

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

| | | |
|------------------------|---|----------------------|
| STATE OF OHIO, | : | O P I N I O N |
| Plaintiff-Appellee, | : | CASE NO. 2017-A-0075 |
| - VS - | : | |
| MIGUEL A. ALSINA, JR., | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2011 CR 18.

Judgment: Affirmed.

Nicholas A. Iarocci, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

Miguel A. Alsina, Jr., pro se, PID: A600-263, Trumbull Correctional Institution, 5701 Burnett Road, Leavittsburg, OH 44430 (Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Miguel Alsina, Jr., appeals the trial court's denial of his motion for resentencing. We affirm.

{¶2} Alsina pleaded guilty to attempted aggravated murder of a police officer, felonious assault, and having weapons while under a disability. He was sentenced in

February 2011. We affirmed his sentence in 2011 in his direct appeal. *State v. Alsina*, 11th Dist. Ashtabula No. 2011-A-0016, 2011-Ohio-6692, ¶23.

{¶3} In May of 2017, Alsina moved the trial court for resentencing claiming it impermissibly considered his juvenile adjudications in enhancing his criminal penalties, contrary to the holdings in *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448, *cert. denied*, 137 S.Ct. 1074, 197 L.Ed.2d 179 and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

{¶4} The trial court disagreed, found these cases inapplicable, and held that it lacked authority to resentence him.

{¶5} Alsina raises one assignment of error:

{¶6} “The trial court erred when using the Appellant-Defendant’s Juvenile history to enhance his penalties for the crimes the Appellant was accused of.”

{¶7} Alsina pursued a direct appeal in 2011 from his convictions and raised one assignment of error based on *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. He did not raise the U.S. Supreme Court’s decision in *Apprendi*, which was decided at the time of his direct appeal. Accordingly, this argument is barred by res judicata. *State v. Garner*, 11th Dist. Lake No. 2017-L-037, 2017-Ohio-7814, ¶18 (res judicata precludes a defendant from raising any defense or claimed lack of due process that could have been raised at trial or on direct appeal.); *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus; *State v. Jeffries*, 182 Ohio App.3d 459, 2009-Ohio-2440, 913 N.E.2d 493, ¶49 (11th Dist.) (finding apparent constitutional issues not raised in the trial court waived on appeal).

{¶8} Further, absent exceptions not present, once a conviction becomes final because a defendant lacks an appellate remedy, “new case law cannot be applied retroactively even if it would be relevant to the facts of his case.” (Citation omitted.) *Wallace v. State*, 11th Dist. Trumbull No. 2004-T-0008, 2004-Ohio-2596, ¶5; compare *State v. Ketterer*, 140 Ohio St.3d 400, 2014-Ohio-3973, 18 N.E.3d 1199, ¶14 (finding exception when case determines for the first time what statute means) and *Montgomery v. Louisiana*, 136 S.Ct. 718, 729, 193 L.Ed.2d 599 (2016) (holding the Constitution requires state collateral review courts to give retroactive effect to new substantive rule of constitutional law.) Instead, new case law generally only applies to cases still pending in the state court system. *Id.* citing *State v. Evans*, 32 Ohio St.2d 185, 187, 291 N.E.2d 466 (1972); *State v. Harrison*, 11th Dist. Portage No. 2004-P-0068, 2005-Ohio-4212, ¶19; *State v. Perkins*, 2nd Dist. Montgomery Nos. 26788, 26797, and 26804, 2016-Ohio-4581, ¶12.

{¶9} We affirmed Alsina’s convictions in December of 2011 and the case on which he now relies, *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448, was decided nearly five years later. Because it was decided after his appeals concluded, we cannot apply it to his 2010 convictions. *Wallace*, *supra*.

{¶10} Finally, even assuming Alsina has the right to argue that *State v. Hand* applies, the holding in *Hand* was limited to the issue of whether Hand’s prior juvenile adjudication for aggravated robbery constitutes a first-degree-felony conviction to enhance his sentence. *Id.* at ¶3. *Hand* held that R.C. 2901.08(A) violates the Due Process Clause because it “is a violation of due process to treat a juvenile adjudication as the equivalent of an adult conviction for purposes of enhancing a penalty for a later

crime" because delinquency determinations do not include the right to a jury trial. *Id.* at ¶1-2.

{¶11} Here, the trial court considered Alsina's delinquency adjudications upon assessing his likelihood of recidivism. Alsina appears to argue that *Hand* applies to all sentencing statutes. However, nothing in *Hand* prohibits a trial court from considering a defendant's juvenile delinquency adjudications when considering and weighing the recidivism factors in R.C. 2929.12. *Id; State v. McBride*, 11th Dist. Trumbull No. 2017-T-0050, 2017-Ohio-9349, ¶12, *appeal not allowed*, 2018-Ohio-1795. In fact, R.C. 2929.12(D)(1) and (E)(1) *require* a sentencing court to consider whether an offender had been adjudicated a delinquent child upon assessing recidivism before imposing a sentence within the prescribed statutory range. *State v. Delp*, 8th Dist. Cuyahoga No. 105467, 2017-Ohio-8879, ¶38-39.

{¶12} Thus, the trial court's consideration of Alsina's delinquency adjudications at sentencing for recidivism purposes was proper. His sole assigned error lacks merit and is overruled.

{¶13} The trial court's decision is affirmed.

DIANE V. GRENDELL, J.,

TIMOTHY P. CANNON, J.,

concur.