

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : CASE NO: 2013 0606
Plaintiff/Appellee : On appeal from the Brown
County Court of Appeals, 12TH
Appellate District
FRANK FINKBEINER :
Defendant/Appellant : C.A. CASE NO: 2012 08 016

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT FRANK FINKBEINER

FRANK FINKBEINER
Post Office Box 5500
Chillicothe, Ohio 45601
DEFENDANT/APPELLANT

JESSICA LITTLE
200 East Cherry Street
Georgetown, Ohio 45121
COUNSEL FOR PLAINTIFF/APPELLEE

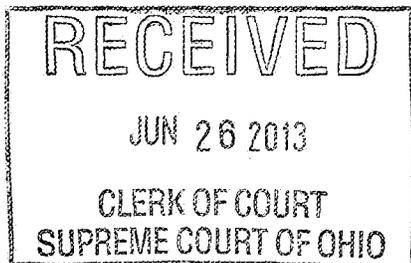
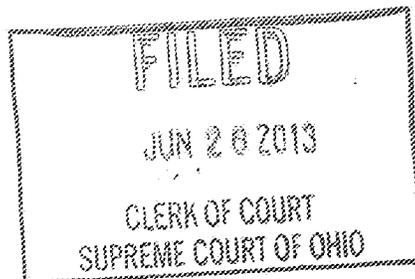


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL
INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTION QUESTION

This case revolves around a multitude of constitutional anomalies as it concerns ineffective assistance of counsel, due process, and equal protection requirements. Moreover, this case centers on this Court's interpretation of void and voidable sentences and their remedies.

Not only have the improper statutes been applied, the mandatory requirements of consistency have been overlooked by both prior courts, but the mandatory notice and requirements of Chapter 2950. This plain language as intended by the General Assembly require strict compliance and not subject to judicial interpretation. To hold otherwise would make Ohio jurisprudence perfunctory in nature and deny Appellant and others the rights guaranteed by the Ohio Constitution and the United States Constitution as well.

These inconsistencies are troubling and being more problematic as the general public becomes more aware of statutory rights as provided by law.

This case involves sentencing errors improvidently ignored and denied by the prior courts.

STATEMENT OF THE CASE AND FACTS

On April 19, 2007, Frank Finkbeiner, hereinafter Appellant, was indicted for one count of Rape, a violation of R.C. §2907.02(A)(1)(b) with a force specification.

On September 6, 2007, Appellant by and through counsel, entered a plea to said charges with the assurance by all parties of three years of imprisonment.

Subsequent to these assurances, and absent the required notice of Chapter 2950, Appellant was sentenced to seven years of imprisonment.

On July 25, 2012, Appellant filed a motion with the lower court, requesting correction of his clearly "void" sentence, and denied on August 9, 2012, by Judge Alan Corbin.

On August 16, 2012, Appellant timely filed notice of appeal, and denied review pursuant to the doctrine of res judicata and this Court's findings in Fischer, "allegedly" on February 12, 2013.

Appellant presents his propositions of law for acceptance of jurisdiction as justice requires.

PROPOSITION OF LAW I

Whether the courts improvidently ignored that a sentence not in accordance with statutorily mandated terms is void

Relying on trial counsel, Appellant with no knowledge of the science of the law, erroneously pled to one count of Rape, in violation of R.C. §2907.02(A)(1)(b). This however is in conflict with the actual act itself. The twenty seconds of wrongful conduct involved no force, nor any penetration. Appellant's attorney certainly should have known the definition attributed to this act. It is well settled that the court, or any court for that matter, may impose a sentence provided for by law. State v. Bruno, 8th Dist. No. 77202, 2001 Ohio 4227. Disregarding the relief proffered by the General Assembly in R.C. §2953.08 as a matter of right, both courts invoked the doctrine of res judicata. This belies the bedrock principle that any attempt to disregard statutory requirements when imposing a sentence renders the imposed sentence a nullity or void. State v. Reasley (1984), 14 Ohio St.3d 74, 14 OER 511, 471 N.E.2d 774.

The United States Supreme Court has made the distinction of void as:

A void judgment is a legal nullity. See, Black's Law Dictionary 1822 (3d ed. 1933); see, also id., @ 1709 (9th ed. 2009). Although the term "void" describes a result, rather than conditions that render a judgment unenforceable, it suffices to say that a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final.

Ohio jurisprudence has consistently recognized a narrow, and imperative rule: a sentence that is not in accordance with statutorily terms is void. Woods v. Telb (2000), 89 Ohio St.3d 504, 733 N.E.2d 1103. Moreover, the majority of this Court held the proposition that the effect of a void judgment is that the judgment is a nullity, and the parties are in the same

position as if there had been no judgment at all. Romito v. Maxwell (1967), 10 Ohio St.2d 266, 267-268, 39 O.O.2d 414, 227 N.E.2d 223.

As clarified in State v. Thomas (1996), 111 Ohio App.3d 510, 512, 676 N.E.2d 903, judges are duty-bound to apply the sentencing laws as they are written. The courts likewise, have no power to substitute a different sentence for that provided for by statute or one that is either greater or lesser than provided for by law.

Contrary to both courts, and their attempt to silence justice with res judicata, Appellant's Motion to Correct the illegal sentence was appropriate when the sentence imposed is facially illegal on many fronts. Common sense, and both Constitutions command nothing more.

Ironically, the Appellate Court references State v. Fischer, 128 Ohio St.3d 92, 2010 Ohio 6238, 942 N.E.2d 332, which this Court allowed extension of the void sentence doctrine for collateral attack. Fischer in itself, succinctly declares "a sentence that is not in accordance with statutorily mandated terms is void."

Equally ignored, was compliance with R.C. §2950.09(B)(1) which mandates notice of the sexual predator hearing prior to sentencing. The trial court committed plain error where it failed to provide timely notice of the sexual offender classification hearing. Appellant was therefore denied due process and denied his right to testify, present evidence, call and examine witnesses and expert witnesses, and cross-examine said witnesses regarding the determination of offenders proper classification. As this right will have a profound impact upon Appellant's life this provision demands strict compliance. To hold otherwise would make the hearing perfunctory in nature and deny Appellant's rights as permitted by statute.

The doctrine of res judicata runs afoul in the case sub judice and clearly contradicts this very Court's reasoning in Fischer and its progeny which hold that the judgment rendered is void. Moreover, in State v. Clover 2012 Ohio 6006, 2012 Ohio App. LEXIS 5179, a void judgment may be challenged at any time.

CONCLUSION

For the above stated reasons, this Court should accept jurisdiction.

Respectfully submitted,

Frank Finkbeiner

Frank Finkbeiner
Post Office Box 5500
Chillicothe, Ohio 45601

DEPENDANT/APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Jurisdiction was mailed via regular U.S. Mail to Prosecutor, Jessica Little, 200 East Cherry Street, Georgetown, Ohio 45121, on this 24 day of June, 2013.

Frank Finkbeiner
Frank Finkbeiner

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : CASE NO: 2013 0606
Plaintiff/Appellee : On appeal from the Brown
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-v- : Appellate District
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APPENDIX TO
MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT FRANK FINKREINER

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DEFENDANT/APPELLANT

JESSICA LITTLE
200 East Cherry Street
Georgetown, Ohio 45121
COUNSEL FOR PLAINTIFF/APPELLEE

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

FEB 12 2013

CASE NO. CA2012-08-016
(Accelerated Calendar)

JUDGMENT ENTRY

- vs -

BROWN COUNTY CLERK OF COURTS

FRANK FINKBEINER,

Defendant-Appellant.

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 2007-2104

{¶ 1} This is an accelerated appeal in which defendant-appellant, Frank Finkbeiner, appeals a decision of the Brown County Court of Common Pleas denying his motion to correct his sentence.

{¶ 2} Appellant's first assignment of error alleging he was charged and sentenced under the incorrect statute is overruled on the basis of the doctrine of res judicata and *State v. Fisher*, 128 Ohio St.3d 92, 2010-Ohio-6238. See also *State v. Bailey*, 12th Dist. No. CA2003-03-066, 2003-Ohio-5989; *State v. Banks*, 8th Dist. Nos. 83782 and 83783, 2004-Ohio-4478; and App.R. 9(B).

{¶ 3} Appellant's second assignment of error alleging ineffective assistance of trial counsel is overruled on the basis of *State v. Piesciuk*, 12th Dist. No. CA2007-04-

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086, 2008-Ohio-4054; *State v. McGraw*, 8th Dist. No. 97839, 2012-Ohio-3692; and the doctrine of res judicata.

{¶ 4} Appellant's third assignment of error challenging his seven-year prison term for rape is overruled on the basis of the doctrine of res judicata. See *Fisher*, 2010-Ohio-6238; *State v. Bradley*, 11th Dist. No. 2003-A-01012, 2006-Ohio-196. See also App.R. 9(B).

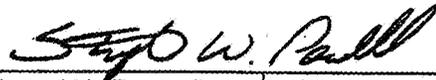
{¶ 5} Judgment affirmed.

{¶ 6} Pursuant to App.R. 11.1(E), this entry shall not be relied upon as authority and will not be published in any form. A certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

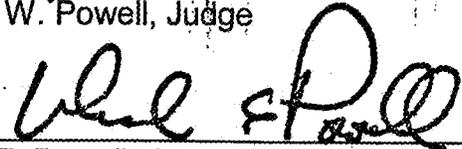
{¶ 7} Costs to be taxed in compliance with App.R. 24.



Robert P. Ringland, Presiding Judge



Stephen W. Powell, Judge



Michael E. Powell, Judge