

ORIGINAL

IN THE SUPREME COURT OF OHIO

13-0436

STATE OF OHIO
Appellee

Vs.

CHARLES SHEPHERD
Appellant

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:

On Appeal From The Cuyahoga
County Court Of Appeals,
Eighth District

Court Of Appeals Case No.
98709

MEMORANDUM IN SUPPORT JURISDICTION OF APPELLANT
CHARLES SHEPHERD.

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RECEIVED
MAR 18 2013
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
MAR 18 2013
CLERK OF COURT
SUPREME COURT OF OHIO

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Eighth Appellate District For Cuyahoga County
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MEMORANDUM IN SUPPORT OF JURISDICTION
EXPLAINING WHY LEAVE TO APPEAL SHOULD BE GRANTED

The lack of a precedent by this court in regards to when an Appellant specifically alleges that his constitutional rights has been violated and the Appellant Court relied upon the doctrine of res judicata to deny relief of a claim, the state contends Defendant's claims error in presenting the repeat violent offender specification to the jury was part of the record and should have been raised on direct appeal, the claim now barred under the doctrine of res judicata.

In addition to res judicata concerns, the principle expressed in special prosecutors Vs. Cuyahoga judges is viewed as part of the law-of-the case doctrine, which bars litigation of issues resolved in previous appellate decisions. See Hawley Vs. Ritley, (1988), 35 Ohio St.3d 157, 160. The bar of inconsistent judgments however, reaches only as far as the "mandate" of the appellate court and issues not resolved in its opinion remain within the trial judge's authority, State ex rel. Neff Vs. Corrigan, (1996), 75 Ohio St.3d 12, 15-16.

It was plain error of law for repeat violent offender specification to be tried to the jury. The jury should have never heard the allegation that defendant is a repeat violent offender as the matter is only for the court's determination. On point is State Vs. Smith, 2009 Ohio 5517 12th Dist. No. CA2008-03-064.

The evidence that was before the jury was highly prejudicial and that the defendant was denied a fair trial and the error also render the conviction void, res judicata cannot transform a void conviction into a valid conviction.

Eighth District Court of Appeals, stated that appellant no time raise the issue that the court erred by allowing the jury to determine the repeat violent offender specification. But a conviction that is "void" is a conviction that must be treated as if it never existed. State Vs. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250 par 12.3 And a void conviction remains non-existent it cannot be transformed into a valid conviction by not appealing it.

This Ohio Supreme Court has made abundantly clear that a void conviction cannot stand, can be corrected at any time, and indeed must be corrected, "Ever judge has a duty to impose a lawful sentence, and a concomitant duty to correct unlawful ones, Simpkin 117 Ohio St.3d at 425-26 (emphasis added). A trial court not only retains jurisdiction to correct a void sentence but has an "obligation" to correct the unlawful sentence. at 425 State Vs. Fischer (2010), 128 Ohio St.3d 92, 99. 2010-Ohio-6238 (explaining that illegal sentence must be corrected at any time); See also State ex rel Carnail Vs. McCormick , (2010) 126 Ohio St.3d 124, 2010-Ohio-2671.

STATEMENT OF THE CASE AND FACTS

On August 27, 2002, a Cuyahoga County Grand Jury indicted Appellant with two charges: Rape, in violation of O.R.C. §2907.02(A)(1)(C), with a Repeat Violent Offender Specification, a Notice of Prior Conviction, and a Sexually Violent Predator Specification, a felony of the first degree. Count Two charged: Attempted Kidnapping in violation of O.R.C. §2923.02 and §2925.01 with a Repeat Violent Offender Specification, a Notice of Prior Conviction, and a Sexual Motivation Specification, a felony of the second degree.

The matter proceeded to a jury trial that ultimately found Appellant guilty of all charges and specifications.

The court then sentenced Appellant to the maximum sentence of ten (10) years, plus ten (10) years to life for the charge of Rape; and for the Attempted Kidnapping, eight (8) years, plus an additional Ten (10) years. The court determined that the sentences should be served consecutively for a total sentence of thirty-eight (38) years to life.

On June 13, 2012, Appellant filed a Motion to Vacate and Correct Illegal Sentence after years of trying to obtain the legal documents of his conviction. The Court of Common Pleas denied the Motion on July 11, 2012.

Appellant timely filed a Notice of Appeal and this Brief follows.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

IT WAS PLAIN ERROR OF LAW FOR THE REPEAT VIOLENT OFFENDER
SPECIFICATION TO BE TRIED TO THE JURY

The prosecution committed plain error when they tried the Repeat Violent Offender Specification (hereinafter "RVO"), to the jury. Section 2941.49 of the Ohio Revised Code mandates that the "RVO" Specification must be tried to the Court. Section 2941.49 reads:

- (B) The Court shall determine the issue of whether an offender is a Repeat Violent Offender.

The term "shall" means without discretion. See, State v. Cruise, 185 Ohio App.3d 230 where the Court stated:

"The Supreme Court has long held that [i]n statutory construction, the word "may" shall be construed as permissive and the word "shall" be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage. Dorrian v. Scioto Conservancy Dist. (1971), 27 Ohio St.2d 102, 56 O.O.2d 58, 271 N.E.2d 834, paragraph one of the Syllabus."

Thus, it is evident from the terms of the statute that the legislature mandated how forfeiture proceeds were to be distributed and in doing so, failed to imbue the trial court with any discretionary authority to distribute the proceeds otherwise. The error started with the Court, prior to reading the "RVO" Specification to the jury. The Court stated:

"There are two specifications, which I will also read, specifications as to counts 1 and 2. The grand jurors further find and specify that Defendant is a Repeat Violent Offender."

The jury should have never heard the allegation that Appellant is a "Repeat Violent Offender" as the matter is only for the Court's determination. On point is State v. Smith, 2009-Ohio-5517, (12th Dist. No. CA 2008-03-064);

where the court stated:

"[¶119] Finally, with regards to trial counsel's failure to insist upon a jury determination of the RVO Specification, we have already determined that a RVO determination must be made by a trial court not by a jury."

The error continued with the state's opening statement when the prosecutor told the jury:

"The evidence will also demonstrate because Defendant has previously been convicted of sexual battery and attempted rape of an eleven year old girl, thirteen years ago prior to these charges. If Defendant is found guilty of the offenses in this case, he would be considered a Repeat Violent Offender."

These remarks by the prosecutor should have never been made to the jury. It was highly prejudicial as the jury is to be precluded from hearing reference to the allegation of Repeat Violent Offender Specification and precluded from hearing evidence on this issue. That was Plain Error.

The jury being told that the Appellant was in prison before is also highly prejudicial, not relevant, and is just another factor contributing to the unfairness of Appellant's trial. The "prison" remark should have never been made, it was plain error to do so.

The evidence to prove that Appellant was a Repeat Violent Offender was prohibited by statute from going before the jury, the error of trying the RVO issue to the jury was magnified in the state's argument, and a verdict form was improperly submitted to the jury requiring the jury to make a determination to whether Appellant was a Repeat Violent Offender. And the jury did make such a finding.

It was an error of law, that did not require an objection for the evidence and argument of the "RVO" Specification to be tried to the jury.

Evidence was before the jury that was highly prejudicial and that the

Appellant was denied a fair trial by being continuously referred to as a "Repeat Violent Offender."

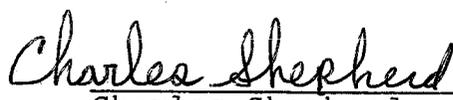
The jury should never even heard the terminology, let alone hear evidence of the "RVO" Specification improperly before the jury. The state utilized such evidence to make legally prohibited and prejudicial comments to the jury. It is a fundamental legal principal that an Appellant's prior conviction cannot be used for the purpose to argue that the Appellant acted in conformity there with. Using the "RVO" evidence that was improperly before the jury.

The "RVO" evidence before the jury plus the improper arguments by the state to the jury combined to taint all evidence and prejudiced the jury to the point that the Appellant was denied his right to a fair trial on all counts.

Appellant's conviction must be reversed and a new trial ordered.

CONCLUSION

Pursuant to the preceding Proposition Of Law, the Defendant-Appellant, Charles Shepherd, respectfully requests that this court reverse his conviction and/or remand this case with a new trial.


Charles Shepherd Pro-Se 434-286

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Memorandum in Support of Jurisdiction has been sent by regular U.S. mail to the Cuyahoga county Prosecutor at 1200 Ontario Street, Cleveland, Ohio, 44113 on this 13th day of March 2013.

Charles Shepherd
Charles Shepherd #434-286

APPENDIX

APPENDIX

APPENDIX

[8]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 98709

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHARLES SHEPHERD

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-427416

BEFORE: Stewart, A.J., Rocco, J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: January 31, 2013

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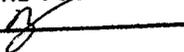
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**FILED AND JOURNALIZED
PER APP.R. 22(C)**

JAN 31 2013

**CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By  Deputy**

MELODY J. STEWART, A.J.:

{¶1} In 2002, a jury found defendant-appellant Charles Shepherd guilty of rape and attempted kidnapping. The conviction contained sexually violent predator and repeat violent offender specifications. In June 2012, Shepherd filed a motion to vacate his sentence as void on grounds that the court submitted the repeat violent offender specification to the jury in violation of R.C. 2941.149(B). The court denied the motion, finding it was res judicata because Shepherd failed to raise it on direct appeal and that “[t]he fact that the defendant may or may not have had a viable appellate issue does not render his sentence void.” Shepherd’s sole assignment of error contests the court’s ruling.

{¶2} A final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceedings, except an appeal from that judgment, any defense or any claimed lack of due process that was raised, or could have been raised, by the defendant at the trial that resulted in the judgment of conviction, or on an appeal from that judgment. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. This doctrine, known as res judicata, “promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard.” *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 18.

{¶3} The court did not err by finding that Shepherd's motion to vacate his sentence was barred by res judicata because he failed to raise the issue of the jury determining the repeat violent offender specification on direct appeal.

{¶4} The record shows that we affirmed Shepherd's convictions on direct appeal, rejecting his claims of insufficient evidence, ineffective assistance of counsel, and invalid sentencing. See *State v. Shepherd*, 8th Dist. No. 81926, 2003-Ohio-3356. We likewise denied Shepherd's request for writs of mandamus and procedendo on the claim that his sentence was void because the court incorrectly imposed postrelease control. See *State ex rel. Shepherd v. Astrab*, 8th Dist. No. 96511, 2011-Ohio-2938, *aff'd*, 130 Ohio St.3d 361, 2011-Ohio-5789, 958 N.E.2d 573. And in federal habeas proceedings, a magistrate judge denied Shepherd's writ of habeas corpus that sought relief on four separate grounds relating to a ruling in limine, the use of a 13-year-old conviction for impeachment purposes, insufficient evidence of kidnapping, and that the section of the rape statute under which he was charged was void for vagueness. See *Shepherd v. Ohio*, N.D. Ohio No. 1:04 CV 1283, 2006 U.S. LEXIS 95480 (June 22, 2006).

{¶5} At no time, either on direct appeal or in postconviction proceedings, did Shepherd raise the issue that the court erred by allowing the jury to determine the repeat violent offender specification. Nothing prevented him from raising this issue on direct appeal from his conviction, so principles of res

judicata apply in these postconviction proceedings to bar the assertion of Shepherd's repeat violent offender claim.

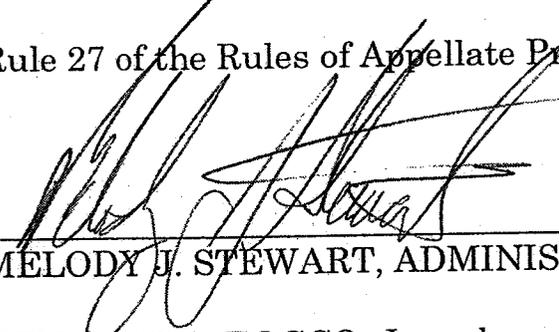
{¶6} Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



MELODY J. STEWART, ADMINISTRATIVE JUDGE

KENNETH A. ROCCO, J., and
EILEEN A. GALLAGHER, J., CONCUR