[Cite as *State v. Kirkpatrick*, 2016-Ohio-1314.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2015-T-0090**
- vs -	:	
JASON W. KIRKPATRICK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2007 CR 00905.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Jason W. Kirkpatrick, pro se, PID: A562-137, Marion Correctional Institution, P.O. Box 57, 940 Marion-Williamsport Rd., Marion, OH 43302 (Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Jason W. Kirkpatrick, appeals from the July 28, 2015 judgment of the Trumbull County Court of Common Pleas, denying his pro se motion for a de novo resentencing hearing. Appellant originally pled guilty to 16 counts of breaking and entering and one count of engaging in a pattern of corrupt activity that involved 19

businesses throughout Trumbull County over a five-month time span. In his first appeal, this court vacated the judgment of the trial court finding he was sentenced outside of the statutory range and remanded the matter for a new sentencing hearing. *State v. Kirkpatrick*, 11th Dist. Trumbull No. 2009-T-0007, 2009-Ohio-6519 ("*Kirkpatrick* I"). In his second appeal, this court affirmed appellant's resentencing following our remand finding his sentence to be within the applicable range. *State v. Kirkpatrick*, 11th Dist. Trumbull No. 2010-T-0025, 2010-Ohio-6578 ("*Kirkpatrick* II").[1] In the instant appeal, appellant asserts the trial court erred in denying his motion for a de novo resentencing hearing. For the reasons stated, we affirm.

{¶2} The following procedural history and factual background are taken from *Kirkpatrick* I and II: on December 26, 2007, appellant was secretly indicted by a grand jury on 34 counts; 19 counts of breaking and entering, fifth degree felonies in violation of R.C. 2911.13(A) and (C); nine counts of grand theft, fourth degree felonies in violation of R.C. 2913.02(A)(1) and (B)(1)(2); five counts of vandalism, fifth degree felonies in violation of R.C. 2909.05(B)(1)(b) and (E); and one count of engaging in a pattern of corrupt activity, a second degree felony in violation of R.C. 2923.32(A)(1) and (B)(1).

{¶3} Appellant appeared with counsel and entered into a plea agreement with appellee, the state of Ohio, which the trial court accepted, pleading guilty to 16 of the 19 counts of breaking and entering, and the one count of engaging in a pattern of corrupt activity. The state entered and the court accepted a nolle prosequi on the remaining counts and the matter was referred for a presentence investigation ("PSI").

1. *See also State ex rel. Kirkpatrick v. Rice*, 11th Dist. Trumbull No. 2013-T-0004, 2013-Ohio-3978 (original action for writ of mandamus – petition dismissed); *Kirkpatrick v. Rice*, 140 Ohio St.3d 1508, 2014-Ohio-5098 (motion for reconsideration – denied).

{¶4} The first sentencing hearing was held on September 18, 2008. The trial court reviewed the factors of R.C. 2929.11 and 2929.12, the report that the PSI "did not go well," and that appellant had an extensive prison record, having already served a total of nine years for three separate felonies in the past. The state urged the maximum sentence be imposed. Appellant's pastor, who was also in charge of Life Challenge, spoke on appellant's behalf. The trial court was initially inclined to sentence appellant to a two-year term of imprisonment. However, the court gave appellant the option to choose the two-year term of imprisonment or five years of community control sanctions, which included successful completion of the 12-month Life Challenge program. Appellant chose community control sanctions and agreed that in the case of revocation he would serve nine years in prison. In its September 25, 2008 judgment entry, the trial court sentenced appellant to five years of community control.

{¶5} Appellant was subsequently terminated from the program. Accordingly, he was arrested and a resentencing/probation violation hearing was held on January 8, 2009. At the hearing, appellant testified that Life Challenge failed to provide certain promised services, including vocational training, on-site employment opportunities, and substance abuse counseling. In his experience, no such services were provided, and, in fact, the program actually discouraged participants from discussing prior substance abuse.

{¶6} Ms. Traci Hunt, appellant's probation officer, testified that appellant was discharged from Life Challenge on October 18, 2008. When she arrived at work that day, she had a message from the program stating that they had given appellant the option to stay in the program on a different level, or to leave altogether. Appellant made

a request to contact either Ms. Hunt or his Michigan probation officer, which was denied. Because he was not given that opportunity, he chose to leave the program. After leaving, he contacted Ms. Hunt, who informed him of his noncompliance, that the trial court's order was very specific, and that because he was terminated from the program, he had to return to court for a resentencing hearing. One week later, appellant was arrested and incarcerated to await his resentencing.

{¶7} Detective Hoolihan, one of the original officers on the case, testified at the resentencing hearing that the Ohio Organized Crime Task Force was very displeased with appellant's original sentence because appellant was allowed to plead guilty to only 16 of a 34-four count indictment, even though he had been incarcerated three other times, including serving time in a federal prison for similar crimes.

{¶8} The state urged the trial court to sentence appellant to the original nine-year term of imprisonment the court and appellant had agreed to if he violated his sentence of community control. The state asserted that although appellant testified that he chose to leave Life Challenge because it was not what was initially explained to him, he was, in fact, terminated from the program for attempting to construct an electric shotgun and not getting along with others.

{¶9} Thereafter, the trial court reviewed the original sentencing hearing, reiterating that appellant was offered a two-year term of imprisonment or the five-year term of community control sanctions, which included the successful completion of the Life Challenge program, and that he would be sentenced to a nine-year term of imprisonment if he did not. Because appellant failed to do as he agreed, the trial court imposed the nine-year sentence on January 21, 2009. This was the sentence appellant

agreed to in accepting the community control sanctions over the two-year term of imprisonment the court originally considered. Specifically, however, the court sentenced appellant to serve nine years on the count of engaging in a pattern of corrupt activity, a second degree felony, to be served concurrently to one-year concurrent terms on the remaining 16 counts of breaking and entering.

{¶10} Appellant filed his first appeal, Case No. 2009-T-0007, asserting the trial court erred at his revocation hearing by not sentencing him anew, and by imposing a nine-year prison sentence that was not reasonably calculated to punish him or to protect the public from future crime. This court determined the trial court erred in sentencing appellant to a term of imprisonment that was clearly and convincingly contrary to law as it was outside the applicable range of a second degree felony. *Kirkpatrick* I at ¶20. Thus, this court vacated and remanded for a resentencing within the statutory range. *Id.* at ¶20, 31-32.

{¶11} Upon remand, the trial court held a third sentencing hearing on January 28, 2010 in which appellant was sentenced anew. The court heard testimony from appellant and arguments from his new attorney detailing potentially mitigating factors of appellant's bipolar disorder and the fact that appellant engaged in nonviolent crimes. Appellant further argued that he did not construct an electric shot gun, a fact that was noted in the record as the reason why he was expelled from Life Challenge, but rather a simple hand buzzer. The court reminded appellant of his original agreement to a nine-year sentence if he failed to complete the program and noted that appellant has been in prison three times in the past.

{¶12} On February 5, 2010, the trial court sentenced appellant to an eight-year term of imprisonment on the count of engaging in a pattern of corrupt activity, to be served consecutively to one-year concurrent terms for each of the remaining counts of breaking and entering, for a total term of imprisonment of nine years.

{¶13} Appellant filed his second appeal, Case No. 2010-T-0025, asserting the following: that the trial court erred by not sentencing him anew, and by imposing a nine-year prison sentence that was not reasonably calculated to punish him or to protect the public from future crime; the trial court erred by imposing a prison sentence upon him because the community control sanction violated the Establishment and Free Exercise Clauses of the United States Constitution; and appellant alleged that he was denied effective assistance of counsel at the second revocation hearing in January 2010. This court found no merit to any of appellant's assignments of error and affirmed the judgment of the trial court. *Kirkpatrick* II at ¶27, 32, 45, 46.

{¶14} Following his second appeal, appellant filed numerous pro se motions with the trial court including a January 15, 2015 motion for a de novo resentencing hearing. The trial court denied appellant's motion on July 28, 2015. Appellant filed the instant appeal, asserting the following assignment of error:

{¶15} "The trial court erred by not granting Mr. Kirkpatrick's MOTION FOR A DE NOVO RESENTENCING HEARING AND A FINAL APPEALABLE ORDER."

{¶16} Under his sole assignment of error, appellant presents four issues:

{¶17} "[1.] The trial court erred by not disposing of each count to which Mr. Kirkpatrick pled guilty, and by imposing a single lump-sum five-year term of community control thereby engaging in 'sentence packaging' and violating Mr. Kirkpatrick's right to

due process under the Fourteenth Amendment to the United States Constitution, and Section Sixteen, Article I of the Ohio Constitution.

{¶18} "[2.] Mr. Kirkpatrick's journal entry is not a final appealable order because it does not speak the truth by reflecting the actual sentence that the trial court imposed.

{¶19} "[3.] A nunc pro tunc entry is not appropriate to correct substantial omissions such as those at issue here.

{¶20} "[4.] Failure of a document filed as a 'judgment' or 'journal entry' in a criminal case to set forth any element of Crim.R. 32(C) renders such document insufficient to constitute a 'judgment' or 'final order' required to establish subject matter jurisdiction in a court of appeals in an appeal attempted therefrom (sic)."

{¶21} In his first issue, appellant argues the trial court erred in the original sentencing entry by not disposing of each count to which he pled guilty and by imposing a single lump-sum five-year term of community control in violation of his right to due process.

{¶22} In his second issue, appellant contends the original sentencing entry is not a final appealable order because it does not reflect what actually happened at the sentencing hearing.

{¶23} In his fourth issue, appellant alleges that a failure of a document filed as a "judgment" or "journal entry" in a criminal case to set forth any element of Crim.R. 32(C) renders such document insufficient to constitute a "judgment" or "final order."

{¶24} The denial of appellant's January 15, 2015 pro se motion for a de novo resentencing hearing is the subject of this appeal. However, the basis for that motion stems from the original sentencing entry from 2008. Appellant argues the trial court

erred in failing to impose a sentence for each of the underlying charges and did not render and journalize a valid judgment. He asserts that community control was never properly imposed. As appellant's first, second, and fourth issues concern the 2008 original sentencing entry and are thus interrelated, we will address them in a consolidated fashion.

{¶25} In support of appellant's argument that he is entitled to a de novo resentencing hearing, he relies, inter alia, on *State v. Williams*, 3d Dist. Hancock No. 5-10-02, 2011-Ohio-995. In 2011, the Third District in *Williams* held that a trial court must sentence a defendant to community control on each separate count of which he is convicted. *Id.* at ¶21. The Third District further held that if a trial court fails to advise a defendant on the specific term of imprisonment that could be imposed, the court cannot sentence him to a lump term of community control for all counts. *Id.* at ¶23-24. Based on the facts in the case at bar, appellant's reliance on *Williams* is misplaced.

{¶26} Here, appellant was advised of the potential penalties for each felony conviction and signed the plea agreement. The trial court indicated that appellant was sentenced to a total of five years community control in 2008. The duration of the community control imposed upon appellant did not exceed the maximum permitted by law. *See* R.C. 2929.15(A)(1) ("[t]he duration of all community control sanctions imposed upon an offender under this division shall not exceed five years.") In addition, appellant was on notice that he would serve a specific amount of prison time (nine years) if he did not comply with the requirements of community control.

{¶27} After undergoing a PSI, at the 2008 sentencing hearing, appellant was represented by counsel who acknowledged that appellant originally entered into a plea.

Following a discussion among appellant's counsel, appellant's pastor, and the trial judge, the judge offered appellant a choice between two years imprisonment or five years community control which would include completion of the Life Challenge program. Appellant chose and received the latter community control option. Appellant agreed that in the case of revocation he would serve nine years in prison.

{¶28} The record reveals appellant knew the conditions imposed upon him while bargaining with the trial court and knew that any violation would result in a nine-year prison term. Neither appellant nor his counsel objected to the sentencing. In fact, appellant received the very sentence he requested from the trial court. Thus, appellant himself induced the sentence the court made. *State v. Tribble*, 7th Dist. Mahoning No. 07 MA 205, 2009-Ohio-1311, ¶34, citing *State v. Kniep*, 87 Ohio App.3d 681, 686 (9th Dist.1993) ("Pursuant to the 'invited error' doctrine, appellant cannot now assert sentencing errors that appellant himself induced the court to make.") Any error made by the trial court in 2008 regarding sentencing appellant to a single five-year term of community control was later amended following his termination from Life Challenge.

{¶29} While appellant argues that he is entitled to a de novo resentencing hearing, we stress that he already had one. Following appellant's first appeal, Case No. 2009-T-0007, this court vacated and remanded for resentencing. *Kirkpatrick* I. Upon remand, the trial court sentenced appellant anew in 2010. Following appellant's second appeal, Case No. 2010-T-0025, this court affirmed the trial court's judgment and appellant's sentence. *Kirkpatrick* II. Thus, any alleged error regarding community control in the original 2008 sentencing entry, which has been vacated by his 2010 resentencing, is now moot.

{¶30} Furthermore, appellant's present arguments are barred by the doctrine of res judicata. "'"Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial*, which resulted in that judgment of conviction, *or on an appeal* from that judgment." (Emphasis sic).' *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 95 * * *, quoting *State v. Perry* (1967), 10 Ohio St.2d 175 * * *, paragraph nine of the syllabus." (Parallel citations omitted.) *State v. Balch*, 11th Dist. Portage No. 2009-P-0074, 2010-Ohio-3361, ¶27.

{¶31} "'(P)rinciples of *res judicata* prevent relief on successive, similar motions raising issues which were or could have been raised originally.' *Brick Processors, Inc. v. Culbertson* (1981), 2 Ohio App.3d 478 * * *, paragraph one of the syllabus. Stated differently, any 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. *Perry,* [*supra,*] paragraph nine of the syllabus; *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, at ¶6 * * *." (Parallel citations omitted.) *State v. Lintz*, 11th Dist. Lake No. 2010-L-067, 2011-Ohio-6511, ¶36.

{¶32} If a sentencing error could have been raised in a direct appeal and was not raised, that error is deemed to have been waived. *State v. Combs*, 73 Ohio App.3d 823, 825 (2d Dist.1991).

{¶33} The arguments raised by appellant concerning the 2008 original sentencing entry are based on information available to him at the time he filed his prior appeals. Appellant previously raised sentencing arguments and could have, but did not,

raise these particular issues in *Kirkpatrick* I or II. Thus, they are now barred by the doctrine of res judicata. In any event, this court notes again that any error made by the trial court in 2008 regarding sentencing appellant to a single five-year term of community control was subsequently vacated by his 2010 resentencing to a proper nine-year prison term.

{¶34} Appellant's first, second, and fourth issues are without merit.

{¶35} In his third issue, appellant argues that a nunc pro tunc entry is not appropriate to correct substantial omissions such as those at issue in this case.

{¶36} Crim.R. 36 governs nunc pro tunc judgment entries in criminal cases and provides: "Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time."

{¶37} "'The term "clerical mistake" refers to a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment.' See, e.g., *State v. Brown* (2000), 136 Ohio App.3d 816, 819-820 * * *. Although courts possess inherent authority to correct clerical errors in judgment entries so that the record speaks the truth, 'nunc pro tunc entries "are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided."' [*State ex rel.*] *Mayer* [*v. Henson*], 97 Ohio St.3d 276, 2002-Ohio-6323, * * * ¶14, quoting *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 164 * * *." (Parallel citations omitted.) *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, ¶19.

{¶38} In this case, appellant is requesting a de novo resentencing hearing. However, as stated, he already had one. Any defect in the 2008 sentencing entry regarding sentencing appellant to a single five-year term of community control was later amended following his termination from Life Challenge. The later 2009 defective sentencing entry involving the second degree felony issue was vacated and a new sentencing hearing was held in 2010. Thus, appellant received a new sentence and this court affirmed that sentence in *Kirkpatrick* II. Although this assignment of error takes issue with a nunc pro tunc entry, we note that there is no nunc pro tunc entry in the record and no indication that one would be used in the future.

{¶39} Appellant's third issue is without merit.

{¶40} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

TIMOTHY P. CANNON, J.,