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APPELLANT'S BRIEF FILED
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Confirmation Nbr. 1430777

STATE OF OHIO

CA 18 107153

vs.

MARIOUS SOWELL

Judge:

Pages Filed: 14

IN THE EIGHTH DISTRICT
COURT OF APPEALS
CUYAHOGA COUNTY, OHIO

Case No. 485862

STATE OF OHIO,)	
)	
Plaintiff-Appellee)	
)	NO. 107153
vs.)	
)	
MARIOUS SOWELL,)	
)	
Defendant-Appellant)	

APPELLANT’S BRIEF AND ASSIGNMENT OF ERROR

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ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT IMPOSED A REPEAT VIOLENT OFFENDER SPECIFICATION WHICH WAS RENDERED VOID BY THE ENACTMENT OF A DIFFERENT REPEAT VIOLENT OFFENDER SPECIFICATION

ISSUE PRESENTED

1. WHETHER THE TRIAL COURT ERRED WHEN IT IMPOSED A REPEAT VIOLENT OFFENDER SPECIFICATION WHICH WAS RENDERED VOID BY THE ENACTMENT OF A DIFFERENT REPEAT VIOLENT OFFENDER SPECIFICATION

STATEMENT OF THE CASE/FACTS

Mr. Sowell was indicted in a 13 count indictment on September 14, 2006. At that time, counts one, two, three, four, five, six, and seven, contained a Repeat Violent Offender (“RVO”) specification under what was the Revised Code section “2929.01 DD.” The relevant code language of this section specified the following, “[t]he Grand Jurors further find and specify that the offender was convicted of or plead 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 Marious 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.”

The Ohio State legislature changed the statute to “R.C. 2929.01 CC,” and the language of the RVO specification on April 4, 2007, in response to the Ohio Supreme Court’s Ruling in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and the United States Supreme Court ruling in *Blakely v. Washington*, 542 U.S. at 310, 124 S.Ct. 2531, 159 L.Ed.2d 403, which held that the language like that found in the RVO specification required unconstitutional judicial fact finding. Specifically problematic with the former section “R.C. 2929.01 DD,” was the court’s determination of whether the prior offense “resulted in death to a person or physical harm to a person.” 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.

On September 26, 2007, the matter proceeded to trial by jury on all counts except for counts eight and nine, Having Weapons while under Disability, in violation of R.C. 2923.13, both having a one and three year firearm specification, which were tried to the bench. Additionally, the court was to consider Mr. Sowell's guilt under the RVO specification and Notice of Prior Conviction.

On October 2, 2007, the jury found Mr. Sowell not guilty of counts two, three and four, and the Judge granted his Crim.R. 29 Motion for count one. The jury found him guilty of count seven, Aggravated Burglary, in violation of R.C. 2911.11, with a one and three year firearm specification under R.C. 2941.141 and 2941.145 respectively. The jury also found him guilty of Tampering with records in violation of R.C. 2921.12. The jury was hung on counts five and six. The judge found Mr. Sowell guilty of the RVO specification and Notice of Prior Conviction contained in count seven. Although Mr. Sowell's indictment did not specify the code sections for the specification, at the time of the indictment, the code section for the Repeat Violent Offender Specification was "R.C. 2929.01 DD"; and, the language contained in his indictment mirrored "R.C. 2929.01 DD."

On November 2, 2007, the State dismissed counts five and six. Additionally, on that date, the court imposed an 18 year sentence. The court determined that the firearm specifications merged for the purpose of sentencing for a total of three years which, by law, were to be served prior to and consecutive to the other counts. The court imposed a 10 year sentence for count seven, Aggravated Burglary, and imposed an additional five years under the RVO specification, where the court engaged in judicial fact finding. (Tr. 13) He then imposed a five year sentence for counts eight, nine and thirteen, running them concurrent to count seven. The transcript

revealed that none of the parties were aware that Mr. Sowell was being convicted of a void RVO Specification. (Tr. 16)

Mr. Sowell has appealed his conviction and the legality of his sentence on three prior occasions. In *State v. Sowell* (“*Sowell I*”), 8th Dist. Cuyahoga No. 90732, 2008-Ohio-5875, Mr. Sowell argued the wrongfulness of his conviction and sentence. This Court denied his appeal. Mr. Sowell then filed a motion with the trial court challenging the imposition of the RVO specification, which the trial court denied. That decision was then appealed in *State v. Sowell* (“*Sowell II*”), 8th Dist. Cuyahoga No. 102752, 2015-Ohio-4770. Here, Mr. Sowell argued that he was denied his Sixth Amendment right to a jury trial when the trial court engaged in judicial fact finding to impose the RVO specification. This Court disagreed, holding that the argument was both *res judicata* and that the trial court did not engage in the judicial fact finding, citing the new statute (“R.C. 2929.01 CC”) which does not contain that language. ID. at ¶’s 9 &10. The problem with this decision was that this Court failed to appreciate that Mr. Sowell was convicted under old statute (“R.C. 2929.01 DD”), not the new one; therefore, the holding was a misapplication of the law.

Mr. Sowell then again attempted to argue the legality of the statute in *State v. Sowell* (“*Sowell III*”), 8th Dist. Cuyahoga No. 104672, 2016-Ohio-8299. This Court again denied his appeal citing *res judicata* and again asserted that no fact finding was necessary as the RVO specification was based on his prior conviction. Id. at ¶11. What this Court failed to recognize was the fact that due to the timing of 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.

Argument

*Assignment of Error***THE TRIAL COURT ERRED WHEN IT IMPOSED A REPEAT VIOLENT OFFENDER SPECIFICATION WHICH WAS RENDERED VOID BY THE ENACTMENT OF A DIFFERENT REPEAT VIOLENT OFFENDER SPECIFICATION**

Mr. Sowell argues that his sentence is void and his argument is not barred under *res judicata*, because a Constitutional claim can be raised at any time.

In the last decision, (*Sowell III*), this Court's reasoning was based upon the doctrine of *res judicata*, by concluding that the sentence imposed should have been appealed in his original appeal thus barring him from review on subsequent appeals. However, the RVO specification was a nullity at the time of its imposition at sentencing, it was *void ab initio* and thus the court lacked jurisdiction to impose that which did not exist. This is because at the time of his sentencing the Ohio Legislature changed the statute from R.C. 2929.01(DD) to R.C. 2929.01 (CC), and changed the language of the statute; however, Mr. Sowell was convicted and sentenced under the old statute R.C. 2929.01 (DD) which was no longer in existence at the time. Void judgments are never waived and therefore any appeal of the void judgment cannot be dismissed as *res judicata*. *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188. The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity. *Romito v. Maxwell*, (1967) 10 Ohio St. 2d 266, citing *Tari v. State*, 117 Ohio St. 481, 498, 159 N.E. 594, 57 A.L.R. 284; 31 Ohio Jurisprudence 2d 706, Judgments, Section 250. The effect of a void judgment is that the parties are in the same position as if there had been no judgment. *Hill v. Hill*, 299 Ky. 351, 185 S.W.2d 245, and 30A American Jurisprudence 198, Judgments, Section 45. The Eighth District conceded this point at ¶9 of its Opinion) We also know this because in *State v. Fischer*, the Ohio

Supreme Court held, “[a] judgment will be deemed void when it is issued by a court which did not have subject matter jurisdiction or otherwise lacked the authority to act.” 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332.

This Court misapplied the concepts of “void” and “voidable,” holding that in Mr. Sowell’s case the trial court’s imposition of the RVO specification was not “void” but rather “voidable;” and, that the RVO should have been appealed on direct appeal. (“Sowell 111”) Id. at ¶5. A “voidable” judgment is distinctly different from a judgment which is “void.” When a court has subject matter jurisdiction over a controversy, an “invalid, irregular, or erroneous” judgment is considered “voidable;” and is subject to reversal only on direct appeal. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568. The distinction between the two concepts has vast implications to Mr. Sowell, since if the RVO is found to be “void” a court can vacate it at any time. *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188.

The reason Mr. Sowell’s RVO sentence is “void” and not “voidable,” is because the statute was changed prior to his conviction yet his indictment was never amended to reflect the changes therefore removing the subject matter jurisdiction from the Court. Thus, if it did not exist then it could not be imposed. We also know it was unconstitutional because of the Supreme Court’s holding in *State v. Foster*, which abrogated statutes that required judicial fact findings. 109 Ohio St.3d 1, 2006-Ohio-856. The Court in *Foster* referred to the unconstitutional statute as “void.” Id. at ¶103. The language of Mr. Sowell’s RVO specification required judicial fact finding under *Foster*, because it required a determination of whether his prior conviction “resulted in death to a person or physical harm to a person.”

In “Sowell 111,” this Court cited *State v. Hunter*, for the proposition that the RVO specification under R.C. 2929.01 (DD), was not implicated by *Blakely*, *Apprendi* and *Foster*. 123

Ohio St.3d 164, 2009-Ohio-4147, 915 N.E. 2d 292. ¶36. The problem with *Hunter* is that the court did not have to engage in judicial fact-finding to determine if the prior offense resulted in death or serious physical harm to a person because Hunter stipulated to that fact. ¶29. The Court held that because of Hunter's stipulations, the trial court had no need to conduct fact-finding in connection with former R.C. 2929.01(DD), and no *Sixth Amendment* violation occurred in the case. *Blakely*, 542 U.S. at 310, 124 S.Ct. 2531, 159 L.Ed.2d 403 (defendant may waive *Apprendi* rights); see also *Smith v. Petkovich* (N.D. Ohio 2008), 562 F.Supp.2d 912, 944 (citing former R.C. 2929.01(DD) and holding that no *Sixth Amendment* violation occurred because "Smith stipulated as to the truth of all facts necessary to allow the court to find that Smith was a repeat violent offender.") ¶ 33

Mr. Sowell never stipulated to the truth of the facts that the aggravated robbery resulted in death or serious physical harm, as such *Hunter* does not apply. Furthermore, because there was no stipulation and no evidence in the record supporting the facts that the aggravated robbery resulted in death or serious physical harm, even under liberal interpretation of *Hunter*, the court failed to comply with *Hunter*.

Regardless of the holdings in *Foster*, *Hunter* and *Malcolm*, the fact remains that the State failed to re-indict Mr. Sowell with the new legislation leaving the RVO, "R.C. 2929.01 (DD)," that was imposed, void. Mr. Sowell was sentenced under a non-existent statute as he was never re-indicted or convicted of "R.C. 2929.01 (CC)," the new legislation.

Even in *Foster*, the matter was remanded for re-sentencing; however, unlike *Foster* the statute was not unconstitutional at the time he was sentenced as it was for Mr. Sowell. (When a sentence is deemed void, the ordinary course is to vacate that sentence and remand to the trial court for a new sentencing hearing. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817

N.E.2d 864, ¶23.) A new sentencing would require an elimination of the RVO specification since the court lacked subject matter jurisdiction to impose it since “R.C. 2929.01(DD),” had been replaced by “R.C. 29290.1(CC),” yet the indictment had not been amended before trial.

In dealing with a void-judgment, a trial court must have either subject matter jurisdiction or the authority to act. *See State v. Payne*, 114 Ohio St.3d 502 (2007) and *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197. Subject matter jurisdiction is given to the Courts from the Constitution and the laws of the states. If the jurisdiction is not so given, the court lacks subject matter jurisdiction. It cannot be conferred to the court by consent or stipulation of the parties. If a court lacks subject matter jurisdiction its judgment is void. *Id. at Payne*

A void judgment is one that is rendered by a court that is “wholly without jurisdiction or power to proceed in that manner.” *In re Lockhart* (1952), 157 Ohio St. 192, 195, 105 N.E.2d 35, 37. Furthermore, a judgement is deemed void when it is issued by a court which did not have subject matter jurisdiction or otherwise lacked authority to act. *State v. Fisher, supra* at 92. The judicial power of the court of common pleas is provided by virtue of Article IV, Section 4, of the Ohio Constitution; jurisdiction is conferred on the common pleas court by statute. *State ex. Rel. Miller v. Keefe*, 152 N.E.2d 113. Only the state legislature can limit or provide for the jurisdiction of a court in this state. *Klucar v. Hull*, 165 N.E.2d 246.

Courts are given authority by the Constitution and they cannot go beyond that power delegated to them, if they go beyond their authority their judgments and orders are regarded as nullities. They are not voidable but simply void. *Old Wayne Mut. I. Assoc. v. McDonough*, 204 U.S. 8, 27 S.Ct. 236 (1907).

In Mr. Sowell’s case, the Ohio Legislature enacted new legislation which has been deemed constitutional on April 4, 2007. The State failed to dismiss or amend the RVO

specification before the trial date of September 26, 2007, even after being put on constructive notice of its unconstitutional provisions. Furthermore, the State failed to secure a new, constitutional indictment for Mr. Sowell via presentation to the Grand Jury. As a result, the trial court was left with what was a void statute that did not garner subject matter jurisdiction and was therefore void.

By analogy, a similar fact pattern occurred in *State v. William Hudson*, CR. 478205. On March 8, 2007, Mr. Hudson (a white male), stood before the court for sentencing for an aggravated burglary with the same unconstitutional RVO specification as Mr. Sowell. However, in *Hudson*, J.D. May, the assistant prosecutor conceded that the RVO specification was void and asked the court not to apply it. (Tr. 913, 919) Mr. Sowell (a black male) was sentenced on November 2, 2007, nearly 8 months after Mr. Hudson. The difference between the cases was that Mr. Sowell's prosecutor did not alert the trial court to the error in the RVO specification. This failure, however, does not implicate waiver by Mr. Sowell; as was previously discussed, a void sentence is not subject to waiver. *See Fischer, supra*.

In light of the foregoing, Mr. Sowell asks this Court to hold a resentencing hearing where the Court finds the RVO specification to be void and subsequently removes them from his sentence.

Respectfully submitted,

/s/ Susan J. Moran

Susan J. Moran, Esq. (0067094)
Counsel for Marious Sowell

CONCLUSION

For the foregoing reasons and based upon the cited authority, Appellant, Marious Sowell, respectfully requests this Honorable Court to reverse his conviction and/or remand this matter to the trial court for further proceedings consistent with this Court's findings.

Respectfully submitted,

/S/ Susan J. Moran

SUSAN J. MORAN, 0067094
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to a representative of Michael O'Malley, Cuyahoga County Prosecutor, at 1200 Ontario Street, 9th Floor, Justice Center, Cleveland, Ohio 44113, the 6 of July.

Respectfully submitted,

/S/ Susan J. Moran

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