

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2010-L-111
SHURMALE LAMAR GARNER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 06 CR 000174.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Shurmale Lamar Garner, pro se, PID# 522-147, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Shurmale Lamar Garner, appeals from the Judgment Entry of the Lake County Court of Common Pleas, denying his Motion to Vacate and Correct Void Judgment. The issue to be decided in this case is whether res judicata precludes a defendant from raising errors regarding the validity of jury

verdict forms subsequent to his direct appeal. For the following reasons, we affirm the decision of the court below.

{¶2} On June 16, 2006, the Lake County Grand Jury returned a three count indictment against Garner. Count One charged him with Trafficking in Cocaine, a felony of the first degree, in violation of R.C. 2925.03(A)(2), with a Major Drug Offender Specification, pursuant to former R.C. 2929.01(X), and a Forfeiture Specification, pursuant to former R.C. 2925.42, relating to Garner's vehicle. Count Two charged Garner with Possession of Cocaine, a felony of the first degree, in violation of R.C. 2925.11. Count Two contained the same Major Drug Offender and Forfeiture Specifications as Count One. Count Three charged Garner with Possessing Criminal Tools, a felony of the fifth degree, in violation of R.C. 2923.24.

{¶3} The matter proceeded to trial before a jury on December 14, 2006. Following a two day trial, the jury returned a verdict of "Guilty" on Counts One and Two, and a verdict of "Not Guilty" on Count Three.

{¶4} On December 28, 2006, Garner filed a Motion for New Trial. On January 24, 2007, the matter proceeded to sentencing, at which time Garner's Motion for New Trial was denied. Garner was sentenced to ten years imprisonment on Count One, and ten years on Count Two, to be served concurrently, and was ordered to serve an additional term of three years on each Major Drug Offender specification, concurrent with each other, but consecutive with the ten year prison terms for the underlying offenses, for a total term of thirteen years.

{¶5} In addition, a mandatory fine of \$10,000 was imposed for each of Counts One and Two, however, this fine was waived upon the filing of Garner's Affidavit of

Indigency. Pursuant to former R.C. 2925.42, all of Garner's rights, title and interest in his vehicle were forfeited to the Willoughby Hills Police Department.

{¶6} Garner timely appealed to this court, raising the issues of whether his confession was valid, sufficiency of the evidence, whether the jury was properly polled, and challenging his sentence under the Major Drug Offender specification. See *State v. Garner*, 11th Dist. No. 2007-L-041, 2007-Ohio-5914. On November 2, 2007, this court issued its judgment on Garner's appeal, finding Garner's arguments to be without merit and affirming the lower court. *Id.* at ¶89.

{¶7} On May 1, 2009, Garner filed a pro se motion with the trial court for the return of the property forfeited. The trial court found Garner was "not entitled to the return of the [property] as it was forfeited as part of his sentence." Garner appealed and this court affirmed the lower court's decision. See *State v. Garner*, 11th Dist. No. 2009-L-115, 2010-Ohio-2153.

{¶8} On June 18, 2010, Garner filed a Motion to Vacate and Correct Void Judgment with the trial court, asserting that the jury verdict forms in his case did not specifically list the applicable code sections of the aggravating factors, R.C. 2925.03(C)(4)(g) and 2925.11(C)(4)(f), and, therefore, his convictions are void.

{¶9} On September 10, 2010, the trial court denied Garner's Motion to Vacate and Correct Void Judgment, holding that Garner's claims were barred by the doctrine of res judicata and could have been raised in his direct appeal.

{¶10} Appellant timely appealed pro se from the aforementioned judgment, raising the following assignments of error:

{¶11} "[1.] The trial court erred by denying appellant's Motion to Vacate and Correct Void Judgment on grounds that the claims were barred by res judicata

consequently depriving him of his constitutional right to due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution and *State v. Pelfrey* (2007), 112 Ohio St.3d 422, 860 N.E.2d 735.

{¶12} “[2.] The trial court erred by applying the doctrine of res judicata to appellant’s Motion to Vacate and Correct Void Judgment.

{¶13} “[3.] The trial court erred by giving the jury verdict forms that did not include the necessary subsections to sustain a conviction for felonies of the first degree.

{¶14} “[4.] The trial court erred by giving the jury verdict forms that did not mandate a finding of guilty beyond a reasonable doubt in violation of appellant’s 5th and 6th Amendment of the United States Constitution [sic].

{¶15} “[5.] The trial court erred when it failed to provide 12 signatures for each count, or separate verdict forms for each count, therefore relieving the state of its burden of proving the appellant guilty beyond a reasonable doubt on each offense charged which is a violation of appellant’s 5th and 6th Amendment of the United States Constitution [sic].¹

{¶16} “[6.] The trial court erred when it failed to properly sentence the appellant on allied offense of similar import, therefore the sentence was void. *State v. Whitfield*, 124 Ohio St.3d 319, 922 N.E.2[d] 182.”

{¶17} We will address Garner’s assignments of error one through five in a consolidated fashion, as they all relate to alleged defects in the jury verdict form and the trial court’s denial of Garner’s Motion to Vacate based on these defects.

1. On January 2, 2011, Garner filed a Motion to Amend Appellant’s Brief to add two additional assignments of error. We granted this Motion instanter and allowed Garner to file assignments of error five and six.

{¶18} Garner argues that, under *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, the jury verdict form was improper because it failed to list the Ohio Revised Code sections related to the aggravating elements of his offenses. He further asserts that the trial court erred in dismissing his Motion to Vacate because *res judicata* does not apply.

{¶19} R.C. 2945.75(A)(2) provides that “[w]hen the presence of one or more additional elements makes an offense one of more serious degree *** [a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.” The court in *Pelfrey* held that “pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense.” 2007-Ohio-256, at ¶14.

{¶20} We find that the trial court did not err by applying *res judicata* in this case and Garner’s argument that the jury verdict forms were defective is precluded by *res judicata*.

{¶21} “Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel 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 trial, which resulted in that judgment of conviction, or on an appeal from that judgment.” *State v. Lorenzo*, 11th Dist. No. 2007-L-085, 2008-Ohio-1333, at ¶20, quoting *State v. Green*, 11th Dist. Nos. 2005-A-0069 and 2005-A-0070, 2006-Ohio-6695, at ¶11 (citation

omitted). “[A]ny issue that could have been raised on direct appeal and was not is res judicata and not subject to review in subsequent proceedings.” *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, at ¶16, citing *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, at ¶37.

{¶22} In this case, Garner has already pursued a direct appeal from his conviction, where the trial court’s decision was upheld. See *Garner*, 2007-Ohio-5914. In that appeal, he raised four assignments of error, raising issues with whether his confession was valid, whether the jury was properly polled, challenging the sufficiency of the evidence, and challenging his sentence under the Major Drug Offender specification. Garner did not raise any errors related to defects in the jury verdict form. He could have and should have raised such errors in his direct appeal. See *State v. Szefcyk*, 77 Ohio St.3d 93, 1996-Ohio-337, at the syllabus; *State v. Perri*, 11th Dist. No. 2009-P-0014, 2009-Ohio-6153, at ¶16.

{¶23} Garner asserts that *Pelfrey* allows parties to raise the issue of jury verdict form defects even if the issue has been waived at the trial court level. While this is true, *Pelfrey* does not hold that res judicata is inapplicable in situations where the appellant has not only waived the issue at the trial court level but also failed to raise the issue in his direct appeal. Appellate courts that have addressed this issue have found that, where the appellant filed and argued a direct appeal but did not raise any arguments under *Pelfrey* or related to the inadequacy of the jury verdict form, res judicata applies to subsequent appeals. See *State v. Evans*, 9th Dist. No. 10CA0027, 2011-Ohio-1449, at ¶9 (holding that “because Evans could have raised issues related to the jury verdict forms in his direct appeal, he is foreclosed from raising the issue at this time”); *State v. Foy*, 5th Dist. No. 2009-CA-00239, 2010-Ohio-2445, at ¶8 (where appellant failed to

raise the issue of jury verdict form defects under *Pelfrey* during his direct appeal, res judicata barred him from raising the issue in a subsequent appeal). Although we need not address the merits of Garner's claims as they are precluded by res judicata, we note that the lower court's jury verdict form complies with the requirements of *Pelfrey* and *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, and, therefore, is constitutional.

{¶24} We also note that Garner filed his notice of appeal for his initial appeal on March 5, 2007, and his brief on June 7, 2007. As *Pelfrey* was decided on February 7, 2007, Garner cannot claim ignorance of the decision at the time of his direct appeal.

{¶25} Garner also argues that res judicata does not apply because the judgment of conviction is not a final appealable order, due to the defect in the verdict forms.

{¶26} Garner does not cite any case law in support of this argument or reasoning as to why the court's Judgment Entry of Sentence was not final. The Judgment Entry of Sentence in this case complies with Crim.R. 32(C), as it sets forth the verdict of the jury and Garner's sentence. Moreover, this argument has previously been rejected by other courts. See *Evans*, 2011-Ohio-1449, at ¶7 (rejecting appellant's argument that a sentencing order is non-final because of an alleged failure to comply with R.C. 2945.75(A)(2), as interpreted by *Pelfrey*, and finding that appellant's contention was barred by res judicata).

{¶27} The first through fifth assignments of error are without merit.

{¶28} In his sixth assignment of error, Garner asserts that Trafficking in Cocaine and Possession of Cocaine are allied offenses of similar import.

{¶29} The sixth assignment of error was not raised before the trial court in Garner's Motion to Vacate, the judgment from which he is appealing. This error is unrelated to the issues he raised before the trial court, in that it deals with his sentence,

rather than his guilt. In essence, Garner is improperly attempting to raise issues related to sentencing from the judgment related to his guilty verdict and such issues will not be considered. See *State v. Lao*, 11th Dist. Nos. 2009-L-058 and 2009-L-059, 2009-Ohio-6233, at ¶11 (appellant may not utilize an appeal to seek review of errors unrelated to the appealed judgment, as this is improper bootstrapping, “the utilization of a subsequent order *** to indirectly and untimely appeal a prior order”).

{¶30} Moreover, as noted above, this assignment of error is also barred by res judicata. Garner failed to raise the error in his direct appeal, and therefore is barred from raising it in this appeal. See *State v. Hobbs*, 11th Dist. No. 2010-L-064, 2011-Ohio-1298, at ¶43 (“[b]ecause [appellant] failed to raise the allied offenses claim in his direct appeal, it is now barred by res judicata”).

{¶31} The sixth assignment of error is without merit.

{¶32} For the foregoing reasons, the Judgment Entry of the Lake County Court of Common Pleas, denying Garner’s Motion to Vacate and Correct Void Judgment, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.