IN THE SUPREME COURT OF OHIO

Mr. Mickey L. Draughon
Appellant,

Supreme Court # 23-0164

-VS-

On Appeal from The Franklin
County Court of Appeals,
Tenth Appellate District.

State Of Ohio,

Court Of Appeals No. 22AP000182

Appellee.

Memorandum in Support of Jurisdiction
Of Appellant Mr. Mickey L. Draughon

Mr. Mickey L. Draughon # 350-843
Chillicothe Correctional inst.
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EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case is of Great Importance to all citizens of Ohio who are dependent upon fair and equitable treatment from its government and its judicial system. The lower courts have not only defied the Ohio Supreme Courts well established principles of law, concerning its retroactivity laws, but has also completely ignored all statutory mandates involving the enhancement of sentences for individuals accused of a sexually violent predator offense.

A decision from this Supreme Court will provide clarity to the lower courts of what is essential, as well as what must be done inside all Ohio court rooms when imposing sanctions involving enhancements to a defendant's sentence. It will provide clarity and appropriate guidelines once an error has been discovered and that are prohibited by Ohio law, and that currently takes place in appellate courts. Particularly, when all parties have brought to the attention of an appellate court that it was their appeals court that had rendered an erroneous ruling, stating that the appellant was properly adjudicated as a sexually violent predator, instead of the trial court making their own determination. It is well established law that an appellate court may not substitute its judgment for that of the trial courts. This is what occurred, here in the case at bar, where the appellate court exceeded its authority and acted as a trial court and imposed or pronounced its sentence upon the defendant-appellant.

This case is important to all Ohio citizens, because it will restore the faith and confidence in the appeals process that has repeatedly shown a complete lack of desire to correct mistakes in its judgments, when it has become clear that obvious errors were committed by its appeals

courts. Correspondingly, it will restore the true meaning of the definition 'meaningful access to the courts', as intended by the United States and the Ohio Constitutions.

STATEMENT OF THE CASE AND FACTS

On March 28 1997, defendant-appellant was indicted on one count of aggravated burglary in violation of R.C. 2921.11, one count of aggravated robbery in violation of R.C. 2911.01, two counts of robbery in violation of R.C. 2911.02, one count of rape in violation of R.C. 2907.02 and one count of kidnapping in violation of R.C. 2905.01. All counts included specifications that defendant-appellant was a repeat violent offender.

The case was tried before a jury, but the specifications were tried separately by the trial court. At the completions of trial, the jury returned their verdict, finding appellant guilty of one counts of aggravated burglary two counts of robbery, one count of rape, and one count of kidnapping. The court found appellant to be guilty of all the related specifications (repeat violent offender) but only adjudicated appellant to be a sexual predator.

The trial court sentenced appellant to Ten years for the aggravated burglary. Five years for the two counts of robbery (the two robberies merged for purpose of sentencing). Ten years to life for the rape conviction and kidnapping conviction (the rape and kidnapping convictions merged for purpose of sentencing). The trial court then ordered the sentences to run concurrent with each other, with an additional ten years because appellant was a repeat violent offender. While conducting a separate hearing, as noted by court entries, and pursuant to R.C. 2950.09 that was formerly in effect, the trial court adjudicated [Appellant] as a 'Sexual Predator'. See: [Draughon II] which is located under 2012-Ohio-1917 at {pg. 2} The appellant then filed a timely direct appeal, which was affirmed on

September 1, 1998, while a subsequent application for reopening [App R. 26(B)] was filed and denied on December 1, 1998.

The Ohio Supreme Court denied appellant's motion to file a delayed appeal. See: 84 Ohio ST. 3d 1473, 704 N.E. 2d. 580 (1999). On October of 2000 appellant filed an untimely motion for post-conviction relief which the trial court denied on November of 2000. See: State –vs- Draughon C.P. No. 97CR03-1733 (No ember 16, 2000). As the record clearly demonstrates, the appellant has filed numerous motions to have his sentence corrected, while the lower courts continue to deny his claims based upon the doctrine of res judicata.

On November 10, 2021 the appellant then filed a pro se, motion for a Nunc Pro Tunc Order, to vacate and set aside a portion of the defendant's sentence. The complete record reflects that the imposition of said sentence did not comport with statutory requirements and was therefore contrary to law. The defendant-appellant clearly stated in this motion that he was never adjudicated by the trial court to be a sexually violent predator. By decision and entry filed January 5, 2022 the trial court denied appellant's motion and held that, "The issue raised by appellant in his motion allegedly occurred during sentencing, and the defendant could have, but did not, raise the issue at the time of sentencing or on direct appeal. As a result, the issue is barred by the doctrine of res judicata. See: [January 5, 2022 decision at 2.] The court did not indicate, in any way, that appellant's claim was incorrect or lacked merit. This will be discussed further within appellant's propositions of law.

Throughout these Nunc Pro Tunc proceedings, both the trial court judge and the prosecutor admitted, and/or agreed that it was the Tenth Appellate District Court of Appeals that inadvertently declared appellant to be a sexually violent predator and it was not the trial court who first made this

determination. Nevertheless, the Tenth Appellate Court still refuses to order the sentence to be corrected in the best interest of justice.

In the case at bar, the appellate court acted outside the scope of its authority; thus, becoming a sentencing court, opposed to a reviewing court. On September 1, 1998, the appellate court did, wrongfully state, that the appellant's argument was that the trial court never adjudicated him as a sexual predator. This statement made by the appellate court is incorrect. The appellant has always maintained that the trial court did properly find him guilty as a sexual predator. Nevertheless, appellant continues to strongly assert that he was never adjudicated or declared to be a sexually violent predator. This matter of law leads to this appeal being taken.

ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law Number One

The appellate court denied appellant substantive due Process and equal protection of the law under the 1st, 5th, and14th, amendments to the United States Constitut-Ion, where it ignored the trial court and prosecutors Findings of fact, and substituted its judgment for that Of the trial court in contravention of its function as a Reviewing court

Appellant, Mickey L. Draughon, respectfully submits that in the case of William –vs- Kisling Nestico & Redick LLC, 2022-Ohio-1044 (the Dist AT HN9) an appellate court's function as a court of review should not exceed the scope of its authority when it analyses, in the first

instance, issues that have not first been addressed by the trial court. The defendant-appellant contends that similar issues have repeatedly been presented to the courts; however, the defendant, has not until recently, gotten both the trial court judge and the prosecuting attorney to agree that he was never adjudicated as a sexually violent predator until now.

Upon these finding, the appellant then requested for the trial court to issue a Nunc Pro Tunc order so that the record would then reflect what did actually occur during the sentencing portion of his trial. These findings were predicated on the former trial court judge deciding not to adjudicate and/or declare the appellant to be a sexually violent predator. See R.C. 2971.01(H)(1)(2)(a)-(f). This fact was made evident in the appellee's brief where it was stated, "It was the Tenth Appellate District Court who actually declared appellant to be a sexually violent predator." It was therefore not the trial court that initially made this determination. The Tenth Appellate Court has thus denied defendant-appellant's request for this nunc pro tunc order based upon the doctrine of res- judicata, despite the trial courts own findings.

According to the case of Leiby -vs- Univ of Akron, 2006-Ohio-2831 (10th Dist AT HN1 this very same court stated that, "A court may not add matters to the record that was not a part of the trial court proceedings, and decide an appeal based on the new matter." See also MacAuley -vs- Smith, (198) 82 Ohio ST. 3d 393, 396, 696 N.E. 2d 575 AT [***5]. Rather, an appellate review is limited to the record as it existed at the time the trial court rendered its judgment. (This did not occur in the case at bar.) The only dispute in question here is whether the trial court properly relied upon the doctrine of res judicata when it denied correction of the sentence, and this classification error which was found or contained in the record.

The appellant directs this courts attention to the case of Re Estate of Zeak, 2022-Ohio-951 (10th Dist AT HN6, which states that, "An appellate court is contained by the record of the appeal when an appellate court cannot consider evidence outside the record created before the trial court. An appellate court is then precluded from considering it.". (Also an issue that did not occur in the case at bar.)

Appellant contends that in his original appeal and all subsequent appeals he was never adjudicated as a sexually violent predator but was only declared to be a sexual predator. The Tenth Appellate Court added to the record as the courts journal entries only make mention of a sexual predator adjudication. (registration and classification.) Therefore, the enhancement of his sentence was done contrary to law, and in violation of the appellant's constitutional and statutory rights, to be present when this sentence was modified by the appellate court. This court never remanded this case back to the trial court for resentencing, so as to be in accordance with the law and the trial records.

Appellant submits that in Re Estate of Wise, 2005-Ohio-564 (10th Dist AT HN3) the opinion by this court is extremely important because it states that, "The duty of the appellate court is to decide 'controversies' between the parties and to enter judgments capable of enforcement. Again in Ohio Patrolman's Benevolent Assn –vs- McFaul 144 Ohio App. 3d 311 (8th Dist. AT HN2 that court stated that, "ordinarily when there is no case in controversy there will be no appellate review unless the underlying legal issue is capable of repetition, yet evading review." See: Adkins-Vs-McFaul (1996) 76 Ohio St. 3d 350. The issue of whether the appellant's claim had merits was not subject to the appeal, as stated in Rummeloff -vs- Rummeloff, 2022-Ohio-1224 (1st Dist AT HN4) stating, "It is well settled in Ohio that court's

will not issue advisory opinions to the end. Courts must avoid giving opinions on abstract propositions; as court's must also avoid ruling on an appeal that is moot," citing Miner -vs- Witt, 82 Ohio St. 237 (1910) stating a case is moot, "If at any time or stage there ceases to be an actual controversy between the parties." Id AT 8.

This shows that if what the trial court and prosecutor has stated in its findings are true, the appellant was denied his constitutional rights, to be present at his sentencing, as the appellate court sentenced appellant to the sexually violent predator status and not the trial court. In Day (1940) 136 Ohio St. 477 26 N.E. 2d 1014, this court states, "A judgment entry is invalid because the sentence was modified in the defendant's absence." Though this court usually follows the Carpenter case in Hamilton County, 1996 Ohio App. LEXIS 3434 stating in part, 'whether the trial court' journal entry is erroneous or not, we find that the matter has become res-judicata. Appellant respectfully maintains that res-judicata was not designed to work an injustice or to defeat the ends of justice. Therefore, it should not be applied so rigidly as to do so. See: State -vs- Tinney, 2014-Ohio-3053 (5th Dist). Here, in the case at bar, a manifest injustice has clearly occurred. A manifest injustice is defined as a clear or openly unjust act that involves extraordinary circumstances. It is a fundamental flaw in the path of justice, so extraordinary, that the defendants could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her.

Appellant submits that for this court to allow the lower court to use res-judicata in all cases would be to allow the courts to take full advantage of all those individuals who are uneducated and thus totally reliant upon court appointed appellate counsel, who may or may not be preforming in defendant's best interest.

Appellant, respectfully brings to this courts attention that when a sentence pronounced in open court is subsequently modified, and the judgment entry reflects the modification, the modification must have been made in the defendant-appellant's absence. See: State -vs- Wilson, 1996-Ohio-App LEXIS 1798 unreported. Crim. Rule 43 (A) is clear. It states that, "A defendant shall be present at the arraignment, and every stage of the trial including the impaneling of the jury, the return of the verdict, and the imposition of the sentence." Although the defendant was present in open court when the first sentence was imposed, there is no evidence in the records that he was present when the harsher modification was journalized by the appellate court who is **not** a sentencing court. The appellant had the right to due process, which has been embodied in Crim. R. 43 (A), to be present when his sentence was modified from a sexual predator to a sexually violent predator classification status.

In conclusion, the defendant-appellant submits that he is invoking the doctrine of res Ipsa-loquitur. This is the doctrine that," THE THING SPEAKS FOR ITSELF." See: McNeilan -vs- Ohio State Univ Med Ctr, 2011-Ohio-678 (10th Dist). The purpose for this is because the trial court speaks through its journal entries, and the imposition of a sentence in a written journal entry of a judgment. that does not agree with the previously oral pronouncement by a trial court imposed in a criminal matter, becomes extremely problematic. As previously stated, "a court speaks through its journal entries so 'great care' should be taken in its preparation.

In State -vs- Imgels, 2020-Ohio-4367 (1st Dist AT HN3 citing: the United States Supreme Court, this court stated that, "While a court may impose a harsher sentence upon a defendant after retrial, it may not do so as a punishment for exercising the right to appeal." In the case at bar, the trial court records never reflect or indicate that the trial court ever declared appellant

to be a sexually violent predator, as both the trial court and the prosecutor have both agreed with the appellant, that it was the appellate court who made this declaration during appellant' review in 2012. This determination by the Tenth District Appellate Court occurred approximately fourteen years (14) after his sentence was impose by the trial court. It is for these reasons that the appellant states that this case must be reversed and remanded back to the trial court for re-sentencing.

PROPOSITION OF LAW NUMBER TWO

Appellant contends that the appellate court has repeatedly made its judgments In this case based upon insufficient and inaccurate evidence, and as such, has displayed discrimination by inviting error, in violation of appellant's 1st, 5th, 6th, 8th, and 14th amendment rights under the United States Constitution.

In the case sub- judice, defendant-appellant strongly asserts that there are no existing controversies between the trial court, the prosecution, and the appellant concerning what actually occurred at the appellant's sentencing hearing. This has caused the appellant to submit multiple appeals and motions from these appellate court judgments. Appellant submits that the Tenth District Appellate Court has invited errors into these proceedings. An invited error is defined in Black's Law Dictionary: "In appellate practice, the principle of invited error is that if during the progress of a cause, a party request or moves the court to make a ruling which is actually erroneous and the court does so, that party cannot take advantage of the error on appeal." It has become exceedingly clear that the trial and appellate court's decisions were *based upon inaccurate information* and as such is not only erroneous, but represents invited error of which the state sought to take advantage through improper use of the doctrine of res

judicata. See: Thomas-vs- Cleveland 176 Ohio App. 3d 401, 2008-Ohio-1720, at 15; McDowell –vs- DeCarlo, 2007 Ohio Appeal LEXIS 1173, 2007-Ohio-1264.

Here in the case now before this Honorable Court, the Tenth District Appellate Court states on page 7 of its judgment that, "Appellant has repeatedly claimed that his (1984) rape conviction could not be supported without a qualifying conviction pursuant to R.C. 2971.01(H)(1)(2)(a)- (f). Secondly, the trial court was precluded by the Ohio Supreme Court decision in State -Vs-Smith, 104 Ohio St 3d 106, 2004-Ohio-6238 from using the underlying rape conviction to support the sexual violent predator specification. The appellate court continues to address appellant's assignments on (page 8) which states," That it has decided prior case law from their court holdings that Smith does not apply retroactively to closed cases. Id AT 24. **Thus, we conclude, that at the time of appellant's conviction and sentencing, the trial court properly could find appellant guilty of the sexually violent predator specification based upon the conduct alleged in the indictment." In State -vs- Smith, at 113 conclusions on (pages 32-33) as well as Cartwright –vs- Maryland Ins. Group, 101 Ohio App. 3d 439 AT HN3) holds that a decision of a court of Supreme jurisdiction overturning former decision is retroactive in operation, and the effect is not that the former law was bad law, but that it was never the law at all. These court decisions mean that appellant's conviction may have been constitutional, but not his sentence. The appellant states that this principle of law still holds true today. See: State Ex rel. Walmark, Inc-vs- Hixson, AT HN2).

In State Ead, 1997 Ohio App. 3d 493 (2nd Dist AT HN4) that court states that: "In general a new judicial ruling may be applied only to cases that are pending at the announcement date that the new judicial ruling is made. It may not be applied retroactively to a conviction that has

become final. Here, in the case at bar, appellant's conviction was not made final until after the Smith decision was ruled upon. The defendant-appellant did have a federal action still pending at this time. See: Attached Exhibit "A" (Petition for Permission to Appeal, filed on October 6, 2004 in case No. C-2-00-798).

In State -vs- Snowden, 2019-Ohio 3006 (2nd Dist AT HN5) that court has clearly stated that, "New rules for the conduct of criminal prosecution must be applied retroactively to all cases, state or federal, ending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "CLEAR BREAK' with the past." Furthermore, these erroneous rulings, that were made by the appellate courts, have additionally prejudiced the defendant-appellant regarding the misinformation presented to the parole board at his determination hearings. In State Ex rel. Anderson-vs- Chambers-Smith, 2021) Ohio-3653 (10th Dist Oct 12, 2021) and Keith-vs-Ohio Adult Parole Authority, 141 Ohio St. 3d 375, 2014-Ohio-4270, the Supreme Court, in Keith AT 21 quoting Layne-vs-Ohio Adult Parole Authority, 97 Ohio St 3d 456 2002-Ohio-6719 At 25 states that;: "Examining the parole related provision of Ohio Adm. code 5120—1-1-07 (B) The Keith court stated that, " the existence of this formal process for considering parole rightly gives parolees some expectations that they are to be judged on their own substantially correct reports. Requiring the board to consider specific factors to determine the parolee's fitness for release would not mean anything if the board is permitted to rely on incorrect, and therefore irrelevant information about a particular candidate."

In the case sub- judice, the appellant has for years argued that he was never properly adjudicated or classified as a sexually violent predator. Additionally, he did have a federal action pending in the courts at the time the Smith decision was pronounced. However, the

appellant's voice was never heard, which reflects an attitude of direct discrimination from the judicial system, and a complete act of misfeasance. This failure amounts to a denial of appellant's substantive due process rights. The trial and appellate court's decisions were based upon inaccurate information, and as such is not only erroneous, but represents invited error, of which the state sought to take advantage through the improper use of the doctrine of res judicata. See: Thomas -vs- Cleveland, 176 Ohio App. 3d 401, 2008-Ohio-1720, At 15; McDowell -vs- DeCarlo, 2007 Ohio App LEXIS 1173, 2007-Ohio-1264.

There is overwhelming evidence in the records that appellant should have legally benefited from the Smith ruling years ago, but his claims were overlooked by a court who simply refused to correct itself, even after the trial court and prosecution respectfully admitted or agreed that it was the Tenth Appellate District Court who created this miscarriage of justice. The first mention of defendant-appellant ever being adjudicated or determine a sexually violent predator occurred nearly fourteen (14) years after his conviction, in its 2012 judgment of appellant's appeal.

For the above stated legal reasons, the appellant respectfully submits that this is a case of Great and General Public Interest, because if the lower courts are allowed to continue to pick and choose who they will allow to benefit from all statutory and constitutional laws or rights, that were meant for all, then justice will once again have no meaning for minorities in America, particularly in Ohio.

CONCLUSION TO ARGUMENT

Appellant, strongly asserts, the record reflects that the trial court, the prosecution, and the appellant have all agreed that the sexually violent predator determination and/or adjudication was never a part of the trial records. The Tenth Appellate District Court, did indeed, abuse its discretion and exceeded the scope of its authority. In Slaughter- vs- Slaughter, 2012-Ohio-3973 (10th Dist At HNB 11) this court stated that, " A party may not be allowed to take two inconsistent positions or to take a positon in regard to a matter which is directly contrary to or inconsistent with one previously assumed by him. The doctrine of judicial Estoppel applies. See also: Fayette Drywall Inc -vs- Oettinger, 2020-Ohio-6611 (2nd Dist AT HN 7). This is not a situation where a defendant was inadvertently sentenced to an additional three (3) years for a felony offense, but one in which a defendant-appellant was sentenced to Life imprisonment, on an enhanced sentence that the Ohio Supreme Court has formerly ruled that sentencing a defendant without having a proper qualifying conviction or using the underlying conviction, was not even the law at the time. See: State –vs- Smith, 104 Ohio St. 3d 106, 2004-Ohio-6238. The appellant respectfully moves this court to correct this injustice.

CETIFICATE OF SERVICE

This is to certify that a true copy of the foregoing brief

Was sent to the Appellee's located at 373 South High Street,

Columbus, Ohio 43215 by regular United States mail services

This 31th day of Januacy, 2023.

Respectfully submitted by:

Mickey L. Draughon

Mr. Mickey L. Draughon No. 350-843
Chillicothe Correctional Institution
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APPELLANT

EXHIBIT 1

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 22AP-182 (C.P.C. No. 97CR-1733)
v.	:	(REGULAR CALENDAR)
Mickey L. Draughon,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 29, 2022

On brief: [*Janet Grubb*, First Assistant Prosecuting Attorney], and *Sheryl L. Prichard*, for appellee.

On brief: *Mickey L. Draughon*, pro se.

APPEAL from the Franklin County Court of Common Pleas

McGRATH, J.

{¶ 1} This is an appeal by defendant-appellant, Mickey L. Draughon, from a judgment of the Franklin County Court of Common Pleas denying his motion for a nunc pro tunc order and motion to vacate and set aside a portion of his sentence.

{¶ 2} On March 28, 1997, appellant was indicted on one count of aggravated burglary, in violation of R.C. 2911.11, one count of aggravated robbery, in violation of R.C. 2911.01, two counts of robbery, in violation of R.C. 2911.02, one count of rape, in violation of R.C. 2907.02, and one count of kidnapping, in violation of R.C. 2905.01. The counts charging him with aggravated burglary, aggravated robbery, rape, and kidnapping all included the specification that appellant was a repeat violent offender, and the rape count

also included a specification, pursuant to R.C. 2941.148, that appellant "is a sexually violent predator."

{¶ 3} The case was tried before a jury, but the specifications were tried separately to the court. Following the trial, the jury returned verdicts finding appellant guilty of one count of aggravated burglary, two counts of robbery, one count of rape, and one count of kidnapping. The court found appellant guilty of all the related specifications (the "repeat violent offender specifications" and the "sexually violent predator specification"). The trial court sentenced appellant to "ten years for the aggravated burglary; five years for the two counts of robbery (the two robberies merged for purposes of sentencing); and ten years to life for the rape conviction and the kidnapping conviction (the rape and kidnapping convictions merged for purposes of sentencing." *State v. Draughon,* 10th Dist. No. 97APA11-1536 (Sept. 1, 1998) ("*Draughon I*"). The court "ordered the sentences to run concurrent with each other, with an additional ten years because appellant was a repeat violent offender." *Id.*

{¶ 4} Conducting a separate hearing, as noted by court entries, and pursuant to former R.C. 2950.09, the trial court also "adjudicated [appellant] a sexual predator." *State v. Draughon*, 10th Dist. No. 11AP-703, 2012-Ohio-1917, ¶ 2 ("*Draughon II*"). This finding relates to appellant's obligation to register as a "sexual predator" with the sheriff of the county within which he resides (after his release from prison, if released from prison) every 90 days for his lifetime (the "sexual predator classification").

{¶ 5} Appellant appealed the judgment, raising six assignments of error. In *Draughon I*, this court overruled appellant's assignments of error and affirmed the judgment of the trial court. This court "subsequently denied appellant's App.R. 26(B) application for reopening," and the Supreme Court of Ohio "denied appellant's motion to file a delayed appeal." *Draughon II* at ¶ 3.

{¶ 6} On January 13, 2011, appellant filed "a 'Motion to Vacate and Discharge,' claiming that his original sentence was void, was not a final appealable order, and failed to comply with Crim.R. 32(C)." *Id.* at ¶ 4. In that motion, appellant argued in part that "the trial court imposed a life sentence on the rape count without properly securing a qualifying prior conviction to support the attached sexually violent predator specification." *Id.* The trial court denied appellant's motion, and appellant appealed that decision.

[*P7] On appeal, appellant argued (under his second assignment of error) that "his original sentence was void because the trial court erroneously imposed a sentence of ten years to life on the rape offense." Id. at ¶ 19. Specifically, appellant asserted the trial court "lacked the statutory authority to enhance [his] sentence on the rape offense because: (1) his 1984 rape conviction could not support the sexually violent predator specification, as it occurred prior to the enactment of R.C. 2971.01, and (2) the trial court was precluded by the Supreme Court of Ohio's decision in State v. Smith, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283 * * * from using the underlying rape conviction to support the sexually violent predator specification." Id.

[*P8] In addressing and rejecting that argument, this court noted the "rape charge in the indictment carried a sexually violent predator specification" and that "[a]fter the jury found appellant guilty of rape, the trial court found appellant to be a sexually violent predator as charged in the indictment. Thus, the trial court, pursuant to R.C. 2971.03(A)(3), enhanced appellant's sentence for the rape, imposing a prison term of ten years to life, instead of a definite prison term of three to ten years prescribed for rape." Id. at ¶ 20. Finding that "at the time of appellant's conviction and sentencing in 1997, the trial court was not precluded from using the underlying rape conviction to satisfy the sexual[ly] [violent] predator specification," this court determined "the trial court could have adjudged appellant to be a sexually violent predator because he was convicted of committing rape, a sexually violent offense, after January 1, 1997." Id. at ¶ 22.

[*P9] In addressing appellant's argument based on the Supreme Court's decision in Smith, this court cited prior case law from our court holding that "Smith does not apply retroactively to closed cases." Id. at ¶ 24. Thus, we concluded, "at the time appellant was convicted and sentenced, the trial court properly could find appellant guilty of the sexually violent predator specification based upon conduct alleged in the indictment." Id. This court overruled appellant's remaining assignments of error and affirmed the judgment of the trial court.

[*P10] On January 22, 2013, "appellant filed a 'Motion for Resentence,'" in which he argued "the trial court imposed an enhanced sentence on the rape count without properly securing a qualifying prior conviction to support the attached sexually violent predator specification." State v. Draughon, 10th Dist. No. 13AP-345, 2014-Ohio-1460, ¶ 6 ("Draughon III"). In response, the state, citing this court's decision in Draughon II, argued that appellant's claims "are barred by res judicata." Draughon III at ¶ 6. By decision and entry filed April 3, 2013, the trial court denied the motion, and appellant appealed that decision.

[*P11] In Draughon III, this court affirmed the judgment of the trial court, finding appellant's assignments of error "advance nearly identical arguments to those asserted and decided in Draughon II," and are therefore barred by the doctrine of res judicata. Id. at ¶ 14. Specifically, this court noted that in Draughon II, "we stated 'this court has held that Smith does not apply retroactively to closed cases' and determined 'at the time appellant was convicted and sentenced, the trial court properly could find appellant guilty of the sexually violent predator specification based upon conduct alleged in the indictment.'" Draughon III at ¶ 13, quoting Draughon II at ¶ 24.

[*P12] In 2015, appellant filed a petition in the Ross County Court of Common Pleas seeking "a writ of habeas corpus to compel his immediate release from the Chillicothe Correctional Institution," arguing that "the Franklin County trial court had lacked subject-matter jurisdiction to add a sentencing enhancement for his rape conviction because the sexually-violent-predator specification in the indictment was improper under Smith," and further asserting that "Smith should have been 'retrospectively' applied to his convictions and sentence." Draughon v. Jenkins, 4th Dist. No. 16CA3528, 2016-Ohio-5364, ¶ 11 ("Draughon IV").

[*P13] The trial court dismissed appellant's petition, and appellant appealed that dismissal. In Draughon IV, the Fourth District Court of Appeals affirmed the judgment of the trial court, holding that the court "correctly dismissed Draughon's petition because: 1) he had an adequate remedy in the ordinary course of law and 2) res judicata barred him from raising the same claim that he had previously unsuccessfully raised in prior proceedings." Id. at ¶ 30.

[*P14] On December 22, 2016, appellant filed a motion to waive or suspend court costs, arguing that "the trial court, at his 1997 sentencing, did not properly deal with the issue of court costs and that as a result, his sentence was contrary to law and, therefore, he should be resentenced." State v. Draughon, 10th Dist. No. 17AP-149, 2017-Ohio-7741, ¶ 3 ("Draughon V"). The trial court denied the motion, noting in part "it had already suspended all costs." Id. at ¶ 4. Appellant appealed that decision and, in Draughon V, this court affirmed the judgment of the trial court.

[*P15] On June 18, 2018, appellant filed a motion to vacate and set aside his sentence, asserting that "he could not be convicted of the sexually violent predator specification because the trial court did not properly determine that he was a sexually violent predator." State v. Draughon, 10th Dist. No. 18AP-709, 2019-Ohio-1461, ¶ 12 ("Draughon VI"). The trial court denied the motion, and appellant filed an appeal.

[*P16] On appeal, appellant raised one assignment of error in which he asserted the trial court "commits prejudicial error when it never adjudicates the defendant as a Sexual Predator as required by Ohio Revised Code 2971.02." Draughon VI at ¶ 9. In response, the state argued "this court has already rejected appellant's arguments and thus, his assignment of error is barred by res judicata." Id. at ¶ 13.

[*P17] In Draughon VI, this court agreed with the state's argument, noting that "[t]his court rejected appellant's argument in our 2012 decision" in Draughon II. Id. at ¶ 14. This court also observed that "[a]ppellant again raised this issue in a subsequent motion and an appeal [in Draughon III] from the trial court's denial" of his motion to vacate and discharge. Id. at ¶ 15.

[*P18] In rejecting appellant's latest motion seeking to challenge his sentence, this court, in Draughon VI, further held in part:

> Pursuant to his motion, appellant presents nearly identical arguments as those he has previously raised multiple times. Thus, because we have already issued a valid, final judgment on the merits of this issue, consideration of appellant's arguments are barred by the doctrine of res judicata.
>
> In his brief to this court, appellant attempts to also argue that the trial court never adjudicated him a sexual predator. [The state] argues that the trial court conducted a hearing on October 9, 1997 and found appellant to be a sexual predator.
>
> The indictment contained a rape count with a sexually violent predator specification. Appellant waived his right to a jury trial in writing on all the specifications. The trial court found him guilty. The trial court conducted a hearing on October 9, 1997 and found appellant guilty of the specifications and adjudicated him a sexual predator. * * * The trial court filed an entry to that effect on October 16, 1997. The trial court found, "For the reasons stated on the record at the conclusion of that hearing, the Court determines by clear and convincing evidence that the defendant, Mickey Draughon is a sexual predator." (Oct. 16, 1997 Entry.) Thus, the trial court did adjudicate appellant a sexual predator despite appellant's arguments to the contrary.

Id. at ¶ 16-18.

[*P19] On November 10, 2021, appellant filed a pro se "Motion for a Nunc Pro Tunc Order and motion to vacate and set aside a portion of the Defendant'[s] Sentence that was imposed by the record contrary to law." In the accompanying memorandum in support, appellant argued "he was never properly adjudicated as a sexually violent predator, and states that this classification never occurred." (Nov. 10, 2021 Mot. at 2.) On November 16, 2021, the state filed a memorandum contra the motion.

[*P20] By decision and entry filed January 5, 2022, the trial court denied appellant's motion. The trial court held that "the issue raised by defendant in his motion allegedly occurred during sentencing," and that "[d]efendant could have, but did not, raise the issue at the time of sentencing or on direct appeal. As a result, the issue is barred by res judicata." (Jan. 5, 2022 Decision at 2.)

[*P21] On appeal, appellant sets forth the following assignment of error for this court's review:

> The appellant contends that the trial court abused its Discretion and denied him Substantive Due Process, Equal Protection of the Law, and Meaningful Access to the Court's [sic] Under the 1st, 5th, and 14th Amendments to the United States Constitution, where the trial court's refusal to enter a Nunc Pro Tunc entry to correct the court records, prejudiced the Appellant's Liberty Interests.

[*P22] Appellant's pro se brief is not a model of clarity, but we construe his argument to be that the trial court erred in refusing to enter a nunc pro tunc entry to correct court records based on his contention there is a "discrepancy" as to whether he was "adjudicated" a "[s]exual predator" or a "[s]exually violent predator." (Appellant's Brief at 1.) As noted under the facts, in his motion before the trial court, appellant asserted he was "never properly adjudicated as a sexually violent predator," and that "this classification never occurred." (Nov. 10, 2021 Mot. at 2.) On appeal, appellant argues that "[i]n 2012 * * * the appellate court [i.e., in Draughon II] found that defendant was adjudicated as a 'Sexual Predator,'" while "[i]n 2019 * * * the appellate court [i.e., in Draughon VI] found that defendant was adjudicated as a 'Sexually Violent Predator.'" (Appellant's Brief at 1.)

[*P23] Appellant's argument is based on a misunderstanding of this court's prior decisions (and/or the distinction between a sexual predator classification and a sexually violent predator specification), and the issues he raises, as determined by the trial court, are barred by the doctrine of res judicata. HN1 Under Ohio law, the doctrine of "[r]es judicata prevents repeated attacks on a final judgment and applies to issues that were or might have been previously litigated." State v. Sappington, 10th Dist. No. 09AP-988, 2010-Ohio-1783, ¶ 10, citing State v. Brown, 8th Dist. No. 84322, 2004-Ohio-6421. The applicability of res judicata presents "a question of law, which an appellate court reviews de novo." State v. Braden, 10th Dist. No. 17AP-321, 2018-Ohio-1807, ¶ 10.

[*P24] As set forth above, in Draughon II, this court rejected appellant's contention that his original sentence was void because the trial court erred in imposing a sentence of ten years to life on the rape offense. In that decision, we noted "the rape charge in the indictment carried a sexually violent predator specification pursuant to R.C. 2941.148" and that, after the judge "found appellant to be a sexually violent predator," the trial court "enhanced appellant's sentence for the rape." Draughon II at ¶ 20. In overruling appellant's assignment of error, we concluded that "at the time appellant was convicted and sentenced, the trial court properly could find appellant guilty of the sexually violent predator specification based upon conduct alleged in the indictment." Id. at ¶ 24.

[*P25] In Draughon III, appellant again challenged his sentence, arguing that "the trial court imposed an enhanced sentence on the rape count without properly securing a qualifying prior conviction to support the attached sexually violent predator specification." Draughon III at ¶ 6. This court held that "the subject matter of appellant's current assignments of error was previously litigated and decided in Draughon II" and, therefore, "because we have already issued a valid, final judgment upon the merits of this issue, consideration of appellant's present assignments of error are barred by the doctrine of res judicata." Draughon III at ¶ 13-14.

[*P26] In a subsequent motion, appellant again sought to vacate his sentence based on the claim "he could not be convicted of the sexually violent predator specification because the trial court did not properly determine that he was a sexually violent predator." Draughon VI at ¶ 12. In Draughon VI, this court observed we "rejected appellant's argument in our 2012 decision" (i.e., Draughon II). Id. at ¶ 14. We further noted that appellant "again raised this issue in a subsequent motion and an appeal," and that we had found (in Draughon III) his arguments barred by res judicata. Id. at ¶ 15. In Draughon VI, we again found appellant's arguments challenging the sexually violent predator specification were "barred by the doctrine of res judicata." Id. at ¶ 16.

[*P27] In Draughon VI, this court also addressed and rejected appellant's contention the trial court never adjudicated him a sexual predator. Noting that "[t]he trial court conducted a hearing on October 9, 1997 and found appellant guilty of the specifications and adjudicated him a sexual predator," this court overruled appellant's assignment of error. Id. at ¶ 18.

[*P28] Appellant's current motion challenging his sentence, based on issues and arguments previously raised and decided, is barred by the doctrine of res judicata. Accordingly, the trial court did not err in its application of the doctrine to deny the motion.

[*P29] Based on the foregoing, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BEATTY BLUNT and MENTEL, JJ., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 22AP-182 (C.P.C. No. 97CR-1733)
v.	:	(REGULAR CALENDAR)
Mickey L. Draughon,	:	
Defendant-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on September 29, 2022, appellant's single assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Any outstanding appellate court costs are assessed against appellant.

McGRATH, BEATTY BLUNT, & MENTEL, JJ.

/s/ Judge
Judge Keith McGrath

Tenth District Court of Appeals

Date:	09-29-2022
Case Title:	STATE OF OHIO -VS- MICKEY L DRAUGHON
Case Number:	22AP000182
Type:	JEJ - JUDGMENT ENTRY

So Ordered

/s/ Judge Keith McGrath

EXHIBIT 2

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 22AP-182 (C.P.C. No. 97CR-1733)
v.	:	(REGULAR CALENDAR)
Mickey L. Draughon,	:	
Defendant-Appellant.	:	

MEMORANDUM DECISION

Rendered on December 27, 2022

[*Janet Grubb*, First Assistant Prosecuting Attorney], and *Sheryl L. Prichard*, for appellee.

Mickey L. Draughon, pro se.

ON APPLICATON FOR RECONSIDERATION

McGRATH, J.

{¶ 1} Defendant-appellant, Mickey L. Draughon, has filed a pro se application for reconsideration of this court's decision in *State v. Draughon*, 10th Dist. No. 22AP-182, 2022-Ohio-3443, in which we affirmed the judgment of the trial court denying his motion for a nunc pro tunc order and motion to vacate and set aside a portion of his sentence.

{¶ 2} The test generally applied in considering an application for reconsideration, pursuant to App.R. 26(A), is whether it "calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Matthews v. Matthews*, 5 Ohio App.3d 140 (10th Dist.1982) paragraph two of the syllabus.

{¶ 3} In his application for reconsideration, appellant argues this court "misstated the facts argued in this case, as appellant has never argued that he was not found to be a sexual predator." Rather, appellant contends, "[h]is legal arguments have always been that he was never declared by the trial court to be a sexual violent predator which would justify the court[']s enhancement of his sentence." (Appellant's App. for Recon. at 2.) Appellant maintains that this court should not have applied the doctrine of res judicata to the facts of this case.

{¶ 4} At the outset, we note our agreement with plaintiff-appellee, State of Ohio, that appellant's application is untimely under App.R. 26(A). App.R. 14(B) provides in part that "[e]nlargement of time to file an application for reconsideration * * * pursuant to App.R. 26(A) shall not be granted except on a showing of extraordinary circumstances." However, even assuming appellant could demonstrate extraordinary circumstances for his untimely filing, we find no merit to the application as appellant merely rehashes arguments made and addressed by this court in our prior decision.

{¶ 5} In our decision, this court addressed appellant's argument that "the trial court erred in refusing to enter a nunc pro tunc entry to correct court records based on his contention there is a 'discrepancy' as to whether he was 'adjudicated' a '[s]exual predator' or a '[s]exually violent predator.' " *Draughon* at ¶ 22. This court held that appellant's argument "is based on a misunderstanding of this court's prior decisions (and/or the distinction between a sexual predator classification and a sexually violent predator specification), and the issues he raises, as determined by the trial court, are barred by the doctrine of res judicata." *Id.* at ¶ 23.

{¶ 6} In his application for reconsideration, appellant generally contends "the binding effect of res judicata has been held not to apply when fairness and justice would not support it." (Appellant's App. for Recon. at 3.)

{¶ 7} While appellant disagrees with this court's determination as to the applicability of the doctrine of res judicata, such disagreement cannot form the basis for reconsideration. Rather, an application for reconsideration "is not intended for instances where a party simply disagrees with the logic or conclusions of the court." *Norman v. Kellie Auto Sales, Inc.*, 10th Dist. No. 18AP-32, 2020-Ohio-6953, ¶ 7, citing *State v. Burke*, 10th Dist. No. 04AP-1234, 2006-Ohio-1026, ¶ 2.

{¶ 8} Here, appellant's application does not call to our attention an obvious error in our decision, nor does it raise an issue for consideration that was either not considered at all, or was not fully considered by this court when it should have been. Accordingly, the application for reconsideration is denied.

Application for reconsideration denied.

BEATTY BLUNT and MENTEL, JJ., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 22AP-182 (C.P.C. No. 97CR-1733)
v.	:	(REGULAR CALENDAR)
Mickey L. Draughon,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered on December 27, 2022, it is the order of this court that appellant's October 11, 2022 application for reconsideration is denied.

McGRATH, BEATTY BLUNT, & MENTEL, JJ.

/s/ Judge
Judge Keith McGrath

Tenth District Court of Appeals

Date:	12-27-2022
Case Title:	STATE OF OHIO -VS- MICKEY L DRAUGHON
Case Number:	22AP000182
Type:	JOURNAL ENTRY

So Ordered

/s/ Judge Keith McGrath

Court Disposition

Case Number: 22AP000182

Case Style: STATE OF OHIO -VS- MICKEY L DRAUGHON

Motion Tie Off Information:

1. Motion CMS Document Id: 22AP0001822022-10-1199980000
   Document Title: 10-11-2022-MOTION FOR DELAYED RECONSIDERATION - MICKEY L. DRAUGHON
   Disposition: 3200

EXHIBIT " A "

IN THE SIXTH CIRCUIT COURT OF APPEALS

MICKEY DRAUGHON,	:	
Petitioner,	:	Case No.
v.	:	Originating In The U.S. District Court For The
DON DEWITT,	:	Southern District Of Ohio, Eastern Division
Respondent.	:	Case Number C-2-00-798

PETITION FOR PERMISSION TO APPEAL

Now comes the Petitioner, Mickey Draughon, and hereby respectfully moves this Honorable Court, pursuant to Federal Rule of Appellate Procedure (5), to permit an appeal of the denial of his habeas corpus which was finalized on September 15, 2004.

I. Procedural History

Petitioner, Mickey Draughon, a state prisoner, filed for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on July 11, 2001. The Southern District Court dismissed the petition as time barred under the statute of limitations. Id. § 2254(d)(1). However, Petitioner filed an appeal of the court's decsion to this Honorable Court. On April 24, 2003, this Court reversed the district court's decision and remanded the cause. Draughon v. DeWitt, No. 01-3899 (6th Cir. April 24, 2003).