**[Cite as *State v. Rossbach*, 2012-Ohio-4740.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-11-1227

Appellee — Trial Court No. CR0200901708

v.

Thomas Rossbach — **DECISION AND JUDGMENT**

Appellant — Decided: October 12, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Thomas Rossbach, pro se.

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**OSOWIK, J.**

**{¶ 1}** This is an appeal from an August 25, 2009 judgment of the Lucas County Court of Common Pleas, which found appellant guilty of four counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4), felonies of the third degree. Appellant was sentenced to five years on each of the four counts, to run consecutive to one another, for an aggregate term of 20 years of imprisonment. Appellant directly appealed the

conviction and sentence to this court. Appellant set forth seven assignments of error. On January 21, 2011, this court found each of appellant's assignments of error not well-taken. Appellant subsequently sought an appeal to the Ohio Supreme Court. They declined to accept the case for review, thereby allowing the decision of this court stand as the binding law of this case.

**{¶ 2}** On May 18, 2011, appellant filed a motion in the trial court challenging the previously affirmed sentencing judgment of the trial court. The state of Ohio opposed the motion. It asserted that the motion was barred by res judicata. The trial court concurred. It found appellant's motion barred on grounds of res judicata. This appeal ensued.

**{¶ 3}** For the reasons set forth below, this court affirms the judgment of the trial court.

**{¶ 4}** Appellant sets forth the following two assignments of error:

1. THE LUCAS COUNTY COURT OF COMMON PLEAS FAILED TO FIRST DECLARE THAT THE DEFENDANT-APPELLANT'S SENTENCE *IS OR IS NOT* VOID, WHEN THAT WAS THE CLAIMED ISSUE PRESENTED, BEFORE IT CAN BAR A CASE REVIEW UNDER THE DOCTRINE OF RES JUDICATA/OR PROCEDURAL DEFAULT

2. THE TRIAL COURT WAS WITHOUT JURISDICTION TO IMPOSE CONSECUTIVE SENTENCES UPON THE DEFENDANT PURSUANT TO R.C. § 5145.01, AND ALSO ABUSED ITS

SENTENCING DISCRETION BECAUSE THE DEFENDANT

EXERCISED HIS RIGHT TO TRIAL.

**{¶ 5}** The undisputed facts relevant to this case are as follows.

**{¶ 6}** Appellant engaged in unlawful sexual acts with his young niece multiple times during the period from August 25, 2008, through November 24, 2008. The victim, born in 2002, was five-years-old at the time the incidents occurred.

**{¶ 7}** Unusual conduct exhibited by the victim triggered her parents' suspicions and alerted them to the possibility that someone had sexually abused their daughter. The victim woke up one night following a nightmare screaming, "No, I don't want to touch it, I don't want to touch it." When her father questioned her, the victim became upset, ran away, and said, "I'm bad, I have to – I have to go to time out."

**{¶ 8}** Another troubling indication that something had occurred to their child became evident when the victim put her tongue inside her mother's mouth when giving her a kiss. Upon questioning by her mother, the victim clearly stated that she had learned that way of kissing from appellant, her uncle. Based upon these disclosures by their child, the victim's parents filed a police report against appellant. In the course of the subsequent investigation, appellant admitted to the investigating detective that the victim had twice touched his penis. Appellant unpersuasively and irrelevantly asserted that his five-year-old niece did so of her own free will.

**{¶ 9}** The victim later disclosed that appellant had touched her genitals on at least five occasions and also had touched her anus on at least one occasion. The victim, who

was found competent by the trial court to testify, testified that all of this unlawful sexual conduct occurred before her sixth birthday. It had occurred on different days, in different rooms, but always at her home. She further testified that her parents were never at home when her uncle committed the criminal sexual acts.

**{¶ 10}** This court will address appellant's two assignments of error simultaneously as they are both rooted in the common premise that this appeal is not barred by res judicata.

**{¶ 11}** Appellant's brief, although predominantly incoherent, rests on the assumption that res judicata does not apply. As noted above, appellant previously unsuccessfully appealed to this court. In addition, the Ohio Supreme Court declined to accept the case for review. As such, whatever issues he seeks to raise again or seeks to raise for the first time are barred by res judicata. In conjunction with this issue, appellant now claims for the first time that his sentence was void in order to avoid the application of res judicata.

**{¶ 12}** In the first assignment of error, appellant contends that consideration of his postconviction claim of a void sentence is not barred by res judicata. However, even if the question of whether the sentence is void is not barred by res judicata, the issues in support of appellant's claim would be barred. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, held that "Although the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other aspects of the merits

of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence."

**{¶ 13}** This court has consistently held that, "the doctrine of res judicata bars a convicted defendant from raising any defense or claim which was or could have been raised at a trial or on appeal, *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus." *State v. Wooten*, 6th Dist. No. L-01-1501, 2002-Ohio-4949, ¶ 6. Determinatively, appellant has furnished no objective evidence in support of the notion that the sentence was void so as to preclude the application of res judicata to this matter. As such, the first assignment of error is found not well-taken.

**{¶ 14}** In the second assignment of error, appellant raises a claim substantively analogous to an assignment of error that he unsuccessfully asserted in his direct appeal. In his fifth assignment of error in the direct appeal, appellant asserted that the imposition of consecutive sentences was improper. This court rejected the claim. We found the sentence to be lawful and the assignment of error not well-taken. Any issue that was raised or could have been raised on appeal is barred by res judicata and is not subject to further appeal. Therefore, we find this same assignment of error again not well-taken.

**{¶ 15}** Wherefore, we find both of appellant's assignments of error not well-taken. On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE