

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

MOSES EDWARD WILLIAMS

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P. J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 2015 CA 00028

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. 89-9824

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 1, 2015

APPEARANCES:

For Plaintiff-Appellee

JOHN D. FERRERO
PROSECUTING ATTORNEY
RONALD MARK CALDWELL
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Wise, J.

{¶1} Appellant Moses Edward Williams appeals the January 20, 2015, decision of the Stark County Court of Common Pleas denying his Petition for Relief after Judgment pursuant to Ohio Revised Code 5145.01.

{¶2} Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} On November 30, 1989, Appellant Moses Edward Williams was arrested, for the murder of Elsie Jackson. This murder occurred when Appellant, along with his brother, Paul Carlos Williams, Joseph Holmes, III and Eugene Waiters, Jr. went to Jackson's home looking for her son, Darryl Ross. Earlier in the evening, Ross saw appellant's brother at a local bar and ordered him to turn over his drugs. Appellant's brother dropped a bag of crack cocaine, which Ross picked up and then smoked with some other people.

{¶4} At Elsie Jackson's home, appellant also shot Ross twice in the head, stabbed Ross, and shot him again, this time grazing him. Appellant's brother also shot Ross twice in the back. Ross managed to survive, despite the five gunshot wounds and one stab wound.

{¶5} Appellant was charged by indictment with one count each of aggravated murder, attempted murder, and aggravated burglary. All three charges included attempted firearm specifications, and the aggravated murder charge included two death penalty specifications.

{¶6} After the trial of his capital case in the Stark County Court of Common Pleas (Judge James R. Unger), the jury found Appellant guilty of the charged offenses

and specifications. At the conclusion of the mitigation-sentencing hearing, the jury recommended that Appellant serve a prison term of life with parole eligibility after serving 30 full years. The trial court accepted this recommendation and imposed a life prison term, as well as imposing indeterminate prison terms for the attempted murder (7 to 25 years) and aggravated burglary (10 to 25 years) convictions. The trial court also imposed the mandatory 3-year terms for the three firearm specifications, imposing two of them to run consecutively.

{¶7} On appeal, this Court upheld Appellant's convictions and sentences. *State v. Williams*, 5th Dist. Stark No. CA-8194, (Apr. 1, 1991), *delayed appeal denied*, 62 Ohio St.3d 1414, 577 N.E.2d 660 (1991).

{¶8} In January, 2015, Appellant filed a "Petition for Relief After Judgment" pursuant to R.C. §5145.01. Appellant argued that his sentence was void because his sentences should have been concurrent under this statute.

{¶9} By Judgment Entry filed January 20, 2015, the trial court summarily denied the petition.

{¶10} Appellant now appeals, raising the following Assignments of Error for review:

{¶11} "I. TRIAL COURT JUDGE JAMES UNGER ABUSED HIS DISCRETION IN NOT AMENDING THE CONSECUTIVE SENTENCE TO CONCURRENT, PURSUANT TO OHIO REVISED CODE §5145.01.

{¶12} "II. DEFENDANT/APPELLANT, MOSES WILLIAMS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, HIRED AND COURT APPOINTED.

{¶13} “III. DEFENDANT/APPELLANT, MOSES WILLIAMS IS DUE A DE NOVE [sic] SENTENCING, TO RE-EVALUATE THIS CASE AND CHARGES.

I.

{¶14} Appellant, in his first assignment of error, argues the trial court erred in not amending his sentences to run concurrently rather than consecutively. We disagree.

{¶15} Appellant herein argues that the trial court was required to impose concurrent sentences pursuant to R.C. §5145.01, which provides:

Courts shall impose sentences to a state correctional institution for felonies pursuant to sections 2929.13 and 2929.14 of the Revised Code. All prison terms may be ended in the manner provided by law, but no prison term shall exceed the maximum term provided for the felony of which the prisoner was convicted as extended pursuant to section 2929.141 or 2967.28 of the Revised Code.

If a prisoner is sentenced for two or more separate felonies, the prisoner's term of imprisonment shall run as a concurrent sentence, except if the consecutive sentence provisions of sections 2929.14 and 2929.41 of the Revised Code apply. If sentenced consecutively, for the purposes of sections 5145.01 to 5145.27 of the Revised Code, the prisoner shall be held to be serving one continuous term of imprisonment.

If a court imposes a sentence to a state correctional institution for a felony of the fourth or fifth degree, the department of rehabilitation and correction, notwithstanding the court's designation of a state correctional institution as the place of service of the sentence, may designate that the person sentenced is to be housed in a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse if authorized pursuant to section 5120.161 of the Revised Code.

If, through oversight or otherwise, a person is sentenced to a state correctional institution under a definite term for an offense for which a definite term of imprisonment is not provided by statute, the sentence shall not thereby become void, but the person shall be subject to the liabilities of such sections and receive the benefits thereof, as if the person had been sentenced in the manner required by this section.

As used in this section, “prison term” has the same meaning as in section 2929.01 of the Revised Code.

{¶16} The offenses underlying appellant's convictions occurred in 1989. Because the offenses were committed before July 1, 1996, the effective date of Senate Bill 2, Appellant was sentenced pursuant to the former version of R.C. Chapter 2929.

{¶17} In *State v. Rush*, 83 Ohio St.3d 53, 1998-Ohio-423, certiorari denied (1999), 525 U.S. 1151, 119 S.Ct. 1052, the Ohio Supreme Court unequivocally held that the "amended sentencing provisions of [Senate Bill 2] apply only to those crimes committed on or after July 1, 1996." *Id.* at paragraph two of the syllabus. See, also, *State v. Warren*, 118 Ohio St.3d 200, 2008–Ohio–2011 (extensive revisions to criminal statutes that were enacted in Senate Bill 2, effective July 1, 1996, apply only to crimes committed on or after July 1, 1996; even though Warren was indicted in 2004, the case was governed by the law in effect in 1988 as the crimes were committed in 1988).

{¶18} Based on the foregoing, we find the trial court did not err in denying Appellant's Petition.

{¶19} Appellant's First Assignment of Error is overruled.

II.

{¶20} In his Second Assignment of Error, Appellant argues that he was denied effective assistance of counsel.

{¶21} Upon review, we find that Appellant did not raise this issue in his Petition before the trial court. 'It is well established that a party cannot raise any new issues or legal theories for the first time on appeal.' " *Carrico v. Drake Construction*, 5th Dist. Stark App. No. 2005 CA 00201, 2006-Ohio-3138, ¶ 37, quoting *Dolan v. Dolan*, Trumbull App. Nos. 2000–T0154 and 2001–T0003, 2002–Ohio–2440, ¶7 citing *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43, 322 N.E.2d 629. "Litigants must

not be permitted to hold their arguments in reserve for appeal, thus evading the trial court process." *Nozik v. Kanaga* (Dec. 1, 2000), 11th Dist. No. 99-L-193, 2000 Ohio App. LEXIS 5615.

{¶22} We therefore find this issue is not properly before this Court.

{¶23} Appellant's Second Assignment of Error is overruled.

III.

{¶24} In his Third and final Assignment of Error, Appellant argues that he is entitled to a de novo re-sentencing. We disagree.

{¶25} Appellant herein argues that the trial court was required by the Sixth Amendment to make certain findings prior to imposing more than the minimum sentence in this case. In support of his argument, Appellant cites this Court to *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, *cert. denied*, 549 U.S. 979, 127 S.Ct. 442, 166 L.Ed.2d 1314 (2006).

{¶26} Upon review, we find that the above-cases are not applicable to the case *sub judice* because they deal with the judicial fact-finding component of Ohio's felony sentencing scheme as enacted by Senate Bill 2. As noted above, Senate Bill 2's provisions do not apply in this case since its provisions are not retroactive.

{¶27} Appellant's Third Assignment of Error is overruled.

{¶28} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is affirmed.

By: Wise, J.

Hoffman, P. J., and

Farmer, J. concur.

JWW/d 0528

