

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
OTTAWA COUNTY

State of Ohio

Court of Appeals No. OT-11-026

Appellee

Trial Court No. 06CR148

v.

Jason Smaltz

**DECISION AND JUDGMENT**

Appellant

Decided: May 25, 2012

\* \* \* \* \*

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and  
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

Jason A. Smaltz, pro se.

\* \* \* \* \*

**HANDWORK, J.**

{¶ 1} This appeal is from the July 5, 2011 judgment of the Ottawa County Court of Common Pleas, which denied the motion of appellant, Jason A. Smaltz, to correct his sentence. Upon consideration of the assignment of error, we affirm the decision of the lower court. Appellant asserts the following single assignment of error on appeal:

The Trial Court failed to properly consider and apply the sentencing guidelines of R.C. 2929.14(D)(4) when it ordered a four year mandatory sentence on the OVI offense, making the sentence contrary to law pursuant to R.C. 2953.08(G)(2).

{¶ 2} In its January 15, 2008 sentencing judgment, as corrected by a subsequent December 13, 2010 judgment, appellant was convicted on two counts of driving while under the influence of alcohol, which are violations of R.C. 4511.19(A)(1)(a), with specifications of five prior convictions of equivalent offenses within the prior twenty years; two counts of driving while under the influence, within twenty years of a prior conviction for equivalent offenses, and refusing to submit to chemical testing after being arrested, which are violations of R.C. 4511.19(A)(2)(a) and (b), with specifications of five prior convictions within the prior twenty years; and a misdemeanor violation of R.C. 4510.15, driving with a suspended license. Because the four OVI offenses were allied offenses, the court merged these convictions and sentenced appellant only on the first conviction, a third degree felony OVI offense, with a specification. Appellant was sentenced to consecutive, mandatory terms of imprisonment of four years on the OVI offense and four years on the specification, for a total of eight years. Appellant was ordered to serve a 180 day concurrent sentence for the misdemeanor.

{¶ 3} Appellant's sentence was appealed and affirmed by this court. *State v. Smaltz*, 6th Dist. No. OT-08-008, 2009-Ohio-517. Appellant did not raise any issue regarding his sentence. On April 8, 2011, appellant filed a motion with the trial court

arguing that there was an error in his sentence because the term of imprisonment for the specification should not have been made mandatory. The trial court treated appellant's motion as a petition for postconviction relief. The court held that this issue could have been raised in appellant's direct appeal, but it was not. Therefore, the trial court found the issue was barred by the doctrine of res judicata. Appellant then sought an appeal to this court.

{¶ 4} Upon a review of the record, we find that the trial court's judgment is not erroneous. Appellant is not able to raise this issue in a postconviction relief petition under the doctrine of res judicata. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph seven of the syllabus.

{¶ 5} Appellee does not dispute that appellant's sentence was contrary to law and requests that this court modify appellant's sentence to correct the error. However, we do not have the power under R.C. 2953.08(G)(2) and App.R. 12(B) to sua sponte correct a sentencing judgment simply because it is contrary to law. Therefore, we find appellant's sole assignment of error not well-taken. We do have the power to appoint counsel to represent appellant if he is indigent and requests assistance in the reopening of his direct appeal, pursuant to App.R. 26(B), to raise the issue of the ineffective assistance of his appellate counsel in failing to assert that there had been an error of law made in sentencing.

{¶ 6} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Arlene Singer, P.J.

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JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

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JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
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