[Cite as *State v. Pippen*, 2016-Ohio-7105.]

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

STATE OF OHIO,	:	
	:	Case No. 16CA3727
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
DANIEL C. PIPPEN,	:	
	:	
Defendant-Appellant.	:	**Released: 09/23/16**

APPEARANCES:

Daniel C. Pippen, Chillicothe, Ohio, Pro Se Appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Jay Willis, Assistant Prosecuting Attorney, Portsmouth, Ohio, for Appellee.

McFarland, J.

{¶1} Daniel C. Pippen appeals the trial court's denial of his motion to vacate and set aside his original sentence. On appeal, Appellant contends that the trial court abused its discretion when it sentenced him to a sentence that exceeded the minimum sentence prescribed by law at the time he was originally sentenced. Because this Court has already addressed the issues raised in the present appeal in prior appeals filed by Appellant and previously determined them to be without merit, Appellant's sole

assignment of error is overruled. Accordingly, the judgment of the trial court is affirmed.

FACTS

{¶2} 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.

{¶3} 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 Pippen 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.

{¶4} Pippen, along with the others, was 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."

{¶5} The trial court sentenced Pippen to 27 years in prison. Pippen appealed his convictions and sentences. In *State v. Pippen*, 4th Dist. Scioto No. 11CA3412, 2012-Ohio-4692 (*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-

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

sentencing, alleging additional sentencing errors and claiming that the trial court lacked jurisdiction to re-sentence him while a motion for reconsideration 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. *State v. Pippen*, 4th Dist. Scioto No. 12CA3526, 2013-Ohio-2239 (*Pippen II*).

{¶6} 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 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.

{¶7} During this time, Appellant 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

[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.

therefore was denied on December 20, 2013. Appellant filed another appeal from that decision and this Court ultimately affirmed that decision in part, vacated it in part and remanded the case once again. *State v. Pippen*, 4th Dist. Scioto No. 14CA3595, 2014-Ohio-4454 (*Pippen III*). Appellant subsequently filed yet another motion to vacate and set aside sentence on October 30, 2015, which the trial court denied on December 10, 2015. It is from that decision that Appellant now brings his appeal, setting forth one assignment of error for our review.

ASSIGNMENT OF ERROR

"I. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT SENTENCED DEFENDANT TO A SENTENCE THAT EXCEEDED THE MINIMUM SENTENCE PRESCRIBED BY LAW AT THE TIME THE DEFENDANT WAS SENTENCED."

LEGAL ANALYSIS

{¶8} In his sole assignment of error, Appellant questions whether the trial court abused its discretion when it sentenced him to a sentence that exceeded the minimum sentence prescribed by law at the time he was originally sentenced in 2011. Appellant contends that the issue to be addressed is whether the "more than minimum sentence imposed" upon him for his conviction for possession of cocaine must be vacated because, in imposing sentence, the trial court did not rely upon fact finding, which Appellant claims was mandated by R.C. 2929.14(B), but which had been

declared unconstitutional, as violative of the Sixth Amendment.[3] The State responds by contending that Appellant's argument is barred by res judicata, and in the alternative that the trial court did not err in imposing the sentence of which Appellant complains.[4]

{¶9} Initially, we note that this case is currently before us for the fourth time on appeal. Since his original conviction, this matter has been remanded by this Court three different times for sentencing related errors. As set forth above, in addition to filing multiple appeals in this Court, Appellant has filed various other motions in the trial court, this Court, and has even appealed to the Supreme Court of Ohio. Further, before we reach the merits of Appellant's current argument, we must address the procedural posture of the case presently before us, as well as the trial court's categorization of the motion which it most recently denied.

{¶10} Appellant's first and second appeals (*Pippen I* and *Pippen II*) were direct appeals from his original convictions and sentences and his first re-sentencing, respectively. Appellant's third appeal to this Court (*Pippen*

[3] On appeal Appellant seems to challenge only a possession of cocaine sentence, and also seems to raise a constitutional challenge. However, the motion he filed in the lower court appears to have challenged all of his sentences and argued statutory violations rather than constitutional violations.

[4] " 'Under 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. Butcher*, 4th Dist. Meigs No. 14CA7, 2015-Ohio-4249, ¶ 23; quoting *State v. Szefcyk*, 77 Ohio St.3d 93, 1996-Ohio-337, 671 N.E.2d 233, syllabus.

III) was from the trial court's denial of a motion for re-sentencing, which the trial court construed as an untimely petition for post conviction relief. This Court found, however, that because Appellant's motion for re-sentencing failed to raise constitutional claims and instead argued his sentences were void due to statutory sentencing errors, the trial court improperly construed Appellant's motion as a petition for post conviction relief. *Pippen III* ¶ 11-12. We further held that res judicata would not apply if the sentence was void. This Court ultimately vacated the trial court's decision, in part, and remanded the matter for re-sentencing with respect to the imposition of post release control. *Id*. at ¶ 25.

{¶11} Subsequent to our last remand in *Pippen III,* Appellant filed another motion in the trial court, which was entitled "Motion To Vacate And SetAside [sic] Sentence That Was Handed Down On January 14, 2011 Where the Sentence does not Comport With Statutory Authority Pursuant to Ohio Revised Code 2929.14(B)(2), and (C) and (E)(4)." It is the trial court's denial of this motion that is being challenged in the current appeal. In the motion, Appellant argued that the sentences originally imposed in 2011 "did not comport with statutory authority and thusly must be deemed void." More specifically, Appellant contended that his non-minimum, maximum and consecutive sentences were contrary to law, were void and must be

vacated. In support of this contention, Appellant argued that the trial court did *not* engage in judicial fact finding before imposing more than minimum sentences, which he claims was required by R.C. 2929.14. He further argued that although the portions of R.C. 2929.14 that required judicial fact finding had been severed from the statute prior to his sentencing, because the judicial branch had no authority to excise portions of the statute, the judicial fact finding requirements remained intact.

{¶12} This time, the trial court did not re-cast Appellant's most recent motion as a petition for post conviction relief. It instead addressed Appellant's arguments on the merits, and ultimately denied the motion. Because Appellant's most recent motion again argued his sentences were void due to statutory sentencing errors, we believe the trial court properly handled the matter from a procedural standpoint, insofar as it did not categorize the motion as a petition for post conviction relief.

{¶13} Further, we must additionally note that Appellant's motion argues errors related to his original sentencing on January 14, 2011. As set forth above, this is the fourth time we have considered this case. Appellant has been re-sentenced three times since his original January 14, 2011 sentencing. Thus, any argument alleging error associated with his original sentencing has arguably been rendered moot. Nonetheless, in the interests of

justice, we will look beyond this potential bar to attempt to address Appellant's arguments on the merits.

{¶14} When reviewing felony sentences, we apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 2016-Ohio-1002, – N.E.3d ——, ¶ 22. Under R.C. 2953.08(G)(2), an appellate court may increase, reduce or modify a sentence or may vacate the sentence and remand the matter to the sentencing court if it clearly and convincingly finds either: (a) that the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant; or (b) that the sentence is otherwise contrary to law.

{¶15} At the time Appellant was originally sentenced, R.C. 2929.14(B), (C) and (E) governed the imposition of non-minimum, maximum and consecutive sentences. For instance, on January 14, 2011, the applicable version of R.C. 2929.14 had an effective date of April 7, 2009, and provided, in pertinent part, as follows:

> "(B) * * * if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term

authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.

(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

* * *

(C) * * * the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

* * *

(E)(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the

offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

{¶16} Thus, it appears based upon a review of the above version of the statute, that when Appellant was originally sentenced, Ohio's sentencing scheme required the trial court to impose a minimum sentence upon a defendant who was not serving and had never served a prison term, and could only impose a maximum sentence if the trial court found that the defendant "committed the worst form[ ] of the offense," or "pose[d] the greatest likelihood of committing future crimes." Prior version of R.C. 2929.14(B) and (C). Likewise, the statutory language required the trial court to make certain findings before imposing consecutive sentences.

{¶17} However, prior to Appellant's original sentencing, the Supreme Court of Ohio had issued a decision, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, which held that the requirement under R.C. 2929.14(B) that a trial court impose a minimum sentence unless the court, not the jury, made certain findings was unconstitutional. Similarly, the *Foster* court also held that the requirement under R.C. 2929.14(C) that the trial court, not the jury, make certain findings to justify imposition of a maximum sentence was unconstitutional. *Id.* at ¶ 64. As a result, the court

severed the unconstitutional statutes from the Revised Code. *Id*. at ¶ 97. The court also held that "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Id.* at ¶ 100. Thus, at the time Appellant was originally sentenced, the trial court was not required to make findings on the record in order to justify imposition of non-minimum, maximum or consecutive sentences and as such, we cannot conclude that Appellant's sentences, as originally imposed in 2011, were contrary to law in this regard.[5]

{¶18} Moreover, in Appellant's first appeal, he argued that the trial court failed to comply with R.C. 2929.14(B). Importantly, in *Pippen I*, we held Appellant's contentions to be meritless and explained that the fact-finding portions of the statute had been declared unconstitutional by *State v. Foster, supra.* We further declined "to remand the case to the trial court to consider an unconstitutional portion of the statute." *Id*. at ¶ 102. Because Appellant raised the same argument in *Pippen I* as he now raises on appeal with respect to 2929.14(B), and because we have already determined the

[5]However, as we discussed in *Pippen II* at ¶ 24-26, the General Assembly later revived the requirement that trial courts make findings before imposing consecutive sentences with the amendment of H.B. No. 86, which became effective September 30, 2011. Thus, by the time Appellant was re-sentenced on November 8, 2012, the trial court was again required to make certain findings before imposing consecutive sentences. As we discuss in more detail below, we determined in *Pippen II* that the trial court made the necessary findings to impose consecutive sentences when it re-sentenced Appellant for the first time.

argument to be meritless, the present argument on appeal is barred by res judicata.

{¶19} Further, in Appellant's second appeal to this Court, he raised, among other things, arguments regarding the trial court's imposition of consecutive sentences. *Pippen II*. Although we stated that the issue was arguably barred by res judicata as it was capable of being raised during Appellant's first appeal, in the interests of justice we addressed Appellant's argument on the merits, ultimately finding no error with respect to the imposition of consecutive sentences. *Pippen II,* at ¶ 24-27. Now, on appeal, Appellant again raises this same argument.

{¶20} Because Appellant raised the same argument in *Pippen II* as he now raises on appeal with respect to the imposition of consecutive sentences under R.C. 2929.12 (E)(4), and because we have already determined the argument to be meritless, the present argument on appeal is barred by res judicata. Moreover, even if we found an error related to the imposition of the consecutive sentences in this case, this Court has previously noted that "the Supreme Court of Ohio has declined to find sentences void based on the court's failure to comply with certain sentencing statutes, including the consecutive sentencing statute." *State v. Butcher, supra,* at ¶ 27; citing *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.2d 382, ¶ 8

(challenges to consecutive sentences must be brought on direct appeal). *See also State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659.

{¶21} Having found no merit to the arguments contained in Appellant's sole assignment of error, it is hereby overruled. We acknowledge that the trial court did not deny Appellant's motion on the basis of res judicata. However, we nevertheless reach the same decision as the trial court, albeit based upon different reasoning. Accordingly, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that costs be assessed to Appellant.

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, J.: Concurs in Judgment and Opinion.
Hoover, J.: Concurs in Judgment Only.

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.