

IN THE OHIO SUPREME COURT

State of Ohio,

Plaintiff-Appellee,

-vs-

Michael D. Harwell,

Defendant-Appellant.

Supreme Court No.

(By Cleerk)

Montgomery C.P. No. 2012-CR-2367

Montgomery App. No. CA28697

A Claimed Appeal of Right From
The Judgment of The Montgomery
County Court of Appeals

Appellant Harwell's Memorandum In Support of Claimed Jurisdiction

FOR THE PLAINTIFF-APPELLEE
STATE OF OHIO

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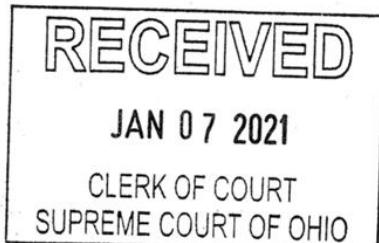
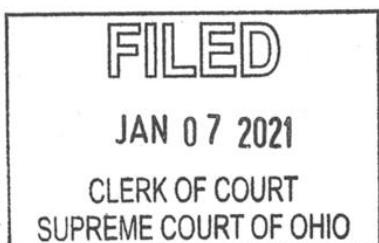


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WHY THIS CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION OF LAW

WHY THE CASE IS OF GENERAL OR GREAT
PUBLIC INTEREST

SUBSTANTIAL CONSTITUTIONAL QUESTION

This case involves a substantial constitutional question of law, because if the trial and appellate court decisions are allowed to stand then their invocation of the rule of res judicata will abridge, modify or enlarge the substantive right of the appellant having a void judgment vacated contrary to the provisions of Article IV, Section 5(B), Ohio Constitution.

OF GENERAL OR GREAT PUBLIC INTEREST

This case is of general or great public interest because it test whether the appellant has been afforded his absolute right to procedural due process of law which does not depend upon the appellant's substantive assertions and because of organized society's vested interest in seeing that procedural due process is being observed.

Cf. *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042 (1978).

Statement of the Case and Facts

The defendant-appellant appeals from the judgment of the Court of Appeals for Montgomery County, Ohio, affirming the judgment of the Montgomery County Court of Common Pleas, summary dismissal of the appellant's motion to vacate void judgment filed in the trial court rendered on October 9, 2020.

In 2012, the appellant was indicted for and convicted on 14 counts: two counts of felony-murder, two counts of attempted felony-murder, six counts of kidnapping, three counts of felonious assault, and one count of having weapons under a disability, with each count carrying a three-year firearm enhancement.

Trial by jury was commenced with the disability count being tried to the court.

After being found guilty on all counts, the trial court imposed an aggregate sentence of from 32 years to Life. Both the convictions and sentences were affirmed by the Court of Appeals in *State v. Harwell*, 2d Dist. Montgomery No. 27658, 2018-Ohio-1950, but vacated the two attempted felony-murder conviction based upon this Supreme Court's holding in *Nolan v. Nolan*, 141 Ohio St. 3d 454, 2014-Ohio-4800, 25 N.E. 3d 1016.

On remand the trial court held a re-sentencing hearing on August 13, 2015 and re-imposed the 32 years to Life sentence.

On August 14, 2019, appellant filed a "Motion to Vacate Void Sentence", arguing that the trial court failed to adhere to the mandatory provisions of R.C. 2929.11 and 2929.12 when it re-sentenced him in 2015. In a decision issued on January 3, 2020, the trial court overruled the void sentence motion on the basis of res judicata and the Court of Appeals for Montgomery County affirmed on October 9, 2020.

This timely appeal ensues.

PROPOSITION OF LAW NO. 1.

Both the trial and appellate court erred and deprived the appellant of his absolute right to procedural due process of law in determining that the doctrine of res judicata overrules a claim of a void sentence

LAW & ARGUMENT

In *State v. Perry*, 10 Ohio St. 2d 175 at syllabus 5, this Supreme Court of Ohio determined that a judgment of conviction is void*** if rendered by a court having either no jurisdiction over the person of the defendant or no jurisdiction of the subject-matter. (emphasis added.). And it is well-settled that 'jurisdiction' means the statutory or constitutional power of a court to act. *Pratts v. Hurley*, 102 Ohio St. 3d 81, 806 N.E. 2d 992; *United States v. Cotton*, 535 U.S. 625, 122 S.Ct. 1781 (2002).

In *State v. Wenmoth*, 2026-Ohio-5135 the Court of Appeals held that: "When sentencing a criminal defendant, the court must consider the sentencing purposes and principles as set forth in R.C. 2929.11, and the aggravating and mitigating factors as set forth in R.C. 2929.12.

In the case sub judice, the trial court in 2015 at the resentencing hearing and during the proceedings of the motion to vacate void sentence never adhered to the strict mandates of either 2929.11 and or 2929.12.

As a result, the trial court lacked subject-matter and statutory jurisdiction to impose sentence ab initio in this case, rendering the appellant's sentence void in its entirety.

This must be so, because in *State v. Beasley*, (1984), 14 Ohio St. 3d 74, 471 N.E. 2d 774, this Supreme Court of Ohio determined that:

"Crimes are statutory as are the penalties therefor, and the only sentence which a trial judge in sentencing a convicted criminal may impose is that provided by statute****(emphasis added.)* Any attempt to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity and void".*(emphasis added.)*

And it is black-letter law that a void judgment is a mere nullity, *Hayes v. Kentucky Joint Stock Land Bank of Lexington*, 125 Ohio St. 259, 181 N.E. 542 (1932), which is not respected as the act of the court, *city of Cleveland v. Young*, 119 Ohio App. 19, 190 N.E. 2d 42 (8th Dist. Cuy. Cnty., 1963). It is as though the proceedings had never occurred, *Romito v. Maxwell*, 10 Ohio St. 2d 366, 337 N.E. 2d 223 (1967); or as if there were no judgment, *Lewis v. Reed*, 117 Ohio St. 152, 157 N.E. 897 (1927); and can be disregarded entirely, *Tari v. State*, 117 Ohio St. 481, 159 N.E. 594 (1927), in any other court, *Union Savings Bank & Trust Co. v. Western Union Rel Co.*, 79 Ohio St. 89, 86 N.E. 478 (1908). Such a judgment cannot be ratified, and cannot be made

valid by anything the defendant might do or fail to do, *Slaven v. Slaven*, 22 Ohio Op. 230, 8 Ohio Supp 70 (C.P., 1941).

Accordingly, where the trial court failed to adhere to the mandatory statutory mandate of Ohio Revised Code Sections 2929.11 and 2929.12 et seq., it lacked statutory jurisdiction to impose sentence in this case initially and or in 2015, and this judgment cannot be made valid by anything the appellant might have done or failed to do, thereby manifesting that the doctrine of res judicata did not exclude the claim from either the trial and or appellate court's purview.

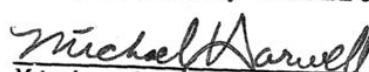
Wherefore, it was plain and prejudicial error in violation of the appellant's substantive rights for both the trial and appellate court to bar appellant's claim based upon the doctrine of res judicata. Cf. Article IV, Section 5(B), Ohio Constitution.

Conclusion

For all of the foregoing reasons this case involves substantial constitutional questions of law and is of general or great public interests requiring the invocation of this Ohio Supreme Court's appellate jurisdiction.

It Is So Prayed For

Respectfully submitted,



Michael D. Harwell-Appellant

Certificate of Service

This is to certify that a copy of the foregoing memorandum in support of claimed jurisdiction was served by regular mail upon Jamie J. Rizzo, Assistant Montgomery County Prosecutor at 301 West Third Street, 5th Floor, Dayton, Ohio 45422 this 4 day of January, 2021.

Michael Harwell

Michael HARWELL%Appellant