

IN THE SUPREME COURT OF OHIO

12-1965

**STATE OF OHIO,
Appellee,**

**On Appeal from the Morrow
Court Of Appeals, Fifth
Appellate District**

**JOHN W. HESS, JR.,
Appellant.**

**Court of Appeals
Case No. 11-CA-11**

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT JOHN W. HESS, JR.**

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PROPOSITIONS OF LAW TO BE REVIEWED CONCURRENTLY

Proposition #1:

Whether a sentence remains void, even when remanded and resentenced to the same original sentence and then resentencing court-appointed counsel fails to object or file timely appeal?

Proposition #2:

Whether law-of-the-case doctrine establishes the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both trial and reviewing levels?

Proposition #3:

Whether an inferior court has any discretion to disregard the mandate of a superior court in a prior appeal in the same case?

Proposition #4:

Whether a Defendant can be denied Due Process and Equal Protection of Laws at any level when he has never had a valid sentence according to the law-of-the-case doctrine and then such denial ends with wrongful imprisonment?

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

This case is of great general interest and involves a substantial constitutional question because it involves a felony and has violated the Rights of the Appellant, and has the tendency of violating others Ohio and United States Constitutional rights to **Due Process and Equal Protection of the law. Ohio Const. Article I, Sections 2, 4, 10, 16; Article IV, section 4; United States Const. Amd[s] 4, 5, 6, and 14.**

The question presented to this Honorable Court is: **Can a trial and reviewing court ignore a *void sentence and allow wrongful imprisonment to take place by not correcting according to the law-of-the-case doctrine?***

The law of the case doctrine establishes the “**decision of a reviewing court in a case remains the law of that case at both the trial and reviewing levels.**” **Pipe Fitters Union Local No. 392 v. Kokosing Constr. Co., Inc., 81 Ohio St.3d 214,218, 690 N.E.2d 515 (1998), quoting Nolan v. Nolan, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984).** “[A]n inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.” **Nolan, @ syllabus.** In reviewing the case law in **State v. Thomas, 3rd Dist. No. 1-04-88, 2005-Ohio-4616, a court must consider the court in State v. Fischer, 128 Ohio St. 3d 92, 2010-Ohio-6238.**

Mr. Hess is being denied meaningful review of the issues presented herein by the courts' failure to *correct* and give him a *valid* sentence. They have stated that Hess's Motion to Vacate Void Sentence attempts to re-raise the same issues as previously reviewed and is merely a collateral attack on the trial court's resentencing. Hess states that motion to correct an illegal sentence presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence. ***It is, however, an appropriate vehicle for raising the claim that a sentence is facially illegal at any time.***

A *void* sentence is defined according to State v. Fischer, 128 Ohio St. 3d 92, 2010-Ohio-6238 at ¶ 8 as “a sentence that is not in accordance with statutorily mandated terms is void.” Citing to State v. Jordan, 104 Ohio St. 3d 21, 2004-Ohio-6085, 817 N.E. 2d 864; State v. Beasley 14 Ohio St. 3d, 14 OBR 511, 471 N.E. 2d 774; Colegrove v. Burns (1964), 175 Ohio St. 437, 25 O.O. 2d 447, 195 N.E. 2d 811; Woods v. Telb (2000), 89 Ohio St. 3d 504, 733 N.E. 2d 1103. And such a sentence may be reviewed at any time, regardless of other procedures claims.

Fischer at ¶ 9 further said: “ Although our case law is rooted in cases that lacked subject matter jurisdiction, it evolved beyond those roots over the years. By the time we decided *Beasley*, it had developed into the principle that

“[a]ny attempt by a court to disregard statutory requirements renders the attempted sentence a nullity or void.” Id., 14 Ohio St. 3d at 75, 14 OBR 511, 471 N.E. 2d 774.

As it currently stands, according the law-of-the-case doctrine, Hess has not had a valid sentence since his conviction and currently is serving a term of wrongful imprisonment being that the only sentence that can be allowed to stand is the one year mandatory given already and in accord with statute and caselaw. It is in the interest of justice that Hess’s case be reviewed without further delay.

STATEMENT OF THE CASE AND FACTS

This Case is presented after Defendant-Appellant John W. Hess, Jr. appealed the October 12, 2011 judgment entry entered by the Morrow County Court of Common Pleas denying Hess’s Motion to Vacate His Void Sentence. Plaintiff-Appellee is the State of Ohio.

On September 22, 2009, Hess was found guilty by a jury of gross sexual imposition, in violation of R.C. 2907.05(A)(4), a felony of the third degree, and disseminating matter harmful to juveniles, in violation of R.C. 2907.31(A)(1), a first-degree misdemeanor. Via judgment entry of December 17, 2009, the trial court sentenced Hess to four years in prison on the gross sexual imposition charge with one year mandatory. The trial court further ordered Hess to serve six months in the jail and pay a fine of \$1,000 on the dissemination charge. Hess appealed his

conviction and sentence to the Fifth District Court of Appeal for Morrow County in *State v. Hess*, 5th Dist. No. 2009CA0016, 2010-Ohio-3692 (“*Hess I*”). The appeal court affirmed Hess’s conviction.

It was the State, however, that appealed Hess’s sentence in *State v. Hess*, 5th Dist. No. 2009CA0015, 2010-Ohio-3695 (“*Hess II*”). In *Hess II*, the appellate court applied the holding in *State v. Thomas*, 3rd Dist. No. 1-04-88, 2005-Ohio-4616, to conclude that trial court was required to impose a mandatory prison term for the entire length of the sentence prescribed and not create a “hybrid” sentence. The appeals court remanded the case to the trial court for resentencing in according with their July 29, 2010 Opinion.

While Hess’s resentencing, pursuant *Hess II* was pending before the trial court *some sixty days later*, the appeals court addressed what they called a similar sentencing issue in the case of *State v. May*, 5th Dist. No. 2010CA2, 2010-Ohio-4625, issued September 27, 2010. In that case, the Morrow County Court of Common Pleas issued a sentence for aggravated vehicular assault, a third degree felony, with only a portion of the term being mandatory. The State appealed the sentence. Upon further analysis, the appeal court declined to adopt the previous rationale of *Hess II*. Instead, the appeal court held the trial court did not abuse its discretion in imposing a one-year “mandatory” term, even though the “stated term” was order to be two years. **Id. @ ¶18-19.**

In the case sub judice, the trial court held a resentencing hearing on December 27, 2010, although the trial court originally had scheduled the resentencing hearing for November 19, 2010. The Sheriff never conveyed Hess for the November 19, 2010 hearing date even though the court issued warrant to convey. Finally when the trial court did resentence Hess on December 27, 2010, the court for some reason did not enter the judgment until March 2, 2011, over sixty (60) days after the sentencing hearing. This entry was not sent to Hess, but secretly entered and accompanied by the statement that the trial court relied upon the appeal's court intervening decision in *State v. May*, rather than *Hess II*, and *reimposed* the sentence adopted at the original sentencing hearing on November 20, 2009. Hess was again sentenced to a stated term of four-year prison term with only one year being *mandatory*.

Though Hess was taken finally for resentencing December 27, 2010, *judgment entry was not issued until March 2, 2011*. Hess did not appeal the March 2, 2011, judgment entry, **nor did he even have knowledge that it was entered being that he nor his counsel was never served.**

On September 22, 2011, Hess filed a Motion to Vacate Void Sentence. The trial court denied the motion on October 12, 2011. Hess appealed following that judgment entry back to the Fifth District Court of Appeals. The Fifth District Court of Appeals dismissed Hess's appeal stating that, “ **...Appellant failed to timely**

appeal the trial's court's March 2, 2011 resentencing entry. Had he done so, this Court likely would have reversed based upon the law of the case analysis..." Hess , No. 11-CA-11 @ ¶20. It is from that judgment that Hess seeks review and asks that this Honorable Court accept jurisdiction.

PROPOSITIONS OF LAW TO BE REVIEWED CONCURRENTLY

Proposition #1:

Whether a sentence remains void, even when remanded and resentenced to the same original sentence and then resentencing court-appointed counsel fails to object or file timely appeal?

Proposition #2:

Whether law-of-the-case doctrine establishes the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both trial and reviewing levels?

Proposition #3:

Whether an inferior court has any discretion to disregard the mandate of a superior court in a prior appeal in the same case?

Proposition #4:

Whether a Defendant can be denied Due Process and Equal Protection of Laws at any level when he has never had a valid sentence according to the law-of-the-case doctrine and then such denial ends with wrongful imprisonment?

In general, a void judgment is one that has been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act.

Unlike a void judgment, a voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but the court's judgment is invalid, irregular, or erroneous. *State of Ohio v. Fischer* (No.2009-897), 128 Ohio

St. 3d 92, 2010 Ohio 6238, 942 N.E. 2d 332, 2010 Ohio Lexis 3184 @

HN 1.

Ohio law has consistently recognized a narrow, and imperative, exception to that general rule that sentencing errors were not jurisdictional and did not render a sentence void: a sentence that is not in accordance with statutorily mandated terms is void. Any attempts by a court to disregard statutory requirements renders the attempted sentence a nullity or void. Id.

@ HN 2. And in any event, Ohio courts have not so severely limited the notion of void judgments to only those judgments that arise from

jurisdictional cases. Id. @ HN 4.

Judges have no inherent power to create sentences. Rather, judges are duty-bound to apply sentencing laws as they are written. The only sentence that a trial court may impose is that provided for by statute. A court has no power to substitute a different sentence for that provided for by statute or one that is either greater or lesser than that provided by law. The failure to

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impose a statutorily mandated [sentence, renders that portion of the sentence not statutorily mandated, void]. **Id. @ HN 5.**

No court has the authority to impose a sentence that is contrary to law. The sentencing judge was supposed to have conformed to the Ohio General Assembly's mandate in sentencing *Hess*, in accord with the statute and ruling case at the time; **Hess II. (See *State v. Hess*, Morrow County App. No. 2009CA0015, 2010-Ohio-3695, in which the court applied the holding in *State v. Thomas*, Allen App. No. 1-04-88, 2005-Ohio-4616, (to conclude the trial court was required to impose a mandatory prison term for the entire length of the sentence prescribed and not create a "hybrid sentence" Id. @ ¶32)**

A motion to correct an illegal sentence presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence. *It is, however, an appropriate vehicle for raising the claim that a sentence is facially illegal at any time.* The scope of relief based on a rule, like **Fed. R. Crim. P. 35**, is likewise constrained to the narrow function of correcting only the illegal sentence. It does not permit reexamination of all perceived errors at trial or in other proceedings prior to sentencing. **Id. @ HN 7.**

R.C. 2953.08(G)(2)(b) permits an appellate court, upon finding that a sentence is clearly and convincingly contrary to law, to remand for resentencing. But a remand is just one arrow in the quiver. R.C.

2953.08(G)(2) also provides that an appellate court may increase, reduce or otherwise modify a sentence or may vacate the sentence and remand the matter to the sentencing court for resentencing. Correcting a defect in a sentence without a remand is an option that has been used in Ohio and elsewhere for years in cases in which the original sentencing court had no sentencing discretion. Id. @ HN 10. Either time *Hess* was being reviewed by the appellate court, the court could have *corrected the defect without* a remand. Certainly after remanding back the first time to the trial court and then *Hess returned with the same sentence*, it was the appellate court's ultimate duty to correct the defect; *the sentence remained void* as the trial court showed no judicial discretion to obey the *remand* order. How then can the appellate court as *Hess* now returns state that they would have reversed, had he appealed within 30 days. *Void sentences are not precluded from appellate review by principles of res judicata and may be reviewed at any time.* Id. @ HN 11& 17.

In further reference to *Hess*, the law-of-the-case doctrine provides that the decision of reviewing court in a case remains the law of that case on the

legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. It precludes a litigant from attempting to rely on arguments at a retrial [proceedings], which, were fully pursued or available to be pursued, in the first appeal. New arguments are subject to issue preclusion and are barred. **Id. @ HN 12.**

The law-of-the-case doctrine is rooted in principles of res judicata and issue preclusion, and this Court has expressly disfavored applying res judicata to sentences that do not conform to statutory mandates. This Court also rejects the application of issue preclusion to sentences that do not comply with statutory mandates, as such sentences are illegal and subject to collateral attack or direct appeal by any party. **Id. @ HN 13.**

The truth is that under the law-of-the-case doctrine **Hess has never had a valid sentence** because his original sentence was void. The appeals court remanded because of the void sentence and the trial court abused its discretion and gave *Hess* the *same void sentence* at his resentencing hearing, claiming the case of May that was decided after Hess II. **Therefore Hess remains without a valid sentence.**

The Court of Appeals for Morrow County Fifth Appellate District **agrees at ¶16-20 of their July 02, 2012 Opinion, Case No. 11-CA-11,** that

“{¶16} While the Hess case was pending in the trial court for resentencing, this Court decided *State v. May*, 5th Dist. No. 2010CA2, 2010-Ohio-4625. *May* declined to adopt the rationale of *Hess II* and found a hybrid sentence was permitted under Ohio sentencing laws. On March 2, 2011, the trial court applied *May* to *Hess*’s resentencing and resentedenced Hess to his original sentence.

{¶17} We find the trial court’s application of *May* to *Hess*’s resentencing violates of the law of the case doctrine.

{¶18} The law of the case doctrine establishes the ‘decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both trial and reviewing levels.’ *Pipe Fitters Union Local No. 392 v. Kokosing Constr. Co., Inc.*, 81 Ohio St.3d 214, 218, 690 N.E.2d 515 (1998), quoting *Nolan v Nolan*, 11 Ohio St.3d 1,3, 462 N.E.2d 410(1984). ‘[A]n inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.’ *Nolan*, at syllabus.

{¶19} The decision rendered in *Hess II* resolved the legal questions for the subsequent resentencing. It was error for the trial court to apply *May* to the resentencing of Hess rather than to follow the law of the case of *Hess II*.

{¶20} That being said, Appellant failed to timely appeal the trial court's March 2, 2011 resentencing entry. Had he done so, this Court likely would have reversed based upon a law of the case analysis discussed supra. We find Appellant's subsequent Motion to Vacate Sentence which attempts to re-raise the same issues as previously reviewed is merely a collateral attack on the trial court's march 2, 2011 resentencing. Having not timely appealed that judgment, and finding nothing in the resentencing entry which would serve to render it void, we dismissed Appellant's instant appeal." Hess (Case No.11-CA-11) @ ¶¶16-20.

It then is clear of the error of the trial court in the case at bar. It should be equally clear that the issue presented for review in the case of Hess II was the issue of Hess's original sentence being void. The resentencing court resentedenced Hess to his original sentence, therefore, due to the law-of-the-case doctrine; Hess's sentence remains void. Being that he sentence is still void; he does not yet have a valid sentence. Being that he sentence his sentence is still void, "It is, however an appropriate vehicle for raising the claim that a sentence is facially illegal at any time." State of Ohio v. Fischer, Id. @ HN 7; See also State v. Holcomb, 9th Dist. No. 24287, 2009-Ohio-3187 (As it is also considered a presentence motion rather than

be reclassified as a post conviction petition) Therefore, *it does not matter* whether Hess's Counsel or Hess himself filed a timely appeal, *because a void sentence can be address at any time.* It also should be noted that the trial court *purposely delayed* Hess resentencing until *after May* was decided, as the docket will show where Hess was scheduled and his counsel was awaiting his arrival, yet the sheriff purposely failed to convey Hess for his original resentencing hearing. But not for this delay, Hess was have already been sentenced before May was decided, which would have eliminated this litigation and the violation of Hess Due Process right to being sentenced without unnecessary delay.

Furthermore, the application of the law-of-the-case doctrine, *if not applied* would lead to unjust results. Even wrongful incarceration for any period Hess has served or will serve beyond the one (1) year mandatory given in accord with the mandated statutory language and ruling in the court of *Hess II*. Then because Mr. Hess's first appeal was invalid as it stemmed from a void sentence, *there is actually* no law of the case to apply. The court of appeals *lacked jurisdiction* to review Mr. Hess's sentence in the first place, because there was no final, appealable order. **Therefore, this Court must review Mr. Hess's sentence as he remains without a *complete* valid sentence and any portion that is void causes Hess to serve a period of**

wrongful imprisonment, even to warrant his immediate release. The *one (1) year mandatory* is the *only part* of his sentence that is *valid* and in accord of the law-of-the-case doctrine in the case of Hess. (See this Court in *State v. Fischer*, 128 Ohio St. 3d 92, 2010 Ohio 6238, 942 N.E.2d 332)

When a sentence is void, there is no reasonable, legitimate expectation of finality. *Simpkins*, @ ¶36, citing *United States v. Crawford* (C.A. 5 1985), 769 F.2d 253, 257-58, *Jones v. Thomas* (1989), 491 U.S. 376, 395. Because *a portion* of the sentence lacks statutory authority when viewed in accord with the law-of-the-case doctrine and is invalid, no expectation of finality triggers double jeopardy or due process protections. *Jordan*, @ ¶25, citing *Beasley*, @ 75. The law-of-the-case doctrine is a practice rule designed to protect against endless litigation. *Hopkins*, @ ¶15. Because the doctrine exists to protect cases from being litigated again and again, *it relies on a presumption of finality. Fischer, supra.*

In any state, even Mr. Hess's first appeal had no finality. Because his original "sentence" was void, no expectation of finality attached to it. Likewise, the court of appeals lacked jurisdiction to review his case. The lack of finality bled from Mr. Hess's void sentence into his appeal, rendering it invalid. Though the law-of-the-case doctrine at the time Hess was sentenced, it applies to his case, and not the case of *May*.

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CONCLUSION

Hess continues to this day with a void sentence and has never had a valid one since his conviction. Since Hess has been under the trial court twice and under the appellate court twice, both having the authority to resentence him in accord with the caselaw relevant to his case, this Honorable Court now must take jurisdiction resentencing Hess to the only applicable sentence. The term of one (1) year mandatory and void out the three years that was not mandatory to avoid double jeopardy. The one-year mandatory sentence is the only portion of the sentence is compliance with the caselaw at the time of Hess's original sentence. Any further litigation and scheduled time for resentencing etc. continues to violate due process of law and further injury Hess's already wrongful imprisonment beyond the one (1) year. This Court must accept jurisdiction of this case in the interest of justice.

Respectfully submitted,

John W. Hess, Jr.

John W. Hess, Jr. (#A617963)
Appellant, Pro se

CERTIFICATE OF SERVICE

I certify that a copy of the Memorandum In Support was sent by regular U.S. mail addressed to the Morrow County Prosecutor, Counsel for the Appellee at **60 E. High Street, Mt. Gilead, Ohio 43338** on this 16 day of November 2012.

John W. Hess Jr.

**John W. Hess, Jr. (#A617963)
Appellant, Pro se**

APPX.
"A"

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JOHN W. HESS, JR.

Defendant-Appellant

JUDGES:

Hon. Patricia A. Delaney, P.J.

Hon. William B. Hoffman, J.

Hon. Sheila G. Farmer, J.

Case No. 11-CA-11

OPINION

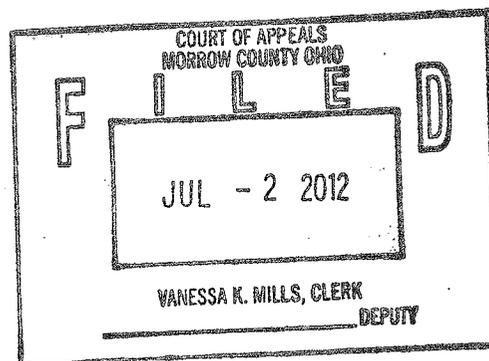
CHARACTER OF PROCEEDING:

Appeal from the Morrow County Court of
Common Pleas, Case No. 2009CR0019

JUDGMENT:

DISMISSED

DATE OF JUDGMENT ENTRY:



APPEARANCES:

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Hoffman, J.

{¶1} Defendant-Appellant John W. Hess, Jr. appeals the October 12, 2011 judgment entry entered by the Morrow County Court of Common Pleas denying Hess's Motion to Vacate Void Sentence. Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE CASE¹

{¶2} On September 22, 2009, Hess was found guilty by a jury of gross sexual imposition, in violation of R.C. 2907.05(A)(4), a felony of the third degree, and disseminating matter harmful to juveniles, in violation of R.C. 2907.31(A)(1), a first degree misdemeanor. The trial court classified Hess as a Tier III sex offender.

{¶3} Via judgment entry of December 17, 2009, the trial court sentenced Hess to four years in prison on the gross sexual imposition charge with one year mandatory. The trial court further ordered Hess to serve six months in jail and pay a fine of \$1,000 on the dissemination charge.

{¶4} Hess appealed his conviction and sentence to this Court in *State v. Hess*, 5th Dist. No. 2009CA0016, 2010-Ohio-3692 ("*Hess I*"). We affirmed Hess's conviction.

{¶5} The State, however, appealed Hess's sentence in *State v. Hess*, 5th Dist. No. 2009CA0015, 2010-Ohio-3695 ("*Hess II*"). In *Hess II*, we applied the holding in *State v. Thomas*, 3rd Dist. No. 1-04-88, 2005-Ohio-4616, to conclude the trial court was required to impose a mandatory prison term for the entire length of the sentence prescribed and not create a "hybrid" sentence. We remanded the case to the trial court for resentencing in accordance with our Opinion.

¹ The underlying facts are unnecessary for the disposition of this appeal.

{¶6} While Hess's resentencing pursuant to *Hess II* was pending before the trial court, this Court addressed a similar sentencing issue in *State v. May*, 5th Dist. No. 2010CA2, 2010-Ohio-4625, issued September 27, 2010. In that case, the Morrow County Court of Common Pleas issued a sentence for aggravated vehicular assault, a third degree felony, with only a portion of the term being mandatory. The State appealed the sentence. Upon further analysis, this Court declined to adopt the previous rationale of *Hess II*. Instead, this Court held the trial court did not abuse its discretion in imposing a one-year "mandatory" term, even though the "stated term" was ordered to be two years. *Id.* at ¶ 18-19.

{¶7} In the case sub judice, the trial court held a resentencing hearing on December 27, 2010. By judgment entry issued March 2, 2011, the trial court relied upon this Court's intervening decision in *State v. May*, rather than *Hess II*, and reimposed the sentence adopted at the original sentencing hearing on November 20, 2009. Hess was again sentenced to a stated term of four year prison term with only one year being mandatory.

{¶8} Hess did not appeal the March 2, 2011 judgment entry.

{¶9} Hess filed motions for judicial release on May 17, 2011 and August 19, 2011. The trial court denied the motions because Hess is not an eligible offender.

{¶10} On September 22, 2011, Hess filed a Motion to Vacate Void Sentence. The trial court denied the motion on October 12, 2011.

{¶11} It is from that decision Hess now appeals, raising the following assignment of error:

{¶12} “THE TRIAL COURT VIOLATED DUE PROCESS AND EQUAL PROTECTION OF LAW. OHIO CONST. ARTICLE I, SECTIONS 2, 4, 10, 16; ARTICLE IV, SECTION 4; UNITED STATES CONST. AMENDMENTS 4, 5, 6, AND 14.”

{¶13} Hess argues in his pro se appeal the March 2, 2011, resentencing is void. Specifically, he challenges the validity of the four year stated term of his sentence but not the one year mandatory term.

{¶14} As stated supra, Hess was convicted of gross sexual imposition, in violation of R.C. 2907.05(A)(4), a felony of the third degree. The trial court sentenced Hess to a four year prison term with one year mandatory. The State appealed the sentence. The State argued pursuant to R.C. 2929.14 and R.C. 2907.05(C)(2), the trial court was required to chose a prison term from the range prescribed and the prison term was mandatory for the full length of the sentence imposed. We agreed.

{¶15} In *Hess II*, we applied the holding of *State v. Thomas*, 3rd Dist. No. 1-04-88, 2005-Ohio-4616, to conclude the trial court was required to impose a mandatory prison term for the full length of the sentence prescribed and not create a “hybrid sentence.” *Id.* at 18-20. We reversed Hess’s sentence and remanded the case to the trial court for resentencing. We stated, “the trial court in the case sub judice was required to impose a mandatory prison term for the entire length of the sentence prescribed. The statutory requirement the court impose a definite prison term from one of the prison terms prescribed does not allow the trial court to create a hybrid sentence.” *Id.* at 21.

{¶16} While the Hess case was pending in the trial court for resentencing, this Court decided *State v. May*, 5th Dist. No. 2010CA2, 2010-Ohio-4625. *May* declined to adopt the rationale of *Hess II* and found a hybrid sentence was permitted under Ohio sentencing laws. On March 2, 2011, the trial court applied *May* to Hess's resentencing and resentedenced Hess to his original sentence.

{¶17} We find the trial court's application of *May* to Hess's resentencing violates of the law of the case doctrine.

{¶18} The law of the case doctrine establishes the "decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Pipe Fitters Union Local No. 392 v. Kokosing Constr. Co., Inc.*, 81 Ohio St.3d 214, 218, 690 N.E.2d 515 (1998), quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). "[A]n inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *Nolan*, at syllabus.

{¶19} The decision rendered in *Hess II* resolved the legal questions for the subsequent resentencing. It was error for the trial court to apply *May* to the resentencing of Hess rather than to follow the law of the case of *Hess II*.

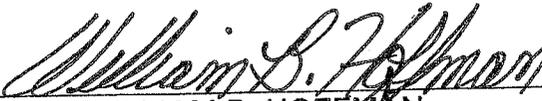
{¶20} That being said, Appellant failed to timely appeal the trial court's March 2, 2011 resentencing entry. Had he done so, this Court likely would have reversed based upon a law of the case analysis discussed supra. We find Appellant's subsequent Motion to Vacate Void Sentence which attempts to re-raise the same issues as previously reviewed is merely a collateral attack on the trial court's March 2, 2011 resentencing. Having not timely appealed that judgment, and finding nothing in

the resentencing entry which would serve to render it void, we dismiss Appellant's instant appeal.

By: Hoffman, J.

Farmer, J. concurs,

Delaney, P.J dissents



HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY



HON. SHEILA G. FARMER

Delaney, P.J., dissenting.

{¶21} I respectfully dissent from the majority opinion.

{¶22} I would overrule Hess's sole Assignment of Error based on the trial court's application of *State v. May*, 5th Dist. No. 2010CA2, 2010-Ohio-4625, and affirm the trial court's resentencing entry and denial of Hess's motion to vacate a void sentence.

{¶23} Where a trial court fails to impose a sentence in accordance with statutorily mandated terms, it is void. *State v. Harris*, -- Ohio St.3d --, 2012-Ohio-1908, -- N.E.2d --, ¶ 7 citing *Colegrove v. Burns*, 175 Ohio St. 437, 438, 195 N.E.2d 811 (1964); *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 8. In this case, the trial court imposed Hess's original sentence in accordance with statutorily mandated terms as established by this Court in the intervening case of *State v. May*, 5th Dist. No. 2010CA2, 2010-Ohio-4625.

{¶24} We stated in *State v. May*:

We recognize that subsequent to the filing of the briefs in this matter, this Court decided *State v. Hess*, Morrow App. No.2009CA0015, 2010-Ohio-3695, in which we applied the holding of *State v. Thomas*, Allen App.No. 1-04-88, 2005-Ohio-4616, to conclude the trial court was required to impose a mandatory prison term for the entire length of the sentence prescribed and not create a "hybrid sentence." *Id.* at ¶ 32. However, the Generally Assembly has not specifically disallowed the type of partially mandatory sentence crafted by the trial court in the case sub judice, and, as R.C. 2929.01(FF) and R.C. 2929.20(C)(2) indicate, a

“stated term” is not necessarily synonymous with a “mandatory term.” It is well-established that the sentencing provisions set forth in the Revised Code are to be strictly construed against the state and liberally construed in favor of the accused. See, e.g., *State v. Fanti*, 147 Ohio App.3d 27, 30, 768 N.E.2d 718, 2001-Ohio-7028; R.C. 2901.04(A).

Accordingly, we decline to herein adopt our previous rationale in *Hess*. We find the trial court acted within its discretion in imposing a one-year “mandatory” term, which comports with R.C. 2903.08(D)(1) and is within the range of penalties for a third-degree felony, even though the “stated term” was ordered to be two years.

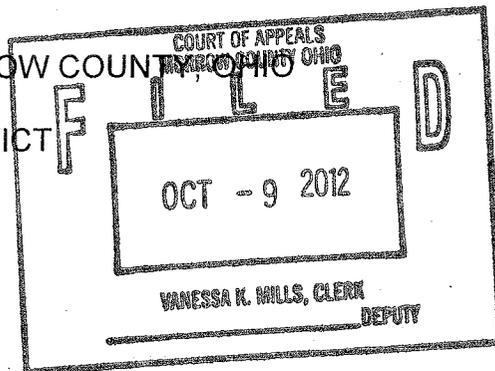
State v. May, supra, at ¶¶18-19.

{¶25} While not explicitly stated, I would find *State v. May* abrogated *Hess II*. This District has followed *State v. May* in *State v. Thompson*, 5th Dist. No. 10CAA020014, 2010-Ohio-5449 and *State v. Martin*, 5th Dist. No. 2011-CA-81, 2012-Ohio-1405. I reconsider my prior position in *Hess II* based on the analysis set forth in *State v. May, supra*, as have Judge Edwards and Judge Hoffman in *State v. May, supra* and *State v. Thompson, supra*, respectively.

{¶26} The trial court must sentence a defendant pursuant to Ohio sentencing laws. This Court decided *State v. May* on September 27, 2010, while the resentencing in the present case was pending before the trial court. *Hess* was resentenced on March 2, 2011 after our decision in *State v. May*. At the time of resentencing, this Court interpreted Ohio sentencing laws to permit a hybrid sentence. We find no error

APPX.
"B"

IN THE COURT OF APPEALS FOR MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT



STATE OF OHIO

Plaintiff-Appellee

-vs-

JOHN W. HESS, JR.

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2011 CA0011

This matter came before the Court on defendant-appellant John W. Hess's Motion for Reconsider Pursuant to App. R. 26(A). Appellant move this Court, pursuant to App. R. 26(A), to reconsider our recent decision in *State v. Hess*, 5thDist. App. No. 11-COA-011, 2012-Ohio-3090. Therein, we affirmed the trial court's denial of his motion to vacate void sentence.

In considering an application for reconsideration, the proper standard for our review is whether the application "calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, 523 N.E.2d 515, citing *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 5 OBR 320, 450 N.E.2d 278. However, "[a]n application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *State v. Owens* (1997), 112 Ohio App.3d 334, 336, 678 N.E.2d 956, dismissed, appeal not allowed, 77 Ohio St.3d 1487, 673 N.E.2d 140.

Appellant bases his application for reconsideration on allegations this Court failed to consider the ineffectiveness of trial counsel appointed for resentencing. We find such is not appropriate in an application for reconsideration. Upon review of our prior decision, we find no obvious errors nor do we find we failed to consider or fully consider all of Appellant's arguments.

Because Appellant has not called our attention to any obvious error in our decision or presented a compelling argument we failed to consider any of the issues herein, we overrule the motion for reconsideration.

IT IS SO ORDERED.


HON. WILLIAM B. HOFFMAN


HON. SHEILA G. FARMER

WBH/ag 9/24/12