

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
HARRISON COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

WILLIAM H. BAER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY Case No. 19 HA 0009

Criminal Appeal from the
Court of Common Pleas of Harrison County, Ohio
Case No. CRI 2006-0691

BEFORE:

Carol Ann Robb, Cheryl Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. T. Owen Beetham, Prosecutor, 111 West Warren Street, Cadiz, Ohio 43907 for
Plaintiff-Appellee and

Atty. William Norman, ,600 E. Granger Rd., Fl 2, Brooklyn Heights, Ohio 44131 for
Defendant-Appellant.

Dated: June 29, 2020

Robb, J.

{¶1} Defendant-Appellant William Baer appeals the decision of the Harrison County Common Pleas Court denying his Motion to Void Illegal Sentence and Resentencing Hearing. The issue in this appeal is whether the trial court erred in denying the motion. For the reason expressed below, this court concludes the trial court appropriately denied the motion.

Statement of Case

{¶2} On July 7, 2006, Appellant was indicted on two counts of rape, a felony of the first degree-in violation of R.C. 2907.02(A)(1)(b), two counts of sexual battery, a felony of the third-degree in violation of R.C. 2907.03(A)(5), and two counts of gross sexual imposition (“GSI”), a felony of the third-degree in violation of R.C. 2907.05(A)(1). On May 24, 2007, the indictment was amended to reflect that the two rape counts were special felonies that were punishable by ten years to life in prison because the victims were under the age of ten. On September 27, 2007, Appellant was convicted by a jury on all counts. On October 11, 2007, the trial court held a sentencing hearing. The court determined that the sexual battery and GSI counts merged with the rape counts for sentencing purposes. Appellant was sentenced to life imprisonment with parole eligibility after ten years on both rape counts. The sentences were ordered to run consecutively.

{¶3} Appellant filed an unsuccessful appeal in *State v. Baer*, 7th Dist. No. 07 HA 8, 2009–Ohio–3248. One argument raised in the direct appeal was that the indictment should not have been allowed to be amended to add the force element and the specification of rape of a child younger than ten years of age. *Id.* at ¶ 16-26. We found that the amendment to include the ages of the victims was a clerical error and not a basis for reversal. *Id.* at ¶ 23. As to the addition of the force element, we concluded any error was at most harmless error. *Id.* at ¶ 24.

{¶4} Thereafter, Appellant unsuccessfully filed a habeas corpus motion. *Baer v. Clipper*, S.D.Ohio No. 2:10–cv–1164, 2013 WL 317061 (Jan. 28, 2013). In this motion, Appellant once again raised issues with the amended indictment. The Federal District Court found no merit with the argument holding that there was no objection to the amendment, the issues were not presented as a federal claim in state court, and the claim

was not “cognizable in federal habeas corpus because the Fifth Amendment guarantee of a grand jury indictment has never been held applicable to the States.” *Id.*

{¶5} On May 16, 2016, Appellant sought leave to file a motion for a new trial and requested an evidentiary hearing. The trial court denied the motion and we affirmed the decision. *State v. Baer*, 7th Dist. Harrison No. 16 HA 0015, 2017-Ohio-7759.

{¶6} On April 22, 2019, Appellant filed the Motion to Void Illegal Sentence and Resentencing Hearing. Appellant asserts the same argument he asserted in the direct appeal regarding the force specification and age specification in the amended indictment. Appellant further contends the trial court was not authorized to sentence him to life, because the jury verdict forms did not indicate the rapes were special felonies or included the additional elements of force or that the victims were under ten years of age. He asserted the remedy for these errors was voiding the sentence and resentencing Appellant to the term authorized for a first-degree felony. 4/22/19 Motion to Void Illegal Sentence.

{¶7} The state filed a memorandum in opposition asserting Appellant’s motion should be overruled. The state asserted the issue regarding the indictment was already adjudicated in the direct appeal and found to be meritless. 5/20/19 Memorandum in Opposition.

{¶8} Without holding a hearing, the trial court denied the motion. 6/3/19 J.E.

{¶9} Appellant timely appealed that decision.

Assignment of Error

“The trial court erred when it denied Appellant’s motion to void illegal sentence and request for resentencing hearing.”

{¶10} Appellant asserts the trial court erred in denying the motion to void an illegal sentence. He asserts the same arguments he did in his motion to void an illegal sentence. He argues the indictment should not have been amended to include a force and age specification and the trial court was not permitted to sentence him to a life sentence because the jury verdict forms did not indicate the rapes were special felonies or include the additional elements of force or that the victims were under ten years of age.

{¶11} Irregular motions are often recast into whatever category necessary to identify and establish the criteria by which the motion should be judged. *State v. Schlee*,

117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12 (recasting defendant's Civ.R. 60(B) motion as postconviction relief petition when he filed it after direct appeal, claimed a denial of the Ohio Supreme Court takes a rather liberal view when reviewing criminal defendants' motions to vacate void postrelease control sanctions). In some instances, courts have treated motions to correct an illegal sentence or void sentence as a postconviction motion. See *State v. Reynolds*, 79 Ohio St.3d 158, 160, 773 N.E.2d 1131 (1997) (Ohio Supreme Court held that a motion styled as a “Motion to Correct or Vacate Sentence” met the definition of a petition for postconviction relief pursuant to R.C. 2953.21(A)(1) because it was “(1) filed subsequent to [the defendant's] direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment and sentence.”) and *State v. Thomas*, 1st Dist. Hamilton No. C-120836, 2013-Ohio-3422, ¶ 4-6 (treating a motion to correct an illegal sentence as a postconviction motion).

{¶12} However, the Ohio Supreme Court has suggested that a “motion to correct an illegal sentence” is “an appropriate vehicle for raising the claim that the sentence is facially illegal at any time.” *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 25. “A sentence that is not in accordance with statutorily mandated terms is void. *Id.* at ¶ 8, citing *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864; *State v. Beasley*, 14 Ohio St.3d 74, 75, 471 N.E.2d 774 (1984); *Colegrove v. Burns*, 175 Ohio St. 437, 195 N.E.2d 811 (1964). These statements may suggest that the time frames and requirements for filing a postconviction petition do not apply when the assertion is that the sentence is void.

{¶13} Here, the motion to void an illegal sentence is based on statutory law, not constitutional violations and is clearly filed outside the 365 day time limit for filing a postconviction relief petition. If the motion is deemed to be a petition for postconviction relief, then it fails to comply with R.C. 2953.21 and R.C. 2953.23.

{¶14} However, even considering the merits of the motion, the trial court did not commit error in denying the motion. We previously addressed the amended indictment issue in the direct appeal. We stated:

Baer claims that the indictment as amended increased the penalty for the rape charges and included two new substantive specifications: force, and that the victims were under ten years of age. Baer further claims that the penalty for the rape charges was erroneously enhanced due to the correction of the rape charge as a special first degree felony rather than a first degree felony.

Baer correctly limits his argument to a plain error analysis, as he did not object to the amendment of the indictment at trial. An appellate court does not have to resolve an alleged error if it was never brought to the attention of the trial court “at a time when such error could have been avoided or corrected by the trial court.” *State v. Carter*, 89 Ohio St.3d 593, 598, 2000–Ohio–172, 734 N.E.2d 345. In the absence of objection, this court may only examine the court's actions for plain error. *Id.* Plain error should be used “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002–Ohio–68, 759 N.E.2d 1240. A claim of plain error does not stand unless, but for the error, the outcome of the trial would have been different: “[t]he test for plain error is stringent. A party claiming plain error must show that (1) an error occurred, (2) the error was obvious, and (3) the error affected the outcome of the trial.” *State v. Davis*, 116 Ohio St.3d 404, 2008–Ohio–2, 880 N.E.2d 31, at ¶ 378.

Pursuant to Crim.R. 7(D), the court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, with respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. What exactly constitutes a change in the identity of a crime is somewhat unclear, but a change does occur when the amended indictment contains different elements requiring independent proof, or increases the severity of the charged offense. *State v. Fairbanks*, 172 Ohio App.3d 766, 2007–Ohio–4117, 876 N.E.2d 1293, at ¶ 19, 21.

The rape charges in the original July 7, 2006 indictment against Baer were cited as being in violation of R.C. 2907.02(A)(1)(b), which prohibits sexual conduct with a person under the age of thirteen. R.C. 2907.02 is generally a first degree felony, and was listed as such in the indictment. However, R.C. 2907.02(B) further specifies that an offender under (A)(1)(b) who engages in sexual conduct with a person under the age of ten or who uses force or threats of force “shall be imprisoned for life.” Within the indictment’s two rape counts, the victims were described as being under the age of ten.

At Baer’s request, the State filed a Bill of Particulars on October 4, 2006 which stated that Baer was charged with rape in violation of R.C. 2907.02(A)(2), prohibiting sexual conduct with another person “when the offender purposely compels the other person to submit by force or threat of force.” The bill of particulars identified the offense as a special first degree felony. The description of the charges included specifics as to the sexual conduct involved, the age of the victims, and the threats of force involved.

Subsequent to a phone conference with the trial court and all attorneys involved, the State filed a Motion to Amend Indictment pursuant to Crim.R. 7(D), which the trial court granted on May 24, 2007. The amended indictment identified the rape offenses as special first degree felonies in violation of R.C. 2907.02(A)(1)(b), moved the description of the victims’ ages to a separate “specification” section, and included a specification that the offense was committed with force or threats of force. The trial court stated that the amended indictment did not change the nature or elements of the indictment, that Baer had sufficient notice of the offense, and that the amendment corrected a clerical error. Baer did not object to the amendment at any stage. The trial court granted an additional amendment at the end of trial to clarify the identity of the victims for each offense.

The amendments relating to the age of the victims and the type of felony were clarifications or corrections of clerical errors at most. Moreover they could not be considered a change in the name or identity of the charged

offense, because the age of the victims and the statute subsection involved were explicitly indicated in the original indictment. Thus there was no error involved in these changes.

Similarly, the addition of the “force” specification to Baer's indictment was not erroneous, or was harmless error at best. If a person is found guilty of R.C. 2907.02(A)(1)(b), i.e., that he has engaged in sexual conduct with a person under thirteen years of age, then he is guilty of a first degree felony. Under 2907.02(B), the penalty from the finding of guilt may be raised to a mandatory life sentence *either* if the offender used force or threats of force, *or* if the victim was under ten years of age. Thus force is not an element required to prove guilt under R.C. 2907.02(A)(1)(b); it is only a specification which may enhance the penalty thereof. A specification that only enhances the penalty is not required to be included in the indictment. *State v. Bowen* (Dec. 8, 1999), 7th Dist. No. 96–CO–68, at *8, citing *State v. Allen* (1987), 29 Ohio St.3d 53, 29 OBR 436, 506 N.E.2d 199.

Moreover, Baer's offense had already been elevated to the life sentence level due to the age of the victims. Even if the State had left out the force specification, not proved the element of force, and not received a finding of force by the jury, the trial court still would have been statutorily required to sentence Baer to a life term subsequent to a jury finding of guilty. Therefore the alleged error would not have affected the outcome of Baer's trial.

The trial court therefore did not commit any error by allowing the foregoing amendments in Baer's indictment, and any potential error would have been harmless beyond a reasonable doubt. Because the trial court did not err, let alone commit plain error, Baer's second assignment of error is meritless.

State v. Baer, 7th Dist. Harrison No. 07 HA 8, 2009-Ohio-3248, ¶ 17-26.

{¶15} This reasoning is still sound and applicable.

{¶16} Appellant also asserts the trial court did not have authority to sentence him to life imprisonment because the jury verdict forms did not indicate it was a special felony

or contain the elements that would authorize a life sentence. Accordingly, he asserts the trial court only had authority to sentence him to 11 years for each rape, which is the maximum sentence for a first-degree felony. His argument is based on the language in R.C. 2945.75(A)(2) stating, “When the presence of one or more additional elements makes an offense one of more serious degree: * * * (2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.”

{¶17} Appellant’s argument is not supported by the jury verdict forms. The jury verdict forms for the rapes, Counts 1 and 3, both contained separate jury verdict specification forms that were signed by the jury. The first jury verdict form specification for each rape count was that the victim was under ten years of age. 9/28/07 J.E. attachment “First Specification to Count One and First Specification to Count Three.” The victim and the count were identified in each of these under ten years of age specification forms. 9/28/07 J.E. attachment First Specification to Count One and First Specification to Count Three. The jury found the victims were under ten years of age and all jurors signed the under ten years of age specification form. 9/28/07 J.E. attachment First Specification to Count One and First Specification to Count Three. Similarly, the second specification jury form for each rape count was a force or threat of force specification. 9/28/07 J.E. attachment Second Specification to Count One and Second Specification to Count Three. The jury found for each count Appellant used force or the threat of force. 9/28/07 J.E. attachment Second Specification to Count One and Second Specification to Count Three. These force specification forms were signed by all jurors. Accordingly, the jury verdict forms did contain the additional elements required for making the offense more serious.

{¶18} For the above stated reasons, the sole assignment of error is without merit. The trial court did not err in any manner when it denied Appellant’s motion to void illegal sentence. The trial court’s decision is affirmed.

Waite, P.J., concurs.

D’Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Harrison County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.