

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103661

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LASHAWN ATKINSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART AND DISMISSED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-09-527332-C and CR-09-527333-A

BEFORE: Blackmon, J., Jones, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: May 19, 2016

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PATRICIA ANN BLACKMON, J.:

{¶1} Lashawn Atkinson (“Atkinson”) appeals “the trial court’s decision not to resentence him after this court had remanded this case for further action by the trial court.” Atkinson assigns the following errors for our review:

I. The trial court erred when it failed to grant the defendant a new sentencing hearing.

II. The trial court erred when it imposed a consecutive sentence of one and one half years on the carrying concealed weapons charge when it had already imposed a concurrent five (5) year sentence with having weapons while under disability and these offenses are allied and appellant should have been sentenced on only one offense.

{¶2} Having reviewed the record and pertinent law, we affirm in part and dismiss in part for lack of a final appealable order. The apposite facts follow.

{¶3} On July 21, 2010, a jury found Atkinson guilty of various offenses in two criminal cases that were consolidated for trial in front of Judge Deena Calabrese, Cuyahoga C.P. Nos. CR-09-527332-C (“Case No. 527332-C”) and CR-09-527333-A (“Case No. 527333-A”). On July 26, 2010, the trial court sentenced Atkinson to an aggregate prison term of seven-and-a-half years. Atkinson appealed, and on November 17, 2011, this court affirmed in part and reversed in part, finding that his convictions for cultivation of marijuana and possession of marijuana were not supported by sufficient evidence. *State v. Atkinson*, 8th Dist. Cuyahoga No. 95602, 2011-Ohio-5918 (“*Atkinson I*”). The case was remanded to the trial court “to carry this judgment into execution.” *Id.*

{¶4} On June 15, 2012, Case No. 527333-A was reassigned and transferred to the docket currently being handled by Judge Cassandra Collier-Williams. Case No. 527332-C remained on Judge Deena Calabrese’s docket. It does not appear from either

case's docket that proceedings were had or journal entries were issued in accordance with this court's remand in *Atkinson I*.

{¶5} On August 3, 2015, Atkinson filed a "request for new sentencing hearing" in Case Nos. 527332-C and 527333-A, arguing that "the original sentencing entries have a couple of errors within these two journal entries, which has also caused the Defendant to be sentenced in excess of his original sentence* * * [and] these case(s) were not heard for resentencing after the reversal * * *."

{¶6} On September 25, 2015, the trial court in Case No. 527333-A denied Atkinson's request for new sentencing hearing, stating that "the instructions for remand from the court of appeals are in reference to Case No. 527332-C which is not assigned to this court." Atkinson filed a motion for reconsideration in both cases, which the court in Case No. 527333-A denied on October 19, 2015.

{¶7} Atkinson's request for new sentencing hearing and motion for reconsideration remain pending in Case No. 527332-C.

{¶8} On October 23, 2015, Atkinson filed this appeal. Attached to his notice of appeal are the September 25, 2015 denial of the request for new sentencing hearing in Case No. 527333-A and an April 26, 2011 sentencing journal entry in Case No. 527332-C.

New Sentencing Hearing Regarding Remand

Case No. 527333-A

{¶9} In Case No. 527333-A, Atkinson was found guilty of carrying a concealed weapon and having a weapon while under disability. These convictions were affirmed in

Atkinson I. Atkinson’s convictions for drug cultivation and drug possession, which were reversed in *Atkinson I*, are part of Case No. 527332-C; therefore, we cannot say the court erred in denying Atkinson’s request for new sentence hearing on the basis that “the instructions for remand from the court of appeals are in reference to Case No. CR-527332-C.”

{¶10} Atkinson’s first assigned error as it relates to Case No. 527333-A is overruled.

Case No. 527332-C

{¶11} The Ohio Constitution, Article IV, Section 3(B)(2) restricts appellate courts’s jurisdiction to the review of final judgments or orders of lower courts. *See also* R.C. 2505.02. As the trial court in Case No. 527332-C has not yet ruled on Atkinson’s request for new sentencing hearing, we dismiss his appeal as it pertains to Case No. 527332-C for lack of a final appealable order.

**New Sentencing Hearing Regarding Consecutive
Sentences/Allied Offenses**

{¶12} Atkinson argues in his second assigned error that he should have been sentenced on only one of his weapons convictions.

Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant 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, 180, 226 N.E. 2d 104 (1967).

{¶13} Atkinson had an opportunity to challenge his consecutive prison sentences and/or raise the issue of merger of allied offenses in his direct appeal. *See Atkinson I*. He failed to do this, and res judicata bars him from raising the argument now. Accordingly, Atkinson's second assigned error is overruled.

{¶14} Judgment affirmed as to Case No. 527333-A, and dismissed as to Case No. 527332-C.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

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

PATRICIA ANN BLACKMON, JUDGE
LARRY A. JONES, SR., A.J., and
MARY EILEEN KILBANE, J., CONCUR