[Cite as *State v. Steiner*, 2018-Ohio-995.]

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- TIMOTHY D. STEINER Defendant-Appellant	JUDGES: Hon. John W. Wise, P. J. Hon. Patricia A. Delaney, J. Hon. Craig R. Baldwin, J. Case No. 17 CA 22 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 15 CR 54
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 5, 2018

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
SEAN M. WARNER PROSECUTING ATTORNEY 164 East Jackson Street Millersburg, Ohio 44654	TIMOTHY D. STEINER, PRO SE GRAFTON CORR. INSTITUTION 2500 South Avon-Belden Road Grafton, Ohio 44044

Wise, P. J.

{¶1} Defendant-Appellant Timothy D. Steiner appeals from the decision of the Court of Common Pleas, Holmes County, denying his motion to correct his 2015 sentence for attempted rape and several counts of importuning. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2} In the spring of 2015, appellant began using social media to inappropriately communicate with a nine-year-old girl. The child's mother discovered the messages and contacted the Holmes County Sheriff's Office. An officer with the Wooster Police Department trained in handling internet crime cases thereupon assumed the child's online role for purposes of an investigation. At some point, appellant attempted to set up a meeting at the child's home. The Holmes County Sheriff's Office utilized a vacant house as a mock residence and placed surveillance teams nearby to record appellant's actions. On or about May 22, 2015, after appellant approached the house and attempted to open a pre-arranged window, he was placed under arrest.

{¶3} On June 29, 2015, the Holmes County Grand Jury indicted appellant on one count of attempted rape, four counts of importuning, and one count of burglary.

{¶4} Appellant thereafter chose to attempt a plea deal, and he signed a guilty plea form. Prior to the plea, the prosecuting attorney amended Count 1 of the indictment (attempted rape) to a felony of the first degree. Based on plea negotiations, appellant entered a plea of guilty to Counts 1, 2, 3, 4, and 5. Count 6 (burglary) was dismissed by the State. On September 22, 2015, the trial court sentenced appellant to nine years in prison on Count 1 and twenty-four months on each of the importuning counts to be served consecutively, for a total of seventeen years in prison.

{¶5} Appellant subsequently appealed his conviction and sentence to this Court, raising one assigned error on the issue of consecutive sentences. We overruled appellant's sole assignment of error and affirmed via an opinion issued on June 27, 2016. *See State v. Steiner*, 5th Dist. Holmes No. 15CA17, 2016–Ohio–4648. Appellant pursued an appeal to the Ohio Supreme Court. However, on December 28, 2016, the Ohio Supreme Court declined jurisdiction. *See State v. Steiner*, 147 Ohio St.3d 1475, 65 N.E.3d 778 (Table), 2016-Ohio-8438.

{¶6} On September 21, 2016, appellant filed a *pro se* "petition to vacate or set aside judgment of conviction or sentence," citing R.C. 2953.21. Appellant therein claimed ineffective assistance of trial counsel, a *Miranda* violation, prosecutorial misconduct, and illegal sentencing. The State of Ohio filed a memorandum in opposition and motion to dismiss the petition on October 19, 2016, arguing *inter alia* that appellant's claims were barred by *res judicata*. The trial court granted appellee's motion to dismiss on October 25, 2016.

{¶7} Appellant appealed said decision to this Court, arguing in his sole assigned error that the trial court had erred in granting the State's motion to dismiss his petition without making findings of fact and conclusions of law. On May 22, 2017, we affirmed, noting in particular that during the pendency of that appeal, the State had requested and obtained a limited remand so that the trial court could prepare findings of fact and conclusions of law to support its dismissal. *See State v. Steiner*, 5th Dist. Holmes No. 16CA012, 2017-Ohio-2947.

{¶8} In the meantime, on January 27, 2017, appellant filed a *pro se* motion to withdraw guilty plea under Crim.R. 32.1. The State filed a memorandum in opposition on

February 7, 2017. The trial court denied appellant's motion on July 12, 2017. The record does not indicate an appeal therefrom.

{¶9} On September 27, 2017, appellant filed a *pro se* "motion to correct sentence pursuant to section 2929.14(B)(3)." The State filed a memorandum in opposition on October 30, 2017. The trial court issued a judgment entry denying appellant's motion to correct sentence on October 31, 2017.

{¶10} Appellant filed a *pro se* notice of appeal on November 17, 2017. He herein raises the following sole Assignment of Error:

{¶11} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW, WHEN IT DENIED STEINER'S MOTION TO CORRECT SENTENCE PURSUANT TO R.C. 2929.14(B)(3)."

I.

{¶12} In his sole Assignment of Error, appellant contends the trial court erred in denying his post-conviction "motion to correct sentence." We disagree.

{¶13} The Ohio Supreme Court has recognized: "* * * [I]n the normal course, sentencing errors are not jurisdictional and do not render a judgment void. * * * But in the modern era, Ohio law has consistently recognized a narrow, and imperative, exception to that general rule: a sentence that is not in accordance with statutorily mandated terms is void." *State v. Fischer,* 128 Ohio St.3d 92, 94, 2010–Ohio–6238, ¶ 7–¶ 8. The rule of *Fischer* was supposed to be limited to "a discrete vein of cases: those in which a court does not properly impose a statutorily mandated period of postrelease control." *See Fischer* at ¶ 31. However, the Ohio Supreme Court has since indicated a willingness, albeit a limited one, to expand its "void sentence" jurisprudence to other situations. *See*

State v. Williams, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶21, citing *State v. Harris,* 132 Ohio St.3d 318, 2012-Ohio-1908, 972 N.E.2d 509, paragraph one of the syllabus, and *State v. Moore,* 135 Ohio St.3d 151, 2012-Ohio-5479, 985 N.E.2d 432, syllabus.

{¶14} Appellant's September 27, 2017 motion to correct his 2015 sentence was made in reference to R.C. 2929.14(B)(3), which states in pertinent part as follows:

> Except when an offender commits a violation of section 2903.01 or 2907.02 of the Revised Code and the penalty imposed for the violation is life imprisonment or commits a violation of section 2903.02 of the Revised Code, *** if the offender is guilty of an attempted violation of section 2907.02 of the Revised Code and, had the offender completed the violation of section 2907.02 of the Revised Code that was attempted, *the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation* of section 2907.02 of the Revised Code, the court shall impose upon the offender for the felony violation a mandatory prison term of the maximum prison term prescribed for a felony of the first degree that, subject to divisions (C) to (I) of section 2967.19 of the Revised Code, cannot be reduced pursuant to section 2929.20, section 2967.19, or any other provision of Chapter 2967. or 5120. of the Revised Code.

{¶15} (Emphasis added).

{¶16} The term "subject to" means "liable, subordinate, subservient, inferior, obedient to; governed or affected by; provided that; provided; answerable." *St. Augustine*

Pools, Inc. v. James M. Barker, Inc., 687 So.2d 957, 958 (Fla.App.1997), quoting Black's Law Dictionary 1425 (6th ed.1990).

{¶17} In a nutshell, appellant in the case *sub judice* proposed in his motion to correct sentence that under the aforesaid provision and given the age of the victim (nine years old at the time of the offense), the trial court in 2015 was required to render a mandatory maximum sentence (eleven years) for his offense of first-degree felony attempted rape (R.C. 2923.02 / R.C. 2907.02(A)(1)(b)).[1] Appellant therefore maintains that his nine-year sentence for attempted rape was void and is subject to review at any time.

{¶18} This Court has observed: "*** R.C. 2971.03(B)(1)(b) states that if a person is convicted of or pleads guilty to rape in violation of R.C. 2907.02(A)(1)(b), committed on or after January 2, 2007, the sentencing court shall, with certain qualifications, impose upon the person, if the victim was less than ten years of age, an indefinite prison term consisting of a minimum term of fifteen years and a maximum of life imprisonment." *In re N.S.*, 5th Dist. Coshocton No. 2016 CA 0005, 2017-Ohio-163, ¶ 17. As comprehensively summarized by the Second District Court of Appeals, *a* trial court actually has three sentencing options for a defendant convicted of raping a child under ten years of age: "1) [P]ursuant to R.C. 2907.02(B), the trial court can impose a sentence of life imprisonment without the possibility of parole; 2) pursuant to R.C. 2971.03(B)(1)(b), the trial court can sentence the defendant to life imprisonment with the possibility of parole after fifteen years; or 3) the trial court can sentence the defendant to an indefinite prison term with a

[1] Appellant in his motion erroneously indicated ten years would be the maximum sentence for attempted rape as a felony of the first degree.

minimum of fifteen years" *State v. Gibson*, 2d Dist. Clark No. 2013 CA 112, 2014-Ohio-5573, ¶ 13 (emphasis deleted).

{¶19} Accordingly, we are not persuaded that appellant herein necessarily "would have been subject to a sentence of life imprisonment or life imprisonment without parole" under R.C. 2929.14(B)(3), *supra*, had his attempted rape been carried out. By extension, we are not persuaded that the trial court was mandated to order a maximum sentence of eleven years for his attempted rape, and we therefore do not find his nine-year sentence was void or illegal.

{¶20} However, even if we accept, *arguendo*, appellant's interpretation of R.C. 2929.14(B)(3), *supra*, we are not inclined to expand the "discrete vein" of *Fischer* to the present scenario absent additional guidance from the Ohio Supreme Court. Therefore, we hold appellant's sentencing claim could have been raised on direct appeal and is thus barred by the doctrine of *res judicata*. The trial court therefore did not err in denying his post-conviction "motion to correct sentence" filed more than two years after his sentence was ordered.

{¶21} Appellant's sole Assignment of Error is therefore overruled.

{¶22} For the foregoing reasons, the judgment of the Court of Common Pleas, Holmes County, Ohio, is hereby affirmed.

By: Wise, P. J.

Delaney, J., and

Baldwin, J., concur.

JWW/d 0214