

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-09-077

Appellee

Trial Court No. 2003CR0265

v.

Gerald Riley

**DECISION AND JUDGMENT**

Appellant

Decided: May 6, 2011

\* \* \* \* \*

Paul A. Dobson, Wood County Prosecuting Attorney,  
Gwen Howe-Gebers and Jacqueline M. Kirian, Assistant  
Prosecuting Attorneys, for appellee.

Lawrence A. Gold, for appellant.

\* \* \* \* \*

OSOWIK, P.J.

{¶ 1} This is an appeal of a judgment of the Wood County Court of Common Pleas which sentenced appellant to a ten year term of incarceration and ordered him to pay \$38,766.69 in restitution stemming from his conviction on one count of aggravated

burglary, in violation of R.C. 2911.11(A)(1), a felony of the first degree. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Gerald Riley, sets forth the following four assignments of error:

{¶ 3} "I. The trial court erred in allowing hearsay testimony in violation of Appellant's Sixth Amendment right to confrontation under the United States Constitution and Article I, § 10 of the Ohio Constitution.

{¶ 4} "II. Appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States constitution and Article I, § 10 of the Constitution of the State of Ohio.

{¶ 5} "III. The trial court abused its discretion and erred to the prejudice of Appellant at sentencing by imposing a prison term in excess of the minimum in violation of Appellant's right to Due Process under the Sixth and Fourteenth Amendments of the United States Constitution.

{¶ 6} "IV. Appellant's conviction was against the sufficiency and/or manifest weight of the evidence at trial."

{¶ 7} The following undisputed facts are relevant to this appeal. On July 16, 2003, appellant was indicted on one count of aggravated burglary, in violation of R.C. 2911.11, a felony of the first degree. In September 2003, following a two-day jury trial, appellant was found guilty. Appellant was sentenced to a ten-year term of incarceration. Appellant appealed to this court and was appointed counsel. On July 2, 2004, the conviction was affirmed.

{¶ 8} In July 2007, following this court's granting of appellant's motion for delayed reopening and the appointment of counsel to appellant, we again affirmed appellant's conviction. The case was remanded for the limited purposes of resentencing under *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, and to conduct a rehearing on the issue of restitution. On remand, appellant was again sentenced to a ten-year term of incarceration. Regarding restitution, appellant was ordered to pay an amount of \$38,766.69.

{¶ 9} In 2009, following the *Foster* resentencing, appellant initiated his third appeal on this matter to this court. In affirming in part and reversing in part, we held that appellant had not been properly notified of postrelease control and the trial court had failed to issue the restitution order in open court. Accordingly, we remanded the case back to the trial court for resentencing to address these procedural matters.

{¶ 10} At resentencing, appellant was consistently sentenced for the third time to a ten-year term of incarceration, was properly notified about postrelease control, and was ordered in open court to pay restitution in the amount of \$38,766.69. Appellant's fourth appeal of this matter is now before the court.

{¶ 11} We note at the outset that the recent decision by the Supreme Court of Ohio in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, materially affects the outcome of this appeal. In *Fischer*, the court held in relevant part that "[a]lthough the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other

aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence." *Id.* at paragraph three of the syllabus.

{¶ 12} Appellant's first and fourth assignments of error speak directly to the merits of his conviction. In appellant's previous appeal, these same substantive issues were raised and found to be without merit. Appellant's case was remanded for the limited, express purposes of addressing procedural errors concerning postrelease control notification and to properly issue the restitution order in open court. In accordance with *Fischer*, we hold that appellant is barred by res judicata from appealing the merits of his conviction. For the reasons stated herein, we find appellant's first and fourth assignments of error not well-taken.

{¶ 13} Pursuant to an analogous legal rationale, we also find the issues raised by appellant second and third assignments of error, concerning the latest resentencing hearing, are similarly barred by res judicata. *Fischer* applies to the merits of appellant's conviction, "including \* \* \* *the lawful elements of the ensuing sentence.*" [Emphasis added.] *Id.* "The scope of an appeal from a resentencing hearing \* \* \* is limited to issues arising at the resentencing hearing." *Id.* at paragraph four of the syllabus. The only issues to be resolved at appellant's resentencing concerned postrelease control and issuance of the restitution order in open court. Appellant does not allege error with either. Res judicata applies to all other portions of the conviction. Accordingly, we find appellant's second and third assignments of error not well-taken.

{¶ 14} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R.24.

JUDGMENT AFFIRMED.

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

Arlene Singer, J.

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JUDGE

Thomas J. Osowik, P.J.

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JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.