

IN THE SUPREME COURT OF OHIO

ORIGINAL

Sylvester J. Hunter

Court of Appeal No. E-16-058

Appellant/Defendant

ON APPEAL FROM THE ERIE COUNTY
COURT OF APPEAL SIXTH APPELLATE
DISTRICT

-VS-

State of Ohio

Appellee/Plaintiff

17-0358

MOTION FOR DELAYED APPEAL

Sylvester J. Hunter #490-242

North Central Correctional Complex

P.O. Box 1812

Marion Ohio, 43301-1812

Pro Se Counsel

Kevin J. Baxter #0015782

Erie County Prosecutor Attorney

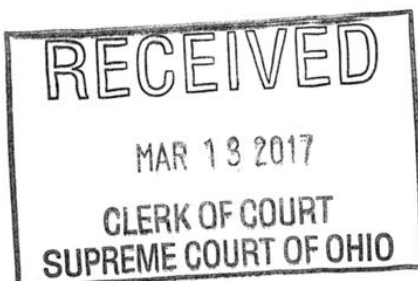
Mary Ann Baryski #0038856

Chief Assistant Prosecutor Attorney

247 Columbus Avenue, Suite 319

Sandusky Ohio, 44870

Counsel for Appellee, State of Ohio



The date of the Sixth Appellate District, Decision and Judgment Entry being appeal. DEC 15, 2016 and DEC 16, 2016.

I Sylvester J. Hunter did file my Memorandum in Support of Jurisdiction on time but in my haste to get it filed within the 45 days I forgot to put a Certificate of Service for Memorandum in Support of Jurisdiction and because of the Rule of Practice of The Supreme Court of Ohio the Clerk of the Court could not file my Memorandum in Support of Jurisdiction and now I am filing a Motion for Delayed Appeal.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion for Delayed Appeal to The Supreme Court of Ohio was sent this 8 day of March, 2017 to Chief Assistant Prosecutor Mary Ann Barski of Erie County, 247 Columbus Avenue, Suite 319 Sandusky Ohio, 48870.

RESPECTFULLY SUBMITTED



Sylvester J. Hunter #490-242

Defendant/Counsel Pro Se

AFFIDAVIT

FACTS THAT SUPPORT, MOTION FOR DELAYED APPEAL

I Sylvester J. Hunter did file my Memorandum in Support of Jurisdiction on time but in my haste to get it filed within the 45 days I forgot to put a Certificate of Service for Memorandum in Support of Jurisdiction.

The appellant is dealing with a prison that is understaffed and without a librarian that can open the library on time every day it has become very hard to perfect an appeal. The library may only be open 3 hours a week and then I am competing with a 100 other inmates for very limited resources and every law book, typewriter, I need to perfect a memorandum in support of jurisdiction and this is only part of what I am dealing with to get this appeal out on time.

There are other facts that will support my delayed appeal and why the Supreme Court of Ohio should accept my motion for delayed appeal and grant the defendant leave to file memorandum in support of jurisdiction in this court.

I would like to bring the court attention to the Sixth Appellate District who put a Mandate on the defendant case deriving out of Erie County Common Pleas Court, Trial Court No. 2004-CR-061.

The Sixth Appellate District is attempting to deny the appellant access to the court on legitimate legal issues that was never ruled on by the appellate court in its decision and judgment.

This case deals with numerous violations of the law and countless violations of the Ohio Constitution, The Sixth Amendment due process, disregard of the statutory requirements of 2951.03 presentence investigation report in felony case, violation of criminal rule 32 (C) one document rule, violation of 2505.02 final order, violation of Sup rule 7, filing and judgment,

Under Ohio Const. art. IV, § 3 (B) (2) never had subject-matter jurisdiction to review the defendant case from the inferior court.

The Ohio Adult Parole Authority extended my time when never had the authority or the jurisdiction to take control over the defendant case under the constitution of Ohio and the United States.

This is why it's so important that this Court allow this case to go forward in this Motion for Delayed Appeal.

AFFIDAVIT
FACTS THAT SUPPORT, MOTION FOR DELAYED APPEAL



Affiant

Sworn to, or affirmed, and subscribed in my presence this 8 day of
March, 20 17. **



Notary public



BROOKE L. MILLER
NOTARY PUBLIC

STATE OF OHIO

My Comm. Expires June 23, 2018

A-1

FILED
COURT OF APPEALS
ERIE COUNTY, OHIO

2016 DEC 15 PM 2:26

LUCYDA S. NELSON
CLERK OF COURTS

MANDATE

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTYFILED
COMMON PLEAS COURT
ERIE COUNTY, OHIO
2016 DEC 16 AM 9:14
LUCYDA S. NELSON
CLERK OF COURTS

State of Ohio

Appellee

v.

Sylvester Hunter

Appellant

Court of Appeals No. E-16-058

Trial Court No. 2004-CR-061

DECISION AND JUDGMENT

Decided: DEC 15 2016

This matter is before the court on the motion of appellee, the state of Ohio, to dismiss the appeal as barred by the doctrine of res judicata. Pro se appellant, Sylvester Hunter, has not filed a memorandum in opposition. For the following reasons, appellee's motion to dismiss is granted.

Relevant Procedural Background

The relevant procedural background of Hunter's conviction has been set forth by this court as follows:

1.

J776/571
12/16/16J37/961
12/16/16

Hunter was indicted by an Erie County Grand Jury on February 13, 2004, on one count of rape and one count of burglary. The case was tried to a jury beginning June 29, 2005. The jury found Hunter guilty of rape, but not guilty of burglary. He was sentenced to a prison term of 10 to 25 years, with 10 years' actual incarceration. The judgment and sentence were memorialized in a judgment entry journalized on July 22, 2005.

Hunter appealed the July 22, 2005 judgment, arguing (1) the trial court erred in admitting the rape kit and testimony concerning its analysis, (2) the jury verdict was against the manifest weight and sufficiency of the evidence, and (3) the court erred in allowing the state to explain that it was able to identify a DNA match because Hunter's DNA was in the Combined DNA Index System due to his involvement in other criminal proceedings. We affirmed the trial court judgment. *State v. Hunter*, 169 Ohio App.3d 65, 2006-Ohio-5113, 861 N.E.2d 898 (6th Dist.).

On January 22, 2007, Hunter filed an application for reopening. He argued that he was not permitted to cross-examine the doctor who took the rape kit, the judge allegedly made improper statements to the venire, a sheriff's deputy was present during his discussions with his attorney, and the judge improperly instructed the jury on the elements of theft. The state objected to the application as untimely and not in compliance with App.R.

26. We denied Hunter's application on March 12, 2007, as failing to set forth a colorable claim of ineffective assistance of counsel.

On May 8, 2015, Hunter filed in the trial court a "Petition to Vacate or Set Aside Judgment to Conviction or Sentence." Though captioned in this manner, Hunter (correctly) referred to it in the body of the petition as one for postconviction relief. In it, he cited *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, and argued that his sentence was void because the court engaged in judicial fact-finding in imposing the maximum prison sentence. The state opposed the petition as untimely under R.C. 2953.21. It also argued that *Foster* was decided on February 27, 2006, while Hunter's appeal was pending, yet Hunter filed no notice of additional authority at that time, instead waiting nine years to file his petition. The trial court, in a judgment journalized on July 21, 2015, denied Hunter's petition as untimely.

State v. Hunter, 6th Dist. Erie No. E-15-049 (June 10, 2016).

Hunter appealed the trial court's denial of his petition for postconviction relief. In his appeal, he argued that his sentence was void, and not barred by the doctrine of res judicata. Specifically, he argued that he was improperly sentenced for the 1995 rape under versions of R.C. 2929.10(B)(2)(d) and 2929.14(B) and (C) that did not become applicable until July 1, 1996. Hunter also made arguments related to the presentence investigation report, and that the contents of the report became elements of the offense

that should have been submitted to the jury and proven beyond a reasonable doubt. Furthermore, he "argue[d] that the trial court improperly sentenced him for an 'aggravated' felony of the first degree despite the fact that 'aggravated' did not appear in either the indictment or the jury verdict forms."

In affirming the trial court's judgment, this court held that Hunter's sentence is not void. *Id.* Upon reviewing issues related to the presentence investigation report, this court further found that "res judicata bars Hunter from raising these purported errors because they could have been raised on direct appeal, or at the very least, in Hunter's January 22, 2007 application for reopening." *Id.*

Appellee's Motion to Dismiss

The record reflects that Hunter has now filed a notice of appeal from a September 6, 2016 judgment of the Erie County Court of Common Pleas that denied his "Motion for Resentencing on a Void Sentence." While it is difficult to understand appellant's motion filed in the trial court on August 3, 2016, he made arguments very similar to those contained in his petition for postconviction relief. Appellant argued that his sentence is void because of an error in the proposed jury instructions where the judge instructed the jury to determine whether appellant had a prior conviction, even though that prior conviction was not stated in the indictment. Furthermore, appellant argued that the trial court failed to permit appellant's counsel to read the presentence investigation report prior to his sentencing for the rape charge.

The state has filed a motion to dismiss the appeal from the September 6 judgment arguing that res judicata bars the appeal. This court agrees.

This court has previously determined that Hunter's sentence is not void. *Id.*, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 29 (clarifying that "pre-Foster sentences imposed after judicial fact-finding and falling within the statutory range are voidable," not void). Therefore, res judicata bars Hunter from raising these purported errors at this time because they could have been raised on direct appeal. *Id.*, citing *State v. Hayes*, 6th Dist. Erie No. E-13-053, 2014-Ohio-1297, ¶ 6 ("Issues that could have been raised on direct appeal are barred from consideration in a motion for postconviction relief by the doctrine of res judicata.").

Conclusion

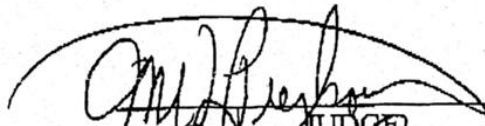

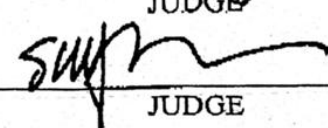
Appellee's motion to dismiss is granted. This appeal is dismissed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

Arlene Singer, J.

Stephen A. Yarbrough, J.
CONCUR.


JUDGE

JUDGE

JUDGE

5.

I HEREBY CERTIFY THIS TO BE
A TRUE COPY OF THE ORIGINAL
FILED IN THIS OFFICE.

LUVADY S. WILSON, CLERK OF COURTS
Erie County, Ohio

By 