

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO
Plaintiff-Appellee

vs

JOSEPH ROMANDA
Defendant-Appellant

: APPEAL FROM THE SUMMIT COUNTY
: COURT OF APPEALS, 9TH APPELLATE DISTRICT
:
: C.A. Case No.:2012-CA-26450
:
:
:
:

13-0925

AMENDED MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JOSEPH ROMANDA

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STATEMENT OF FACTS AND CASE

On 22 April 2007, Joseph Romanda, Defendant and Appellant, hereafter Appellant, was charged with two counts of Rape, two counts of Kidnapping, one count of Felonious Assault, and One count of Disrupting a Public Service. This incident arose from a night of drinking alcohol. Since from returning from Iraq, as a medic in an Engineer unit in the United States Army, he had been obsessively drinking alcohol as a coping mechanism. Appellant had also been habitually taking 'performance enhancers' for six years. At the time of the incident, Appellant was on the steroid /steroid precursor M-1p, Mixed with the steroid and alcohol. Appellant had become uncontrolled and unaware of his actions. On 22 April 2007, while in his apartment with the victim, he lost control and attacked the victim. During the course of the attack, the Appellant had restrained and raped the victim.

On 23 December 2007, Appellant pled Guilty to two (2) counts of rape, one (1) count of kidnapping, one (1) count of Felonious Assault, and one (1) count of Disrupting a Public Service.

On the 23rd of May 2008, Appellant was sentenced to a term of: eight (8) years, eight (8) years, seven (7) years, six (6) years, and one (1) year, respectively, and the sentences to be ran consecutively.

On the 27th of June 2008, Appellant filed a motion to Appeal from Judgement Entered In The Court of Common Pleas to the Court of Appeals Ninth (9) Judicial District. On 23rd of January 2009, the Summit County Prosecutor's office filed the response 'Opposing the Motion'.

On the 15th of April 2009, the Ninth (9) District affirmed the ruling of Summit County.

On 2 March 2012, Appellant filed a Motion to Vacate and to Set Aside Sentence Pursuant to Ohio Revised Code §2941.25. On 8 March 2012 Summit County Prosecutor's Office filed a Motion Opposing the Motion. On 19 March 2012, Appellant filed a Response to the State's Opposition. On 27 April 2012, Summit County Common Pleas Denied the Motion.

17 May 2012, Motion to Vacate and Set Aside was filed with the Ninth (9) District of the Court of Appeals. On the 24 August 2012, the Brief of the Appellant was filed. On the 19 September 2012, the Brief of the Appellee was filed. On the 10 October 2012, Appellant filed the Response to Appellee Motion. On 1 May 2013, the Ninth (9), affirmed the decision of Summit County.

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

I In this case, at bar, Appellant is serving multiple sentences of one crime from one event. Appellant is arguing that these charges should have been merged as one under new case laws. The State is counter arguing that this is "Post Conviction Relief" and barred "by "Res Judicata".

However, in light of new cases presented, failure to merge and failure to have a hearing to determine Allied Offenses of Similar Import is "plain error" and subject to no time frame for correction. The Appellant is in an Appellate District that has granted some people, discussed in detail later, and denied the Appellant, an EVIDENTIARY HEARING. This is unfair.

AND further, Appellant had Post Release Control improperly imposed. The State did not properly inform Appellant of consequences for violations. The State neglected, then also, to have a hearing.

In order to correct this Manifest Injustice, the Appellant is pleading with this Court to Accept jurisdiction

ARGUMENT IN SUPPORT OF LAW:

PROPOSITION OF LAW: I

When determining if crimes are to be merged as Allied Offenses of Similar Import, there must be a "hearing" to determine if this is correct. Under Ohio Revised Code §2941.25, the court must determine prior to sentencing whether offenses are Allied Offenses of Similar Import. "The court must conduct a hearing to make such a determination."

-State vs Kent, 428 N.E. 2d 453.

QUESTION:

Is the Appellant prejudiced when a trial court fails to determine Allied Offense of Similar or Dissimilar Import, prior to sentencing? If the Appellant is not allowed Due Process, then the only conclusion is that the Appellant was prejudiced. In Kent, supra, "No facts are presented as to this inquiry, nor did Appellant present any facts to demonstrate that the crimes to which he had pled guilty WERE OR WERE NOT Allied Offenses of Similar Import. The subject of Allied Offenses was never discussed AT THE TIME THE PLEA WAS MADE." If nothing is said by either the Prosecutor or the Defendant in regard to the Allied Offense and the Court accepted the guilty plea to all the offenses, the Court has an AFFIRMATIVE DUTY to make inquiry as to whether the Allied Offense statute would be applicable." From the record and the above mentioned case, it is clear that the Appellant did not receive DUE PROCESS and that the trial court had a duty to inquire as to Allied Offense issue.

RESOLUTION:

The simple remedy is to grant the Appellant a hearing, that is written as MANDATORY in O.R.C. §2941.25, supra. "Plain errors or

defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *Criminal Rule 52(B).

Because failing to determine similar or dissimilar import, this does constitute plain error by the trial court, and borders on ineffective assistance of counsel. Therefore, the only remedy is to void the sentence. "Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." -State vs Beasley 471, N.E.2d 774. This court has already held that such a failure would render the sentence void.

PROPOSITION OF LAW II :

QUESTION:

Does the trial court error in failing to afford a Criminal Defendant a full, fair, and considerate hearing of an "alleged plain error" committed by the trial court?

In this case, the trial court committed plain error by failing to determine Allied Offenses of Similar Import and failure to properly impose Post Release Control. When the record clearly shows that the trial court clearly disregarded statutory requirements, the only remedy is to hold an evidentiary hearing. "We must determine whether the trial court actually abused its discretion. An abuse of discretion is "More than an error of law or judgement" , it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. -Blake vs Blake S.OHIO ST 3d 217. Because the trial court acted unreasonably in denying Appellant's request for an evidentiary hearing, this clearly demonstrates an abuse of discretion, and therefore this judgement must be reversed.

RESOLUTION :

When the Appellant clearly shows by the record that the Appellant had grounds for an evidentiary hearing, and the trial court denied the request, the Appellant's DUE PROCESS rights were violated. The only remedy at this time, would be to afford Appellant a "full, fair, and considerate hearing."

PROPOSITION OF LAW III:

When Post Release Control is not properly imposed in a sentence, by failing to advise of the consequences of a Post Release Control violation, and brought to the attention of the trial court, does the trial court have a duty, THEN AND THEREFORE to correct that sentence, or does "Res Judicata" apply?

Ohio Revised Code §2967.28 requires a trial court to notify a Criminal Defendant being sentenced to prison, of Post Release Control obligations, as well as, the consequences for violating, a sanction imposed by the Parole Board. In STATE VS FISHER 947 N.E.2d 3322, this Court has held that when a court fails to properly impose Post Release Control, the sentence is void and the doctrine of "Res Judicata" DOES NOT apply.

In this case, the trial court failed to properly impose Post Release Control, by failing to advise Appellant of the consequences for violating the terms of Post Release Control. Although the issue was not directly argued in Appellant's motion to vacate, it was brought to the attention of the court, in his response to the State's Opposition. The trial court was given notice of Appellant's voidable sentence, and the court still failed to address the issue based on "Res Judicata".

This is clearly plain error committed by the trial court in failing to correct failure and connotes an abuse of discretion. The trial court had a statutory duty to properly impose Post Release Control at the original sentencing and failed to do so correctly. Even after it was brought to the court's attention, they still disregarded this duty, by failing to provide Appellant with an evidentiary hearing. And therefore rendered this "attempted sentence" a nullity or void.

CONCLUSION:

The Appellant's sentence should be deemed void because of the aforementioned reasons. Not yet stated, there are conflicts among the twelve (12) Appellate Districts, with the issue of a hearing to determine if the offenses are to be merged as "Allied Offenses of Similar Import". Some districts might agree with the language of O.R.C. § 2941.25, *State vs Johnson*, 128 Ohio St.3d 153, 2010-OHIO-6314, *State vs Reives-Bey*, 9th District, No.25138, 2011-OHIO-1778, *State vs Jones*, 9th District, No.25676, 2011-OHIO-4934, and some might have differing views and opinions. Some districts might have differing opinions within the same district. There should be no conflicts, and especially no conflicts within the same district. The Ninth (9) Appellate District, in *Reives-Bey*, supra, ¶28-33, ¶ "Because imposing two sentences for Allied Offenses constitutes plain error, we have also recognized that it is appropriate to remand cases for consideration under JOHNSON when the Appellant argues plain error."

In this case, at bar, the Ninth (9) District stated that this appeal was "post Conviction Relief", and therefore "untimely". This is contrary to what has already been viewed from this Court. When a

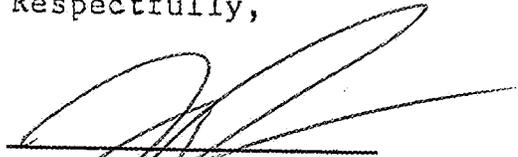
trial court fails to determine, if Appellant's charges are of similar or dissimilar import, prior to sentencing, is that sentence void, and therefore not subject to review because of "res judicata"? If the answer is not no, then the hearing will left to be discretionary, and there will continue to be "conflicts" within the state and also the appellate districts. An individual may then be less equally protected under the law. This itself is, contrary to the United States Constitution, the Fourteenth (14th) Amendment, Section One (1), of equal protection under the law. If an individual is less protected than that individual may then be subject to "Double Jeopardy", U.S. Constitution, the Fifth (5) Amendment, and "Cruel and Unusual Punishment", the U.S. Constitution, the Eighth (8) Amendment. This can be decided solely on that individual's location. If Person "A" happens to be located in an Appellate district that consistently grants an individual a "Johnson Hearing", *Johnson, supra*, compared against a Person "B" who is not located in such a fortunate district, that complies with the law, this is unfair. This could be considered, an almost discrimination by location. Because, Person "B", being unfortunate by which district that he/she resides, can then be subjected to a sentence that is "a multiple" of the sentence of Person "A". And this is decided by which appellate district, and whether or not the trial court and the appellate court decide to follow the law and/ or this Court's Opinion. The Appellant is not attacking the charges, the Appellant is attacking the sentence.

This is humbly submitted to you, the Supreme Court of Ohio, and the Appellant prays that you will accept jurisdiction.

CERTIFICATE OF SERVICE

I sent a copy of the Attached Memorandum in Support of Jurisdiction,
to the Summit County Prosecutor's Office, at 53 Univeristy Ave., Akron,
Ohio 44308, on this 10th day of June 2013.

Respectfully,



Joseph M. Romanda #550521
Marion Correctional Institution
P.O. Box 57
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APPENDIX

STATE OF OHIO
COUNTY OF SUMMIT

COURT OF APPEALS
NINTH JUDICIAL DISTRICT
2013 MAY 31 AM 8:37

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

COURT OF COMMON PLEAS
SUMMIT COUNTY
CLERK OF COURTS

C.A. No. 26450

Appellee

v.

JOSEPH M. ROMANDA

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 07 04 1226

COURT OF APPEALS
NINTH JUDICIAL DISTRICT
2013 MAY -1 AM 9:37

DECISION AND JOURNAL ENTRY

Dated: May 1, 2013

MOORE, Presiding Judge.

{¶1} Defendant, Joseph M. Romanda, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} In 2007, Mr. Romanda pleaded guilty to two counts of rape, one count of kidnapping, one count of felonious assault, and one count of disrupting a public service. The trial court sentenced Mr. Romanda to a total term of incarceration of thirty years. Mr. Romanda appealed from the sentencing entry, and this Court affirmed his convictions. *State v. Romanda*, 9th Dist. No. 24293, 2009-Ohio-1763.

{¶3} In 2012, Mr. Romanda filed a "Motion to Vacate and Set Aside Sentence Pursuant to R.C. 2941.25[.]" In his motion, he argued that the trial court should vacate his sentence because it violated his due process rights by failing to merge purportedly allied offenses of similar import.

{¶4} The trial court denied this motion in a journal entry issued on April 27, 2012. Mr. Romanda filed a timely notice of appeal from the trial court's entry denying his motion, and he now presents four assignments of error for our review. We have consolidated the assignments of error to facilitate our discussion.

II.

ASSIGNMENT OF ERROR I

TRIAL COURT ERRED IN NOT ADVISING OF RIGHT TO APPEAL PURSUANT TO OHIO CRIMINAL RULE 32(B)[.]

ASSIGNMENT OF ERROR II

TRIAL COURT FAILED PROPERLY TO IMPOSE POST RELEASE CONTROL PURSUANT TO OHIO REVISED CODE 2967.28[.]

ASSIGNMENT OF ERROR III

TRIAL COURT ERRED WHEN CONVICTING OF CHARGES THAT WERE TO BE MERGED AS ALLIED OFFENSES OF SIMILAR IMPORT PURSUANT TO OHIO REVISED CODE 2941.25[.]

ASSIGNMENT OF ERROR IV

TRIAL COURT ERRED IN DENYING MOTION WITHOUT A FULL AND FAIR CONSIDERATION HEARING[.]

{¶5} In his assignments of error, Mr. Romanda raises challenges to his sentencing. However, Mr. Romanda did not raise the issues set forth in his first and second assignments of error in his motion. Rather his motion pertained only to the issue of merger of allied offenses.¹ Therefore, we need not address the issues raised in the first or second assignments of error. *See State v. Logan*, 9th Dist. No. 21070, 2002-Ohio-6290, ¶ 18.

¹ Mr. Romanda argued in his response to the State's brief in opposition to his motion that his sentencing was not a "final appealable order" due to the failure of the sentencing entry to include the consequences of violating postrelease control. However, the record does not indicate that Mr. Romanda has moved the trial court to correct the allegedly improper imposition of postrelease control.

{¶6} R.C. 2953.21(A)(1)(a) provides that “[a]ny person who has been convicted of a criminal offense * * * and who claims that there was such a denial or infringement of the person’s rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief.” Therefore, “[w]here a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for post-conviction relief as defined in R.C. 2953.21.” *State v. Reynolds*, 79 Ohio St.3d 158 (1997), syllabus. Here, Mr. Romanda’s motion requesting the trial court to vacate his sentence because of purported violations of his due process rights constituted a motion for post-conviction relief.

{¶7} A trial court’s decision denying a post-conviction petition is reviewed for an abuse of discretion. *State v. Craig*, 9th Dist. No. 24580, 2010-Ohio-1169, ¶ 14. An abuse of discretion connotes that a trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶8} R.C. 2953.21 establishes procedures for filing a petition for post-conviction relief. R.C. 2953.21(A)(2) provides, in part, that:

[A] petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

{¶9} An exception to the time limit exists if it can be shown both that (1) “the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief or * * * the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner’s situation, and the petition asserts a claim based on that right;” and (2) there is clear and convincing evidence that, but for the constitutional error at trial, no reasonable trier of fact would have found the petitioner guilty of the offense. R.C. 2953.23(A)(1).

{¶10} Mr. Romanda filed the transcript in his direct appeal in November of 2008; he did not file his petition for post-conviction relief until March of 2012. Therefore, his motion was untimely. Mr. Romanda did not argue that the exceptions contained in R.C. 2953.23(A)(1) apply to this case. Therefore, we cannot say that the trial court abused its discretion in denying Mr. Romanda’s motion.

{¶11} Further, it is well settled that res judicata prohibits the consideration of issues that could have been raised on direct appeal. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶ 16-17, citing *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, ¶ 37. Because Mr. Romanda’s merger argument could have been raised in his direct appeal, it is now barred by the doctrine of res judicata. See *State v. Smith*, 9th Dist. No. 02CA0068, 2003-Ohio-4264, ¶ 10, and *State v. Horton*, 9th Dist. No. 12CA010271, 2013-Ohio-848, ¶ 12, citing *State v. Thomas*, 9th Dist. No. 25590, 2011-Ohio-4226, ¶ 5.

{¶12} Accordingly, Mr. Romanda’s assignments of error are overruled.

III.

{¶13} Mr. Romanda’s assignments of error are overruled. The decision of the trial court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



CARLA MOORE
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR.

APPEARANCES:

JOSEPH M. ROMANDA, pro se, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.