

[Cite as *State v. Heard*, 2011-Ohio-1513.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 25358

Appellee

v.

DARYL HEARD

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 05 03 0821(A)

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 30, 2011

MOORE, Judge.

{¶1} Appellant, Daryl Heard, appeals his conviction by the Summit County Court of Common Pleas. This Court affirms in part, vacates in part, and remands the matter to the trial court.

I.

{¶2} In the early morning of October 30, 2004, Larry Belton was shot and killed in his apartment. An investigation led to the arrest of Daryl Heard. On June 1, 2005, a jury convicted Heard of aggravated murder in violation of R.C. 2903.01(B), murder in violation of R.C. 2903.02(B), felonious assault in violation of R.C. 2903.11(A)(1), aggravated robbery in violation of R.C. 2911.01(A)(1), having weapons under disability in violation of R.C. 2923.13(A)(2)/(A)(3), a felony of the third degree, along with accompanying firearm specifications. On July 1, 2005, the trial court sentenced him to life in prison. He appealed, and this Court affirmed his convictions. *State v. Heard*, 9th Dist. No. 23025, 2006-Ohio-3558.

{¶3} On April 14, 2010, the trial court resentenced Heard so as to properly impose postrelease control. Prior to the new sentencing proceeding, Heard filed a motion to dismiss indictment for failure to charge an offense. He also filed a motion to dismiss due to unreasonable delay in sentencing. Those motions were denied.

{¶4} Heard timely filed a notice of appeal. He raises five assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

“TRIAL COURT ERRED WHEN OVERRULING [HEARD’S] MOTION TO DISMISS INDICTMENT FOR FAILURE TO CHARGE AN OFFENSE PURSUANT TO CRIM.R. 12(C)(2). [HEARD’S] INDICTMENTS FOR AGGRAVATED MURDER, MURDER AND AGGRAVATED ROBBERY ARE DEFECTIVE FOR FAILING TO STATE ANY ELEMENT OF ACCOMPLICES IN THE ACTUS REUS OR MENS REAS [SIC] CAPACITIES.”

ASSIGNMENT OF ERROR II

“TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OF [SIC] ANY PROCEEDINGS FOR THE CHARGE OF AGGRAVATED MURDER. [HEARD’S] INDICTMENT FOR AGGRAVATED MURDER WAS SO [SIC] DEFECTIVE AS IT SET NOT [SIC] FORTH ANY ESSENTIAL ELEMENT OF ‘INTENT’ THAT [SIC] THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION.”

ASSIGNMENT OF ERROR III

“TRIAL COURT ERRED WHEN PROVIDING INCORRECT ACCOMPLICE JURY INSTRUCTION.”

ASSIGNMENT OF ERROR IV

“[HEARD’S] CONVICTION WAS OBTAINED WITH INSUFFICIENT EVIDENCE.”

ASSIGNMENT OF ERROR V

“INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.”

{¶5} Heard raises five assignments of error for our review. Each assignment of error, however, pertains to the merits of his underlying conviction. It is long-standing precedent in Ohio that res judicata bars the consideration of issues that could have been raised on direct appeal. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, at ¶16-17, citing *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, at ¶37; *State v. D’Ambrosio* (1995), 73 Ohio St.3d 141, 143.

{¶6} The Ohio Supreme Court has now held that, if a defendant has “already had the benefit of one direct appeal, [he can] not raise any and all claims of error in a second, successive appeal.” *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, at ¶33, citing *State v. Fischer*, 181 Ohio App.3d 758, 2009-Ohio-1491. Accordingly, “[a]lthough the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence.” *Id.* at paragraph three of the syllabus. Further, “[t]he scope of an appeal from a resentencing hearing in which a mandatory term of postrelease control is imposed is limited to issues arising at the resentencing hearing.” *Id.* at paragraph four of the syllabus.

{¶7} Heard has appealed from his resentencing hearing, at which the trial court imposed a mandatory life period of postrelease control. He may only raise issues arising from that resentencing hearing because issues concerning the merits of his convictions are barred by res judicata. See, e.g., *State v. Cook*, 9th Dist. No. 25276, 2010-Ohio-6524. Because each assignment of error pertains to the merits of his original conviction, our review of Heard’s first, second, third, fourth, and fifth assignments of error is barred.

{¶8} Although Heard did not raise the terms of his postrelease control as an assignment of error, our review indicates that the trial court improperly imposed a mandatory life period of

postrelease control. This judgment entry must be corrected. We vacate the postrelease control portion of the judgment entry and remand to the trial court to impose proper postrelease control.

III.

{¶9} We decline to address Heard's first, second, third, fourth, and fifth assignments of error. We vacate and remand to the trial court for proceedings consistent with this opinion.

Judgment affirmed in part,
vacated in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

CARLA MOORE
FOR THE COURT

CARR, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

DARYL HEARD, pro se, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.