

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-L-121
JUSTIN D. RUPERT,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 01 CR 000215.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Justin D. Rupert, pro se, PID: A408-679, Marion Correctional Institution, P.O. Box 57, Marion, OH 43302 (Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} This matter is submitted to this court on the record and the briefs of the parties. Appellant, Justin D. Rupert, appeals the September 28, 2010 judgment of the Lake County Court of Common Pleas. For the following reasons, we affirm the decision of the trial court.

{¶2} In June 2001, appellant was charged by way of information with eight counts of robbery, in violation of R.C. 2911.02(A)(2), all felonies of the second degree.

Appellant pled guilty to all eight charges and was sentenced to a two-year term of imprisonment on each conviction. Seven of the sentences were ordered to be served consecutively to one another, and the final two-year prison term was ordered to be served concurrently with the other seven. Appellant's aggregate term of imprisonment was 14 years.

{¶3} Appellant appealed the trial court's sentence to this court. In *State v. Rupert*, 11th Dist. No. 2001-L-169, 2002-Ohio-7268 ("*Rupert I*"), at ¶15-16, this court reversed the trial court's sentencing entry and remanded the matter for resentencing, due to the trial court's failure to comply with former R.C. 2929.19(B)(2)(c) when imposing consecutive sentences.

{¶4} The trial court resentenced appellant to an identical aggregate 14-year prison sentence, consisting of eight two-year prison sentences, with seven of the sentences ordered to be served consecutively. Appellant appealed this sentence to this court, arguing, in part, that the trial court used factual findings to support its imposition of consecutive sentences, which did not comply with the United States Supreme Court's decision in *Blakely v. Washington* (2004), 542 U.S. 296. In *State v. Rupert*, 11th Dist. No. 2003-L-154, 2005-Ohio-1098 ("*Rupert II*"), at ¶37-49, this court affirmed the judgment of the trial court. Appellant appealed this court's judgment to the Supreme Court of Ohio. The Supreme Court of Ohio reversed the decision of this court regarding the *Blakely* issue and remanded the matter to the trial court for a new sentencing hearing pursuant to its prior decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *State v. Rupert*, 106 Ohio St.3d 1481, 2005-Ohio-3978.

{¶5} Following the remand from the Supreme Court of Ohio, the trial court sentenced Rupert to an identical aggregate 14-year prison sentence, consisting of eight two-year prison sentences, with seven of the sentences ordered to be served consecutively. Again, appellant appealed to this court. This court affirmed the trial court's sentence in *State v. Rupert*, 11th Dist. No. 2006-L-223, 2007-Ohio-2059 ("*Rupert III*"). A discretionary appeal was not allowed by the Supreme Court of Ohio. *State v. Rupert*, 115 Ohio St.3d 1412, 2007-Ohio-4884.

{¶6} In March 2010, appellant, acting pro se, moved the trial court to "impose a lawful sentence," arguing that his sentence failed to properly impose post-release control. The trial court, in a July 16, 2010 judgment entry, noted that it failed to properly notify appellant of post-release control and scheduled a sentencing hearing for August 5, 2010. The trial court ordered appellant to participate via video conferencing.

{¶7} Thereafter, on July 29, 2010, appellant moved the trial court to dismiss the matter pursuant to Crim.R. 12(C)(2). Appellant argued that the 2001 Information charging him with eight counts of robbery was defective. Appellant maintained that the information did not contain all of the essential elements, did not apprise him of the facts constituting the offense, and did not include the statute number of the predicate theft offense.

{¶8} Appellant also moved the trial court to dismiss the case due to lack of jurisdiction, as there was a delay in imposing a valid and proper sentence.

{¶9} The trial court denied said motions after a hearing in which appellant was present via video conferencing. Further, appellant was sentenced to the same term of

imprisonment as previously imposed. The trial court imposed a three-year period of post-release control.

{¶10} Appellant filed a timely notice of appeal and asserts the following assignments of error:

{¶11} “[1.] The trial court erred in not dismissing the appellant’s information(s) that are constitutionally insufficient to charge any criminal offense whatsoever under Ohio law, violating appellant’s rights under the Sixth and Fourteenth Amendment[s] to the United States Constitution, and Section 10 Article I of the Ohio Constitution.

{¶12} “[2.] The trial court erred in imposing consecutive sentences on the appellant when no statutory authority exist[s] for the imposition of such, violating the appellant’s constitutional rights pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I Section 16 & Article IV Section 10 of the Ohio Constitution.

{¶13} “[3.] The trial court erred in imposing any sentence upon appellant due to the unreasonable delay in imposing a valid sentence which resulted in a loss of jurisdiction, violating appellant’s right to due process under the United States and Ohio Constitution.”

{¶14} At the outset, we note that the Supreme Court of Ohio, in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, at ¶1, held:

{¶15} “A sentence that does not include the statutorily mandated term of postrelease control is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack. Although 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 guilty and the lawful elements of the ensuing sentence.” (Emphasis added.)

{¶16} “Thus, when a court affirms the convictions in an appellant’s first appeal, the propriety of those convictions becomes the law of the case, and subsequent arguments seeking to overturn them are barred. *** Therefore, in a subsequent appeal, only arguments relating to the resentencing are proper. ***.” *State v. Poole*, 8th Dist. No. 94759, 2011-Ohio-716, at ¶11. (Internal citations omitted.)

{¶17} Under his first assignment of error, appellant reiterates the arguments outlined in his motion to dismiss the matter, pursuant to Crim.R. 12(C)(2), filed in the trial court on July 29, 2010. Specifically, appellant claims the information fails to “charge [the] predicate offenses as mandated by the Supreme Court of Ohio” and fails to “include the requisite degree of culpability for each actus reus element as specified by the sections defining the offense which they constitute.”

{¶18} We reiterate that appellant was improperly advised of post-release control and, thus, the trial court held a hearing whereby appellant participated via video link. In his original appeal, appellant, although having the opportunity to do so, did not raise the argument regarding the deficiency of the indictment. Therefore, he is barred by the doctrine of res judicata from raising such argument in a subsequent appeal.

{¶19} The Supreme Court of Ohio has recognized that, “[u]nder the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating *** any defense or any claimed lack of due process that was raised or could have been raised *** on an appeal from that

judgment.” *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

{¶20} In addition, the Supreme Court of Ohio recently clarified the ability to challenge defects in the indictment in *State v. Horner*, 126 Ohio St. 3d 466, 2010-Ohio-3830. The syllabus from that case states, in pertinent part:

{¶21} “An indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state. *** By failing to timely object to a defect in an indictment, a defendant waives all but plain error on appeal.”

{¶22} Thereafter, the Supreme Court of Ohio held, in *State v. Dunlap*, 2011-Ohio-4111, that “Dunlap’s indictment tracked the language of R.C. 2907.05(A)(4), so, pursuant to *Horner*, even if the indictment failed to charge a mens rea, it was not defective.” *Id.* at ¶17. In this case, the language from the statute is mirrored in the information that charged the appellant. Therefore, the information is not defective, and even if it was, appellant waived any defect therein.

{¶23} Based on *Fischer*, this assignment of error is beyond the scope of the instant appeal. An appeal from an entry that corrects a previous sentence based solely on improper imposition of post-release control does not give appellant the authority to reopen the matter; appellant is entitled to appellate review only on those issues relating to the resentencing.

{¶24} Appellant’s first assignment of error is without merit.

{¶25} Under his second assignment of error, appellant maintains that it was error for the trial court to sentence him to consecutive sentences. Appellant argues that consecutive sentences are contrary to law.

{¶26} The Supreme Court of Ohio, in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, at ¶39, held:

{¶27} “[T]he decision of the United States Supreme Court in *Oregon v. Ice* does not revive Ohio’s former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*. Because the statutory provisions are not revived, trial court judges are not obligated to engage in judicial fact-finding *prior to imposing consecutive sentences* unless the General Assembly enacts new legislature requiring that findings be made.” (Emphasis added.)

{¶28} We further note that this court has addressed and rejected appellant’s argument regarding consecutive sentences in *Rupert III*, 2007-Ohio-2059, at ¶11:

{¶29} “Collectively, Rupert asserts his sentence is unconstitutional, because he committed his crimes prior to the Supreme Court of Ohio’s decision in *State v. Foster*, but was sentenced pursuant to the post-*Foster* version of the sentencing statutes. This court has recently addressed nearly identical arguments in the case of *State v. Elswick*. In *State v. Elswick*, this court found the nearly verbatim assignments of error that are raised in this appeal to be without merit.”

{¶30} Appellant’s second assignment of error is without merit.

{¶31} Under his third assignment of error, appellant argues the trial court’s sentence is void due to the trial court’s delay in issuing its sentence. Appellant claims

that he has “languished in prison unlawfully for over nine years without a sentence.” We disagree.

{¶32} As previously stated, appellant was not properly advised of post-release control. As this court noted in *State v. Howard*, 11th Dist. No. 2010-L-048, 2011-Ohio-2840, at ¶20:

{¶33} “*** *Fischer* stands for the proposition that when the ‘post-release control’ part of a criminal judgment is rendered void due to improper notification under the statute, only that part of the judgment is affected; i.e., the remaining aspects of the judgment are still valid.”

{¶34} Appellant’s third assignment of error is without merit.

{¶35} Based on the opinion of this court, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDALL, J.,

MARY JANE TRAPP, J.,

concur.