

THE STATE EX REL. MAXWELL, APPELLANT, v. SPICER, APPELLEE.

[Cite as *State ex rel. Maxwell v. Spicer*, 104 Ohio St.3d 344, 2004-Ohio-6594.]

Criminal law – Sentencing – Defendant not entitled to resentencing under State v.

Comer where conviction was final before Comer was decided.

(No. 2004-1497 — Submitted November 16, 2004 — Decided December 15,
2004.)

APPEAL from the Court of Appeals for Summit County, No. 22160.

Per Curiam.

{¶ 1} In 2000, the Summit County Court of Common Pleas convicted appellant, Thomas Maxwell, of rape and gross sexual imposition, and classified him as a habitual sex offender. The common pleas court sentenced him to prison.

{¶ 2} In June 2004, Maxwell filed a petition in the Court of Appeals for Summit County for a writ of mandamus to compel appellee, Judge Mary F. Spicer of the common pleas court, to vacate his sentence and resentence him in accordance with applicable law. Maxwell claimed that Judge Spicer did not make the findings required by *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473, paragraphs one and two of the syllabus. Judge Spicer moved to dismiss the petition.

{¶ 3} On July 29, 2004, the court of appeals granted Judge Spicer's motion and dismissed Maxwell's petition.

{¶ 4} This cause is now before the court upon Maxwell's appeal as of right.

{¶ 5} We affirm the judgment of the court of appeals. Maxwell is not entitled to the retroactive application of *Comer* to his convictions, which had become final before *Comer* was decided. See *Ali v. State*, 104 Ohio St.3d 328,

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2004-Ohio-6592, 819 N.E.2d 687, ¶ 6, and cases cited therein. Moreover, Maxwell waived the new claims he attempts to raise on appeal because he did not raise them in his petition or seek leave to amend his petition to include these claims. See *State ex rel. Scruggs v. Sadler*, 102 Ohio St.3d 160, 2004-Ohio-2054, 807 N.E.2d 357, ¶ 6. Therefore, the court of appeals properly dismissed Maxwell's mandamus petition.

Judgment affirmed.

MOYER, C.J., RESNICK, F.E. SWEENEY, PFEIFER, LUNDBERG STRATTON,
O'CONNOR and O'DONNELL, JJ., concur.

Thomas Maxwell, pro se.

Sherri Bevan Walsh, Summit County Prosecuting Attorney, and Richard
S. Kasay, Assistant Prosecuting Attorney, for appellee.
