

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

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| STATE OF OHIO, | : | OPINION |
| Plaintiff-Appellee, | : | |
| - vs - | : | CASE NO. 2010-L-064 |
| KENNETH L. HOBBS, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 000001.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Rick L. Ferrara, 1424 East 25th Street, Cleveland, OH 44114 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Kenneth L. Hobbs appeals from judgments of the Lake County Court of Common Pleas which denied his motions to merge allied offenses and to reopen the suppression hearing regarding his convictions of having weapons while under disability, carrying concealed weapons, and improperly handling firearms in a motor vehicle. This is the second time Mr. Hobbs appealed to this court regarding his convictions of these offenses. For the following reasons, we affirm the judgments of the trial court.

{¶2} Substantive Facts and Procedural History

{¶3} Mr. Hobbs was charged with having weapons while under a disability, carrying concealed weapons, and improperly handling firearms in a motor vehicle with a firearm specification. The Wickliffe Police were looking for a stolen Dodge Intrepid. While Mr. Hobbs' Dodge Intrepid was stopped for a light, the officer ran a computer check and found an outstanding warrant for Mr. Hobbs' arrest from a neighboring city. Mr. Hobbs was pulled over, arrested on the warrant, and placed in the patrol car. The arresting officer then asked other officers to conduct an inventory search of Mr. Hobbs' vehicle prior to its impoundment, and they found a small bag of marijuana and a loaded gun in the center console. Mr. Hobbs had previously been convicted of drugs and drug trafficking.

{¶4} Mr. Hobbs filed a motion to suppress the evidence. At the suppression hearing, defense counsel conceded that the propriety of the search was not an issue in this case and instead focused on the validity of the traffic stop. Because the defense waived the search issue, the prosecution did not introduce evidence regarding the police department's standard procedures for the inventory search of impounded vehicles, nor did it attempt to elicit testimony showing the search was conducted pursuant to the department's standard practice. The defense's cross-examination of the officer concerned only the propriety of the traffic stop, i.e., whether the officer had a reasonable suspicion for the stop and whether the stop was extra-jurisdictional.

{¶5} After the hearing, the trial court found the stop of Mr. Hobbs' vehicle to be lawful and denied his motion to suppress. On September 17, 2008, Mr. Hobbs was found guilty of the charges by a jury. The trial court sentenced him to three years in

prison for having weapons while under a disability, one year for carrying a concealed weapon, and one year for improperly handling firearms in a motor vehicle, to be served concurrently. The trial court also imposed an additional one-year term for the firearm specification, to be served consecutively to the three-year term. Mr. Hobbs appealed his convictions to this court, claiming the trial court erred in denying his motion to suppress, his counsel provided ineffective assistance, and his convictions were against the manifest weight of the evidence. This court affirmed the convictions in *State v. Hobbs*, 11th Dist. No. 2008-L-155, 2010-Ohio-589, ¶3-12.

{¶6} In our decision, we explained the record indicated the search of Mr. Hobbs' vehicle was nothing more than a routine inventory search of an impounded vehicle, which is a well-recognized exception to the warrant requirement. We noted that although the state did not present its standardized policy and procedures to show that the police department conducted the inventory search pursuant to its guidelines, Mr. Hobbs had waived the issue of the propriety of the inventory search by choosing not to challenge it at the suppression hearing.

{¶7} Through a footnote in our decision we noted that the search of the vehicle *could* also be characterized as a search incident to arrest, another exception to the warrant requirement. However, as we further noted, although Ohio law currently allows an officer to search the passenger compartment of a vehicle as a contemporaneous incident of an arrest after the officer has made a lawful custodial arrest of the occupant of a vehicle, the United States Supreme Court, in *Arizona v. Gant* (2009), 129 S.Ct. 1710, recently held that police may search a vehicle incident to an occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time

of the search or if it is reasonable to believe the vehicle contains evidence of the offense of arrest. *Hobbs*, supra, at fn. 1. However, because we determined Mr. Hobbs did not contest the legality of the search as a lawful inventory search and the record does not suggest otherwise, there was no need for this court to delve into the inquiry of whether the search would be also lawful as a search incident to arrest under *Gant*.

{¶8} Mr. Hobbs filed a motion for a reconsideration of our decision. He argued (1) the search of his vehicle was illegal as an inventory search, and (2) the search of his vehicle would have been illegal pursuant to *Gant*. We denied his motion, because he failed to raise issues not already considered in our decision. We stressed *Gant* would not affect the outcome of his appeal because he did not contest the police's search of his vehicle as a lawful inventory search at the suppression hearing.

{¶9} Mr. Hobbs appealed our decision to the Supreme Court of Ohio. The court denied the appeal in *State v. Hobbs*, 125 Ohio St.3d 1464, 2010-Ohio-2753.

{¶10} Mr. Hobbs filed several pro se motions subsequent to his direct appeal. On March 8, 2010, he filed a "Motion for Resentencing to Vacate a Void Sentence Pursuant to R.C. 2929.14(D)(1)(E)." He claimed the trial court erroneously applied a one-year gun specification to the count of improper handling of a firearm in a motor vehicle, rendering the sentence void. The state conceded a prison term for a firearm specification cannot be imposed when the underlying offense is improperly handling a firearm in a motor vehicle. The state therefore agreed the additional one-year prison term for the firearm specification was improper, requiring resentencing. The trial court

granted the motion and scheduled a new sentencing hearing.¹

{¶11} The Instant Appeal

{¶12} Before the resentencing hearing, Mr. Hobbs filed several motions. On April 16, 2010, he filed a pro se motion captioned as “Pre-Sentencing Hearing Motion to Merge Allied Offenses Pursuant to R.C. 2941.25(A),” requesting the trial court “to vacate and void convictions that would impose allied offenses, and violate the Double Jeopardy Clause of the Ohio and Federal Constitution.” The court denied the motion.

{¶13} On April 23, 2010, he filed another pro se motion captioned as “Motion for Pre-Sentence Hearing Suppression Review, 4th Amendment Violation, Pursuant to *Arizona v. Gant* Warrantless Searches.” On May 6, 2010, he filed a motion through counsel captioned as “Motion to Reopen Suppression Hearing/Supplement to Defendant’s pro se Motion for Pre-resentence Hearing suppression Review.” He sought to reopen his suppression hearing under *Gant*. The court denied this motion as well.

{¶14} The court then held a resentencing hearing and sentenced him to three years in prison for having weapons while under disability, one year for carrying concealed weapons, and one year for improperly handling firearms in a motor vehicle, to be served concurrently. This appeal followed. On appeal, he assigns the following errors:

{¶15} “[1.] The trial court abused its discretion when it failed to grant Appellant’s Motion to Reopen Suppression Hearing because an unforeseen change in law ushered

1. As the trial court noted, R.C. 2929.14 was amended by H.B.152 v S 184, effective September 9, 2008. The bill added the following sentence to section (D)(1)(e) of R.C. 2929.14: “*** The court shall not impose any of the prison terms described in division (D)(1)(a) or (b) of this section upon an offender for a violation of section 2923.122 [2923.12.2] that involves a deadly weapon that is a firearm other than a dangerous ordnance, section 2923.16, or section 2923.121 [2923.12.1] of the Revised Code.” Hobbs was convicted and sentenced after the effective date of the statute, and therefore, the imposition of the additional one-year prison term for the firearm specification had been contrary to law.

in by the United States Supreme Court in *Arizona v. Gant* (2009), 129 S.Ct. 1710, rendered the original suppression hearing insufficient under the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution.”

{¶16} “[2.] The trial court erred in misapplying Ohio’s prohibition against conviction for allied offenses under R.C. 2941.25. Appellant’s sentences for Improperly Handling a Firearm in a Motor Vehicle and Carrying a Concealed Weapon should be vacated because, as this case demonstrates, commission of the former results in a commission of the latter.”

{¶17} Motion to Reopen Suppression Hearing

{¶18} Mr. Hobbs claims the trial court abused its discretion when it failed to grant his motion to reopen the suppression hearing. He claims he was entitled to a new suppression hearing because *Gant* changed the law and that decision came after his original suppression hearing. Mr. Hobbs’ contention is without merit. In our decision in his first appeal, we concluded as follows:

{¶19} “Because the propriety of the search of Mr. Hobbs’ vehicle was not contested at the suppression hearing, he has waived the issue. Because he had not raised the issue, the prosecution did not have the opportunity to present evidence regarding the Wickliffe Police Department’s standard policy and procedures for the inventory search of impounded vehicles and to demonstrate the propriety of the search. Mr. Hobbs, furthermore, has not pointed to anything in the record indicating that the search conducted by the police in this case was more than a routine inventory search of an impounded vehicle.” *Id.* at ¶24.

{¶20} As defense counsel conceded the validity of the search of the defendant's vehicle, choosing to focus instead only on the validity of the traffic stop, the issue of the propriety of the vehicle search was waived.

{¶21} Although the issue had been waived, we noted the record reflects the search of Mr. Hobbs' vehicle was nothing but a routine inventory search prior to the impoundment of the vehicle. As we further explained in our judgment entry denying his motion for reconsideration, although *Gant* calls into doubt the legality of the search if characterized as a search incident to arrest, the *Gant* decision does not affect the outcome of this case, because, regardless of the legality of whether the police could lawfully search the vehicle under the search-incident-to-arrest exception to the warrant requirement, Mr. Hobbs waived the issue of the lawfulness of the police's search of his vehicle as an inventory search. As the United States Supreme Court stated in *Gant*, "a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." *Gant* at 1723-1724. One such exception, unaffected by *Gant*, is the inventory search exception. *State v. Garnett*, 10th Dist. No. 09AP-1149, 2010-Ohio-5865, ¶23; *State v. Walker*, 11th Dist. No. 2009-L-155, 2010-Ohio-4695.

{¶22} "A trial court has discretion to permit a party, in the interest of justice, to reopen its case after it has rested." *State v. Boggs* (Mar. 20, 1995), 12th Dist. No. CA94-08-067, 1995 Ohio App. LEXIS 1029, *2-3, citing *Ohio Edison Co. v. Highway Carrier Corp.* (Jan. 21, 1994), 2d Dist. No. 3047, 1994 Ohio App. LEXIS 1594. "The decision of a trial court as to the reopening of a case will not be disturbed on appeal in

the absence of an abuse of discretion.” Id. at *3, citing *State v. Williamson* (May 6, 1991), 12th Dist. No. CA90-06-065, 1991 Ohio App. LEXIS 2082.

{¶23} At the hearing to address his motion to reopen the suppression hearing, the trial court stated: “The Court is not aware of any evidence that would suggest that the search of the vehicle in this case was anything other than an inventory search. The Court does not have any evidence that has been presented to me, either at the time of the suppression hearing or even up to this moment, that would indicate or suggest that this was a search incident to a lawful arrest, which would probably trigger *Gant*, but [there was] the testimony of the officers, even though it wasn’t a primary issue, there was testimony of at the time of the suppression hearing that indicated this was an inventory search.”

{¶24} In its judgment entry denying Mr. Hobbs’ motion to reopen the suppression hearing, the trial court again stated: “No evidence has been suggested, either now or at the suppression hearing, that the search of defendant’s vehicle was a search incident to arrest, thereby invoking *Arizona v. Gant*. No evidence has been suggested, either now or at the suppression hearing, that the search of defendant’s vehicle was anything other than an inventory search.”

{¶25} Mr. Hobbs had waived the issue of the propriety of the search of his vehicle; the record indicated the search was a routine inventory search; and Mr. Hobbs has not come forward with any evidence suggesting otherwise. Given this record, we cannot say the trial court abused its discretion in denying Mr. Hobbs’ request to reopen the suppression hearing.

{¶26} Mr. Hobbs cited a single authority, *State v. Pilot*, 12th Dist. Nos. CA2003-03-023 & CA2003-03-024, 2004-Ohio-3669, to support his claim that a new suppression hearing is warranted.

{¶27} In that case, defendants claimed the police violated the knock-and-announce rule required by the statute when they executed a search warrant. Defendants did not raise the issue in their suppression motions. However, the police officer's testimony at the suppression hearing touched on the issue, and the defendants argued the issue in a memorandum which they filed *after* the suppression hearing. The trial court *granted* the motions to suppress. The state then requested the court to reopen the suppression hearing to allow it to present evidence on the knock-and-announce issue. The state contended the defendants did not place the prosecution on notice that they intended to litigate the knock-and-announce issue at the suppression hearing, and, as a result, the prosecution did not have the necessary witnesses present at the hearing to present its own evidence regarding this issue. The trial court denied the state's request.

{¶28} The Twelfth District reversed the trial court. It reasoned that the defendants raised the knock-and-announce rule *after* the evidentiary hearing, a violation of Crim.R. 47, which requires a motion to "state with particularity the grounds upon which it is made." Therefore, the court of appeals determined the trial court should have rejected the defendants' knock-and-announce claim on that basis. However, because the trial court *granted* the motion to suppress despite the defendants' failure to properly raise the issue, the Twelfth District held that the trial court should have granted the

state's motion to reopen the suppression hearing in order for the state to offer testimony on the issue.

{¶29} Thus, *Pilot* does not support Mr. Hobbs' contention. As the Twelfth District stressed, the trial court should *not* have granted the defendants' motions to suppress because the defendants raised the knock-and-announce issue *after* the evidentiary hearing. As it explained, "[a] motion to suppress evidence must give the prosecution notice of the specific factual and legal grounds upon which the defendant is challenging the admissibility of the evidence, since a prosecutor cannot be expected to anticipate them beforehand." *Id.* at ¶39, citing *City of Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 218. "The prosecutor and the trial court must be given forewarning of the grounds for a defendant's motion to suppress in order to allow the prosecutor to prepare his or her case against the defendant's motion, and to allow the trial court to properly rule on any evidentiary issues that may arise at the hearing on the motion." *Pilot* at ¶39, citing *Xenia*. Because the trial court erred in *granting* the motion to suppress after the defendants failed to put the state on notice and afford the state an opportunity to present testimony on the issue, the Twelfth District held that the trial court abused its discretion in not allowing the state a new hearing to present its evidence regarding the issue.

{¶30} Mr. Hobbs similarly waived the issue of the propriety of the search. However, unlike *Pilot*, the trial court here properly *denied* the request by the defendant to reopen the suppression hearing. Unlike *Pilot*, a reopening to allow the state to present evidence on an issue previously not raised by the defendant is not necessary in this case.

{¶31} Furthermore, in *Pilot*, the court emphasized that the state’s request to reopen the suppression hearing “involved a pretrial matter, [and therefore] reopening the evidentiary hearing on appellees’ motions to suppress would have been of minimal inconvenience to the trial court.” *Id.* at ¶43. Here, Mr. Hobbs requested another suppression hearing after he was convicted and sentenced following a jury trial, and *after* he appealed to this court, sought reconsideration of our decision, and then appealed to the Supreme Court. We recognize he could not have litigated the issue regarding a search incident to arrest pursuant to *Gant* at the original suppression hearing, because the hearing took place before *Gant*. However, he *could* have challenged the propriety of the inventory search at the initial suppression hearing, or raised the issue in some fashion before trial. Given this record, the trial court did not abuse its discretion in not allowing the reopening of the suppression hearing at such a late stage of the litigation.

{¶32} For these reasons, *Pilot* does not support Mr. Hobbs’ claim that he is entitled to another suppression hearing because of a change in law regarding the issue of a search incident to arrest. The first assignment of error is without merit.

{¶33} **Allied Offenses Claim**

{¶34} Prior to the resentencing hearing to correct the sentencing error regarding the additional one-year term for the firearm specification, Mr. Hobbs filed another pro se motion, claiming the offenses of improperly handling a firearm in a motor vehicle and carrying concealed weapons were allied offenses.

{¶35} “The Double Jeopardy Clauses of the United States and Ohio Constitutions prevent multiple punishments for the same offense.” *State v. Delfino*

(1986), 22 Ohio St.3d 270, 272. Ohio's multiple-count statute, R.C. 2941.25, was enacted to protect against multiple punishments for the same criminal conduct prohibited by the double jeopardy clauses of the United States and Ohio Constitutions. That statute provides:

{¶36} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶37} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶38} We are aware that in a recent decision, *State v. Johnson*, Slip Opinion No. No. 2009-1481, 2010-Ohio-6314, the Supreme Court of Ohio overruled *State v. Rance* (1999), 85 Ohio St.3d 632 and revised the allied offenses analysis. Under the new analysis, "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Id.* at the syllabus.

{¶39} However, Mr. Hobbs' allied offenses claim is barred by res judicata. "[A] convicted defendant is precluded under the doctrine of res judicata from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant

at the trial which resulted in that judgment of conviction or on appeal from that judgment.” *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 96.

{¶40} Mr. Hobbs apparently believes that the judgment of his conviction and sentence was void due to the sentencing error and that, consequently, he can raise any and all issues relating to his conviction. He is mistaken.

{¶41} In another recent decision, *State v. Fischer*, Slip Opinion No. 2009-0897, 2010-Ohio-6238, a case addressing the scope of the remedy for improperly imposed postrelease control, the Supreme Court of Ohio took the opportunity to explain again the notion of a void judgment. The court reminded us that “[i]n general, a void judgment is one that has been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act. Unlike a void judgment, a voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but the court’s judgment is invalid, irregular, or erroneous.” *Id.* at ¶6, quoting *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶27. “[I]n the normal course, sentencing errors are not jurisdictional and do not render a judgment void. Rather, void sentences are typically those in which a court lacked subject-matter jurisdiction over the defendant.” *Id.* at ¶7 (internal citations omitted).

{¶42} In the modern era, however, “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.” *Id.* at ¶8 (citations omitted). Under this narrow exception, a judgment which fails to impose postrelease control in

accordance with the statutorily mandated terms is void and a nullity, and “the parties are in the same position as if there had been no judgment.” *Id.* at ¶12.²

{¶43} However, unlike a failure to impose postrelease control in accordance with statutorily mandated terms, the sentencing error in this case does not render the judgment void. Rather, the trial court’s imposition of a separate prison term for the firearm specification—inappropriate when the underlying offense was improperly handling a firearm in a motor vehicle—was an error, and therefore, the judgment is voidable, to be corrected by the trial court upon resentencing. In contrast to a void judgment, *res judicata* applies to a voidable judgment. See *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶30 (“*res judicata* applies to a voidable sentence and may operate to prevent consideration of a collateral attack based on a claim that could have been raised on direct appeal from the voidable sentence”). Because Mr. Hobbs failed to raise the allied offenses claim in his direct appeal, it is now barred by *res judicata*. The second assignment of error is overruled.

{¶44} The judgments of the Lake County Court of Common Pleas are affirmed.

DIANE V. GRENDALL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.

2. In *Fischer*, the court limited the scope of the new sentencing hearing to the proper imposition of postrelease control. *Id.* at paragraph two of the syllabus. It held that “[a]lthough the doctrine of *res judicata* does not preclude review of a void sentence, *res judicata* still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence.” *Id.* at paragraph three of the syllabus.