

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

State of Ohio

Court of Appeals No. E-11-068

Appellee

Trial Court No. 2004-CR-450

v.

Herbert L. Henson, Jr.

DECISION AND JUDGMENT

Appellant

Decided: August 17, 2012

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Herbert L. Henson, Jr., pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Herbert L. Henson, Jr. appeals a July 7, 2011 judgment of the Erie County Court of Common Pleas. The judgment overruled appellant’s “motion for sentencing.” The motion is directed at appellant’s convictions in 2005 on three counts of rape with force and five counts of gross sexual imposition.

{¶ 2} Henson was indicted by the Erie County Grand Jury on September 13, 2004, on three counts of rape by force of a person less than thirteen years of age, violations of R.C. 2907.02(A)(1)(b) and first degree felonies, and five counts of gross sexual imposition of a person less than thirteen years of age, violations of R.C. 2907.05(A)(4) and third degree felonies. The indictment identified the child victim in each count by name and date of birth. The victim on each count was appellant's daughter, who was age eight at the time of each alleged incident. The charges arose from allegations that appellant engaged in sexual conduct with his daughter while she and her brother visited appellant during the summer of 2003.

{¶ 3} The case proceeded to trial in October 2005 and a jury returned guilty verdicts on each count. In a judgment filed on November 8, 2005, the trial court sentenced appellant:

{¶ 4} 1. To imprisonment for life with eligibility for parole after 10 years on each of the three convictions for rape with force (Counts 1, 2, and 3 of the indictment) and also ordered that the sentences run concurrent to each other;

{¶ 5} 2. To imprisonment for three years each on convictions for gross sexual imposition under Counts 4, 5, and 6 of the indictment and ordered the sentences run concurrent to each other;

{¶ 6} 3. To imprisonment for two years each on convictions for gross sexual imposition under Counts 7 and 8 of the indictment and ordered the sentences to run concurrent to each other.

{¶ 7} 4. The court ordered that the sentences imposed in Counts 4, 5, and 6 be served consecutively to the sentences imposed in Counts 1, 2, and 3.

{¶ 8} In total, the trial court imposed an aggregate sentence of life with eligibility for parole after 15 years on the convictions.

{¶ 9} In a January 26, 2006 judgment, the trial court found appellant to be a child victim offender. On March 14, 2006, the trial court denied appellant's motion for a new trial. Appellant filed a notice of appeal.

{¶ 10} On appeal, appellant claimed trial court error based upon asserted prosecutorial misconduct, the trial court's denial of the motion for a new trial, and claimed insufficiency of the evidence to support a conviction, a claim that the jury verdicts were against the manifest weight of the evidence, and claimed ineffective assistance of counsel. We issued a decision and judgment on the direct appeal on July 13, 2007, and affirmed. *State v. Henson*, 6th Dist. No. E-06-021, 2007-Ohio-3567.

{¶ 11} On February 18, 2010, appellant filed a motion in the trial court entitled "Motion for Void Judgment Pursuant to Civil Rule 60(B)(4)(5)." In the motion, appellant contended that his convictions are unconstitutional and void, claiming the jury verdict forms at trial failed to meet the requirements of R.C. 2945.75(A)(2) in that the jury verdict forms did not specify the degree of felony or the necessary elements to support the sentence. Appellant also claimed that the indictment contains structural errors. Appellant argued that the errors constituted a denial of due process of law in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States

Constitution and Article I, Sections 10 and 16 of the Ohio Constitution. The trial court denied the motion in a judgment filed on March 19, 2010.

{¶ 12} Appellant appealed the March 19, 2010 judgment to this court. In a decision and judgment issued on July 19, 2010, we dismissed the appeal, on the motion of the state of Ohio, due to the failure of appellant to file an appellate brief.

{¶ 13} On January 18, 2011, appellant was resentenced by the trial court to correct sentencing errors with respect to imposition of postrelease control.

{¶ 14} On June 28, 2011, appellant filed a motion for sentencing, arguing that under *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735 and R.C. 2945.75(A)(2) his sentences for rape with force and gross sexual imposition were void because of defects in the jury verdict forms on which his convictions are based. Appellant argued that under *Pelfrey* and R.C. 2945.75(A)(2), “a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted, or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense.” *Pelfrey* at syllabus.

{¶ 15} The trial court denied the motion in a judgment filed on July 7, 2011. Appellant filed a notice of appeal from the judgment on August 4, 2011. Appellant asserts two assignments of error on appeal:

1. Trial court erred by failing to vacate void sentence pursuant to stare decisis and statute.

2. Whether trial court acted outside of its jurisdiction provided by law in sentencing the defendant and further, dismissing appellant's motion to rectify void sentence.

{¶ 16} We consider Assignment of Error No. 2 first. Appellant contends that his sentences for rape with force and gross sexual imposition are contrary to statute, R.C. 2945.75(A)(2), and void. Whether a failure of jury verdict forms to comply with the requirements of R.C. 2945.75(A)(2) renders a sentence imposed pursuant to the verdicts void has been considered at length by Ninth District Court of Appeals in *State v. Grooms*, 9th Dist. No. 25819, 2011-Ohio-6062, ¶ 11:

R.C. 2945.75 is not a sentencing statute. Chapter 2945 of the Revised Code governs trials, not penalties, sentences, or other sanctions. See R.C. 2945, et seq. Compare R.C. 2929, et seq. (governing penalties and sentencing); R.C. 2967, et seq. (governing other sanctions such as post-release control). And while an error under R.C. 2945.75(A)(2) ultimately will impact an offender's sentence, the nature of the error is such that it gives rise to a defective verdict, not a void sentence. The logical extension of any number of errors is that they ultimately could impact the sentence imposed. The focal point of the analysis must be whether the trial court disregarded an express statutory requirement in imposing the sentence. [*State v.*] *Fischer*[, 128 Ohio St.3d] at ¶ 23; *Beasley*, 14 Ohio St.3d at 75. R.C. 2945.75(A)(2) only speaks to the information that a guilty verdict

must contain. See *Pelfrey* at ¶ 12 (noting the content that R.C. 2945.75 requires “in order to find a defendant guilty” of an offense of a higher degree). It does not impose any statutory sentencing duty upon a court or set out a requirement that a court must follow “when imposing a sentence.” *Beasley*, 14 Ohio St.3d at 75. Compare R.C. 2929.14(A) (setting forth felony prison terms and providing that, for felonies, a court “shall impose a definite prison term that shall be” for a designated duration, depending on the felony level); R.C. 2967.28(B)-(C) (mandating that a trial court impose post-release control in sentencing for designated offenses). Thus, we must conclude that an error arising from a failure to apply R.C. 2945.75 does not give rise to a void sentence.

{¶ 17} Courts of Appeals for the Tenth and Eleventh Districts have approved and followed *Grooms* and held that the claimed failure of jury verdict forms to comply with the requirements of R.C. 2945.75 does not render resulting sentences in the case void. *State v. Love*, 11th Dist. No. 2011-L-159, 2012-Ohio-3029, ¶ 17-21; *State v. Myers*, 10th Dist. No. 11AP-909, 2012-Ohio-2733, ¶ 7. The Third District Court of Appeals reached the same result before *Grooms* in *State v. Hines*, 193 Ohio App.3d 660, 2011-Ohio-3125, 953 N.E.2d 387, ¶ 16 (3d Dist.).

{¶ 18} We also find the reasoning of the *Grooms* decision persuasive and follow it. We agree that R.C. 2945.75 is not a sentencing statute and an error as to a jury verdict

form under R.C. 2945.75(A)(2) may result in a defective verdict, but not a void sentence. Accordingly, we find appellant's Assignment of Error No. 2 not well-taken.

{¶ 19} Under Assignment of Error No. I, appellant argues trial court error based upon the claim that the verdict forms on which the 2005 convictions are based failed to comply with the requirements of R.C. 2945.75(A)(2). The state argues in response that the issue is barred by res judicata. We agree.

{¶ 20} Under res judicata a convicted defendant is barred from litigating issues that were raised or could have been raised at trial or on direct appeal from the judgment of conviction:

Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel 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, 226 N.E.2d 104 (1967) at paragraph nine of the syllabus.

{¶ 21} Other courts have held that claimed trial court error of failing to comply with the requirements of R.C. 2945.75(A)(2) as to jury verdict forms is the type of trial court error that can be raised at trial or on direct appeal and that res judicata bars consideration of the issue after direct appeal. *State v. Rippey*, 10th Dist. No. 06AP-1229, 2007-Ohio-4521, ¶ 11-12; *State v. Santiago*, 10th Dist. No. 07AP-678, 2007-Ohio-6863,

¶ 8; *State v. Washington*, 9th Dist. No. 25784, 2011-Ohio-6600, ¶ 9-12. Appellant did not raise this claimed error either in the trial court or on direct appeal. We agree that res judicata bars him from raising the issue now.

{¶ 22} Furthermore, res judicata also bars appellant's claims under Assignment of Error No. 1 due to a prior adverse final judgment on the issue. Appellant raised the issue of a violation of R.C. 2945.75 after direct appeal in appellant's February 18, 2010 motion for void judgment. The trial court denied the motion in a judgment filed on March 19, 2010. Although appellant appealed that judgment, the appeal was dismissed by this court.

{¶ 23} Res judicata bars a party from relitigating an adverse final judgment on an issue in a subsequent appeal. *Perry* at paragraph nine of the syllabus. Accordingly, res judicata also bars Assignment of Error No. 1 because appellant is bound by a prior adverse final judgment on the issue.

{¶ 24} We also agree with the state that appellant's latest motion on the issue is barred under the time limitations for petitions for postconviction relief. A motion filed by a criminal defendant after direct appeal or after the time for direct appeal has expired, that seeks to vacate or correct his sentence on constitutional grounds is to be treated as a petition for postconviction relief under R.C. 2953.21. *State v. Young*, 6th Dist. No. E-08-041, 2009-Ohio-1118, ¶ 16; see *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus. Appellant's motion is a petition for postconviction relief as it

seeks to vacate or correct his sentence based upon claims that his constitutional rights were violated.

{¶ 25} The state argues that appellant's motion was untimely under R.C. 2953.21(A)(2) as it was filed more than 180 days after the date on which trial transcripts were filed in this court on direct appeal. Transcripts on direct appeal were filed on November 17, 2006. Appellant's motion/petition was filed on June 28, 2011 and is therefore untimely.

{¶ 26} Although R.C. 2953.23(A)(1) and (2) provide exceptions to the 180-day filing deadline, neither applies here. Appellant was not prevented from discovering facts relied upon for the claim of defective jury verdict forms and the claim is not based upon a new state or federal right recognized by the United States Supreme Court that applies retroactively to this case. *See* R.C. 2953.23(A)(1). Nor does the appeal involve DNA testing. *See* R.C. 2953.23(A)(2).

{¶ 27} Accordingly, we conclude that Assignment of Error No. 1 is barred both by *res judicata* and because appellant's petition for postconviction relief was not filed within the time requirements of R.C. 2953.21(A)(2).

{¶ 28} We find appellant's Assignment of Error No. 1 not well-taken.

{¶ 29} We find that justice has been afforded the party complaining and affirm the judgment of the Erie County Court of Common Pleas. We order appellant to pay the costs 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.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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