[Cite as *State v. Gipson*, 2011-Ohio-5747.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-02-015
	:	O P I N I O N
- vs -		11/7/2011
	:	
BILLY L. GIPSON,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 97CR17269

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Kenneth J. Rexford, 112 North West Street, Lima, Ohio 45801, for defendant-appellant

HENDRICKSON, J.

{¶1} Appellant, Billy L. Gipson, appeals his conviction and sentencing in the Warren County Court of Common Pleas, and also appeals the court's decision denying his motion to approve a proposed App.R. 9(C) statement.

{¶2} Following a two-day bench trial on July 21 and 22, 1997, appellant was convicted of rape, aggravated burglary, attempted kidnapping, and attempted murder of his ex-wife, Dawn Simons. Appellant's conviction also included two firearm specifications for the

rape and aggravated burglary. In an earlier appeal, appellant contended that the aggravated burglary conviction was based on evidence insufficient to establish all the elements of the crime, that the convictions on all counts were against the manifest weight of the evidence, and that he received ineffective assistance of counsel at trial. *State v. Gipson* (Apr. 6, 1998), Warren App. No. CA97-07-080, at 2. We affirmed appellant's conviction. Id. at 6.

{¶3} Nearly thirteen years later, in December 2010, appellant filed a motion asking the trial court to correct a portion of the sentencing entry regarding restitution and requested a conference. Appellant claimed that the portion of the original verdict and judgment entry requiring appellant to pay "any restitution" was void. Appellant also raised the collateral issues of double jeopardy, withdrawal of his "not guilty by reason of insanity" plea, and jury waiver.

{¶4} On January 14, 2011, by entry, the trial court found the original sentencing entry should have more properly stated "no restitution." The entry also stated that the collateral issues, including double jeopardy, were not discussed in conference, and that the collateral issues were barred by res judicata because they could have been raised in prior proceedings. Subsequently, an amended verdict and judgment entry of sentence was journalized, reflecting appellant owed "no restitution." The balance of the sentencing entry remained the same as the original 1997 sentencing entry. On February 9, 2011, appellant filed a notice of appeal from the amended sentencing entry.

{¶5} On the same day, appellant also filed an App.R. 9(C) statement detailing facts from his 1997 divorce case, *Gipson v. Gipson*, Warren County Court of Common Pleas Domestic Relations Division, Case No. 97DR22125. Appellant claimed he was held in criminal contempt of court in his divorce case for violating a temporary protection order and that his contempt was based on the same underlying conduct as his criminal case. The trial court denied appellant's motion for the approval of his App.R. 9(C) statement.

{¶6} Appellant now appeals his criminal conviction and sentencing as well as the trial court's rejection of his App.R. 9(C) statement.

{¶7} Because we find appellant's second assignment of error dispositive, we will address his second assignment of error first.

{¶8} Assignment of Error No. 2:

{¶9} "THE CONVICTION AND SENTENCE OF MR. GIPSON VIOLATED HIS RIGHT TO BE FREE FROM TWICE BEING IN JEOPARDY FOR THE SAME OFFENSE."

{¶10} Appellant argues that he was found in contempt of court for violating a temporary protection order in his divorce case and sentenced to 30 days incarceration by the Warren County Domestic Relations Court. Appellant alleges that the sentence was for criminal contempt and based on the same underlying conduct that resulted in his sentence in his criminal case, and thus he was placed twice in jeopardy for the same offense. However, we are unable to address appellant's argument on the merits.

{¶11} Appellant's double jeopardy argument presumes the issue is now properly before this court on the basis that this court lacked jurisdiction in his first appeal in 1997 because there was no final and appealable order due to the lack of specificity regarding restitution.

{¶12} Appellant's original verdict and judgment entry of sentence stated: "Defendant is ordered to pay any restitution, all prosecution costs, court appointed counsel costs and any fees permitted pursuant to R.C. 2929.18(A)(4), for which execution is hereby ordered." At sentencing, there was no mention of restitution, and no specific restitution was ordered in the entry. In its January 14, 2011 entry, the trial court stated: "As to the issue of restitution, the judgment should more properly have stated 'no restitution.'" As a result, the amended verdict and judgment entry of sentence changed the word "any" to "no."

{¶13} Despite the lack of specificity regarding restitution, we find *State v. Fischer*, 128

Ohio St.3d 92, 2010-Ohio-6238, dispositive in this case and hold that there was a final and appealable order for appellant's first appeal.[1] *Fischer* stands for the premise that even when a portion of the sentence is void, the order is still final and appealable. In *Fischer*, the portion of the sentence regarding postrelease control was void because postrelease control was not properly applied and contrary to statute. *Fischer*, 2010-Ohio-6238 at ¶38-39.

{¶14} Regarding appellant's situation, the restitution order was contrary to statute. R.C. 2929.18 provides that an offender may be ordered to pay restitution and sets out several requirements should the court impose restitution, including requiring the court to determine the amount of restitution to be paid at sentencing. Like *Fischer* where the court failed to apply the proper postrelease control sanctions, while the trial court in this case imposed a sentence, it failed to apply the proper standards to impose restitution. There was no mention of restitution at sentencing, let alone a determination of the amount of restitution. The imposition of restitution in the original verdict and judgment entry without such a determination was contrary to statute, and therefore, void.

{¶15} Because appellant's sentence was void as to restitution, and the trial court addressed the void portion of the judgment, appellant may now properly appeal any restitution issues. See *Fischer*, 2010-Ohio-6238 at ¶40 ("We therefore hold that void sentences are not precluded from appellate review by principles of res judicata and may be reviewed at any time, on direct appeal or by collateral attack"). However, res judicata still applies to all other aspects of the merits of the conviction, including the determination of guilt. See *Fischer*, 2010-Ohio-6238 at ¶40.

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1. In *State v. Baker*, Butler App. No. CA2007-06-152, 2008-Ohio-4426, we found that when neither the amount of restitution nor the method of payment is set forth, the judgment of conviction does not satisfy the sentence requirement as required by the Ohio Supreme Court decision in *State v. Baker,* 119 Ohio St.3d 197, 2008-Ohio-3330. We recognize that other appellate courts have continued to follow the Ohio Supreme Court case, *Baker,* 2008-Ohio-3330, regarding undetermined restitution. See, e.g., *State v. Thompson*, Ross App. No. 10CA3177, 2011-Ohio-1564. See, also, *State v. Kline*, Henry App. No. 7-10-09, 2010-Ohio-6378. However, our analysis reflects why we now hold *Fischer*, 2010-Ohio-6238, dispositive regarding undetermined restitution.

{¶16} Appellant has not raised any issue regarding the trial court amending the entry to reflect he owes "no restitution." The only issue on the merits raised by appellant is double jeopardy. However, appellant timely appealed from his original verdict and judgment entry of sentence in 1997. *Gipson*, Warren App. No. CA97-07-080 at 2. There was no double jeopardy argument made in appellant's first appeal regarding offenses against his ex-wife, even though the argument was available to be pursued. Consequently, appellant is barred from raising the issue of double jeopardy in this appeal. See *Fischer*, 2010-Ohio-6238 at ¶34-35.

{¶17} Accordingly, appellant's second assignment of error is overruled.

{¶18} Assignment of Error No. 1:

{¶19} "THE TRIAL COURT ERRED IN REJECTING APPELLANT'S APPELLATE RULE 9(C) STATEMENT."

{¶20} Appellant argues that the trial court unfairly disregarded the actual words in his motion in determining that the "defense never addressed the double jeopardy issues" and that in order to properly preserve the record on appeal, appellant correctly sought the approval of the App.R. 9(C) statement. However, appellant's proposed App.R. 9(C) statement includes facts from appellant's divorce case, which relate to appellant's double jeopardy argument, and does not include any facts as to restitution. Because we find that there was a final and appealable order in appellant's first appeal and appellant is barred by res judicata regarding claims outside of restitution, we now find this argument moot.

{¶21} We also note that appellant's use of App.R. 9(C) was not proper. A trial court should only approve an App.R.9(C) statement if no report of evidence or proceedings at a hearing or a trial is made or a transcript is unavailable. App.R. 9(C); *Seegert v. Zietlow* (1994), 95 Ohio App.3d 451, 454. Appellant failed to show that there was no report of evidence or a proceeding or that a transcript was unavailable regarding any hearing before

the trial court. It appears from the record and briefs that some type of conference took place where the restitution order was discussed. However, appellant has failed to provide any specific facts regarding this issue. In addition, appellant's App.R. 9(C) statement attempts to supplement the record before this court with material which was not before the trial court. In its entry denying appellant's App.R. 9(C) statement, the trial court stated that there was no discussion at any point regarding appellant's divorce case, order of a domestic relations court, or contempt action.

{¶22} We find that appellant's first assignment of error is moot.

{¶23} Judgment affirmed.

POWELL, P.J., and PIPER, J., concur.