

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

PATRICK NERO

Defendant-Appellant

JUDGES:

Hon. John W. Wise, P.J.
Hon. Patricia A. Delaney, J.
Hon. Craig R. Baldwin, J.

: Case No. 2015CA00031

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas, Case Nos.
2011CR0566 and 2011CR1129

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

October 13, 2015

APPEARANCES:

For Plaintiff-Appellee:

JOHN D. FERRERO, JR.
STARK CO. PROSECUTOR
RONALD MARK CALDWELL
110 Central Plaza South, Ste. 510
Canton, OH 44702-1413

For Defendant-Appellant:

PATRICK NERO, PRO SE
Inmate No. A621-612
Lake Erie Correctional Institution
501 Thompson Rd.
P.O. Box 8000
Conneaut, OH 44030

Delaney, J.

{¶1} Appellant Patrick Nero appeals from the February 10, 2015 "Judgment Entry Denying Defendant's Motion for Resentencing" of the Stark County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} A statement of the facts underlying appellant's criminal convictions is not necessary to our resolution of this appeal. This appeal arises from sentencing upon two separate criminal cases before the Stark County Court of Common Pleas: Case Nos. 2011CR0566 and 2011CR1129. The facts underlying both cases may be found in our opinions at *State v. Nero*, 5th Dist. Stark No. 2012CA00015, 2012-Ohio-4033 [*Nero I*] and *State v. Nero*, 5th Dist. Stark No. 2012CA-00016, 2012-Ohio-4810 [*Nero II*].

{¶3} In Case Number 2011CR0566, appellant was convicted upon one count of having weapons while under disability and one count of illegal possession of a firearm in a liquor-permit premises. The trial court sentenced appellant to a prison term of three years to be served consecutively to the prison term imposed in Case Number 2011CR1129.

{¶4} In that case, appellant was convicted of one count of having weapons while under disability. The three-year term in that case is to be served consecutively with the three-year term in 2011CR0566.

{¶5} Appellant appealed both convictions and sentences to this Court and we affirmed in *Nero I* and *Nero II*, supra.

{¶6} Following his direct appeals, appellant filed a joint motion to correct void sentences in both cases. The trial court overruled the motion and we affirmed the

decision in *State v. Nero*, 5th Dist. Stark Nos. 2013CA00050 and 2013CA00054, 2013-Ohio-3610 [*Nero III*].

{¶7} Appellant next filed a joint motion for specific performance relative to an alleged breach of contract which was also overruled by the trial court. This decision was not appealed.

{¶8} Finally, on February 9, 2015, appellant filed a "Motion for Resentencing to Minimal and Concurrent Sentences," which the trial court overruled on February 10, 2015. Appellant now appeals from this judgment entry.

{¶9} Appellant raises one assignment of error:

ASSIGNMENT OF ERROR

{¶10} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR TO THE EXTENT THAT THE AGREED-UPON PRISON SENTENCE WOULD BE RUN CONCURRENTLY WITH HIS SENTENCE IN ANOTHER CASE, BUT THEN ORDERED THOSE TWO SENTENCES TO INSTEAD BE RUN CONSECUTIVELY. ALSO THE TRIAL COURT FAILED TO FOLLOW THE STATUTORY REQUIREMENTS WHEN IMPOSING THE SENTENCES."

ANALYSIS

{¶11} Appellant argues his sentences should run concurrently instead of consecutively on a number of bases: the offenses should have merged for sentencing, the trial court failed to make required findings for consecutive sentences, and appellant was somehow "promised" concurrent sentences by the trial court at sentencing. We disagree and find appellant's arguments are barred by res judicata.

{¶12} Appellant had a prior opportunity to litigate each of the claims he sets forth in the instant appeal via his timely direct appeals from his convictions and sentencing in *Nero I* and *Nero II*; his most recent round of arguments are therefore 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.

State v. Perry, 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967).

{¶13} Having failed to raise his consecutive-sentencing argument or merger argument in *Nero I* and *Nero II*, his arguments are barred under the doctrine of res judicata. *Id.* We decided *Nero III* on the basis of res judicata as well; in that case, appellant challenged his sentences on the basis he did not receive jail-time credit. The instant appeal thus represents appellant's third bite at the apple.

{¶14} We also note appellant's allied-offenses argument fails substantively; the charged offenses in the two separate criminal cases occurred independently of each other, on separate days. Appellant's conduct thus constitutes two or more offenses of dissimilar import, and his conduct resulted in two or more offenses of the same or similar kind committed separately or with a separate animus as to each and he was properly convicted of each of them. R.C. 2941.25(B).

{¶15} Appellant's final argument in the instant appeal is that the trial court by some means promised him concurrent sentences. Again, this is a claim not raised in the previous appeals and appellant cites no support in the record.¹

{¶16} Appellant's sole assignment of error is therefore overruled.

CONCLUSION

{¶17} Appellant's sole assignment of error is overruled and the judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J. and

Wise, P.J.

Baldwin, J., concur.

¹ We note appellant was convicted upon trial by jury in both cases, therefore this is not a case in which appellant allegedly changed his pleas in exchange for a promised sentence.