

IN THE SUPREME COURT OF OHIO

17-1321

STATE OF OHIO : CASE NO:

Plaintiff/Appellee : On Appeal from the Hardin
-v- County Court of Appeals, Third
DONALD A. GAMMON, II : Appellate District

Defendant/Appellant : C.A. CASE NO. 6 17 09

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT DONALD A. GAMMON, II

DONALD A. GAMMON, II
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DEFENDANT/APPELLANT

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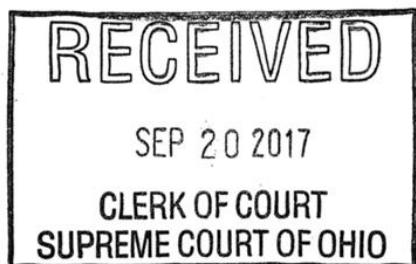


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Judgment Entry, Third Appellate District, Hardin County, Ohio, entered on
the 21st day of August 2017.

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL
INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

It is well established that flagrant violations of State laws are cognizable as due process concerns under the Fourteenth Amendment.

The crux in the case sub judice is can a defendant waive his right of due process when the tainted plea and created sentence ignores the controlling language of the Ohio General Assembly and this Court's myriad of rulings which prohibits arbitrary and capricious actions by the lower courts?

Despite this Court's most recent holdings, the lower courts determined that "[i]t is well settled that 'pursuant to res judicata, a defendant cannot raise an issue in a [petition] for post-conviction relief if he or she could have raised the issue on direct appeal.'" In contradiction of this theory, the lower court's held that Appellant's sentence "was not reviewable for direct appeal."

Notwithstanding the judicial paradox in the case sub judice, "res judicata" is a rule of fundamental and substantial justice, that is to be applied in particular situations as justice and fairness require, and is not to be applied so rigidly as to defeat the ends of justice.

This Court nor the legislature intended the lower courts to create their own sentences and prohibit any review that ignores full compliance of Ohio law.

Common sense nor the Constitution supports denial of a clear right.

STATEMENT OF THE CASE AND FACTS

On April 28, 2017, Donald A. Gammon, II, hereinafter Appellant, submitted a Motion to Set Aside Judgment pursuant to this Court's retrospective holdings of Am.Sub.H.B. No. 86.

On May 5, 2017, the trial court denied said motion finding Appellant "joined in the joint sentencing recommendation including imposition of consecutive sentences and can not now complain about said sentences."

On August 21, 2017, the Third Appellate District invoked this Court's holdings that "challenges to a trial court's judgment as to whether sentences must be served concurrently or consecutively 'must be presented in a timely appeal.'"

Reasonable jurists would agree that if Appellant cannot have access to appellate review, when could he present a clear error of current Ohio law.

Despite the fundamental principle of stare decisis that a court is bound by and must follow decisions of a court of supreme jurisdiction, the lower courts have attempted to over-shadow this Court's recent holdings in order to trump justice.

PROPOSITION OF LAW I

The courts committed prejudicial error in creating a sentence that conflicts with Ohio law

As decided by this Court on November 2, 2016, in **State V. Thomas**, 2016-Ohio-7561; 2016 Ohio LEXIS 2701, the courts must apply the appropriate statutory construction provision, H.B. 86 controls." Moreover, this Court held that the courts violated the right of due process under the Fourteenth Amendment to the United States Constitution, Article I, Section 16 of the Ohio Constitution, by imposing a harsher sentence than intended by the legislature.

When a statute directs a court to make findings before imposing a particular sentence, a failure to make those findings is "contrary to law." R.C. §2929.14(C)(4) requires the court to make the specific findings that are absent from Appellant's created sentence.

The "post-Foster era" ended with the enactment of H.B. 86 and the "revival" of statutory findings necessary for imposing consecutive sentences. This requisite is a predicate prior to imposing consecutive sentences.

The United States Supreme Court has recognized that "Ohio appears to be unique in having a rule that sentences of imprisonment shall be served concurrently." The imposition of consecutive sentences in Ohio is thus an exception to the rule that sentences should be served concurrently.

The authority to sentence in criminal cases is limited by the people through the Ohio Constitution and by our legislators through the Revised Code. No court has the inherent power to create sentences.

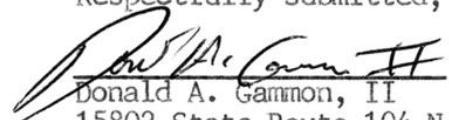
In **State v. Williams**, 2016-Ohio-7658; 2016 Ohio LEXIS 2782, this Court determined that a court only has authority to impose a sentence that conforms to law. More importantly, and contrary to the lower courts, "res judicata" does not preclude a court from correcting those sentences after a direct appeal.

In **State v. Fischer**, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, this Court likewise held: "Ohio jurisprudence on void sentences reflects a fundamental understanding of constitutional democracy that the power to define criminal offenses and prescribe punishment is vested in the legislative branch of government, and courts may impose sentences only as provided by statute." (emphasis added).

-CONCLUSION-

No court has the power to substitute a different sentence for that provided by statute or one that is greater than that provided for by law and warrants this Court to accept jurisdiction.

Respectfully submitted,


Donald A. Gammon, II
15802 State Route 104 N
Chillicothe, Ohio 45601

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was forwarded by regular U.S. Mail to Bradford W. Bailey, Hardin County Prosecutor, One Courthouse Square, Suite 50, Kenton, Ohio 43326, on this 15th day of September 2017.



Donald A. Gammon, II

IN THE SUPREME COURT OF OHIO

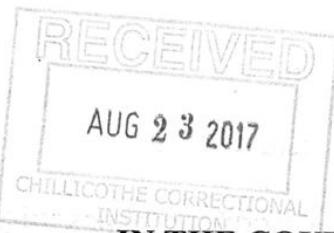
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Plaintiff/Appellee : On Appeal from the Hardin
-v- : County Court of Appeals, Third
DONALD A. GAMMON, II : Appellate District

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APPENDIX TO

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT DONALD A. GAMMON, II



FILED
HARDIN COUNTY
COURT OF APPEALS
3rd APPELLATE DIST.

AUG 21 2017

Carrie L. Haudenschild Clerk
Hardin Co. Court of Appeals

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
HARDIN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 6-17-09

v.

DONALD ANDREW GAMMON, II,

JUDGMENT
ENTRY

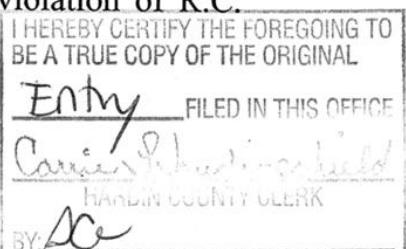
DEFENDANT-APPELLANT.

This appeal, having been placed on the accelerated calendar, is being considered pursuant to App.R. 11.1(E) and Loc.R. 12. This decision is therefore rendered by summary judgment entry, which is only controlling as between the parties to this action and not subject to publication or citation as legal authority under Rule 3 of the Ohio Supreme Court Rules for the Reporting of Opinions.

Defendant-appellant, Donald Gammon II (“Gammon”), appeals the May 5, 2017 judgment entry of the Hardin County Common Pleas Court denying Gammon’s motion to set aside judgment. Because we find the denial was proper as set forth by the trial court, we affirm the trial court’s decision to deny the motion.

Facts and Procedural History

On March 29, 2012, Gammon was charged, by way of a Bill of Information, of the following crimes: seven counts of Sexual Battery, in violation of R.C.



2907.03(A)(5), felonies of the third degree (Counts One, Two, Three, Four, Five, Seven and Eight); and Disseminating Matter Harmful to Juveniles, in violation of R.C. 2907.31(A)(1), a felony of the fifth degree (Count Six). That same day, Gammon entered a guilty plea to seven counts of Sexual Battery, felonies of the third degree, and one count of Disseminating Matter Harmful to Juveniles, a felony of the fifth degree.

Gammon waived a pre-sentence investigation and the Court proceeded with sentencing. By its judgment entry filed April 2, 2012, the trial court sentenced Gammon to two years of incarceration on each count included in the Bill of Information, with those sentences to be served consecutively to each other. Gammon did not appeal his sentence as he had agreed to consecutive sentences.¹

On May 1, 2017, Gammon filed a motion to set aside judgment, asserting in part that his sentence should be vacated because the trial court failed to make requisite findings under R.C. 2929.14(C)(4). By its entry filed May 5, 2017, the trial court denied Gammon's motion, stating “[t]he Defendant having joined in the joint sentencing recommendation including imposition of consecutive prison sentences may not now complain about said sentences * * *”. (Doc. 41).

It is from this entry that Gammon filed his notice of appeal raising the following assignment of error for our review:

¹ Even though the trial court refers to a Joint Sentencing Agreement, the record on appeal fails to provide us with a copy. However, the appellant *does not* contest its existence, and we will proceed accordingly.

Assignment of Error

**THE LOWER COURT COMMITTED PREJUDICIAL ERROR
IN ITS NON-COMPLIANCE WITH THE LEGISLATURE.**

Under his sole assignment of error, Gammon contends the trial court failed to comply with the requirements of R.C. 2929.14(C)(4) by imposing consecutive terms of imprisonment.

Res Judicata

Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or 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 (1967), paragraph nine of the syllabus. Further, "[i]t is well-settled that, 'pursuant to res judicata, a defendant cannot raise an issue in a [petition] for post-conviction relief if he or she could have raised the issue on direct appeal' ". *State v. Lindsay*, 5th Dist. Richland No. 16CA39, 2017-Ohio-595, citing *State v. Elmore*, 5th Dist. Licking No. 2005-CA-32, 2005-Ohio-5940, ¶ 21, quoting *State v. Reynolds*, 79 Ohio St.3d 158, 161 (1997).

Analysis

In the case *sub judice*, Gammon's claim that the trial court erred by imposing consecutive sentences could have been raised through a direct appeal from his

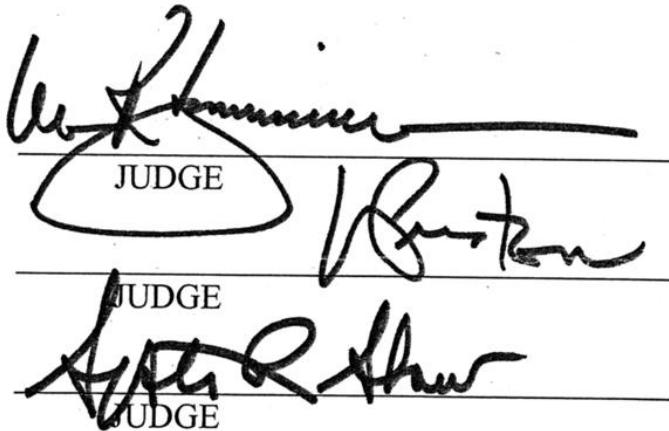
conviction. *State v. Adams*, 10th Dist. Franklin No. 14AP-623, 2015-Ohio-868, ¶ 8 (defendant's claim that the trial court erred by failing to make the findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences could have been raised in his direct appeal, and thus "any further review of defendant's sentence is barred by res judicata"); *State v. Petitto*, 8th Dist. Cuyahoga No. 99893, 2013-Ohio-5435, ¶ 13 (defendant's claim that the trial court imposed consecutive sentences without making appropriate findings "could have and should have been raised in a timely filed appeal" from trial court's sentencing entry, and therefore "this claim is now barred by the doctrine of res judicata"); *State v. Ferrell*, 5th Dist. Stark No. 2013CA00121, 2013-Ohio-5521, ¶ 15 ("Appellant either raised or could have raised arguments regarding the appropriateness of consecutive sentences * * * during his direct appeal. Accordingly, any such argument is barred under the doctrine of res judicata.").

In this appeal, Gammon challenges the trial court's compliance with R.C. 2929.14(C)(4) by sentencing him to consecutive sentences. However, the Ohio Supreme Court has determined that challenges to a trial court's judgment as to whether sentences must be served concurrently or consecutively *must be presented in a timely direct appeal*. *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, ¶ 8. (Emphasis added). Since Gammon's appeal attacks the trial court's sentencing order and could have been addressed (by Gammon) on direct appeal, we find under

Holdcroft, that *res judicata* applies in this matter which prevents us from reviewing this appeal. Accordingly, Gammon's sole assignment of error is not well taken and overruled.

Accordingly, for the aforementioned reasons, it is the order of this Court that the Judgment Entry of the Hardin County Court of Common Pleas be, and hereby is, affirmed. Costs are assessed to Appellant for which judgment is hereby rendered. This cause is remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this judgment entry to the trial court as the mandate prescribed by App.R. 27, and serve a copy of this judgment entry on each party to the proceedings and note the date of service in the docket as prescribed by App.R. 30.



Lee K. Gammon
JUDGE

K. R. Burton
JUDGE

A. P. Arthur
JUDGE

DATED: August 21, 2017

/jlr