

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

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-A-0052
ERIC V. ROBY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 00 CR 125.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Eric V. Roby, pro se, PID: 405-203, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, OH 44430-0901 (Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Eric V. Roby, appeals from the Ashtabula County Court of Common Pleas' denial of his request for a de novo resentencing hearing. For the reasons that follow, the judgment is affirmed.

{¶2} On July 6, 2000, appellant was indicted on 24 counts of rape, with a force specification and a forfeiture specification on each count, based on the allegation that he repeatedly forced his eight-year-old daughter to engage in sexual conduct.

Appellant withdrew his “not guilty” plea and entered a “guilty” plea to all counts with the forfeiture specification, but not the force specification. He was sentenced to a 24-year mandatory prison term.

{¶3} Appellant’s conviction was affirmed by this court in *State v. Roby*, 11th Dist. No. 2001-A-0029, 2003-Ohio-603.

{¶4} On July 29, 2011, appellant filed a motion for a de novo resentencing hearing. In support, appellant argued that the sentencing entry in his case was defective for two reasons. First, he argued his judgment entry of conviction did not comply with Crim.R. 32(C) because it did not articulate the manner of conviction, i.e., his guilty plea to each count. Second, he argued that he was sentenced under the now-unconstitutional R.C. 2929.14(E)(4) and should be resentenced.

{¶5} The trial court found that appellant’s previous sentencing entry did not, in fact, conform to Crim.R. 32(C) because it failed to set forth the manner of conviction. However, the court found that a de novo resentencing hearing was not required and not necessary on either of appellant’s claims. As such, the court issued a nunc pro tunc corrective entry. Appellant now appeals and asserts three assignments of error.

{¶6} Appellant’s first assignment of error states:

{¶7} “The trial court erred to the prejudice of defendant-appellant in overruling his motion for a De Novo Re-sentencing Hearing from a void sentence violating his rights to due process and protection against double jeopardy.”

{¶8} Appellant’s first assignment of error is barred by res judicata. “[A]ny issues that were raised or could have been raised by a defendant at the trial court level or on direct appeal are res judicata and not subject to review in subsequent

proceedings.” *State v. Lintz*, 11th Dist. No. 2010-L-067, 2011-Ohio-6511, ¶36, citing *State v. Perry*, 10 Ohio St.2d 175 (1967). The doctrine “bars not only subsequent actions involving the same legal theory of recovery as the previous action, but also claims which could have been litigated in the previous action[.]” (Emphasis deleted.) *State v. Robinson*, 8th Dist. No. 85266, 2005-Ohio-4154, ¶8, citing *Grava v. Parkman Township*, 73 Ohio St.3d 379, 381 (1995).

{¶9} Specifically, res judicata encompasses two concepts. *Krahn v. Kinney*, 43 Ohio St.3d 103, 107 (1989). The first concept is “estoppel by judgment,” which “prevents a party from litigating [the same] cause of action after a prior court has rendered a final judgment on the merits[.]” *Id.* The second concept is “collateral estoppel,” which “precludes litigation of an issue that has been ‘actually and necessarily litigated and determined in a prior action.’” *Id.*, quoting *Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St.3d 193, 195 (1983).

{¶10} Appellant’s assigned error, wherein he collaterally attacks his original indictment, should have been raised in his initial direct appeal to this court. Appellant’s first assignment of error is without merit.

{¶11} Appellant’s second assignment of error states:

{¶12} “The trial court erred to the prejudice of defendant-appellant in overruling his motion for a De Novo Re-sentencing Hearing when he was sentenced under an unconstitutional statute and the court failed to comply with the statute.”

{¶13} Appellant argues he should have been resentenced because he was sentenced under R.C. 2929.14(E)(4), which was deemed unconstitutional by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. As such, he argues the court erred in not

granting his request for a de novo resentencing hearing. However, the Ohio Supreme Court in *Foster* explained that only those cases pending on direct review would be remanded to trial courts for new sentencing hearings consistent with its opinion. *Foster*, ¶104. Here, *Foster* would not apply in appellant's case because he was sentenced on March 16, 2001, approximately five years before *Foster* was decided and, more importantly, three years prior to this court's original opinion in *Roby, supra*. Similarly, the General Assembly's recent amendment to R.C. 2929.14(E)(4) through H.B. No. 86 has no effect on appellant's sentence. See *State v. Du*, 2nd Dist. No. 2010-CA-27, 2011-Ohio-6306, ¶23. ("This new language * * * which had an effective date of September 30, 2011, was not applicable to [appellant], who received his sentence in March 2010.")

{¶14} Appellant's second assignment of error is without merit.

{¶15} Appellant's third assignment of error states:

{¶16} "The Appellant should be given a new first right of appeal as his original sentence was void, thus trial court's [sic] journal entry was a not a [sic] final appealable order."

{¶17} Appellant argues the trial court's March 20, 2001 judgment entry, which he appealed from in 2001, is not a final, appealable order because it did not comply with Crim.R. 32(C). In *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, ¶12, the Ohio Supreme Court squarely addressed this issue:

{¶18} [W]hen the substantive provisions of Crim.R. 32(C) are contained in the judgment of conviction, the trial court's omission of how the defendant's conviction was effected, i.e., the 'manner of conviction,'

does not prevent the judgment of conviction from being an order that is final and subject to appeal. Crim.R. 32(C) does not require a judgment entry of conviction to recite the manner of conviction as a matter of substance, but it does require the judgment entry of conviction to recite the manner of conviction as a matter of form. The identification of the particular method by which a defendant was convicted is merely a matter of orderly procedure rather than of substance. A guilty plea, a no-contest plea upon which the court has made a finding of guilt, a finding of guilt based upon a bench trial, or a guilty verdict resulting from a jury trial explains how the fact of a conviction was effected. Consequently, the finality of a judgment entry of conviction is not affected by a trial court's failure to include a provision that indicates the manner by which the conviction was effected, because that language is required by Crim.R. 32(C) only as a matter of form, provided the entry includes all the substantive provisions of Crim.R. 32(C).

{¶19} Here, the judgment entry complies with the “substantive” requirements of Crim.R. 32(C), as outlined by the Ohio Supreme Court in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, syllabus, modified by *State v. Lester*, 130 St.3d 303, 2011-Ohio-5204: it sets forth the facts of the conviction, it explains the sentence, it was signed by the judge, and it was certified with a time stamp. Thus, as was previously determined by this court when accepting appellant's initial appeal from this judgment, the judgment is final and appealable.

{¶20} Appellant's third assignment of error is without merit.

{¶21} The judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.