

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

APPELLEE,

v.

TONY D. SMITH,

APPELLANT.

CASE NO. GEN-2009-0499

ON APPEAL FROM SUMMIT COUNTY
COURT OF APPEALS, NINTH JUDICIAL
DISTRICT

COURT OF APPEALS CASE NO. 24247

MOTION FOR RECONSIDERATION OF APPELLANT

TONY D. SMITH

TONY D. SMITH #424-807
MANSFIELD CORRECTIONAL INST.
P.O. Box 788
Mansfield, Ohio 44901

Appellant, pro se

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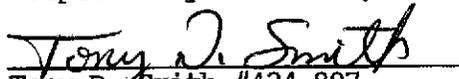
APPELLANT'S MOTION FOR RECONSIDERATION, PURSUANT APP.R. 26(A)

Now comes Appellant, by and through pro se without the benefit of adequate counsel, hereby respectfully moving this Honorable Court for reconsideration of its June 03, 2009, decision declining jurisdiction and dismissing his appeal for lack of a substantial constitutional question of great general or public interest being therein proposed.

Appellant, Tony D. Smith, moving this Honorable Court pursuant to App.R. 26(A), proffers that the Court failed to appropriately consider its intervening declaration announced in State v. Boswell (2009), -- N.E.2d --, 2009-Ohio-1577, (Decided April 09, 2009), when declining to hear Appellant's case, and, consequently, is implicitly ignoring, validating, and permitting his State conceded void sentence to stand.

Reasons more fully supporting this Motion are set forth in the attached Memorandum of Law in Support, and same is incorporated herein for this Honorable Court's consideration.

Respectfully submitted,


Tony D. Smith #424-807
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Appellant, pro se

STATEMENT OF CASE AND FACTS

On March 29, 2002, Appellant was found guilty by a jury of various offenses. At sentencing, the trial court sentenced Appellant to a term of imprisonment attendant to a Felony of the First Degree offense. However, the trial court did not mention postrelease control during his sentencing hearing.

On July 26, 2007, Appellant filed a motion for resentencing because he was not informed of postrelease control during his sentencing hearing, this logic being based upon State v. Jordan (2006), 104 Ohio St.3d 21, rendering his sentence void thereunder. Appellee responded and conceded Appellant's sentence was void and that he must be receive a de novo sentencing hearing pursuant to State v. Bezak (2007), 114 Ohio St.3d 94.

The trial court ordered Appellant and his co-defendant be conveyed back to the Summit County Jail for resentencing, which they were on March 12, 2008.

On April 16, 2008, Appellee changed its position regarding its de novo sentencing hearing concession, predicated upon the Ninth Appellate District's decision in State v. Price, 2008 WL 1700341, 2008-Ohio-1774, Ohio App. 9 Dist., April 14, 2008 (No. 07CA0025) (holding that a trial court lacks subject-matter jurisdiction to hear a motion for resentencing because it must be reclassified as a postconviction relief petition, and therefore, if untimely, jurisdictionally limited under R.C. 2953.23, even where the sentence is prima facie void).

On May 01, 2008, the trial court denied Appellant's "motion for re-sentencing," and returned Appellant back to prison upon his apparent void sentence.

Through timely appeal to the appellate court and this Honorable Court Appellee has consistently acknowledged Appellant's sentence is void, and has never contested this fact.

On June 03, 2009, this Honorable Court declined to accept jurisdiction over Appellant's case and dismissed it. The foregoing is timely before the Court requesting reconsideration of that decision.

MEMORANDUM OF LAW IN SUPPORT

Appellant's specific proposition of law proposed before the Court in his Memorandum in Support of Jurisdiction was as follows:

"The trial court erred in denying the Appellant's request for resentencing based on the Supreme Court of Ohio's holdings in State v. Bezak (2007), 114 Ohio St.3d 94, and State v. Simpkins (2008), 117 Ohio St.3d 420. Furthermore, the Ninth District Court erred in affirming the trial court's denial to resentence the Appellant."

Id. at Mem.Sup.Jur, Proposition of Law One. Thus, it is abundantly clear that, inter alia, the precise issue presented to the Court was directly on point to the fact that: (1) both parties concede the sentence is void for lack of any notification of postrelease control at Appellant's sentencing hearing; and (2) this case has reached this Court on Appellant's motion for resentencing.

In determining whether to grant a motion for reconsideration, a court of review must review the motion to see if it calls to the attention of the court an obvious error in its decision or if it raises issues not considered properly by the court. Garfield Hts. City School Dist. v. State Bd. of Edn. (1992), 85 Ohio App.3d 117.

Appellant submits that this Honorable Court, prior to declining jurisdiction over Appellant's case and thereby dismissing it, has just approximately one and one-half months ago expressly, and sua sponte, announced that a court cannot ignore a void sentence, but, instead, must vacate it and order resentencing. Consequently, Appellant respectfully proposes that the Court made an obvious error by not properly considering recently decided clarity announced by this Honorable Court on the very point of the requirements of a court when confronted

with a sentence that is void.

In State v. Boswell (Decided April 09, 2009), -- N.E.2d --, 2009-Ohio-1577, this Court was presented with the opportunity to enunciate the ramifications that a void sentence plays in the context of the standard of review that attends a motion to withdraw a plea of guilty, even when that motion is a post-sentence motion, and this Court held as follows:

"It is undisputed that [Boswell's] sentence is void. It failed to include mandatory postrelease control, violating R.C. 2967.28. As a result, we place him in the same position that he would be in if he had never been sentenced and treat his motion to withdraw his guilty plea as a presentence motion."

Id. at ¶ 10. However, this Court having determined the merits of the case notwithstanding, it, "sua sponte," went on to further address the status of the void sentence as follows:

"Having determined the proper standard for evaluating [Boswell's] motion to withdraw his plea, we must also address the status of the void sentence. Unlike the parties in our prior cases, neither party here is actually challenging the imposed sentence, although both parties admit that the sentence is void. Instead, the case has reached us on [Boswell's] motion to withdraw his guilty plea based upon the plea colloquy. Despite the lack of a motion for resentencing, we still must vacate the sentence and remand for a resentencing hearing in the trial court. Because the original sentence is actually considered a nullity, a court cannot ignore the sentence and instead must vacate it and order resentencing."

Id. at ¶ 12, citing State v. Simpkins, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, at ¶ 20-22. (Emphasis added).

Appellant posits that, the instant case was precisely presented to the Court upon the denial of his motion for resentencing; that his sentence is likewise void for lack of any mention of mandatory postrelease control notification related to a First Degree Felony offense at his sentencing hearing; and that this very Court, by allowing Appellant's flagrantly void sentence to stand, will render meaningless the above directive of what Court's must do when presented with a void sentence.

It is unambiguously inconceivable to deduce that this Honorable Court would make such a sua sponte announcement in Boswell, yet, not even two months subsequent to that announcement, decline to accept jurisdiction over a case that presents the precise issue it deemed imperative enough to sua sponte proclaim in directive to all Ohio courts, i.e., courts' duty to not "ignore [a void] sentence," but rather the requirement that they "must vacate the sentence and remand for a resentencing hearing in the trial court." Boswell, supra. Id.

Here, Appellant's sentence is concededly void, and this Honorable Court, in declining to accept jurisdiction over his case on the issue of the trial court's requirement to resentence him de novo, is both "ignoring his void sentence" and permitting it to stand despite its former ascription to the principle of "achiev[ing] neither fairness nor justice by permitting a void sentence to stand." Simpkins, supra, 117 Ohio St.3d 420, at ¶ 25.

Appellant thus respectfully contends this Honorable Court did not properly consider the intervening announcement in Boswell, and, resultingly, implicitly committed obvious error by failing to, at a minimal, accept jurisdiction over Appellant's case limited to summary reversal of the appellate court's decision on the authority of Boswell, Simpkins, or their progeny, State v. Bezak (2007), 114 Ohio St.3d 94, and thereby vacating Appellant's sentence and remanding for a resentencing hearing in the trial court.

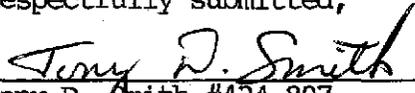
CONCLUSION

Commensurate with stare decisis principles advocating adherence with precedent in order to foster predictability and continuity, prevent the arbitrary administration of justice, and provide clarity to the citizenry, this Honorable Court cannot ignore its own recently clarified directive to all Ohio courts of their duty to "vacate [void] sentence[s] and remand for resentencing hearing[s]

in the trial court[s]." Id.

For the foregoing reasons, Appellant respectfully requests this Honorable Court to GRANT the instant motion for reconsideration and to therefore either order briefing attendant to accepting jurisdiction over Proposition of Law One or to order any other just and adequate relief deemed proper.

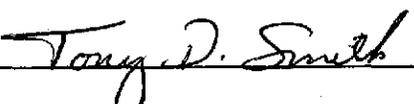
Respectfully submitted,


Tony D. Smith #424-807
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P.O. Box 788
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Appellant, pro se

SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion for Reconsideration was sent by regular U.S. Mail upon Richard S. Kasay, Assistant Prosecuting Attorney, at 53 University Avenue, 6th Floor, Akron, Ohio 44308, on this 11th day of June 2009.


Appellant, pro se