

[Cite as *State v. Turner*, 2008-Ohio-6648.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91695

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DONALD TURNER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-453056

BEFORE: Gallagher, J., Cooney, P.J., and Stewart, J.

RELEASED: December 18, 2008

JOURNALIZED:

FOR APPELLANT

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, 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} Defendant-appellant, Donald Turner, appeals from his resentencing hearing in the Cuyahoga County Court of Common Pleas. Finding no error in the proceedings below, we affirm.

{¶ 3} Following a jury trial, Turner was convicted of robbery. He appealed his conviction, raising six assignments of error. On October 27, 2007, this court affirmed his conviction, but vacated his sentence and remanded the case for a new sentencing hearing because the court failed to inform Turner that he was subject to post-release control. *State v. Turner*, Cuyahoga App. No. 88958, 2007-Ohio-5732.

{¶ 4} The trial court resentenced Turner on May 29, 2008. Turner appeals, advancing two assignments of error for our review. His first assignment of error states the following:

{¶ 5} “The judgment entered by the trial court and the indictment returned by the grand jury are null and void for lack of subject matter jurisdiction and for failure to charge as defined by statute a robbery offense.”

{¶ 6} Under this assignment of error, Turner relies on *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, and argues that his indictment was defective because it failed to set forth the mens rea element, and thus his conviction must be reversed.

{¶ 7} The state contends that *Colon* does not apply because Turner's direct appeal was not pending at the time that *Colon* was decided. The state also argues that Turner waived the issue or that it is barred by res judicata.

{¶ 8} Post-conviction relief is available only for errors based upon facts and evidence outside the record. "Errors and deficiencies in an indictment are not outside the record; therefore, they can only be attacked on direct appeal. * * * It follows that a court may apply the doctrine of res judicata to bar a petition for post-conviction relief if it is based upon a claim that the indictment is insufficient or defective, since this claim would not require consideration of matters outside the original record." *State v. Peterson*, Cuyahoga App. No. 90263, 2008-Ohio-4239, citing *State v. Grimm* (Apr. 25, 1997), Miami App. Nos. 96-CA-37 and -38 (citations omitted).

{¶ 9} Since Turner did not raise the sufficiency of the indictment on direct appeal, although he could have done so, he is barred by the doctrine of res judicata from raising that issue now. Turner's first assignment of error is overruled.

{¶ 10} Turner's second assignment of error states the following:

{¶ 11} "The trial court erred in failing to impose any statutory sentence as mandated by R.C. 2929.14, thereby rendering appellant's imprisonment unlawful."

{¶ 12} Turner contends that the trial court did not conduct a new sentencing hearing upon remand by this court. Turner has failed to file a transcript of the resentencing hearing.

{¶ 13} The law is settled that the appellant has the duty to file the transcript or such parts of the transcript as are necessary for evaluating the lower court's decision. See App.R. 9(B) and *State v. Gray* (1993), 85 Ohio App.3d 165, 170. Furthermore, failure to file the transcript prevents an appellate court from reviewing the appellant's assignments of error. *Szitasi v. Sobe* (Apr. 27, 2000), Cuyahoga App. No. 75632; see, also, *Roberts v. Payton* (1995), 105 Ohio App.3d 597, 600.

{¶ 14} Since we cannot review the transcript, we must overrule this assignment of error.

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, JUDGE

COLLEEN CONWAY COONEY, P.J., CONCURS;
MELODY J. STEWART, J., DISSENTS
(WITH SEPARATE OPINION)

MELODY J. STEWART, J., DISSENTING:

{¶ 15} I respectfully dissent from the majority's application of the principles of res judicata to this appeal from a resentencing because I conclude that Turner's initial sentencing was not a valid, final judgment of conviction.

{¶ 16} In Turner's first appeal, this court cited to *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, and held that the court's failure to advise Turner of the mandatory nature and exact term of postrelease control necessitated a de novo resentencing. See *State v. Turner*, Cuyahoga App. No. 88958, 2007-Ohio-5732, ¶56-57. In *Bezak*, the supreme court held:

{¶ 17} "In cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is *void* and the state is entitled to a new sentencing hearing in order to have postrelease control imposed on the defendant unless the defendant has completed his sentence." (Emphasis added.)

{¶ 18} In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-420, the supreme court noted that "[t]he effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment." *Id.* at ¶19.

{¶ 19} If Turner’s initial sentence was “void,” he was not sentenced at all. The failure to impose sentence means that there is no final order from which a valid appeal can be taken. See *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330 (holding that a “judgment of conviction” is a final appealable order only when it sets forth “(1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court”).

{¶ 20} Principles of res judicata apply only to “valid, final judgment[s] rendered upon the merits [.]” *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, syllabus. The court’s failure to advise Turner of postrelease control rendered his sentence void. Because he was not sentenced, there was no judgment of conviction. Without a valid judgment of conviction, principles of res judicata cannot apply. I would find that Turner’s case was still pending at the time of resentencing and that the law set forth in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, could be applied prospectively to this appeal. Applying that law, I would find structural error requires reversal of Turner’s conviction because (1) the indictment did not charge the reckless mental element for robbery under R.C. 2911.01(A)(2); (2) the state did not attempt to prove the element of recklessness; (3) the trial court failed to instruct the jury on a mens rea element of recklessness; and (4) in closing arguments, the state treated robbery as a strict liability offense.

