[Cite as *State v. Smith*, 2018-Ohio-3297.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 27900
	:	
v.	:	Trial Court Case No. 2004-CR-3554
	:	
RONALD A. SMITH	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 17th day of August, 2018.

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Defendant-Appellant – Pro Se

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DONOVAN, J.

{¶ 1} This matter is before the Court on the February 15, 2018 pro se Notice of Appeal filed by Ronald A. Smith. Smith appeals from the trial court's January 26, 2018 "Decision & Entry Overruling Defendant's 'Motion for Re-Sentencing for Void Sentence Pursuant to R.C. 2929.19(D)' and 'Motion to Set Aside Sentence Void Sentence Re-Sentencing.' " We hereby affirm the judgment of the trial court.

{¶ 2} Smith was indicted on October 21, 2004, on one count of aggravated burglary (deadly weapon), in violation of R.C. R.C. 2911.11(A)(2), and one count of aggravated robbery (deadly weapon), in violation of R.C. 2911.01(A)(1), both felonies of the first degree. A jury found Smith guilty of both offenses, and on January 27, 2006, he was sentenced to ten years on each count, to be served consecutively, for an aggregate term of 20 years. The trial court further ordered his sentence to be served concurrently with the sentence imposed in C.P. Case No. 2005 CR 1624, wherein Smith was convicted of carrying a concealed weapon (loaded/ready at hand), a felony of the fourth degree, and having weapons while under disability (prior drug conviction), a felony of the third degree. We note that Smith was sentenced to 18 months for carrying a concealed weapon and to five years for having weapons while under disability in Case No. 2005 CR 1624, and this Court reversed and vacated his convictions and sentence on appeal. *State v. Smith*, 176 Ohio App.3d 119, 2008-Ohio-1682, 890 N.E.2d 350 (2d Dist. 2008).

{¶ 3} Smith filed his pro se "Motion for Re-Sentencing for Void Sentence Pursuant to R.C. 2929.19(D)" on September 19, 2017, asserting that the trial court disregarded R.C. 2929.19(D) when it sentenced him on January 27, 2006. He asserted: "Any attempt by a court to disregard Statutory Requirements when imposing a sentence renders that

sentence Void." (Emphasis sic.) Smith argued that the trial court erred by failing to set forth its reasons for disapproving shock incarceration and intensive program prison, which rendered his sentence void. Smith directed the court's attention to *State v. Beasley*, 14 Ohio St.3d 74, 471 N.E.2d 774 (1984), and he requested re-sentencing. He attached to his motion a portion of the transcript from his sentencing hearing and his judgment entry of conviction. The relevant portion of the transcript provides: "The court disapproves shock incarceration and intensive program prison."

{¶ 4} On November 27, 2017, Smith filed a pro se motion noting that the State did not file a response to his motion for re-sentencing. On November 28, 2017, the court ordered the State to file a response by January 12, 2018.

{¶ 5} The State opposed Smith's motion on December 6, 2017, initially arguing that Smith's reliance upon *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448, which Smith did not cite, was misplaced. The State further noted as follows:

> In its discretion, the court considered factors and principles of R.C. 2929.11 and R.C. 2929.12 as required. Under those guidelines the court examined the defendant's [likelihood] of recidivism and seriousness factors. The court found that the seriousness factors and likelihood of recidivism were present and thus sentenced the Defendant accordingly. Consequently, Defendant's claim is without merit and should be overruled.
>
> Nevertheless, the Second District Court of Appeals has already determined that the trial court did not err by sentencing the Defendant to more than a minimum concurrent prison term in the direct appeal of this case. See State v. Smith, Montgomery Nos. 21463 and 22334, [2008-

> Ohio-6330]. The Court found that the Defendant was sentenced pursuant to Blakely v. Washington, [542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)]. And since the Defendant failed to make an objection to his sentence on the basis of Blakely, the Defendant has forfeited all but plain error for the purposes of appeal. Id. Furthermore, the Court of Appeals has already determined that there is no plain error when the Defendant was originally sentenced. This Court should follow the determinations already made by the Court of Appeals and reject the Defendant's contention that consecutive sentences are contrary to law.
>
> Additionally, any changes in the law were made after the Defendant was convicted and his appeals were exhausted. In *State v. Singleton*, the court stated " 'a new judicial ruling applies only to cases that are pending on the announcement date of the new ruling, and may not be applied retroactively to a conviction that has become final.["] State v. Singleton, Montgomery No. 25946, 2014 Ohio 630, citing State v. Boyce, Clark No. 11CA0095, 2012 Ohio 3713 and Ali v. State of Ohio, 104 Ohio St.3d 328, 2004 Ohio 6592. Since the Defendant's sentence was final upon the court affirming the judgment of the trial court in his direct appeal, the Defendant is barred by the doctrine of *res judicata* from raising these issues again.

{¶ 6} On December 8, 2017, Smith filed his "Motion to Set Aside Sentence Void Sentence Re-Sentencing." Therein, he argued that the "legal principles that [*Hand*] represents" had been held to be retroactive. Smith argued that, at his sentencing hearing, the trial court considered his juvenile record and "other improper findings to

enhance" his sentence. (Emphasis sic.) Smith attached his judgment entry of conviction and the trial court's February 6, 2006 "Findings in Support of Consecutive Sentences," wherein the court determined as follows:

> **First finding: Consecutive sentences are necessary to protect the public from future crime** for the following reasons: The Defendant is a career criminal. Over the 16 years period of 1989 to 2005, he had 10 cases in which he was adjudicated a juvenile delinquent by reason of committing a criminal offense; he has been convicted as an adult of 7 felonies. He repeatedly has been granted probation and parole and repeatedly been incarcerated, and yet he continues to reoffend. He has a history, both as a juvenile and an adult, of committing crimes while on probation. He has a lengthy pattern committing violent crimes both as [a] juvenile and an adult, of committing crimes while on probation. As a juvenile, he committed the following: robbery (1990), assault (1991), robbery (1993). As an adult, he committed the following: assault (1998), misdemeanor domestic violence (1999), felony domestic violence (2000), and aggravated robbery and aggravated burglary (2004). The Defendant has demonstrated a complete lack of remorse, and worse, he attempted to obstruct justice both before and after the trial by attempting to bribe a witness, attempting to persuade a witness to change her trial testimony, attempting to persuade another witness not to testify, and, after conviction, submitting two false affidavits in support of his pro se motion for a new trial. If the Defendant were to receive a concurrent sentence, he poses the

highest risk of committing more crimes, including violent crimes, upon release from prison.

Second Finding: consecutive sentences are necessary to punish the defendant for all the reasons set forth in the First Finding, above, as well as the following: In case number 04 CR 3554, the Defendant engaged in a particularly terrifying crime: A "home invasion" in which he and several other males forcibly entered a home trapping in that home its occupants, a woman with three young children; pointing a gun at a child's head in the presence of the mother, and thus terrifying her; ransacking her home; and attempting to intimidate her with the statement, "I'm Little Ronnie. Remember me."

Third Finding: Consecutive sentences are not disproportionate to the seriousness of the defendant's conduct and to the danger defendant poses to the public for all of the reasons set forth in the First and Second Findings, above.

Fourth Finding: The Defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the defendant for all of [the] reasons set forth in the First, Second and Third Findings, above.

(Emphasis sic.)

{¶ 7} On December 29, 2017, Smith filed a reply to the State's memorandum in opposition, noting that the State's assertion that he relied upon *Hand* was "not true," and requesting to be re-sentenced. Smith attached a copy of his motion filed September 19,

2017, a portion of his sentencing transcript, his judgment entry of conviction, and the State's memorandum in opposition.

{¶ 8} On January 16, 2018, the State filed a memorandum in opposition to Smith's motion for re-sentencing, which was duplicative of the memorandum filed on December 6, 2017. On January 24, 2018, Smith filed a "Motion for a Ruling."

{¶ 9} In its Decision of January 26, 2018, the trial court determined as follows:

> For the reasons set forth in the State's memoranda, this Court specifically finds that Mr. Smith's reliance on *State v. Hand*, 149 Ohio St. 3d 94, is misplaced.
>
> With regard to Mr. Smith's reliance on R.C. 2929.19(D), this Court notes the following:
>
> The Second Appellate District has held that a trial court's disapproval of shock incarceration and intensive program prison is necessarily harmless when the defendant is not eligible for either program. *State v. Walz*, 2d Dist. Montgomery No. 23783, 2012-Ohio-4627, ¶ 26. Under R.C. 5120.032(B)(2)(a), a person is ineligible for intensive program prison if he "previously has been imprisoned for aggravated murder, murder, or a felony of the first or second degree or a comparable offense under the law in effect prior to July 1, 1996." A person who is ineligible to participate in an intensive program prison is also ineligible for shock incarceration. R.C. 5120.031(A)(4).
>
> Because Mr. Smith has been imprisoned for the first-degree felonies of aggravated robbery and aggravated burglary, he was and is ineligible for

shock incarceration and intensive program prison. Thus, this Court's error, if any, for its failure to give reasons for disapproving shock incarceration and intensive program prison is harmless. Since this error, if any, is harmless, it does not invalidate Mr. Smith's sentence.

{¶ 10} Smith asserts the following two assignments of error:

> THE DEFENDANT[']S FIRST ASSIGNMENT OF ERROR IS PURSUANT TO THE DEFENDANT[']S MOTION FILED ON SEPTEMBER 19, 2017 TITLED MOTION FOR RE-SENTENCING VOID SENTENCE.
>
> THE DEFENDANT[']S SECOND ASSIGNMENT OF ERROR IS PURSUANT TO THE DEFENDANT[']S MOTION FILED DECEMBER 8, 2017 TITLED MOTION TO SET ASIDE SENTENCE VOID SENTENCE RE-SENTENCING.

{¶ 11} In his first assignment of error, Smith asserts that R.C. 2929.19(D) "requires that the trial court, if it shall make a recommendation must make a finding that gives its reasons for its recommendation or disproval." Smith asks this Court to remand the matter for re-sentencing so that he can be re-sentenced and "receive" a termination entry consistent with the law. In his second assignment of error, Smith argues, pursuant to *Hand*, that he "was sentenced to consecutive sentences based on the Defendant[']s past juvenile adjudications not because he had been previously convicted of Agg Robbery and Agg Burglary. This must be true because the Defendant has <u>never</u> been convicted of Agg Robbery and Agg Burglary to require a mandatory prison term under R.C. 2929.13(F)(6)." (Emphasis sic.) According to Smith, the legal principles set forth in *Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448, have been held to be

retroactive.

{¶ 12} The State responds that the court's failure to make the required findings was harmless, since Smith "was convicted of two first degree felonies * * * and therefore would be ineligible for either program." Regarding Smith's second assignment of error, the State asserts as follows:

> * * * This Court has already ruled that it would not apply *Hand* retroactively. "We further agree with the State that *Hand* does not apply to Smith's sentence." *State v. Smith*, 2d Dist. Montgomery No. 27294, 2017-Ohio-2684, at ¶ 11 [(an opinion addressing prior post-conviction motions filed by Smith which the trial court had denied.)]
>
> In his brief, Smith cites to *State v. Parker*, 8th Dist. Cuyahoga No. 105472, 2017-Ohio-7484, where the Eighth District applied *Hand* retroactively. However, in *Parker*, the Eighth District distinguished [its] case from *State v. Smith*, stating, "*Smith* may be distinguished from this matter in that Smith also committed numerous adult prior offenses that supported the imposition of mandatory imprisonment under R.C. 2929.13(F)(6), whereas in this case, Parker's sole adjudication was the basis for imposing the mandatory term of imprisonment." *Parker*, at ¶ 23. It should be noted that the Appellant in *State v. Smith*, 2d Dist. Montgomery No. 27294, 2017-Ohio-2684 is the current Appellant, Ronald Smith.

{¶ 13} Finally, the State asserts that "regardless of Smith's juvenile record, Smith's prior adult felony record required the trial court to impose mandatory prison sentences in this case. *See* R.C. 2929.13(F)(6) (requiring a mandatory prison sentence for a first- or

second-degree felony if the offender has previously been convicted of or pled guilty to a first- or second-degree felony)." The State asserts that "*Hand*, therefore, has no application in this case."

{¶ 14} In reply, Smith asserts that "the trial court imposed a Mandatory Sentence on the Defendant solely based on the Defendant[']s Juvenile Record not because the Defendant had previously been incarcerated or convicted of a First or Second degree felony because the Defendant has never been convicted of a first or second degree felony * * *." (Emphasis sic.) In his amended reply brief, Smith argues that the "statutory requirement imposed on the Trial Court is not satisfied by an Appellate Court finding in the record reasons that the Trial Court could have given, or might have given for disapproval." Smith again asserted that he did not have any prior convictions that made R.C. 2929.13(F)(6) applicable.

{¶ 15} R.C. 2929.19(D) provides:

> The sentencing court, pursuant to division (I)(1) of section 2929.14 of the Revised Code, may recommend placement of the offender in a program of shock incarceration under section 5120.031 of the Revised Code or an intensive program prison under section 5120.032 of the Revised Code, disapprove placement of the offender in a program or prison of that nature, or make no recommendation. *If the court recommends or disapproves placement, it shall make a finding that gives its reasons for its recommendation or disapproval.*

(Emphasis added.)

{¶ 16} As noted by the Third District:

> [T]he Second District * * * has * * * required that trial courts explicitly provide their reasons for disapproval where the offender was convicted of a type of felony that rendered him eligible for the alternative programs. *See State v. Blessing,* 2d Dist. No.2011 CA 56, 2013–Ohio–392, ¶ 48 (vacating trial court's disapproval of shock incarceration and intensive program prison where the offender was convicted of third and fifth degree felonies and eligible for the alternative programs, but the trial court did not list its reasons for the disapproval); *State v. Allender,* 2d Dist. No. 24864, 2012–Ohio–2963, ¶ 22 ("[R.C.2929.19(D)'s] requirement, imposed on the trial court, is not satisfied by an appellate court finding in the record reasons that the trial court could have given, or might have given, for disapproval."). However, the Second District has not required that trial courts give explicit reasons for their disapproval where the offender has committed a type of felony that manifestly renders him ineligible for the alternative programs. *E.g., State v. Lewis,* 2d Dist. No.2012-CA-31, 2013-Ohio-809, ¶ 19; *State v. Barron,* 2d Dist. Nos. 25059, 25074, 2012–Ohio–5787, ¶ 16; *State v. Walz,* 2d Dist. No. 23783, 2012-Ohio-4627, ¶ 26. According to the Second District, trial courts' failure to give explicit reasons in this circumstance is "necessarily harmless error." *State v. DeWitt,* 2d Dist. No. 24437, 2012-Ohio[-]635, ¶ 23.

State v. Snyder, 3d Dist. Seneca No. 13-12-38, 2013-Ohio-2046, ¶ 33. *See also State v. Griffie*, 2d Dist. Montgomery No. 24102*,* 2011-Ohio-6704*,* ¶ 38 ("with respect to the trial court's error in having disapproved of shock incarceration and intensive program prison in this case, this error is necessarily harmless because [the defendant-appellant], as a

first-degree felon, is not eligible for either program. R.C. 5120.031(A)(4) and R.C. 5120.032(B)(2)(a). See also *State v. Porcher*, Montgomery App. No. 24058, 2011-Ohio-5976.")

{¶ 17} "R.C. 5120.031 and 5120.032 establish alternative prison arrangements for certain offenders." *Snyder* at ¶ 32. R.C. 5120.032(B)(2) provides:

> A prisoner who is in any of the following categories is not eligible to participate in an intensive program prison established pursuant to division (A) of this section:
>
> (a) The prisoner is serving a prison term for aggravated murder, murder, or a felony of the first or second degree or a comparable offense under the law in effect prior to July 1, 1996, or the prisoner previously has been imprisoned for aggravated murder, murder, or a felony of the first or second degree or a comparable offense under the law in effect prior to July 1, 1996.

{¶ 18} R.C. 5120.031(A)(4) provides: " 'Eligible offender' means a person, other than one who is ineligible to participate in an intensive program prison under the criteria specified in section 5120.032 of the Revised Code, who has been convicted of or pleaded guilty to, and has been sentenced for, a felony." Pursuant to R.C. 5120.031(A)(4), "if an offender is ineligible for the intensive program prison, he is likewise ineligible for shock incarceration." *Snyder* at ¶ 32.

{¶ 19} Smith, a first-degree felon, serving a prison term for aggravated burglary and aggravated robbery, was not eligible for intensive program prison and shock incarceration, and the trial court's disapproval of the programs without a finding that gives

its reasons for disapproval was harmless error. We note that the court's judgment entry did not establish that the court imposed a mandatory term of imprisonment, pursuant to R.C. 2901.08(A) and R.C. 2929.13(F)(6), and as the State asserts, and this Court previously determined, "*Hand* does not apply to Smith's sentence." *Smith*, 2d Dist. Montgomery No. 277294, 2017-Ohio-2684, ¶ 11. Smith's argument pursuant to *Hand* is further barred by the doctrine of res judicata, since we addressed it in his prior appeal. For the foregoing reasons, Smith's sentence is not void, and his two assignments of error are accordingly overruled. The judgment of the trial court is affirmed.

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WELBAUM, P.J. and HALL, J., concur.

Copies mailed to:

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Michael P. Allen
Ronald A. Smith
Hon. Dennis J. Langer