[Cite as *State v. Marshall*, 2015-Ohio-1986.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellant

-vs-

EDDIE L. MARSHALL

Defendant-Appellee

JUDGES:
Hon. John W. Wise, P. J.
Hon. Patricia A. Delaney, J.
Hon. Craig R. Baldwin, J.

Case No. 14 CA 37

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case Nos. 1993 CR 198H and 1996 CR 197H
JUDGMENT:	Reversed
DATE OF JUDGMENT ENTRY:	May 20, 2015

APPEARANCES:

For Plaintiff-Appellant

JILL M. COCHRAN
ASSISTANT PROSECUTOR
38 South Park Street
Mansfield, Ohio 44902

For Defendant-Appellee

JEFFREY P. UHRICH
LAW OFFICE OF JEFFREY P. UHRICH
Post Office Box 1977
Westerville, Ohio 43086

Wise, P. J.

{¶1}. Appellant State of Ohio appeals the decision of the Court of Common Pleas, Richland County (hereinafter "trial court"), which ordered that Appellee Eddie L. Marshall's state felony sentences from 1993 and 1996 cases should run concurrently with a subsequent federal sentence. The relevant facts leading to this appeal are as follows.

Common Pleas Case No. 93-CR-198H

{¶2}. In March 1993, in case number 93-CR-198H, Appellee Marshall was indicted by the Richland County Grand Jury on one count of aggravated trafficking in crack cocaine, a felony of the third degree. Appellee thereafter entered a plea of guilty. On July 9, 1993, the trial court sentenced him to one and one-half years in prison and a $2,500.00 fine. The trial court, however, suspended appellee's prison sentence and placed him on three years of probation.

{¶3}. At some point in July or August 1993, appellee absconded from supervision. A bench warrant was issued for appellee for violating his aforesaid probation, and his probation time was temporarily tolled.

{¶4}. Appellee's probation time was reinstated on January 10, 1994. A second bench warrant was issued at about that time, but there is no record of a hearing being held on the alleged violation.

{¶5}. On May 2, 1995, the trial court vacated appellee's "mandatory" fine based on his filing of an affidavit of inability to pay.

{¶6}. On April 18, 1996, appellee was involved in another transaction for the sale of cocaine. At that time, a third bench warrant was issued for appellee for a

violation of his probation. Appellee made an admission to the probation violation under case 93-CR-198H on July 3, 1996. The trial court subsequently imposed a sentence of one and one-half years. Also, the fine of $2,500.00 was re-imposed.

Common Pleas Case No. 96-CR-197H

{¶7}. On May 8, 1996, appellee was indicted in case number 96-CR-197H on one count of aggravated trafficking in crack cocaine, a felony of the first degree. This was apparently related to the April 1996 activity referenced above.

{¶8}. In 96-CR-197H, appellee entered a plea of guilty to the aggravated trafficking charge on July 22, 1996. Accordingly, in 96-CR-197H, appellee was thereupon sentenced to a prison term of six to twenty-five years and a $10,000.00 fine. This sentence was ordered to be served prior to the aforesaid sentence of one and one-half years imposed in 93-CR-198H.

Subsequent Joint Case Rulings; Federal Prosecution

{¶9}. On June 8, 1998, appellee filed a motion for judicial release and/or suspension of sentence under both common pleas case numbers. In addition, on October 1, 1998, appellee filed a motion to modify sentence. Appellee was brought to court on or about October 19, 1998. At that time, the trial court, with the agreement of the State, modified appellee's sentence in 96-CR-197H to a non-mandatory prison term of six years under the law as amended in 1996 by Senate Bill 2.

{¶10}. Again, the 1993 and the 1996 cases were ordered to be served consecutively to each other. Appellee was granted judicial release and was placed on five years of intensive probation.

{¶11}. In October 1999, appellee was arrested by FBI agents on federal drug trafficking offenses. Crack cocaine and a weapon were present in violation of the terms of his probation. A warrant was issued for the state probation violation on October 25, 1999. Appellant was convicted on the federal charges in December 1999, but sentencing was deferred until later in 2000.

{¶12}. In the meantime, appellee appeared before the trial court on December 17, 1999, and admitted to violating probation. During this probation violation hearing, it was noted that appellee had entered a guilty plea in federal court but was awaiting a March 8, 2000 sentencing hearing for that charge. *See* Probation Violation Tr. at 10. The trial court indicated that it would "look into the matter of whether or not it can be concurrent or should be concurrent." Tr. at 13. The court advised appellant: "Do the right thing by the federal officials. They'll be here to talk to me in regards to what should be done by way of concurrent or consecutive sentencing." Tr. at 14.

{¶13}. In a probation violation judgment entry issued on December 23, 1999, the trial court wrote that it took judicial notice that appellee had been convicted on "federal drug charges." Appellee's sentence was re-imposed. It was noted at the bottom of said judgment entry that the sentence was pursuant to an agreement between appellee, his attorney, the trial court and the Richland County Prosecutor's Office. *See* Exhibit F. Appellee was then remanded into federal custody.

{¶14}. Notably, the trial court at that time did not issue orders on the record or in the judgment entry regarding whether these sentences were to be served concurrently or consecutively to the federal sentence which was yet to be imposed.

{¶15}. On March 8, 2000, appellee appeared for federal sentencing in the United States District Court, Northern District of Ohio. Having pled guilty to a charge of conspiracy with the intent to distribute, he was sentenced to 141 months in federal prison with credit for time served. He was also sentenced to five years of supervised release upon his release from prison. There is no mention in his federal sentence whether it was to be served consecutively or concurrently to the charges in the underlying state cases. *See* Exhibit G.

{¶16}. Back in the trial court, on October 1, 2003, appellee filed a "motion for final disposition" and request to have his state detainer lifted, arguing *inter alia* that his federal and his state sentences were to be run concurrently. The State responded on November 6, 2003, arguing that federal prison time is to be treated as consecutive unless there was a determination that the sentences were to be run concurrently, and maintaining that the state trial court did not order concurrent sentences. *See* Exhibit H. There is no record that appellee's motion was ever answered or ruled upon.

{¶17}. Appellee was released from federal prison on February 13, 2009.

{¶18}. On September 30, 2013, appellee was ordered to prison for eighteen months on a state felony charge from Wood County, Ohio, for drug trafficking. At that time, officials from the Ohio Department of Rehabilitation and Correction determined that appellee had yet to serve his time in cases 93-CR-198H and 96-CR-197H.

{¶19}. On March 26, 2014, the trial court, apparently sua sponte, filed a judgment entry indicating that the original intent of the trial court and the parties had been that the sentences in case numbers 93-CR-198H and 96-CR-197H, while consecutive to each other, were to be served concurrently to appellee's federal sentence.

{¶20}. On April 23, 2014, the State of Ohio filed a notice of appeal. It herein raises the following Assignment of Error:

{¶21}. "THE TRIAL COURT ERRED WHEN IT SUA SPONTE ORDERED THE APPELLEE'S SENTENCES IN 93-CR-198H AND 96-CR-197H TO RUN CONCURRENTLY TO THE APPELLEE'S FEDERAL SENTENCE AS THE TRIAL COURT DID NOT HAVE THE AUTHORITY TO ENTER THAT SENTENCE ORIGINALLY OR THE JURISDICTION TO RECONSIDER ITS OWN VALID JUDGMENT."

I.

{¶22}. In its sole Assignment of Error, the State contends the trial court erred in sua sponte ordering that appellee's state sentences in 93-CR-198H and 96-CR-197H were intended to run concurrent to his subsequent 2000 federal sentence. We agree.

{¶23}. R.C. 2929.41(A) states that with certain exceptions (including the consecutive sentence provisions of R.C. 2929.14(C)), "a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States. ***."

{¶24}. The State first herein argues, relying in part on *State v. White*, 18 Ohio St.3d 340, 481 N.E.2d 596 (1985), that the use of the past-tense term "imposed" in R.C. 2929.41(A) evinces a legislative intent to allow a trial court to fashion a concurrent or consecutive sentence only in relation to an extant sentence or sentences. In other words, the State maintains, the chronologic "first court" (in this instance the state trial court) to impose a sentence on a particular defendant has no authority to render its

sentence as either concurrent or consecutive to a *future* sentence, as only the "second court" (in this instance the federal court) can make such a determination vis-à-vis a previously-imposed term of incarceration. *Cf. State v. Biegaj*, 6th Dist. Lucas No. L-07-1070, 2007-Ohio-5992, ¶ 9 (stating "[i]t is established in Ohio that a sentence cannot run consecutively with a future sentence.")

{¶25}. The State secondly contends that the trial court did not have the authority to reconsider appellee's state sentences. The Ohio Supreme Court has clearly indicated that trial courts lack authority to reconsider their own valid final judgments in criminal cases. *State ex rel. White v. Junkin*, 80 Ohio St.3d 335, 338, 686 N.E.2d 267, 1997-Ohio-340. Similarly, as a general rule, once a valid sentence has been executed, a trial court no longer has the power to modify the sentence except as provided by the Ohio General Assembly. *See State v. Hayes* (1993), 86 Ohio App.3d 110.

{¶26}. The first of the two main exceptions to the aforesaid general rule is the void sentence doctrine. *See State ex rel. Cruzado,* 111 Ohio St. 3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19. The Ohio Supreme Court has thus recognized: " * * * [I]n the normal course, sentencing errors are not jurisdictional and do not render a judgment void. * * * But in the modern era, Ohio law has consistently recognized a narrow, and imperative, exception to that general rule: a sentence that is not in accordance with statutorily mandated terms is void." *State v. Fischer,* 128 Ohio St.3d 92, 94, 2010–Ohio–6238, ¶ 7–¶ 8.[1] Another exception to the general rule is that a trial court has jurisdiction to correct clerical errors in its judgments. *See State ex rel. Cruzado*, *supra*, ¶

[1] It is worth noting that the rule of *Fischer* was originally limited to "a discrete vein of cases: those in which a court does not properly impose a statutorily mandated period of postrelease control." *See Fischer* at ¶ 31.

19, citing Crim.R. 36. A *nunc pro tunc* order can be used to supply information which existed but was not recorded, and to correct typographical or clerical errors. *See Jacks v. Adamson* (1897), 56 Ohio St. 397, 47 N.E. 48.

{¶27}. We find merit in the State's position under the unusual procedural circumstances of this matter. At the respective times appellee was sentenced in 93-CR-198H and 96-CR-197H, appellee had not yet even committed the crime leading to his 2000 federal sentence; thus, we hold the trial court has never had authority under R.C. 2929.41(A) to designate the state sentences as either concurrent or consecutive to said federal sentence. As such, we are further persuaded that the trial court lacked authority to revisit or attempt to clarify its prior sentences, either on a "void sentence" or "nunc pro tunc" basis. Accordingly, appellee's remedy, if any, will have to be pursued via a different procedural vehicle.

{¶28}. Appellant State of Ohio's sole Assignment of Error is sustained.

{¶29}. For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Richland County, Ohio, is hereby reversed.

By: Wise, P. J.
Delaney, J., and
Baldwin, J., concur.

JWW/d 0417