[Cite as *State v. Jarrells*, 2015-Ohio-879.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101707

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT F. JARRELLS, JR.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-11-556216-A

BEFORE: Celebrezze, A.J., Jones, J., and Boyle, J.

RELEASED AND JOURNALIZED: March 12, 2015

FOR APPELLANT

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Appellant, Robert Jarrells, Jr., pro se, brings this appeal claiming the sentence that resulted from his 2012 driving while under the influence ("OVI") conviction is contrary to law. After a thorough review of the record and law, we hold that his sentence is not contrary to law, and therefore, the trial court did not err in denying his motion.

I. Factual and Procedural History

{¶2} Appellant was indicted on November 16, 2011, with the following charges: One count of driving while under the influence, a violation of R.C. 4511.19(A)(1)(a), a third-degree felony; and one count of driving under the influence, a violation of 4511.19(A)(1)(d), a third-degree felony. Both counts included furthermore clauses indicating appellant had previously pled guilty to a felony violation of R.C. 4511.19 in 2006.

{¶3} On November 2, 2011, Cleveland police officers initiated a traffic stop of a vehicle driven by appellant. He was determined to be intoxicated and arrested for OVI. A more thorough recitation of the facts surrounding the arrest can be read in this court's prior opinion in *State v. Jarrells*, 8th Dist. Cuyahoga No. 99329, 2013-Ohio-3813 ("*Jarrells I*").

{¶4} A jury trial commenced on October 30, 2012. On November 1, 2012, the jury returned guilty verdicts on all charges. A presentence investigation report was ordered and sentencing held on November 29, 2012. The court merged the two counts as allied offenses and the state elected to have appellant sentenced on the first count. The court imposed a prison sentence of four years with up to three years of postrelease control. The court also imposed a $1,340 mandatory fine[1] and imposed a lifetime driver's license suspension.

[1]The record indicates the court waived the fine and costs after appellant filed an affidavit of indigence.

{¶5} Appellant perfected a timely appeal to this court. We affirmed appellant's conviction on September 5, 2013. In doing so, we rejected appellant's arguments that the court erred when it excluded appellant's expert witness testimony, appellant's counsel was ineffective, and his convictions were against the manifest weight of the evidence. *See Jarrells I.*

{¶6} On June 6, 2014, appellant, pro se, filed a motion styled "Motion for Void of Sentence." The state filed its opposition to the motion on July 3, 2014. The court denied the motion on July 9, 2014. Appellant then filed the instant appeal assigning one error for review:

> I. The trial court erred when it sentenced the defendant/appellant outside the statutory range to four years.

II. Law and Analysis

A. Res Judicata

{¶7} The state asserts that appellant's appeal is barred by the doctrine of res judicata. It points to appellant's first appeal where he did not raise the present issue that was known at the time and could have been raised. Whether res judicata prevents appellant from successfully appealing his sentence necessarily depends on the propriety of this sentence.

{¶8} In *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995), the court stated that the doctrine of res judicata bars not only subsequent actions involving the same legal theory of recovery as the previous action, but also claims that could have been litigated in the previous action:

> "It has long been the law of Ohio that 'an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or *might* have been litigated in a first lawsuit'" (emphasis sic) (quoting *Rogers v. Whitehall*, 25 Ohio St.3d 67, 69, 25 OBR 89, 90, 494 N.E.2d 1387, 1388 [1986]).

> We also declared that "the doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." *Id*.

Id. at 382, quoting *Natl. Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990).

{¶9} If the sentence is invalid and consequently void, res judicata does not operate to bar correction. *See State v. Willard*, 8th Dist. Cuyahoga No. 101055, 2014-Ohio-5278, ¶ 11; *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 40. Therefore, before determining whether res judicata applies, this court must determine whether the sentence imposed is void.

{¶10} The state argues that any error in the sentence only makes it voidable rather than void, citing *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 12. However, *Simpkins* does not precisely address the issue, and the court's discussion of what constitutes a void sentence makes clear that the imposition of a sentence unauthorized by law is void:

> If a judge imposes a sentence that is unauthorized by law, the sentence is unlawful. "If an act is *unlawful* it [is] not erroneous or voidable, but it is wholly unauthorized and void." (Emphasis sic.) *State ex rel. Kudrick v. Meredith* (1922), 24 Ohio N.P. (N.S.) 120, 124, 1922 WL 2015, *3.

Id. at ¶ 21.

B. Proper Sentencing Range

{¶11} This court reviews sentences according to the framework set forth by the legislature in R.C. 2953.08(G)(2). This statute provides,

> The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
>
> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> * * *
>
> (b) That the sentence is otherwise contrary to law.

This court has previously set forth the proper standard of review required by this statute:

> "[W]e presume the sentence imposed by the trial court is correct absent evidence that it is clearly and convincingly contrary to law. "Clear and convincing evidence is more than a mere preponderance of the evidence; it is that evidence 'which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established."' *State v. Edwards*, 8th Dist. No. 82327, 2003-Ohio-5503, ¶ 32, quoting *State v. Garcia*, 126 Ohio App.3d 485, 710 N.E.2d 783 (12th Dist.1998), citing *Cincinnati Bar Assn. v. Massengale*, 58 Ohio St.3d 121, 122, 568 N.E.2d 1222 (1991)."

State v. Sherman, 8th Dist. Cuyahoga No. 97840, 2012-Ohio-3958, ¶ 16.

{¶12} The issue before this court is the appropriate sentencing range for a third-degree felony violation of R.C. 4511.19(A)(1)(a).

{¶13} There is currently a split among the appellate districts in Ohio regarding this issue. On one hand, the Second, Ninth, and Eleventh Districts analyzed portions of R.C. 4511.19 and 2929.14 and found certain portions of those statutes in conflict. *See State v. May*, 2d Dist.

Montgomery No. 25359, 2014-Ohio-1542, ¶ 29; *State v. South*, 9th Dist. Summit No. 26967, 2014-Ohio-374; and *State v. Owen*, 2013-Ohio-2824, 995 N.E.2d 911 (11th Dist.). Specifically, R.C. 4511.19 calls for felony sentences that can exceed the maximum sentence for third-degree felonies found in R.C. 2929.14. The Tenth and Twelfth Districts reached the opposite conclusion. *See State v. Sturgill*, 12th Dist. Clermont No. CA2013-01-002, 2013-Ohio-4648; *State v. Mercier*, 10th Dist. Franklin No. 13AP-906, 2014-Ohio-2910. The *Sturgill* court found the statutes were not in conflict where a specification found in R.C. 2941.1413 was involved. This specification calls for an additional mandatory sentence of between one- and five-years as set forth in R.C. 2929.13(G)(2). The *Mercier* decision did not involve that specification, but the Tenth District found that R.C. 4511.19(G)(1) precluded any finding of conflict by finding that prison terms imposed for violations of R.C. 4511.19(A)(1)(a) are guided by R.C. 4511.19(G)(1) rather than R.C. 2929.14

> **{¶14}** R.C. 4511.19(G)(1) provides,
>
> > [w]hoever violates any provision of divisions (A)(1)(a) to (i) or (A)(2) of this section is guilty of operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them. * * * The court shall sentence the offender for either offense under Chapter 2929. of the Revised Code, *except as otherwise authorized or required by divisions (G)(1)(a) to (e) of this section* * * *.

(Emphasis added.) R.C. 4511.19(G)(1)(e)(i), the provision implicated in this case, states in part,

> > [i]f the offender is being sentenced for a violation of division (A)(1)(a) * * * of this section, [the court shall impose] a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender is not convicted of and does not plead guilty to a specification of that type. *The court may impose a prison term in addition to the mandatory prison term. The*

> *cumulative total of a sixty-day mandatory prison term and the additional prison term for the offense shall not exceed five years.*

(Emphasis added.)

{¶15} R.C. 4511.19(G)(1)(e)(i) directs the reader to R.C. 2929.13(G)(2):

> If the offender is being sentenced for a third degree felony OVI offense, or if the offender is being sentenced for a fourth degree felony OVI offense and the court does not impose a mandatory term of local incarceration under division (G)(1) of this section, the court shall impose upon the offender a mandatory prison term of one, two, three, four, or five years if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or shall impose upon the offender a mandatory prison term of sixty days or one hundred twenty days as specified in division (G)(1)(d) or (e) of section 4511.19 of the Revised Code if the offender has not been convicted of and has not pleaded guilty to a specification of that type. * * * The offender shall serve the one-, two-, three-, four-, or five-year mandatory prison term consecutively to and prior to the prison term imposed for the underlying offense and consecutively to any other mandatory prison term imposed in relation to the offense. * * * In addition to the mandatory prison term described in division (G)(2) of this section, the court may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve the prison term prior to serving the community control sanction.

{¶16} R.C. 2929.13(A)(2) also includes a provision for sentences involving third- or fourth-degree felony OVI offenses. "For a third or fourth degree felony OVI offense for which sentence is imposed under division (G)(2) of this section, an additional prison term as described in division (B)(4) of section 2929.14 of the Revised Code or a community control sanction as described in division (G)(2) of this section" may be imposed. R.C. 2929.14(B)(4) calls for a maximum 36-month sentence for the OVI offense in the present case, but R.C. 2929.13(A)(2)'s reference to R.C. 2929.14(B)(4) provides for an additional sentence, not a maximum sentence.

{¶17} The Eighth District has not weighed in on the issue.[2] This court agrees with the interpretation of the involved statutes set forth by the Tenth District. R.C. 4511.19(G)(1)

[2] The issue is currently pending before the Ohio Supreme Court in *State v. Mercier*, Ohio Supreme Court Nos. 2014-1409 and 2014-1411. The certified question before the court is "[w]hen a defendant is convicted of an

specifically indicates the provisions found in R.C. 4511.19(G)(1)(a) through (e) may act to enhance the sentence imposed for a third-degree felony above the range set forth in R.C. 2929.14. R.C. 4511.19(G)(1)(e) specifically provides for a sentence above that found in R.C. 2929.14 — five years as opposed to 36 months.

III. Conclusion

{¶18} Appellant's sentence is within the statutory range as set forth above. Therefore, his sentence is not contrary to law or void. Res judicata therefore applies to his arguments. This also means the court did not err in denying his motion.

{¶19} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

OVI as a felony of the third degree, does Ohio's OVI statute, R.C. 4511.19, prevail such that a sentence up to five years can be imposed or does R.C. 2929.14(A) require that the sentence be limited to a maximum of 36 months incarceration?" A similar issue is also currently pending before the Ohio Supreme Court in *State v. South*, Ohio Supreme Court No. 2014-0563. The question before the court in that case is "[w]hen a defendant is convicted of a R.C. 2941.1413 specification, does Ohio's OVI statute, R.C. 4511.19 prevail so that a five year sentence can be imposed for a third degree felony OVI or does R.C. 2929.14(A) require that the maximum sentence that can be imposed is three years?"

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

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

LARRY A. JONES, SR., J., and
MARY J. BOYLE, J., CONCUR