

[Cite as *State v. Frazier*, 2009-Ohio-1091.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91617

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

THOMAS FRAZIER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-320159 and CR-322046

BEFORE: Cooney, A.J., McMonagle, J., and Dyke, J.

RELEASED: March 12, 2009

JOURNALIZED:

FOR APPELLANT

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Defendant-appellant, Thomas Frazier (“Frazier”), pro se, appeals the trial court’s denial of his motion to clarify sentence. Finding no merit to the appeal, we affirm.

{¶ 2} As this court has previously stated regarding Frazier’s underlying criminal actions:

“In August 1995, Frazier pled guilty to charges in two separate cases. In CR-320159, he pled guilty to drug trafficking and having a weapon while under disability. In CR-322046, he pled guilty to failure to comply with the order of a police officer, having a weapon while under disability, drug trafficking, vandalism, and two counts of assault on a police officer. Frazier was sentenced to seven to fifteen years in prison, to be served consecutively to six years in prison for the firearm specifications.

“On April 10, 2003, Frazier moved for judicial release under R.C. 2929.20. The trial court granted his motion, thereby placing him on community control sanctions for four years. In May 2004, Frazier was found in violation of his community control sanctions, and the trial court returned him to prison.” *State v. Frazier*, Cuyahoga App. No. 86984, 2006-Ohio-3023 (“*Frazier I*”); *State v. Frazier*, Cuyahoga App. No. 88331, 2007-Ohio-1851 (“*Frazier II*”).

{¶ 3} In August 2004, Frazier filed a motion for jail time credit, which the trial court granted. However, he continued to assert that the jail time calculations were incorrect. Subsequently, in August 2005, he filed a motion for declaratory judgment alleging that the calculations of the Department of Rehabilitation and Correction were incorrect. The trial court denied the motion and Frazier appealed. We affirmed the trial court’s decision finding that Frazier was not entitled to any jail time credit for any period of incarceration that arose from facts separate and apart from those facts

on which his current sentence is based; thus, the Department of Rehabilitation and Correction was correct in not crediting time earned pursuant to his gun specification conviction. *Frazier I*.

{¶ 4} Frazier also filed a “Crim. Rule (52-B) Motion,” alleging that his constitutional rights were violated by the trial court’s sentence after he was found to have violated his community control sanctions. The trial court denied the motion, and Frazier again appealed. We found that his motion did not exist under the Ohio Rules of Criminal Procedure and that he was barred by res judicata from raising issues related to his sentence. *Frazier II*.

{¶ 5} Subsequent to our decision in *Frazier II*, Frazier filed a “Motion to Clarify Sentence” and an “Order to Compel,” again asking the trial court to compel the Department of Rehabilitation and Correction to comply with the sentencing order of the court. Frazier also filed a writ of mandamus, which we dismissed as moot. *State ex rel. Frazier v. Saffold*, Cuyahoga App. No. 88166, 2006-Ohio-4494. Frazier then filed a writ of procedendo, which we denied. *State ex rel. Frazier v. Saffold*, Cuyahoga App. No. 91188, 2008-Ohio-3353.

{¶ 6} The trial court denied his motion to clarify sentence and motion to compel. Frazier now appeals the denial of his motion to clarify sentence, arguing that the trial court erred in denying his motion.

{¶ 7} As this court recently stated in *State v. Nutter*, Cuyahoga App. Nos. 91073-91076, 91848-91851, 2009-Ohio-723:

“Once a defendant begins serving his or her sentence there is a finality to the judgment, and the trial court may not modify its previously imposed sentence. ‘As a general rule, the execution of a criminal sentence commences when a defendant has been sentenced to a term of imprisonment and the defendant has been delivered to a penal institution of the executive branch.’ Once a defendant is in the custody of the penal institution in which he or she is to serve the sentence, a trial court’s authority to suspend or to modify a sentence is limited to those instances specifically provided by the General Assembly. Consequently, the general rule is a court has no authority to amend a valid sentence that has been placed into execution.

“The Ohio Supreme Court, in *State ex rel. Cruzado v. Zaleski* [111 Ohio St.3d 353, 2006-Ohio-5759] discussed two exceptions to the general rule. The *Cruzado* court explained that a trial court is authorized to correct a void sentence and can also correct clerical errors in the judgment.” (Internal citations omitted.)

{¶ 8} In the instant case, it is undisputed that Frazier had commenced serving his sentence prior to his “motion to clarify sentence.” Furthermore, this court has previously affirmed the validity of his original sentence in *Frazier II*. Although Frazier argues that the Ohio Department of Rehabilitation and Correction has misinterpreted the sentence imposed by the trial court to include nine years in gun specifications, rather than the sentence we previously affirmed, the trial court rejected that argument. Therefore, because his original sentence was not void and there is no clerical error in the judgment, we find that the trial court did not err in denying his motion to clarify sentence.

{¶ 9} Moreover, we also find that Frazier’s motion is barred by res judicata and the law of the case doctrine.¹ In *Frazier II*, we found that:

¹The law of the case doctrine provides that the decision of a reviewing court in a case remains the law of the case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *Nolan v. Nolan* (1984),

“the doctrine of res judicata prevents this court from reviewing the issues Frazier could have raised in a timely appeal. Errors of law that were either previously raised or could have been raised through an appeal may be barred from further review based upon the operation of res judicata. See, *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

“In the instant case, Frazier possessed the opportunity through a direct or delayed appeal to challenge the issues he now raises, including the trial court’s resentencing in June 2004 when the trial court found he violated his community control sanctions. Instead, Frazier waited more than one year to challenge his sentence by filing a motion which is not recognized under Ohio’s Rules of Criminal Procedure. Therefore, because he failed to timely appeal his sentence, he has waived his right to review of the issues raised herein.”

{¶ 10} When this court found in *Frazier II* that review of any sentencing issues was barred by res judicata, the propriety of his sentence became the law of the case and subsequent arguments seeking to “modify” or “clarify” his sentence were barred. Thus, we find that the trial court properly denied Frazier’s motion.

{¶ 11} Therefore, the sole assignment of error is overruled.

{¶ 12} Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant 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 common pleas court to carry this judgment into execution. The defendant's

11 Ohio St.3d 1, 3, 462 N.E.2d 410. Thus, “the doctrine of law of the case precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal. New arguments are subject to issue preclusion, and are barred.” *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402,

conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

ANN DYKE, J., CONCURS;

CHRISTINE T. McMONAGLE, J., DISSENTS WITH SEPARATE OPINION

CHRISTINE T. McMONAGLE, J., DISSENTING:

{¶ 13} Respectfully, I dissent and would reverse the trial court's ruling denying Frazier's motion to clarify, and direct the trial court to clarify its sentence to accurately reflect the finding of this court in *State v. Frazier*, Cuyahoga App. No. 86984, 2006-Ohio-3023. In that case, Frazier, pro se, appealed a denial of a motion for declaratory judgment in which he requested review of his "good time credit" toward the projected date of his first parole board hearing. This court upheld the DRC's (Department of Rehabilitation and Correction) computation and affirmed the trial court's denial of declaratory judgment.

{¶ 14} We held in 2006 that, "on August 3, 1995, appellant pleaded guilty to amended counts in two separate cases. *** Appellant was sentenced to a total term of imprisonment of seven to fifteen years, to run consecutive to six years on gun

specifications, and he was subsequently admitted to the Rose Correctional Institution.”

{¶ 15} Frazier comes to us, again pro se, alleging that the DRC now construes his sentence in the two cases as seven to fifteen years to run consecutive to **nine** years on the gun specification. He requested the trial court clarify his sentence to accurately reflect our previous holding. I would hold that the trial court’s sentencing entry is ambiguous;² but whatever misunderstandings may have been contained therein have been resolved by our decision above.

{¶ 16} I see no enduring harm to process or procedure in requiring the trial court to clarify its judgments in order that they not be misunderstood by those whose job is to enforce them.

²The majority states there is no “clerical error” in the trial court’s original judgment; however, there is and that error is in the form of an omission. Nowhere in the judgment under either case number is there an indication as to whether the firearm specifications are to be merged, served concurrently or served consecutively, nor is there any language as to whether the base charges are to be run concurrent or consecutive to the other case number. In 2006, this court *construed* the judgment to mean six years on the gun specification consecutive to seven to fifteen years on the base charges, but that is not at all what appears in the judgment entries of sentence. It is the judgment entry of sentence that is sent to the DRC, not the decisions of this court.