

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

DOUGLAS L. FRYER

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Sheila G. Farmer, J.

Case No. 14-CA-17

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal appeal from the Perry County
Court of Common Pleas, Case No. 06-CR-
0060

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

February 9, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Gwin, P.J.

{¶1} Defendant-appellant Douglas L. Fryer [“Fryer”] appeals from the June 6, 2014 decision of the Perry County Court of Common Pleas decision denying his request for an evidentiary hearing.

Facts and Procedural History

{¶2} Fryer was indicted on thirty-one counts of Gross Sexual Imposition in violation of R.C. Section 2907.05(A), all third degree felonies, and one count of Rape in violation of R.C. Section 2907.02(A)(1)(b), a felony of the first degree. He pleaded guilty to fifteen of the counts of Gross Sexual Imposition and the count of Rape on March 20, 2007. The balance of the counts was nolle. The judgment entry noting the change of plea was filed by the trial court on March 27, 2007.

{¶3} On April 17, 2007, Fryer was sentenced by the trial court and was found to be a sexual predator. This was pursuant to an agreement between the state and Fryer. The termination judgment entry was filed by the trial court on April 18, 2007.

{¶4} The court reviewed the Notice of Registration Duties of Sexually Oriented Offender or Child-Victim Offender. The form was signed by Fryer and filed with the court on April 7, 2007. A direct appeal was not filed by Appellant on any issues from either hearing.

{¶5} On March 12, 2014, Fryer filed a Motion to Correct Sentence. A request for an evidentiary hearing on Fryer’s classification as a sex offender was made therein. By entry filed June 6, 2014, the court granted the motion in part in accordance with Criminal Rule 32(C) and the Ohio Supreme Court’s decisions in *State v. Baker*, 119 Ohio St.3d 197, 893 N.E.2d 163 (2008) and *State v. Lester*, 130 Ohio St.3d 303, 2011–

Ohio—5204, 958 N.E.2d 142. However, the trial court denied Fryer’s request for an evidentiary hearing. The nunc pro tunc termination entry was filed June 18, 2014.

Assignment of Error

{¶6} Fryer raises one assignment of error,

{¶7} “I. THE TRIAL COURT ERRED IN REFUSING TO HOLD AN EVIDENTIARY HEARING AS TO APPELLANT’S STATUS AS A SEXUAL PREDATOR.”

{¶8} We also note Fryer has filed pro se “Permission to File a Supplemental Brief and for an Extension of Time” on October 7, 2014. He filed his brief without leave of Court on October 29, 2014.

{¶9} We begin by noting that Fryer was appointed counsel to perfect his appeal as of right. We further note appellate counsel filed a merit brief in the appeal.

{¶10} App.R. 16 provides for a brief for the appellant, a brief for the appellee, and a reply brief, noting, “[n]o further briefs may be filed except with leave of court.” Accordingly, the Appellate Rules do not allow the additional pro se briefs filed by appellant absent prior leave of this court. Since appellant was not granted leave of court to file an additional brief, we did not consider the arguments contained therein. *State v. White*, 71 Ohio App.3d 550, 594 N.E.2d 1087(1991) at n. 1.

{¶11} We further note, “appellant has no constitutional right to self-representation in the appellate process on direct appeal. *Martinez v. California Court of Appeal, Fourth Appellate Dist.*, 528 U.S. 152, 163, 120 S.Ct. 684, 145 L.Ed.2d 597(2000). Furthermore, ‘[a] defendant has no right to a ‘hybrid’ form of representation wherein he is represented by counsel, but also acts simultaneously as his own counsel.’

State v. Keenan (1998), 81 Ohio St.3d 133, 138, 689 N.E.2d 929, *citing McKaskle v. Wiggins* (1984), 465 U.S. 168, 183, 104 S.Ct. 944, 79 L.Ed.2d 122". *State v. Ferguson*, 108 Ohio St.3d 451, 2006-Ohio-1502, 844 N.E.2d 806 at ¶97.

{¶12} However, in the interest of justice we will include Fryer's sole pro se assignment of error in our analysis,

{¶13} "I. THE TRIAL COURT ERREED [SIC.] LIN [SIC.] TRYING AND CONVICTING OF CRIMES THAT WERE NOT SPECIFIC TO DISTINGUISH DIFFERENT CRIMES CHARGED DUE TO DUPLICITOUS INDICTMENT."

Analysis

{¶14} Fryer contends that the trial court erred when it accepted his stipulation to his classification as a sexual predator because the trial court failed to conduct a hearing, receive evidence and apply the factors delineated in R.C. 2950.09(B)(2) before determining that Fryer should be classified as a sexual predator. In his pro se assignment of error, Fryer attacks his original indictment.

{¶15} At the time of Fryer's sentencing on April 17, 2007, R.C. 2950.02 read, in relevant part,

(B)(1)(a) The judge who is to impose sentence on a person who is convicted of or pleads guilty to a sexually oriented offense that is not a registration-exempt sexually oriented offense shall conduct a hearing to determine whether the offender is a sexual predator if any of the following circumstances apply:

(i) Regardless of when the sexually oriented offense was committed, the offender is to be sentenced on or after January 1, 1997, for

a sexually oriented offense that is not a registration-exempt sexually oriented offense and that is not a sexually violent offense.

(ii) Regardless of when the sexually oriented offense was committed, the offender is to be sentenced on or after January 1, 1997, for a sexually oriented offense that is not a registration-exempt sexually oriented offense, and that is not a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or after the effective date of this amendment for which sentence is imposed under section 2971.03 of the Revised Code or for which a sentence of life without parole is imposed under division (B) of section 2907.02 of the Revised Code, and that is not attempted rape committed on or after the effective date of this amendment when the offender also is convicted of or pleads guilty to a specification of the type described in section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code, and either of the following applies: the sexually oriented offense is a violent sex offense other than a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or after the effective date of this amendment and other than attempted rape committed on or after that date when the offender also is convicted of or pleads guilty to a specification of the type described in section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code, and a sexually violent predator specification was not included in the indictment, count in the indictment, or information charging the violent sex offense; or the sexually oriented offense is a designated homicide, assault, or kidnapping offense and

either a sexual motivation specification or a sexually violent predator specification, or both such specifications, were not included in the indictment, count in the indictment, or information charging the designated homicide, assault, or kidnapping offense.

(iii) Regardless of when the sexually oriented offense was committed, the offender is to be sentenced on or after May 7, 2002, for a sexually oriented offense that is not a registration-exempt sexually oriented offense, and that offender was acquitted of a sexually violent predator specification that was included in the indictment, count in the indictment, or information charging the sexually oriented offense.

(b) The judge who is to impose or has imposed an order of disposition upon a child who is adjudicated a delinquent child for committing on or after January 1, 2002, a sexually oriented offense that is not a registration-exempt sexually oriented offense shall conduct a hearing as provided in this division to determine whether the child is to be classified as a sexual predator if either of the following applies:

(i) The judge is required by section 2152.82 or division (A) of section 2152.83 of the Revised Code to classify the child a juvenile offender registrant.

(ii) Division (B) of section 2152.83 of the Revised Code applies regarding the child, the judge conducts a hearing under that division for the purposes described in that division, and the judge determines at that hearing that the child will be classified a juvenile offender registrant.

(2) Regarding an offender, the judge shall conduct the hearing required by division (B)(1)(a) of this section prior to sentencing and, if the sexually oriented offense for which sentence is to be imposed is a felony and if the hearing is being conducted under division (B)(1)(a) of this section, the judge may conduct it as part of the sentencing hearing required by section 2929.19 of the Revised Code. Regarding a delinquent child, the judge may conduct the hearing required by division (B)(1)(b) of this section at the same time as, or separate from, the dispositional hearing, as specified in the applicable provision of section 2152.82 or 2152.83 of the Revised Code. The court shall give the offender or delinquent child and the prosecutor who prosecuted the offender or handled the case against the delinquent child for the sexually oriented offense notice of the date, time, and location of the hearing. At the hearing, the offender or delinquent child and the prosecutor shall have an opportunity to testify, present evidence, call and examine witnesses and expert witnesses, and cross-examine witnesses and expert witnesses regarding the determination as to whether the offender or delinquent child is a sexual predator. The offender or delinquent child shall have the right to be represented by counsel and, if indigent, the right to have counsel appointed to represent the offender or delinquent child.

(3) In making a determination under divisions (B)(1) and (4) of this section as to whether an offender or delinquent child is a sexual predator,

the judge shall consider all relevant factors, including, but not limited to, all of the following:

(a) The offender's or delinquent child's age;

(b) The offender's or delinquent child's prior criminal or delinquency record regarding all offenses, including, but not limited to, all sexual offenses;

(c) The age of the victim of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made;

(d) Whether the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made involved multiple victims;

(e) Whether the offender or delinquent child used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;

(f) If the offender or delinquent child previously has been convicted of or pleaded guilty to, or been adjudicated a delinquent child for committing an act that if committed by an adult would be, a criminal offense, whether the offender or delinquent child completed any sentence or dispositional order imposed for the prior offense or act and, if the prior offense or act was a sex offense or a sexually oriented offense, whether the offender or delinquent child participated in available programs for sexual offenders;

(g) Any mental illness or mental disability of the offender or delinquent child;

(h) The nature of the offender's or delinquent child's sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;

(i) Whether the offender or delinquent child, during the commission of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made, displayed cruelty or made one or more threats of cruelty;

(j) Any additional behavioral characteristics that contribute to the offender's or delinquent child's conduct.

(4) After reviewing all testimony and evidence presented at the hearing conducted under division (B)(1) of this section and the factors specified in division (B)(3) of this section, the court shall determine by clear and convincing evidence whether the subject offender or delinquent child is a sexual predator. If the court determines that the subject offender or delinquent child is not a sexual predator, the court shall specify in the offender's sentence and the judgment of conviction that contains the sentence or in the delinquent child's dispositional order, as appropriate, that the court has determined that the offender or delinquent child is not a sexual predator and the reason or reasons why the court determined that

the subject offender or delinquent child is not a sexual predator. If the court determines by clear and convincing evidence that the subject offender or delinquent child is a sexual predator, the court shall specify in the offender's sentence and the judgment of conviction that contains the sentence or in the delinquent child's dispositional order, as appropriate, that the court has determined that the offender or delinquent child is a sexual predator and shall specify that the determination was pursuant to division (B) of this section. In any case in which the sexually oriented offense in question is an aggravated sexually oriented offense, the court shall specify in the offender's sentence and the judgment of conviction that contains the sentence that the offender's offense is an aggravated sexually oriented offense. The offender or delinquent child and the prosecutor who prosecuted the offender or handled the case against the delinquent child for the sexually oriented offense in question may appeal as a matter of right the court's determination under this division as to whether the offender or delinquent child is, or is not, a sexual predator.

{¶16} By judgment entry filed April 18, 2007, the trial court noted that it had considered R.C. 2950.09(B)(3). Specifically the trial court found that subsections (a), (b), and (c) mitigated in favor of the sexual predator classification. The trial court further found that subsections (d), (e), (f), (g), (h), and (i) mitigated against classifying Fryer as a sexual predator. Finally, the trial court found that no evidence was presented concerning subsection (j). The court concluded by clear and convincing evidence and in

accordance with the stipulation by Fryer, Fryer should be classified as a sexual predator.

{¶17} Fryer did not object to the classification at the April 17, 2007 sentencing hearing. Fryer did not file a direct appeal from the sexual predator designation imposed at the April 17, 2007 sentencing hearing.

{¶18} In *State v. Rogers*, 7th Dist. Columbiana No. 01-CO-5, 2002-Ohio-1150, the defendant stipulated to a sexual predator designation. On appeal, he argued that the court erred in designating him a sexual predator without a hearing. The Court of Appeals disagreed and observed that because the trial court informed the defendant that it is required to hold a hearing to determine his status as a sexual predator, asked him if he was stipulating to that status, and informed him of the registration requirements, the waiver of the hearing and stipulation were done knowingly, intelligently, and voluntarily.

{¶19} In *State v. Bowens* the Ninth District Court of Appeals noted,

In any case, we are not persuaded that R.C. 2950.09 requires the trial court to articulate the basis for classifying a defendant as a sexual predator where the defendant stipulates to that classification and waives a hearing. [*State v.*] *Davidson*, [5th Dist. Stark No. 2001CA00386, 2002-Ohio-2887] at *4. So long as public policy is not violated, an individual may generally waive any right, “whether secured by contract, conferred by statute, or guaranteed by the Constitution,” including the right to a hearing on one’s sexual predator status. *Id.*, quoting *State ex rel. Hess v. Akron* (1937), 132 Ohio St. 305, 307.

9th Dist. Summit No. 22896, 2006-Ohio-4721, ¶15.

{¶20} In the case at bar, Fryer could have appealed the designation at the time it was made in 2007. He did not file a direct appeal from the trial court's April 17, 2007 sentence. Fryer was informed that the trial court was required to determine at the time of sentencing whether he would be classified as a sexually oriented offender, child victim oriented offender, child victim predator or sexual predator. (T. March 20, 2007 at 4-5). Fryer acknowledged that his attorney explained the classifications and consequences of each classification to Fryer. *Id.*

{¶21} In *State v. Lester*, 130 Ohio St.3d 303, 2011–Ohio–5204, 958 N.E.2d 142, the Ohio Supreme Court held a nunc pro tunc judgment entry issued for the sole purpose of complying with the rule governing contents of a judgment of conviction by correcting a clerical omission in a final judgment entry is not a new final order from which a new appeal may be taken. *Lester* held when the substantive provisions of the governing Rule are contained in judgment of conviction, the trial court's omission of how the defendant's conviction was effected, i.e., the "manner of conviction," does not prevent the judgment of conviction from being an order that is final and subject to appeal. *Lester*, *Syllabi by the court*, paragraphs 1, 2, and 3. The Supreme Court explained the absence of the language required by Crim. R. 32(C) indicating how the conviction was effected does not deprive the appellant of any opportunity to appeal the conviction or sentence. *Id.*, at paragraph 17. *Accord*, *State v. Bates*, 5th Dist. Guernsey Nos. 2012-CA-06, 2012-CA-10, 2012-Ohio-4360, ¶39; *State v. Priest*, 2nd Dist. Montgomery No. 25896, 2014-Ohio-3843, ¶11; *State v. Phippen*, 4th Dist. Scioto No.

14CA3595, ¶18; *State v. Brown*, 7th Dist. Mahoning No. 14 MA 37, 2014-Ohio-5832, ¶14; *State v. Davis*, 9th Dist. Medina No. 13CA0104-M, 2014-Ohio-4122, ¶6.

{¶22} Because Fryer did not file a direct appeal, he may not raise in his pro se assignment of error, errors which he could have raised at the time of sentencing in 2007. A defendant may challenge the sufficiency of an indictment only by direct appeal. Crim R 12(C); *State v. Jackson*, 5th Dist. Knox No. 94-CA-26, 1995WL497632(Aug. 4, 1995)(citing *State, ex rel. Hadlock v. McMackin*, 61 Ohio St.3d 433, 434, 575 N.E.2d 184(1991)). To the extent that Fryer argues the indictment was defective, he waived that argument by failing to raise it before trial. See Crim. R. 12(C)(2); *State v. Schultz*, 96 Ohio St. 114, 117 N.E. 30(1917); *State v. Hardy*, 8th Dist. Cuyahoga No. 82620, 2004-Ohio-56; *State v. Blalock*, 8th Dist. Cuyahoga Nos. 80419 and 80420, 2002-Ohio-4580; *State v. Kenney*, 5th Dist. Holmes No. CA93-480A, 2000 WL 699673(May 10, 2000); *State v. Avery*, 26 Ohio App.3d 36, 709 N.E.2d 875(9th Dist 1998); *State v. Biros*, 78 Ohio St.3d 426, 436, 678 N.E. 2d 891, 901-902(1997), citing *State v. Joseph*, 73 Ohio St.3d 450, 455, 653 N.E. 2d 285(1995); and *State v. Mills*, 62 Ohio St.3d 357, 363, 582 N.E.2d 972(1992) (Under Crim. R. 12(B) and 12(G), alleged defects in an indictment must be asserted before trial or they are waived"); see, also, *State v. Williams*, 51 Ohio St. 2d 112, 117, 98, 101, 364 N.E. 2d 1364, 1367-1368(1977), *death penalty vacated* (1977), 438 U.S. 911, 98 S.Ct. 3137, 57 L.Ed. 2d 1156.

{¶23} Fryer's original judgment entry of conviction meets the requirements contained in Crim.R. 32(C) because it contained the fact of the conviction, the sentence, the sexual predator designation the judge's signature, and the time stamp indicating the entry upon the journal by the clerk. Like the nunc pro tunc judgment entry in *Lester*, the

June 18, 2014 nunc pro tunc judgment entry in this case was issued solely for the purpose of correcting a clerical omission in the prior sentencing judgment to comply with Crim.R. 32(C). No new or substantial right was affected under R.C. 2505.02(A)(1) by this correction. However, because a statement of how a conviction was effected is required by Crim.R. 32(C) within a judgment entry of conviction as a matter of form, Fryer was entitled to an order that conforms to Crim.R. 32(C). The June 18, 2014 nunc pro tunc entry does this by including the manner of conviction. See, *State v. Horn*, 5th Dist. Delaware No. 13 CAA 12 0087, 2014-Ohio-1814, ¶12.

{¶24} Thus, the original termination judgment entry filed April 18, 2007 entry was a final order subject to appeal under R.C. 2505.02 and the absence of how Fryer's conviction was effected, required as a matter of form by Crim.R. 32(C), did not deprive Frye of the opportunity to appeal his conviction or sentence. *Horn*, ¶13.

{¶25} The April 18, 2007 judgment entry of sentence is a valid, final appealable order and any new challenges to it are barred by the doctrine of res judicata. Res judicata is defined as "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967); *Horn*, ¶14.

{¶26} Frye's assignment of error and his pro se assignment of error are overruled and the June 6, 2014 judgment entry by the Perry County Common Pleas Court is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur