

[Cite as *State v. Brown*, 2015-Ohio-884.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101941

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JERRY V. BROWN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-94-317508-A

BEFORE: Kilbane, J., Celebrezze, A.J., and Keough, J.

RELEASED AND JOURNALIZED: March 12, 2015

APPELLANT

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Jerry Brown (“Brown”), appeals from the order of the trial court that denied his second successive “motion to correct a void sentence.” Finding no error, we affirm.

{¶2} On December 8, 1994, Brown was indicted pursuant to a six-count indictment in connection with a shooting that occurred on November 17, 1994, on Martin Luther King Jr. Drive, in front of Club 91. Brown was observed shooting a 9mm handgun in the front area of a bar known as Club 91 as it was closing and patrons were leaving. When the shooting ended, Major Sharp (“Sharp”), a patron, was dead; Eddie Parker (“Parker”), a patron, was shot in the left thigh; and two security guards, Jerome Sanders (“Sanders”) and Anthony Bolar (“Bolar”), were wounded. In Count 1, Brown was charged with the aggravated murder of Sharp, in violation R.C. 2903.01, with five mass murder specifications and one firearm specification. In Counts 2-6, he was charged with the attempted murders of Sanders, Robert Powell (“Powell”), Parker, Bolar, and Sharon Lee (“Lee”), in violation of R.C. 2903.02 and 2923.02, with a firearm specification.

{¶3} The matter proceeded to a jury trial on May 10, 1995. At the conclusion of the state’s case, the trial court dismissed Counts 3 and 6. On May 12, 1995, Brown was convicted of involuntary manslaughter, a lesser included offense of aggravated murder in Count 1, and felonious assault, a lesser included offense of Count 5, and two firearm specifications. He was acquitted of the remaining charges. The trial court sentenced Brown to a term of 8 to 25 years on Count 1, plus 3 years for the firearm specification on Count 1, consecutive to a term of 6 to 15 years on Count 5, felonious assault, for a total of 14-40 years of imprisonment, plus 3 years for the firearm specification.

{¶4} Brown filed a direct appeal to this court and asserted that the trial court erred in failing to instruct on self-defense, improperly instructed on transferred intent, failed to identify the culpable mental state for involuntary manslaughter, erred in failing to dismiss the aggravated murder charge, and the jury's verdict of guilty to involuntary manslaughter was inconsistent with its verdict of not guilty to voluntary manslaughter. This court rejected the assignments of error and affirmed. *See State v. Brown*, 8th Dist. Cuyahoga No. 69149, 1996 Ohio App. LEXIS 2711 (June 27, 1996).

{¶5} On November 25, 1996, Brown filed a motion for a new trial in which he asserted that he had been denied effective assistance of counsel. The trial court denied the motion.

{¶6} On March 19, 2001, Brown again filed a motion for a new trial, asserting that the prosecution withheld exculpatory evidence. The trial court denied Brown's motion for a new trial, and he appealed to this court. This court found no abuse of discretion and affirmed. *See State v. Brown*, 8th Dist. Cuyahoga No. 80553, 2002-Ohio-3635.

{¶7} On September 26, 2012, Brown filed a motion for de novo sentencing pursuant to Crim.R. 36, in which he maintained that his 8- to 25-year sentence for involuntary manslaughter is outside of the range for first-degree felonies, and his 6- to 15-year sentence for felonious assault is outside of the range of sentences for second-degree felonies. In opposition, the state noted that at the time of the offense and sentencing, involuntary manslaughter was an aggravated felony of the first degree, which carried a sentence of 5, 6, 7, 8, 9, or 10 years with a maximum of 25 years, and felonious assault was an aggravated felony of the second degree that carried a sentence of 3, 4, 5, 6, 7, or 8 years with a maximum of 15 years, and therefore, no sentencing error occurred. On October 26, 2012, the trial court denied this motion.

{¶8} On September 27, 2013, Brown again filed a motion for de novo sentencing, and claimed that his sentences were outside the permissible ranges. The state filed a response in which it asserted that the sentences were proper for the aggravated first-degree felony, involuntary manslaughter, and the aggravated second-degree felony, felonious assault. On August 29, 2014, the trial court denied the motion.¹

{¶9} Brown now appeals, assigning the following error for our review:

The trial court abused its discretion and erred to the prejudice of appellant and violated his due course and due process rights guaranteed to him by the fourteenth amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution, when the trial court had denied appellant's motion to correct void sentence/judgment entry based solely upon the fact that the trial court had imposed an unauthorized and void term to-wit 8 to 25 year indeterminant sentence and a 6 to 15 year indeterminant sentence upon defendant for first and second degree felonies to which term had exceeded the minimum and maximum term that could have been imposed upon the appellant.

{¶10} Within this assignment of error, Brown maintains that the trial court erred in denying his motion to correct his sentence, since the terms imposed are outside of the permissible ranges. In opposition, the state asserts that involuntary manslaughter was an aggravated felony of the first degree that carried a sentence of 5, 6, 7, 8, 9, or 10 years with a maximum of 25 years, and felonious assault was an aggravated felony of the second degree that carried of 3, 4, 5, 6, 7, or 8 years with a maximum of 15 years, so no sentencing error occurred.

¹At the time of this ruling, Brown had filed a third motion for resentencing, but that motion is not the subject of the instant appeal.

{¶11} As an initial matter, we note that the doctrine of res judicata bars the assertion of claims against a valid, final judgment of conviction that has been raised or could have been raised on appeal. *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 59, citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. Principles of res judicata also bar successive, similar motions raising issues that were previously raised. *State v. Alexander*, 11th Dist. Trumbull No. 2013-T-0100, 2014-Ohio-2710, ¶ 12.

{¶12} In this matter, the motion at issue raises claims that could have been raised on direct appeal but were not, and also raises issues that were previously raised and rejected by the trial court. As such, the motion is without merit under principles of res judicata.

{¶13} In any event, with regard to the substantive law, we note that at the time of the offense and at sentencing, involuntary manslaughter was a aggravated felony of the first degree. R.C. 2903.04(A). As such, it carried a term of 5, 6, 7, 8, 9, or 10 years with a maximum of 25 years. R.C. 2929.11(B)(1)(a). *See also State v. McClutchen*, 8th Dist. Cuyahoga No. 66538, 1994 Ohio App. LEXIS 5480 (Dec. 8, 1994). Similarly, felonious assault was an aggravated felony of the second degree. *See State v. Wells*, 8th Dist. Cuyahoga No. 82334, 2003-Ohio-4071. As such, it carried a term of 3, 4, 5, 6, 7, or 8 years with a maximum of 15 years. R.C. 2929.11(B)(2)(a); *State v. Calloway*, 8th Dist. Cuyahoga Nos. 65431, 65432, and 65433, 1994 Ohio App. LEXIS 2266 (May 26, 1994). Therefore, at the time of Brown's conviction, the trial court correctly imposed sentence.

{¶14} In accordance with the foregoing, the assignment of error is without merit.

{¶15} Judgment is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
KATHLEEN ANN KEOUGH, J., CONCUR