ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. _____
Plaintiff-Appellee,	:	On Appeal from the Hardin County Court of Appeals Third Appellate District
vs.	:	
JOSEPH HENRY ALLSUP, JR.	:	C.A. Case No. 6-11-09
Defendant-Appellant.	:	

12-083

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JOSEPH HENRY ALLSUP, JR.

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Defendant's sentence of six months for a violation of R.C. 4511.19(G)(1)(b)(i) is outside of the sentencing range for other misdemeanors violating equal protection under the law in Ohio Constitution Art. I, §2 and violating the United States Constitution Amend. VIII, & res judicata should not bar Defendant from arguing that his void sentence should have had a hearing under R.C. 2929.18

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

This case is of public and great general interest and involves a substantial constitutional question because it involves a felony along with the principles that this court should examine whether Ohio sentencing law can have two different misdemeanor sentencing laws, one governing all misdemeanors but a violation of R.C. 4511.19(G)(1)(b)(i), and another governing R.C. 4511.19(G)(1)(b)(i). To have two differing sets of laws for misdemeanors seems to be a violation of equal protection under the law under the Ohio Constitution Article I, §2. This could also be viewd as a violation of Amendment VIII of the United States Constitution which prohibits cruel and unusual punishment. For these constitutional priciples, this Honorable Court should examine this aspect of Ohio sentencing law to see if it conforms with the above principles of the Ohio and United States Constitution.

This case also raises the question of whether this Honorable Court wishes to uphold its caselaw in State v. Simpkins 2008-Ohio-1197, 117 Ohio Ohio St.3d 420, 884 N.E.2d 568 at 575 that res judicata does not prevent resentencing in a void sentence handed down by the court. It is Defendant's constention that his sentence is void because a necessary part of the sentencing hearing, an evaluation of whether Defendant could even pay for court costs, fines, and restitution was never conducted by the trial court. The lower courts are trying to punish the indigent Defendant for the failures of his trial and appellate counsel for not timely raising this issue. As this Honorable Court has said, we would achieve neither fairness nor justice by allowing a void sentence to stand. All the Defendant is asking is that these vital issues be brought forth on appeal so these counstitutional principles that effect the public's trust in the judiciary system of Ohio be debated in a court of law.

STATEMENT OF THE CASE AND THE FACTS

On March 23, 2010, Defendant was convicted of one count of failure to comply with an order or signal of a police officer, a felony of the third degree, one count of felonious assault of a police officer, a felony of the first degree, one count of vandalism, a felony of the fifth degree, and one count of operating a vehicle while under the influence of alcohol, a misdemeanor of the first degree. The trial court on May 10, 2010, sentenced Defendant to three years in prison on count one, seven years in prison on count two, six months in prison on count three, with these three terms to be served consecutively. The trial court also sentenced Defendant to six months in prison on count four to be served consecutively to the six month sentence on count three. In addition, Defendant was ordered to pay court costs, restitution of $1,000 and a $525 fine.

Defendant filed a direct appeal to the Third District Court of Appeals that was denied on January 31, 2011. On September 3, 2011 Defendant filed a motion to vacate restitution and postpone collection of court costs, which was denied on November 18, 2011. Defendant filed an appeal from that judgment which the Court of Appeals denied on April 16, 2012. Defendant appeals this judgment.

Defendant will be making the case that the trial court failed to follow Ohio sentencing guidelines for misdemeanor offenses and chose to sentence Defendant outside of this guideline range of 180 days maximum. Further Defendant will argue that res judicata should not apply to his issue of his trial counsel and appellate counsel failing to argue for a hearing under R.C. 2929.18(E) in order to determine if Defendant has the means to pay for the court costs, fines, and restitution in the case at bar. Defendant contends that since his sentence is void for failing to have this hearing, then this Honorable Court should uphold its previous caselaw and find that res judicata does not lie in the case at bar.

PROPOSITION OF LAW

Defendant's sentence of six months for a violation of R.C. 4511.19(G)(1)(b)(i) is outside of the sentencing range for other misdemeanors violating equal protection under the law in Ohio Constitution Art. I, §2 and violating the United States Constitution Amend. VIII,& res judicata should not bar Defendant from arguing that his void sentence should have had a hearing under R.C. 2929.18(E) to see if he could pay costs & fines.

Defendant's sentence of six months for a violation of R.C. 4511.19(G)(1)(b)(i) is outside of the 180 days for all other misdemeanors in the Ohio sentencing law. To create two different standards of justice, one for all misdemeanors except R.C. 4511.19(G)(1)(b)(i) and one for R.C. 4511.19(G)(1)(b)(i) is a violation of the Ohio Constitution Art. I, §2 which states equal protection under the law is a constitutional right for the citizens of Ohio. This also stands as a violation of the United States Constituiton Amendment VIII which states that cruel and unusual punishment shall not be inflicted upon a defendant.

Defendant urges this Honorable Court to follow its caselaw in State v. Simpkins 2008-Ohio-1197, 117 Ohio St.3d 420, 884 N.E.2d 568 at 575:

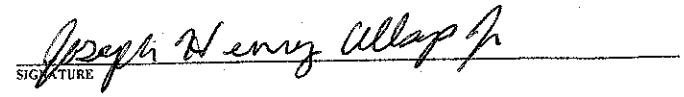
> Res judicata is arule of fundamental and substantial justice, see State v. Szefcyk (1996), 77 Ohio St.3d 93, 95, 671 N.E.2d 233, citing Federated Dept. Stores, Inc. v. Moitie (1981), 452 U.S. 394, 401, 101 S.Ct. 2424, 69 L.Ed.2d 103, that "'is to be applied in particular situations as fairness and justice require, and that *** is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice.'" Grava v. Parkman Twp. (1995), 73 Ohio St.3d 379, 386-387, 653 N.E.2d 226 (Douglas, J., dissenting), quoting 46 American Jurisprudence 2d (1994) 786-787, Judgments, Section 522, and citing Goodson v. McDonough Power Equip., Inc. (1983), 2 Ohio St.3d 193, 202, 2 OBR 732, 443 N.E.2d 978. We would achieve neither fairness nor justice by permitting a void sentence to stand.

Defendant's sentence is void because the required hearing under R.C. 2929.18(E) was not performed to see if Defendant could even pay court costs, fines, and restitution. To penalize the Defendant for the ineffectiveness of his trial and appellate counsel is to deny him due process of law under the Ohio Constitution Art. I, §16 and the United States Constitution Amendment XIV.

For all of the reasons stated above, Defendant requests that he be brought back to the trial court for a resentencing hearing.

CONCLUSION

For all of the reasons stated above, this Honorable Court should grant jurisdiction to hear this appeal.



SIGNATURE

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was forwarded by regular U.S. Mail to Bradford W. Bailey, Prosecuting Attorney, Hardin County, 50 Courthouse One Courthouse Square, Kenton, Ohio 43326, this 7th day of May, 2012.

Joseph Henry Allsup Jr.
SIGNATURE

Joseph Henry Allsup, Jr. #A628337
NAME AND NUMBER

DEFENDANT-APPELLANT, PRO SE

IN THE SUPREME COURT OF OHIO

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	:	Case No. _____
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	:	On Appeal from the Hardin
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	:	Third Appellate District
JOSEPH HENRY ALLSUP, JR.	:	
	:	C.A. Case No. 6-11-09
Defendant-Appellant.	:	

APPENDIX TO

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JOSEPH HENRY ALLSUP, JR.

BE A TRUE COPY OF THE ORIGINAL
Entry FILED IN THIS OFFICE
Carrie L Houdenschield
HARDIN COUNTY CLERK
BY: [illegible]

FILED
HARDIN COUNTY
COURT OF APPEALS
3rd APPELLATE DIST.
APR 16 2012
Carrie L. Houdenschield Clerk
Hardin Co. Court of Appeals

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
HARDIN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 6-11-09**

v.

JOSEPH HENRY ALLSUP, JR., **JUDGMENT ENTRY**

DEFENDANT-APPELLANT.

This appeal, having been placed on the accelerated calendar, is being considered pursuant to App.R. 11.1(E) and Loc.R. 12. This decision is therefore rendered by summary judgment entry, which is only controlling as between the parties to this action and not subject to publication or citation as legal authority under Rule 3 of the Ohio Supreme Court Rules for the Reporting of Decisions.

On March 23, 2010, Appellant was convicted of one count of failure to comply with an order or signal of a police officer, a felony of the third degree, one count of felonious assault of a police officer, a felony of the first degree, one count of vandalism, a felony of the fifth degree, and one count of operating a vehicle while under the influence of alcohol, a misdemeanor of the first degree. The trial court, on May 10, 2010, sentenced Appellant to three years in prison on count one, seven years in prison on count two, six months in prison on count three, with these three terms to be served consecutively. The trial court also sentenced Appellant to

six months in prison on count four to be served consecutive to the six month sentence imposed for count three. In addition, Appellant was ordered to pay court costs, restitution in the amount of $1,000 and a fine of $525.

Appellant filed a direct appeal to this court. The appeal was overruled on January 31, 2011. On September 3, 2010, Appellant filed a motion to vacate restitution and postpone collection of court costs. The motion was denied by the trial court on November 18, 2011. Appellant files this appeal from that judgment and raises the following assignments of error.

First Assignment of Error

> **The trial court erred to the prejudice of [Appellant] by sentencing him to a void sentence outside the statutory guidelines for misdemeanor sentencing in violation of R.C. 2929.24, thus denying [Appellant] due process of law and equal protection under the law in violation of the Ohio Constitution Art. I, §§ 16 & 2; and the United States Constitution Amendment XIV.**

Second Assignment of Error

> **The trial court erred to the prejudice of [Appellant] by failing to hold a hearing pursuant to R.C. 2929.18(E) to determine if [Appellant] was able to pay a financial sanction or would be likely to pay in the future, thus denying [Appellant] due process of law and equal protection under the law in violation of the Ohio Constitution Art. I, §§ 16 & 2; and the United States Constitution Amendment XIV.**

The first assignment of error is overruled. R.C. 4511.19(G)(1)(b)(i) provides as follows.

> **If the sentence is being imposed for a violation of division (A)(1)(a) * * * of this section, a mandatory jail term of ten consecutive days. * * * The court may impose a jail term in addition to the ten-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.**

The jail term in this case does not exceed the six month maximum. In addition, it was ordered to be served concurrently with a fifth degree felony sentence of six months. Thus, there is no error and the first assignment of error is overruled.

In the second assignment of error, Appellant claims that the trial court erred in imposing restitution and fines without first holding a hearing determining his ability to pay. This court notes that Appellant had a direct appeal and did not raise these arguments at that time. "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, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of syllabus. This court has previously held that failing to raise the ability to pay fines and restitution on direct appeal bars a defendant from raising the issues in a subsequent motion to vacate the financial sanctions. *State v. Brady*, 3d Dist. No. 9-04-33, 2004-Ohio-6490. Since Appellant did not raise this issue

during his direct appeal, he is prohibited by the doctrine of res judicata from doing so now. Therefore, the second assignment of error is overruled.

Accordingly, for the aforementioned reasons, it is the order of this Court that the Judgment Entry of the Court of Common Pleas of Hardin County be, and hereby is, affirmed. Costs are assessed to Appellant for which judgment is hereby rendered. This cause is remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this judgment entry to the trial court as the mandate prescribed by App.R. 27, and serve a copy of this judgment entry on each party to the proceedings and note the date of service in the docket as prescribed by App.R. 30.

JUDGES

DATED: April 16, 2012
/jlr