

[Cite as *State v. Worley*, 2018-Ohio-5359.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107179

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

PEREZ WORLEY

DEFENDANT-APPELLANT

JUDGMENT:
DISMISSED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-587709-B

BEFORE: Celebrezze, J., E.T. Gallagher, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: December 27, 2018

FOR APPELLANT

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Defendant-appellant, Perez Worley (“Worley”), appeals, pro se, from the trial court’s nunc pro tunc resentencing entry. After a thorough review of the record and law, this court dismisses Worley’s appeal.

I. Factual and Procedural History

{¶2} The facts of the instant matter were outlined previously by this court in *State v. Worley*, 8th Dist. Cuyahoga No. 103105, 2016-Ohio-2722, ¶ 2-4 (“*Worley I*”).

In June 2014, Worley confronted the victim for allegedly snitching on Worley in 2009. An argument and then a physical altercation ensued, but the fight was broken up by others. Sometime after the physical altercation (the time period is not clearly specified in the record), Worley approached and then shot the victim multiple times. Worley immediately fled the scene and absconded for four months. No one heard from Worley during those four months, an abnormal occurrence for his mother, who spoke with him at least a couple of times a month before the shooting.

Several witnesses circumstantially identified Worley as the shooter, and two witnesses familiar with Worley saw him actually shoot the victim. Before the shooting, Worley was also seen at a local gas station looking angry and holding a firearm. There is disputed evidence whether the codefendant drove Worley away from the scene or they departed separately. The codefendant's alleged involvement in the crime was limited to driving the getaway vehicle. No witness identified the codefendant as the shooter.

After the evidence was presented at trial, the jury found Worley guilty of aggravated murder. The trial court found him not guilty of retaliation, but guilty of improperly handling a firearm and having a weapon while under disability. Those sentences were imposed to be served concurrently to the aggravated murder and firearm specification charges. Worley's aggregate sentence is 28 years to life.

{¶3} On June 8, 2015, Worley timely appealed his conviction and sentence and assigned four assignments of error

(1) that his conviction is against the sufficiency of the evidence because the state failed to present evidence that Worley purposely caused the death of the victim or acted with prior calculation and design;

(2) that his conviction is against the manifest weight of the evidence because of the inconsistencies in the witnesses' testimony;

(3) that Worley's trial counsel rendered ineffective assistance — by not waiving Worley's right to a jury trial on the retaliation charge or by stipulating to an "overly broad" flight instruction because it allowed the jury to "consider if Mr. Worley leaving the scene of the crime was caused by consciousness of guilt"; and

(4) that the state violated the trial court's pretrial order, which partially granted a motion in limine.

Id. at ¶ 5. On April 28, 2016, this court issued an opinion overruling Worley's four assignments of error and affirming his conviction and sentence. Worley sought reconsideration of this court's opinion and reconsideration was denied. On October 26, 2016, the Ohio Supreme Court declined to accept Worley's appeal. *State v. Worley*, 147 Ohio St.3d 1412, 2016-Ohio-7455, 62 N.E.3d 185.

{¶4} Pursuant to App.R. 26(B), Worley filed a motion with this court seeking to reopen

his appeal. In general, Worley argued that he was deprived of the effective assistance of counsel on appeal. This court subsequently denied Worley's application to reopen his appeal. *State v. Worley*, 8th Dist. Cuyahoga No. 103105, 2017-Ohio-649. On May 31, 2017, the Ohio Supreme Court declined to accept Worley's appeal. *State v. Worley*, 149 Ohio St.3d 1422, 2017-Ohio-4038, 75 N.E.3d 238.

{¶5} Thereafter, in the trial court on December 11, 2017, Worley filed a "motion for final appealable order pursuant to R.C. 2505.02(A), Crim.R. 32(C) and Article IV 3(B)(2)." On December 31, 2017, the trial court issued a journal entry denying Worley's motion and stated the following:

[Worley's] motion for [a] final appealable order pursuant to R.C. 2505.02(A), Crim.R.[.] 32(C) and Article IV, Section 3(B)(2) is denied. [Worley] previously appealed his conviction to the Eighth District Court of Appeals (Case No. 103105) and his conviction was affirmed. [Worley's] motion argues that his original sentencing entry was not a final and [appealable] order. As this was an issue that could have been raised on his direct appeal, the issue is res judicata and the motion is denied.

{¶6} On January 30, 2018, Worley filed a petition for a writ of mandamus against the trial court. *State ex rel. Worley v. Ambrose*, 8th Dist. Cuyahoga No. 106775, 2018-Ohio-1206 ("Worley II"). In his petition to this court, Worley sought to compel the trial judge "to engage in a resentencing hearing and issue a final, appealable order in the underlying criminal case." *Id.* at ¶ 1. This court dismissed Worley's petition as moot and, in so doing, noted that

In response to Worley's complaint, the respondent judge filed a motion for summary judgment where it was acknowledged that postrelease control was required but not imposed on Counts 11 and 13. The respondent judge attached a certified copy of a journal entry setting the date for a hearing to impose postrelease control for March 29, 2018.

The respondent judge is required to hold a limited sentencing hearing to impose postrelease control for the charges of improperly handling a firearm in a motor vehicle and having a weapon while under disability. The trial court has set a

date for that hearing. Therefore, Worley has been provided with the relief sought in his complaint to which he is entitled. This renders the present action moot.

Id. at ¶ 10-11.

{¶7} Thereafter, on April 11, 2018, the trial court held a hearing and issued a nunc pro tunc journal entry correcting this error. It is from that nunc pro tunc journal entry that Worley brings the instant appeal. Worley assigns one error for review.

I. [Worley] was not provided a final appealable order by the trial court for his initial appeal, violating due process and making his initial appeal a nullity.

II. Law and Analysis

{¶8} In Worley's sole assignment of error, he argues that the trial court's original sentencing entry, issued on April 2, 2015, did not constitute a final, appealable order.

{¶9} Worley brings this instant appeal, seeking this court to declare that the trial court's judgment entry issued April 11, 2018, was the only final, appealable order in the instant case. Further, Worley asks this court to declare that the April 2, 2015 original sentencing entry did not constitute a final, appealable order.

{¶10} Worley specifically contends that because the trial court failed to properly inform him of his postrelease control at the original sentencing hearing, his first appeal to this court was not a final, appealable order. As such, Worley contends that he is entitled to a direct appeal.¹

{¶11} In support of his argument, Worley directs this court's attention to *State v. Hannah*, 2d Dist. Montgomery No. 24162, 2011 Ohio App. LEXIS 2427 (Feb. 8, 2011). In *Hannah*, the Second District ruled that a trial court's entry stating that Hannah had been "convicted" of

¹ Even if we were to agree with Worley, he would be left without a remedy. Or, he would be left without a remedy he desires; advancing different or additional arguments to this court other than those he argued on his first appeal. In the instant appeal, Worley has failed to present any additional assignments of error. Therefore, any subsequent appeal after this instant appeal would be barred by res judicata.

offenses, was not a final, appealable order because the entry did not specify the manner of the conviction. *Id.* at 5, citing *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, 895 N.E.2d 805. Hannah had previously filed a direct appeal challenging his conviction and sentence, and the court issued an opinion affirming the trial court's judgment. *State v. Hannah*, 2d Dist. Montgomery No. 19208, 2003-Ohio-5525. In the subsequent appeal, the court noted that its "2003 opinion resolving Hannah's first appeal is a nullity because we lacked jurisdiction to issue it in the absence of a final, appealable order. *See* Section 3(B)(2), Article IV, Ohio Constitution." *Hannah*, 2d Dist. Montgomery No. 24162, 2011 Ohio App. LEXIS 2427.

{¶12} To this end, Worley asks this court to declare that this court's first opinion, *Worley I*, 8th Dist. Cuyahoga No. 103105, 2016-Ohio-2722, is similarly a nullity. Thus, Worley's argument follows that he would be free to raise any issues in a subsequent appeal, including issues related to his trial and the merits of his convictions. *Id.*

{¶13} However, we find that Worley's arguments are barred by res judicata. We note that this court addressed this exact issue in Worley's previous actions before this court. As this court noted in *Worley II*,

The Ohio Supreme Court's recent ruling in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, does not persuade us otherwise. *Fischer* involved a trial court's failure to impose mandatory post-release control at sentencing. Upon review, the Ohio Supreme Court determined that the defendant's sentence was void to the extent that it lacked post-release control. The majority also concluded, however, that the rest of the defendant's sentence remained valid. Finally, the *Fischer* court addressed whether a second direct appeal following a remand for re-sentencing due to a void sentence was a "first appeal as of right" because the original appeal was a nullity. The majority answered that question in the negative, stating: "The court of appeals correctly ruled that Fischer, having already had the benefit of one direct appeal, could not raise any and all claims in a second or successive appeal." *Id.* at ¶ 33.

Worley is, however, incorrect that there is no final order capable of invoking appellate jurisdiction in his underlying criminal case. The *Fischer* and *Holdcroft* courts determined that res judicata applies to validly imposed portions of the sentence, and a sentencing journal entry that fails to include postrelease control is still a final, appealable order as to those portions of the sentence that were validly imposed, including the finding of guilt. *Fischer* at ¶ 40; [*State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 9].

Worley II, 8th Dist. Cuyahoga No. 106775, 2018-Ohio-1206, at ¶ 8-9.

{¶14} In accordance with the above analysis, Worley is not precluded in the instant appeal from challenging the trial court's resentencing entry as it specifically pertained to postrelease control. However, any other challenges are barred by res judicata.

{¶15} Appeal dismissed.

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.

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

EILEEN T. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR