

NO.

11-0008

ORIGINAL

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 95128

STATE OF OHIO

Plaintiff-Appellant

-vs-

MARIO HARRIS

Defendant-Appellee

NOTICE OF CERTIFIED CONFLICT

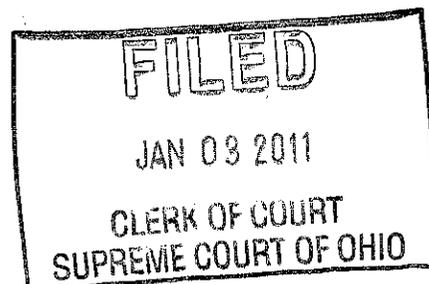
Counsel for Plaintiff-Appellee

WILLIAM D. MASON (0037540)
CUYAHOGA COUNTY PROSECUTOR

THORIN FREEMAN (0079999)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Defendant-Appellee

Mario Harris Pro Se A550804
Richland Correctional Inst.
P.O. Box 8107
Mansfield Ohio 44905



Notice of Certified Conflict

Appellant, The State of Ohio, gives notice of a certified conflict to the Ohio Supreme Court from the Cuyahoga Court of Common Pleas, Eighth Appellate District, CA 95128 (2010-Ohio-5374) decided and journalized on November 4, 2010, timely reconsideration denied on December 6, 2010. The Eighth District has certified the following question to this Court:

Does the failure to include a mandatory driver's license suspension in a criminal sentence render that sentence void?

The Eighth District has declared that its decision in *State v. Harris* is in conflict with the First District's decision in *State v. Thomas*.

Under Sup.Ct.R. IV Section 1, a copy of the Eighth District's order certifying the conflict and copies of all decisions determined to be in conflict are attached in the accompanying appendix.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

By:


THORIN FREEMAN (0079999)
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-78000

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellant has been mailed this 3rd day of January, 2011 to Mario Harris A550804 P.O. Box 8107 Mansfield Ohio 44901 and the Ohio Public Defender.


Assistant Prosecuting Attorney

Appendix

Order of the Eighth District Court of Appeals certifying a conflict in *State v. Harris*, Cuyahoga App. No. 95128, issued December 6, 2010.

Decision of the Eighth District Court of Appeals in *State v. Harris*, Cuyahoga App. No. 95128, 2010-Ohio-5374.

Conflicting cases:

State v. Thomas, 1st District App. Nos. C-090716 and C-090463, 2010-ohio-4856.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
95128

LOWER COURT NO.
CP CR-506498
CP CR-510551

-vs-

MARIO HARRIS

COMMON PLEAS COURT

Appellant

MOTION NO. 439304

Date 12/06/2010

Journal Entry

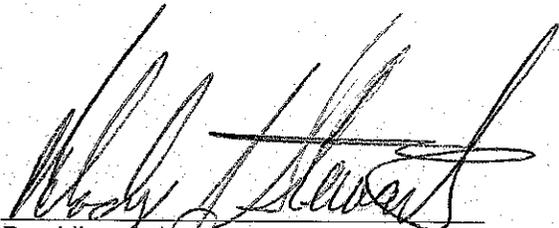
MOTION BY APPELLEE TO CERTIFY CONFLICT IS GRANTED. SEE JOURNAL ENTRY OF SAME DATE.

RECEIVED FOR FILING

DEC 06 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY GMB DEP.

Judge KENNETH A. ROCCO, Concur


Presiding Judge
MELODY J. STEWART

THORIN O. FREEMAN
ASST. COUNTY PROSECUTOR
8TH FLOOR, JUSTICE CENTER
1200 ONTARIO STREET
CLEVELAND, OH 44113

CA 95128

PLEASE PRINT NO CONSENT FOR FILING OF CERTAIN WRITS

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
95128

LOWER COURT NO.
CP CR-506498
CP CR-510551

-vs-

COMMON PLEAS COURT

MARIO HARRIS

Appellant

MOTION NO. 439304

Date 12/06/2010

Journal Entry

APPELLEE, THE STATE OF OHIO, HAS FILED A MOTION TO CERTIFY A CONFLICT BETWEEN THE JUDGMENT IN THE ABOVE CAPTIONED CASE AND THAT IN *STATE V. THOMAS*, 1ST DIST. NOS. C-090716 AND C-090463. IN THE ABOVE-CAPTIONED CASE, THIS COURT HELD: "WHEN A SENTENCE FAILS TO IMPOSE A MANDATED TERM SUCH AS A DRIVER'S LICENSE SUSPENSION, THAT SENTENCE IS VOID." IN *THOMAS*, THE FIRST DISTRICT COURT OF APPEALS HELD THE OPPOSITE AND FOUND THAT THE "OMISSION OF A STATUTORILY MANDATED DRIVER'S LICENSE SUSPENSION DOES NOT RENDER VOID AN OTHERWISE LAWFUL SENTENCE." ID. AT ¶11. THE *THOMAS* COURT, FOLLOWING A PRIOR DECISION, STATED, "THIS COURT HAS PREVIOUSLY HELD THAT ALTHOUGH A SENTENCE IS VOID WHEN IT DOES NOT CONTAIN A STATUTORILY MANDATED TERM LIKE POSTRELEASE-CONTROL NOTIFICATION, A DRIVER'S LICENSE SUSPENSION IS NOT A 'STATUTORILY MANDATED TERM' AKIN TO POSTRELEASE CONTROL." ID., CITING *STATE V. FAIN*, 1ST DIST. NOS. C-080830 AND C-080832, 2010-OHIO-2455.

UPON REVIEW, WE GRANT APPELLEE'S MOTION AND CERTIFY THE RECORD IN THE ABOVE-CAPTIONED CASE TO THE SUPREME COURT OF OHIO FOR REVIEW AND FINAL DETERMINATION DUE TO A CONFLICT BETWEEN THE UNDERLYING JUDGMENT IN THE CASE AT HAND AND THE JUDGMENT IN *STATE V. THOMAS*, 1ST DIST. NOS. C-090716 AND C-090463 ON THE FOLLOWING

[Cite as *State v. Harris*, 2010-Ohio-5374.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95128

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARIO HARRIS

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED IN PART AND REMANDED FOR
RESENTENCING; DISMISSED IN PART**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-506498 and CR-510551

BEFORE: Stewart, J., Rocco, P.J., and Dyke, J.

RELEASED AND JOURNALIZED: November 4, 2010

FOR APPELLANT

Mario Harris, Pro Se
Inmate No. 550-804
Richland Correctional Institution
P.O. Box 8107
Mansfield, OH 44901

ATTORNEYS FOR APPELLEES

William D. Mason
Cuyahoga County Prosecutor

BY: Thorin Freeman
Assistant County Prosecutor
The Justice Center
1200 Ontario Street, 8th Floor
Cleveland, OH 44113

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Mario Harris, appeals the orders in two criminal cases that deny his motions for sentencing. Appellant argues that because the trial court failed to impose the driver's license suspension and fine mandated by statute for drug trafficking convictions, his sentences are void and he must be resentenced. Because this appeal challenges the denial of appellant's motions for sentencing filed in two separate criminal cases, we will address each case separately.

Case No. CR-510551

{¶ 2} In Case No. CR-510551, appellant was charged in a three-count indictment with drug possession in violation of R.C. 2925.11(A), drug trafficking in violation of R.C. 2925.03(A)(2), and possession of criminal tools in violation of R.C. 2923.24(A).¹ Each count included a forfeiture specification for a vehicle used in the commission of the offense. On May 27, 2008, appellant entered a guilty plea to the trafficking offense with the forfeiture specification. The remaining counts were nolle.

{¶ 3} In the judgment entry dated May 27, 2008, the trial court imposed a prison term of six-months, to be served consecutive to the sentence in Case No. CR-506498, and ordered forfeiture of the vehicle. However, the trial court neglected to suspend appellant's driver's license. Pursuant to statute, appellant's fifth degree felony trafficking conviction carries with it a mandatory driver's license suspension of between six months and five years. R.C. 2925.03(G). When a sentence fails to impose a mandated term such as a driver's license suspension, that sentence is void. *State v. Donahue*, 8th Dist. No. 89111, 2007-Ohio-6825, at ¶22. Where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is to resentence the defendant. *Id.*, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 471

¹ We call attention to the fact that all documents and journal entries subsequent to the indictment show the defendant's name as "Mario Harris," while the indictment shows the defendant's name as "Calvin Harris."

N.E.2d 774. Therefore, we reverse the judgment in Case No. CR-510551 and remand for resentencing.

Case No. CR-506498

{¶ 4} In Case No. CR-506498, the grand jury indicted appellant on multiple counts including drug trafficking, drug possession, possession of criminal tools, and having a weapon while under disability. The trafficking offenses included a schoolyard specification, a one-year firearm specification, and a forfeiture specification for cash, cell phones, and a Smith & Wesson revolver. The weapons under disability offense included a forfeiture specification for the revolver.

{¶ 5} On May 27, 2008, appellant entered a guilty plea to one count of drug trafficking in violation of R.C. 2925.03(A)(1) with the schoolyard, firearm, and forfeiture specifications (a third degree felony), and one count of having a weapon while under disability in violation of R.C. 2923.13(A)(3) with the forfeiture specification. The remaining counts were nolle. The guilty pleas, disposition of the remaining counts, and order of forfeiture were recorded in a judgment entry dated May 27, 2008.

{¶ 6} By separate entry dated June 3, 2008, the court sentenced appellant to a mandatory one-year prison term on the firearm specification, to be served consecutive to a three-year term on the trafficking offense, and a one-year term on the weapons under disability offense, for a total of five

years. However, the court neglected to suspend appellant's driver's license or to impose a fine. Pursuant to statute, a third-degree felony drug trafficking conviction carries with it a mandatory fine and driver's license suspension. R.C. 2925.03(D)(1)(2) and (G).

{¶ 7} While this case presents the same error as in the prior case, a procedural error by the trial court in announcing its judgment mandates we reach a different result. In issuing judgment, the trial court employed two separate journal entries to record appellant's plea and sentence. However, only one document can constitute a final appealable order. *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, at ¶17. Since the second judgment entry fails to account for the the order of forfeiture recorded in the first entry, it is not a final appealable order. As a result, we are without jurisdiction to review any order of the trial court relating to Case No. CR-506498, including the trial court's denial of appellant's motion to resentencing. While our disposition of the prior case suggests the proper course of action for the trial court, we find we have no choice but to dismiss the appeal in this case for lack of a final appealable order.

{¶ 8} Accordingly, appellant's single assignment of error is sustained in part. The judgment in Case No. CR-510551 is reversed and remanded for resentencing. The appeal in Case No. CR-506498 is dismissed for lack of a final appealable order.

It is ordered that the parties bear their own costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
ANN DYKE, J., CONCUR

[Cite as *State v. Thomas*, 2010-Ohio-4856.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-090716
		C-090463
Plaintiff-Respondent-Appellee,	:	TRIAL NO. B-0801083
vs.	:	
		<i>DECISION.</i>
AKO THOMAS,	:	
Defendant-Petitioner-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in C-090716; Appeal Dismissed in C-090463

Date of Judgment Entry on Appeal: October 6, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*,
Assistant Prosecuting Attorney, for Plaintiff-Respondent-Appellee,

Ako Thomas, pro se.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} Petitioner-appellant Ako Thomas has taken these consolidated appeals from the Hamilton County Common Pleas Court’s judgments denying his R.C. 2953.21 petition for postconviction relief and overruling his “Motion Requesting Resentencing to Correct a Void Sentence.” We affirm.

{¶2} In 2008, Thomas was convicted upon his guilty plea to cocaine trafficking and sentenced to four years in prison. We affirmed his conviction on appeal.¹

{¶3} In March 2009, while his appeal was pending, Thomas filed with the common pleas court his motion requesting resentencing and a Crim.R. 32.1 motion to withdraw his guilty plea. In April, he filed his postconviction petition. The court overruled the motions and denied the petition, and these appeals followed.

Appeal No. C-090463

{¶4} We note preliminarily that, in the appeal numbered C-090463, Thomas appeals from the judgment overruling his motion requesting resentencing. But in his brief, he does not assign as error the overruling of the motion. We, therefore, dismiss as abandoned the appeal numbered C-090463.²

Appeal No. C-090716

{¶5} In the appeal numbered C-090716, Thomas appeals from, and advances a single assignment of error challenging, the denial of his postconviction petition without a hearing. This challenge is untenable.

{¶6} To prevail on a postconviction claim, the petitioner must demonstrate an infringement of his rights in the proceedings resulting in his conviction that

¹ See *State v. Thomas* (Oct. 7, 2009), 1st Dist. No. C-080940.

² See *State v. Johnson*, 1st Dist. Nos. C-080156 and C-080158, 2009-Ohio-2568, ¶49; *State v. Perez*, 1st Dist. Nos. C-040363, C-040364, and C-040365, 2005-Ohio-1326, ¶24; *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693, ¶8.

rendered the conviction void or voidable under the state or federal constitution.³ The petitioner bears the initial burden of demonstrating, through his petition, supporting affidavits, and the case record, “substantive grounds for relief.”⁴ A common pleas court may dismiss a postconviction claim without a hearing if the petitioner has failed to submit with his petition evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief.⁵

{¶7} First postconviction claim: ineffective assistance of trial counsel.

In his first postconviction claim, Thomas contended that he had been denied his constitutional right to the effective assistance of counsel, when his trial counsel had failed to move to suppress the cocaine seized incident to his arrest on an outstanding warrant, following a traffic stop. Thomas supported his claim with outside evidence in the form of his and his girlfriend’s affidavits. The pair averred that a police officer had stopped the girlfriend’s car and had arrested Thomas, the car’s passenger, on an outstanding warrant. The officer, they asserted, did not give them a reason for stopping the car, did not tell Thomas “exactly what [he] was being arrest[ed] for,” and did not cite Thomas’s girlfriend for a traffic violation. Thus, Thomas argued, the stop was not, consistent with the Fourth Amendment to the United States Constitution, effected upon “probable cause,” and his trial counsel was ineffective in refusing to accede to his request to move to suppress the fruits of the stop.

{¶8} A knowing, voluntary, and intelligent guilty plea waives any “independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea,”⁶ including a challenge to trial counsel’s failure to

³ See R.C. 2953.21(A)(1); *State v. Powell* (1993), 90 Ohio App.3d 260, 264, 629 N.E.2d 13.

⁴ See R.C. 2953.21(C).

⁵ See *id.*; *State v. Pankey* (1981), 68 Ohio St.2d 58, 59, 428 N.E.2d 413; *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819, syllabus.

⁶ *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130, 595 N.E.2d 351, quoting *Tollett v. Henderson* (1973), 411 U.S. 258, 267, 93 S.Ct. 1602; accord *State v. Morgan*, 1st Dist. No. C-080011, 2009-Ohio-1370, ¶25.

file a pretrial motion to suppress.⁷ Thomas's direct appeal was submitted, and we determined the appeal, consistent with the procedure set forth in *Anders v. California*.⁸ Thus, in affirming Thomas's conviction, we necessarily concluded that Thomas had entered his guilty plea knowingly, voluntarily, and intelligently.

{¶9} The affidavits offered by Thomas in support of his first postconviction claim may fairly be read to allege otherwise. But his self-serving suggestion that his guilty plea was unknowing or involuntary because his counsel had disregarded his request to move for suppression is discredited by his confirmation, both in his plea form and during the Crim.R. 11 colloquy at the plea hearing, that he was entering his plea knowingly and voluntarily.⁹

{¶10} Thomas thus failed to sustain his burden of submitting evidentiary material setting forth sufficient operative facts to demonstrate that his guilty plea had been the unknowing or involuntary product of his trial counsel's ineffectiveness in failing to file a motion to suppress.¹⁰ Therefore, Thomas's guilty plea waived his first postconviction claim, and the common pleas court properly denied the claim without an evidentiary hearing.

{¶11} ***Second postconviction claim: void sentence.*** In his second postconviction claim, Thomas sought relief from his sentence on the ground that the sentence was void because it did not include a statutorily mandated driver's license suspension. This court has previously held that although a sentence is void when it does not contain a statutorily mandated term like postrelease-control notification, a driver's license suspension is not a "statutorily mandated term" akin to postrelease control.¹¹ Consequently, under *State v. Fain*, a trial court's omission of a statutorily

⁷ See *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶116.

⁸ (1967), 386 U.S. 738, 87 S.Ct. 1396.

⁹ See *State v. Calhoun*, 86 Ohio St.3d 279, 284-285, 1999-Ohio-102, 714 N.E.2d 905.

¹⁰ See R.C. 2953.21(C); *Strickland v. Washington* (1984), 466 U.S. 668, 694, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

¹¹ See *State v. Fain*, 1st Dist. Nos. C-080830 and C-080832, 2010-Ohio-2455.

mandated driver's license suspension does not render void an otherwise lawful sentence. We conclude that the trial court properly denied Thomas's postconviction claim contending that his sentence was void because the doctrine of res judicata applied to bar that claim.

{¶12} “Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding[,], except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial [that] resulted in that judgment of conviction[] or on an appeal from that judgment.”¹² Thus, res judicata bars a postconviction claim that could fairly have been determined in the direct appeal, based upon the trial record and without resort to evidence outside the record.¹³ Thomas's second postconviction claim could fairly have been determined in Thomas's direct appeal from his conviction, and the claim was accordingly barred by res judicata in this case.

{¶13} **Conclusion.** The common pleas court properly denied Thomas's postconviction petition. We, therefore, overrule the assignment of error and affirm the common pleas court's judgment denying the petition.

Judgment accordingly.

SUNDERMANN, P.J., HENDON and MALLORY, JJ.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

¹² *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

¹³ See *id.*; *State v. Cole* (1982), 2 Ohio St.3d 112, 114, 443 N.E.2d 169.