[Cite as *State v. Sowell*, 2015-Ohio-4770.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102752

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARIOUS SOWELL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-06-485862-A

BEFORE: Stewart, J., Jones, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: November 19, 2015

ATTORNEY FOR APPELLANT

John P. Parker
988 East 185th Street
Cleveland, OH 44119

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

Frank Romeo Zeleznikar
Assistant County Prosecutor
Justice Center, 9th Floor
1200 Ontario Street
Cleveland, OH 44113

MELODY J. STEWART, J.:

{¶1} In 2007, a jury found defendant-appellant Marious Sowell guilty of aggravated burglary, tampering with evidence, and two counts of having a weapon under disability. As relevant here, the aggravated burglary count contained a repeat violent offender specification ("RVO") upon which the court entered a guilty finding. We upheld Sowell's conviction on direct appeal in *State v. Sowell*, 8th Dist. Cuyahoga No. 90732, 2008-Ohio-5875, rejecting among other arguments Sowell's claim that there was insufficient evidence to prove the RVO specification. In February 2015, Sowell filed a motion to correct his sentence with respect to the RVO specification. He argued that the repeat violent offender specification was a "fact" that increased the penalty for aggravated burglary and thus should have been submitted to the jury for a finding of guilt beyond a reasonable doubt. He maintained that he did not waive his right to have the jury determine the RVO specification, so the five-year sentence imposed for the specification was void. The state countered that Sowell's claims were res judicata because they were not raised on direct appeal. The court denied the motion without opinion.

{¶2} The court did not have jurisdiction to consider Sowell's motion to vacate the RVO specification because Sowell filed his motion after entry of a final judgment of conviction and did not challenge the RVO specification as being void.

{¶3} "A criminal sentence is final upon issuance of a final order." *State v. Carlisle*, 131 Ohio St.3d 127, 2011-Ohio-6553, 961 N.E.2d 671, ¶ 11. The law desires finality of judgments, so trial courts cannot 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), citing *State ex rel. Hansen v. Reed*, 63 Ohio St.3d 597, 589 N.E.2d 1324 (1992). This is because "[t]he state has an interest in maintaining the finality of a conviction that has been considered a closed case for a long period of time." *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, ¶ 40. As stated in *State v. Steffen*, 70 Ohio St.3d 399, 1994-Ohio-111, 639 N.E.2d 67, "[t]he purpose of a court is to resolve controversies, not to prolong them. When issues are constantly relitigated, there is no resolution and hence no finality." *Id*. at 409-410.

{¶4} An exception to the rule against reconsidering final judgments in criminal cases applies to "void" judgments. The word "void" has been applied to criminal cases in two different situations. The usual meaning of the word "void" describes judgments that were rendered by a court that lacked subject matter jurisdiction over a controversy. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 6. The Ohio Supreme Court has developed a second theory of voidness — one stating that "[a]ny attempt by a court to disregard statutory requirements renders the attempted sentence a nullity or void." *State v. Beasley*, 14 Ohio St.3d 74, 75, 471 N.E.2d 774 (1984). This second branch of the voidness doctrine is premised on the fact that the legislature, not the courts, has the power to create criminal sentences and that the courts are "duty-bound to

apply sentences as written." *Fischer* at ¶ 22. Hence, a void criminal judgment can be one that the court has no authority to enter, whether by omitting that which is statutorily required or including that which is not statutorily authorized.

{¶5} By definition, a "void" judgment is not "valid." *State v. Montgomery*, 2013-Ohio-4193, 997 N.E.2d 579, ¶ 56 (8th Dist.). For this reason, the courts have inherent authority to vacate void judgments at any time. *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, paragraph three of the syllabus. And a void judgment, being a nullity, is open to collateral attack at any time. *Id*. at paragraph two of the syllabus.

{¶6} A "voidable" judgment is distinctly different from a judgment that is "void." When a court has subject matter jurisdiction over a controversy, an "invalid, irregular, or erroneous" judgment is considered "voidable;" that is, subject to reversal. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 12. In the criminal law, "a voidable sentence is one that a court has jurisdiction to impose, but was imposed irregularly or erroneously." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 27, citing *State v. Filiaggi*, 86 Ohio St.3d 230, 240, 714 N.E.2d 867 (1999); *State v. Hollomon*, 10th Dist. Franklin No. 07AP-875, 2008-Ohio-2650, ¶ 11.

{¶7} The court imposed the RVO specification under R.C. 2941.149(B). That section states that "[t]he court shall determine the issue of whether an offender is a repeat violent offender." If the court determines that a defendant is a repeat violent offender, it must impose the maximum sentence for the underlying offense from the basic range and

an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years for the specification itself. *See* R.C. 2929.14(B)(2)(b).

{¶8} Sowell argues that R.C. 2941.149(B) is unconstitutional because it conflicts with his Sixth Amendment right to a trial by jury on any "fact" that increases his punishment beyond the punishment allowed on facts that were determined by a jury. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *Alleyne v. United* States, ___ U.S. ___, 133 S.Ct. 2151, 186 L. Ed. 2d 314 (2013). In other words, he maintains that because the RVO specification increases his punishment beyond what would be allowed by facts found by the jury on the underlying offense, he had the right to have the jury determine the facts supporting the specification. And since R.C. 2945.05 requires that a defendant's waiver of the right to a trial by jury must be made in writing and made a part of the record, none of which occurred in this case, Sowell claims that he did not validly waive his right to have a jury determine the facts supporting the specification, so the RVO specification is void.

{¶9} Sowell forfeited his right to make a Sixth Amendment jury trial argument on the validity of the RVO specification because he failed to raise the issue on direct appeal of his conviction. As a matter of statutory law, "[t]he failure to comply with R.C. 2945.05 may be remedied only in a direct appeal from a criminal conviction." *State v. Pless*, 74 Ohio St.3d 333, 1996-Ohio-102, 658 N.E.2d 766, paragraph two of the syllabus; *Martin v. Bova*, 8th Dist. Cuyahoga No. 100844, 2014-Ohio-1247, ¶ 2. As a matter of

constitutional law, constitutional violations occurring during sentencing are not structural errors and thus do not render a sentence void. *Payne,* 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, at ¶ 20. That being the case, a defendant like Sowell, who was sentenced after *Blakely* had been announced, had to seek redress of any alleged constitutional violation of that right on direct appeal. *Id.* at ¶ 28.

{¶10} It follows that Sowell's motion to correct his sentence did not give the court any basis to conclude that the RVO specification was void. That being the case, the court had no authority to grant the relief sought, and did not err by denying the motion.[1]

{¶11} The assigned error is overruled.

{¶12} Judgment affirmed.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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[1]Even if the court had jurisdiction to consider Sowell's motion to correct the sentence ordered on the RVO specification, Sowell's failure to raise that issue on direct appeal made the issue res judicata. *See State v. Brumley*, 12th Dist. Butler No. CA2004-05-114, 2005-Ohio-5768. What is more, the alleged fact-finding engaged in by the court in this case was limited to determining whether Sowell was a repeat violent offender under R.C. 2941.149(B). That determination, made at the time under former R.C. 2929.01(D)(D) (now R.C. 2929.01(C)(C)), required the court to determine whether Sowell had a prior conviction involving a felony of the first or second degree that resulted in the death of a person or in physical harm to a person. *Apprendi* made it clear that it did not apply to "the fact of a prior conviction." *Apprendi*, 530 U.S. at 490. Therefore, "when designating an offender as a repeat violent offender pursuant to former R.C. 2929.01(D)(D), a trial court does not violate the Sixth Amendment by considering relevant information about the offender's prior conviction that is part of the judicial record." *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147, 915 N.E.2d 292, ¶ 38. For this reason, Sowell's reliance on *State v. Malcolm*, 8th Dist. Cuyahoga No. 85351, 2005-Ohio-4133, where we held that *Blakely* applied to an RVO specification, is no longer viable authority in light of *Hunter*.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

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MELODY J. STEWART, JUDGE

LARRY A. JONES, SR., P.J., and
PATRICIA ANN BLACKMON, J., CONCUR