentencing court abused its discretion’ ”); See also *State v. Graham*, 4th Dist. Highland No. 13CA11, 2014-Ohio-3149, ¶ 31. R.C. 2953.08(G)(2) specifies that an appellate

court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either that “the record does not support the sentencing court's findings” under the specified statutory provisions or “the sentence is otherwise contrary to law.”

{¶14} "Courts have found that the failure to impose a statutorily mandated driver's license suspension renders a sentence void and that the proper remedy is resentencing of the defendant." *State v. Benjamin*, 4th Dist. Scioto No. 10CA3378, 2011-Ohio-5699, ¶11; See also *State v. Harris*, 132 Ohio St.3d 318, 2012-Ohio-1908, 972 N.E.2d 509, paragraph one of the syllabus ("When a trial court fails to include a mandatory driver's license suspension as part of an offender's sentence, that part of the sentence is void. Resentencing of the offender is limited to the imposition of the mandatory driver's license suspension."). Thus, if the trial court did, in fact, fail to properly impose a driver's license suspension at sentencing, Appellant's sentence would not only be contrary to law, but also void.

{¶15} However, a review of the record reveals that the trial court notified Appellant of the suspension during the November 8, 2013 sentencing hearing and also incorporated that suspension into the sentencing entry. The transcript of the sentencing entry provides as follows in the last paragraph:

"The Court further finds that the Defendant is not eligible for the I.P.P. Program. That there are items to be forfeited to the State of

Ohio and delivered to the Scioto County Prosecutors Office to be distributed according to the law, which is cash in the sum of \$16,803.00, and also orders that his driver's license be suspended for one year."

Further, the sentencing entry dated November 9, 2013, provides as follows:

"Pursuant to Revised Code Section 2925.11(E)(2), Defendants [sic] drivers' license shall be suspended for a period of twelve (12) months."³ Thus, by properly imposing a driver's license suspension within the time frame specified in R.C. 2925.11(E)(2) in Appellant's presence at the sentencing hearing and incorporating that suspension into the sentencing entry, the trial court complied with the pertinent sentencing requirements. In light of the foregoing, we cannot find that Appellant's sentence is contrary to law in this respect and we, therefore, overrule Appellant's first assignment of error.

ASSIGNMENT OF ERROR II

{¶16} In his second assignment of error, Appellant contends that the trial court rendered a void judgment and "non final appealable order" when it failed to state in the judgment entry or at sentencing that he was acquitted of counts five and six, and failed to state the manner of conviction as to counts one, two, three, four,

³ R.C. 2925.11(E)(2) requires that the trial court "suspend for not less than six months or more than five years the offender's driver's or commercial driver's license or permit."

seven, eight and nine, which was a jury verdict. Because this Court has already considered and rejected this argument multiple times, we conclude that it is barred by res judicata.

{¶17} Appellant has filed several post-direct appeal motions in this Court raising this exact argument, which this Court has rejected. After two direct appeals of this matter, Appellant filed a "motion to strike appeal rulings based on lack of subject matter jurisdiction on non-final appealable orders." This Court, in a decision and judgment entry filed on December 24, 2013, denied Appellant's motion. Further, that decision decided the issue now raised by Appellant on appeal, holding that both of Appellant's sentencing entries were final, appealable orders. Specifically, the decision found that both of Appellant's sentencing entries, filed on January 19, 2011, and November 9, 2012, contained language which dismissed counts five and six.

{¶18} Then, on January 7, 2014, Appellant filed another "motion to strike appeal ruling based on lack of subject matter jurisdiction on non-finale [sic] appealable order" and also a "motion for reconsideration /and en banc review pursuant to App.R. 26(A)." Both of these motions argued there was no final, appealable order because the sentencing entries failed to state the "manner of conviction." This Court denied both motions by judgment entries dated March 13, 2014. This Court's decisions and judgment entries denying these motions

specifically found both of Appellant's sentencing entries to be final and appealable. For instance, our decision found "that although the judgment entry states that Pippen was convicted but does not state that it was by a jury, this omission does not affect the finality of the November 9, 2012 judgment entry." In reaching our decision, we relied upon *State v. Lester*, 130 Ohio St.3d 303, 307-308, 2011-Ohio-5204, 958 N.E.2d 142, which held that "the finality of a judgment entry of conviction is not affected by a trial court's failure to include a provision that indicates the manner by which the conviction was effected."

{¶19} Thus, the questions raised by Appellant under this assignment of error have already been presented to and have been rejected by this Court. As such they are barred by res judicata. “ ‘Theories of res judicata are used to prevent relitigation of issues already decided by a court or matters that should have been brought as part of a previous action.’ ” *State v. Paulsen*, 4th Dist. Nos. 09CA15, 09CA16, 2010-Ohio-806, ¶14; quoting *Lasko v. G.M.C.*, 11th Dist. No. 2002-T-0143, 2003-Ohio-4103, ¶16. “ ‘This doctrine has been held to apply to appellate proceedings in both criminal and civil cases.’ ” *Id.*; quoting *In re Kangas*, 11th Dist. No. 2006-A-0084, 2007-Ohio-1921, ¶71; citing *State v. Beckwith*, 8th Dist. Cuyahoga No. 75927, 2001 WL 237525 (Mar. 2, 2001). Accordingly, Appellant's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

{¶20} In his third assignment of error, Appellant contends that the trial court rendered a void judgment when it failed to properly address post-release control and include said requirements in the judgment entry. Appellant's argument under this assignment of error is two-fold. First, Appellant contends that the trial court was required to impose separate terms of post release control for each conviction, but failed to do so. Second, Appellant contends that the trial court failed to notify Appellant of the consequences for violating post-release control, specifically that a prison term imposed for violation of post-release control shall be served consecutively to any prison term for the new felony.

{¶21} The trial court imposed, both at the sentencing hearing and in the November 9, 2012, sentencing entry, a single, mandatory five-year term of post-release control for Appellant's multiple felony convictions. Although Appellant contends that the trial court was required to impose a separate term of post-release control for each offense, the Supreme Court of Ohio and multiple other appellate districts have rejected this argument. For instance, in *Durain v. Sheldon*, 122 Ohio St.3d 582, 2009-Ohio-4082, 913 N.E.2d 442, ¶1, it was determined that only one term of post-release control was required for Durain, who was serving a combination of stated prison terms. The Court based its reasoning on the language of R.C. 2967.28(F)(4)(c), and quoted subsection (c) as follows:

" ' If an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last, as determined by the parole board or court. Periods of post-release control shall be served concurrently and shall not be imposed consecutively to each other.' "⁴ See also *State v. Brown*, 2nd Dist. Montgomery No. 25653, 2014-Ohio-2551, ¶23; *State v. Orr*, 8th Dist. Cuyahoga No. 96377, 2011-Ohio-6269, ¶50; *State v. Reed*, 2012-Ohio-5983, 983 N.E.2d 394, ¶12 (6th Dist.); *State v. Sulek*, 2nd Dist. Greene No. 09CA75, 2010-Ohio-3919, ¶23.

As a result, in ordering the imposition of a single, mandatory five-year term of post-release control, the trial court was not required to impose shorter terms for the other convictions. *State v. Brown* at ¶23. Accordingly, we find no merit to this portion of Appellant's argument under this third assignment of error and therefore it is overruled.

{¶22} Our inquiry, however, does not end here. Appellant further argues that his sentences are void and contrary to law because the trial court failed to advise him of all of the consequences of violating post-release control, specifically

⁴ The version of the statute with an effective date of September 10, 2012, applies herein. The pertinent language is the same as the applicable version of the statute in *Durain*.

that a prison term may be imposed for violation of post-release control in the form of the commission of a new felony, which prison term shall be served consecutively to any sentence imposed on a new felony. The Supreme Court of Ohio addressed the "importance of notification" in *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶18, as follows:

"* * * in order to comply with separation-of-powers concerns and to fulfill the requirements of the post release-control-sentencing statutes, especially R.C. 2929.19(B) and 2967.28, a trial court must provide statutorily compliant notification to a defendant regarding postrelease control at the time of sentencing, *including notifying the defendant of the details of the postrelease control and the consequences of violating postrelease control*. [*Woods v. Telb*, 89 Ohio St.3d 504, 733 N.E.2d 1103 (2000), at paragraphs one and two of the syllabus; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, at paragraph one of the syllabus; *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, at ¶2.]" (Emphasis added).

{¶23} As recently noted in *State v. Chasteen*, 12th Dist. Butler No. CA2012-12-247, 2013-Ohio-3573, ¶19:

"When a court imposes a sentence that includes postrelease control, it must notify the offender at the sentencing hearing that he will be

supervised pursuant to R.C. 2967.28 and that upon violating a condition of postrelease control, the parole board may impose a prison term of up to one-half of the prison term originally imposed upon the offender. R.C. 2929.19(B)(3)(c) and (e); *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶2."

Further, R.C. 2929.141 addresses sentencing for an offense committed while under post-release control and provides in (A)(1)-(2) as follows:

"(A) Upon the conviction of or plea of guilty to a felony by a person on post-release control at the time of the commission of the felony, the court may terminate the term of post-release control, and the court may do either of the following regardless of whether the sentencing court or another court of this state imposed the original prison term for which the person is on post-release control:

(1) In addition to any prison term for the new felony, impose a prison term for the post-release control violation. The maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony. In all cases, any prison term imposed for the violation shall be reduced by any prison term that is administratively imposed by the parole board as a

post-release control sanction. *A prison term imposed for the violation shall be served consecutively to any prison term imposed for the new felony.* The imposition of a prison term for the post-release control violation shall terminate the period of post-release control for the earlier felony.

(2) Impose a sanction under sections 2929.15 to 2929.18 of the Revised Code for the violation that shall be served concurrently or consecutively, as specified by the court, with any community control sanctions for the new felony." (Emphasis added).

{¶24} Here, Appellant was not so advised during his sentencing hearing. A review of the sentencing transcript reveals that the trial court notified Appellant as follows with respect to the consequences for violating post-release control:

"The Court will make a finding that post Release Control is mandatory -- mandatory for five years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code Section 2967.28. The Defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control. If the Defendant violates supervision by the Parole Board or any condition of post release

control, the Adult Parole Authority or Parole Board could impose a more restrictive or longer control sanction, or return the Defendant to prison for up to nine months for each violation, up to a maximum of one half of the stated prison term, or may impose a prison term as part of the sentence of up to half of the stated prison term originally imposed upon the Defendant. If the violation is a new felony the Defendant may receive a prison term of the greater of one year, or the time remaining on post release control, in addition to any other prison term imposed for the new offense."

Unfortunately, nowhere in the transcript do we find the notification that a prison term imposed for the commission of a new felony during a term of post-release control will be served "consecutively" to the prison term imposed for the violation of post release control. This is in contrast to *State v. Lux*, 2nd Dist. Miami No. 2010CA30, 2012-Ohio-112, ¶75, where the trial court correctly informed Lux about the consecutive nature of the sentence to be imposed for the commission of a new felony while on post-release control.

{¶25} Failure to advise of the possible consequences of violating post-release control renders that part of the sentence void and it must be set aside. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶26. As the trial court failed to fully notify Appellant of the consequences of violating post-release control, we

find this portion of Appellant's third assignment of error to be meritorious.

Accordingly, this portion of Appellant's argument is sustained, the post-release control portion of Appellant's sentence is void and must be vacated, and this matter is remanded to the trial court for re-sentencing.

**JUDGMENT AFFIRMED IN PART,
VACATED IN PART, AND
REMANDED.**

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED IN PART, VACATED IN PART, AND REMANDED. Appellant and Appellee shall split 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 Scioto 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, P.J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland, 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.