[Cite as *State v. Draughon*, 2012-Ohio-1917.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	Nos. 11AP-703 and 11AP-995 (C.P.C. No. 97CR-1733)
Mickey L. Draughon,	:	(REGULAR CALENDAR)
Defendant-Appellant	:	

D E C I S I O N

Rendered on May 1, 2012

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichar*d, for appellee.

Mickey L. Draughon, pro se.

APPEALS from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} In this consolidated action, defendant-appellant, Mickey L. Draughon, pro se, appeals from two judgments of the Franklin County Court of Common Pleas denying his motions to vacate his sentence. For the following reasons, we affirm.

{¶ 2} On March 28, 1997, appellant was charged in a six-count indictment with one count each of aggravated burglary, aggravated robbery, rape, and kidnapping, and two counts of robbery. The aggravated burglary, aggravated robbery, rape, and kidnapping counts included repeat violent offender specifications; the rape count also included a sexually violent predator specification. The charges stemmed from conduct occurring on March 5, 1997. Appellant waived his right to a jury trial on all of the specifications. The remaining charges were tried to a jury in October 1997. At the conclusion of trial, the trial court granted appellant's Crim.R. 29 motion to dismiss the

aggravated robbery charge. Following deliberations, the jury found appellant guilty of the remaining charges. The trial court subsequently found appellant guilty of all of the specifications. The court sentenced appellant to an aggregate term of 20 years to life in prison and adjudicated him a sexual predator.

{¶ 3} Appellant filed a direct appeal, and this court affirmed the convictions. *State v. Draughon,* 10th Dist. No. 97APA11-1536 (Sept. 1, 1998). We subsequently denied appellant's App.R. 26(B) application for reopening. *State v. Draughon*, 10th Dist. No. 97APA11-1536 (Dec. 31, 1998) (memorandum decision). The Supreme Court of Ohio denied appellant's motion to file a delayed appeal. *State v. Draughon*, 84 Ohio St.3d 1473 (1999). In October 2000, appellant filed an untimely motion for post-conviction relief, which the trial court denied in November 2000. *State v. Draughon*, Franklin C.P. No. 97CR03-1733 (Nov. 16, 2000).

{¶ 4} On January 13, 2011, appellant filed a "Motion to Vacate and Discharge," claiming that his original sentence was void, was not a final appealable order, and failed to comply with Crim.R. 32(C). As relevant here, appellant specifically argued that: (1) the trial court did not properly impose post-release control at his sentencing hearing or in the trial court's sentencing entry, and (2) the trial court imposed a life sentence on the rape count without properly securing a qualifying prior conviction to support the attached sexually violent predator specification. The trial court denied appellant's motion in a decision and entry filed August 5, 2011. Appellant timely appealed the trial court's decision in case No. 11AP-703.

{¶ 5} Thereafter, on September 2, 2011, appellant filed a "Motion to Vacate Sentence," asserting again that his original sentence was void, was not a final appealable order, and failed to comply with Crim.R. 32(C). Pertinent to this appeal, appellant specifically claimed that the trial court: (1) erroneously failed to impose a prison term on the kidnapping and robbery convictions, and (2) failed to properly address the dismissal of the aggravated robbery charge in the sentencing entry. By decision and entry filed October 25, 2011, the trial court denied appellant's motion. Appellant timely appealed the trial court's decision in case No. 11AP-995.

{¶ 6} On December 16, 2011, this court sua sponte consolidated the appeals.

{¶ 7} In case No. 11AP-703, appellant sets forth the following two assignments of error:

> [I.] THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION WHEN IT DENIED THE APPELLANT'S MOTION TO VACATE AND DISCHARGE FOR LACK OF NOTICE OF POST-RELEASE CONTROL.
>
> [II.] THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION WHEN IT DENIED THE APPELLANT'S MOTION TO VACATE AND DISCHARGE FOR RENDERING A SENTENCE ENHANCEMENT THAT IS CONTRARY TO LAW AND SUBJECT[-]MATTER JURISDICTION.

{¶ 8} In case No. 11AP-995, appellant advances two assignments of error, as follows:

> [I.] THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION BY DENYING APPELLANT'S MOTION TO VACATE FOR FAILURE TO STATE THE SENTENCE ON THE JOURNAL ENTRY.
>
> [II.] THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION BY DENYING APPELLANT'S MOTION TO VACATE FOR FAILURE TO DISCHARGE THE COUNT OF AGGRAVATED ROBBERY ON THE JOURNAL ENTRY.

{¶ 9} As an initial matter, we note that plaintiff-appellee, state of Ohio, contends that all of appellant's claims are barred by res judicata. Under the doctrine of res judicata, "a final judgment bars a 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 the defendant raised or could have raised at trial or on appeal." *State v. Brown*, 167 Ohio App.3d 239, 2006-Ohio-3266, ¶ 7 (10th Dist.). Regardless of whether the principles of res judicata apply here, we find that the trial court did not err in denying appellant's motions to vacate on any of the grounds raised in these appeals.

{¶ 10} We first address appellant's arguments in case No. 11AP-703. In his first assignment of error, appellant maintains that the trial court did not properly impose post-release control at his sentencing hearing or in the sentencing entry. Appellant specifically claims that the notifications provided by the trial court were insufficient because they

failed to advise him of the mandatory nature of post-release control or the consequences of violating the terms of his post-release control.

{¶ 11} "In 1996, the General Assembly imposed a duty on trial courts to notify an offender at the sentencing hearing of the imposition of postrelease control and of the authority of the parole board to impose a prison term for a violation; the General Assembly also required that a court include any postrelease-control sanctions in its sentencing entry. See former R.C. 2929.14(F) and former R.C. 2929.19(B)(3)(b) through (d) and (B)(4), Am.Sub.S.B. No. 2, 146 Ohio Laws, Part IV, 7136, 7470, 7486-7487." *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, ¶ 22.

{¶ 12} At appellant's October 9, 1997 sentencing hearing, the trial court orally informed appellant that "if you're released * * * and you're on post-release control and you get in trouble, they could add up to 50 percent at that time of what I give you." (Tr. 102.) While this statement arguably may not have advised appellant of the mandatory nature of post-release control, the length of the period of any post-release imposed, or all the possible consequences of violating post-release control, the record reflects that appellant and his counsel signed a notice titled "Prison Imposed" on the date of the sentencing hearing which informed appellant of those matters. That form provided as follows:

> NOTICES
> (Prison Imposed)
>
> The Court hereby notifies the Defendant as follows:
>
> * * *
>
> B. Post-Release Control.
>
> After you are released from prison, you (will) have a period of post-release control for 5 years following your release from prison. If you violate a post-release control sanction imposed upon you, any one or more of the following may result:
>
> (1) The Parole Board may impose a more restrictive post-release control sanction upon you; and
>
> (2) The Parole Board may increase the duration of the post-release control subject to a specified maximum; and

> (3) The more restrictive sanction that the Parole Board may impose may consist of a prison term, provided that the prison term cannot exceed nine months and the maximum cumulative prison term so imposed for all violations during the period of post-release control cannot exceed one-half of the stated prison term originally imposed upon you; and
>
> (4) If the violation of the sanction is a felony, you may be prosecuted for the felony and, in addition to any sentence it imposes on you for the new felony, the Court may impose a prison term, subject to a specified maximum, for the violation.
>
> I hereby certify that the Court read to me, and gave to me in writing, the notice set forth herein.

(R. at 91.)

{¶ 13} In its October 15, 1997 judgment entry journalizing appellant's sentence, the court indicated that it "notified the Defendant, orally and in writing, of * * * the applicable periods of post-release control pursuant to R.C. 2929.19(B)(3)(c), (d) and (e)." The sentencing entry did not, however, specifically state whether appellant was subject to a mandatory period of post-release control or the length of any imposed post-release control.

{¶ 14} In a series of cases beginning with *State v. Mays*, 10th Dist. No. 10AP-113, 2010-Ohio-4609, this court has consistently held that a trial court properly imposes post-release control when the "applicable periods" language in the trial court's sentencing entry, such as that in the present case, is combined with other written or oral notification of the imposition of post-release control. In *Mays*, the trial court held a videoconference hearing to review whether a period of post-release control had been validly imposed during Mays' original sentencing proceeding. After the hearing, the court issued a nunc pro tunc entry clarifying that post-release control was applicable, and stating the length of the post-release control period.

{¶ 15} On appeal, Mays challenged the propriety of conducting the resentencing hearing via videoconference. We declined to address that issue, however, because we found that the trial court had properly imposed post-release control in the original sentencing proceeding. In so finding, we noted that the original sentencing entry made reference to the fact that Mays had been informed of the applicable period of post-release

control. We further noted that Mays signed a guilty plea form which specifically stated that he would be subject to a mandatory five-year period of post-release control. *Id.* at ¶ 4. Finally, we noted that Mays signed a "Prison Imposed" notice specifying the five-year period of post-release control and the consequences of violating post-release control sanctions imposed against him. We concluded that, under these circumstances, "post-release control was appropriately included in the sentence in 2002," and therefore the subsequent resentencing hearing "was unnecessary and had no legal effect." *Id.* at ¶ 8.

{¶ 16} This court has applied the *Mays* holding to cases involving similar factual circumstances. *See, e.g., State v. Chandler*, 10th Dist. No. 10AP-369, 2010-Ohio-6534 (post-release control properly imposed where: (1) the original sentencing entry stated that the defendant was informed of the applicable period of post-release control without specifying that the applicable period was five years, (2) the defendant signed a guilty plea form that specified the five-year period for post-release control, and (3) the record contained a "Prison Imposed" notice signed by the defendant specifying the five-year period); *State v. Cunningham,* 10th Dist. No. 10AP-452, 2011-Ohio-2045 (defendant properly notified of post-release control following jury trial where original sentencing entry and "Prison Imposed" notice contained language identical to comparable documents in *Mays* and *Chandler*); *State v. Easley*, 10th Dist. No. 10AP-505, 2011-Ohio-2412, ¶ 14 ("although appellant was not orally notified by the trial court of the imposition of post-release control, it is clear from the record that appellant was notified at the sentencing hearing that he would be subject to post-release control upon his release and of the consequences of violating post-release control through the use of the written 'Prison Imposed' notice"). *See also State v. Addison,* 10th Dist. No. 10AP-554, 2011-Ohio-2113; *State v. Knowles*, 10th Dist. No. 10AP-119, 2011-Ohio-4477; *State v. Quintanilla,* 10th Dist. No. 10AP-703, 2011-Ohio-4593; *State v. Klausman,* 10th Dist. No. 10AP-794, 2011-Ohio-4980; *State v. Townsend,* 10th Dist. No. 10AP-983, 2011-Ohio-5056; *State v. Holloman*, 10th Dist. No. 11AP-454, 2011-Ohio-6138; *State v. Williams*, 10th Dist. No. 10AP-1135, 2011-Ohio-6231.

{¶ 17} The "applicable period" language set forth in the sentencing entries in *Mays*, *Chandler*, and the other cases cited above, as well as the language set forth in the "Prison Imposed" notice in those cases, is virtually identical to that found in the instant

case. Accordingly, pursuant to the foregoing jurisprudence, we find that the trial court properly notified appellant of post-release control pursuant to the statutory requirements.

{¶ 18} Because the trial court properly notified appellant of post-release control at his sentencing, the trial court did not err in denying appellant's motion to vacate and discharge on this issue. Accordingly, we overrule appellant's first assignment of error.

{¶ 19} In his second assignment of error, appellant contends his original sentence was void because the trial court erroneously imposed a sentence of ten years to life on the rape offense. Appellant specifically claims that the trial court lacked the statutory authority to enhance appellant's sentence on the rape offense because: (1) his 1984 rape conviction could not support the sexually violent predator specification, as it occurred prior to the enactment of R.C. 2971.01, and (2) the trial court was precluded by the Supreme Court of Ohio's decision in *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238 from using the underlying rape conviction to support the sexually violent predator specification.

{¶ 20} As outlined above, the rape charge in the indictment carried a sexually violent predator specification pursuant to R.C. 2941.148. After the jury found appellant guilty of rape, the trial court found appellant to be a sexually violent predator as charged in the indictment. Thus, the trial court, pursuant to R.C. 2971.03(A)(3), enhanced appellant's sentence for the rape, imposing a prison term of ten years to life, instead of a definite prison term of three to ten years prescribed for rape. *See* R.C. 2929.14(A)(1).

{¶ 21} R.C. 2971.03(A) mandates an enhanced sentence upon a guilty verdict or plea on a rape offense if the offender also "is convicted of or pleads guilty to a sexually violent predator specification that was included in the count of the indictment * * * charging that offense." In 1997, when appellant was sentenced, R.C. 2971.01(H)(1) defined a "sexually violent predator" as "a person who has been convicted of or pleaded guilty to committing, on or after January 1, 1997, a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses." "Rape is a 'sexually violent offense.' " *State v. Haynes*, 10th Dist. No. 01AP-430, 2002-Ohio-4389, citing R.C. 2971.01(G) and (L). Thus, appellant's 1984 rape conviction could not be used to demonstrate that appellant had been convicted of a sexually violent offense for purposes

of proving the sexually violent predator specification because the conviction predated the January 1, 1997 cutoff date in R.C. 2971.01(H)(1).

{¶ 22} However, at the time of appellant's conviction and sentencing in 1997, the trial court was not precluded from using the underlying rape conviction to satisfy the sexual predator specification. Ohio courts had not uniformly interpreted R.C. 2971.01(H)(1) to require a prior conviction to satisfy the specification. Indeed, this court construed the statute to permit satisfaction of a sexually violent predator specification through contemporaneous conviction of a sexually violent offense. For example, in *Haynes,* this court upheld a trial court's finding that the defendant was a sexually violent predator based upon conduct alleged in the indictment that contained the sexually violent predator specification. *Id.* at ¶ 82-96. We concluded as such even though the defendant had no "prior history of conviction for sexually oriented offenses." *Id.* at ¶ 90. Under the construction employed in *Haynes,* the trial court could have adjudged appellant to be a sexually violent predator because he was convicted of committing rape, a sexually violent offense, after January 1, 1997.

{¶ 23} In December 2004, the Supreme Court of Ohio decided *Smith,* which held that a "[c]onviction of a sexually violent offense cannot support the specification that the offender is a sexually violent predator as defined in R.C. 2971.01(H)(1) if the conduct leading to the conviction and the sexually violent predator specification are charged in the same indictment." *Id.* at syllabus. The court based its holding on its interpretation of R.C. 2971.01(H)(1) to require that a sexually violent predator specification be supported by a sexually violent offense "conviction * * * that [had] existed prior to the * * * indictment" charging the specification. *Id.* at ¶ 27.

{¶ 24} Appellant urges that *Smith* applies to his case and, therefore, the trial court erroneously found him guilty of the specification because the underlying rape conviction did not predate the indictment. However, this court has held that *Smith* does not apply retroactively to closed cases. *State v. Haynes,* 10th Dist. No. 01AP-430 (Jan. 26, 2006) (memorandum decision). Accordingly, at the time appellant was convicted and sentenced, the trial court properly could find appellant guilty of the sexually violent predator specification based upon conduct alleged in the indictment.

{¶ 25} Because the trial court properly imposed a sentence of ten years to life on his rape conviction, the trial court did not err in denying his motion to vacate and discharge on this issue. The second assignment of error is overruled.

{¶ 26} We next address appellant's claims in case No. 11AP-995. Appellant argues in his first assignment of error that the trial court should have vacated his sentence and conducted a new sentencing hearing because the trial court failed to impose sentence on each of the robbery counts and the kidnapping count.

{¶ 27} The jury found appellant guilty of two counts of robbery. At the sentencing hearing, the court stated that "[t]he two robberies merge. The sentence on those is five years." (Tr. 102.) The trial court's sentencing entry states, "5 years for two counts of Robbery (the two robberies merge for sentencing)." The trial court merged the robbery counts pursuant to R.C. 2941.25. A trial court may not impose multiple sentences for offenses that merge under R.C. 2941.25. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 31. Having found that the offenses merged, the court could only sentence appellant on one of the robbery counts. Thus, the trial court did not err in failing to impose sentence on each of the robbery counts.

{¶ 28} Similarly, the trial court did not err in failing to impose sentence on the kidnapping count. The jury found appellant guilty of rape and kidnapping. At the sentencing hearing, the court stated that "[t]he sentence on the kidnapping and the rape merge." (Tr. 101.) In the sentencing entry, the court stated "10 years to life for Rape with specifications and Kidnapping (the Rape and Kidnapping merge for sentencing)." The trial court merged the kidnapping count as incidental to the rape count pursuant to R.C. 2941.25. As noted above, a trial court may not impose multiple sentences for offenses that merge under R.C. 2941.25. *Id*. Having found that the offenses merged, the trial court could properly sentence appellant only on the rape count.

{¶ 29} Because the trial court properly sentenced appellant pursuant to R.C. 2941.25, the trial court did not err in denying his motion to vacate on this issue. The first assignment of error is overruled.

{¶ 30} In his second assignment of error, appellant contends that the trial court erred in its disposition of sentence on the aggravated robbery count. As noted above, the trial court granted appellant's Crim.R. 29 motion for acquittal as to the aggravated

robbery count. At the sentencing hearing, the trial court orally imposed a sentence of ten years on that count. However, the trial court's sentencing entry did not impose that sentence. "A court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum." *Schenley v. Kauth*, 160 Ohio St. 109 (1953), paragraph one of the syllabus. "[A]n oral pronouncement of sentence in open court does not meet this rule." *State v. Teets*, 9th Dist. No. C.A. 3022-M (Sept. 20, 2000). Because the judgment entry did not impose a sentence on the aggravated robbery count, the trial court did not err in denying appellant's motion to vacate on this issue. The second assignment of error is overruled.

{¶ 31} Having overruled appellant's assignments of error in both case Nos. 11AP-703 and 11AP-995, we hereby affirm the judgments of the Franklin County Court of Common Pleas.

Judgments affirmed.

BRYANT and KLATT, JJ., concur.

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