[Cite as *State v. Spencer*, 2015-Ohio-1445.]

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

State of Ohio,	:	Case No. 15CA3681
Plaintiff-Appellee,	:	**DECISION AND JUDGMENT ENTRY**
v.	:	
Claude Lee Spencer,	:	
Defendant-Appellant.	:	**RELEASED: 04/14/2015**

APPEARANCES:

Claude Lee Spencer, Chillicothe, Ohio, Pro Se Appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, Portsmouth, Ohio, for Appellee.

HOOVER, P.J.,

{¶1} Spencer filed an appeal from an entry denying his motion for resentencing based on alleged errors in the imposition of court costs. The state filed a motion to dismiss the appeal arguing that the entry is not a final appealable order because Spencer's arguments concerning court costs could have been raised on direct appeal. Spencer filed a response arguing that errors in the imposition of court costs makes that portion of his sentence "void" and thus it is subject to review at any time. After reviewing the memoranda and the relevant law, we hereby **GRANT** the state's motion and **DISMISS** this appeal because the entry appealed from is not a final, appealable order.

I.

{¶2} In 1993 Spencer pleaded guilty to murder and was sentence to 15 years to life in prison. His sentence included the imposition of court costs. Spencer did not appeal.

In late 2014, Spencer filed a motion seeking a re-sentencing on the grounds that his original sentence was void because the trial court did not determine whether he had the ability to pay court costs prior to imposing them and because the trial court did not inform him that the failure to pay court costs could result in court ordered community service pursuant to R.C. 2947.23(A)(1)(a). The trial court denied his motion on the grounds that any errors in court costs should have been raised on appeal. The trial court also found that, to the extent Spencer's motion was a petition for post-conviction relief under R.C. 2359.21, it was untimely. Spencer appeals the trial court's denial of his motion for re-sentencing.

II.

{¶3} The trial court's entry denying Spencer's motion for re-sentencing is not a final appealable order. Appellate courts in Ohio have jurisdiction to review the final orders or judgments of inferior courts within their district. Section 3(B)(2), Article IV of the Ohio Constitution; R.C. 2501.02. A final appealable order is one that affects a "substantial right" and either determines the action or is entered in a special proceeding. R.C. 2501.02(B)(1) & (2). If a judgment is not final and appealable, then an appellate court has no jurisdiction to review the matter and must dismiss the appeal. *Production Credit Assn. v. Hedges,* 87 Ohio App.3d 207, 210 at fn. 2 (4th Dist. 1993); *Kouns v. Pemberton*, 84 Ohio App. 3d 499, 501 (4th Dist. 1992).

{¶4} In *State v. Lemaster*, 4th Dist. No. 02CA20, 2003-Ohio-4557, we held that an order denying the defendant's motion "to correct and/or modify sentence" was not a final appealable order. We noted that, "[a] final appealable order includes an order which amounts to a disposition of the cause and which affects a substantial right in an action which in effect determines the action and prevents a judgment." *Id*. (internal quotations

omitted). We further stated that:

> [The defendant] is asking us to review his sentence by reviewing the trial court's denial of his motion. However, the trial court's denial of this motion did not affect [the defendant's] substantial rights and determine the action. If [the defendant's] substantial rights were in fact ever violated, the violation occurred at the trial court's order of conviction and sentencing. He should have raised all arguments concerning his sentence on his direct appeal to this Court from the trial court's imposition of sentence. He failed to do so.

Id. at ¶ 25. As a result, we dismissed the appeal for lack of a final appealable order.

{¶5} In *State v. Kaiser,* 4th Dist. No. 10CA1, 2010-Ohio-4616, we followed our holding in *Lemaster* and reached the same result. *Id.* at ¶ 22. (defendant did not have a substantial right to a modification of a previously imposed sentence). We also noted that several other courts have likewise concluded that a motion to correct, modify or reconsider a sentence that is merely attempting to attack the original conviction or sentence is not a final appealable order. *Id.* at ¶ 21, citing *State v. Senk*, 8th Dist. No. 88524, 2007-Ohio-3414, at ¶ 18 ("it is evident that [the defendant] is attempting to attack his sentence collaterally by appealing the trial court's denial of his motion to correct sentence. We conclude that the judgment of the trial court, which [the defendant] is appealing, is not a final appealable order."); *State v. Vanelli,* 9th Dist. No. 02CA66, 2003-Ohio-2717, at ¶ 9 ("The November 15, 2001 judgment entry was final and appealable, yet Appellant failed to timely appeal from that order. Appellant has filed a notice of appeal from a judgment on a motion to reconsider. Such a judgment is a nullity and is not a final, appealable order."); *State v. Tully*, 5th Dist. No. 2001CA313, 2002-Ohio-1290 (finding that appellant's substantial rights were not affected because "[n]othering changed by virtue of the [trial court's] order"); *State v. Arnett*, 3rd Dist. No. 17-95-25, 1996 WL 106999 (Feb. 22, 1996)(finding that the trial court's denial of a motion to modify sentence was not a final appealable order); *State v. Shinkle,* 27 Ohio App.3d 54, 55 (12th Dist. 1986)("For purposes

of appeal in a criminal case, a final judgment or order amounting to a disposition of the cause usually means the imposition of a sentence.").

{¶6} We note that courts frequently treat motions to correct, re-sentence, modify, or vacate sentences as petitions for post-conviction relief. See *State v. Eubank*, 6th Dist. No. L-07-1302, 2008-Ohio-4225. However, post-conviction relief petitions are used to assert claims that there was such a denial or infringement of the persons' rights as to render the judgment void or voidable under the Ohio or United States Constitution such that the conviction should be vacated or set aside. R.C. 2953.21(A)(1). Additionally, post-conviction relief petitions must be filed no later than 365 days after the expiration of the time for filing the appeal. R.C. 2953.21(A)(2)

{¶7} Spencer's claim that the error in his sentence as it relates to court costs renders that portion of his sentence "void" is not supported by law. The Supreme Court of Ohio makes a clear distinction between sentencing errors involving postrelease control, which may result in a void portion of a sentence, and sentencing errors involving the imposition of court costs. "There is a significant difference between postrelease control and court costs in regard to the duty of the trial court." *State v. Joseph*, 126 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 18. A trial court has a statutory duty to provide notice of postrelease control, but exercises discretion in the waiver of court costs.

{¶8} Additionally, court costs are not punishment and are civil in nature. *Id.* "The civil nature of the imposition of court costs does not create the taint on the criminal sentence that the failure to inform a defendant of postrelease control does. Nor does the failure to inform a defendant orally of court costs affect another branch of government." *Id.* at ¶ 21. A defendant must make a motion to waive payment of court costs at the time of sentencing or the issue is waived, "If the defendant makes such a motion, then the

issue is preserved for appeal and will be reviewed under an abuse of discretion standard. Otherwise, the issue is waived and costs are res judicata." *Id*. citing *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 23, see also *State v. Harris*, 132 Ohio St.3d 318, 2012-Ohio-1908, 972 N.E.2d 509, ¶ 11 (discussing *Joseph* and the distinction between court costs and postrelease control terms).

{¶9} Also, we note that Spencer's argument that his sentence is void because the trial court failed to comply with R.C. 2947.23(A)(1)(a) when it failed to notify him of the possible imposition of community service for failure to pay court costs is without merit. That statutory provision did not exist at the time Spencer was sentenced in 1993. It came into existence on March 24, 2003 and has since been modified a number of times. In the current version of the statute, the court must only notify an offender of the possibility of community service in lieu of unpaid court costs if that offender is sentenced to community control sanction or other nonresidential sanction. R.C. 2947.23(A)(1)(a). It expressly excludes the notification requirement on an offender sentenced to term of imprisonment. See *State v. Young*, 8th Dist. Cuyahoga App. No. 99752, 2014-Ohio-1055; *State v. Wright*, 6th Dist. Lucas, App. Nos. L-13-1056, L-13-1057, L-13-1058, 2013-Ohio-5903. And, any errors in a trial court's application of R.C. 2947.23A)(1)(a) are immediately ripe for appeal and must be raised in a defendant's direct appeal. *State v. Smith*, 131 Ohio St.3d 297, 2012-Ohio-781, 964 N.E.2d 423; *State v. Moss*, 186 Ohio App.3d 787, 2010-Ohio- 1135, 930 N.E.2d 838 (4th Dist.).

{¶10} Because any errors in the trial court's imposition of court costs do not cause any portion of Spencer's judgment of conviction to be void, any alleged errors had to be raised on a direct appeal. Spencer's attempt to attack them collaterally some 22 years later is barred by res judicata. Therefore, we decline to treat his motion for resentencing as

an improperly titled petition for post-conviction relief. The trial court's entry dismissing his motion for resentencing is not a final appealable order.

III.

{¶11} We conclude that Spencer's motion for re-sentencing is not a proper petition for post-conviction relief, is barred by the doctrine of res judicata, and the trial court's order denying it is not a final appealable order. Because the trial court's entry denying his motion is not a final appealable order, we do not have jurisdiction to consider this appeal from that entry. Therefore, we **GRANT** the state's motion and **DISMISS** this appeal.

{¶12} The clerk shall serve a copy of this order on all counsel of record at their last known addresses. The clerk shall serve appellant by certified mail, return receipt requested. If returned unserved, the clerk shall serve appellant by ordinary mail.

MOTION GRANTED. APPEAL DISMISSED. COSTS TO APPELLANT.

IT IS SO ORDERED.

Abele, J.: Concurs.
Harsha, J.: Concurs with concurring opinion.

FOR THE COURT

_____
Marie Hoover
Presiding Judge

Harsha J., Concurring:

{¶13} I agree that the trial court's sentence is void. Therefore, I concur in dismissal because in this context the trial court lacked jurisdiction to substantively modify or reconsider the final criminal judgment and any attempt to do so would have been a nullity. In essence, the trial court had no jurisdiction to do anything but deny the motion. *See State v. Simin*, 9th

Dis. No. 25309, 2011-Ohio-3198, at ¶ 10 (trial court loses jurisdiction to substantively modify final judgment and any attempt to do so would be a nullity.) *See also State v. Conghenour*, 4th Dist. Gallia App. No. 12CA2 (May 25, 2012).