[Cite as *State v. Lusher*, 2015-Ohio-1924.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff - Appellee	:	Hon. Patricia A. Delaney
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
MARK R. LUSHER	:	Case No. 14CA72
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 2008-CR-0498-H
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	May 18, 2015

APPEARANCES:

For Plaintiff-Appellee

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Prosecuting Attorney

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Baldwin, J.

{¶1} Defendant-appellant Mark Lusher appeals from the August 28, 2014 Judgment Entry of the Richland County Court of Common Pleas overruling his Motion for Resentencing. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} The Richland County Grand Jury indicted appellant in 2008 with one count of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), a felony of the second degree, one count of aggravated vehicular assault in violation of R.C. 2903 .08(A)(1)(a), a felony of the third degree, and three counts of operating a motor vehicle under the influence of drugs and/or alcohol ("OVI") in violation of R.C. 4511.19(A), misdemeanors of the first degree.

{¶3} On September 17, 2008, appellant entered a plea to aggravated vehicular homicide, aggravated vehicular assault and OVI. The two remaining OVI counts were dismissed. On December 10, 2008, the trial court sentenced appellant to eight years in prison on the charge of aggravated vehicular homicide, five years in prison on the charge of aggravated vehicular assault, and six months on the charge of OVI. The charges were ordered to be served concurrently, for a total sentence of eight years in prison. The trial court further ordered appellant to pay a fine of $15,000.00, restitution and court costs. In addition, appellant was sentenced to five years of post- release control and appellant's driver's license was suspended for life.

{¶4} Appellant filed a Notice of Appeal on January 22, 2009 with this Court in Case No. 09–CA–10. That appeal was dismissed on March 5, 2009 for failure to prosecute.

{¶5} On February 24, 2010, appellant filed a Motion to Vacate all fines and court costs with the trial court. On March 2, 2010, appellant filed a motion for transcripts in this case under the guise of a public records request. The motions were overruled on March 17, 2010 and March 26, 2010.

{¶6} Appellant, on April 22, 2010, filed a Motion to Correct an Improper Sentence. Appellee agreed that the trial court had improperly imposed post-relief control in this case, imposing five years, rather than the mandatory three years of post-relief control as required under statute. Appellee requested that appellant be brought back for re-sentencing.

{¶7} On May 17, 2010, appellant filed a Motion to Withdraw Guilty Plea. Appellant specifically argued in his motion that he was not properly informed by the trial court, prior to his plea, that the maximum sentence he faced included a lifetime driver's license suspension. Appellant also argued that the plea agreement had been violated.

{¶8} On August 6, 2010, appellant appeared before the trial court for resentencing and was sentenced to the same prison sentence as before with the exception that he was sentenced to three (3) years of mandatory post-release control rather than a discretionary five years. The court’s August 9, 2010 Entry states that appellant was advised of his right to appeal.

{¶9} Thereafter, on September 7, 2010, appellant filed a Notice of Appeal of his re-sentencing in 5th Dist. Richland No. 10–CA–107. By Judgment Entry filed March 11, 2011, this Court dismissed appellant’s appeal for failure to prosecute after he had been granted five extensions and failed to file a brief.

{¶10} The trial court, on November 1, 2010, overruled appellant's May 17, 2010 Motion to Withdraw Guilty Plea. Appellant did not appeal such ruling.

{¶11} On July 3, 2013, appellant, who was represented by counsel, filed his second Motion to Withdraw his guilty plea. Appellant again argued that the trial court's failure to inform him of the lifetime license suspension was a failure to inform of the maximum penalty, thus making his plea unknowing and involuntary. Defense counsel cited to sections of the sentencing transcript in the motion. The trial court overruled appellant's motion by Judgment Entry filed August 13, 2013. The trial court cited the reasons stated in appellee's motion in opposition, which included that appellant's argument was barred by *res judicata*, as the grounds for overruling the motion.

{¶12} Appellant then appealed. Pursuant to an Opinion filed on May 5, 2014 in *State v. Lusher,* 5th Dist. Richland No. 13–CA–83, 2014-Ohio-1930, this Court affirmed the judgment of the trial court. A Nunc Pro Tunc Opinion was filed on July 18, 2014.

{¶13} Subsequently, on August 13, 2014, appellant filed a Motion for Resentencing. Appellant, in his motion, argued that his plea was not knowing, intelligent and voluntary. Appellant argued that the trial court had failed to comply with Crim.R. 11, had failed to inform him that he had a right to appeal, had failed to allow him to read the presentence investigation report and to comment on the same[1] , and had failed to inform him that he was obligated to pay for any of the costs of his own prosecution. Appellant further argued that appellee had breached the plea agreement with respect to

[1] The portions of the transcript cited in appellant's brief indicate that appellant's counsel had received the report.

the length of appellant's license suspension. Appellee filed a response to appellant's motion on August 19, 2014.

{¶14} Pursuant to a Judgment Entry filed on August 28, 2014, the trial court overruled appellant's motion. The trial court found that the five grounds for resentencing raised in appellant's motion were barred by the doctrine of res judicata. The trial court further found that appellant had failed to timely file a post-conviction petition or meet the standards for an untimely filing under R.C. 2953.23(A).

{¶15} Appellant now raises the following assignments of error on appeal:

{¶16} I. THE STATE [FAILED] TO ADVISE DEFENDANT THAT BY ENTERING INTO A PLEA AGREEMENT, HE WOULD: [ALSO BE WAIVING] HIS CONSTITUTIONAL RIGHTS, AS SET FORTH IN CRIMINAL RULE 11(C)(2)(a)(b)(c), (E), and (F).

{¶17} II. THE STATE, AFTER SENTENCING, [FAILED] TO INFORM DEFENDANT "ON THE RECORD AND IN OPEN COURT" OF HIS CRIMINAL RULE 32 RIGHTS. THAT IS, HIS CRIMINAL RULE 32(B)—NOTIFICATION ON RIGHT TO APPEAL.

{¶18} III. NOT ONLY WAS DEFENDANT [NEVER] ADVISED AS STOW (SIC) HT (SIC) WAS IN HIS PRESENTENCE INVESTIGATION REPORT, THE STATE [FAILED] TO NOTIFY HIM THAT IF HE WANTED TO, HE HAD THE RIGHT TO COMMENT ON, AND/OR CONTEST, ANY OF THE INFORMATION THAT IT CONTAINED! CLEARLY, THE STATE [IGNORE] (SIC) DEFENDANT'S CRIMINAL RULE 32.2 RIGHTS, AND THE OHIO REVISED CODE §2951.03(B)(1)(2) AND (3) AS IT PERTAINED TO SAID DEFENDANT.

{¶19} IV. THE STATE [FAILED] TO INCLUDE, AND/OR IMPOSE IN THE DEFENDANT'S SENTENCE, THE COSTS OF PROSECUTION, AND THUS, [NEVER] RENDERED A JUDGMENT AGAINST DEFENDANT FOR SUCH A COLLECTION OF COSTS, AS IS REQUIRED BY OHIO REVISED CODE § 2947.23(A)(i-ii). BUT, ARE NONETHELESS, CONTINUING TO COLLECTING FUNDS [UNLAWFULLY] FROM DEFENDANT'S INMATE ACCOUNT AT THE INSTITUTION, DESPITE THE FACT DEFENDANT BROUGHT THIS TO THEIR ATTENTION.

{¶20} V. THE STATE [BREACHED] THE PLEA AGREEMENT, (AND/OR CONTRACT) WITH DEFENDANT BY SENTENCING SAID DEFENDANT TO A [LIFETIME DRIVER'S LICENSE SUSPENSION]. WHEN CLEARLY THE PLEA AGREEMENT DICTATED A SUSPENSION OF SIX (6) MONTHS UP TO A MAXIMUM OF FIVE (5) YEARS, NOR DOES THE STATE ABIDE TO [SPECIFIC PERFORMANCE] REQUIREMENTS, AS IT RELATES TO BREACHES.

I, II, III, IV, V

{¶21} We find that the issues raised by appellant in his five assignments of error are barred by the doctrine of res judicata. Appellant either raised, or had the opportunity to raise, the claims that he now sets forth in the instant appeal in a direct appeal or in one of his previous appeals. Such claims, therefore, are barred under the doctrine of res judicata. *State v. Perry,* 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967). The *Perry* court explained the doctrine as follows: "Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant 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 the trial

which resulted in that judgment of conviction or on an appeal from that judgment." *Id.* at paragraph 8 of the syllabus.

{¶22} We also find that the trial court did not err in finding that appellant's Motion for Resentencing was an untimely post-conviction relief motion. Appellant's motion meets the definition of a motion for post-conviction relief set forth in R.C. 2953.21(A)(1), if it was (1) filed subsequent to direct appeal, (2) claims a denial of constitutional rights, (3) seeks to render the judgment void, and (4) asks for vacation of the judgment and sentence. *State v. Reynolds,* 79 Ohio St.3d 158, 160, 679 N.E.2d 1131 (1997). Appellant's motion met this definition, and the trial court therefore did not err in treating his motion as a petition for post-conviction relief. Pursuant to R.C. 2953.21(A)(2), the petition had to be filed "no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication." "If no appeal is taken, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal." R.C. 2953.21(A)(2). In the case sub judice, appellant's direct appeal was dismissed on March 5, 2009 for failure to prosecute. As noted by the trial court, appellant "has failed to timely file a post-conviction petition or meet the standard for an untimely filing under R.C. 2953.23(A)…"

{¶23} Appellant's five assignments of error are, therefore, overruled.

{¶24} Accordingly, the judgment of the Richland County Court of Common Pleas is affirmed.

By: Baldwin, J.

Hoffman, P.J. and

Delaney J. concur.