

IN THE SUPREME COURT OF OHIO

13-0412

STATE OF OHIO
Appellee

On Appeal from the Summit
County Court of Appeals,
Ninth Appellate District

v.

Court of Appeals Case
No. 26750

MARCEL A. MORALES
Appellant

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, MARCEL A. MORALES

Marcel A. Morales
Prison No.490-268
Grafton Correctional Inst.
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Grafton, Ohio 44044

Appellant, pro se

Summit County Prosecutor

Sheri Belvin Walsh
53 University Avenue
Akron, Ohio 44308

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SUPREME COURT OF OHIO

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FIRST PROPOSITION OF LAW

When a defendant files a motion for resentencing
in the context of a post release control error
proceeding, the motion must still be reclassified
by a trial court as a petition for post convic-
tion relief and the trial court must ignore
the 180-day time limit prescribed in the statute.
A trial court must follow this Court's holding
in Bush and Reynolds because a trial court
has inherent authority and power to vacate
a void judgment or sentence which is codified
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Judgment Entry by Summit County Court of Appeals,
Ninth District, dismissal in CA No.26750, Time
Stamped January 30, 2013A-1

Judgment Entry of Resentencing in Summit County
Court of Common Pleas, Time Stamped February 22,
2011 but certified as received by Appellant on
December 18, 2012 as provided by the appearance
docket attached to the Notice of Appeal as req-
uired by Ninth District Loc.R.1.2A-2

MEMORANDUM IN SUPPORT OF JURISDICTION
AND EXPLANATION OF WHY LEAVE TO APPEAL
SHOULD BE GRANTED IN THIS FELONY CASE

This case involves a matter of procedure where the favorable outcome of this case and many others hinges on this Court's establishment of a precedent regarding whether a resentencing hearing based upon post release control error is considered to be a post conviction proceeding "governed by the Ohio Rules of Appellate Procedure as applicable to civil actions." State v. Nichols (1984), 11 Ohio St.3d 40, 463 N.E.2d 375, at ¶2 of the syllabus.

Leave to appeal should be granted in this felony case. Whereas, a lack of precedent by this Court regarding whether a notice of appeal from (or appeal from) a post release control resentencing hearing is an appeal from a post conviction proceeding is counter productive to this Court's holding in State v. Bush, 2002-Ohio-3993, P10, and, State v. Reynolds, 1997-Ohio-304, requiring trial court's to reclassify "no name" Motions to Correct or Vacate Sentence as post conviction petitions. Bush at P10. That is, while at the same time the Ninth District Court of Appeals continues to hold in State v. Holcomb, 2009-Ohio-3187, that these "no name" Motions to Correct [Resentence] or Vacate Sentence "should not be reclassified as post conviction petitions." Holcomb, at P19. In other words, Appellant's Notice of Appeal to the Ninth District Court of Appeals was an appeal from a post release control resentencing hearing and Appellant specifically alleged in his notice of appeal and the attached certified appearance docket unequivocally demonstrates along with the attached certified transcript of the proceeding, that,

Appellant was not served with notice of the judgment and its date of entry on the journal. But, rather, was denied access to the Court of Appeals on the grounds that Appellant "didn't timely file his notice of appeal" and "[a]lthough appellant contends that service was improper the service provisions in App.R.4(A) and Loc.R.1.2 are applicable to civil appeals only." (See January 30, 2013 judgment entry (App. A-1), hereto and fully incorporated herein).

In other words, the lack of a precedent by this Court will allow the trial court's to continue to arbitrarily fail to serve notice of the judgment and the appellate court's to continue to arbitrarily deny access to the court's of appeals as a result. The lack of a precedent by this Court has resulted in and will continue to result in others similarly situated being denied access to the court's of appeals and thereby violating an Appellant's rights under Art. 1, Section 16 of the Ohio Constitution regarding the rights of redress and consequently the Fifth and Fourteenth Amendment Due Process rights of the United States Constitution.

This issue is surely capable of repetition yet evading review. Leave to appeal should be granted in this felony case.

STATEMENT OF THE CASE

Appellant pled guilty in this case to Felonious Assault, Count one (1), O.R.C. §2903.11(A)(2); Aggravated Robbery, Count five (5) of Supp. 1, w/spec 1 to Count five (5) of supp. 1, O.R.C. §2911.01(A)(1); 2941.145, F-1, Kidnaping, Count 6 of supp. 1, w/spec. to Count 6 of supp.1, O.R.C. 2905.01(A)(2);

2945.145, F-1, Felonious Assault, Counts 10-12 of supp. 1, w/spec 1 to Counts 10-12 of supp. 1, O.R.C. §2903.11(A)(2)/§2941.145, 2nd degree Felony's; Aggravated robbery, Count 13 of supp.1, w/spec. 1 to Count 13 of supp. 1 O.R.C. §2911.01(A)(1); 12945.145, f-1 Burglary, Counts 14-16 of supp.2, O.R.C. §2911.11(A)(2), 2nd Degree Felonies, and Breaking and Entering, Counts 17-19 of supp. 2, O.R.C. §2911.13(A), 5th degree felonies dismissed charges: Tampering with evidence Count 2, Felony 3, Carrying a Concealed Weapon, Count 3, f-4, Assault Count 4, f-4, and attempted murder, Counts 7-9 of supp 1, w/spec. 1 to Counts 7-9 f-1.

Appellant was then sentenced to a total of 24 years in prison for the above felonies on the same date as he pled guilty on June 7, 2005.

STATEMENT OF THE FACTS

The pertinent facts in this case consist of: Appellant moved the trial court for resentencing through a motion titled as such on January 03, 2011. The motion for resentencing pertained to the fact that Appellant was not notified of post release control at his original sentencing hearing back in the year 2005. On February 22, 2011 Defendant was resentenced by the trial court and notified of post release control. However, Appellant was not represented by nor was he provided with counsel by the trial court for the purposes of or during this hearing. Thereafter, Appellant was not served with notice of the judgment and the date of its entry on the journal but the court did serve Appellant's original trial attorney and the prosecutor. Appellant never received notice of the judgment and its date of entry

until Appellant requested a copy of the judgment and a certified copy of the trial court docket certified on December 17, 2012. Appellant believed that the state of the law indicated in this Court's holdings in Bush and Reynolds, supra, that this situation would entitle him to the tolling provisions of Ohio Rules of Appellate procedure, App.R.4(A) as this court holds in Nichols, supra.

Appellant then filed his Notice of Appeal in the Ninth District Court on January 09, 2013 alleging that he is entitled to the tolling provisions of App.R.4(A) due to the court's failure to serve notice of the judgment until December 17, 2013. Appellant also provided a certified copy of the appearance docket in support of Appellant's claim as required by the Ninth District Local Rule 1.2 Appellant also provided a certified copy of the resentencing hearing transcript to prove that Appellant was not provided with counsel. However, on January 30, 2013 the Ninth District Court of Appeals dismissed Appellant's appeal claiming that Appellant did not file a timely notice and the tolling provisions of App.R.4(A) and Loc R. 1.2 "are applicable to civil appeals only." (See attached judgment entry entered on January 30, 2013, Appx. A-1).

FIRST PROPOSITION OF LAW

When a defendant files a motion for resentencing in the context of a post release control error proceeding, the motion must still be reclassified by a trial court as a petition for post conviction relief and the trial court must ignore the 180 day time limit prescribed in the statute. A trial court must follow this Court's holdings in Bush and Reynolds's because a trial court has inherent authority

and **power** to vacate a void judgment or sentence which is codified in the plain language of O.R.C. §2953.21's reference to the term "void."

This Court is now faced with the perfect opportunity to reconcile the assumed conflict in O.R.C. §2953.21 between the statute's use of the term "void" and the procedural time limit prescribed therein. Moreover, the continued validity of this Court's holding in Bush and Reynolds is at stake for the sake of argument.

O.R.C. §2953.21's history prior to the year 1995 shows that a petition under this code could be filed "at any time." (See, 132 v H 742(Eff 12-9-67)). That is, prior to the enactment of the AEDPA by the United States Congress in the year 1995, placing time limits on raising federal constitutional claims by way of federal habeas corpus petitions in the federal court's to one year from the last state court judgment. The state court's then followed suit with respect to placing time limits on state post conviction petition's. (See, 146 v S 4. Eff 9-21-95). Prior to this 1995 amendment of O.R.C. §2953.21 the same terms, "void or voidable," were used within the statute as were used after the amendment. In other words, there was no seemingly inherent conflict with the statute's use of the term "void" before 1996 when the time limit did not exist. However, after the amendment and subsequent development of case law by this Court over the years in regards to the distinction between the terms void and voidable, the issue now before the Court in this case has boiled to the top as a result. That is, this Court now need's to fashion a precedent reconciling the 180-day time limit prescribed in O.R.C. §2953.21 with the statute's use of the term "void."

In other words, this Court's precedent's regarding void judgments indicate that a void judgment "places the parties in the same position as if there had been no judgment." Romito v. Maxwell (1967), 10 Ohio St.2d 266, 227 N.E.2d 223. And "any attempt by a trial court to disregard statutory requirement when imposing a sentence render's the attempted sentence a nullity and void." State v. Beasley (1984), 14 Ohio St.3d 74,75, 571 N.E. 2d 774.

That is, the 180-day time limit prescribed by O.R.C. §2953.21(A) is seemingly in conflict with this Court's own precedent's regarding void judgments and sentences, and whether motions for resentencing should be construed as post conviction petitions. See, State v. Bush, 2002-Ohio-3993, P10, State v. Reynolds, 1997-Ohio-304, Accord, State v. Holcomb, 2009-Ohio-3187.

CONCLUSION

There is a simple solution to this dilemma because the statute is not in conflict with itself but is reconciled in Appellant's first proposition of law. Therefore this Court should accept this request for leave to appeal in this matter and grant counsel to fully develop this proposition of law and present it to this Court for review on the merits.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum
In Support of Jurisdiction has been forwarded to the Summit
County Prosecutor's Office at 53 University Ave., Akron, OH.,
44308, on this *9th* day of *March* 2013.

Marcel Morales
Marcel A. Morales
Appellant, pro se

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STATE OF OHIO)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COUNTY OF SUMMIT)

SS: COURT OF APPEALS
DANIEL M. HERRON, CLERK

STATE OF OHIO)

2013 JAN 30 } PM 3: 15

C.A. NO. 26750

Appellee

SUMMIT COUNTY
CLERK OF COURTS

v.

MARCEL ALEXANDER MORALES)

Appellant)

JOURNAL ENTRY

On January 9, 2013, appellant filed a notice of appeal from the trial court's February 22, 2011, entry. App.R. 4(A), however, provides that a notice of appeal in a criminal case must be filed within thirty days of the entry of the judgment or order appealed. Failure to file an appeal within that time is a jurisdictional defect. *State ex rel. Boardwalk Shopping Ctr., Inc. v. Court of Appeals for Cuyahoga Cty.*, 57 Ohio St.3d 33, 36 (1990). Here, the notice of appeal was not filed in accordance with App.R. 4(A). Although appellant contends that service was improper, the service provisions in App.R. 4(A) and Loc.R. 1.2 are applicable to civil appeals only.

The attempted appeal is dismissed for lack of jurisdiction. Costs are taxed to appellant.

The clerk of courts is ordered to mail a notice of entry of this judgment to the parties and make a notation of the mailing in the docket, pursuant to Rule 30 of the Ohio Rules of Appellate Procedure, and to provide a certified copy of the order to the clerk of the trial court. The clerk of the trial court is ordered to provide a copy of this order to the judge who presided over the trial court action.



Judge

Concur:

Carr, J.

Whitmore, J.

COPY

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO
vs.

DANIEL M. HERRIGAN
)

Case No. CR 04 09 3018

MARCEL ALEXANDER MORALES

2011 FEB 22 AM 7:46

JOURNAL ENTRY

SUMMIT COUNTY

CLERK OF COURTS

On February 11, 2011, the Prosecuting Attorney and the Defendant with counsel appeared before the Court for re-sentencing. On June 27, 2005, the Defendant pled GUILTY to:

- 1) Count 1, Felonious Assault, which occurred on September 1, 2004
- 2) Count 5 of the Supplement 1, Aggravated Robbery with Firearm Specification 1 to Count 5, which occurred on September 1, 2004
- 3) Count 6 of the Supplement 1, Kidnapping with Firearm Specification 1 to Count 6, which occurred on September 1, 2004
- 4) Counts 11 and 12 of the Supplement 1, Felonious Assault with Firearm Specification 1 to Counts 11 and 12, which occurred on September 1, 2004
- 5) Count 13 of the Supplement 2, Aggravated Robbery with Firearm Specification 1 to Count 13, which occurred on August 14, 2004
- 6) Counts 14, 15, 16 of the Supplement 2, Burglary, which occurred on July 29, 2004, July 31, 2004 and August 13, 2004
- 7) Counts 17, 18 and 19 of the Supplement 2, Breaking and Entering, which occurred on July 29, 2004, July 30, 2004 and August 12, 2004

The Defendant was afforded all rights pursuant to Crim. R. 11. The Court has considered the record, statements of counsel, as well as the principles and purposes of sentencing under O.R.C. 2929.11, and the seriousness and recidivism factors under O.R.C. 2929.12.

The Court further finds the following pursuant to O.R.C. 2929.13(B): not to sentence the Defendant to a period of incarceration would not adequately protect society from future crimes by the Defendant, and would demean the seriousness of the offense; and the Court further finds the Defendant is not amenable to community control and that prison is consistent with the purposes of O.R.C. 2929.11.

The pleas were knowingly, intelligently, and voluntarily made with a full understanding of the consequences. The Court found the Defendant Guilty, and inquired of the Defendant if he had anything to say before sentence was imposed. Having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

COPY

The Defendant is committed to the Ohio Department Of Rehabilitation And Correction for punishment of the crimes of:

- 1) Felonious Assault, Ohio Revised Code Section 2903.11(A)(2), a felony of the first (1st) degree, for a definite term of Nine (9) years
- 2) Aggravated Robbery, Ohio Revised Code Section 2911.01(A)(1), a felony of the first (1st) degree, for a definite term of Nine (9) years
- 3) Firearm Specification 1 to Count 5, for a definite and mandatory term of Three (3) years
- 4) Kidnapping, Ohio Revised Code Section 2905.01(A)(2), a felony of the first (1st) degree, for a definite term of Nine (9) years
- 5) Firearm Specification 1 to Count 6, for a definite and mandatory term of Three (3) years
- 6) Felonious Assault, Ohio Revised Code Section 2903.11(A)(2), a felony of the second (2nd) degree, for a definite term of Seven (7) years
- 7) Firearm Specification 1 to Count 11, for a definite and mandatory term of Three (3) years
- 8) Felonious Assault, Ohio Revised Code Section 2903.11(A)(2), a felony of the second (2nd) degree, for a definite term of seven (7) years.
- 9) Firearm Specification 1 to Count 12, for a definite and mandatory term of Three (3) years
- 10) Aggravated Robbery, Ohio Revised Code Section 2911.01(A)(1), a felony of the first (1st) degree, for a definite term of Nine (9) years
- 11) Firearm Specification 1 to Count 13, for a definite and mandatory term of Three (3) years
- 12) Burglary, Ohio Revised Code Section 2911.12(A)(2), felonies of the second (2nd) degree, for a definite term of Five (5) years on each of three (3) counts
- 13) Breaking And Entering, Ohio Revised Code Section 2911.13(A), felonies of the fifth (5th) degree, for a definite term of Nine (9) months on each of three (3) counts

Pay the costs of this prosecution and *attorney fees* as directed by the Adult Probation Department. Monies are to be paid to the Summit County Clerk of Courts, Courthouse, 205 South High Street, Akron, Ohio 44308-1662. The Summit County Clerk of Courts shall collect monies from Defendants in criminal cases in the following order of priority: 1) costs and Adult Probation Department fees, and 2) restitution, if applicable.

Pursuant to the above sentence, the Defendant is to be conveyed to the Lorain Correctional Institution to commence the prison intake procedure.

COPY

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO
vs.

MARCEL ALEXANDER MORALES

Case No. CR 04 09 3018

JOURNAL ENTRY

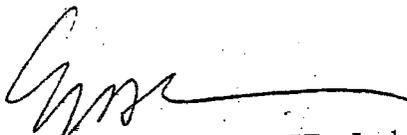
The Three (3) year sentence imposed on Firearm Specification 1 to Counts 5 and 6 are merged, and the Three (3) year sentence imposed on Firearm Specification 1 to Counts 11 and 12 are merged. These Firearm Specifications are to be served concurrently with each other.

The merged Firearm Specification 1 to Counts 5 and 6 is to be served consecutively the Firearm Specification 1 to Count 13, and Counts 5 and 13 for a total sentence of Twenty-Four (24) years.

Counts 1, 6, 10, 11, 12, 14, 15, 16, 17, 18 and 19 are to be served concurrently with each other and Counts 5, 13 and the Firearm Specifications.

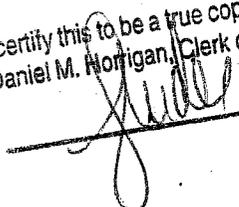
As part of the sentence in this case, the Defendant shall be supervised on post-release control by the Adult Parole Authority for a mandatory period of Five (5) years after being released from prison. If the Defendant violates the terms and conditions of post-release control, the Adult Parole Authority may impose a residential sanction that may include a prison term of up to nine months, and the maximum cumulative prison term for all violations shall not exceed one-half of the stated prison term. If the Defendant pleads guilty to, or is convicted of, a new felony offense while on post-release control, the sentencing court may impose a prison term for the new felony offense as well as an additional consecutive prison term for the post-release control violation of twelve months or whatever time remains on the Defendant's post-release control period, whichever is greater.

APPROVED:
February 14, 2011
tms



ELINORE MARSH STORMER, Judge
Court of Common Pleas
Summit County, Ohio

cc: Prosecutor Dan Sallerson/Aaron Howell
Attorney Kerry O'Brien
(Court Convey email)
(Registrar's Office email)
(L Campbell, SCSO email)

I certify this to be a true copy of the original
Daniel M. Horgan, Clerk of Courts
 Deputy