

**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. 2011-L-159
MICHAEL K. LOVE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 98 CR 000458.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Michael K. Love, pro se, PID: 368-723, Grafton Correctional Institution, 2500 South Avon Belden Road, Grafton, OH 44044 (Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This is an accelerated-calendar appeal, predicated upon a final judgment of the Lake County Court of Common Pleas. Appellant, Michael K. Love, contests the merits of the trial court's decision to overrule his post-judgment motion on the basis that it was barred under the doctrine of res judicata. Specifically, he argues that the doctrine had no application in this instance because the sentencing judgment in the underlying criminal case has been void since its issuance in February 1999.

{¶2} Appellant's conviction arose from an incident in which the victim, Kenneth Johnson, was shot and killed at an apartment complex in Painesville, Ohio. Following the police investigation, appellant was indicted on two charges of murder, with a firearm specification accompanying each count. The first murder charge alleged a violation of R.C. 2903.02(A), while the second charge was based upon R.C. 2903.02(B).

{¶3} At the end of appellant's trial, the jury found him not guilty of murder under R.C. 2903.02(A), but guilty of felony murder under R.C. 2903.02(B). In rendering this verdict, the jury completed and signed written verdict forms concerning each of the two counts. After entering judgment in accordance with the verdict, the trial court sentenced appellant to an indefinite term of fifteen years to life on the felony-murder count, with a separate term of three years on the accompanying firearm specification.

{¶4} Appellant directly appealed his conviction to this court. In *State v. Love*, 11th Dist. No. 99-L-051, 2001 Ohio App. LEXIS 2147 (May 11, 2001), we affirmed the conviction in all respects. Despite raising multiple assignments of error for our review, appellant did not assert any challenge to the propriety of the verdict forms.

{¶5} Over the next decade, appellant filed a number of post-judgment motions with the trial court. The rulings on some of these submissions resulted in two additional appeals to this court. See *State v. Love*, 11th Dist. No. 2007-L-030, 2007-Ohio-6256; *State v. Love*, 11th Dist. No. 2009-L-040, 2009-Ohio-5216. Notwithstanding appellant's continuing efforts, though, no aspect of his conviction and sentence was ever modified.

{¶6} In October 2011, appellant moved the trial court to "correct" the invalid and void judgment. As the primary basis for this new motion, he claimed that his conviction had to be vacated because the jury verdict forms had failed to satisfy the requirements

of R.C. 2945.75. According to appellant, the verdict form as to the felony-murder count did not adequately specify certain information regarding the predicate felony upon which the charge was based.

{¶7} After the state had submitted a written response, the trial court issued its final judgment overruling appellant's motion to correct. In doing so, the trial court never addressed the substance of appellant's argument about the propriety of the verdict form for the felony-murder count. Instead, the court held that the argument was barred under the doctrine of res judicata because it could have been raised in his direct appeal from the sentencing judgment.

{¶8} In appealing the denial of his motion to correct, appellant has advanced three assignments of error for review:

{¶9} "[1.] Does a trial court have the authority to uphold a void sentence using the doctrine of res judicata based on the defendant raising variations of the same issues in prior motions, permitting an otherwise unauthorized and unlawful sentence and conviction to stand.?"

{¶10} "[2.] Can a verdict be had for felony-murder without a finding for the predicate felony (culpable mental state) with the record also failing to reflect any mention of the offense for the purposes of sentencing[?]"

{¶11} "[3.] Does a trial court no longer need to resolve every charge including the specifications, along with a clear pronouncement on the record by the trial court to support the judgment entry in order to have a final order for appellate purposes, or can an appeal be taken from an incomplete judgment and record?"

{¶12} Appellant's first assignment constitutes the crux of the instant appeal. In

contending that the trial court should have addressed the merits of his “jury verdict form” argument, he submits that the doctrine of res judicata could not be employed to bar all further consideration of the point because any problem regarding the form resulted in a sentencing error that rendered his ensuing conviction invalid. Citing *State v. Beasley*, 14 Ohio St.3d 74 (1984), appellant asserts that when a trial court accepts a verdict form which does not comply with R.C. 2945.75, it leads to an error that renders the conviction void as a matter of law, and therefore subject to review at any time.

{¶13} R.C. 2945.75 sets forth certain requirements which must be met during a criminal trial in relation to the degree of the offense and the need to prove the existence of additional elements. Concerning verdict forms, division (A)(2) of the statute provides:

{¶14} “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.”

{¶15} In construing the foregoing statutory language, the Supreme Court of Ohio has held that a defendant cannot be convicted of a higher degree of an offense unless the jury verdict forms strictly comply with the express statutory requirements. *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, ¶14. The *Pelfrey* court also indicated that the failure to contest the propriety of the forms at the trial level did not bar the defendant from raising the issue in his direct appeal from the conviction. *Id.*

{¶16} In applying the *Pelfrey* precedent in subsequent criminal matters in which the defendant has sought to raise the “verdict form” issue in post-judgment motions, this court has concluded that the doctrine of res judicata bars judicial review of the issue in

some instances. In *State v. Garner*, 11th Dist. No. 2010-L-111, 2011-Ohio-3426, the defendant did not challenge the legality of the verdict forms until he moved the trial court to vacate the sentencing judgment three years after the entry of his conviction. The trial court overruled the motion, holding that the res judicata was applicable when the issue could have been asserted in the defendant's prior direct appeal from his conviction. In upholding the trial court's ruling, this court stated:

{¶17} “[The defendant] 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. * * *.” (Citations omitted.) *Id.*, at ¶23.

{¶18} See also *State v. Pesci*, 11th Dist. No. 2011-L-057, 2011-Ohio-6211, ¶25, in which we extended our holding in *Garner* to situations in which the defendant's conviction and direct appeal were completed before the release of *Pelfrey*.

{¶19} In arguing against the application of res judicata in this case, appellant has not attempted to distinguish his situation from that of the *Garner* defendant. Instead, he essentially contends that the “verdict form” issue under R.C. 2945.75(A)(2) can never be waived because such an error makes any resulting conviction *void*, not voidable. As noted previously, appellant bases this contention upon the underlying assertion that the failure to comply with R.C. 2945.75(A)(2) constitutes an error in sentencing. However,

this court would indicate that this general argument was expressly rejected by the Ninth Appellate District in *State v. Grooms*, 9th Dist. No. 25819, 2011-Ohio-6062, ¶11:

{¶20} “R.C. 2945.75 is not a sentencing statute. Chapter 2945 of the Revised Code governs trials, not penalties, sentences, or other sanctions. See R.C. 2945, et seq. Compare R.C. 2929, et seq. (governing penalties and sentencing); R.C. 2967, et seq. (governing other sanctions such as post-release control). And while an error under R.C. 2945.75(A)(2) ultimately will impact an offender’s sentence, the nature of the error is such that it gives rise to a defective verdict, not a void sentence. The logical extension of any number of errors is that they ultimately could impact the sentence imposed. The focal point of the analysis must be whether the trial court disregarded an express statutory requirement in imposing the sentence. [*State v. Fischer*, 128 Ohio St.3d 92, 2010 Ohio 6238,] at ¶23; *Beasley*, 14 Ohio St.3d at 75. R.C. 2945.75(A)(2) only speaks to the information that a guilty verdict must contain. See *Pelfrey* at ¶12 (noting the content that R.C. 2945.75 requires ‘in order to find a defendant guilty’ of an offense of a higher degree). It does not impose any statutory sentencing duty upon a court or set out a requirement that a court must follow ‘when imposing a sentence.’ *Beasley*, 14 Ohio St.3d at 75. Compare R.C. 2929.14(A) (setting forth felony prison terms and providing that, for felonies, a court ‘shall impose a definite prison term that shall be’ for a designated duration, depending on the felony level); R.C. 2967.28(B)-(C), (mandating that a trial court impose post-release control in sentencing for designated offenses). Thus, we must conclude that an error arising from a failure to apply R.C. 2945.75 does not give rise to a void sentence.”

{¶21} To the extent that the *Grooms* analysis is based upon a logical distinction

between an “actual” sentencing statute and other provisions which do not directly relate to sentencing, the holding of that opinion is persuasive. Therefore, since an error in a verdict form under R.C. 2945.75(A)(2) only renders the subsequent conviction *voidable*, the failure to raise the issue in the initial direct appeal from the conviction would have the effect, pursuant to *Garner*, of waiving it for purposes of any post-judgment motion to vacate/correct and any ensuing appeal.

{¶22} A review of the assignments in appellant’s direct appeal of his conviction readily shows that he did not challenge the propriety of the verdict form in which he was found guilty of felony murder under R.C. 2903.02(B). Thus, the doctrine of res judicata barred the consideration of the issue in the context of a post-judgment motion, and the trial court did not err in overruling appellant’s motion on that basis. The first assignment of this appeal lacks merit.

{¶23} Under his second assignment, appellant basically re-argues his contention that the verdict form used during his trial was insufficient to satisfy the requirements of R.C. 2945.75. Given our prior conclusion that appellant waived this issue by failing to assert it in his direct appeal from his conviction, the substance of his contention is not properly before this court in the context of this appeal. For this reason, this assignment is also without merit.

{¶24} Relying again upon his argument that the alleged error in the verdict form had the direct effect of rendering his conviction void, appellant submits under his third assignment that a proper final judgment has never been issued in the underlying case. According to appellant, a true final judgment cannot be rendered until the trial court has acknowledged that the verdict form was not sufficient to establish the exact offense of

which he was found guilty.

{¶25} Consistent with the analysis under the first assignment, this court would again state that, even if any error did occur regarding the jury verdict form for the felony-murder count, such an error would have only made the sentencing judgment voidable, not void. Furthermore, a review of the trial court's March 5, 1999 sentencing judgment demonstrates that it complied with the basic requirements for finality in a criminal action; i.e., the judgment sets forth the jury verdict as to all pending charges and sets forth the imposed sentence. See *Garner*, 2011-Ohio-3426, at ¶26. Hence, since a proper final judgment was issued immediately after appellant's trial in 1999, his third assignment of error is not well taken.

{¶26} Given our conclusion that none of appellant's three assignments establish any error in the denial of his motion to correct, it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.