

[Cite as *State v. Phelps*, 2018-Ohio-4709.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106735

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LARRY PHELPS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-93-296956-A

BEFORE: Celebrezze, J., Kilbane, P.J., and Jones, J.

RELEASED AND JOURNALIZED: November 21, 2018

FOR APPELLANT

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Defendant-appellant, Larry Phelps, brings this appeal challenging the trial court's judgment denying his "motion for specific enforcement of contract by third-party beneficiary" (hereinafter "motion for specific enforcement"). Specifically, Phelps argues that plaintiff-appellee, the state of Ohio, breached the agreement it entered into with Phelps's codefendant in exchange for her testimony against him, and that his due process rights were violated at trial based on the state's breach of the agreement. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} Phelps and his codefendant, common-law wife Laura Dumchas (hereinafter

“Laura”),¹ were charged for their involvement in the murder of Merle Johnston.² In June 1993, the Cuyahoga County Grand Jury returned a three-count indictment charging Phelps with (1) aggravated murder, in violation of R.C. 2903.01, with two underlying felony murder specifications alleging that the aggravated murder offense was committed while Phelps was committing, attempting to commit, or fleeing after committing or attempting to commit the offenses of aggravated robbery and kidnapping; (2) aggravated robbery, in violation of R.C. 2911.01; and (3) kidnapping, in violation of R.C. 2905.01.

{¶3} During pretrial proceedings, the trial court granted the state’s motion to try Phelps and Laura separately. Furthermore, Phelps filed a motion in limine to exclude Laura’s testimony pursuant to Evid.R. 601(B). After holding a hearing, the trial court ruled that the state could not compel Laura to testify against Phelps, but that Laura could elect to testify against Phelps. The state appealed the trial court’s ruling on the motion in limine, and this court affirmed the trial court’s ruling. *Phelps I* at *id.*

{¶4} The state and Laura reached an agreement under which the state would grant Laura immunity and “delete the death penalty specification” charged against Phelps in exchange for Laura waiving the spousal privilege and testifying against Phelps.

{¶5} A jury trial commenced in May 1995. At the close of trial, the jury found Phelps guilty on all three counts. Regarding the aggravated murder offense charged in Count 1, and the first felony murder specification, the jury found that the offense of aggravated murder was not committed while Phelps was committing, attempting to commit, or fleeing after committing or

¹ Laura Dumchas was also known as Laura Phelps and Laura LaFlore. See *State v. Phelps*, 100 Ohio App.3d 187, 188, 652 N.E.2d 1032 (8th Dist.1995) (hereinafter “*Phelps I*”).

² Cuyahoga C.P. No. CR-93-296956-A pertained to Phelps and CR-93-296956-B pertained to Laura.

attempting to commit the offense of aggravated robbery. (Tr. 1181-1182.) Regarding the second felony murder specification, the jury found that the offense of aggravated murder was committed while Phelps was committing, attempting to commit, or fleeing after committing or attempting to commit the offense of kidnapping. (Tr. 1182.)

{¶6} On May 25, 1995, the trial court sentenced Phelps to life imprisonment: life imprisonment on the aggravated murder count, a prison sentence of 10 to 25 years on the aggravated robbery count, and a prison sentence of 10 to 25 years on the kidnapping count.³ The trial court did not impose separate sentences on the aggravated murder count and the underlying specification on which the jury found Phelps guilty. The trial court ordered the counts to run consecutively.

{¶7} In June 1995, Phelps filed a direct appeal challenging his convictions. *State v. Phelps*, 8th Dist. Cuyahoga No. 69157, 1996 Ohio App. LEXIS 4067 (Sept. 19, 1996) (hereinafter “*Phelps II*”). Phelps argued that his convictions were against the manifest weight of the evidence, the state engaged in prosecutorial misconduct that deprived him of his constitutional right to a fair trial, the trial court erred by admitting other acts evidence, he was denied his constitutional rights to counsel and the effective assistance of counsel, and that the trial court lacked subject matter jurisdiction over the criminal proceedings. This court overruled Phelps’s assignments of error and affirmed his convictions in September 1996. The Ohio Supreme Court declined review. *State v. Phelps*, 78 Ohio St.3d 1510, 679 N.E.2d 310 (1997). Phelps filed a delayed motion for reconsideration in July 1997, which this court denied.

{¶8} In March 1998, Phelps filed a motion for a new trial and a motion for appointment of counsel. The trial court denied Phelps’s motions in April 1998. In July 1999, Phelps filed an

appeal challenging the trial court's judgment (8th Dist. Cuyahoga No. 76688). This court denied Phelps's motion for leave to file a delayed appeal in August 1999.

{¶9} In March 2009, Phelps filed a motion for leave to file a motion for a new trial. He also filed a petition to vacate or set aside the trial court's sentence pursuant to R.C. 2953.21 in June 2009. The trial court granted Phelps's motion for leave to file a motion for a new trial in July 2009.

{¶10} Phelps filed a motion for a new trial on July 21, 2009, arguing that he was entitled to relief based on newly discovered evidence that Laura had been hypnotized prior to trial, a fact that the prosecution failed to divulge to the defense. The trial court held a hearing on Phelps's motion on December 14, 2009. In January 2010, the trial court denied Phelps's motion for a new trial.

{¶11} In February 2010, Phelps filed an appeal challenging the trial court's judgment. *State v. Phelps*, 192 Ohio App.3d 484, 2011-Ohio-706, 949 N.E.2d 567 (8th Dist.) (hereinafter "*Phelps III*"). On appeal, this court affirmed the trial court's judgment, concluding that (1) the state did not commit a *Brady* violation,⁴ (2) Laura's testimony was admissible, and thus, Phelps was not materially prejudiced, and (3) Phelps did not meet his burden of demonstrating conscious wrongdoing or bad faith on the part of the prosecution. *Id.* at ¶ 50-51.

{¶12} In October 2014, Phelps filed a motion for leave to file a second motion for a new trial. In his motion, Phelps argued that he was entitled to a new trial based on (1) the fact that Laura's trial testimony was affected by her hypnosis, and (2) newly discovered evidence — that another individual purportedly murdered the victim.

³ The state asserts that Phelps will be eligible for parole in December 2020. Appellee's brief at 1.

⁴ *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

{¶13} On June 9, 2015, the trial court denied Phelps’s motion for a new trial. As to the first ground for relief, the trial court concluded that the hypnosis issue had been previously raised and considered during the December 2009 hearing on Phelps’s first motion for a new trial. As to the second ground for relief, the trial court concluded that the information on which Phelps relied was available at the time of his trial and/or contradicted by the physical and documentary evidence.

{¶14} Phelps filed an appeal challenging the trial court’s judgment denying his motion for a new trial without holding a hearing. *State v. Phelps*, 8th Dist. Cuyahoga No. 103206, 2016-Ohio-2631 (hereinafter “*Phelps IV*”). This court affirmed the trial court’s judgment.

{¶15} On November 9, 2017, Phelps filed his motion for specific enforcement. Therein, Phelps argued, for the first time, that he was entitled to a new trial because the state breached the agreement it had entered into in exchange for Laura’s testimony against him. The state filed a brief in opposition to Phelps’s motion on December 12, 2017.

{¶16} On December 19, 2017, the trial court denied Phelps’s motion for specific enforcement. It is from this judgment that Phelps filed the instant appeal on January 17, 2018.

{¶17} Phelps assigns two errors for review:

- I. Trial court errs in denying [Phelps’s] motion for specific enforcement of a contract saying it has no merit.
- II. Original trial court errs and deprives [Phelps] of due process in trying [Phelps] on a capital case when the record clearly demonstrates a trial on a non capital case where the specifications were deleted prior to trial[.]

For ease of discussion, we will address Phelps’s assignments of error out of order.

II. Law and Analysis

{¶18} As an initial matter, we note that the record before this court does not contain a complete transcript of Phelps’s trial in CR-93-296956-A, or Laura’s criminal proceedings in CR-93-296956-B.

The appellant in an appeal has the responsibility of ensuring that the record is complete and contains a transcript of all “evidence” relevant to the issues raised. *State v. Price*, 11th Dist. Trumbull No. 94-T-5056, 1995 Ohio App. LEXIS 2977, 6-7 (July 14, 1995), quoting *Columbus v. Hodge*, 37 Ohio App.3d 68, 68-69, 523 N.E.2d 515 (10th Dist.1987). In the “‘absence of documents demonstrating the error complained of, we must presume regularity in the proceedings.’” *State v. Goines*, 8th Dist. Cuyahoga No. 105436, 2017-Ohio-8172, ¶ 30, quoting *Brandimarte v. Packard*, 8th Dist. Cuyahoga No. 67872, 1995 Ohio App. LEXIS 2095 (May 18, 1995).

State v. Calhoun, 8th Dist. Cuyahoga No. 105442, 2017-Ohio-8488, ¶ 30; *see also Rocky River v. Collins*, 8th Dist. Cuyahoga No. 103111, 2015-Ohio-4390, ¶ 10 (pro se litigants are held to the same standards as all other litigants and are presumed to have knowledge of the law and correct legal procedure.).

{¶19} In this case, although Phelps originally filed his appeal pursuant to App.R. 9(B), this court, sua sponte, converted the record in this appeal to an App.R. 9(A) record based on Phelps’s failure to file a complete transcript. Although it is his responsibility to provide this court with a complete record, Phelps has only provided this court with portions of the trial court transcript from his criminal case and Laura’s proceedings.

A. Scope of Appeal

{¶20} In his second assignment of error, Phelps argues that his due process rights were violated because despite the state’s agreement to delete the death penalty specifications charged against him in exchange for Laura’s testimony, the trial court conducted a “capital trial,” and the state presented the felony murder specifications underlying the aggravated murder count to the jury during his trial.

{¶21} Our review in this appeal is limited to issues pertaining to Phelps’s motion for specific enforcement and the trial court’s December 19, 2017 judgment denying the motion. In his second assignment of error, however, Phelps raises an issue pertaining to his 1995 jury trial. Specifically, Phelps contends that his due process rights were violated during trial. Phelps’s second assignment of error, pertaining to a purported due process issue during the 1995 trial, predates the trial court’s judgment denying Phelps’s motion for specific enforcement and is outside the scope of the instant appeal. *See State v. Davis*, 8th Dist. Cuyahoga No. 104442, 2017-Ohio-7713, ¶ 16.

{¶22} Phelps’s argument pertaining to his 1995 jury trial is also untimely and barred by the doctrine of res judicata. “It is well established that res judicata bars the consideration of issues that could have been raised on direct appeal.” *State v. Turner*, 8th Dist. Cuyahoga No. 106123, 2018-Ohio-2730, ¶ 6, citing *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 16-17. In this case, Phelps could have challenged his convictions on direct appeal on the basis that his due process rights were violated during trial. However, he failed to do so. Accordingly, Phelps’s subsequent attempt to assert an alleged due process violation is barred by res judicata.

{¶23} Finally, the record reflects that Phelps is attempting to employ the procedure of “bootstrapping” through his appeal challenging the trial court’s judgment denying his motion for specific enforcement.

“Bootstrapping” is “the utilization of a subsequent order to indirectly and untimely appeal a prior order that was never directly appealed.” *State v. Williamson*, 8th Dist. Cuyahoga No. 102320, 2015-Ohio-5135, ¶ 9. Such attempt is “procedurally anomalous and inconsistent with the appellate rules that contemplate a direct relationship between the order from which the appeal is taken and the error assigned as a result of that order” and is disfavored. *Williamson*, citing *State v. Church*, 8th Dist. Cuyahoga No. 68590, 1995 Ohio App. LEXIS

4838 (Nov. 2, 1995); *Bd. of Health v. Petro*, 8th Dist. Cuyahoga No. 104882, 2017-Ohio-1164, ¶ 12 (noting this court’s consistent declination to consider bootstrapped claims).

State v. Bhambra, 8th Dist. Cuyahoga No. 105283, 2017-Ohio-8485, ¶ 12.

{¶24} In the instant matter, Phelps argues in his first assignment of error that the trial court erred by denying his motion for specific enforcement. As noted above, Phelps’s notice of appeal appeals from the trial court’s December 19, 2017 judgment denying his motion for specific enforcement. Phelps’s second assignment of error in which he claims that his due process rights were violated during the 1995 jury trial is unrelated to the trial court’s December 19, 2017 order that Phelps timely appealed. Because Phelps is attempting to bootstrap a claim that is now time-barred, we are without jurisdiction to consider Phelps’s second assignment of error. See *Bhambra* at ¶ 13, citing *State v. Cottrell*, 8th Dist. Cuyahoga No. 95053, 2010-Ohio-5254, ¶ 20, and App.R. 4.

{¶25} For all of the foregoing reasons, Phelps’s second assignment of error is overruled.

B. Motion for Specific Enforcement

{¶26} In his first assignment of error, Phelps argues that the trial court erred by denying his motion for specific enforcement.

{¶27} In his motion for specific enforcement, Phelps argued that he was an intended third-party beneficiary to the contract that was entered into between the state and Laura in CR-93-296956-B. Phelps requested specific performance of the contract between Laura and the state, arguing that he is entitled to a new trial during which the state can prosecute him for a noncapital offense.

{¶28} The terms of the agreement between the state and Laura were as follows:

The following constitutes the agreement between the State of Ohio and Laura Phelps:

WHEREAS, the State desires to call Laura Phelps as a witness in the case of State of Ohio v. Larry Phelps (CR 296956(A)), an Aggravated Murder prosecution; and

In return for Laura Phelps' willingness to testify in the above-referenced matter only:

1. The State agrees, prior to the above case commencing trial, to dismiss the indictment against Laura Phelps;
2. The State will, prior to the above case commencing trial, seek a grant of immunity for Laura Phelps in the above-referenced case;
3. The State will, prior to the above case commencing trial, seek a grant of immunity regarding the homicide of Danny Atkins (CR 211536) and the alleged arson of 2445 West 11th Street (CR 232527); Atkins, Danny.
4. *The State will delete the death penalty specification against Larry Phelps.*

And in consideration thereto, Laura Phelps agrees to:

1. Testify truthfully in the trial of Larry Phelps in CR 296956(A);
2. Waive any and all spousal privileges in connection with her testimony.

Signed on this 8th day of May, 1995.

(Emphasis added.) See Exhibit A to Phelps's motion for specific enforcement.

{¶29} As it pertained to Phelps, the state agreed to "delete the death penalty specification" underlying the aggravated murder charge in exchange for Laura's testimony against Phelps and waiver of any and all spousal privileges. The trial court confirmed that pursuant to the agreement between Laura and the state, "the [s]tate has also indicated that in exchange for [Laura's] testimony they would not seek the death penalty and would remove the death penalty specifications in this case as they relate to [Phelps]." (Tr. from Laura's case, CR-93-296956-B, at 51).

{¶30} During a pretrial hearing, the trial court accepted the agreement reached between the state and Laura. Furthermore, the trial court applied the terms of the agreement as they pertained to Phelps, stating, in relevant part:

the Court will also pursuant to the request of the Prosecution delete the felony murder specifications being Specification 1 and Specification 2 in Count 1 of this indictment as they pertain to Larry Phelps aka Kareem Phelps. Making this a straight aggravated murder without death penalty specifications and, therefore, removing any possibility of the death penalty being imposed against Mr. Phelps in this case.

(Tr. 54.)

{¶31} Despite the agreement and the trial court's judgment granting the state's request to delete the two specifications underlying the aggravated murder count, it appears from the limited portions of the trial transcript in our record that (1) the specifications were presented to the jury during Phelps's prosecution, (2) the trial court instructed the jury on the specifications, and (3) the jury returned verdicts on the two specifications. The jury found Phelps guilty of the aggravated murder offense charged in Count 1 and the underlying felony murder specification alleging that Phelps committed the offense of aggravated murder while he was committing, attempting to commit, or fleeing after committing or attempting to commit the offense of kidnapping. Without a complete transcript of Phelps's trial, however, we are unable to confirm whether and to what extent the agreement between the state and Laura affected Phelps's trial.

{¶32} Initially, we note that Phelps's argument that the state breached the agreement it entered into with Laura is premised on the assumption that the state agreed to delete the *felony*

murder specifications underlying the aggravated murder count. This assumption is not supported by the record.

{¶33} The document memorializing the terms of the agreement between the state and Laura provides, in relevant part, “[t]he [s]tate will delete the *death penalty specification* against Larry Phelps.” (Emphasis added.) The written agreement does not indicate that the state agreed to dismiss or amend the aggravated murder count charged against Phelps, or the two *felony murder specifications* underlying the aggravated murder count.

{¶34} Additionally, the minimal portions of the trial court transcript in our record do not indicate that Phelps’s trial counsel raised objections when (1) the trial court instructed the jury on the specifications underlying the aggravated murder count, (2) the jury returned verdicts on the underlying specifications, or (3) the trial court sentenced Phelps on the specification he was found guilty of. Generally, an issue that is not raised in the trial court forfeits all but plain error.

Plain error involves alleged omissions of trial counsel, alleged error on the part of the trial court, or alleged error in the trial court proceedings. See *State v. Nelson*, 2d Dist. Champaign No. 00CA12, 2001 Ohio App. LEXIS 975, 3-4 (Mar. 9, 2001), citing *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978).

{¶35} In this case, Phelps asserts that he did not discover the agreement between Laura and the state “until years later” (presumably referring to years after his jury trial in 1995) after he sought relief in federal court. Appellant’s brief at 3. Phelps further contends that the agreement between the state and Laura “was not mention[ed] at trial or on appeal” and that “[t]he only parties that knew of this contract [were] the court and state.” *Id.*

{¶36} As noted above, the record before this court does not contain a complete transcript of Phelps's trial. Accordingly, we are unable to determine whether, and to what extent, the agreement between Laura and the state was raised during Phelps's trial.

{¶37} Nevertheless, to the extent that Phelps argues that the agreement between Laura and the state and the state's breach thereof are newly discovered evidence based upon which he is entitled to a new trial pursuant to Crim.R. 33 or postconviction relief pursuant to R.C. 2953.21 or 2953.23, this argument is entirely unsupported by the record.

{¶38} Initially, we find no merit to Phelps's assertion that only the state and the trial court knew about the agreement. The limited record before this court reflects that Laura and her defense counsel were also aware of the agreement. The written document memorializing the terms of the agreement was signed by Laura and her attorneys, and Laura and both of her attorneys were present during the pretrial hearing when the terms of the agreement were read on the record.

{¶39} Furthermore, the record reflects that at least one of Phelps's trial attorneys was present at the pretrial hearing during which the terms of the agreement were placed on the record.

Phelps's March 1, 2009 affidavit, which he submitted in support of his March 2009 motion for leave to file a motion for a new trial, provides, in relevant part: "I was represented at trial by attorneys Thomas M. Shaughnessy and John Gardner." The portions of the trial court transcript that are in the record before this court reflect that at least one of Phelps's trial attorneys, Mr. Shaughnessy, was present at Laura's pretrial hearing during which the terms of the agreement were discussed. (Tr. 49.)

{¶40} Contrary to Phelps's assertion that the agreement was not mentioned on appeal, this court recognized on direct appeal that "Laura testified that the prosecutors offered her

immunity in this case, another murder case, and an arson case, if she would waive the spousal privilege and testify against [Phelps]. The prosecutors also agreed to drop the death penalty specifications against [Phelps].” *Phelps II* at 4.

{¶41} The record reflects that Phelps was aware of the agreement between Laura and the state when he filed his motion for leave to file a motion for a new trial on March 19, 2009. See brief in support of motion for leave at 1 (“[i]n order to persuade [Laura] to testify, the prosecution, in addition to dismissing all charges [against Laura], agreed to dismiss the capital specifications against Larry Phelps.”).

{¶42} Phelps asserted his claim that the state breached the agreement it entered into with Laura for the first time in November 2017 — more than 20 years after his jury trial and this court’s judgment on direct appeal affirming his convictions. Under these circumstances, we cannot say that the agreement or the state’s purported breach thereof are newly discovered evidence based upon which Phelps is entitled to a new trial or postconviction relief. Nor do we find that Phelps was unavoidably prevented from discovering the agreement and the state’s alleged breach. Because Phelps was, or should have been aware of the agreement and the state’s purported breach thereof at the time of his 1995 trial, the doctrine of res judicata precluded Phelps from raising this argument in his motion for specific enforcement because he failed to raise the issue on direct appeal.

{¶43} Assuming, arguendo, that (1) the state breached the agreement during Phelps’s trial, (2) the trial court erred by instructing the jury on the specifications underlying the aggravated murder count, or (3) the trial court erred by accepting the jury’s verdicts on the specifications, we find that any errors in these respects were harmless. First, the jury acquitted Phelps on the first underlying felony murder specification — committing the aggravated murder

offense while committing, attempting to commit, or fleeing after committing or attempting to commit the offense of aggravated robbery.

{¶44} Second, the trial court sentenced Phelps to life imprisonment on the aggravated murder count and did not impose the death penalty. Third, although the jury found Phelps guilty on the second underlying felony murder specification — committing the aggravated murder offense while committing, attempting to commit, or fleeing after committing or attempting to commit the offense of kidnapping — the trial court did not impose separate sentences on the aggravated murder count and the felony murder specification on which the jury found Phelps guilty. The trial court’s sentencing journal entry provides, in relevant part, Phelps “is sentenced to Lorain Correctional Institution under all counts; [Count] 1 aggravated murder with felony murder specification 2 (kidnapping) for a term of life imprisonment[.]”

{¶45} Based on the limited record before this court, we find that the essence of the agreement between Laura and the state, as it pertained to Phelps, was that the state would not pursue the death penalty if Phelps was convicted of aggravated murder in exchange for Laura’s testimony against him. The state lived up to its end of the bargain.

{¶46} After the jury returned its verdict, the trial court provided the prosecutor an opportunity to address the court on the issue of sentencing. The prosecutor did not advocate for the death penalty, and did not make any statement or argument regarding Phelps’s sentence. (Tr. 1188.) Furthermore, the trial court did not impose the death penalty on Phelps’s aggravated murder conviction, or separate sentences on the aggravated murder count and the underlying specification of which Phelps was convicted. Accordingly, Phelps has failed to demonstrate how he was harmed or prejudiced by the state’s purported breach of the agreement with Laura.

{¶47} For all of the foregoing reasons, Phelps’s first assignment of error is overruled.

III. Conclusion

{¶48} After thoroughly reviewing the record, we find that the trial court did not err in denying Phelps's motion for specific enforcement. Phelps's assertion that his due process rights were violated during his 1995 trial is untimely, outside the scope of this appeal, and barred by res judicata.

{¶49} 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 convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, P.J., and
LARRY A. JONES, SR., J., CONCUR