[Cite as *State v. Fowler*, 2015-Ohio-1053.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 14 MA 124
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
DELBERT M. FOWLER	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 95 CR 459

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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Mahoning County Prosecutor
Atty. Ralph M. Rivera
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For Defendant-Appellant:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: March 18, 2015

[Cite as *State v. Fowler*, 2015-Ohio-1053.]
WAITE, J.

{¶1} Pro se Appellant Delbert N. Fowler appeals the judgment of the Mahoning County Court of Common Pleas overruling a motion to vacate his conviction and sentence for murder, aggravated burglary, aggravated robbery, and kidnapping. Appellant presents two arguments on appeal. The first is that his conviction was not final pursuant to Crim.R. 32(C) because the fact that he was actually convicted was not included in the court's sentencing entry. As will be more fully explained below, Appellant misconstrues Crim.R. 32(C) and the recent cases interpreting the rule regarding the elements that need to be stated in a final order of conviction. The current version of Crim.R. 32(C) does not apply to Appellant's conviction, which occurred in 1996. Instead, former Crim.R. 32(B) applies to Appellant. The record indicates that his sentencing judgment entry conformed to former Crim.R. 32(B) and was a final order.

{¶2} Furthermore, Appellant has already had a direct appeal of his sentence. The sentence was reviewed as a final appealable order and was affirmed, and no further appeal was taken. Any question as to the status of the sentencing entry of the trial court judgment should have been taken up with the Ohio Supreme Court but was not. Thus, the matter is now *res judicata*.

{¶3} Appellant also argues that he was improperly allowed to enter a guilty plea to a charge that was not in the indictment. The record reflects that the indictment was amended to include the change from aggravated murder to murder. Any alleged error in whether the plea conforms to the indictment could have been addressed in a direct appeal and is now also *res judicata*.

Background

{¶4} On June 23, 1995, Appellant was indicted by the Mahoning County Grand Jury on counts of aggravated murder, aggravated burglary, aggravated robbery, and kidnapping, along with corresponding firearm specifications. The crimes were committed against Hector and Arlene Ramirez. Appellant entered into a Crim.R. 11 plea agreement. As part of the plea agreement, count one of the indictment was amended to the charge of murder. "To the indictment as amended, appellant entered guilty pleas." *State v. Fowler*, 7th Dist. No. 96 C.A. 58, 1999 WL 61063, at *1 (Feb. 1, 1999).

{¶5} On February 21, 1996, the court sentenced Appellant to fifteen years to life in prison for murder. On each of the three remaining counts, the trial court sentenced him to ten to twenty-five years in prison. The trial court merged the firearm specifications and imposed one three-year prison term. All the sentences were to be served consecutively.

{¶6} On February 29, 1996, Appellant filed a motion to correct his sentence, arguing that counts two through four were allied offenses that should have merged at sentencing and that the trial court incorrectly stated the minimum prison term. The trial court denied the motion. Appellant filed an appeal. We reviewed the entire sentence and determined that there were no allied offenses. We held that the minimum prison term was incorrectly calculated, but there was no reversible error since the correct minimum prison term would be automatically recalculated, at the appropriate time, pursuant to the sentencing statutes. *Fowler*, *supra*.

{¶7} On May 25, 2007, Appellant filed a motion to vacate his conviction and sentence. The motion was denied on May 30, 2007. No appeal was taken.

{¶8} On June 30, 2014, Appellant filed another motion seeking to vacate his conviction. The trial court denied the motion on August 21, 2014. This appeal followed.

ASSIGNMENTS OF ERROR NOS. ONE AND TWO

> THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION SEEKING NOTICE OF PLAIN ERROR PURSUANT TO CRIMINAL RULE 52(B). WHERE THERE IS NO SOUND PROCESS TO SUPPORT THE JUDGMENT OF DENIAL.
>
> THE TRIAL COURT WAS AND STILL IS WITHOUT SUBJECT MATTER JURISDICTION TO SENTENCE THE APPELLANT IN VIOLATION OF THE 14th AMENDMENT AND CRIMINAL RULE 11, WHERE THERE WAS NO CONVICTION PRIOR TO THE SENTENCE BEING IMPOSED.

{¶9} In these first two assignments of error, Appellant argues that the trial court should have sustained his motion to vacate the conviction as void because there was no final appealable order of conviction when the sentence was issued on February 21, 1996. Appellant bases his argument on a former version of Crim.R. 32(C), which states: "A judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence." Appellant contends that former Crim.R. 32(C) required the trial judge to include the fact of his

conviction in the sentencing entry. The judgment entry in this case states that Appellant pleaded guilty to murder and the other charges in the indictment, but does not expressly use the word "convicted" when setting forth the guilty plea. Appellant believes that there was never a final appealable order because the word "convicted" or some similar word, is not expressly stated in the entry.

{¶10} Appellant is mistaken on a number of levels here. First, the version of Crim.R. 32(C) cited by Appellant does not apply to his conviction. In 1996, the applicable rule was Crim.R. 32(B), which stated: "A judgment of conviction shall set forth the plea, the verdict or findings, and the sentence." Appellant is attempting to rely on recent Ohio Supreme Court cases interpreting former Crim.R. 32(C), rather than former Crim.R. 32(B). The first of these is *State v. Baker*, in which the Supreme Court determined that a final judgment of conviction, in order to be an appealable order under Crim.R. 32(C), must contain: (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court, a trial court must issue one entry which contains these elements. *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, syllabus. "Simply stated, a defendant is entitled to appeal an order that sets forth the manner of conviction and the sentence." *Id.* at ¶18.

{¶11} Following this, many convictions were challenged on the grounds that the sentencing entries were not final and appealable because the manner of conviction was not expressly stated in the sentencing entry. To alleviate some

considerable confusion in this area, the Ohio Supreme Court later clarified *Baker* by holding that where the sentencing entry states the fact of conviction, but fails to state the manner in which the conviction was obtained (such as through a guilty plea or a jury trial), the entry is still final and appealable. *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, modifying *Baker*, 119 Ohio St.3d 197.

{¶12} Appellant concludes, based on *Baker* and *Lester*, that a sentencing entry that includes the guilty plea and the sentence, but does not explicitly say that the defendant was "convicted", violates former Crim.R. 32(C). *Baker*, interpreting the plain language of Crim.R. 32(C), never held that the phrase "defendant was convicted" was required to be in the sentencing entry. There is also no such requirement in former Crim.R. 32(C) or in former Crim.R. 32(B). *Lester*, dealing with a different problem, held that a sentencing entry that included the fact of conviction, but that did not describe the manner of conviction, *i.e.*, whether there was a jury trial or a plea agreement, was also a final appealable order. *Lester* at ¶15. *Lester* also held that the defendant could obtain a *nunc pro tunc* corrected sentencing entry, if desired, so that the manner of conviction could be part of the record.

{¶13} The sentencing entry in this case contains the guilty plea, the sentence, and the signature of the judge, and was a final appealable order pursuant to former Crim.R. 32(B).

{¶14} Appellant may be confused because Crim.R. 32(C) was recently amended to read: "A judgment of conviction shall set forth the fact of conviction and

the sentence." This language reflects a change after Appellant was sentenced and does not apply to his situation.

{¶15} Regardless of Appellant's arguments regarding the appealability of the February 21, 1996 judgment, any questions regarding the status of that judgment as a final appealable order should have been made in the earlier direct appeal or a further appeal to the Ohio Supreme Court. We have already reviewed and affirmed Appellant's sentence, and no further appeal was taken. Appellant is essentially arguing that we had no authority to review and decide the previous appeal because there was no final appealable order from the trial court. It is axiomatic that, "[a] court having general jurisdiction of the subject matter of an action has authority to determine its own jurisdiction on issue raised, and a party challenging its jurisdiction has a remedy at law in appeal from an adverse holding of the court that it has such jurisdiction * * *." *State ex rel. Miller v. Court of Common Pleas of Lake Cty.*, 151 Ohio St. 397, 397, 86 N.E.2d 464 (1949). Although this rule typically arises in questions over the jurisdiction of the lower courts, it also applies to the jurisdiction of a court of appeal. *State ex rel. Emery-Thompson Mach. & Supply Co. v. Jones*, 96 Ohio St. 506, 511-512, 118 N.E. 115 (1917).

{¶16} If Appellant believed there was error in our acceptance and review of the February 21, 1996 judgment as a final appealable order, his remedy was by way of further review in the Ohio Supreme Court, and not in a postconviction attempt at the trial court level to have the sentence declared void. We have recently held in another case involving the holdings of *Baker* and *Lester*, "[a]ppellant is mistaken,

however, that the finality of his original sentencing entries is voided or disturbed by a defect in form. Finality was established in his original appeal as of right. The appellate decision is *res judicata* as to the issue in this matter. The principle of '*[r]es judicata* may be applied to bar further litigation of issues that were raised previously or could have been raised previously in an appeal.' *State v. Houston*, 73 Ohio St.3d 346, 347, 652 N.E.2d 1018 (1995), citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967)." *State v. Gilmore,* 7th Dist. No. 11 MA 30, 2014-Ohio-5059, ¶11.

{¶17} The trial court's judgment entry conforms to former Crim.R. 32(B), and any alleged errors regarding the finality of that judgment are now *res judicata*. Appellant's first and second assignments of error have no merit and are overruled.

ASSIGNMENT OF ERROR NO. THREE

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS WHEN IT SENTENCED APPELLANT TO A CRIME THAT WAS NOT MENTION [SIC] WITHIN THE BODY OF THE INDICTMENT.

{¶18} Appellant contends that he was convicted of murder (through a guilty plea arising from a Crim.R. 11 plea agreement), but that the original indictment contained a charge of aggravated murder. Appellant believes that murder, as defined by R.C. 2903.02(A), is not the same crime as aggravated murder and that he could not be convicted of murder unless the indictment itself was changed to reflect a charge of murder rather than aggravated murder. Appellant argues that the indictment was not properly amended. As noted above, we have determined in his prior appeal that, "[t]o the indictment as amended, appellant entered guilty pleas."

Fowler, 7th Dist. No. 96 C.A. 58, 1999 WL 61063, at *1 (Feb. 1, 1999). Thus, it is an established fact in this appeal that the indictment was amended. Further, errors in the content or form of the charges in the indictment must be raised and reviewed on direct appeal rather than on collateral review of post-judgment motions. Since the error was not raised in the prior appeal, the matter is now *res judicata*. *State v. Sloane*, 7th Dist. No. 06 MA 144, 2009-Ohio-1175, ¶46.

Conclusion

{¶19} Appellant argues that his sentencing judgment entry was not a final order when it was entered in 1996, and that his indictment was not properly amended to reflect a change in the charge from aggravated murder to murder. The record reveals that the sentencing judgment entry conforms to former Crim.R. 32(B) and was a final appealable order, and that any questions regarding it or the form of the indictment are now *res judicata*. The judgment of the trial court overruling Appellant's motion to vacate his conviction and sentence is affirmed.

Donofrio, P.J., concurs.

Robb, J., concurs.