

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

EARL INGELS,

Defendant-Appellant.

11-1271

:
: Case No. _____
: On Appeal from the Hamilton
: County Court of Appeals
: First Appellate District
: C.A. Case No. C-1000297
:

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT EARL INGELS

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Defendant-Appellant, Pro Se

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL
INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents two opportunities for this Court to address the issue of, when a criminal defendant in the State of Ohio receives a sentence that is contrary to law, does that sentence render's the sentence void, and if so, can a criminal defendant challenge that sentence collaterally, or directly; Secondly, when a District court render a decision contrary to standing precedence that holds a void judgment can be challenge collaterally, or directly, and then rules differently without a per-curiam decision of that court overruling current precedence which decision should stand?...

In the case at bar, the trial court based it's finding to support an enhanced Sexual Violent Predator Specification using the present conviction, and same and similar chart for determination to support the conviction and sentence, thereby imposing a sentence that is contrary to law, State v. Smith, 818 N.E.2d 283 (Ohio 2004). Further, the first district court of appeals violated it's on precedent when it held that a void judgment and sentence must meet the stringent requirements imposed pursuant to R.C. § 2953.23, rather than a simple motion to vacate a void sentence, or judgment, when challenging a conviction and sentence that is contrary to law and thereby void, State v. Ingels, violating current precedence that a void judgment can be challenged at any-time, collaterally, or directly, State v. Millow. Further, see State v. Fischer, a void judgment can be challenged at any time, collaterally or directly.

Therefore, Defendant-Appellant prays that this Court will accept Jurisdiction of this case to give guidance to the lower court's when addressing issue's that affects criminal defendant's rights to be free from void judgments' and sentences.

Respectfully submitted,

Earl Ingels

Statement of the Case

On February, 20, 1998, the Hamilton county Grand Jury Returned a six count indictment in case number B-9800321 to wit: R.C. § 2905.01(A)(4), Kidnapping, four of which contained sexual motivation specifications as defined by R.C. § 2941.147, one count of gross sexual imposition as defined by R.C. §2907.05(A)(1) and one count of sexual battery as defined by R.C. § § 2907.03. On April 8, 1998, a Hamilton County Grand Jury returned a second indictment in case number B-9802147 charging defendant with two counts of kidnapping in violation of R.C. § 2905.01(A), one of which contained a Sexual Motivations Specification as defined in O.R.C. § 2941.147, two counts of attempted kidnapping as defined in O.R.C. § 2905.01 and 2923.02(A) and one count of gross sexual imposition as defined in Ohio Revised Code § 2907.05(A)(2). The case proceeded to a jury trial, and the jury returned guilty verdicts for four counts of kidnapping, two with specifications of sexual motivation; two counts of gross sexual imposition; and one count of abduction and one count of attempted abduction, (THE Conviction of Abduction and Attempted Abduction were Never part of the Grand Jury Indictment), with respect to the first indictment in case no. B-9800321. The court sentenced the defendant to consecutive terms of nine (9) years to life on the two kidnapping convictions, and four years on the abduction, and concurrent one and one half year term on the gross sexual imposition conviction. With respect to the Second Indictment in case No. B-9802147, the court sentenced defendant to consecutive terms of nine (9) years on the kidnapping and to concurrent terms of one (1) year with respect to the gross sexual imposition conviction.

PROPOSITION OF LAW NO. ONE:

Defendant was Denied Due Process of Law when the Court based its finding of a Sexual Predator Specification using the present conviction, and Same and Similar Chart for determination to Support an Enhance Conviction and Sentence, thereby imposing a sentence that is contrary to State Law. State v. Smith, 818 N.E. 2d 283 (Ohio 2004). Further, the Defendant's sentence also becomes void by act of sentencing him to counts of Abduction and Attempted Abduction which as noted in the original motion was never part of his indictment.

ALLEGED VARIANCE BETWEEN INDICTMENT AND BASIS OF CONVICTION

It is elementary that procedural due process requires that a person be tried and convicted for specific offenses with which he is charged. Cole v. Arkansas, 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948).

Any variance between indictment and proof which "destroy(s) the defendant's substantial right to be tried ONLY on charges presented in an indictment" is Not Harmless error.

Defendant-Appellant, Earl Ingels asserts that the Sexual Violent Predator Specification used in this cause to enhance his sentence to a life term as set forth in the indictment failed to allege the elements of the offense, and that the instant offense could not support a conviction for this specification according to the Ohio Supreme Court in State v. Smith, 818 N.E. 2d 283 (Ohio 2004), 18. A grand jury cannot indict based on a conviction that has not occurred and may not ever occur. Consequently, accepting the state's interpretation of R.C. § 2971.01(H)(1), would lead to an absurd result.

Further, pursuant to R.C. § 2971.03(A), a sexual violent predator specification enhances the sentence of a defendant "who is convicted of or pleads guilty to a sexual violent offense and who also is convicted of or pleads guilty to a sexual violent predator specification that was in the indictment ***."

Further more, R.C. § 2971.01(H)(1) requires that a conviction that existed prior to the Indictment of the underlying offense cannot be used to support the

specification which accrued before January 1, 1997. In State v. Smith, 818 N.E. 2d 283, (ohio 2004) note 1, Smith's 1989 sexual-battery conviction is ineligible to show that Smith "has been convicted" of a sexual violent predator specification because the conviction predated the January 1, 1997 cutoff date in R.C. § 2971.01(H)(1). This ruling by the Ohio Supreme Court in Smith makes it clear that the Defendant Earl Ingels is Ineligible to be labeled as a Violent Sexual Predator.

In the instant case, Appellant was indicted in case no.(s) B-9800321, and B-9802147, on February 20, 1998, and April 8, 1998, and at that time he was according to the Ohio Revised Code and the Smith ruling by the Ohio Supreme Court was not eligible to be labeled as a Sexual Violent Predator.

Despite the restrictions of R.C. § 2971.01(H)(1) in cases No.(s) B-9800321 and B-9802147, the Court sentenced Appellant to Life imprisonment under R.C. 2971.03(A)(2) for the sexual violent predator specification, in addition to other sentences for the kidnapping counts in the indictment. Further, the trial Jury did Not return a verdict of guilty with specification or allow this action in B-9802147 count (1) which the trial Judge used to enhance Mr. Ingels sentence.

Appellant asserts that it was plain error for the trial court to sentence him pursuant to R.C. § 2971(H)(1) imposing a life sentence under the sexually violent predator specification.

The statute does not comply with the facts of his case despite the Court's attempt to use same and similar situations to justify imposing such a sentence.

Further, the Jury did not return a verdict on the Sexual Violent Predator Specification in case no. B-9802147, count one (1) which also support appellant's plain error assertion.

Conclusion

This Conviction and Sentencing for Sexual Violent Predator Specification and it's Life Tail Enhancement is contrary to Ohio Law, along with the Abduction and Attempted Abduction charges levied by the court which are in direct conflict with the Defendant's Indictments and are also apart of the Plain Error Statute.

We further submit that Not Only is the decision in this case a violation of the Defendant's and Publics 6th and 14th Constitutional Rights, but also in conflict with the Ruling of The Ohio Supreme Court In State of Ohio v. Smith No. 2003-1194 and State of Ohio v. Fischer and in direct conflict with R.C. 2953.08 (G)(2)(b). We also note that The Ohio Supreme Court has long recognized and recently "reaffirmed [the] vital principle "that" [N]o court has the authority to impose a sentence that is contrary to law. And it has "consistently" held that "a sentence that is NOT in accordance with statutorily mandated terms is "VOID"

Therefore, this Court should accept jurisdiction of this case to Reverse the First District erroneous decision to prevent a miscarriage of justice from being done in this case, and remand this case back to the trial court for a new trial, or at the minimum, a new sentencing hearing. It is so prayed

Respectfully submitted,



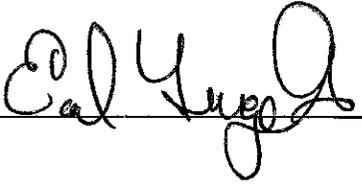
Earl Ingels #363-813

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Certificate of Service

I, Earl Ingels, certify that a true and accurate copy of this motion has been forwarded to the Hamilton County Prosecutor Joe Deters on this 11th day of July, 2011, by regular U.S. Mail.



Earl Ingels

Slip Copy, 2011 WL 2436654 (Ohio App. 1 Dist.), 2011 -Ohio- 2901

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
First District, Hamilton County.

STATE of Ohio, Plaintiff–Appellee,
v.
Earl INGLES, Defendant–Appellant.

No. C–100297.
Decided June 17, 2011.

Criminal Appeal from Hamilton County, Court of Common Pleas.
Joseph T. Deters, Hamilton County Prosecuting Attorney, and Philip R. Cummings, Assistant Prosecuting Attorney, for Plaintiff–Appellee.

Earl Ingles, pro se.

SUNDERMANN, Judge.

*1 {¶ 1} Defendant-appellant Earl Ingles presents on appeal a single assignment of error, challenging the Hamilton County Common Pleas Court's judgments overruling his Civ.R. 60(B) motions for relief from his judgments of conviction. We do not reach the merits of this challenge because the common pleas court had no jurisdiction to entertain the motions.

{¶ 2} In 1998, following a joint trial on the charges contained in the indictments in the cases numbered B–9800321 and B–9802147, Ingles was convicted upon jury verdicts finding him guilty of five counts of kidnapping, two counts of gross sexual imposition, and a single count of attempted kidnapping. He unsuccessfully challenged his convictions in direct appeals to this court and to the Ohio Supreme Court ^{FN1} and, collaterally, in postconviction motions filed in 2005 in the common pleas court. In February 2009, Ingles again collaterally challenged his convictions, this time in Civ.R. 60(B) motions. The common pleas court overruled the motions, and this appeal followed.

^{FN1}. See *State v. Ingles* (Dec. 3, 1999), 1st Dist. Nos. C–980673 and C–980674, leave to file delayed appeal denied, 99 Ohio St.3d 1539, 2003–Ohio–4671, 795 N.E.2d 679.

{¶ 3} Ingles's 2009 motions sought relief from his convictions “pursuant to Civil Rule 60(B) and

Criminal Rule 57.” But Crim.R. 57(B) instructs a court to “look to the rules of civil procedure” only “if no rule of criminal procedure exists.” Crim.R. 35 governs the proceedings upon a petition under R.C. 2953.21 et seq. for postconviction relief. And R.C. 2953.21 et seq. provide “the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case.” ^{FN2} Therefore, the common pleas court should have recast Ingles's Civ.R. 60(B) motions as postconviction petitions and reviewed them under the standards provided by R.C. 2953.21 et seq. ^{FN3}

FN2. R.C. 2953.21(J).

FN3. See State v. Schlee, 117 Ohio St.3d 153, 2008–Ohio–545, 882 N.E.2d 431, ¶ 12.

{¶ 4} But Ingles filed his motions well after the expiration of the time prescribed by R.C. 2953.21(A)(2). R.C. 2953.23 closely circumscribes the jurisdiction of a common pleas court to entertain a tardy postconviction petition: the petitioner must show either that he was unavoidably prevented from discovering the facts upon which his petition depends, or that his claim is predicated upon a new or retrospectively applicable federal or state right recognized by the United States Supreme Court since the expiration of the time prescribed by R.C. 2953.21(A)(2) or since the filing of his last petition; and he must show “by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found [him] guilty of the offense of which [he] was convicted.”

{¶ 5} Ingles did not demonstrate that he had been unavoidably prevented from discovering the facts upon which his postconviction claims depended. Nor did he predicate his postconviction claims upon a new or retrospectively applicable federal or state right recognized by the United States Supreme Court since the prescribed time had expired. Because Ingles failed to satisfy either the time restrictions of R.C. 2953.21(A)(2) or the jurisdictional requirements of R.C. 2953.23, the common pleas court had no jurisdiction to entertain Ingles's postconviction motions on their merits.

*2 {¶ 6} And because the common pleas court lacked jurisdiction to entertain the motions, the motions were subject to dismissal. Accordingly, upon the authority of App.R. 12(A)(1)(a), we modify the judgments appealed from to reflect a dismissal of the motions. And we affirm the judgments as modified.

Judgments affirmed as modified.

HENDON, J., concurs.

CUNNINGHAM, P.J., concurs in part and dissents in part.

CUNNINGHAM, P.J., concurring in part and dissenting in part.

{¶ 7} I join the majority in affirming as modified the common pleas court's judgments dismissing Ingles's postconviction motions for lack of jurisdiction. But a trial court retains jurisdiction to correct a void judgment.^{FN4} And the sentences imposed for the kidnapping offenses charged in counts one and three of the indictment in the case numbered B-9800321 are void because the trial court lacked the statutory authority to impose them. I would, therefore, vacate those sentences and remand for resentencing.

FN4. See *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 18-19.

{¶ 8} The kidnapping charges in counts one and three of the indictment in the case numbered B-9800321 each carried a sexual-motivation specification and a sexually-violent-predator specification. With respect to each offense, the jury found that Ingles had acted with a sexual motivation, and the trial court found that Ingles was a "sexually violent predator" for purposes of the sentencing-enhancement provisions of R.C. Chapter 2971. Thus, the trial court, pursuant to R.C. 2971.03(A)(3), enhanced Ingles's sentences for the sexually motivated kidnappings, imposing for each offense a prison term of nine years to life, instead of a definite prison term of up to ten years prescribed for first-degree-felony kidnapping.^{FN5}

FN5. See R.C. 2929.14(A)(1).

{¶ 9} R.C. 2971.03, in relevant part, mandates an enhanced sentence upon a guilty verdict or plea on a kidnapping charge if the offender also "is convicted of or pleads guilty to both a sexual motivation specification and a sexually violent predator specification that were included in the * * * count in the indictment * * * charging that offense."^{FN6} In 1998, when Ingles was sentenced, R.C. 2971.01(H)(1) defined a "sexually violent predator" as "a person who *has been convicted of or pleaded guilty to committing*, on or after January 1, 1997, a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses."^{FN7} In 2005, the General Assembly amended the statute to define a "sexually violent predator" as "a person who, on or after January 1, 1997, *commits* a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses."^{FN8} The 2005 amendment was prompted by the Ohio Supreme Court's 2004 decision in State v. Smith.^{FN9}

FN6. R.C. 2971.03(A).

FN7. Emphasis added.

FN8. Emphasis added.

FN9. 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283.

{¶ 10} In *Smith*, the supreme court held that a "[c]onviction of a sexually violent offense cannot support the specification that the offender is a sexually violent predator as defined in R.C. 2971.01(H)

(1) if the conduct leading to the conviction and the * * * specification are charged in the same indictment.” FN10 The court’s holding in *Smith* derived from its reading of R.C. 2971.01(H)(1) to require that a sexually-violent-predator specification be supported by a sexually-violent-offense “conviction * * * that [had] existed prior to the * * * indictment” charging the specification. FN11

FN10. See *id.*, syllabus.

FN11. See *id.* at ¶ 27.

*3 {¶ 11} In the proceedings below, the trial court enhanced Ingles’s sentences for the sexually motivated kidnappings based upon its finding, in support of the accompanying sexually-violent-predator specifications, that Ingles was a “sexually violent predator.” But the court’s finding that Ingles was a “sexually violent predator” was based on the conduct underlying the sexually-violent-offense charges contained in the indictments in the cases numbered B–9800321 and B–9802147. Thus, the court’s finding that Ingles was a “sexually violent predator” was not, as former R.C. 2971.01(H)(1) had required, based on a sexually-violent-offense “conviction * * * that [had] existed prior to the * * * indictment” in the case numbered B–9800321 charging the sexually-violent-predator specifications. Accordingly, R.C. Chapter 2971 did not confer upon the trial court the authority to enhance Ingles’s sentences for the sexually motivated kidnappings.

{¶ 12} The Ohio Supreme Court has long recognized and has recently “reaffirmed [the] vital principle” that “[n]o court has the authority to impose a sentence that is contrary to law.” FN12 And it has “consistently” held that “a sentence that is not in accordance with statutorily mandated terms is void.” FN13 A void sentence “may be reviewed at any time, on direct appeal or by collateral attack.” FN14 This, is a egregious miscarriage of justice. Thus, irrespective of a case’s procedural posture, when a trial court has imposed a sentence that it had no statutory authority to impose, and the matter has come to a court’s attention, the sentence must be vacated, and the defendant must be resentenced. FN15

FN12. *State v. Fischer*, 128 Ohio St.3d 92, 2010–Ohio–6238, 942 N. E.2d 332, ¶ 23 (citing *Colgrove v. Burns* [1964], 175 Ohio St. 437, 438, 195 N.E.2d 811).

FN13. *Id.* at ¶ 8 (citing *Colgrove*, 175 Ohio St. 437, and its progeny).

FN14. See *id.*, paragraph one of the syllabus.

FN15. See *State v. Boswell*, 121 Ohio St.3d 575, 2009–Ohio–1577, 906 N.E.2d 422, ¶ 12; accord *State v. Holcomb*, 184 Ohio App.3d 577, 2009–Ohio–3187, 921 N.E.2d 1077, ¶ 17–20; *State v. Long*, 1st Dist. No. C–100285, 2010–Ohio–6115, ¶ 5.

{¶ 13} R.C. Chapter 2971, as it provided in 1998 when Ingles was sentenced, did not confer upon the trial court the authority to enhance Ingles’s sentences for kidnapping as charged in counts one and three of the indictment in the case numbered B–9800321. Therefore, those sentences are void.

{¶ 14} The Eighth Appellate District concluded to the contrary in addressing a *Smith* claim in its 2006 decision in *State v. Waver*. FN16 Waver had petitioned the court of appeals for a writ of mandamus

“[a]ppeal [would provide] the remedy” for Waver’s *Smith* claim.^{FN17} In so holding, the court concluded that a successful *Smith* claim would not have rendered Waver’s convictions void, because the supreme court in *Smith* had expressly held that “the trial court *erred* in relying on the jury’s convictions of the underlying rape and kidnapping charges to prove the sexually-violent-predator specification alleged in the same indictment.”^{FN18}

FN16. 8th Dist. No. 87495, 2006–Ohio–1743.

FN17. *Id.* at ¶ 4.

FN18. *Smith*, 104 Ohio St.3d 106, at ¶ 33 (quoted and emphasis added in *Waver*, supra, at ¶ 4).

{¶ 15} The *Waver* decision is not controlling on this appellate district. Nor is it persuasive. For the purpose of determining whether a *Smith* error renders a sentence void, we perceive no significance in the supreme court’s use of the word “erred” in declaring its holding. The void-or-voidable issue was not before the supreme court in *Smith* because the case was before the court on direct appeal, requiring no more to “remedy” the sentencing error than to hold that “the trial court erred” and to order that *Smith* be resentenced. But a void-or-voidable inquiry is not superfluous when, as here and in *Waver*, it is undertaken in a collateral proceeding. To the contrary, the determination in a collateral proceeding of whether a sentencing error rendered a sentence void effectively determines whether the court may “remedy” the error at all.^{FN19}

FN19. See *Fischer*, 128 Ohio St.3d at ¶ 40 (holding that “void sentences are not precluded from appellate review by principles of res judicata and may be reviewed at any time, on direct appeal or by collateral attack”).

*4 {¶ 16} Because R.C. Chapter 2971, as it provided when Ingles was sentenced, did not confer upon the trial court the authority to enhance Ingles’s sentences for kidnapping as charged in counts one and three of the indictment in the case numbered B–9800321, the sentences are void. I would, therefore, vacate those sentences and remand for resentencing.

{¶ 17} And because this disposition would conflict with the decision of the Eighth Appellate District in *Waver*, I would, upon the authority conferred by Section 3(B)(4), Article IV, Ohio Constitution, certify to the Ohio Supreme Court the following question: “Is a sentence imposed under former R.C. Chapter 2971 void, when the finding that the offender was a ‘sexually violent predator’ was not, as former R.C. 2971.01(H)(1) had required, based on a sexually-violent-offense conviction that had existed prior to the indictment charging the sexually-violent-predator specification.”

Please Note:

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

Ohio App. 1 Dist., 2011.
State v. Ingles

To The Reviewing Law Clerk:
Supreme Court of Ohio
65 South Front Street 8th Floor
Columbus, Ohio 43215-3431

07-21-11

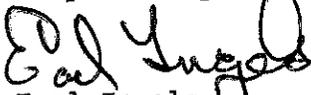
Sir or Madam:

I implore you not to reject the request for **Jurisdiction** just as a matter of fact, reasoning because it came from a Pro Se Litigant before you fully read the appeals courts decision in this matter. Especially the Dissenting part from experienced and unbiased Justice P.J. Cunningham. I would further ask you to review the brief in answer from the Prosecutor, Admitting sarcastically on page 4 paragraph 1 that the Defendant was correct and the sentence was void. Further considering Your own courts decisions in **State v. Smith** as to the enhancement question and your decision in **Fischer** dealing with void sentences plus Ohio Statues and the Courts position on sentences that are Contrary to law. There is also a conflict in the First Districts own ruling in State v. Millow where the court stepped aside from a flawed motion and corrected a void sentence. While they denied this Defendant the same courtesy.

The **Constitutional** question here at hand and the 10,000 lb Elephant in the room that no one wants to address is simple. By the previous Lower Courts Actions does the Ohio Supreme Court and Justice System allow or permit and sanction the Lower Courts allowing them to issue sentences that are Contrary To Ohio Law and a Violation of the Defendants **Constitutional Rights** and in prisoning the Defendant, giving him a void that constitutes a Life in Prison Specification and a Labeling Specification that are contrary to law and contrary to Your Courts Decisions in State v. Smith and State v. Fischer. And many many other case decisions. This sentence also being Contrary to Ohio Law 2953.08 (G) (2) (b) and these are not a subjective opinion, they are written opinions and rules of law.

If this action is to be allowed and endorsed by the Court there is little left for the citizens of Ohio to hope for from the Judicial Branch of Government, except to Pray For God To Have Mercy on The Poor Unsuspecting Citizens of Ohio.

Respectfully Submitted


Earl Ingels

