[Cite as *State v. Tyson*, 2020-Ohio-372.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellee	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, J.
-vs-	:	
	:	
FRANK E. TYSON,	:	Case No. 2019CA00139
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2000-CR-0849
JUDGMENT:	Dismissed
DATE OF JUDGMENT:	February 3, 2020

APPEARANCES:

For Plaintiff-Appellee

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Baldwin, J.

STATEMENT OF FACTS AND THE CASE

{¶1} On July 28, 2000, the Stark County Grand Jury indicted Appellant on one count of kidnapping, in violation of R.C. 2905.01, a felony of the second degree; one count of burglary, in violation of R.C 2911.12, a felony of the second degree; one count of failure to comply with the order or signal of a police officer, in violation of R.C.2921.331, a felony of the third degree; one count of receiving stolen property, in violation of R.C. 2913.51, a felony of the fourth degree; and one count of grand theft of a motor vehicle, in violation of R.C 2913.02, a felony of the fourth degree. Appellant appeared for arraignment on August 4, 2000, and entered a plea of not guilty to the charges.

{¶2} A jury found Appellant guilty of all of the charges and the trial court sentenced Appellant to an aggregate prison term of twenty-four years. Appellant appealed his convictions and sentence to this court and we affirmed the trial court's actions. *State v. Tyson,* 5th Dist, Stark No.2000-CA-00361, 2001–Ohio–1382.

{¶3} On November 26, 2007, appellant filed a motion for new trial under Crim. R. 33(B). The trial court denied said motion as untimely and we affirmed the trial court's denial of a new trial. *See State v. Tyson*, 5th Dist. Stark No.2008–CA–00068, 2009–Ohio–104.

{¶4} On June 17, 2008, appellant filed a petition for post-conviction relief. The trial court overruled the petition, finding appellant had failed to meet the jurisdictional requirements set forth in R.C. 2953.23(A) and we affirmed that decision on January 26, 2009. See *State v. Tyson*, 5th Dist. Stark No.2008CA00253, 2009–Ohio–374.

{¶5} On August 11, 2010, appellant filed a motion requesting resentencing with proper post-release control notification. The trial court conducted a limited resentencing hearing on the issue of post-release control and, on June 6, 2011, the trial court issued a resentencing judgment entry. The trial court denied appellant's follow-up motion requesting a de novo resentencing hearing. Appellant filed an appeal, asserting the trial court had erred in not conducting a "full de novo resentencing hearing." We affirmed the decision of the trial court. *State v. Tyson*, 5th Dist. Stark No.2011CA00177, 2012–Ohio–712.

{¶6} In July, 2013, Appellant filed another motion for resentencing. His motion was granted pursuant to the holding in *State v. Holdcroft*, 137 Ohio St.3d 526, 2013–Ohio–5014. The trial court vacated the post-release control associated with his conviction for kidnapping on February 14, 2014. Appellant appealed, arguing his sentence for kidnapping could not be reinstated because he had already served his sentence thereon. This Court rejected Appellant's argument and we affirmed his resentencing. *State v. Tyson*, 5th Dist. No.2014-CA-00040, 2014–Ohio–5822.

{¶7} On July 29, 2015, Appellant filed a motion requesting de novo sentencing repeating his assertion that his sentence for kidnapping could not be reinstated. The trial court denied Appellant's motion and Appellant appealed that decision. We held that the claims raised by Appellant were previously raised in his prior appeal in *State v. Tyson*, 5th Dist. No.2014CA00040, 2014–Ohio–5822 and we dismissed the claims as barred by res judicata. *State v. Tyson*, 5th Dist. Stark No. 2015CA00196, 2016-Ohio-3048.

{¶8} Appellant filed a motion requesting de novo sentencing on June 12, 2019, asserting that the trial court did not order preparation of a victim impact statement and

that the prosecutor improperly prepared the statements without the court's order. Appellant does not contend that the victim impact statements were not prepared or that the trial court did not consider them, but only that the trial court did not order their preparation. The record reflects that the trial court considered victim impact statements without objection. (Entry, November 6, 2000, p. 2) The trial court denied the motion without opinion and from that ruling Appellant files his appeal with one assignment of error:

{¶9} "I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING THE MOTION FOR RESENTENCING HEARING, BASED UPON A FRAUD ON THE COURT."

ANALYSIS

{¶10} Appellant has filed a number of actions related to his conviction in 2000 and now points to an alleged error by citing the record of the proceedings before the trial court. His counsel did not object to the alleged error at the trial and Appellant did not assert his argument in a timely appeal. These facts raise the issue of the applicability of the doctrine of res judicata.

{¶11} "Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment." *State v. Perry*, 10 Ohio St.2d 175, 180, 226 N.E.2d 104, 108 (1967). "Thus, the doctrine serves to preclude a defendant who has had his day in court from seeking a second on that same issue. In so doing, res judicata promotes the

principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard." *State v. Saxon,* 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 18 (2006). Accordingly, "[t]o survive preclusion by res judicata, a petitioner must produce new evidence that would render the judgment void or voidable and must also show that he could not have appealed the claim based upon information contained in the original record." (Citations omitted.) *State v. Poissant,* 5th Dist. Fairfield No. 2005-CA-90, 2006-Ohio-7130, ¶ 13.

{¶12} Appellant argues, without support of precedent, demonstration of prejudice or claim of inability to pursue an appeal for lack of evidence in the record, that the trial court's failure to order the preparation of the victim witness statements rendered his sentence void. The record supports a conclusion that the statements were completed and considered and though the record is not clear regarding whether the trial court ordered the preparation of the statements, Appellant does not demonstrate any prejudice from the absence of that information. His sentence is not void and likely not voidable, since the failure to order the statements does not rise to the level of plain error. *State v. Shaffner,* 12th Dist. Madison No. CA2002-07-012, 2003-Ohio-3872, ¶ 8.

{¶13} The error Appellant alleges is based upon details that were evident in the record and he had the opportunity to challenge the error in a direct appeal, but neglected to do so. We hold that this appeal is barred by the doctrine of res judicata.

By: Baldwin, J.

Gwin, P.J. and

Wise, Earle, J. concur.