[Cite as *State v. Cunningham*, 2011-Ohio-5108.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-L-153**
- vs -	:	
SELVIN R. CUNNINGHAM,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 05 CR 000675.

Judgment: Affirmed.

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

Selvin R. Cunningham, pro se, PID: A521-832, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Selvin R. Cunningham, appeals from the judgment of the Lake County Court of Common Pleas partially denying his "Motion to Vacate and Correct Void Sentence pursuant to R.C. 2945.75(A)(2)." For the reasons discussed herein, we affirm.

{¶2} After a trial by jury, appellant was convicted of Count One, failure to comply with order or signal of police officer, a felony of the third degree, in violation of R.C. 2921.331(B); Count Two, receiving stolen property, a felony of the fourth degree,

in violation of R.C. 2913.51(A); Count Three, possessing criminal tools, a felony of the fifth degree, in violation of R.C. 2923.24; Count Four, burglary, a felony of the third degree, in violation of R.C. 2911.12(A)(3); and Count Five, breaking and entering, a felony of the fifth degree, in violation of R.C. 2911.13(B). Appellant was eventually sentenced to an aggregate term of 12.5 years imprisonment. In *State v. Cunningham*, 11th Dist. No. 2007-L-034, 2008-Ohio-1127, this court affirmed appellant's convictions.

{¶3} On April 28, 2010, appellant filed a "Motion to Vacate and Correct Void Sentence pursuant to R.C. 2945.75(A)(2)." In his motion, appellant asserted the verdict forms relating to counts one, two, three, four, and five were insufficient under R.C. 2945.75, and therefore the court was required to enter judgment on the least degree of the offenses with which he was charged. On May 10, 2010, the state responded to appellant's motion, arguing appellant's request lacked merit regarding counts one, three, four, and five; the state conceded, however, that the verdict form relating to Count Two was insufficient.

{¶4} On June 30, 2010, the trial court granted appellant's motion as it related to Count Two and overruled the motion as it related to counts one, three, four, and five. The court set a resentencing date on Count Two for August 19, 2010. Appellant noticed an appeal with this court and the trial court stayed the proceedings at appellant's request pending the outcome of the appeal. This court subsequently dismissed the appeal as premature for want of a final, appealable order. See *State v. Cunningham*, 11th Dist. No. 2010-L-087, 2010-Ohio-4197, at ¶4.

{¶5} On December 2, 2010, the trial court convened with the prosecutor and appointed defense counsel in chambers. After considering the record and discussing the issue with counsel, the trial court took notice that the verdict form relating to Count

Two was deficient in that it had been signed by only 11 members of the jury. The court therefore vacated appellant's conviction on Count Two and, as a result, determined the previously scheduled resentencing hearing was moot. Appellant now appeals from the court's judgment overruling his motion to vacate counts one, three, four, and five and asserts five assignments of error. His first four assigned errors are related and shall be addressed together. They provide:

{¶6} "[1.] The verdict form and the resulting entry were insufficient under R.C. 2945.75 to support Mr. Cunningham's conviction for *** R.C. 2921.331(B)(C)(5)(a)(ii) as a felony of the 3rd degree as reflected in the journal entry. ***.

{¶7} "[2.] The verdict form and the resulting entry were insufficient under R.C. 2945.75 to support Mr. Cunningham's conviction and sentence for count 3, possession of criminal tools, as a felony of the fifth degree as reflected in the entry[.] ***.

{¶8} "[3.] The verdict form and resulting entry were insufficient under R.C. 2945.75 to support Cunningham's conviction and sentence for burglary in violation of R.C. 2911.12(A)(3) as a felony of the third degree. ***.

{¶9} "[4.] The verdict form and resulting entry for breaking and entering did not comply with R.C. 2945.75(A)(2)[.] ***." (Sic throughout.)

{¶10} Appellant's first four assigned errors challenge the trial court's judgment overruling his motion to vacate his remaining convictions pursuant to the authority announced in *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256. In *Pelfrey*, the Supreme Court considered the plain language of R.C. 2945.75, holding:

{¶11} "Pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted

or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense." *Pelfrey*, supra, syllabus.

{¶12} If the verdict form is insufficient, "*** a guilty verdict constitutes a finding of guilty on the least degree of the offense charged." R.C. 2945.75(A)(2).

{¶13} Although the trial court engaged in an analysis of each verdict form in concluding each complied with the dictates of R.C. 2945.75, we affirm the trial court's decision without considering the merits of its analysis.

{¶14} This court has recently held that the doctrine of res judicata applies to *Pelfrey* challenges that could have been, but were not, leveled on an appellant's direct appeal from his or her conviction. *State v. Garner*, 11th Dist. No. 2010-L-111, 2011-Ohio-3426, at ¶20-22. "Res judicata bars the assertion of claims against a valid, final judgment of conviction that have been raised or could have been raised on appeal." *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, at ¶59. In his direct appeal, filed on February 21, 2007, appellant alleged seven assignments of error. Appellant's assigned errors included challenges to the evidential sufficiency and weight; challenges to venue and jury instructions; as well as a challenge to the admissibility of certain evidence at trial. Appellant could have but did not raise any errors relating to defects in the verdict forms on direct appeal.[1] And each of the cases he cites in support of his appellate arguments involve applications of *Pelfrey* or R.C. 2945.75 to verdict form challenges occurring on direct appeal. As the instant appeal emanates from a collateral postconviction motion to vacate, appellant is precluded from raising his challenges to

1. The Supreme Court of Ohio issued its opinion in *Pelfrey* in February 7, 2007, and in any event, that opinion merely applied R.C. 2945.75, enacted in 1974, as written. Thus, even had appellant's appeal been heard prior to the release of *Pelfrey*, res judicata would still apply to preclude postconviction challenges to the validity of verdict forms.

the verdict forms at this stage. We therefore hold appellant's arguments are barred by the doctrine of res judicata.

{¶15} With this in mind, we are aware that *Pelfrey* permits an appellant to raise the sufficiency of a jury verdict form even though the issue was not raised in the trial court. This, however, does not imply "*** that res judicata is inapplicable in situations where the appellant has not only waived the issue at the trial court level but also failed to raise the issue in his direct appeal." *Garner*, supra, at ¶23; see, also, *State v. Evans*, 9th Dist. No. 10CA0027, 2011-Ohio-1449, at ¶9 ("because [the appellant] could have raised issues related to the jury verdict forms in his direct appeal, he is foreclosed from raising the issue at this time"); *State v. Foy*, 5th Dist. No. 2009-CA-00239, 2010-Ohio-2445, at ¶8 (res judicata bars an appellant from raising the issue of jury verdict form defects under *Pelfrey* where he failed to raise the issue on direct appeal); *State v. Martin*, 9th Dist. No. 25534, 2011-Ohio-1781, at ¶7 (challenge to the validity of 23-year-old conviction pursuant to *Pelfrey* barred by res judicata because the appellant could have raised R.C. 2945.75 on direct appeal).

{¶16} As appellant's arguments are barred by res judicata, his first, second, third, and fourth assignments of error are overruled.

{¶17} Appellant's fifth assignment of error asserts:

{¶18} "The trial court violated appellant's 14th amendment right under due process of law and article 1 & 16 of the Ohio Constitution, and United States Bill of Rights, 5th and 6th amendments of the United States Constitution." (Sic.)

{¶19} Under his final assigned error, appellant contends the trial court violated his right to due process when it conducted an in-chambers discussion on December 2,

2010, in his absence, prior to vacating his conviction on Count Two and canceling the sentencing hearing. We do not agree.

{¶20} Although an accused has a right to be present at every critical stage of the proceedings against him, *Kentucky v. Stincer* (1987), 482 U.S. 730, 745, due process specifically requires a defendant's presence only "to the extent that a fair and just hearing would be thwarted by his absence." *Snyder v. Massachusetts* (1934), 291 U.S. 97, 108. The court initially convened on December 2, 2010, for a resentencing hearing on Count Two. Had the resentencing hearing gone forward, appellant's presence would have been required. See, e.g., Crim.R. 43(A)(1). After considering the record and conducting an impromptu "in-chambers" discussion with the prosecutor and appointed counsel, however, the court determined that appellant's conviction was structurally invalid and vacated the jury's verdict. As no resentencing occurred and the in-chambers discussion culminated in a result favorable to appellant, we hold appellant received fair and just treatment. Appellant therefore suffered no deprivation of due process.

{¶21} Appellant's fifth assignment of error is overruled.

{¶22} For the reasons stated in the foregoing opinion, appellant's assignments of error are without merit and the judgment of the Lake County Court of Common Pleas is hereby affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.

concur.