[Cite as *State v. Hrytsyak*, 2023-Ohio-3159.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	No. 112496
v.	:	
SVYATOSLAV HRYTSYAK,	:	
Defendant-Appellee.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: September 7, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-629890-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anthony T. Miranda, Assistant Prosecuting Attorney, *for appellant*.

Cullen Sweeney, Cuyahoga County Public Defender, and Rick Ferrara, Assistant Public Defender, *for appellee*.

FRANK DANIEL CELEBREZZE, III, P.J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.App.R. 11.1. The state of Ohio ("the state") brings the instant accelerated appeal challenging the Cuyahoga County Common Pleas Court's

judgment granting Svyatoslav Hrytsyak ("Hrytsyak") limited driving privileges following two convictions for driving while under the influence (hereinafter "OVI"). After a thorough review of the record and law, this court reverses and remands.

I. Factual and Procedural History

{¶ 2} On June 13, 2018, Hrytsyak was pulled over by the Independence Police Department after observing Hrytsyak committing multiple traffic infractions. On June 16, 2018, the Cuyahoga County Grand Jury returned a two-count indictment charging appellant with OVI, a third-degree felony in violation of R.C. 4511.19(A)(2)(a), with a furthermore clause alleging that appellant had a prior OVI conviction on or around August 2016, in Cuyahoga C.P. No. CR-16-603930 and a prior felony OVI specification (Count 1); and OVI, a third-degree felony in violation of R.C. 4511.19(A)(1)(a), with a furthermore clause alleging that appellant had a prior OVI conviction on or around June 2015, in Cuyahoga C.P. No. CR-14-592194, and a prior felony OVI specification, pursuant to R.C. 2941.1413(A) (Count 2).

{¶ 3} The matter proceeded to a jury trial, though Hrytsyak elected to proceed with a bench trial on all of the prior felony OVI specifications. The jury found Hrytsyak guilty of both counts and the court found Hrytsyak guilty on the prior felony OVI specifications.

{¶ 4} At sentencing, the parties agreed that both OVI charges merged for purposes of sentencing. Before proceeding to sentencing, the trial court reviewed Hrytsyak's presentence-investigation report. The report revealed that Hrytsyak has had at least ten OVI convictions since 2000, amounting to a nearly 20-year history

of OVI convictions. Hrytsyak was sentenced on Count 1 to a total of three years and six months: a mandatory two-year sentence for the prior felony OVI specification, which was to be served consecutively with the one-year and six months sentence on the OVI offense. The court also imposed a lifetime suspension of Hrytsyak's driver's license. The court journalized a sentencing entry and then a nunc pro tunc sentencing entry shortly thereafter. Neither of these entries mentioned the driver's license suspension.

{¶ 5} Hrytsyak appealed his convictions and sentence, and this court affirmed. *State v. Hrytsyak*, 8th Dist. Cuyahoga No. 108506, 2020-Ohio-920, ¶ 1 ("*Hrytsyak I*").

{¶ 6} The docket was largely silent after this court's affirmance in *Hrytsyak I*. Then, on August 18, 2022, Hrytsyak filed a pro se motion asking the court to grant limited driving privileges. In support of his motion, Hrytsyak noted that he "need[s] to be driving to work, sho[p]ping, meetings, visitation with my child." He attached a worksheet indicating that he works seven days per week at ILC Group, Inc., as well as a letter from his supervisor corroborating this employment. The worksheet also indicated that he has a second job that he described as "self-employed," and wrote that he "need[s] to be available 7 days a week from 6 a.m. to 10 p.m." and "everytime [sic] different customer and address." The nature of the work was not revealed or explained. The worksheet also indicated that he is a caregiver to his mother who relies on him for transportation to medical appointments.

{¶ 7} On September 21, 2022, the trial court issued a second nunc pro tunc entry adding the lifetime license suspension and advising that driving privileges would be available after three years.

{¶ 8} Counsel was appointed to assist Hrytsyak in obtaining limited driving privileges. On November 1, 2022, Hrytsyak's counsel filed another motion for driving privileges. This time, the motion indicated that

> Mr. Hrytsyak is highly dependent on the use of his vehicle, and currently has no alternative means of transportation. He is currently gainfully employed at Decks by ILC Group located at 7069 State Road, Parma, OH 44124. His employment hours vary from Monday through Saturday, 6:30 am until 10:00 pm. Mr. Hrytsyak is fully insured by MGA Insurance Company.

The motion included the same letter that Hrytsyak attached to his pro se motion from his supervisor and an Ohio Auto Insurance Identification Card with an effective date of August 15, 2022.

{¶ 9} The state opposed Hrytsyak's motion for driving privileges, arguing that Hrytsyak is not currently eligible for driving privileges based on the statute. The state argued in the alternative that Hrytsyak's request is overly broad and that he is a poor candidate for driving privileges based on his history of OVI convictions.

{¶ 10} In February 2023, the trial court granted Hrytsyak's motion for driving privileges, conditioning the privileges on Hrytsyak displaying restricted plates, an interlock system, and proof of attendance of an alcohol addiction program. The order restricted Hrytsyak's privileges to "Monday through Saturday: 6:30 AM to 6:30 PM."

{¶ 11} On March 10, 2023, the state initiated the instant accelerated appeal, seeking leave from this court to appeal pursuant to R.C. 2945.67 and App.R. 5(C), arguing that the trial court's grant of driving privileges was contrary to law. Hrytsyak opposed, and this court granted leave to appeal. The state presents a single error for our review:

The trial court erred in granting [Hrytsyak] driving privileges.

II. Law and Analysis

{¶ 12} In support of its sole assignment of error, the state contends that the trial court erred in granting Hrytsyak limited driving privileges because Hrytsyak was not qualified for such privileges pursuant to the statutory requirements. Hrytsyak, in response, argues that (1) the trial court did not properly impose the license suspension, rendering it void; (2) the nunc pro tunc entry was an improper vehicle for imposing the license suspension, rendering the suspension voidable; (3) the state waived any opportunity to object to the sentence; and (4) the trial court did not err in granting limited driving privileges because it properly applied the subject statute.

A. Whether Granting Limited Driving Privileges Was Proper

{¶ 13} Hrytsyak was sentenced pursuant to R.C. 4511.19(G). R.C. 4511.19(G)(1)(e) designates the mandatory sentence that a defendant shall receive when the offender "previously has been convicted of or pleaded guilty to a violation of division (A) of this section that was a felony, regardless of when the violation and the conviction or guilty plea occurred[.]" Relevant to this appeal, Hrytsyak's

mandatory sentence included "a class two license suspension of the offender's driver's license * * * from the range specified in division (A)(2) of section 4510.02 of the Revised Code." R.C. 4511.19(G)(1)(e)(iv). A class two license suspension is "a definite period of three years to life[.]" R.C. 4510.02(A)(2). The guiding sentencing statute further provides that "[t]he court may grant limited driving privileges relative to the suspension under sections R.C. 4510.021 and 4510.13 of the Revised Code." Relevant to this appeal, R.C. 4510.13(A)(5)(g) provides that a judge shall not grant limited driving privileges during the first three years of a suspension imposed pursuant to R.C. 4511.19(G)(1)(e). During sentencing, the trial court elected to impose a lifetime license suspension and duly informed Hrytsyak of such sentence:

> As to the suspension of your license, the Court suspends your license for life. Driving privileges are available after three years.
>
> * * *
>
> Driving privileges are available after three years. I think I already said that.

(Tr. 486.)

{¶ 14} Hrytsyak argues that the state waived its right to contest the portion of the sentence where the trial court advised that driving privileges would be available after three years. We agree that if the state's arguments contested the original sentence, such an argument would be improper unless the state was arguing that the sentence was void, which it is not. The state is not contesting the original sentence; the state is contesting the trial court's ruling on Hrytsyak's motion for limited driving privileges. While the relevant sentencing statutes dictate the ability

of a court to consider driving privileges after a license suspension is imposed, the actual decision to grant privileges is discretionary ("a court *may* grant limited driving privileges * * *") based on the guidance found in R.C. 4510.021. (Emphasis added.) Additionally, the trial court's advisements at sentencing were correct; it could not consider driving privileges for three years based on R.C. 4510.13(A)(5)(g), but such advisement did not guarantee Hrytsyak driving privileges after three years elapsed; he was still required to request the privileges and the court was only empowered to grant the privileges to the extent Hrytsyak qualified for them pursuant to the relevant statutory sections.

{¶ 15} "Obtaining limited driving privileges pursuant to R.C. 4510.021 is a separate and distinct procedure from the termination or modification of the suspension pursuant to R.C. 4510.54." *State v. Kincaid*, 8th Dist. Cuyahoga No. 109358, 2021-Ohio-583, ¶ 10. In *State v. Manocchio*, 138 Ohio St.3d 292, 2014-Ohio-785, 6 N.E.3d 47, the Supreme Court of Ohio pertinently recognized that "the General Assembly has carved out two procedures by which drivers under license suspensions may seek to drive and has given them distinct labels. One procedure allows limited driving privileges. R.C. 4510.021 and related statutes. The other allows termination or modification of the suspension. R.C. 4510.54." *Id.* at ¶ 18. Hrytsyak requested driving privileges pursuant to R.C. 4510.021, so that is the statute that guides our analysis in the instant appeal.

{¶ 16} R.C. 4510.021(A) expressly provides, "Unless expressly prohibited by section 2919.22, section 4510.13, or any other section of the Revised Code, a court

may grant limited driving privileges for any purpose described in division (A) of this section during any suspension imposed by the court." R.C. 2919.22 is the statute for the offense of endangering children and is plainly irrelevant to this appeal. The state argues that R.C. 4510.13 "expressly prohibits" the trial court from granting limited driving privileges to Hrytsyak. Specifically, the state points to R.C. 4510.13(A)(3), providing:

> No judge * * * shall grant limited driving privileges to an offender whose driver's or commercial driver's license * * * has been suspended under division (G) or (H) of section 4511.19 of the Revised Code * * * if the offender, within the preceding ten years, has been convicted of or pleaded guilty to three or more violations of one or more of the Revised Code sections, municipal ordinances, statutes of the United States or another state, or municipal ordinances of a municipal corporation of another state that are identified in divisions (G)(2)(b) to (H) of section 2919.22 of the Revised Code.

{¶ 17} R.C. 2919.22(G)(2)(b) provides that these offenses are defined in R.C. 4511.181 and, as relevant to this case, include violations of R.C. 4511.19(A) and violations of a municipal OVI ordinance. Hrytsyak does not dispute that he has been convicted of or pleaded guilty to three or more of the relevant offenses contemplated by the statute. Instead, Hrytsyak argues that the state's argument is misplaced because R.C. 4510.13(A)(3) was amended in 2017 to the current "preceding ten years" version and previously provided for a lookback period of the "preceding six years." Hrytsyak therefore argues that any convictions or guilty pleas occurring prior to 2017 should be examined under a six-year lookback period.

{¶ 18} We do not accept Hrytsyak's argument. We note that at the time Hrytsyak was indicted for this offense, on June 19, 2018, the statute provided for a

ten-year lookback period. When Hrytsyak was sentenced on April 15, 2019, the statute also provided for the ten-year lookback period. Hrytsyak cites the Twelfth District's decision in *State v. Gregoire*, 12th Dist. Butler No. CA2019-04-066, 2020-Ohio-415, for the proposition of law that R.C. 4510.13(A)(3) is to be prospectively applied; but even the holding in *Gregoire* applies the version of the statute *that was in effect at the time of conviction* of the subject offense that resulted in the driver's license suspension, not the version of the statute that was in effect for each of the prior convictions, as Hrytsyak argues. *Id.* at ¶ 19. Here, the version of the statute containing the ten-year lookback was in effect both at the time of indictment and the time of conviction. Therefore, the ten-year lookback period is the period that the trial court should have looked at in determining Hrytsyak's motion for driving privileges.

{¶ 19} We therefore find that the trial court, pursuant to R.C. 4510.021, was not empowered to grant limited driving privileges to Hrytsyak because R.C. 4510.13(A)(3) expressly forbids limited driving privileges if the offender had been convicted of or pleaded guilty to the relevant offenses in the preceding ten years. Even though Hrytsyak does not dispute the specific offenses, we find that the record before us establishes that Hrytsyak pled guilty to a violation of R.C. 4511.19(A) on May 11, 2015, and August 3, 2016 (by virtue of the trial court finding Hrytsyak guilty of the furthermore clauses and prior specifications for these offenses), and was found guilty of two violations of R.C. 4511.19(A) by a jury on March 27, 2019. These offenses alone support that Hrytsyak was not eligible for driving privileges.

{¶ 20} ""The concept of "abuse of discretion" as the basis for determining "error" of the trial court connotes the right to exercise a sound discretion.'" *Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463, ¶ 37, quoting *Rohde v. Farmer*, 23 Ohio St.2d 82, 262 N.E.2d 685 (1970). However, "where a specific action, ruling or order of the court is required as a matter of law, involving no discretion, the test of 'abuse of discretion' should have no application." *Id.*, citing *Farmer* at 89. "[A] court does not have discretion to misapply the law." *Id.* at ¶ 38. Here, the trial court was unempowered to grant limited driving privileges to Hrytsyak pursuant to R.C. 4510.13(A)(3).

B. Validity of the License Suspension

{¶ 21} As a final note, we must acknowledge Hrytsyak's arguments contesting the validity of the sentence in the first place. Particularly, Hrytsyak argues that the sentence suspending Hrytsyak's driver's license was void due to the trial court's failure to journalize it and that, even if the sentence is not void, the trial court's nunc pro tunc entry was improper and voidable because Hrytsyak had already completed his sentence. We note the state's argument that these arguments were not raised in the trial court and therefore waived on appeal, but elect to address them in the interest of justice and for the sake of completeness.

{¶ 22} Res judicata bars the assertion of claims from a valid, final judgment of conviction that have been raised or could have been raised on direct appeal. *State v. Dunbar*, 8th Dist. Cuyahoga No. 109120, 2020-Ohio-4568, ¶ 22, citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. We

recognize, however, that the doctrine of res judicata is not applicable to void sentences because void sentences are subject to correction at any time. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 27, 30. According to the Ohio Supreme Court, "[a] sentence is void only if the sentencing court lacks jurisdiction over the subject matter of the case or personal jurisdiction over the accused." *State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, ¶ 43.

{¶ 23} A judgment is voidable when the court has jurisdiction to act and may be successfully challenged on direct appeal. *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, ¶ 26. If a voidable claim is challenged after a direct appeal, it is subject to res judicata. "In criminal cases res judicata generally bars a defendant from litigating claims in a proceeding subsequent to the direct appeal 'if he or she raised or could have raised the issue at the trial that resulted in that judgment of conviction or on an appeal from that judgment.'" (Emphasis deleted.) *State v. Davic*, 10th Dist. Franklin No. 18AP-569, 2019-Ohio-1320, ¶ 9, quoting *State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707, 23 N.E.3d 1023, ¶ 92.

{¶ 24} In the instant appeal, Hrytsyak maintains that the nunc pro tunc entry that journalized the driver's license suspension was either void or voidable, and under either construction, Hrytsyak's license suspension was not properly imposed and therefore, should not be enforced in the first place. We note that Hrytsyak did not appeal from the trial court's nunc pro tunc entry, nor is the nunc pro tunc entry

squarely before us in this appeal; the state only appealed the trial court's grant of limited driving privileges.

{¶ 25} Even assuming, arguendo, that we could review the validity of the sentence, we find that the trial court did not err in imposing the sentence; it imposed the sentence exactly in accordance with the statutory sentencing guidelines and properly advised that it could not consider driving privileges until three years had elapsed. Further, the nunc pro tunc entry was a proper vehicle for correcting the record. Crim.R. 36 provides that a clerical mistake in a judgment "arising from oversight or omission" may be corrected by the court "*at any time*." (Emphasis added.) "Although trial courts generally lack authority to reconsider their own valid final judgments in criminal cases, they retain continuing jurisdiction to correct clerical errors in judgments by nunc pro tunc entry to reflect what the court actually decided." *State ex rel. Womack v. Marsh*, 128 Ohio St.3d 303, 2011-Ohio-229, 943 N.E.2d 1010, ¶ 13, citing *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19. Further, a nunc pro tunc entry "does not replace the original judgment entry; it relates back to the original judgment entry." *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 43. The trial court *imposed* the sentence orally at the sentencing hearing; the nunc pro tunc entry was merely a correction of the record that relates back to the date that the sentence was imposed.

{¶ 26} Hrytsyak directs us to *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868

N.E.2d 961; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568; and *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, 912 N.E.2d 1106. These cases specifically pertain to postrelease control and focus on various errors that a court may commit in imposing postrelease control. Many of these have been overruled by the Supreme Court's decisions in *Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, and *Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776. Further, this line of cases has been corrected by the General Assembly in R.C. 2929.191, which contains specific provisions aimed at errors that occur in imposing postrelease control. In particular, subsection (A)(1) instructs that if a court fails to notify the offender of postrelease control or include a statement in the judgment of conviction, the court may issue a correction to the judgment before the offender is released from prison or after the offender is released if a hearing is held. No similar sections exist as applied to the imposition of a driver's license suspension. We therefore decline to rely on these cases.

{¶ 27} Hrytsyak also points us to this court's decision in *State v. Sneed*, 8th Dist. Cuyahoga No. 100380, 2014-Ohio-1438. During Sneed's sentencing hearing, the trial court failed to orally advise *Sneed* of the lifetime suspension of his license, leading this court to conclude that the transcript "reflects no record of the trial court imposing the license suspension[.]" *Id.* The court then attempted to add the lifetime license suspension in a nunc pro tunc sentencing entry, which this court noted was an improper use of Crim.R. 36 because the sentence was not "imposed" orally at the hearing. *Id.* at ¶ 4. The court then concluded that because Sneed had been released

from prison, the court was without jurisdiction to impose the license suspension. *Id.* at ¶ 5. The instant matter is distinguishable because here, the trial court properly imposed the sentence orally, but failed to journalize the sentence, an omission that is plainly correctible by Crim.R. 36 that relates back to the original sentencing entry. We conclude that the nunc pro tunc entry was not an imposition of a new sentence or a resentencing — it was merely a correction of a sentence validly imposed by the trial court.

{¶ 28} We therefore find that Hrytsyak's attempts to contest the validity of the sentence are barred by res judicata and that the court did not act improperly in issuing the nunc pro tunc. Further, the relevant sentencing statute explicitly authorizes the court to grant limited driving privileges to the extent that such driving privileges comport with R.C. 4510.021 and 4510.13, which the court recognized and advised defendant of during sentencing.

III. Conclusion

{¶ 29} The trial court erred in granting Hrytsyak limited driving privileges when, pursuant to R.C. 4510.13(A)(3), he did not yet qualify for them. The judgment of the trial court is reversed and remanded.

It is ordered that appellant recover from appellee 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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FRANK DANIEL CELEBREZZE, III, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
EMANUELLA D. GROVES, J., CONCUR