[Cite as *State v. Nelson*, 2010-Ohio-6032.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95420

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CARL A. NELSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-212590

BEFORE: Gallagher, A.J., Jones, J., and Vukovich, J.*

RELEASED AND JOURNALIZED: December 9, 2010

FOR APPELLANT

Carl A. Nelson, Sr., pro se
Inmate No. 199-605
Grafton Correctional Institution
2500 S. Avon Belden Road
Grafton, OH 44044

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: T. Allan Regas
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

SEAN C. GALLAGHER, A.J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records, and briefs of counsel.

{¶ 2} Appellant Carl Nelson appeals his sentence from the Cuyahoga County Court of Common Pleas. For the reasons stated herein, we affirm.

{¶ 3} On October 21, 1987, Nelson was convicted of four counts of rape and one count of kidnapping, for crimes against a 14-year-old girl. At the

sentencing hearing on October 28, 1987, the trial court expressed extreme outrage over Nelson's conduct and empathized with the victim and the tragedy she had suffered. The court sentenced Nelson to 15 to 25 years on each of the five counts.

{¶ 4} The transcript of the sentencing hearing reflects that the court then stated: "It is incomprehensible to me how the General Assembly of our State can impanel a jury and empower the Court to sit and pass sentence on an individual like yourself and * * * then the General Assembly also enacts a Revised Code Section 2929.41 that says that there are maximums. * * * In your case I find that to be incomprehensible and therefore I am going to deny you consecutive on each count because if you are released you are a menace to society and you have proven your unfitness to live in our community." The sentencing journal entry indicates that Nelson was sentenced to 15 to 25 years on each of the five counts, and states: "Said counts to be served consecutively."

{¶ 5} In 1987, Nelson appealed his convictions, which this court affirmed, holding that the jury verdict was not against the manifest weight of the evidence and that Nelson was not denied effective assistance of counsel. See *State v. Nelson* (Mar. 16,1989), Cuyahoga App. No. 54791. Nelson did not assign as error any inconsistency between the oral pronouncement of sentence and the sentencing entry.

{¶ 6} In 2000, Nelson file a petition for postconviction relief to introduce additional evidence, which the trial court denied without a hearing. On appeal, this court affirmed the lower court's decision that Nelson had not introduced evidence that warranted granting the petition. See *State v. Nelson* (Sept. 21, 2000), Cuyahoga App. No. 77094. It also held that Nelson's motion for appointment of an expert to assist with DNA testing was properly denied. Id.

{¶ 7} In 2004, Nelson petitioned for DNA testing, which the trial court denied. On appeal, this court affirmed the lower court's decision finding that Nelson "failed to demonstrate that DNA testing would prove to be outcome determinative." See *State v. Nelson*, Cuyahoga App. No. 85930, 2005-Ohio-5969.

{¶ 8} In 2010, nearly 23 years after his conviction, Nelson filed a motion to amend the sentencing journal entry on the basis that the trial court increased his punishment by running his sentences consecutively in the journal entry, which is inconsistent with the sentenced pronounced at the hearing. On July 1, 2010, the trial court denied his motion.

{¶ 9} Here, Nelson appeals the trial court's denial of his motion. In his sole assignment of error, Nelson argues that "[t]he trial court abused its discretion when it denied defendant-appellant's motion for a nunc pro tunc sentencing judgment entry for the sole purpose of correcting a clerical error in

the sentencing judgment entry to cause said sentence to reflect the actual sentence pronounced and imposed in open court Crim.R. 36."

{¶ 10} Nelson contends that because the sentencing journal entry does not accurately represent the sentence pronounced at his hearing, this court must correct the "clerical error" and run his sentences concurrently.

{¶ 11} We agree that Crim.R. 36 permits a court to correct clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission. Courts possess inherent authority to correct errors in judgment entries in order for the record to speak the truth. *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 163-164, 1995-Ohio-278, 656 N.E.2d 1288. We also do not take issue with Nelson's assertion that a court of record speaks only through its journal entries. *Gaskins v. Shiplevy* (1996), 76 Ohio St.3d 380, 382, 667 N.E.2d 1194, citing *State ex rel. Fogle v. Steiner*. Nonetheless, Nelson's claim is barred by the doctrine of res judicata.

{¶ 12} "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 any claimed lack of due process that was raised or could have been raised by the defendant at trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Reynolds*, 79 Ohio

St.3d 158, 161, 1997-Ohio-304, 679 N.E.2d 1131, quoting *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, at the syllabus.

{¶ 13} Nelson filed a direct appeal of his conviction in 1987 and could have raised any sentencing errors then. He did not. Furthermore, Nelson never raised any sentencing errors in his second and third appeals. Therefore, he is precluded from appellate review of his sentence now.

{¶ 14} Even if Nelson's claim were not barred by res judicata, we do not find that the sentencing journal entry was a clerical error. A review of the record demonstrates that the trial court intended to run Nelson's five sentences consecutively. At the hearing, the court made its intentions known by stating that it felt constrained by the enactment of maximum terms and that it felt Nelson was a menace to society and unfit to live in the community.

{¶ 15} Although a nunc pro tunc judgment entry would be proper to record the true action of the trial court had it made a genuine clerical error, we do not find it applies here, where to enter the requested change would modify the court's judgment. See *State v. Starks* (Dec. 31, 1997), Sandusky App. No. S-97-034.

{¶ 16} Nelson's sole assignment of error is overruled.

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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

LARRY A. JONES, J., and
JOSEPH J. VUKOVICH, J.,* CONCUR

*(Sitting by assignment: Judge Joseph J. Vukovich, of the Seventh District Court of Appeals.)