

[Cite as *State v. Wallace*, 2017-Ohio-8043.]

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 16CA3754
 :
 vs. :
 :
 JEREMY E. WALLACE, : DECISION AND JUDGMENT ENTRY
 :
 :
 Defendant-Appellant. :

APPEARANCES:

Jeremy Wallace, Chillicothe, Ohio, pro se.

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

CRIMINAL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED: 9-20-17

ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment that denied a motion to correct sentence filed by Jeremy Wallace, defendant below and appellant herein. Appellant assigns the following error for review:

ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT’S MOTION TO CORRECT SENTENCE AS THE TRIAL COURT FAILED TO NOTIFY THE APPELLANT OF HIS RIGHT TO APPEAL PURSUANT TO CRIM.R. 32(B)(2) AND (3) FOLLOWING A GUILTY PLEA WHICH IS SILENT AS TO A SENTENCING RECOMMENDATION.”

{¶ 2} On June 16, 1997, the grand jury returned an indictment that charged appellant with one

count of aggravated robbery in violation of R.C. 2911.01(A)(3) and one count of aggravated murder in violation of R.C. 2903.01(B), in addition to a R.C. 2929.04(A)(7) specification. On May 15, 1998, appellant pled guilty to aggravated murder, and the state dismissed the specification, as well as the aggravated robbery charge. The trial court sentenced appellant to serve life in prison with parole eligibility after 20 years. Appellant did not appeal.

{¶ 3} On April 8, 2016, appellant filed a motion to correct sentence and argued that the trial court did not comply with Crim.R. 32(B) and failed to advise him of his right to appeal. Appellant argues that, because the court did not advise him of the right to appeal, his sentence is void. Consequently, appellant sought a new sentencing hearing. The trial court, however, denied the motion on the grounds that, pursuant to *State v. Abernathy*, 4th Dist. Scioto No. 10CA3341, 2011-Ohio-1056, the trial court did not have jurisdiction to modify appellant's sentence. This appeal followed. In his sole assignment of error, appellant asserts that the trial court erred when it denied his motion to correct sentence. Appellant contends that the court (1) failed to notify him of his right to appeal following his guilty plea, and (2) did not include such notification in the judgment entry. Appellant argues that the appropriate relief is for the trial court to resentence him.

{¶ 4} The state contends, however, that appellant's motion to correct sentence is not a final appealable order, that this collateral attack on a sentence nearly twenty years after sentencing is barred by res judicata, and that the trial court had no jurisdiction to modify the sentence.

A

TIMELINESS

{¶ 5} Generally, "The time for filing a notice of appeal is governed by App.R. 4 and, pursuant to App.R. 14(B), a court may not enlarge the time for filing a notice of appeal." *State v. Kaiser*, 4th

Dist. Lawrence No. 10CA1, 2010-Ohio-4616, ¶ 12, citing *State v. Thacker*, 4th Dist. Lawrence No. 02CA35, 2002-Ohio-7443, ¶ 3, citing *Ross v. Harden*, 8 Ohio App.3d 34, 455 N.E.2d 1313 (10th Dist.1982). “If a party fails to file a notice of appeal within thirty days as required by App.R. 4(A), we do not have jurisdiction to entertain the appeal. The timely filing of a notice of appeal under this rule is a jurisdictional prerequisite to our review.” *Hughes v. A & A Auto Sales, Inc.*, 4th Dist. Lawrence No. 08CA35, 2009-Ohio-2278, ¶ 7. See also *State v. Cremeens*, 4th Dist. Vinton No. 06CA646, 2006-Ohio-7092, ¶ 6; *Thacker* at ¶ 3; *State v. Sides*, 11th Dist. Lake No. 2008-L-145, 2008-Ohio-6058, ¶ 6; *State v. Sturkey*, 5th Dist. Muskingum No. CT2006-0087, 2007-Ohio-5701, ¶ 21. Journalization of the judgment of conviction pursuant to Crim.R. 32(C) starts the 30-day appellate clock ticking. *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, ¶ 10.

{¶ 6} In the case sub judice, appellant did not file a direct appeal after he pled guilty in 1998. On April 8, 2016, he filed his motion to correct sentence. The trial court denied appellant’s motion. Although appellant claims to appeal the denial of this motion, it appears that appellant is instead attempting to challenge his 1998 sentence. Pursuant to App.R. 4(A) and 4(B)(3), a party in a criminal case must file a notice of appeal within thirty days of the judgment from which the appeal is taken. Consequently, appellant’s appeal is untimely. See App.R. 4.

B

RES JUDICATA

{¶ 7} The state also contends, citing *State v. Kachovee*, 4th Dist. Scioto No. 00CA2745, 2001-Ohio-2382, that when a defendant has previously raised an issue on direct appeal, or had the opportunity to raise the issue, the review of the matter is now barred by the doctrine of res judicata. “The doctrine of res judicata bars the assertion of claims against a valid, final judgment of conviction

that have been raised or could have been raised on direct appeal.” *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 59, citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

{¶ 8} ““In general, a void judgment is one that had been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act. Unlike a void judgment, a voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but the court’s judgment is invalid, irregular, or erroneous.”” *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 6, quoting *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 12. In general, “sentencing errors are not jurisdictional and do not render a judgment void.” *Fischer* at ¶ 7. However, “the Supreme Court of Ohio has, at times, held that ‘a sentence that is not in accordance with statutorily mandated terms is void,’ which ‘is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack.’” *State v. Hamilton*, 4th Dist. Hocking No. 16CA17, 2017-Ohio-1294, ¶ 12, citing *Fischer* at ¶ 8 and paragraph one of the syllabus.

{¶ 9} In *Hamilton*, this court noted that in *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, at ¶ 8, the Supreme Court of Ohio emphasized that the language in *Fischer* regarding the inapplicability of res judicata “does not apply to most sentencing challenges,” and instead applied “only in a limited class of cases - all three cases to which we have applied the *Fischer* rule have in common the crucial feature of a void sanction.” *Hamilton* at ¶ 13, citing *Holdcroft*.

{¶ 10} In addition, we look to *State v. Berecz*, 4th Dist. Washington No. 16CA15, 2017-Ohio-266, for guidance. In *Berecz*, the trial court denied the defendant’s appeal from the

denial of his postconviction motion to correct sentence. Like here, Berecz asserted that the trial court purportedly failed, in its original sentencing entry, to notify him of his ability to appeal his sentence. This court held that “[a]lthough R.C. 2953.08 confers on a defendant the right to appeal from the sentence, it contains no requirement that the court notify the defendant of that right. And any purported failure by the trial court in its notification obligations under Crim.R. 32 could not render his sentence void.” *Berecz* at ¶ 23.

{¶ 11} Similarly, in *State v. Gannon*, 4th Dist. Lawrence No. 15CA16, 2016-Ohio-1007, we considered a case in which the defendant filed a postconviction “motion for resentencing based on void judgment,” arguing that the trial court failed to advise him about the mandatory period of postcontrol that was part of his maximum sentence. We held that “because the error here resulted from the court’s failure to comply with the Crim.R. 11(C)(2)(a) requirements for accepting a plea, rather than as a result of ignoring a statutory mandate for imposing sentence, the plea was merely avoidable and not void.” *Gannon* at ¶ 15. *See also State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, at paragraph three of the syllabus (“[a]lthough the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt.”).

{¶ 12} Finally, in *State v. Barnes*, 12th Dist. Warren No. CA2014-03-049, 2015-Ohio-651, the Twelfth District considered the same issue as in the case sub judice. Barnes filed a motion for resentencing based on a void judgment and argued, inter alia, that the trial court failed to advise him of his right to appeal. Barnes argued that the trial court is required to advise him of his right to appeal under Crim.R. 32(B)(2), which provides that a trial court “shall advise the defendant of the defendant’s right, where applicable, to appeal or to seek leave to appeal the sentence imposed,” after

imposing sentence in a serious offense. The court held that “[w]hile the trial court failed to advise Barnes of his right to appeal under CrimR. 32(B)(2), such an error does not render Barnes’ conviction void. Therefore, Barnes’ postconviction relief petition on this issue is untimely. Furthermore, Barnes never filed a direct appeal, nor did he request leave to file a delayed appeal from his conviction.” *Id.* at ¶ 27. Consequently, the court found that Barnes’ petition for postconviction relief on the basis of the trial court’s failure to advise him of his right to appeal was barred by res judicata. *See also State v. Hamilton*, 4th Dist. Hocking No. 16CA17, 2017-Ohio-1294, ¶ 16-18.

{¶ 13} Accordingly, based upon the foregoing reasons, we conclude that appellant’s claims are untimely and barred by res judicata. Thus, we overrule appellant’s assignment of error and affirm the trial court’s judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

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, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty-day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Supreme Court of Ohio in the forty-five day 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 the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, 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.