[Cite as *State v. Jones*, 2006-Ohio-2360.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. Case No. 2005-CA-26
v.	:	T.C. Case No. 01-CR-196
OTIS J. JONES, II	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

. . . .

OPINION

Rendered on the 12th day of May, 2006.

. . . .

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Defendant-Appellant, Pro Se

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FAIN, J.

{¶ 1} Defendant-appellant Otis Jones appeals from an order of the trial court overruling his motion for re-sentencing. Jones's sole assignment of error asserts ineffective assistance of counsel in connection with his original sentencing, in 2001, and his sentencing following a community control sanction violation, in 2004. These proceedings have nothing to do with the argument Jones made in support of his

motion for re-sentencing, the overruling of which is the order from which this appeal is taken. We find no error in the order from which this appeal is taken. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 2} In 2001, Jones pled guilty to Burglary. His sentence was the imposition of community control sanctions.

{¶ 3} In 2004, Jones was found to have violated the terms of his community control sanction. He was sentenced to four years in prison for the original offense.

{¶ 4} On June 13, 2005, Jones filed a motion for re-sentencing. Therein, he argued that only the minimum sentence should have been imposed because, based upon *United States v. Booker* (2005), 125 S.Ct. 738, and *Blakely v. Washington* (2004), 124 S.Ct. 2531, only a jury could make the findings required by R.C. 2929.14(B) for the imposition of more than a minimum sentence.

{¶ 5} Three days later, the trial court overruled Jones's motion for re-sentencing. From the order overruling his motion, Jones appeals.

II

{¶ 6} Jones's sole assignment of error is as follows:

{¶ 7} "TRIAL COUNSEL COMMITTED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE STATUTORILY INCORRECT SENTENCE IMPOSED, A VIOLATION OF U.S.C.A. CONSTITUTIONAL

AMENDMENT 6."

{¶ 8} In support of his assignment of error, Jones contends that he received ineffective assistance of trial counsel, both at his original sentencing in 2001, and again at his 2004 sentencing, following the finding that he had violated the terms of his community control sanctions. This assignment of error might be asserted in connection with an appeal from either his 2001 sentence or his 2004 sentence, but this appeal is not concerned with either of those judgments of the trial court. This appeal is taken from the overruling of his June 13, 2005 motion for re-sentencing.

{¶ 9} Jones's motion for re-sentencing, the overruling of which is the order from which this appeal is taken, was based upon his argument that the *Booker* and *Blakely* cases prohibited him from being sentenced to more than a minimum prison term. The trial court, in the order from which this appeal is taken, decided that issue as follows:

{¶ 10} "On June 13, 2005, the Defendant filed a motion for re-sentencing because the Court did not sentence him to the minimum term.

{¶ 11} "The Defendant seeks an order of the Court vacating the sentence on the premise that recent United States Supreme Court rulings have found the sentence to be unconstitutional. *Blakely v. Washington*, (2004) 124 S.Ct 2531, and *U.S. v. Booker and U.S. v. Fanfan*, (2005) 125 S.Ct. 738, have been decided since the Defendant's sentencing.

{¶ 12} "The First District Court of Appeals would agree with the Defendant, that the foregoing cases would compel the Court to impose the minimum sentence of one

year, rather than four. *State v. Montgomery*, 2005-Ohio-1018. However, the Court finds the reasoning of the other appellate districts more compelling. They are cited in *State v. Combs*, 2005-Ohio-1923.

{¶ 13} "Secondly, application of the foregoing U.S. Supreme Court cases is not retroactive. *State v. Cressel*, 2005-Ohio-2013 (Montgomery App., April 29, 2005). The Defendant waived any defects in the sentence brought to light by the foregoing United States Supreme Court cases by not making a proper objection at the time of sentencing. *State v. Watkins*, 2005-Ohio-1378, (Champaign App. March 25, 2005).

{¶ 14} "Thirdly, the issues presented herein could have been litigated in the Defendant's direct appeal. The Defendant appealed the sentence on appeal. Therefore, the issues are barred by the doctrine of *res judicata*.

{¶ 15} "For all of the foregoing reasons, the Defendant's motion for re-sentencing is denied.

{¶ 16} "IT IS SO ORDERED."

{¶ 17} To begin with, we doubt whether Jones's motion for re-sentencing is a proper motion under the Ohio criminal statute and rules of procedure. Once the trial court sentenced Jones, following the vacation of his community control sanctions, the trial court had no jurisdiction to modify or vacate its judgment, except the power to do so prescribed in R.C. 2953.21, which provides for petitions for post-conviction relief.

{¶ 18} If we are to assume that the trial court treated Jones's motion as a petition for post-conviction relief, we are satisfied that the trial court correctly denied it. The effect of the *Booker* and *Blakely* cases upon Ohio's sentencing scheme has been

resolved in *State v. Foster*, ___ Ohio St.3d ____, 2006-Ohio-856. Under *Foster*, neither the *State v. Montgomery* case, which the trial court found unpersuasive, nor the cases cited in *State v. Combs*, which the trial court found to be persuasive, are correct expositions of the law. But we agree with the trial court's second and third propositions. We agree that the holdings in *Booker* and *Blakely* do not apply retroactively, and we agree that the argument Jones made in support of his motion for re-sentencing is barred by res judicata, because he could have raised that argument in his direct appeal from his sentence.

{¶ 19} Similarly, Jones could have raised the argument he now makes in support of his assignment of error – that his trial counsel was ineffective at his sentencing hearings – an argument that he did not make in the trial court, in a direct appeal from either his 2001 sentence, his 2004 sentence, or both.

{¶ 20} Because Jones did not make the ineffective assistance of trial counsel argument in the trial court, he has waived that argument, and may not raise it in this appeal. We find no error in the order of the trial court overruling Jones's motion for re-sentencing, from which this appeal is taken.

{¶ 21} Jones's sole assignment of error is overruled.

III

{¶ 22} Jones's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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GRADY, P.J., and WOLFF, J., concur.

Copies mailed to:

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Hon. Jeffrey M. Welbaum