IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO EX. REL.	:	
Rodney D. Zeune,		
Relator,	:	**Case No. 2013-0959**
v.	:	
JUDGE ALAN TRAVIS; FRANKLIN		
COUNTY COMMON PLEAS COURT	:	**In Procedendo**
Respondent.	:	

MOTION TO ESTABLISH VOID SENTENCE (Collateral Attack)
PURSUANT TO *STATE V. FISCHER & BILLITER*; CRIM. R. 32(C), R.C. 2505, AND R.C. 2929.19

Relator hereby requests that the Court review his sentence and judgment, as a collateral attack, and establish that Relator's sentence and judgment are void. Relator herein presents the following reasons as to why his judgment is void.

JURISDICTION

This Court has subject matter jurisdiction over a collateral attack of the same judgment that is subject to this Action. A defendant may raise a claim of a **void sentence** in the trial court by filing a motion for resentencing and the motion should not be reclassified as a petition for postconviction relief. Relator has made several requests for resentencing and the trial court fails to resentence Relator even after remand from a higher court thus Relator is entitled to a proper sentencing hearing. *State v. Holcomb, 184 Ohio ,App. 3d 577; 2009 Ohio 3187; 921 N.E.2d 1077; 2009 Ohio App. LEXIS 2714.*

"Final judgment in a criminal case means sentence." The sentence is the judgment. *Miller v.*

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Anderhold, 228 U.S. 206, 210, 553 S.Ct. 325, 77 L. Ed 702, Hill v. United States ex rel Wampler, 298, U.S. 460, 464, 56 S.Ct. 760, 762, L. Ed 1283. "Contrary to law" means that a sentencing decision manifestly ignores an issue or factor which a statute requires a court to consider. *State v. Hawkins, 2007 Ohio 3581, citing State v. Lofton, 2004 Ohio 169.*

A trial court is without authority to sentence a defendant outside of the law, statutes, or guidelines. A sentence that is contrary to law is void and must be set aside. *State v. Fischer 128 Ohio St. 3d, 92, 2010 Ohio 6238, 942 N.E.2d 322, State v. Billiter, 134 Ohio St.3d 103, 2012 Ohio 5144, 980 N.E.2d 960.* A void judgment cannot stand and can be challenged at any time and any place.

By failing to pronounce [on the record] its findings or the jury's verdict as to the count of the indictment in the defendant's presence, the trial court violated Crim.R. 43(A). See, e.g., *State v. Henson, Champaign App. No. 2002 CA 21, 2003 Ohio 4426, P7-9*. Relator has had two (2) sentencing hearings and the trial court has failed to pronounce the judgment, the charge, the violation of Code, or the jury's verdict. Therefore, for it to claim that defendant was present when the jury's verdict was pronounced, the trial court's position is in direct contrast to the record. This Court received transcripts of both sentencing hearings and the record clearly demonstrates that the trial court is in violation of *Crim. R. 43, Crim R. 32 and Section 2929.19 of the Ohio Revised Code.*

First, *Crim R. 32(A)*; Imposition of sentence, section (4) states: In serious offenses, the court must state its statutory findings and give reasons supporting those findings, if appropriate. In *R.C. 2929.19(A)*, the court shall inform the offender of the verdict of the jury or finding of the court and ask the offender whether the offender has anything to say as to why sentence should not be imposed upon the offender. Here, the trial court has never even stated Relator/Defendant's name, what charge Relator/ Defendant was indicted for, the statutory violation for which Relator/Defendant was being sentenced for or the jury's verdict; including the amount of cocaine involved at the time of the offense. Relator has

been greatly prejudiced by the trial court's failure to abide by sentencing guidelines because his substantial rights to an appeal are hindered. The trial court's failure to state and record the jury's verdict leaves Relator without the ability to appeal that the jury's finding, as to the amount of cocaine, and how the additional finding applies to the underlying offense of Trafficking in Cocaine, a violation of R.C. 2925.03. Pursuant to Crim. R. 32 (C), the verdict must be recorded and in this case it ***was not***. In this case, pursuant to R.C. 2925.03(4)(d), if the amount of the drug involved equals or exceeds ten grams but is less than one hundred grams of cocaine, trafficking in cocaine is a felony of the third degree. *See indictment and verdict*. The amount of cocaine is an element of the underlying offense, *trafficking in cocaine*, and the amount of cocaine is not an element of complicity. "Complicity" is an additional charge that applies to all criminal offenses that simply overlaps the principle offense, thus, making complicity the same as the principle offense, which requires the offender to act with the kind of culpability required for the commission of an offense. Therefore, all the elements of the principle offense must still be defined, presented and proven beyond a reasonable doubt. Here, that was not the case and the trial court refuses to pronounce or record that amount of cocaine because the underlying offense, trafficking, was not presented or proven.

The underlying offense, trafficking in cocaine, was not a finding of the jury. In fact, the jury was never instructed on, or given the definition of, "trafficking" and were told "to forget about trafficking" even when they asked for the definition. Without the jury's verdict in the judgment entry, Relator has never had an opportunity to appeal the verdict due to it never being pronounced or recorded. *See both transcripts included in this Action.*

When the state proves an offense not through a guilty plea, but via a conviction, and the defendant does not stipulate to the fact of the conviction, the judgment entry of conviction offered must

contain the four elements described in Crim.R. 32(C) and in *State v. Lester, 130 Ohio St.3d 303, 2011 Ohio 5204, 958 N.E.2d 142*, paragraph one of the syllabus. A finding of guilt is not enough. (Emphasis added). In the case at hand, the finding of guilt is not enough because the verdict is two part: 1) the finding of guilt of [**complicity**] and 2) the amount of cocaine involved. The verdict is one of the four elements contained in Crim. R. 32(C), therefore, Relator/Defendant's judgment is void because the requirements of the Rule were not complied with.

Moreover, the trial court ignored the mandate of the Tenth District Court of Appeals. As pointed out in this Action, Relator's case was remanded for resentencing. On January 25, 2012, the trial court held somewhat of a hearing, however, the [hearing] was neither a sentencing hearing nor a resentencing hearing. Pursuant to *R.C. 2929.19(A)*, the court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony and before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded pursuant to section 2953.07 or 2953.08 of the Revised Code. A complete sentencing hearing was required. *State v. Fischer 128 Ohio St. 3d. 92, 2010 Ohio 6238, 942 N.E.2d 322.*

In a case in which a trial court has imposed sentence without first asking a defendant whether he or she wishes to exercise the right of **allocution, resentencing** is required. Under *Crim. R. 32(A)(1)*, before imposing sentence, a **trial court** shall afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she **wishes** to make a statement in his or her own behalf or present any information in mitigation of punishment. The right of **allocution** is absolute and has indicated that **trial courts** must painstakingly adhere to Crim. R. 32, guaranteeing the right of **allocution.** (Emphasis added). Therefore, in a case in which the **trial court** has **imposed sentence** without first **asking** the defendant whether he or she **wishes** to **exercise** the right of

allocution created by Crim. R. 32(A), **resentencing** is **required** unless the error is invited error or harmless error. The courts have previously recognized that the right of allocution under Crim.R. 32(A) applies to resentencing and is mandatory. *State v. Norris, Cuyahoga App. No. 95485, 2011 Ohio 1795; State v. Chambers, Cuyahoga App. No. 89319, 2008 Ohio 3017; State v. Bolton (2001), 143 Ohio App.3d 185, 190, 757 N.E.2d 841.* The record was devoid of any evidence indicating that the trial court addressed defendant's right to allocution at his sentencing hearing. Therefore, because the trial court erred by failing to afford Relator/defendant his right to allocution under *Crim. R. 32(A)(1)*, and because nothing in the record indicated that this error was invited or harmless a remand for resentencing is required.

Stating again, the purpose of allocution is to permit the defendant to speak on his own behalf or present any information in mitigation of punishment." *State v. Short, 129 Ohio St.3d 360, 2011 Ohio 3641, ¶ 85, 952 N.E.2d 1121*. Although not considered a constitutional right, "the right of allocution is firmly rooted in the common-law tradition." S*tate v. Copeland, 12th Dist. No. CA2007-02-039, 2007 Ohio 6168, ¶ 6, citing Green v. United States, 365 U.S. 301, 304, 81 S.Ct. 653, 5 L. Ed. 2d 670 (1961); State v. Lynch, 98 Ohio St.3d 514, 2003 Ohio 2284, ¶ 100-103, 787 N.E.2d 1185*. This right is "both absolute and not subject to waiver due to a defendant's failure to object." *State v. Collier, 2nd Dist. Nos. 2006 CA 102 and 2006 CA 104, 2007 Ohio 6349, ¶ 92.*

The effect of vacating the sentence placed defendant in the same position that he would have been in had there been no sentence. An appellate court still must vacate a void sentence and remand for a resentencing hearing in the trial court. When the original sentence is actually considered a nullity, a court cannot ignore the sentence and instead must vacate it and order resentencing. *State v. Holcomb, 184 Ohio , App. 3d 577; 2009 Ohio 3187; 921 N.E.2d 1077; 2009 Ohio App. LEXIS 2714.* The Tenth

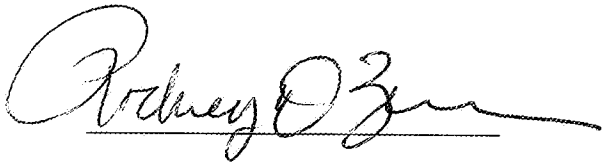
District Court of Appeals did exactly what was required and the trial court ignored the mandate.

The posture of this case is quite unique. The State indicted Relator on a single count of Trafficking in Cocaine, a felony of the third degree. The State of Ohio and their agents (the police) withheld all evidence pertaining to Rayshon Alexander because he is a Federal Informant for the Drug Enforcement Agency (DEA). So, the State is claiming that Mr. Zeune is an accomplice to a "Federal Agent" in a sale where Mr. Zeune bought and used $100 worth of cocaine. Mr. Zeune wrongfully bought $100 worth of cocaine, admitted that he bought 2.3 grams of cocaine to the trial court, and expressed his remorse and apology. However, for the State to claim Mr. Zeune was an accomplice to an Informant, in a sale, where he purchased cocaine, is so contrary to law that the trial court is not even willing to state Mr. Zeune's name, his charge or the jury's verdict on the record at sentencing. The government used Rayshon Alexander [Informant #1] to sell cocaine to Ayman Musleh [Informant #2] to arrest Mr. Zeune for the cocaine that Alexander [Informant #1] sold. While obstructing justice, tampering with evidence, and falsifying information, the prosecutor went to a Grand Jury and withheld all information about Alexander in order to exclude his name from the indictment and discovery. At trial, without any statement from Alexander or discovery including Alexander's involvement in the drug transaction, Mr. Zeune was informed that he was now an accomplice to Alexander even though Alexander was an Agent of the government and where he never claimed Mr. Zeune assisted him in "anything". The use of a Sham Legal Process is evident. The only discovery [which was never disclosed] pertaining to Alexander is the attached photograph. This photograph was introduced [only] after Informant Musleh testified that police had a photograph of Alexander immediately after the sale that was shown to him. Prior to and even after Musleh's testimony, the police were claiming they did not even know Alexander. (Transcript attached to this Action). The trial was stopped for three (3) hours

where the State left to later return in order to produce the attached photograph of Alexander.

Wherefore, Relator is entitled to a collateral attack of his void judgment that is attached to and the subject of this Action. Relator respectfully requests that the Court declare his judgment and sentence void. Relator further requests that the Court compel Respondent, Judge Allan Travis; Franklin County Common Pleas Court to hold the required sentencing hearing and proceed to judgment in Case No. 09 CR 4919. Relator has supported all claims with documentation including transcripts and court documents. (Indictment, verdict form, photograph and Judgment Entries).

Respectfully submitted,



Rodney D. Zeune, 625-137
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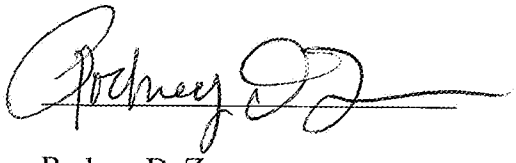
CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was sent the Franklin County Prosecutor's Office, Counsel for Judge Alan Travis, by the way of Regular Mail, at 373 South High Street, Columbus, Ohio 43215, on this 20th day of August, 2013.



Rodney D. Zeune

DRUG DEALER, RAYSHON ALEXANDER

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Access History

Name	Agency	Last Access Time	Count
Carroll, Janey	U.S. Drug Enforcement Administration Columbus	12/23/2009 9:45:47 AM	1

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This data is provided by the OBMV and originates from their Vehicle Registration files with the exception of the photos which are cross referenced from the Driver's License files using the SSN of the owner. Information provided is for investigative purposes and may contain inaccuracies. Verify accuracy with the OBMV. The office of Attorney General of Ohio disclaims liability for any errors or omissions.

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*ALEXANDER WAS NOT ARRESTED FOR SELLING AN OUNCE OF COCAINE ON MARCH 5, 2009 IN THE PRESENCE OF WESTERVILLE POLICE DETECTIVE RUSSELL MOORE AND MVPD; MATT DAILY