

[Cite as *State v. Jackson*, 2016-Ohio-7308.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 104068 and 104450

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

THEODORE R. JACKSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-81-162099-ZA

BEFORE: Celebrezze, J., Stewart, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: October 13, 2016

FOR APPELLANT

Theodore R. Jackson, pro se
Inmate No. A590406
Lake Erie Correctional Institution
P.O. Box 8000
Conneaut, Ohio 44030

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Brett Hammond
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant, Theodore R. Jackson, brings two appeals raising similar issues about the validity of the sentence he received in 1981. This court has consolidated the appeals for review. Appellant raises several assignments of error arguing that because the journal entry of sentence evidencing his conviction and sentence for aggravated robbery lacks the signature of a judge and file stamp from the clerk of courts, the trial court erred in denying his various pleadings for sentencing, and he was never properly sentenced. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} In Cuyahoga C.P. No. CR-81-162099-ZA, on June 18, 1981, appellant was sentenced to a term of imprisonment between 7 and 25 years, to be served consecutive to a prison term for a parole violation in another case. This conviction was the result of a jury finding him guilty of aggravated robbery.

{¶3} Appellant then filed a direct appeal. This court did not dismiss the appeal for lack of a final, appealable order, and appellant did not argue that he was not sentenced or that the journal entry of sentence was improper in any way. This court reviewed the errors assigned by appellant and overruled them. *State v. Jackson*, 8th Dist. Cuyahoga No. 44093, 1982 Ohio App. LEXIS 15381 (June 3, 1982). Appellant also filed a petition for postconviction relief without raising any argument about a lack of a sentencing hearing or the journal entry. The trial court denied the petition without a hearing, and this court affirmed in *State v. Jackson*, 8th Dist. Cuyahoga No. 46251, 1983 Ohio App.

LEXIS 13789 (Sept. 29, 1983).

{¶4} On December 28, 2015, appellant filed a “Motion for Sentence via House Bill 86.” In the motion, he argued that he never received a sentencing hearing. After a review of the record, the trial court denied appellant’s motion, finding that the court’s journal entry of sentence indicates appellant had a sentencing hearing. Appellant then filed a combined Civ.R. 60(B) motion for relief from judgment and motion for reconsideration on January 20, 2016. Therein, and for the first time, he argued that the journal entry of sentence was not properly signed by the trial judge and lacked a file stamp from the clerk’s office. Prior to the court ruling on this motion, appellant filed a notice of appeal, resulting in the first appeal in the present case. The state submitted a response to appellant’s Civ.R. 60(B) motion after the notice of appeal was filed. After appellant submitted several more filings, the trial court denied appellant’s motion for relief from judgment and motion for reconsideration on April 6, 2016. The trial court called appellant’s interpretation of the record “a fiction without legal or factual support.” Appellant then filed an appeal from that decision on May 6, 2016, resulting in the second appeal in this case. These appeals were consolidated for decision.

{¶5} Appellant now raises eight assigned errors across two appeals all arguing that he was not sentenced in 1981. The first four assignments of error are from the denial of his motion for sentence, and the second four are from the denial of his motion for reconsideration and relief from judgment:

I. Imprisonment of the appellant without sentence denies due process of law and equal protection under the law in violation of Ohio Constitution

Article I, Sections 1, 2, 10, [and] 16 in conjunction with the United States Constitution[,] Amendments 5th, 6th, and 14th [sic].

II. The appellant was denied his state and federal constitutional right to counsel where as here counsel was not appointed prior to sentencing in violation of Ohio Const. Art. I, Section 1, 2, 10, 16, and United States Constitution Amendments 5th, 6th, 14th [sic].

III. Because [appellant] was not sentenced in June 1981, he possesses the legislative right to be sentenced under House Bill 86 via due course of law.

IV. The common pleas court refuses to grant appellant jail-time credit for days served in Case No. CR-81-162099, which should be a violation of his constitutional rights to due process of law and equal protection under the laws.

V. Where Ex. (A) and Ex. (A-3) are the same journal entry[,] to protect appellant's substantive right to liberty the court must order original journal entry brought before the open court for review and determination of which journal entry Ex. (A) or Ex. (A-3) speaks the truth and the court failing to do so denies appellant due process of law rights to be heard and to redress in the court of law.

VI. The appellant's judgment if obtained by fraud is void ab initio and may be challenged at anytime [sic] via Ohio Const., Art., I Sections 1, 2, 10, 16 and United States Const., Amends., 5th, 6th, and 14th [sic].

VII. The appellant has been denied his fundamental rights to speedy trial guaranteed via R.C. 2945.71 et seq[.]; 2941.401, and Ohio Const., Art. I, Section 10, in conjunction with United States Const., Amends., 6th, and 14th [sic].

VIII. Where the record demonstrates appellant has never been sentenced, and judge has never pronounced judgment or sentence in open court any attempted judgment of sentence should be null and void and of no effect as the same violates his rights to due process of law and equal protection fundamental right via Ohio Const., Art., I, Section 1, 2, 10, 16, in conjunction with United States Constitution Amends., 5th, 6th, 14th [sic] because he's imprisoned without sentence.

II. Law and Analysis

A. Motion to be Sentenced Under New Law

{¶6} Appellant raises numerous issues in the appeal from the denial of his motion to be sentenced. In that motion, he only advanced one argument to the trial court — he was never sentenced in 1981. Appellant never asserted any impropriety with the journal entry of sentence in that motion. Therefore, this court will only address what was brought before the trial court in relation to the denial of this motion.

As a general rule an appellate court will not consider an alleged error that the complaining party did not bring to the trial court's attention at the time the alleged error is said to have occurred. This rule is a product of our adversarial system of justice. "Its purpose is practical: to prevent the defensive trial tactic of remaining silent on a fatal error during trial with the expectation of demanding a reversal on appeal if the verdict is guilty." *State v. Craft* (1977), 52 Ohio App.2d 1, 4-5, 367 N.E.2d 1221, 1224. The rule is also consistent with the structure of our court system. An appellate court is not to be the first court to decide an issue; it is to review decisions made by the trial court after the lower court has had an opportunity to hear the arguments of the parties. "The traditional appeal calls for an examination of the rulings below to assure that they are correct, or at least within the range of error the law for sufficient reasons allows the primary decision-maker." Carrington, Meador & Rosenberg, *Justice on Appeal* (1976) 2.

State v. Slagle, 65 Ohio St.3d 597, 604, 605 N.E.2d 916 (1992). Issues that are not brought to the trial court's attention are generally not cognizable on appeal. This court has discretion to review them for plain error on appeal under Crim.R. 52(B). *Id.* This court does not have to exercise that discretion because the issues were sufficiently raised in appellant's motion for relief from judgment analyzed in his last four assignments of error.

{¶7} Returning to the argument actually brought before the trial court in his motion, appellant's assertion that he never had a sentencing hearing is belied by the record in this case. The journal entry of sentence indicates that appellant had a sentencing hearing. Further, appellant did not raise this issue in his direct appeal or previously on postconviction relief, and does not explain why the issue was not previously raised.¹ Also, appellant's argument relies on an assertion that can be proved or disproved by examining the transcript of proceedings. His eighth assignment of error similarly asserts that he was never sentenced. However, appellant has failed to provide a transcript. It is his obligation to do so. "The duty to provide a transcript for appellate review falls upon the appellant." *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). Where arguments rely on alleged errors that require support from the transcript and none is provided, an appellate court presumes regularity in

¹ This court exercised jurisdiction and heard the prior appeals. Therefore, this court implicitly found that the journal entry of sentence complied with Crim.R. 32 and was a final, appealable order. *See State v. Monroe*, 2015-Ohio-844, 29 N.E.3d 391, ¶ 28 (10th Dist.).

the proceedings. *Id.* (“When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court’s proceedings, and affirm.”). Here, that presumption is not overcome.

{¶8} Appellant’s first, third, fourth, and eighth assignments of error are overruled.

B. Appointment of Counsel

{¶9} In his second assignment of error, appellant argues that he was denied his constitutional rights to counsel when the court did not appoint counsel to represent him prior to denying his motion for sentencing.

{¶10} Appellant was previously sentenced as discussed above. Therefore, appellant’s motion is a civil, collateral attack on his sentence. “The right to counsel in civil, collateral attacks on valid criminal judgments is not constitutionally required.” *State v. Mack*, 8th Dist. Cuyahoga No. 101261, 2015-Ohio-2149, ¶ 55, citing *State v. Mapson*, 41 Ohio App.3d 390, 391, 535 N.E.2d 729 (8th Dist.1987). Therefore, he is not entitled to appointed counsel. Appellant’s second assignment of error is overruled.

C. Civ.R. 60(B)

{¶11} In appellant’s second appeal encompassing his last four assignments of error, he raises issues with the denial of his motion for relief from judgment. Appellant filed a motion for relief from judgment and for reconsideration following the trial court’s

decision to deny appellant's motion for sentencing. There, and for the first time, he raised an argument that the journal entry of sentence was not properly signed and journalized. He used this assertion to argue that he was never sentenced, his incarceration is unlawful, he must be sentenced under revised sentencing laws set forth in 2011 Am.Sub.H.B. No. 86, and given jail-time credit.

{¶12} A motion for relief from judgment may relieve a party from a final judgment in certain circumstances set forth in Civ.R. 60(B):

(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment.

The motion must also be timely filed — generally within one year. *Id.*

{¶13} Here, appellant asserts that the journal entry of sentence is invalid because it does not satisfy the requirements of Crim.R. 32. All of his arguments flow from that proposition.

{¶14} Crim.R. 32(C) requires a journal entry of sentence to contain, “the fact of conviction and the sentence. * * * The judge shall sign the judgment and the clerk shall enter it on the journal.” “[T]he purpose of Crim.R. 32(C) is to ensure that a defendant is on notice concerning when a final judgment has been entered and the time for filing an appeal has begun to run.” *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958

N.E.2d 142, ¶ 10, citing *State v. Tripodo*, 50 Ohio St.2d 124, 127, 363 N.E.2d 719 (1977); App.R. 4(A).

{¶15} Appellant asserts that the journal entry of sentence in this case was not signed by the trial judge or journalized by the clerk. However, the record in this case contains a journal entry of sentence that is both signed by the trial judge and time stamped by the clerk. The entry submitted to the trial court by the state more clearly demonstrates the trial court signed the entry and the stamp from the clerk's office is more legible. However, the entry that appears in the record also bears a faint stamp near the upper right-hand corner of the document, and a faint signature. Therefore, appellant's arguments about the invalidity of this entry is belied by the record. This court does not find that appellant's entry of sentence is missing any requirement set forth in Crim.R. 32(C). Accordingly, appellant's entry of sentence is valid, and res judicata bars appellant's claims to be sentenced under H.B. 86. Therefore, appellant is not entitled to jail-time credit, his speedy trial rights were not violated, and appellant is not entitled to a hearing on his motion. Appellant's fifth, sixth, and seventh assignments of error are overruled.

III. Conclusion

{¶16} Appellant was sentenced in 1981 and a final entry of sentence was issued at that time. Appellant has not provided anything to this court to show otherwise. He argues a violation of Crim.R. 32 that would make his journal entry of sentence invalid, but that argument is belied by the record in this case.

{¶17} Judgment 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.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., and
SEAN C. GALLAGHER, J., CONCUR