[Cite as *State v. Sailor*, 2021-Ohio-2277.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 109459
v.	:	
RU-EL SAILOR,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 1, 2021

Criminal Appeal from the Cuyahoga County Common Pleas Court
Case No. CR-03-435700-B

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Mary McGrath, Assistant Prosecuting Attorney, *for appellee*.

Friedman, Gilbert + Gehardstein, L.L.C., Sarah Gelsomino, and Marcus Sidoti, *for appellant.*

SEAN C. GALLAGHER, P.J.:

{¶ 1} Ru-el Sailor appeals the denial of his motion to correct an allegedly void sentence, filed almost two years following the entry of his final conviction. The

trial court concluded it lacked jurisdiction to modify Sailor's sentence. For the following reasons, we affirm.

{¶ 2} In 2003, Sailor was convicted of aggravated murder, among other offenses, and sentenced to serve a life sentence with the possibility of parole after 28 years. The conviction was affirmed. *State v. Sailor*, 8th Dist. Cuyahoga No. 83552, 2004-Ohio-5207. In 2002, Cordell and Nichole Hubbard were involved in an altercation with Clark Lamar and Omar Clark that led to Cordell Hubbard shooting Omar Clark eleven times and causing serious injury to Lamar. *Id.* at ¶ 2. An eyewitness wrongly identified Sailor as the driver of the car transporting Cordell to the murder scene. *Id.* at ¶ 6. At trial, Sailor lied under oath by testifying that he was with Cordell the entire night of the shooting, that neither of them had been present at the scene of the shooting, and they had spent most of their time inside a bar — finally ending their evening at 4:00 a.m. after the shooting had occurred. *Id.* at ¶ 20. At the sentencing hearing, and for the first time throughout the proceedings, Cordell disclosed to the court that another man had accompanied him to the shooting and Sailor was not present. *Id.* at ¶ 21.

{¶ 3} In 2017, the Cuyahoga County Prosecutor's conviction integrity unit evaluated Sailor's case. According to the state, Sailor was exonerated of any involvement in the actual murder for which he was found guilty based on testimony from the eyewitness who had obtained his information about Sailor's supposed presence from another — the witness claimed to have been under the influence of PCP and alcohol on the night of the shooting and relied on a trusted friend's

description of the events to identify Sailor as a participant in the murder. That information was not previously disclosed to the state. Based on that development, the state also interviewed the individual Cordell identified at trial, corroborating Cordell's statements and the eyewitness's newly obtained testimony.[1]

{¶ 4} In March 2018, the parties filed a joint motion to vacate the conviction under Crim.R. 33(B) based on the "newly discovered" information — although the information could be best categorized as information that could have been available at the time of Sailor's trial in light of his knowledge of not being with Cordell at the time of the shooting. *State v. Bethel*, 10th Dist. Franklin No. 19AP-324, 2020-Ohio-1343, ¶ 20, citing *State v. Bethel*, 10th Dist. Franklin No. 09AP-924, 2010-Ohio-3837, ¶ 13, and *State v. Berry*, 10th Dist. Franklin No. 06AP-803, 2007-Ohio-2244, ¶ 19. The trial court granted the joint motion, and Sailor pleaded guilty, per his agreement with the state, to perjury in violation of R.C. 2921.11, a third-degree felony, and obstructing justice in violation of R.C. 2921.32(A)(1), another third-degree felony. Both charges stemmed from Sailor's conduct at trial in attempting to provide an alibi for Cordell. At the hearing on the motion for the new trial, the trial court noted the role Sailor played in his own conviction, tying his fate to that of Cordell's for the jury to decide. The trial court accepted the amendment to the indictment and the recommended sentence, and imposed a ten-year aggregate

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[1] At the oral hearing the state asserted that a second witness, who also identified Sailor as being present at the time of the murder, stood by his original identification of Sailor being present. Nevertheless, the state made the decision to move to vacate the conviction.

term of imprisonment — five years on each count to be served consecutively. In light of the time served, the trial court immediately discharged Sailor, concluding that the sentence had been completed. It does not appear from the record that the discretionary period of postrelease control was imposed.

{¶ 5} In December 2019, the state filed a motion to vacate an allegedly void sentence claiming that the maximum sentence that could be imposed upon the perjury and obstructing justice charges, under the version of R.C. 2929.14 in effect at the time of sentencing, was three years for each. At the time of the 2018 resentencing, the parties relied on the sentencing range in effect at the time that Sailor committed the crimes. Apparently, no one was aware that H.B. 86, passed in 2011, reduced some sentences for offenders sentenced after the bill's enactment. *State v. Thomas*, 148 Ohio St.3d 248, 2016-Ohio-5567, 70 N.E.3d 496 ("if the provisions of H.B. 86 reduced the potential sentence for an offense, then R.C. 1.58(B) gives offenders not yet sentenced the benefit of the reduced sentence."). The trial court denied the state's motion for the want of jurisdiction over the closed case.

{¶ 6} Sailor appealed claiming the trial court possesses jurisdiction to correct what he asserted at the time to be a void sentence. After the briefing in this matter was completed, the Ohio Supreme Court issued two decisions of note. In *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, and *State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, the Ohio Supreme Court held that "sentences based on an error, including sentences in which a trial court fails to impose a statutorily mandated term, are voidable if the court

imposing the sentence has jurisdiction over the case and the defendant." *Henderson* at ¶ 1; *see also State v. Stewart*, 8th Dist. Cuyahoga No. 109498, 2020-Ohio-6743, ¶ 5. If the sentencing error rendered the defendant's sentence voidable, the error cannot be corrected through a postconviction proceeding or through another form of collateral attack. *Stewart* at ¶ 5, citing *Henderson* at ¶ 43. Before the combination of *Harper* and *Henderson* ("*Harper/Henderson*"), a sentence imposed in violation of law was considered void, and subject to collateral attack in postconviction proceedings. If a sentence is considered void, a court possesses continuing jurisdiction to correct the sentence. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19.

{¶ 7} Thus, when initially filing his appeal Sailor had an argument that his sentence was void; however, following *Harper/Henderson*, the Ohio Supreme Court returned Ohio to the narrow interpretation of that exception to sentencing finality rendering his sentence to be voidable and subject to correction only through a timely, direct appeal. A sentence can only be considered void if the trial court lacked subject matter jurisdiction over the matter or personal jurisdiction over the person — all other sentencing errors, including the failure to impose the statutorily mandated sentence or in exceeding the statutory sentence, must be timely challenged or forever forfeited. *See generally Henderson*. Throughout the trial court proceedings involving Sailor during the 1998 trial, the trial court possessed personal jurisdiction over Sailor and subject matter jurisdiction over his convictions and sentencing. No one is arguing otherwise.

{¶ 8} In light of the change in law arising in the midst of the pending appeal that is considered applicable under *State ex rel. Romine v. McIntosh*, 162 Ohio St.3d 501, 2020-Ohio-6826, 165 N.E.3d 1262, we sua sponte sought additional briefing on two issues: the question regarding the trial court's jurisdiction previously mentioned with respect to *Harper/Henderson,* and whether the appeal solely challenging the length of a sentence that has been served presented a justiciable controversy for the purposes of appellate jurisdiction, as discussed in *State v. Kimbro*, 8th Dist. Cuyahoga No. 107529, 2019-Ohio-1247. Both parties complied.

The justiciable controversy issue

{¶ 9} In *Kimbro*, it was generally recognized that "courts will not resolve issues that are moot." *State v. Marcum*, 2015-Ohio-5237, 54 N.E.3d 719, ¶ 6 (10th Dist.), citing *In re L.W.*, 168 Ohio App.3d 613, 2006-Ohio-644, 861 N.E.2d 546, ¶ 11 (10th Dist.). An appeal, direct or otherwise, will be deemed moot if the appellant seeks to obtain a "judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then-existing controversy." *Id.,* citing *In re L.W.* When an appeal becomes moot, it must be dismissed. *Kimbro*, 8th Dist. Cuyahoga No. 107529, 2019-Ohio-1247, at ¶ 2. This is because, in general, appellate courts avoid issuing advisory opinions. *Dohme v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825, ¶ 27, citing *State ex rel. White v. Koch*, 96 Ohio St.3d 395, 2002-Ohio-4848, 775 N.E.2d 508, ¶ 18, *State ex rel. Baldzicki v. Cuyahoga Cty. Bd. of Elections*, 90 Ohio St.3d 238, 242, 2000-Ohio-67, 736 N.E.2d

893, and *Egan v. Natl. Distillers & Chem. Corp.*, 25 Ohio St.3d 176, 495 N.E.2d 904 (1986).

{¶ 10} Although an appeal challenging a felony conviction is generally not rendered moot by the fact of the sentence being served because of the collateral consequences stemming from the fact of conviction, *State v. Golston*, 71 Ohio St.3d 224, 1994-Ohio-109, 643 N.E.2d 109, syllabus; *State v. Ingledue*, 2d Dist. Clark No. 2018-CA-47, 2019-Ohio-397, ¶ 8; there is an important exception. When the defendant challenges the length of the sentence that has been completely served, as opposed to challenging the fact of conviction itself, the mootness doctrine applies. *Ingledue* at ¶ 10, citing *State v. Bedell*, 11th Dist. Portage No. 2008-P-0044, 2009-Ohio-6031, ¶ 15, and *State v. Corpening*, 11th Dist. Ashtabula No. 2005-A-58, 2006-Ohio-5290, ¶ 6; *State v. Moore*, 8th Dist. Cuyahoga No. 106647, 2018-Ohio-4778, ¶ 27. This is a critical distinction. When a defendant serves his prison sentence, any appellate review of the length of that sentence — whether through a direct appeal of the conviction or of a collateral proceeding — becomes advisory, and there is no relief that can be afforded. *Kimbro* at ¶ 2. The appellate court simply lacks a justiciable controversy.

{¶ 11} In this case, in light of the fact that Sailor has fully served the imposed term of incarceration, one he believes is four years longer in the aggregate than statutorily allowed at the time, the sole issue advanced in this appeal is arguably moot. There is no live case or controversy to be resolved, nor can we offer any relief from the length of the sentence already served. In response to our request for

briefing on this issue, Sailor contends that he is suffering from the collateral consequences of having served four years longer than the law required based on *Ru-el Sailor v. State*, CV-20-931518, presently pending in the Cuyahoga County Court of Common Pleas. In that civil action, Sailor advances a wrongful imprisonment claim under R.C. 2743.48(A). According to Sailor, the wrongful imprisonment action establishes a collateral consequence as to the length of his sentences — the shorter the sentence, the more compensation he would allegedly receive. Sailor's reliance on his civil action is misplaced.

{¶ 12} R.C. 2743.48(A), in pertinent part, defines a wrongfully imprisoned individual as someone who, upon having a conviction vacated, dismissed, or reversed on appeal, has no criminal proceeding "pending against the individual *for any act associated with that conviction*." (Emphasis added.) *Id.* In this case, upon the granting of a new trial with respect to the aggravated murder charges based on newly discovered evidence under Crim.R. 33, Sailor pleaded guilty to two felony counts of perjury and obstructing justice for his conduct related to the underlying criminal conviction, and in exchange for dismissal of the murder charges on the reinstated indictment.

{¶ 13} Thus, in the civil action to declare Sailor to be wrongfully imprisoned, even if R.C. 2743.48(A) is applicable to Sailor's situation, the trial court will either conclude that Sailor is a wrongfully imprisoned person as defined under the statute, or the trial court will conclude that a guilty plea to charges associated with the murder conviction negates his ability to be deemed a wrongfully imprisoned

individual altogether. Either way, the length of his sentences is immaterial. Sailor has failed to demonstrate the existence of a collateral consequence to maintain our jurisdiction to resolve the theoretical question with respect to the length of time he should have served after he has already completed both sentences.

The void and voidable doctrines, trial court jurisdiction and the scope of appellate review

{¶ 14} Because this is not a delayed or direct appeal, we need not rest solely on the mootness analysis in light of the extraordinary circumstances presented by this appeal, because the trial court lacks jurisdiction to modify the sentence for two separate and distinct reasons, which will be discussed in further detail. First and foremost, we cannot deem the trial court's decision, to deny the motion to vacate a void sentence, to be in error. Under *Harper/Henderson*, any errors in the imposition of the final sentence are voidable, and can only be corrected through a direct appeal rather than through a collateral attack in a postconviction proceeding. It is undisputed that the conclusions reached in *Harper* and *Henderson* apply to this case. *Jimison v. Wilson*, 106 Ohio St.3d 342, 2005-Ohio-5143, 835 N.E.2d 34, ¶ 12, quoting *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, 819 N.E.2d 687, ¶ 6-7 ("'A new judicial ruling may be applied only to cases that are pending on the announcement date.'"); *see also Stewart*, 8th Dist. Cuyahoga No. 109498, 2020-Ohio-6743, at ¶ 5. And, irrespective of *Harper/Henderson,* a trial court patently lacks jurisdiction to modify a sentence after the offender has fully served the

sentence and has been released. *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 14.

{¶ 15} Sailor claims that *Harper/Henderson* is inapplicable because Sailor was sentenced to an aggregate term longer than legally required. According to Sailor, there is an exception to the doctrine of res judicata that permits the trial court to modify the final sentence in this case because the pair of Ohio Supreme Court decisions in *Harper/Henderson* involved the defendant receiving shorter sentences than statutorily required.

{¶ 16} Sailor draws our attention to *State v. Stansell*, 8th Dist. Cuyahoga No. 109023, 2021-Ohio-2036, in which the panel concluded that such a distinction was dispositive. In *Stansell*, the defendant filed a motion to vacate what he asserted to be a void sentence in 2019. *Id.* at ¶ 11-13. The sentence was originally imposed in 1998, so the trial court denied the motion. *Id.* In the appeal of the collateral proceeding, the panel concluded that the doctrine of res judicata did not preclude the trial court from modifying what was deemed to be an erroneous sentence because "res judicata is generally inapplicable 'where life or liberty is at stake.'" *Id.*, quoting *Sanders v. United States*, 373 U.S. 1, 8, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). According to that panel, "the trial court [in *Stansell*] imposed a sentence outside of its authority; *Harper* and *Henderson* should not serve as a bar to this court's review." *Id.* at ¶ 31. *Stansell* concluded that the sentence imposed was void and subject to collateral attack despite *Harper/Henderson*. *Stansell* at ¶ 23 and 29. The panel in *Stansell* concluded that the sentence imposed was void and subject to

collateral attack despite *Harper/Henderson*. *Stansell* at ¶ 23 and 29. Stansell was overruled by this court sitting en banc, in which it was concluded that *Harper* and *Henderson* apply to sentences imposed in excess of that which is authorized by statute. *State v. Stansell*, 8th Dist. Cuyahoga No. 109023, 2021-Ohio-2036, ¶ 11. The panel decision upon which Sailor relies has been vacated and is no longer valid. *Id.*

{¶ 17} Further and irrespective of the en banc proceedings in *Stansell*, although the doctrine of res judicata can impact the postconviction collateral proceedings, that is an affirmative defense and the tribunal must first possess jurisdiction in order to resolve the applicability of the doctrine. *State ex rel. McGirr v. Winkler*, 152 Ohio St.3d 100, 2017-Ohio-8046, 93 N.E.3d 928, ¶ 17, citing *State ex rel. Lipinski v. Cuyahoga Cty. Common Pleas Court, Probate Div.*, 74 Ohio St.3d 19, 20-21, 1995-Ohio-96, 655 N.E.2d 1303, and *State ex rel. Flower v. Rocker*, 52 Ohio St.2d 160, 162, 370 N.E.2d 479 (1977); *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967) (res judicata applies 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).

{¶ 18} As is pertinent to this appeal, a trial court possesses continuing jurisdiction only for the purposes of vacating a void judgment. *Id.* If the judgment is not void, the court lacks a basis to assert its continuing jurisdiction to act and denying the motion merely reflects the ministerial task of disposing of the active motion on the court's docket. Although this concept is derived from the principles

of res judicata, it should not be confused with the affirmative defense of res judicata, which may only be considered if the trial court possesses continuing jurisdiction over the criminal conviction. *Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 14. The scope of an appeal in this situation is limited to determining whether the trial court correctly denied the motion to vacate the void judgment, in other words, correctly determined that it lacked jurisdiction to modify the final sentence.[2]

{¶ 19} In order to apply or consider the doctrine of res judicata to a final sentence, the court must first possess continuing jurisdiction to modify the final sentence — in other words res judicata could potentially be considered in situations in which the trial court is reviewing a void sentence but has no bearing on the trial court's lack of continuing jurisdiction to modify a sentence that is merely voidable. *State ex rel. Flower v. Rocker*, 52 Ohio St.2d 160, 162, 370 N.E.2d 479 (1977) (writ of prohibition was not warranted because the court had jurisdiction to rule on the

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[2] In the effort to avoid any further confusion, it should be noted that the trial court's jurisdiction to act in postconviction proceedings and the appellate court's jurisdiction to review a decision therein are two separate matters. A trial court can lack jurisdiction to act, but the appellate court maintains jurisdiction to review the trial court's jurisdictional decision. The question becomes, in this type of case, whether the trial court erred in declining to exercise its continuing jurisdiction to correct or modify a final sentence. Under *Harper/Henderson*, a sentence may no longer be deemed void based on errors in application of statutory law — in order to be considered void, the trial court must lack subject matter or personal jurisdiction over the defendant or his case. Denying a motion to vacate the void sentence must be affirmed when the sentence is merely voidable because the trial court lacked continuing jurisdiction to modify the sentence; in other words, the trial court correctly determined it lacked jurisdiction to modify the final sentence. No longer can courts of review consider the validity of a sentence outside of the direct appeal. *Compare State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234 (sentence declared void after numerous appeals) *with McIntosh*, 162 Ohio St.3d 501, 2020-Ohio-6826, 165 N.E.3d 1262.

affirmative defense of res judicata). Sailor's observation regarding an exception to the doctrine of res judicata did not obviate the impact of the Ohio Supreme Court's decisions with respect to the trial court's lack of continuing jurisdiction to modify a sentence that is voidable. The affirmative defense of res judicata is never implicated in that situation because a trial court must possess continuing jurisdiction to consider the merits of the res judicata defense. Since a sentence that is merely voidable cannot be collaterally attacked, the doctrine of res judicata is irrelevant. It is not res judicata that binds the trial court's action, but instead is the trial court's lack of jurisdiction. *Holdcraft* at ¶ 14.

{¶ 20} Under *Harper/Henderson,* Sailor's sentence was merely voidable. Accordingly, the trial court lacked jurisdiction to modify the final sentence because there was no other basis cited to invoke the trial court's continuing jurisdiction over the final entry of conviction. Moreover, practically speaking, under *Harper/Henderson* there is no imaginable scenario in which the sentence alone would be deemed void — the voidness doctrine implicates the trial court's jurisdiction over the person and subject matter such that the entire conviction, both guilt and sentencing, would be affected.

{¶ 21} And regardless, the Ohio Supreme Court in *McIntosh*, 162 Ohio St.3d 501, 2020-Ohio-6826, 165 N.E.3d 1262, addressed the application of *Harper/Henderson* to situations in which the sentence exceeds the maximum permitted by law, essentially holding that such sentences were merely voidable and could not be considered void. In *McIntosh*, the Ohio Supreme Court reaffirmed its

commitment to the *Harper/Henderson* rationale and concluded that a defendant who is sentenced to what were deemed allied offenses by the trial court before imposing sentence must timely appeal those sentences even though the offender is subjected to a conviction in excess of that which is authorized by law. *Id.* Importantly, *McIntosh* did not distinguish *Harper/Henderson* based on the fact that the offender was sentenced to more than was legally permitted and the court disregarded the fact that the appellate court had deemed the sentence to be void based on the law as it existed before *Harper/Henderson*. *Id.* at ¶ 15.

{¶ 22} Instead it was concluded that "[t]he imposition of compound sentences for allied offenses is an error in the exercise of jurisdiction, to be challenged at sentencing and remedied on direct appeal." In so concluding, *McIntosh* expressly overruled *Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, at ¶ 28, in which it was concluded that "the imposition of separate sentences for those offenses—even if imposed concurrently—is contrary to law" and the sentences are considered void. Sentences in excess of that which is statutorily permitted necessarily fall under the ambit of *Harper/Henderson. Id.* Under *McIntosh,* the imposition of separate sentences for allied offenses, even if imposed concurrently, renders the sentence voidable, but not subject to collateral attack despite the fact that the offender is being punished in excess of what the law permits.

{¶ 23} In light of *Harper/Henderson* and *McIntosh*, we cannot conclude that the trial court erred by denying the motion to vacate a void sentence. In this case, the trial court possessed jurisdiction over the criminal matter, and as such, any

error in the imposition of sentence rendered the sentence voidable and not subject to collateral attack.

{¶ 24} Regardless, in addition to and independent from the *Harper/Henderson* rationale, a trial court patently lacks jurisdiction to modify a sentence after the offender has been released. *Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, at ¶ 14. Sailor's attempt to claim that the exception to res judicata applies in support of demonstrating error lacks merit. In light of the fact that the trial court imposed a ten-year aggregate term of imprisonment and then calculated the time Sailor served to have exceeded the sentences imposed, Sailor was immediately discharged. At that time, the case was fully resolved and closed. "[O]nce a valid prison sanction has been served, it is no longer res judicata that acts as a bar to modification; rather, the court has lost jurisdiction to modify the sentence" altogether. *Id.* Contrary to Sailor's assertion, it is not res judicata that bars the modification in this case, but instead, it is the trial court's lack of jurisdiction over the served sentence that is dispositive — an issue that deprived the trial court of jurisdiction to modify the sentence the moment Sailor was discharged from his final sentence and precludes this court from finding error.

{¶ 25} In light of the fact that Sailor is solely challenging the length of a sentence that has been completely served, this appeal could be dismissed as moot. Notwithstanding, even if we were to consider the merits of the arguments presented, there is no error — the trial court lacked jurisdiction to modify the final sentence based on the doctrine of void sentences set forth in *Harper/Henderson* and based

on the fact that Sailor had completely served his sentence before the sentencing issues were raised under *Holdcraft*. We affirm.

It is ordered that appellee recover from 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.

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

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SEAN C. GALLAGHER, PRESIDING JUDGE

EMANUELLA D. GROVES, J., CONCURS;
MARY EILEEN KILBANE, J., CONCURS IN JUDGMENT ONLY