

FEB 28 2019

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107153

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: Keough, J., S. Gallagher, P.J., and Jones, J.

RELEASED AND JOURNALIZED: February 28, 2019

CR06485862-A

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KATHLEEN ANN KEOUGH, J.:

{¶1} Defendant-appellant, Marious Sowell, appeals from the trial court's judgment denying his third "motion to remove unconstitutional RVO specifications and request for a new sentencing hearing." Once again, Sowell contends that the sentence imposed for the repeat violent offender ("RVO") specification attached to his conviction for aggravated burglary is void. Once again, we conclude that the sentence is not void and affirm the trial court's denial of Sowell's motion.

I. Background

{¶2} Sowell was indicted on September 14, 2006. In 2007, a jury found him guilty of aggravated burglary with firearm specifications, tampering with evidence, and two counts of having a weapon while under disability. The aggravated burglary count contained an RVO specification upon which the court entered a guilty finding. The trial court sentenced Sowell to three years incarceration on the firearm specifications, to be served prior to and consecutive to ten years on the aggravated burglary conviction and five years on the RVO specification. The court sentenced Sowell to five years each on the tampering with evidence and having a weapon under disability convictions, to be served concurrently with each other and the aggravated burglary conviction, for a total sentence of 18 years.

{¶3} Sowell filed a direct appeal, and this court affirmed his convictions. *State v. Sowell*, 8th Dist. Cuyahoga No. 90732, 2008-Ohio-5875 (“*Sowell I*”). With regard to the RVO specification, Sowell did not challenge his sentence; rather, he asserted the evidence was insufficient to support his conviction on the specification. *Id.* at ¶ 41. This court found that Sowell had been charged as a repeat violent offender under R.C. 2941.149, as defined in former R.C. 2929.01(DD), which defined a repeat violent offender as someone being sentenced for a first-degree felony of violence who has previously been convicted of or pleaded guilty to, among other things, a first-degree offense of violence. *Id.* at ¶ 45-49, 52. This court noted that both Sowell and the state had stipulated to Sowell’s prior conviction for first-degree aggravated robbery, an offense of violence, and accordingly, concluded there was sufficient evidence to support his conviction on the RVO specification. *Id.* at ¶ 52.

{¶4} Seven years later, in February 2015, Sowell filed his first “motion to correct void or illegal sentence with respect to RVO specifications;” he later amended his motion to include a request for a new sentencing hearing. The trial court denied the motion, and this court affirmed on appeal. *State v. Sowell*, 8th Dist. Cuyahoga No. 102752, 2015-Ohio-4770 (“*Sowell II*”). On appeal, Sowell argued that the RVO specification was a fact that increased his punishment beyond what would be allowed by facts found by the jury on the underlying offense, and that because he had not waived his constitutional right to have a

jury, instead of the court, determine the RVO specification, the sentence on the RVO specification was void. *Id.*

{¶5} This court found that Sowell had forfeited any right to make a Sixth Amendment jury trial argument regarding the validity of the RVO specification, however, because he had not raised the issue on direct appeal. *Id.* at ¶ 9. This court noted that “constitutional violations occurring during sentencing are not structural errors and thus do not render a sentence void.” *Id.* Accordingly, the court found that because the sentence on the RVO specification was not void, Sowell “had to seek any redress of that right on direct appeal.” *Id.*

{¶6} Further, this court found that, in any event, there was no constitutional violation of Sowell’s right to a jury trial on the RVO specification because the trial court had found him to be a repeat violent offender due to his prior conviction. *Id.* at ¶ 10, fn. 1. The court noted that “when designating an offender as a repeat violent offender pursuant to former R.C. 2929.01(DD), 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.” *Id.*

{¶7} In April 2016, Sowell filed his second “motion to eliminate the repeat violent offender specification and request for a new sentencing hearing.” The trial court denied the motion, and this court again affirmed on appeal. *State v. Sowell*, 8th Dist. Cuyahoga No. 104673, 2016-Ohio-8299 (“*Sowell III*”). This

court noted that in his motion, Sowell argued that he was indicted in 2006 for the RVO specification under former R.C. 2941.149, but the statute was deemed unconstitutional in April 2007 to the extent it required the trial court to engage in impermissible factfinding. *Id.* at ¶ 6. Thus, Sowell argued that “because his indictment was never amended to include the new RVO statute, his sentence was void.” *Id.*

{¶8} This court concluded that Sowell’s argument was barred by res judicata because it could have been raised on direct appeal. *Id.* at ¶ 8. Although this court agreed with Sowell that res judicata does not bar appellate review of void or illegal sentences, it noted that in *Sowell II*, this court had recognized that constitutional errors occurring at sentencing do not render a sentence void. *Id.* at ¶ 9. Thus, it stated, “[w]e have determined that the RVO specification is not void.” *Id.* at ¶ 13.

{¶9} Further, this court found that even if were not barred by res judicata, Sowell’s argument had no merit because a failure to timely object to a defect in the indictment constitutes a waiver of the error and, thus, any claim of error in the indictment is limited to plain error. *Id.* This court reasoned that the purpose of an indictment is to provide notice to the offender of the crimes with which he is charged, and that amendment of the indictment is not necessary if the defendant is provided notice that the RVO is related to the prior conviction. *Id.* at ¶ 12. The court found that because Sowell’s indictment clearly stated that

the RVO specification was based on his prior conviction for aggravated robbery and set forth the date of the prior conviction and case number, it sufficiently apprised Sowell that the RVO specification was based on his prior conviction. *Id.* Accordingly, this court found no plain error.

{¶10} In April 2018, Sowell filed a third “motion to remove unconstitutional RVO specification and request for a new sentencing hearing.” The trial court denied the motion, and this appeal followed.

II. Law and Analysis

{¶11} In his single assignment of error, Sowell again argues that his sentence on the RVO specification is void because “despite the change to the statute, Mr. Sowell’s indictment was never amended nor was he re-indicted with the new RVO specification, leaving him with the indictment containing a void statute.” Specifically, Sowell argues that he was indicted on September 14, 2006, and that the language of his indictment relating to the definition of a repeat violent offender stated:

[T]he offender was convicted of or pleaded guilty to, and served a prison term for committing a felony of the first or second degree or any substantially equivalent offense, which resulted in death to a person or physical harm to a person, to wit: the said Marius Sowell, with counsel, on or about the 21st day of February 2001, in the Court of Common Pleas, Cuyahoga County, Ohio, Case No. CR 392756, having been convicted of the crime of Aggravated Robbery, in violation of Revised Code Section 2911.01 of the State of Ohio.

{¶12} Sowell argues that the language requiring a finding of “death to a person or physical harm to a person” mirrored that of former R.C. 2929.01(DD).

He asserts that former R.C. 2929.01(DD) was amended on April 4, 2007, prior to his trial and sentencing, to R.C. 2929.01(CC), and that the language of the statute changed substantially in this amendment. Accordingly, he asserts that “due to the timing of the legislative change and the state’s failure to amend the indictment before sentencing, Mr. Sowell was sentenced under a non-existent statute. As such, the RVO specification should be rendered a void sentence, something not barred by a res judicata claim.” He also contends that his sentence on the RVO specification is void because it required judicial factfinding regarding whether his prior conviction resulted in death or physical harm to a person, and the Ohio Supreme Court determined in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, that such judicial factfinding is impermissible.

{¶13} Sowell’s arguments are barred by res judicata. This court has repeatedly found that the sentence on the RVO specification is not void; thus, any argument regarding sentencing should have been raised on direct appeal. We have also previously determined that the trial court did not engage in improper judicial factfinding in finding Sowell guilty of the RVO specification.

{¶14} Furthermore, even if they were not barred by res judicata, Sowell’s arguments are without merit. Sowell was not sentenced on a “non-existent statute.” He was indicted, tried, and sentenced under the definition of a repeat violent offender as set forth in former R.C. 2929.01(DD), which was amended on

May 2, 2006 and effective August 3, 2006, prior to Sowell's indictment. See 2005 Ohio H.B. 95. This amendment deleted the language requiring that the prior conviction resulted in death or physical harm to a person. As amended, former R.C. 2929.01(DD) stated:

"Repeat violent offender" means a person about whom both of the following apply:

(1) The person is being sentenced for committing or for complicity in committing any of the following:

(a) Aggravated murder, murder, any felony of the first or second degree that is an offense of violence, or an attempt to commit any of these offenses if the attempt is a felony of the first or second degree;

(b) An offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to an offense described in division (DD)(1)(a) of this section.

(1) The person previously was convicted of or pleaded guilty to an offense described in division (DD)(1)(a) or (b) of this section.

{¶15} R.C. 2929.01(DD) was renumbered to R.C. 2929.01(CC) by Am.Sub.H.B. No. 130, which was enacted on January 6, 2009, not April 4, 2007, as argued by Sowell. The renumbering did not change the definition of a repeat violent offender.

{¶16} It is not apparent why the RVO specification in Sowell's indictment included the phrase "which resulted in death to a person or physical harm to a person" regarding Sowell's prior conviction. That language was deleted from former R.C. 2929.01(DD) effective August 6, 2006, when the statute was amended. Nevertheless, as this court found in *Sowell I*, Sowell and his counsel

stipulated to his prior conviction for aggravated robbery, a first-degree felony offense of violence. The court found him guilty of the RVO specification in light of this stipulation¹ and, as this court found in *Sowell II*, such a finding is not improper judicial factfinding. *Sowell II* at ¶ 10, fn. 1. Furthermore, as this court found in *Sowell III*, Sowell raised no objection to the indictment and cannot demonstrate plain error regarding the indictment because it sufficiently apprised him that the RVO specification was based on his prior conviction. *Sowell III* at ¶ 12.

{¶17} As this court has repeatedly stated, any challenge to the RVO specification is barred by res judicata. Further, the sentence on the specification is not void. Accordingly, the trial court did not err in denying Sowell's third motion to delete the specification and for a new sentencing hearing.

{¶18} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

¹In finding Sowell to be a repeat violent offender, the trial judge stated, "[t]he Court further finds pursuant to the stipulations made prior to trial in count seven, that Mr. Sowell is guilty of notice of prior conviction specification and the repeat violent offender specification by way of this prior conviction in criminal case 392756; therefore, enters a finding of guilty to those specifications as to Mr. Sowell in count seven." The court did not even mention or discuss whether Sowell's prior conviction resulted in death or physical harm to a person.

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


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


KATHLEEN ANN KEOUGH, JUDGE

SEAN C. GALLAGHER, P.J., and
LARRY A. JONES, SR., J., CONCUR

FILED AND JOURNALIZED
PER APP.R. 22(C)

FEB 28 2019

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