[Cite as *State v. Henley*, 2015-Ohio-4113.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26604
	:	
v.	:	T.C. NO. 04CR1953
	:	
BRIAN D. HENLEY	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the ___30th___ day of ___September___, 2015.

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CARLEY J. INGRAM, Atty, Reg. No. 0020084, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

BRIAN D. HENLEY, Inmate #485-121, P. O. Box 8107, Mansfield, Ohio 44901
Attorney for Defendant-Appellant

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DONOVAN, J.

{¶ 1} Defendant-appellant Brian D. Henley, acting pro se, appeals a decision of the Montgomery County Court of Common Pleas, Criminal Division, overruling his "notice of plain error," in which he argued that the trial court committed plain error by considering instances of uncharged misconduct when it imposed sentence. In its decision rendered

on February 3, 2015, the trial court found that Henley's claim was barred by res judicata, noted that he failed to establish plain error, and overruled his motion. Henley filed a timely notice of appeal with this Court on March 2, 2015.

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{¶ 2} After a jury trial in late 2004, Henley was convicted of one count of kidnapping, four counts of rape, two counts of felonious assault, and one count of attempted felonious assault. The trial court sentenced Henley to an aggregate term of twenty-two years in prison and designated him as a sexual predator. In an opinion issued on November 18, 2005, we affirmed Henley's convictions and the sentences they involved on direct appeal. *State v. Henley,* 2d Dist. Montgomery No. 20789, 2005–Ohio–6142 (hereinafter "*Henley I*." We note that Henley filed a notice of appeal on December 7, 2005, with the Ohio Supreme Court regarding this opinion. The Ohio Supreme Court ultimately dismissed his appeal "as not involving any substantial constitutional question." *State v. Henley*, 108 Ohio St.3d 1489, 2006-Ohio-962, 843 N.E.2d 795.[1]

{¶ 3} On December 13, 2005, Henley filed a pro se application for reconsideration pursuant to App. R. 26(A) of our opinion in *Henley I*. We subsequently denied his application for reconsideration in a decision and entry issued on January 18, 2006. Shortly thereafter on January 31, 2006, Henley filed a pro se application for reopening his direct appeal pursuant to App. R. 26(B). In a decision and entry rendered on April 10, 2006, we denied his application to reopen.

{¶ 4} On June 15, 2011, Henley filed a "Motion Pursuant to Civil Rule 60(B)(5) for

[1]Henley also filed a petition for a writ of certiorari with the U.S. Supreme Court which was subsequently denied in an entry issued on October 2, 2006.

Relief from Judgment" with this Court. Significantly, the argument advanced by Henley in his Civ. R. 60(B) motion is the same argument he presents to us in the instant appeal, namely that the trial court committed plain error by considering instances of uncharged misconduct when it imposed sentence. Without reaching the merits of his argument, we denied his 2011 motion, holding that Henley improperly relied on Civ. R. 60(B)(5), which only applies in civil cases, and is not applicable in criminal cases.

{¶ 5} On December 12, 2013, Henley filed the instant "notice of plain error" in the trial court. As previously discussed, the trial court overruled his motion finding that his claims were barred by res judicata and otherwise failed to demonstrate plain error.

{¶ 6} It is from this judgment that Henley now appeals.

{¶ 7} Henley's first assignment of error is as follows:

{¶ 8} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR WHEN IT DENIED DEFENDANT'S 'NOTICE OF PLAIN ERROR' WHERE THE RECORD DID NOT SUPPORT THE TRIAL COURT'S FINDINGS."

{¶ 9} In his first assignment, Henley contends that the trial court erred when it denied his "notice of plain error." Specifically, Henley argues that it was plain error for the trial court to have considered uncharged conduct, i.e. the alleged rape of three local prostitutes, when it ordered him to serve consecutive sentences herein.

{¶ 10} In order to constitute plain error, the error must be an obvious defect in the trial proceedings, and the error must have affected substantial rights. *State v. Barnes,* 94 Ohio St.3d 21, 2002–Ohio–68, 759 N.E.2d 1240. Under the plain error doctrine, errors or defects affecting substantial rights may be noticed on appeal although they were not

brought to the attention of the trial court. Crim. R. 52(B). The plain error doctrine does not extend the period during which a defendant may appeal from the trial court's judgment; it simply allows an appellate court to review an error that was not objected to at trial. *State v. Haynes*, 2d Dist. Clark No. 2013 CA 90, 2014-Ohio-2675, ¶ 7. The "obvious" nature of such an error conflicts with any assertion that an extension is or should be provided in such a circumstance. *Id*.

{¶ 11} Res judicata bars re-litigation of a matter that was raised or could have been raised on direct appeal. *State v. Griffin*, 138 Ohio St.3d 108, 2013-Ohio-5481, 4 N.E.3d 989. Otherwise, appeals could be filed indefinitely. Henley's argument under this assignment falls within that category, and is therefore, barred by res judicata. Henley argues that res judicata does not apply because he is raising plain error. However, regardless of whether an error can be characterized as plain error, the issue raised in the instant assignment could have been raised on direct appeal and is barred by res judicata, and we will not consider the issue. *See Haynes*, at ¶ 14.

{¶ 12} Henley's first assignment of error is overruled.

{¶ 13} Because they are interrelated, Henley's second and third assignments of error will be discussed together as follows:

{¶ 14} "THE SENTENCES ARE VOID FOR FAILURE TO COMPLY WITH STATUTORY MANDATES."

{¶ 15} "THE TRIAL COURT ERRED AND COMMITTED MULTIPLE ACTS OF PLAIN ERROR AT THE SENTENCING HEARING TO THE PREJUDICE OF HENLEY."

{¶ 16} Upon review, we find that Henley failed to raise the arguments he advances in his second and third assignments of error before the trial court in his "notice of plain

error." The Ohio Supreme Court has stated that "[t]he general rule is that 'an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.' " *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986). Therefore, as these issues were not raised before the trial court in Henley's "notice of plain error," they are waived and we decline to consider them.

{¶ 17} Henley's second and third assignments of error are overruled.

{¶ 18} All of Henley's assignments of error having been overruled, the judgment of the trial court is affirmed.

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FAIN, J. and HALL, J., concur.

Copies mailed to:

Carley J. Ingram
Brian D. Henley
Hon. Dennis J. Langer