

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

vs.

KAREEM GILBERT

Defendant -Appellee.

On Appeal from the Hamilton
County Court of Common Pleas

Case No. 2013-0382

MERIT BRIEF OF KAREEM GILBERT,
~~DEFENDANT - APPELLEE~~

Ravert J. Clark (042027)
Counsel of Record
114 E. 8th Street
Suite 400
Cincinnati, OH 45202
513-587-2887
Fax 513-621-2525
notguilty14@aol.com

Counsel for Appellee
Kareem Gilbert

Joseph T. Deters (012084)
Hamilton County Prosecutor
Melynda J. Machol (040724)
Assistant Prosecuting Attorney
230 E. 9th Street
Suite 400
Cincinnati, OH 45202
513-946-3119
Fax 513-946-3021
Counsel for Appellant
State of Ohio

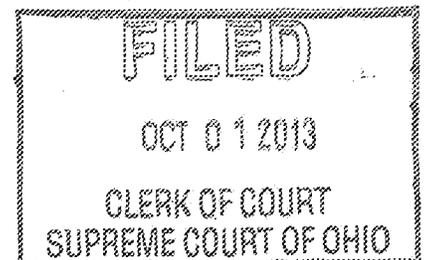


Table of Contents

Table of Contents i

Table of Authorities ii

Statement of the Case and Facts 1

Proposition of Law I 4

In a Criminal Case, Once The Trial Court Issues a Final Judgment Satisfying Crim.
R. 32(C) The Trial Court Lacks Authority to Reconsider It’s Own Valid Final
Judgment.

Proposition of Law II 11

Vacating an Otherwise Valid Final Judgment to Allow Retrial of the Defendant on
the Same Offense Violates the Prohibition Against Double Jeopardy Guaranteed in
Both the Ohio and United States Constitutions.

Conclusion 14

Certificate of Service 16

Appendix:

May 24, 2010 Judgment Entry: Sentence: Incarceration, *State of Ohio v. Kareem Gilbert*,
B09-1283. T.d. 163.

May 24, 2011 Judgment Entry: Sentence: Incarceration, *State of Ohio v. Kareem Gilbert*,
B09-1283. T.d. 180.

January 30, 2013, Judgment Entry and Opinion, *State v. Gilbert*, C11-0382, 1st Dist.
(*Gilbert II*).

March 30, 2012, Opinion, *State v. Gilbert*, C11-0382, 1st Dist. (*Gilbert I*).

Table of Authorities

Cases:

Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). 1

Gamble v. State, 449 So.2d 319, 371 (1984). 12

Illinois v. Vitale, 447 U.S. 410, 415 (1980). 12

Kingsborough v. Tousley, 56 Ohio St. 450, 47 N.E. 541 (1897). 5

Miller v. Nelson-Miller, 132 Ohio St.3d 381, 972 N.E.2d 568, 2012 Ohio 2845. 5

Pratts v. Hurley, 102 Ohio St.3d at 83, 806 N.E.2d 992, 2004 Ohio 1980. 5, 6, 7, 12

Patton v. Diemer, 35 Ohio St.3d 68, 518 N.E.2d 941 (1988). 6

State v. Adkins, 161 Ohio App.3d 114, 2005 Ohio 2577, 829 N.E.2d 729. 10

State v. Baker, 119 Ohio St.3d 197, 893 N.E.2d 163, 2008 Ohio 3330. 5

State v. Bethel, 110 Ohio St.3d 416, 2006 Ohio 4853, 854 N.E.2d 150. 10

State v. Carlisle, 131 Ohio St.3d 127, 961 N.E.2d 671, 2011 Ohio 6553. 4, 6, 7, 8, 10

State v. Gilbert, (Gilbert II) 2013 Ohio 238, 2013 Ohio App. Lexis 193 2

State v. Gilbert, (Gilbert I) 2012 Ohio 1366, 1st. Dist. Hamilton Cty., C11-0382. 1

State v. Gilroy, 195 Ohio App.3d 173, 2011 Ohio 4163 959 N.E.2d 19. 10

State v. Clouser, 2012 Ohio 1711 (9th Dist). 9

State ex rel. White v. Junkin, 80 Ohio St.3d 335, 686 N.E.2d 267 (1997). 4, 13

State ex rel., Tubbs Jones v. Suster, 84 Ohio St.3d 70, 75, 701 N.E.2d 1002 (1998). 6

State v. Lester, 130 Ohio St.3d 303, 958 N.E.2d 142, 2011 Ohio 5204. 5

State v. Liskany, 196 Ohio App.3d 609, 2011 Ohio 4456, 946 N.E.2d 1073. 10

State v. Raber, 134 Ohio St.3d 350, 982 N.E.2d 684, 2012 Ohio 5636. 6, 7, 13

<i>State v. Simpkins</i> , 117 Ohio St.3d 420, 884 N.E.2d 568, 2008 Ohio 1197.	13
<i>State v. Taylor</i> , 9 th Dist. No. 92-CA-05469, 1993 Ohio App. Lexis 2585.	11
<i>State v. Williams</i> , 2012 Ohio 3401, 2012 Ohio App. Lexis 2993.	10
<i>United States v. Cotton</i> , 535 U.S. 625, 630, 122 S.Ct. 1781 (2002).	6
<i>United States v. Fogel</i> , 829 F.2d 77 (D.C. Cir. 1987).	13
<i>United States v. Wilson</i> , 420 U.S. 332, 343, 95 S.Ct. 1013 (1975).	12
Constitutional Provision:	
Ohio Constitution, Article IV, Sec. 18	4
Rules:	
Crim. R. 32(C).	5

Statement of the Case and Facts

The First District Court of Appeals summarized the factual posture of the case in its March 30th 2012, Opinion in *Gilbert I*.

[*P2] In May 2010, after entering into a detailed agreement with the state, Gilbert entered pleas of guilty to voluntary manslaughter with an accompanying firearm specification, having a weapon while under a disability, and witness intimidation. In exchange, the state dismissed other weapons charges and a count of aggravated murder with an accompanying firearm specification. The trial court accepted Gilbert's guilty pleas and sentenced him to an aggregate sentence of 18 years' imprisonment.

[*P3] A year later, in May 2011, the state moved to vacate Gilbert's pleas, contending Gilbert had breached his 2010 plea agreement by failing to give truthful testimony in a criminal case against his father, Reuben Jordan. Gilbert's trial counsel informed the court that Gilbert did not object **[**4]** to the state's motion to vacate his pleas. Gilbert admitted he had breached the plea agreement but maintained he had testified truthfully in the Jordan case.

[*P4] The trial court granted the state's motion to vacate Gilbert's pleas. At the same hearing, Gilbert then pleaded guilty to murder with an accompanying firearm specification and to having a weapon while under a disability. The trial court accepted Gilbert's guilty pleas, withdrew the prior sentence, and imposed a new aggregate sentence of 18 years to life in prison.¹

On direct appeal, Kareem's counsel filed a no-error brief pursuant to *Anders v. California*.² The First District, following an independent review of the record ordered briefing on the issue of the trial court's jurisdiction to reconsider its valid final judgment.³ There are two Judgment Entries at issue, both entered May 24th, one year apart. The first was journalized May

¹ *State v. Gilbert, (Gilbert I)* 2012 Ohio 1360, 2012 Ohio App. Lexis 1247 ¶2-4. Attached.

² *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

³ *State v. Gilbert, (Gilbert I)* 2012 Ohio 1360, 2012 Ohio App. Lexis 1247, ¶7-10.

24, 2010.⁴ The second was journalized May 24, 2011.⁵ It is the trial court's reconsideration of the May 24, 2010, Entry which is the issue in this case.

Following this supplemental briefing, relying on this Court's jurisprudence, in *Gilbert II*, the First District held a trial court does not have authority - jurisdiction, to reconsider its own valid final judgment.⁶ The concurrence incorrectly states as a result of the First District Decision, Kareem "may escape a conviction."⁷ As correctly reflected earlier in the opinion, the First District ordered Kareem's convictions for voluntary manslaughter with a firearm specification, weapon under disability, and witness intimidation, and resulting 18 year sentence in the Department of Corrections, reinstated.⁸ Literally ignoring every applicable prior decision of this Court, the Dissent opined the trial court acted within its jurisdiction in reconsidering its own prior valid entry.⁹

Factual Errors In State's Brief

The State asserts Kareem breached the plea agreement by refusing to testify in an unrelated murder trial after having agreed to do so.¹⁰ This is not accurate. Kareem did testify at

⁴ T.d. 163, attached.

⁵ T.d. 180, attached.

⁶ *State v. Gilbert*, (Gilbert II) 2013 Ohio 238, 2013 Ohio App. Lexis 193, ¶21. Attached.

⁷ *State v. Gilbert*, (Gilbert II) 2013 Ohio 238, 2013 Ohio App. Lexis 193, ¶22.

⁸ *State v. Gilbert*, (Gilbert II) 2013 Ohio 238, 2013 Ohio App. Lexis 193, ¶3, 21.

⁹ *State v. Gilbert*, (Gilbert II) 2013 Ohio 238, 2013 Ohio App. Lexis 193, ¶23-30.

¹⁰ Appellant Brief, p.4.

the unrelated trial.¹¹

The State asserts Kareem failed to appeal the decision of the trial court granting the State's Motion to Vacate his May 24, 2010, plea.¹² This is not accurate. A Notice of Appeal was filed on June 23, 2011.¹³ This matter before the Court is the very essence of Kareem appealing the decision of the trial court.

The State asserts "both parties contemplated Gilbert's cooperation would occur after he had been sentenced. All expectations were specifically stated."¹⁴ This is not accurate. The plea agreement makes no reference to when Kareem would be expected to testify in relation to his own sentencing.¹⁵ The last page of the agreement reflects the document contains all terms and conditions between the parties.¹⁶ There is nothing in the record supporting this statement of fact by the State.

The State asserts the trial court "expressly retained jurisdiction to continue proceedings against Gilbert in the event he breached the plea agreement."¹⁷ This is not accurate. No where in the plea agreement is there any mention of the trial court retaining jurisdiction.¹⁸ In addition, the

¹¹ T.p. 86-88. *Gilbert I* at ¶3.

¹² Appellant's Brief, p. 7.

¹³ T.d. 182.

¹⁴ Appellant's Brief p. 9.

¹⁵ T.d. 166.

¹⁶ T.d. 166, p.4.

¹⁷ Appellant's Brief p. 8.

¹⁸ T.d. 166.

very act of imposing sentencing and journalizing the judgment entry is an intentional act of the trial court which divest the trial court of jurisdiction.

Proposition of Law I

In a Criminal Case, Once The Trial Court Issues a Final Judgment Satisfying Crim. R. 32(C) The Trial Court Lacks Authority to Reconsider It's Own Valid Final Judgment.

The State of Ohio and its Amicus argue the law of contracts, applied to plea agreements, operates as an exception to the settled rule a trial court lacks authority to reconsider its own valid final judgments. But because a court can only consider a contract dispute when it has the authority or jurisdiction to do so, this argument is fatally flawed. As the First District pointed out, "...the trial court's power to hear, and its authority to decide cases, is conferred by law and not by the parties."¹⁹ Under the law the trial court did not have authority to reconsider its May 24, 2010 valid, final judgment.

The State, its Amicus, and the Dissent want this Court to ignore established law and conclude the trial court some how retained jurisdiction to reconsider its own valid entry of May 24, 2010. Unless the trial court some how had jurisdiction the terms of any plea agreement are irrelevant because the trial court did not have jurisdiction to consider the terms of the agreement.

A Valid Final Judgment In a Criminal Case

A criminal sentence is final upon issuance of a final order.²⁰ Crim. R. 32 specifies the requirements of a valid final judgment entry in a criminal case. A judgment of conviction is a valid

¹⁹ *State v. Gilbert*, 2012 Ohio 1366, 1st Dist. Hamilton Cty., C11-0382, ¶8 (Gilbert I), citing, Ohio Constitution, Article IV, Sec. 18.

²⁰ *State v. Carlisle*, 131 Ohio St.3d 127, 129, 961 N.E.2d 671, 2011 Ohio 6553, ¶11, citing *State ex rel. White v. Junkin*, 80 Ohio St.3d 335, 337, 686 N.E.2d 267 (1997).

final order when it sets forth:

- The fact of the conviction,
- The sentence,
- The judge's signature, and
- The time stamp indicating the entry upon the journal by the clerk.²¹

In this case, satisfying Crim. R. 32(C)'s four requirements, the trial court's May 24, 2010, *Judgment Entry* is a valid final order.²²

This Court has a firm and longstanding principle that final judgments are meant to be just that - final.²³ "Finality produces "certainty in the law and public confidence in the system's ability to resolve disputes."²⁴

Jurisdiction

"[J]urisdiction means the court's statutory or constitutional power to adjudicate the case," encompassing "jurisdiction over the subject matter and over the person."²⁵ "If a court acts without jurisdiction, then any proclamation by that court is void."²⁶ It is a "condition precedent"

²¹ Crim. R. 32(C); *State v. Baker*, 119 Ohio St.3d 197, 893 N.E.2d 163, syllabus, as modified in *State v. Lester*, 130 Ohio St.3d 303, 958 N.E.2d 142, syllabus.

²² T.d. 163.

²³ *Kingsborough v. Tousley*, 56 Ohio St. 450, 458, 47 N.E. 541 (1897).

²⁴ *Miller v. Nelson-Miller*, 132 Ohio St.3d 381, 385, 972 N.E.2d 568, 2012 Ohio 2845, ¶18.

²⁵ *Pratts v. Hurley*, 102 Ohio St.3d at 83, 806 N.E.2d 992, 2004 Ohio 1980, ¶11.

²⁶ *Pratts v. Hurley*, 102 Ohio St.3d at 83, 806 N.E.2d 992, 2004 Ohio 1980, ¶11.

to the court's ability to consider the case.²⁷ Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time.²⁸ A valid final judgment satisfying Crim. R. 32 divest the trial court of jurisdiction over the case.

Absent statutory authority, "a trial court lacks authority to reconsider its own valid final judgment with two exceptions; to correct a void judgment and when the judgment contains a clerical error."²⁹ Demonstrating a failure to understand the "distinction between a court that lacks subject-matter jurisdiction over a case and a court that improperly exercises that subject-matter jurisdiction," the State wants to ignore this jurisdictional prerequisite, and move directly to consideration of the substantive law of contracts to produce the result desired by the prosecution.³⁰ The State argues Kareem agreed to certain terms, conditions, and waivers in the May 18, 2010 Plea Agreement.³¹ The State's argument puts the proverbial cart before the horse.

Before any consideration can be given to the terms of the plea agreement, the court must have jurisdiction to consider the terms of the agreement. With the May 24th, 2010 journalization of the trial court's judgment entry, the trial court lost authority - jurisdiction over the case. Thus

²⁷ *Pratts v. Hurley*, 102 Ohio St.3d at 83, 806 N.E.2d 992, 2004 Ohio 1980, ¶11, citing *Patton v. Diemer*, 35 Ohio St.3d 68, 518 N.E.2d 941, paragraph three of the syllabus.

²⁸ *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781 (2002); *State ex rel., Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 75, 701 N.E.2d 1002 (1998); *Pratts v. Hurley*, 102 Ohio St.3d at 83, 806 N.E.2d 992, 2004 Ohio 1980, ¶11.

²⁹ *State v. Raber*, 134 Ohio St.3d 350, 351, 982 N.E.2d 684, 2012 Ohio 5636, ¶20; *State v. Carlisle*, 131 Ohio St.3d 127, 961 N.E.2d 671, 2011 Ohio 6553, ¶1.

³⁰ *Pratts v. Hurley*, 102 Ohio St.3d at 83, 806 N.E.2d 992, 2004 Ohio 1980, ¶10.

³¹ Appellant Brief, p. 1-2, 4.

the trial court did not have authority - jurisdiction, to consider the terms of the Plea Agreement pursuant to the State's oral Motion to Vacate. Divested of jurisdiction by its May 24, 2010, Entry, the trial court lacked "authority to do anything but announce its lack of jurisdiction and dismiss" the State's Motion to Vacate.³²

Referring to this Court's recent affirmation of these jurisdictional principles,³³ the State urges this Court to ignore well established law because "this matter deals with much more than a sexual offender classification."³⁴ This result-oriented argument is in complete disregard for the rule of law and justice. Essentially the State urges this Court to "ignore the law because we don't like the results if you follow the law." This is also the central theme of the dissent in *Gilbert II*.

Ignoring the jurisdictional prerequisite, the State relies on several cases supporting its flawed argument that substantive contract law requires vacation of Kareem's plea. But this authority does not support the State's argument.

State v. Carlisle

The Ohio Supreme Court accepted *Carlisle* to address the proposition a trial court retains jurisdiction to modify a sentence not yet executed.³⁵ On July 11, 2007, Carlisle was sentenced to a prison term and granted bond pending appeal with the Judgment Entry journalized July 13, 2007.³⁶ Following an unsuccessful direct appeal, Carlisle moved the trial court to reconsider and

³² *Pratts v. Hurley*, 102 Ohio St.3d at 85-86, 806 N.E.2d 992, 2004 Ohio 1980, ¶21.

³³ *State v. Raber*, 134 Ohio St.3d 350, 982 N.E.2d 684, 2012 Ohio 5636.

³⁴ Appellant's Brief, p.4.

³⁵ *State v. Carlisle*, 131 Ohio St.3d at 129, 961 N.E.2d 671, 2011 Ohio 6553, ¶8.

³⁶ *State v. Carlisle*, 131 Ohio St.3d at 127, 961 N.E.2d 671, 2011 Ohio 6553, ¶2.

modify his sentence for medical reasons.³⁷ On April 2, 2009, the trial court vacated Carlisle's sentence, imposing five years of community control.³⁸ The Court of Appeals reversed concluding the trial court lacked authority because Carlisle's conviction was affirmed by the Court of Appeals.³⁹ Carlisle appealed to the Ohio Supreme Court.

As Appellee in *Carlisle* the State argued, and Carlisle agreed, the trial court was divested of jurisdiction to reconsider its previously imposed sentence because it had journalized a final judgment entry.⁴⁰ This Court held the trial court lacked authority to modify Carlisle's sentence after journalization of the July 13, 2007, Judgment Entry and remanded the case back to the trial court for execution of the original sentence.⁴¹

The issue in this case is virtually identical to the issue in *Carlisle*. Framing the issue, the *Carlisle* Court stated, "[i]n this case, a valid judgment of conviction was journalized on July 13, 2007, yet the trial court purported to modify Carlisle's sentence nearly two years later. The trial court's attempts to do so were improper."⁴² Here the trial court, despite a valid judgment entry purportedly attempted to modify Kareem's sentence one year to the day after journalization of that entry. Here, as in *Carlisle*, the trial court's attempts to do so were improper. And as in

³⁷ *State v. Carlisle*, 131 Ohio St.3d at 128, 961 N.E.2d 671, 2011 Ohio 6553, ¶4.

³⁸ *State v. Carlisle*, 131 Ohio St.3d at 128, 961 N.E.2d 671, 2011 Ohio 6553, ¶6.

³⁹ *State v. Carlisle*, 131 Ohio St.3d at 128, 961 N.E.2d 671, 2011 Ohio 6553, ¶7.

⁴⁰ *State v. Carlisle*, 131 Ohio St.3d at 129, 961 N.E.2d 671, 2011 Ohio 6553, ¶10.

⁴¹ *State v. Carlisle*, 131 Ohio St.3d at 130-31, 961 N.E.2d 671, 2011 Ohio 6553, ¶13, 15, 17.

⁴² *State v. Carlisle*, 131 Ohio St.3d at 129, 961 N.E.2d 671, 2011 Ohio 6553, ¶12.

Carlisle this Court should remand the case back to the trial court for execution of the original sentence.

At least one appellate district has relied on *Carlisle* in reversing a trial court which purported to modify its valid final judgment entry.⁴³ In *Clouser* the trial court imposed a six month sentence in a judgment entry journalized March 15, 2011.⁴⁴ The trial court then granted Clouser a one week stay of execution.⁴⁵ Clouser failed to report to the county jail to begin serving his sentence.⁴⁶ In response, the trial court vacated its sentence journalized March 15, 2011, and increased Clouser's sentence from six months to eighteen months.⁴⁷

Finding the trial court's March 15, 2011 sentencing entry complied with Crim. R. 32(C) and *Baker*, the *Clouser* court held the trial court lacked the authority to vacate its March 15, 2011 judgment entry. The trial court's subsequent sentencing entry with the eighteen month sentence was vacated and the original March 15, 2011, sentencing entry reinstated.⁴⁸

No Inherent Authority

The State, Amicus, and the Dissent essentially argue the trial court had the inherent authority, under substantive contract law, to reconsider its valid final May 24, 2010, order.⁴⁹ But

⁴³ *State v. Clouser*, 2012 Ohio 1711 (9th Dist., 2012).

⁴⁴ *State v. Clouser*, 2012 Ohio 1711, ¶3.

⁴⁵ *State v. Clouser*, 2012 Ohio 1711, ¶3.

⁴⁶ *State v. Clouser*, 2012 Ohio 1711, ¶3-4.

⁴⁷ *State v. Clouser*, 2012 Ohio 1711, ¶4.

⁴⁸ *State v. Clouser*, 2012 Ohio 1711, ¶8-9.

⁴⁹ Appellant's Brief, p. 12.

a trial court does not have inherent authority - jurisdiction, only that given by statute. Relying on *Carlisle*, the Fourth Appellate District stated, “ the trial court did not have inherent authority to modify William’s November 4, 2010 judgment entry of conviction.”⁵⁰

State’s Authority

The State cites *State v. Adkins*,⁵¹ *State v. Gilroy*,⁵² *State v. Liskany*,⁵³ and *State v. Bethel*,⁵⁴ to support its argument a trial court retains jurisdiction in the event of a breach of a plea agreement.⁵⁵ But in *Adkins*, *Gilroy*, and *Bethel*, unlike this case, the defendant had not been sentenced at the time the trial court sought to reconsider its previous order. Because the defendant had not been sentenced in these three cases, the issue of the trial court’s continuing jurisdiction was not an issue. *Liskany* was a defense direct appeal raising the issue of the trial court’s consideration of improper information during sentencing, in violation of the State’s obligation under the plea agreement. Again the jurisdiction of the trial court was not an issue.

In *Bethel* the issue was not the same as in this case. The central issue in *Bethel* relating to the plea agreement was an inconsistency and ambiguity in the terms of the agreement, *not* the trial court’s jurisdiction to consider the prosecution’s motion to vacate Bethel’s plea. *Bethel* supports

⁵⁰ *State v. Williams*, 2012 Ohio 3401, 2012 Ohio App. Lexis 2993, ¶14, citing *State v. Carlisle*, 131 Ohio St.3d 127, 961 N.E.2d 671, 2011 Ohio 6553.

⁵¹ *State v. Adkins*, 161 Ohio App.3d 114, 2005 Ohio 2577, 829 N.E.2d 729.

⁵² *State v. Gilroy*, 195 Ohio App.3d 173, 2011 Ohio 4163 959 N.E.2d 19.

⁵³ *State v. Liskany*, 196 Ohio App.3d 609, 2011 Ohio 4456, 946 N.E.2d 1073.

⁵⁴ *State v. Bethel*, 110 Ohio St.3d 416, 2006 Ohio 4853, 854 N.E.2d 150.

⁵⁵ Appellant Brief p. 10-12.

Kareem's argument by providing a blue-print of how the prosecution should have handled Kareem's case in the trial court.

In *Bethel*, Bobby Bethel entered a plea agreement, which, among other things, allowed Bobby to avoid the death penalty in exchange for, among other things, Bobby testifying against a co-defendant. *Prior* to being sentenced, Bobby refused to testify at the co-defendant's trial. *Prior* to sentencing the prosecution moved to set aside Bobby's plea agreement. *Prior* to Bobby's sentencing, the trial court vacated Bobby's plea. All of which this Court approved. The question of the trial court's authority - jurisdiction, to vacate Bobby's plea was never an issue. The State's reliance on *Bethel* is misplaced and demonstrates any "injustice" is the result of the way the Hamilton County Prosecutor's office handled the case.

The State also relies on *State v. Taylor*.⁵⁶ Contrary to Dissent and the State's assertion, as the First District explained, this reliance is misplaced. *Taylor* is significantly distinguished by what the *Taylor* court does not do. *Taylor* does not address the issue of the trial court's jurisdiction to reconsider its own valid final judgment. *Gilbert II*, ¶13. Because the issue of the trial court's jurisdiction was not raised in *Taylor*, and for the reasons explained by the First District, *Taylor* does not support the State's argument. Any case failing to address an Ohio trial court's jurisdiction to reconsider its own valid final judgment does not support the State's argument.

In this case, because the May 24, 2010, *Judgment Entry*,⁵⁷ was a valid final order, the trial court did not have jurisdiction to grant the State's oral motion to vacate Kareem's conviction and plea. In the absence of jurisdiction, a court lacks the authority to do anything but announce its

⁵⁶ *State v. Taylor*, 9th Dist. No. 92-CA-05469, 1993 Ohio App. Lexis 2585.

⁵⁷ T.d. 163.

lack of jurisdiction and dismiss.⁵⁸ The trial court should have so announced and dismissed the State's motion, leaving its valid final order of May 24, 2010, undisturbed.

Proposition of Law II

Vacating an Otherwise Valid Final Judgment to Allow Retrial of the Defendant on the Same Offense Violates the Prohibition Against Double Jeopardy Guaranteed in Both the Ohio and United States Constitutions.

Double jeopardy prohibits a second prosecution for the same offense after conviction.⁵⁹ Acceptance of a guilty plea places the accused in jeopardy and prohibits vacating that plea without legal cause.⁶⁰ As a matter of policy, final judgments of conviction bar a second prosecution because of the "public's strong interest in the finality of criminal judgments..."⁶¹

In vacating its valid May 24, 2010 final order, the trial court effectively restored the parties to their respective positions prior to the journalization of the May 24, 2010, Judgment Entry. For Kareem this means being placed in jeopardy of all counts contained in the indictment, for a second time. Once the court vacated Kareem's conviction, Kareem was left to defend all charges in the indictment or enter a plea. Placing Kareem in jeopardy of all charges in the indictment for a second time violated Kareem's double jeopardy protections in both the United States and Ohio Constitutions.

"To permit a judge to pass judgment on a defendant, to sentence the defendant, to provide for the sentence to be executed, and then subsequently vacate the otherwise valid judgment so as

⁵⁸ *Pratts v. Hurley*, 102 Ohio St.3d at 85-86, 806 N.E.2d 992, 2004 Ohio 1980, ¶21.

⁵⁹ *Illinois v. Vitale*, 447 U.S. 410, 415 (1980).

⁶⁰ *Gamble v. State*, 449 So.2d 319, 371 (1984).

⁶¹ *United States v. Wilson*, 420 U.S. 332, 343, 95 S.Ct. 1013 (1975).

to allow retrial on the same offense violates the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution by placing the defendant in double jeopardy.”⁶²

Expectation of Finality

“If a defendant has a legitimate expectation of finality, then an increase in that sentence is prohibited by the double jeopardy clause.”⁶³ Unless the sentence imposed was unlawful and therefore void, the defendant has a reasonable, legitimate expectation of finality in the sentence.⁶⁴ Because Kareem had a legitimate expectation of finality in his sentence when the trial court entered its judgment of conviction on May 24, 2010, the protections of the Double Jeopardy Clause prohibit the trial court from vacating his plea and placing Kareem in jeopardy for a second time.⁶⁵

The authority relied on by the State does not address the situation presented once a trial court loses jurisdiction over the case having journalized a valid final judgment. There is no dispute a trial court can set aside or vacate a plea prior to sentencing the defendant. But none of the cases relied on by the State address the situation presented here, where the defendant has already been sentenced, thus divesting the trial court of jurisdiction over the case.

Neither the State, its Amicus, or the Dissent cite any authority where the defendant has

⁶² *State ex rel. White v. Junkin*, 80 Ohio St.3d at 340, 686 N.E.2d 267, Justice Lundberg Stratton, dissenting.

⁶³ *State v. Raber*, 134 Ohio St.3d 350, 982 N.E.2d 684, 2012 Ohio 5636, ¶24, citing, *United States v. Fogel*, 829 F.2d 77, 87 (D.C. Cir. 1987).

⁶⁴ *State v. Simpkins*, 117 Ohio St.3d 420, 884 N.E.2d 568, 2008 Ohio 1197, ¶36.

⁶⁵ *State v. Raber*, 134 Ohio St.3d 350, 982 N.E.2d 684, 2012 Ohio 5636, ¶26.

been sentenced, a valid final judgment journalized, and then the trial court seeks to reconsider its valid final judgment, placing the defendant in jeopardy for a second time.

Conclusion

Much in the role of “Chicken Little,” the State cries the “integrity of plea agreements and the ability to enforce them has been threatened by the First District Court of Appeals’ decision, not only in the present case, where Kareem Gilbert’s manslaughter conviction was reversed, but in all pending and future cases where plea bargains are struck to preserve the State’s interest in justice and the defendant’s interest in due process. The effects of the majority are far-reaching.”⁶⁶ In a further appeal to criminal hysteria, the State added, “any rule of law that allows any party to perpetrate a fraud on the court simply cannot stand.”⁶⁷ The dissent argues the majority opinion “undermines the plea arrangement system in Ohio and is gravely unjust to the citizens of Ohio.” All of these claims are feckless.

The rule of law has not allowed any fraud to be perpetrated on the court. It was the Hamilton County Prosecutor’s naive and poor handling of the case that put the State in the current position. Plea arrangements have not been undermined. If one can call a result where Kareem is convicted of manslaughter, weapon under disability and witness intimidation, resulting in an 18 year prison sentence, an injustice, the injustice results from the actions of the Hamilton County Prosecutors office in failing to understand the applicable law and quite simply, for believing a convicted murderer would keep his word.

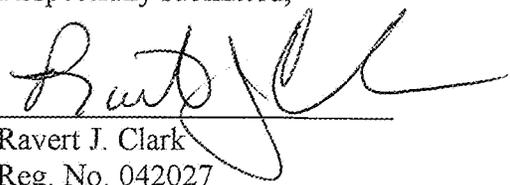
⁶⁶ Memorandum In Support of Jurisdiction, p. 1.

⁶⁷ Memorandum In Support of Jurisdiction, p. 2.

It has been said this Court is not an “error correction court.” But that is what the State, it’s Amicus, and the Dissent would have this Court do. They want this Court to correct the errors of the Hamilton County Prosecutors Office. Had the Hamilton County Prosecutor’s office handled Kareem’s plea and case as the Franklin County Prosecutor’s office handled Bobby Bethel’s, this issue would not be before the court. This failure by the Hamilton County Prosecutor’s office is the cause of any injustice to the citizens of Hamilton County. This failure by the prosecutors does not justify this Court abandoning over 100 years of jurisprudence. To do so would be an injustice to the citizens of the State of Ohio.

The trial court’s Judgment Entry journalized May 24, 2010, is a valid final judgment which the trial court did not have the authority - jurisdiction, to modify. By modifying this valid order the trial court violated Kareem’s constitutional rights prohibiting double jeopardy. For these reasons this Court should affirm the decision of the First District Court of Appeals.

Respectfully submitted,



Ravert J. Clark
Reg. No. 042027
For the Appellant
114 E. 8th Street
Suite 400
Cincinnati, OH 45202
513-587-2887
Fax 513-621-2525
Notguilty14@aol.com

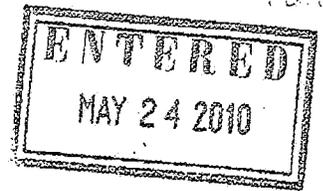
Certificate of Service

I certify a copy of this Brief was served on the Melynda J. Machol, Esq., Hamilton County Prosecutors Office, 230 E. 9th Street, Suite 400, Cincinnati, OH 45202, Steven Taylor, Esq., at 373 South High Street, 13th Floor, by ordinary U.S. mail on October 1, 2013.


Ravert J. Clark

Appendix

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS



date: 05/18/2010
code: GJEI
judge: 230

Robert C Winkler
Judge: ROBERT C WINKLER

**DEFENDANT'S
EXHIBIT**

A

NO: B 0901283

STATE OF OHIO
VS.
KAREEM GILBERT

JUDGMENT ENTRY: SENTENCE:
INCARCERATION

Defendant was present in open Court with Counsel JOHN K ISSENMANN on the 18th day of May 2010 for sentence.

The court informed the defendant that, as the defendant well knew, the defendant had pleaded guilty, and had been found guilty of the offense(s) of:

count 1: VOLUNTARY MANSLAUGHTER WITH SPECIFICATION

#1 (AMENDED, 2903-03A/ORCN, F1

count 2: HAVING WEAPONS WHILE UNDER DISABILITY, 2923-13A3/ORCN, F3

count 3: INTIMIDATION OF A CRIME VICTIM/WITNESS, 2921-04B/ORCN, F3

count 4: AGGRAVATED MURDER WITH SPECIFICATIONS SPECIAL FELONY, 2903-01A/ORCN, DISMISSAL

count 5: HAVING WEAPONS WHILE UNDER DISABILITY, 2923-13A3/ORCN, DISMISSAL

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned as follows:

count 1: CONFINEMENT: 10 Yrs DEPARTMENT OF CORRECTIONS
CONFINEMENT ON SPECIFICATION #1: 3 Yrs DEPARTMENT OF CORRECTIONS

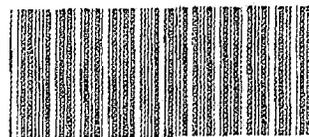
TO BE SERVED CONSECUTIVELY AND PRIOR TO THE SENTENCE IMPOSED IN UNDERLYING OFFENSE IN COUNT #1.

count 2: CONFINEMENT: 5 Yrs DEPARTMENT OF CORRECTIONS

count 3: CONFINEMENT: 5 Yrs DEPARTMENT OF CORRECTIONS

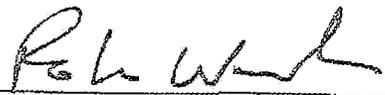
THE SENTENCES IN COUNTS #2 AND #3 ARE TO BE SERVED CONCURRENTLY WITH EACH OTHER BUT CONSECUTIVELY TO COUNT #1 IN THE DEPARTMENT OF CORRECTIONS.

Defendant was notified of the right to appeal as required by Crim.



THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 05/18/2010
code: GJEI
judge: 230


Judge: ROBERT C WINKLER

NO: B 0901283

STATE OF OHIO
VS.
KAREEM GILBERT

JUDGMENT ENTRY: SENTENCE:
INCARCERATION

THE TOTAL AGGREGATE SENTENCE IS EIGHTEEN (18) YEARS IN THE DEPARTMENT OF CORRECTIONS.

THE DEFENDANT IS TO RECEIVE CREDIT FOR FIVE HUNDRED THIRTEEN (513) DAYS TIME SERVED.

THE DEFENDANT IS TO PAY THE COURT COSTS.

FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW. IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.

AS PART OF THE SENTENCE IN THIS CASE, THE DEFENDANT SHALL BE SUPERVISED BY THE ADULT PAROLE AUTHORITY AFTER DEFENDANT LEAVES PRISON, WHICH IS REFERRED TO AS POST-RELEASE CONTROL, FOR FIVE (5) YEARS.

IF THE DEFENDANT VIOLATES POST-RELEASE CONTROL SUPERVISION OR ANY CONDITION THEREOF, THE ADULT PAROLE AUTHORITY MAY IMPOSE A PRISON TERM, AS PART OF THE SENTENCE, OF UP TO

Defendant was notified of the right to appeal as required by Crim. R 32(A)(2)

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 05/18/2010
code: GJEI
judge: 230


Judge: ROBERT C WINKLER

NO: B 0901283

STATE OF OHIO
VS.
KAREEM GILBERT

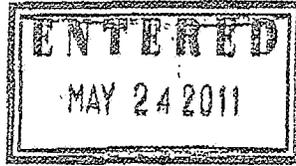
JUDGMENT ENTRY: SENTENCE:
INCARCERATION

NINE (9) MONTHS, WITH A MAXIMUM FOR REPEATED VIOLATIONS OF FIFTY PERCENT (50%) OF THE STATED PRISON TERM. IF THE DEFENDANT COMMITS A NEW FELONY WHILE SUBJECT TO POST-RELEASE CONTROL, THE DEFENDANT MAY BE SENT TO PRISON FOR THE REMAINING POST-RELEASE CONTROL PERIOD OR TWELVE (12) MONTHS, WHICHEVER IS GREATER. THIS PRISON TERM SHALL BE SERVED CONSECUTIVELY TO ANY PRISON TERM IMPOSED FOR THE NEW FELONY OF WHICH THE DEFENDANT IS CONVICTED.

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

B

date: 05/18/2011
code: GJEI
judge: 230



Robert C Winkler
Judge: ROBERT C WINKLER

NO: B 0901283

STATE OF OHIO
VS.
KAREEM GILBERT

JUDGMENT ENTRY: SENTENCE:
INCARCERATION

Defendant was present in open Court with Counsel ELIZABETH GILLESPIE on the 18th day of May 2011 for sentence.

The court informed the defendant that, as the defendant well knew, the defendant had pleaded guilty, and had been found guilty of the offense(s) of:

count 1: MURDER WITH SPECIFICATION #1 (REDUCED & AMENDED),
2903-02A/ORCN,SF

count 2: HAVING WEAPONS WHILE UNDER DISABILITY,
2923-13A3/ORCN,F3

count 3: INTIMIDATION OF A CRIME VICTIM/WITNESS, 2921-04B/ORCN,F3,
DISMISSAL

count 4: AGGRAVATED MURDER WITH SPECIFICATIONS, 2903-01A/ORCN,
DISMISSAL

count 5: HAVING WEAPONS WHILE UNDER DISABILITY, 2923-13A3/ORCN,
DISMISSAL

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned as follows:

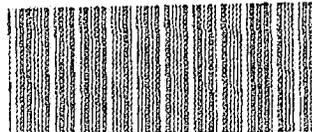
count 1: CONFINEMENT: 15 Yrs - LIFE DEPARTMENT OF CORRECTIONS
CONFINEMENT ON SPECIFICATION #1: 3 Yrs DEPARTMENT OF
CORRECTIONS

TO BE SERVED CONSECUTIVELY AND PRIOR TO THE SENTENCE
IMPOSED IN UNDERLYING OFFENSE IN COUNT #1.

count 2: CONFINEMENT: 5 Yrs DEPARTMENT OF CORRECTIONS

THE SENTENCES IN COUNTS #1 AND #2 ARE TO BE SERVED
CONCURRENTLY WITH EACH OTHER.

Defendant was notified of the right to appeal as req



D93169575

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 05/18/2011
code: GJEI
judge: 230


Judge: ROBERT C WINKLER

NO: B 0901283

STATE OF OHIO
VS.
KAREEM GILBERT

JUDGMENT ENTRY: SENTENCE:
INCARCERATION

THE TOTAL AGGREGATE SENTENCE IS EIGHTEEN (18) YEARS TO LIFE
IN THE DEPARTMENT OF CORRECTIONS.

THE DEFENDANT IS TO RECEIVE CREDIT FOR ALL TIME SERVED.

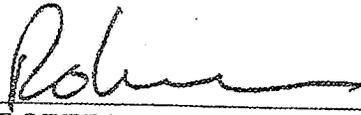
THE DEFENDANT IS TO PAY THE COURT COSTS.

PURSUANT TO A PLEA AGREEMENT BETWEEN THE PARTIES, THE
DEFENDANT HEREIN IS NOT ELIGIBLE FOR INTENSIVE PRISON
PROGRAM, TRANSITIONAL CONTROL, JUDICIAL RELEASE, OR ANY
OTHER EARLY RELEASE PROGRAM AND IS TO SERVE THIS SENTENCE
IN ITS ENTIRETY.

FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS
REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED
AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO
WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE
INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR
IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL
CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE
REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL,
PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO
SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT
PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW.
IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED
DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE
SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS
CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE,
TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 05/18/2011
code: GJEI
judge: 230


Judge: ROBERT C WINKLER

NO: B 0901283

STATE OF OHIO
VS.
KAREEM GILBERT

JUDGMENT ENTRY: SENTENCE:
INCARCERATION

THE DEFENDANT IS NOT SUBJECT TO THE POST RELEASE CONTROL PROVISIONS OF OHIO LAW AS THIS IS A LIFE SENTENCE. PAROLE ELIGIBILITY FOR THIS OFFENDER IS GOVERNED BY OHIO REVISED CODE §2967.13(A)(1) AND THE DEFENDANT IS SO ADVISED.

*** GUILTY PLEA AND AGREED SENTENCE ***

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

ENTERED
JAN 30 2013

STATE OF OHIO, : APPEAL NO. C-110382
Plaintiff-Appellee, : TRIAL NO. B-091283

vs. :

KAREEM GILBERT, : *JUDGMENT ENTRY.*
Defendant-Appellant. :



This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is reversed and cause remanded with instructions for the reasons set forth in the Opinion filed this date.

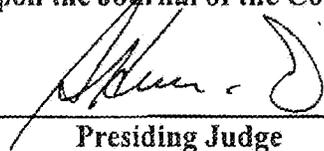
Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on January 30, 2013 per Order of the Court.

By: _____


Presiding Judge

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ENTERED
JAN 30 2013

STATE OF OHIO, : APPEAL NO. C-110382
Plaintiff-Appellee, : TRIAL NO. B-091283

vs. :

KAREEM GILBERT, : *OPINION.*
Defendant-Appellant. :

PRESENTED TO THE CLERK
OF COURTS FOR FILING

JAN 30 2013

Criminal Appeal From: Hamilton County Court of Common Pleas

COURT OF APPEALS

Judgment Appealed From Is: Reversed and Cause Remanded with Instructions

Date of Judgment Entry on Appeal: January 30, 2013

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Melynda J. Machol*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Ravert J. Clark, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

ENTERED

JAN 30 2013

CUNNINGHAM, Presiding Judge.

{¶1} Defendant-appellant Kareem Gilbert appeals from the trial court's May 2011 judgment of conviction for murder, an accompanying firearm specification, and having weapons under a disability.

{¶2} Previously appointed counsel for Gilbert filed a no-error brief stating that no meritorious issues existed to support Gilbert's appeal. *See Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Contrary to appellate counsel's position, this court found that legal points arguable on the merits existed, including the trial court's authority to set aside Gilbert's prior final judgment of conviction upon the state's motion, and the subsequent resentencing of the defendant. Thus, we granted counsel's motion to withdraw, and we appointed new counsel for additional briefing. *State v. Gilbert*, 1st Dist. No. C-110382, 2012-Ohio-1366, ¶ 7-11.

Procedural and Factual Posture

{¶3} This court summarized the procedural and factual posture of the case in its March 30, 2012, opinion:

In May 2010, after entering into a detailed agreement with the state, Gilbert entered pleas of guilty to voluntary manslaughter with an accompanying firearm specification, having a weapon while under a disability, and witness intimidation. In exchange, the state dismissed other weapons charges and a count of aggravated murder with an accompanying firearm specification. The trial court accepted Gilbert's guilty pleas and sentenced him to an aggregate sentence of 18 years' imprisonment.

A year later, in May 2011, the state moved to vacate Gilbert's pleas, contending Gilbert had breached his 2010 plea agreement by failing to give truthful testimony in a criminal case against his father, Reuben Jordan. Gilbert's trial counsel informed the court that Gilbert did not object to the

ENTERED

JAN 30 2013

state's motion to vacate his pleas. Gilbert admitted he had breached the plea agreement but maintained he had testified truthfully in the Jordan case.

The trial court granted the state's motion to vacate Gilbert's pleas. At the same hearing, Gilbert then pleaded guilty to murder with an accompanying firearm specification and to having a weapon while under a disability. The trial court accepted Gilbert's guilty pleas, withdrew the prior sentence, and imposed a new aggregate sentence of 18 years to life in prison.

Gilbert at ¶ 2-4.

{¶4} Gilbert now raises three assignments of error, which all concern the trial court's authority to set aside the final judgment of conviction and resentence him. First, he argues that after the May 2010 judgment of conviction had been journalized, the trial court lacked the authority to grant the state's 2011 motion to vacate his pleas and then to reconsider its own valid judgment and resentence him. We agree.

Reconsideration of Final Judgments in Criminal Cases

{¶5} Generally, Ohio trial courts lack the authority to reconsider their own valid final judgments in criminal cases. *See, e.g., State v. Raber*, ___ Ohio St.3d ___, 2012-Ohio-5636, ___ N.E.2d ___, paragraph one of the syllabus; *State v. Carlisle*, 131 Ohio St.3d 127, 2011-Ohio-6553, 961 N.E.2d 671, ¶ 9; *Brook Park v. Necak*, 30 Ohio App.3d 118, 120, 506 N.E.2d 936 (8th Dist.1986).

{¶6} There are both judicially and legislatively created exceptions to this general rule, none of which apply in this case. The judicially created exceptions, for example, provide the trial courts with continuing jurisdiction "to correct a void sentence" and "to correct a clerical error in a judgment." *Raber* at ¶ 20, citing *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19. In addition, under Crim.R. 32.1, the trial court retains jurisdiction to review and grant a defendant's

ENTERED

JAN 30 2013

postsentence motion to withdraw a plea when he has not taken a direct appeal. *See State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97-98, 378 N.E.2d 162 (1978). Further, the trial court retains jurisdiction to decide a motion for a new trial based on newly discovered evidence as permitted by Crim.R. 33, when that "specific issue has not been decided upon direct appeal." *State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, ¶ 37.

{¶7} The legislatively created exceptions include habeas corpus and postconviction remedies as set forth by statute. *See R.C. 2725.01 et seq. and 2953.21 et seq.*

{¶8} The state argues that the general rule relating to the finality of judgments in criminal cases does not apply in this case. Instead, the state contends that the facts implicate the distinction between a trial court's lack of subject-matter jurisdiction and a trial court's improper exercise of jurisdiction or authority. *See Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992.

{¶9} In essence, the state argues that the parties were properly before the court on the state's motion to vacate the pleas because the common pleas court has subject-matter jurisdiction over felony cases. According to the state, Gilbert, at best, could have argued that the trial court improperly exercised its jurisdiction when it granted the state's motion to vacate his pleas, but that he "waived" his right to challenge the court's exercise of jurisdiction in that instance when he acquiesced in the proceedings below.

{¶10} The state's argument, however, ignores what we believe to be the crux of Gilbert's argument. Gilbert does not merely argue that the trial court lacked subject-matter jurisdiction to rule on a postconviction motion. He argues, rather, that the trial court lacked the authority to reconsider its final judgment and to grant the relief sought. *See Raber*, ___ Ohio St.3d ___, 2012-Ohio-5636, ___ N.E.2d ___; *Carlisle*, 131 Ohio St.3d 127, 2011-Ohio-6553, 961 N.E.2d 671, at ¶ 9. The state's argument is not responsive

ENTERED

JAN 30 2013

to Gilbert's argument concerning the finality of the judgment. Nor do we find the state's argument persuasive.

Continuing Jurisdiction to Enforce a Plea Agreement

{¶11} The state also suggests that the trial court "expressly retained jurisdiction to continue proceedings against Gilbert in the event that he breached the plea agreement." The plea agreement does state that, in the event of a breach, the state may reinstate the original charges against Gilbert.

{¶12} But the parties' agreement, even if incorporated into the judgment of conviction, could not give the trial court the authority to reconsider its final judgment, in the absence of authority affixed by law. See Ohio Constitution, Article IV, Section 4(B) ("The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters * * * as may be provided by law."). (Emphasis added.) In this case, the trial court did not reconsider its final judgment under any statute or under any judicially recognized source of authority.

Final Judgment

{¶13} It is undisputed that the judgment of conviction entered by the trial court in May 2010 met the requirements of finality set forth in Crim.R. 32(C). See *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, paragraph one of the syllabus, *modifying State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163 (holding that a judgment of conviction is final, when the order sets forth "(1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk [of courts]."). For this reason, the state's reliance on the Ninth Appellate District's decision in *State v. Taylor*, 9th Dist. No. 92CA005469, 1993 Ohio App. LEXIS 2585 (May 19, 1983), is misplaced.

{¶14} *Taylor* was based on the Ninth District's earlier decision in *State v. Curry*, 49 Ohio App.2d 180, 359 N.E.2d 1379 (9th Dist.1976). In *Curry*, the court initially considered whether it was the duty of the trial court or the prosecutor to determine

ENTERED

JAN 30 2013

whether the defendant had complied with his plea agreement. The court decided that it was the duty of the trial court to make that determination, after a hearing on the issue. The *Curry* court then stated that if, on remand, the trial court found that the state had proven that the defendant had failed to perform under his plea bargain, then the trial court should either proceed to sentencing—which had not yet occurred—or vacate Curry's pleas. *Id.* at 183. See also *State ex rel. White v. Junkin*, 80 Ohio St.3d 335, 686 N.E.2d 267 (1997) (holding that, in the absence of formal journalization of a decision, the municipal court possessed authority to review and reverse its previous decision.).

{¶15} In contrast, in this case, the trial court granted the state's motion to vacate Gilbert's pleas after the court had already sentenced Gilbert and after the judgment of conviction including that sentence had been journalized in accordance with the criminal rules, resulting in a final judgment of conviction. Because the court below, unlike the trial court in *Curry*, reconsidered a final judgment, *Curry* does not support the state's position.

{¶16} The Ninth Appellate District in *Taylor* cited *Curry* to support its determination that the trial court had jurisdiction to grant the state's motion to vacate Taylor's plea and sentence after the sentence had become final. But the *Taylor* court did not reconcile its decision with the general rule that an Ohio trial court lacks the authority to reconsider its own valid final judgment in a criminal case. And the *Taylor* court failed to acknowledge the distinction between Curry's case and Taylor's case in that regard.

{¶17} Moreover, in *Taylor*, the state actually reindicted Taylor after the trial court found that she had breached the plea agreement by feigning amnesia in an attempt to avoid testifying at her husband's trial. The defendant again entered a plea and was again convicted upon the new indictment. Taylor's reindictment might well have influenced the *Taylor* court's disposition of the jurisdictional issue in the case. In this case, the state did not reindict Gilbert.

ENTERED
MAY 30 2013

{¶18} We, therefore, hold that the trial court lacked the authority to reconsider its own valid final judgment in this case. Accordingly, we sustain the first assignment of error.

{¶19} In his second assignment of error, Gilbert argues that the trial court violated his Double Jeopardy rights under the United States and Ohio Constitutions, when it reconsidered its final judgment. In his third assignment of error, Gilbert argues that he was denied his constitutional right to the effective assistance of trial counsel, when counsel failed to object to the trial court's exercise of jurisdiction to reconsider the May 2010 final judgment.

{¶20} We have already determined that the trial court lacked the authority to reconsider Gilbert's May 2010 judgment of conviction. Thus, our resolution of Gilbert's first assignment of error renders his second and third assignments of error moot, and we decline to address them. *See* App.R. 12 (A)(1)(c).

Conclusion

{¶21} The trial court lacked the authority to reconsider the May 2010 valid final judgment. Accordingly, we reverse the trial court's May 2011 judgment, and we remand this cause to the trial court with instructions to vacate its May 2011 order granting the state's motion to vacate the pleas and its May 2011 judgment of conviction and to reinstate its May 2010 judgment of conviction.

Judgment reversed and cause remanded with instructions.

FISCHER, J., concurs separately.

DINKELACKER, J., dissents.

FISCHER, J., concurring separately.

{¶22} Given the current state of the law, I am compelled to join the lead opinion in this case. Regrettably, Kareem Gilbert may escape a conviction because he was sentenced before he fulfilled a material obligation of his plea agreement. This case exposes an obvious deficiency in the power of Ohio's courts to enforce plea agreements, a central element of our criminal justice system. *See, e.g., Missouri v.*

ENTERED

JAN 30 2013

Frye, ___ U.S. ___, 132 S.Ct. 1399, 1407, 182 L.Ed.2d 379 (2012) (noting that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas). Even in civil cases, there is at least some law indicating that a civil judgment induced by fraud may be void. *See generally Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 23. Unfortunately, the legislature so far has not provided Ohio courts with the statutory authority in criminal matters for the state to enforce plea agreements when a breach by the defendant occurs postconviction. *Compare* Crim.R. 32.1. Absent such specific legal authority, with any attendant constitutional process therein, Ohio law, as it now stands, commands that I concur.

DINKELACKER, J., dissenting.

{¶23} Kareem Gilbert's scheme of dishonesty and disrespect for the justice system should not be rewarded. This court should hold Gilbert to the series of agreements he made with the state and the trial court. To do otherwise undermines the entire plea arrangement system.

{¶24} In this case, Gilbert entered into a detailed agreement with the state to provide honest testimony. He did not. Instead, he has gamed the system in the worst possible way. He clearly lied to the trial court at some point in order to garner his initial conviction for voluntary manslaughter, as opposed to the indicted offense of aggravated murder.

{¶25} The Ohio Supreme Court has held that the reasons for disfavoring collateral attacks do not apply in two principle circumstances: (1) when the issuing court lacked jurisdiction or (2) when the order was the product of fraud. *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 23. Gilbert perpetrated a fraud of the highest order. I believe that his conduct places this case within this narrow line of exceptions to judgment finality that allows courts to

ENTERED

JAN 30 2013

correct grave injustices like the one that has occurred here. The trial court acted within its jurisdiction in reconsidering the May 2010 judgment of conviction.

{¶26} Since the trial court acted within its jurisdiction, I believe that the reasoning of the court in *State v. Taylor*, 9th Dist. No. 92CA005469, 1993 Ohio App. LEXIS 2585 (May 19, 1993), applies. The facts in that case are similar to the facts in the present case. The court in *Taylor* held that “where a plea is accepted conditionally and the defendant fails to comply with the condition, the court is justified in vacating the plea.” *Id.* at *4. This is exactly the case here. This would effectuate justice in this case.

{¶27} Further, in *Taylor*, the defendant had objected in the trial court to the state’s motion to vacate her plea. Here, Gilbert not only did not object to the state’s motion to vacate the plea, but acquiesced to it. He did not appeal the state’s motion. Consequently, he has waived any error, and we can reverse only upon a finding of plain error. See *State v. Underwood*, 3 Ohio St.3d 12, 13, 444 N.E.2d 1332 (1983); *State v. Tibbs*, 1st Dist. No. C-100378, 2011-Ohio-6716, ¶ 40.

{¶28} “[T]he plain error rule is to be applied with the utmost caution and invoked only under exceptional circumstances, in order to prevent a manifest miscarriage of justice.” *State v. Cooperrider*, 4 Ohio St.3d 226, 227, 448 N.E.2d 452 (1983); *State v. Salaam*, 1st Dist. Nos. C-070385 and C-070413, 2008-Ohio-4982, ¶ 25. In this case, the manifest miscarriage of justice would be to allow Gilbert to avoid his conviction for murder through his own lies. Therefore, I cannot join in the majority opinion.

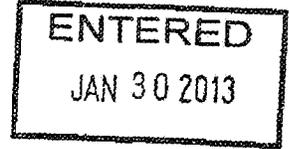
{¶29} My interpretation of the law surrounding the circumstances of this case does not allow me to join the majority. Gilbert did not seek justice, he thwarted

it. Left to stand, the decision of this court allows an injustice against the citizens of Ohio. The state committed no unfair act and broke no rule.

{¶30} Therefore, I dissent.

Please note:

The court has recorded its own entry on the date of the release of this opinion.



Caution

As of: September 30, 2013 5:45 PM EDT

State v. Gilbert

Court of Appeals of Ohio, First Appellate District, Hamilton County
March 30, 2012, Date of Judgment Entry on Appeal
APPEAL NO. C-110382

Reporter: 2012-Ohio-1366; 2012 Ohio App. LEXIS 1247; 2012 WL 1072749

STATE OF OHIO, Plaintiff-Appellee, vs. KA-REEM GILBERT, Defendant-Appellant.

Notice: THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

Subsequent History: Decision reached on appeal by, Remanded by [State v. Gilbert, 2013 Ohio 238, 2013 Ohio App. LEXIS 193 \(Ohio Ct. App., Hamilton County, Jan. 30, 2013\)](#)

Prior History: **[**1]** Criminal Appeal From: Hamilton County Court of Common Pleas. TRIAL NO. B-0901283.

Disposition: Judgment of Court: Motion to Withdraw As Counsel for Appellant is Granted, New Counsel for Appellant is Appointed, Further Briefing Ordered, and Appeal is Ordered to be Resubmitted..

Case Summary

Procedural Posture

Defendant appealed from a judgment of the Hamilton County Court of Common Pleas, Ohio, that convicted defendant of murder and an accompanying firearm specification, and of having weapons while under a disability. Defendant's appointed appellate counsel filed a no-error brief stating that no meritorious issues exist to support defendant's appeal. Counsel also filed a motion to withdraw.

Overview

Defendant originally pled guilty to voluntary manslaughter, however, on motion of the State a year later, and with the agreement of defendant, the trial court granted the State's motion to have the plea withdrawn based on defendant's breach of the plea agreement. Defendant then pled guilty to murder and the firearm specification and charge. Contrary to counsel's position, the appellate court found that an arguable issue existed as to whether, after the 2010 judgment of conviction had been journalized, the trial court had authority to grant the State's 2011 motion to vacate the pleas, and then to reconsider its own valid final judgment and resentencing defendant. Because legal points arguable on their merits remained to be resolved, the appellate court could not reach a decision on the merits of the appeal. Without the assistance of counsel to argue the matters for defendant, and without the State's response, the appellate court was ill-equipped to determine whether the trial court had jurisdiction or authority to act.

Outcome

The motion to withdraw was granted. New counsel was appointed and further briefing on the appeal was ordered.

Syllabus

An appeal, submitted pursuant to the dictates of [Anderson v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 \(1967\)](#), is not wholly frivolous when there remain legal points arguable on their merits to be resolved before

the appellate court can fulfill its constitutionally mandated function and affirm, reverse, or modify the judgment of the trial court.

If the appellate court finds an appeal, properly submitted by means of a no-error brief, to be wholly frivolous, the court may proceed to a decision on the merits; if, on the other hand, the appellate court finds any legal points arguable on their merits and prejudicial to the defendant exist, it must ensure, prior to decision, that the indigent defendant receives the assistance of counsel to argue the appeal.

Absent statutory authority, trial courts generally lack authority to reconsider their own final judgments entered in criminal cases; therefore, whether the trial court [**2] had authority to reconsider its final judgment, entered one year earlier, upon the state's motion to vacate the defendant's guilty pleas and then to re-sentence the defendant is a legal point arguable on its merits.

[See SEPARATE CONCURRENCE: Whether a defendant who waived objection to the state's motion to vacate his guilty pleas made one year after the trial court's entry of final judgment has also waived any error with regard to the trial court's exercise of its authority to reconsider that judgment is also a legal point arguable on its merits.]

[But see DISSENT: Where an appellate court, having thoroughly reviewed the record, agrees with the determination of both appointed counsel and the state that a criminal defendant has no meritorious arguments to present, the appeal is wholly frivolous, and the the court should proceed to a decision on the merits.]

Counsel: Joseph T. Deters, Hamilton County Prosecuting Attorney, and Melynda J. Machol, Assistant Prosecuting Attorney, for Plaintiff-Appellee.

Timothy J. McKenna, for Defendant-Appellant.

Judges: CUNNINGHAM, Presiding Judge. FISCHER, J., concurs separately. DIN-

KELACKER, J., dissents.

Opinion by: CUNNINGHAM

Opinion

CUNNINGHAM, Presiding Judge.

[*P1] Defendant-appellant Kareem Gilbert [**3] appeals from the trial court's May 2011 judgment of conviction for murder, an accompanying firearm specification, and having weapons while under a disability. Gilbert's appointed appellate counsel has filed a no-error brief stating that no meritorious issues exist to support Gilbert's appeal. See *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

I. The Trial Court Reconsiders Its Final Judgment

[*P2] In May 2010, after entering into a detailed agreement with the state, Gilbert entered pleas of guilty to voluntary manslaughter with an accompanying firearm specification, having a weapon while under a disability, and witness intimidation. In exchange, the state dismissed other weapons charges and a count of aggravated murder with an accompanying firearm specification. The trial court accepted Gilbert's guilty pleas and sentenced him to an aggregate sentence of 18 years' imprisonment.

[*P3] A year later, in May 2011, the state moved to vacate Gilbert's pleas, contending Gilbert had breached his 2010 plea agreement by failing to give truthful testimony in a criminal case against his father, Reuben Jordan. Gilbert's trial counsel informed the court that Gilbert did not object [**4] to the state's motion to vacate his pleas. Gilbert admitted he had breached the plea agreement but maintained he had testified truthfully in the Jordan case.

[*P4] The trial court granted the state's motion to vacate Gilbert's pleas. At the same hearing, Gilbert then pleaded guilty to murder with an accompanying firearm specification and to having a weapon while under a disability. The trial court accepted Gilbert's guilty

pleas, withdrew the prior sentence, and imposed a new aggregate sentence of 18 years to life in prison. This appeal followed.

II. The No-Error Brief and This Court's Sole Obligation

[*P5] Gilbert's appointed appellate counsel has advised this court that, after a conscientious examination of the record, he can discern no error in the trial proceedings that would arguably support Gilbert's appeal. See Freele v. Hills, 843 F.2d 958, 960 (6th Cir.1988); see also Anders, 386 U.S. at 744, 87 S.Ct. 1396, 18 L.Ed.2d 493. Appellate counsel communicated this conclusion to Gilbert but has received no response. See Loc.R. 16.2(C)(1). Counsel has moved this court for permission to withdraw as counsel. See Anders at 744.

[*P6] At counsel's urging, *HNI* this court now "assume[s] its sole obligation of [*5] conducting 'a full examination of all the proceedings' to decide whether the case is wholly frivolous." State v. Williams, 183 Ohio App.3d 757, 2009 Ohio 4389, 918 N.E.2d 1043, ¶ 11 (1st Dist.), quoting Anders at 744. If this court determines that the appeal is wholly frivolous, then the court may proceed to a decision on the merits. See In re Booker, 133 Ohio App.3d 387, 390, 728 N.E.2d 405 (1st Dist.1999), citing Anders at 744. If, however, this court determines that any legal points arguable on their merits and prejudicial to the defendant exist, we must ensure, prior to decision, that the indigent defendant receives the assistance of counsel to argue the appeal. See id. at 390-391.

III. Arguable Issue of the Trial Court's Authority to Reconsider Its May 2010 Judgment of Conviction

[*P7] Based upon our review of the record and the applicable law, we do not agree with appointed counsel's assertion that Gilbert's appeal is wholly frivolous. We find that an arguable issue exists as to whether, after the 2010 judgment of conviction had been journalized, the trial court had authority to grant the state's 2011 motion to vacate Gilbert's pleas,

and then to reconsider its own valid final judgment [*6] and resentence Gilbert.

[*P8] It is well-established law in Ohio that *HN2* "trial courts lack authority to reconsider their own valid final judgments in criminal cases." State ex rel. White v. Junkin, 80 Ohio St.3d 335, 338, 1997 Ohio 340, 686 N.E.2d 267 (1997); see also State ex rel. Crigade v. Zucki, 111 Ohio St.3d 353, 2006 Ohio 5795, 856 N.E.2d 263, ¶ 18. No matter what term we attach to it—subject—matter jurisdiction or authority—the trial court's power to hear and its authority to decide cases is conferred "by law," and not by the parties. Ohio Constitution, Article IV, Section 18; see also Morrison v. Steiner, 32 Ohio St.2d 86, 290 N.E.2d 841 (1972), paragraph one of the syllabus; Ohio Constitution, Article IV, Section 4(B) (a common pleas court's jurisdiction is fixed by statute). Thus "[a]bsent statutory authority," the trial court was not empowered to modify its May 2010 criminal sentence, and its attempt to do so may have been improper. State v. Curdise, 131 Ohio St.3d 127, 2011 Ohio 6553, 961 N.E.2d 671, ¶ 1.

Assistance of Counsel to Argue the Appeal

[*P9] The appeal is not, therefore, wholly frivolous. Since legal points arguable on their merits remain to be resolved, this court cannot now reach a [*7] decision on the merits of the appeal. See Anders, 386 U.S. at 744, 87 S.Ct. 1396, 18 L.Ed.2d 493. Without the assistance of counsel to argue these matters for Gilbert, and without the state's response, we are ill-equipped to determine whether the court had jurisdiction or authority to act. See In re Booker, 1st Dist. No. C-980214, 1999 Ohio App. LEXIS 3378, *9 (July 23, 1999).

[*P10] We, therefore, grant counsel's motion to withdraw. We appoint attorney Ravert J. Clark, Attorney Registration Number 0042027, to serve as counsel for Gilbert. We order him to present, in accordance with App.R. 12 and 16(A), an assignment of error on the issue of whether the trial court had authority to grant the state's motion to vacate Gilbert's pleas and to reconsider and modify its May 2010 criminal

sentence, and on any other matter counsel may discover in a diligent review of the record.

[*P11] We further order new counsel to file a brief on or before May 29, 2012, and counsel for the state to file a responsive brief on or before June 29, 2012.

Judgment accordingly.

FISCHER, J., concurs separately.

DINKELACKER, J., dissents.

Concur by: FISCHER

Concur

FISCHER, J., concurring separately.

[*P12] I concur with the result of the lead opinion in so [*8] far as I believe that an arguable issue exists as to whether the trial court had authority to grant the state's motion to vacate Gilbert's pleas and resentence Gilbert, but I write separately to note that, because *Carlisle* was concerned with a trial court's exercise of its authority, as opposed to subject-matter jurisdiction, Gilbert may have waived any error with regard to the trial court's exercise of au-

thority. See *Frank v. Hawley*, 102 Ohio St.3d 21, 2004 Ohio 1980, 506 N.E.2d 992, ¶ 11-12 (distinguishing between a court's subject-matter jurisdiction and the court's exercise of jurisdiction); see, e.g., *State v. Finkbe*, 5th Dist. No. E-07-003, 2007 Ohio 6126, ¶ 10 (determining that "[p]urported errors in a court's decision in the exercise of its jurisdiction may be waived and are waived by failure to interpose timely objections."); but see *Crim.P. 52(B)* (discussing plain error). Therefore, I would have ordered appointed counsel for Gilbert to address whether, assuming that the trial court erred, such an error can be waived, and whether Gilbert waived such error, if any.

Dissent by: DINKELACKER

Dissent

DINKELACKER, J., dissenting.

[*P13]. I do not agree that the record supports the appointment of counsel in [*9] this case. Having thoroughly reviewed the record, I agree with the determination of both appointed counsel and the state that Gilbert has no meritorious arguments to present to this court. I therefore dissent.