

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO,	:	Case No. 09CA19
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
MICHAEL DAVIS,	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellant.	:	Released 12/24/09

APPEARANCES:

Michael Davis, Hillsboro, Ohio, pro se appellant.

James B. Grandey, Highland County Prosecuting Attorney, Hillsboro, Ohio, and Brad L. Tamaro, Assistant Attorney General, Special Prosecuting Attorney, Grove City, Ohio, for appellee.

Harsha, J.

{¶1} Michael Davis appeals from his re-sentencing in March 2009 for deception to obtain dangerous drugs. Davis was convicted of aggravated trafficking in drugs and deception to obtain dangerous drugs in 2005. He appealed and we reversed his conviction for aggravated trafficking. On remand, the trial court vacated Davis' conviction for aggravated trafficking and re-sentenced him on the deception to obtain dangerous drugs charge.

{¶2} First, Davis argues that he received ineffective assistance of appellate counsel in his first appeal, a claim he cannot pursue here. Our record in this appeal is limited to what occurred at Davis' re-sentencing. But the facts giving rise to Davis' claims of ineffective assistance of appellate counsel on his first appeal are outside of

this record. Moreover, Davis failed to exercise his option to pursue these claims through an application to re-open his earlier appeal under App.R. 26(B).

{¶3} Next, Davis claims that the trial court erred in re-sentencing him on the deception to obtain dangerous drugs charge. Essentially, he argues that our reversal of his conviction for trafficking in drugs also vacated his separate conviction for deception to obtain dangerous drugs. He is wrong. Davis did not assign error to his conviction for deception to obtain dangerous drugs in his initial appeal. Accordingly, our decision in that case was limited to the review of his charge for aggravated trafficking and had no effect on his conviction for deception to obtain dangerous drugs.

{¶4} Last, Davis argues that this Court erred by declining to address the merits of two assignments of error we deemed moot in his earlier appeal. Procedurally, this is another claim that Davis cannot raise in an appeal of his re-sentencing. Furthermore, Davis failed to properly pursue this argument through an application for reconsideration under App.R. 26(A) or by appealing to the Supreme Court of Ohio.

I. Statement of Facts

{¶5} In 2005 Davis was indicted and convicted of one count of aggravated trafficking in drugs, a violation of R.C. 2925.03, and one count of deception to obtain dangerous drugs, a violation of R.C. 2925.22, in the Highland County Court of Common Pleas. In the midst of trial, the court amended Davis' indictment for aggravated trafficking and increased the amount of controlled substance involved. After he was convicted, Davis was sentenced to two years incarceration for the drug trafficking charge and one year for the deception charge, to be served concurrently. Davis then appealed his conviction to this Court.

{¶16} On appeal, Davis argued that the trial court erred by permitting the State to amend the count of aggravated trafficking in drugs. We agreed, holding that the amendment violated Davis' right to presentment of the charges to the grand jury. Consequently, in *State v. Davis*, Highland App. No. 06CA26, 2007-Ohio-2249, we reversed and vacated his conviction for aggravated trafficking.

{¶17} In the same appeal Davis set forth two additional assignments of error. First, he argued that there was insufficient evidence to convict him and that the manifest weight of the evidence was contrary to the jury verdict. Though he phrased this assignment of error as a general attack on the evidence and jury verdict, his brief focused solely on the offense of aggravated trafficking. Second, Davis claimed that his trial counsel was ineffective for failing to object to the amendment to his indictment for aggravated trafficking. We held that both these assignments of error were moot because of our reversal of his conviction for aggravated trafficking.

{¶18} The State subsequently appealed our decision to the Supreme Court of Ohio. The Court accepted discretionary jurisdiction and, in *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, 903 N.E.2d 609, affirmed our decision. The Supreme Court's review was limited to our holding that the trial court's amendment was improper.

{¶19} Subsequently, the trial court vacated Davis' conviction and sentence for aggravated trafficking. The court also re-sentenced Davis on the deception to obtain dangerous drugs charge and imposed a lighter sentence: three years of community control.¹ Davis appeals from this decision.

II. Assignments of Error

¹ We do not address the propriety of the trial court's decision upon remand to resentence Davis on the remaining valid conviction for deception to obtain dangerous drugs.

{¶10} Davis assigns the following errors for our review:

First assignment of error:

Appellant was denied effective assistance of appellate counsel

Second assignment of error:

Appellant was denied a valid judgment pursuant to the law

Third assignment of error:

Appellant was denied the right to a final determination as to sufficiency of the evidence directed toward Count 33

III. Ineffective Assistance of Appellate Counsel

{¶11} In his first assignment of error, Davis argues that he received ineffective assistance of appellate counsel. He claims that appellate counsel misled him to believe that his earlier appeal would challenge his conviction for deception to obtain dangerous drugs. Davis further argues that appellate counsel was ineffective for failing to assign error concerning the deception charge in his direct appeal. We are unable to address the merits of this assignment of error. Davis' claims alleging ineffective assistance of appellate counsel rely on facts outside of our record on appeal of Davis' resentencing entry. Furthermore, Davis failed to properly pursue these claims by moving to reopen his earlier appeal under App.R. 26(B).

{¶12} Our record on appeal is limited. It consists of "[t]he original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court***." App.R. 9(A). Our job is to determine the appeal on its merits based

on the “record on appeal under App.R. 9.” App.R. 12(A)(1)(b). Therefore, our factual review of a re-sentencing is limited to those matters directly associated with the re-sentencing, i.e. sentencing memoranda, the transcripts of hearings, and the judgment entries memorializing the re-sentencing. Davis’ allegations of ineffective assistance of appellate counsel in his earlier appeal consist of facts occurring well before his re-sentencing. Accordingly, we cannot address those claims by review of the record before us.

{¶13} Typically, when a criminal defendant alleges that his conviction was in error based on facts that are not contained in the trial record, the proper procedure is to petition the trial court for a post-conviction hearing under R.C. 2953.21. However, in *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, the Supreme Court of Ohio held that a claim of ineffective assistance of appellate counsel in a criminal case cannot be determined in a hearing for post-conviction relief but should be raised in an application for reconsideration under App.R. 26(A). One year after *Murnahan*, the Court promulgated App.R. 26(B), “application for reopening,” to provide for such a procedure.

{¶14} App.R. 26(B) permits the courts of appeal to consider ineffective assistance of appellate counsel claims by motion filed ninety days after journalization of the judgment of the appellate court.

{¶15} But we do not have the option of treating Davis’ appeal of his re-sentencing as an attempt to move for reopening under App.R. 26(B). Our posture in a typical appeal is to review the record below and review the trial court’s findings of fact and conclusions of law. But “[t]he clear intent of App.R. 26(B) is for the appellate court to function as the trier of fact***.” *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608,

894 N.E.2d 1221, at ¶21. Accordingly, App.R. 26(B)(2)(d) requires that the application contain “[a] sworn statement of the basis for the claim that appellate counsel’s representation was deficient ***.” That is not the posture of this matter. Moreover, more than ninety days has passed from the journalization of our judgment in the initial appeal.

{¶16} Based on the foregoing, we overrule Davis’ first assignment of error.

IV. Alleged Error in Re-Sentencing on Deception Charge

{¶17} In his second assignment of error, Davis claims that the trial court erred “when it found appellant still guilty for Deception to obtain a Dangerous Drug, after it had been Reversed on appeal [capitalization sic].” Essentially, Davis is arguing that our decision in his earlier direct appeal vacated his entire conviction, not just the aggravated trafficking charge. That is simply incorrect.

{¶18} App.R. 12(A)(1)(b) states that we are to “[d]etermine the appeal on its merits on the assignments of error set forth in the briefs under App.R. 16***.” App.R. 16 required Davis to set forth “[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies.” App.R. 16(A)(7).

{¶19} In his prior appeal Davis did not argue that his conviction for deception to obtain dangerous drugs was improper. Therefore Davis did not comply with App.R. 16 insofar as the deception charge is concerned. Consequently, we had no cause to review that charge for error.

{¶20} A simple reading of our earlier decision should have indicated that we did not reverse the deception charge. We mentioned the deception charge in passing --

only when setting forth the facts. Otherwise, our legal analysis focused singularly on the alleged defect in Davis' indictment for aggravated trafficking. This should have indicated (as it did to the trial court) that our reversal was limited to Davis' aggravated trafficking charge and did not affect his conviction for deception to obtain dangerous drugs. Thus, this assignment of error is without merit.

V. Denial of "final determination as to the sufficiency of the evidence"

{¶21} In his third assignment of error, Davis argues that this Court erred by failing to address two assignments of error in his earlier appeal. We determined that those assignments of error were moot because of our reversal of his aggravated trafficking charge. Again, this appeal is not the proper forum to address the merits of this argument. Like his first assignment of error in the present appeal, Davis is procedurally prohibited from raising this argument in his appeal of the trial court's re-sentencing entry.

{¶22} Davis had two options to pursue this argument: (1) apply for reconsideration under App.R. 26(A) within ten days of our earlier decision or; (2) file a notice of appeal with the Supreme Court of Ohio within forty-five days of our decision. Davis chose to do neither. Even so, the State appealed to the Supreme Court. Davis then had the option of filing a notice of cross-appeal. See Rule II, Section 2, subsection (A)(2)(a) of the Rules of Practice of the Ohio Supreme Court. Again, Davis did not raise these arguments when he could have.

{¶23} Accordingly, the time to challenge our decision in his earlier appeal has long since past. Further analysis of the claims underlying that appeal is foreclosed

under principles of res judicata. See *State v. Gillard* (1997), 78 Ohio St.3d 548, 549, 679 N.E.2d 276. Accordingly, this last assignment of error is also meritless.

VI. Conclusion

{¶24} For the foregoing reasons, we reject all of Davis' assignments of error.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.