

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

State of Ohio

Court of Appeals No. S-12-001

Appellee

Trial Court No. 08 CR 203

v.

Daniel Elkins

DECISION AND JUDGMENT

Appellant

Decided: January 18, 2013

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Daniel A. Elkins, pro se.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Sandusky County Court of Common Pleas which, on December 28, 2011, denied the motion filed by pro se appellant, Daniel A. Elkins, to correct a void sentence. Appellant appealed the

trial court's denial of his motion on January 9, 2012. In his sole assignment of error, appellant argues that

The trial court's failure to adhere to the mandatory provisions of R.C. 2929.14(B) when sentencing the appellant renders the attempted sentence void and had deprived the appellant of his liberty interest in serving the minimum term of imprisonment authorized for the offense(s) which he was convicted of in violation of appellant's right to due process as guaranteed by the 14th Amendment to the United States Constitution.

{¶ 2} Appellant argues that the trial court should have resentenced him because the trial court failed to apply "former" R.C. 2929.14(B) at his original sentencing on May 14, 2008, which rendered his sentence void. We, however, find that appellant was sentenced after the Ohio Supreme Court issued *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, and held that R.C. 2929.14(B) was unconstitutional and severed same from the Ohio Revised Code. As such, the trial court was correct in failing to apply R.C. 2929.14(B) to appellant's sentence. Accordingly, appellant has failed to demonstrate that his sentence is void or that he is entitled to be resentenced. *See also State v. Elkins*, 6th Dist. No. S-10-018, 2010-Ohio-5170, ¶ 17.

{¶ 3} Having affirmed appellant's conviction and sentence in *State v. Elkins*, 6th Dist. No. S-08-014, 2009-Ohio-2602, we find that appellant's argument on appeal in this matter should or could have been raised upon direct appeal from his original sentence. Accordingly, we find that appellant's sole assignment of error is also barred by the

doctrine of res judicata. *See State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph one of the syllabus, and *State v. Ishmail*, 67 Ohio St.2d 16, 423 N.E.2d 1068 (1981).

{¶ 4} On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Sandusky 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.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

<p>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: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
