

[Cite as *State v. Perdue*, 2017-Ohio-7586.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 16 MA 0156
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
CLINTON PERDUE)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio
Case No. 88 CR 574B

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant: Clinton Perdue, *Pro se*
#217-703
Trumbull Correctional Institution
P.O. Box 901
Leavittsburg, Ohio 44430

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: September 7, 2017

[Cite as *State v. Perdue*, 2017-Ohio-7586.]
WAITE, J.

{¶1} Appellant Clinton Perdue appeals a September 12, 2016 decision of the Mahoning County Common Pleas Court denying his motion to correct an “illegal” sentence. Appellant appears to argue that the sentencing statute in effect at the time he was sentenced did not authorize the court to sentence him to life imprisonment without the possibility of parole. He additionally argues that he did not commit one of the enumerated offenses required to be charged with felony murder. For the following reasons, Appellant’s arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On September 22, 1988, Appellant was one of several men who robbed an apartment. During the course of the robbery, three people were shot. Two of the victims died as a result of their injuries. On October 11, 1988, Appellant was indicted on two counts of aggravated murder, two counts of aggravated robbery, and one count of attempted murder. Appellant was also indicted on five attendant firearm specifications. Following a jury trial, Appellant was convicted on all counts. The trial court sentenced Appellant to life imprisonment for each of the aggravated murder counts, ten to twenty-five years on each of the robbery counts, and seven to twenty years for the attempted murder count. The trial court additionally sentenced him to three years per firearm specification.

{¶3} Appellant’s convictions were affirmed in *State v. Perdue*, 7th Dist. No. 90 C.A. 18, 1993 WL 546609 (Dec. 30, 1993). However, as to his sentence, we merged two of the firearm specifications stemming from the aggravated robbery

counts. On March 11, 1998, Appellant filed a “motion to vacate a void judgment pursuant to Civ.R. 60(B)(5)” in the trial court. *State v. Perdue*, 7th Dist. No. 98 C.A. 156, 1999 WL 1138567, *1 (Dec. 9, 1999), which was denied. On appeal, we construed this motion as a postconviction petition and upheld the trial court because the petition was untimely.

{¶14} On February 2, 1999, Appellant filed a motion for leave to file a motion for a new trial. The trial court denied the motion. On appeal, we reversed the trial court’s decision and instructed the court to order and review transcripts of select witnesses and affidavits from Appellant’s codefendants. See *State v. Perdue*, 7th Dist. No. 99 CA 156, 2000 WL 1902206 (Dec. 18, 2000). On remand, the trial court again denied the motion for a new trial after review. We affirmed this decision in *State v. Perdue*, 7th Dist. No. 04 MA 119, 2005-Ohio-2703.

{¶15} On August 12, 2008, Appellant filed a “MOTION TO VACATE A VOID JUDGMENT FOR LACK OF SUBJECT MATTER JURISDICTION.” In his motion, he argued that the trial court was stripped of its subject matter jurisdiction when the state amended his indictment. The trial court deemed the motion frivolous and it was denied. No appeal was taken.

{¶16} On February 7, 2012, Appellant filed a “MOTION TO VACATE VOID JUDGMENT PURSUANT TO R.C. 2929.03(F).” Appellant argued that Ohio law requires the trial court to file separate entries for conviction and sentencing. Appellant argued that as a result of the failure to file a separate sentencing entry in his case, no final, appealable order was ever entered addressing his sentence. The

trial court denied the motion as an untimely postconviction petition. No appeal was taken.

{¶7} On May 16, 2012, Appellant filed a “MOTION FOR A NEW TRIAL PURSUANT TO R.C. 2905.02(A) Crim. R. 32 (C).” Appellant repeated his earlier arguments regarding the lack of a separate sentencing entry. The trial court again denied the motion and again, no appeal was taken. On May 16, 2014, Appellant filed a “MOTION FOR FINAL APPEALABLE ORDER PURSUANT TO O.R.C. 2525.02(A) O.R.C. 2929.03(D)(1)(2); 2929.03(F) AND CRIM.R. 32(C).” Appellant continued to argue that as the trial court did not enter a separate sentencing entry, he had no final, appealable sentencing entry. On September 4, 2014, the trial court entered a *nunc pro tunc* sentencing entry.

{¶8} On December 4, 2014, Appellant filed a “MOTION FOR FINAL APPEALABLE ORDER PURSUANT TO O.R.C. 2929.03(D)(1)(2)(3), 2929.03(F), 2525.02(A), CRIM.R. 32(C).” Appellant contended that the *nunc pro tunc* entry was insufficient because it failed to delineate the counts to which it pertained and did not consist of separate entries for judgment and sentencing. The trial court denied the motion. No appeal was taken.

{¶9} On January 8, 2015, Appellant filed a “SUPPLEMENTAL MOTION FOR FINAL, APPEALABLE ORDER PURSUANT TO OHIO REVISED CODE 2929.03(D)1,2,3, F.” On July 24, 2015, Appellant filed a “MOTION TO MODIFY THE JUDGMENT, APPELLATE RULE 12(B) O.R.C. 2945.79.” On October 16, 2015,

Appellant filed a “MOTION TO PROCEED TO JUDGMENT.” The trial court denied each of these motions in a single judgment entry.

{¶10} On August 9, 2016, Appellant filed a document he titled “MOTION TO CORRECT AN ILLEGAL SENTENCE.” In this filing, he argued that his sentences on the aggravated murder counts were not authorized by statute. He also argued that his sentence for attempted aggravated murder was improper, as attempted murder is not a qualifying offense forming the basis for a felony murder charge. On September 12, 2016, the trial court denied the motion. It is from this judgment entry that Appellant timely appeals.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT COMMITTED PLAIN ERROR PURSUANT TO
CRIM.R. 52(B) BY SENTENCING THE DEFENDANT-APPELLANT TO
SERVE A LIFE SENTENCE ON COUNTS ONE AND TWO OF THE
INDICTMENT.

{¶11} A motion to correct a void sentence can be used to correct a facially invalid portion of a sentence. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 25. However, “res judicata would still apply to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence.” *State v. Brown*, 7th Dist. No. 14 MA 37, 2014-Ohio-5832, ¶ 32, citing *Fischer* at ¶ 25, 31, 40.

{¶12} It appears that Appellant is arguing that the statute in effect at the time of his sentencing, R.C. 2929.03(D)(2), did not allow for a sentence of life in prison

without the possibility of parole. The state responds by arguing that Appellant is barred from raising this alleged error by the doctrine of *res judicata*.

{¶13} The trial court's sentencing entry states in relevant part,

It is the sentence of the Court that the Defendant be taken from here to the Mahoning County Jail, and from thence to the Correctional Reception Center, Orient, Ohio, there to serve a Life Sentence and to pay the costs. This sentence being under Revised Code Section 2929.02.

(1/10/1990 J.E.)

{¶14} At the time Appellant was sentenced, R.C. 2929.02(A) read as follows:

"Whoever is convicted of, pleads guilty to, or pleads no contest and is found guilty of, aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022, 2929.03, and 2929.04 of the Revised Code."

{¶15} Former R.C. 2929.03(D)(2) provided:

Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof

beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

{¶16} In *Brown, supra*, we reviewed whether the trial court's sentence ordering the defendant to serve life imprisonment without the possibility of parole was void when the relevant statute actually provided for life imprisonment with the possibility of parole after twenty years. We held that the defendant's life sentence was not void. On review, we emphasized that the Ohio Administrative Code "provides that a life sentence imposed via R.C. 2929.03 for aggravated murder shall be presumed to be a sentence of life imprisonment with parole eligibility after twenty years, subject to certain diminutions, unless the sentencing entry specifies parole eligibility is to be after twenty full years or thirty full years." *Id.* at ¶ 35, citing Ohio Adm.Code 5120-2-10(B). Hence, the trial court's sentence in *Brown* did not exceed the court's authority and was not void.

{¶17} In the present matter, the trial court did not specify whether Appellant was to be given parole eligibility after twenty years or thirty. Pursuant to Ohio Adm.Code 5120-2-10(B), Appellant is presumed to be sentenced to life imprisonment

with parole eligibility after twenty years. The trial court in this matter did not exceed its authority and Appellant's sentence does not create an issue of voidness. Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT COMMITTED PLAIN ERROR PURSUANT TO CRIM.R. 52(B) BY ENTERING A JUDGMENT OF CONVICTION ON COUNT SEVEN OF THE INDICTMENT FOR ATTEMPTED AGGRAVATED FELONY MURDER PURSUANT TO R.C. 2903.01(B) AND R.C. 2923.02(A).

{¶18} Appellant argues that attempted murder is not an offense that triggers a felony murder charge. As such, he believes that his conviction and sentence for felony murder is void. In response, the state argues that Appellant's argument is barred by *res judicata*.

{¶19} The doctrine of *res judicata* "bars an individual from raising a defense or claiming a lack of due process that was or could have been raised at trial or on direct appeal." *State v. Croom*, 7th Dist. No. 13 MA 98, 2014-Ohio-5635, ¶ 7, citing *State v. Ishmail*, 67 Ohio St.2d 16, 18, 423 N.E.2d 1068 (1981). However, where "an alleged constitutional error is supported by evidence that is de hors the record, *res judicata* will not bar the claim because it would have been impossible to fully litigate the claim on direct appeal." *State v. Green*, 7th Dist. No. 02 CA 35, 2003-Ohio-5142, ¶ 21, citing *State v. Smith*, 125 Ohio App.3d 342, 348, 708 N.E.2d 739 (12th Dist.1985). "To overcome the *res judicata* bar, the petitioner must demonstrate that the claim

could not have been appealed based on the original trial record.” *State v. Dumas*, 7th Dist. No. 15 MA 0101, 2017-Ohio-731, ¶ 11 citing *State v. Agee*, 7th Dist. No. 14 MA 0094, 2016-Ohio-7183, ¶ 11; *State v. Combs*, 100 Ohio App.3d 90, 97, 652 N.E.2d 205 (1st Dist.1994).

{¶20} Appellant in this case simply presents an argument that was available to him during his direct appeal. He does not present any evidence that was not a part of the original trial record. Therefore, his argument is barred by the doctrine of *res judicata*.

{¶21} Regardless, it appears that Appellant misunderstands his indictment. Appellant believes that the attempted murder charge formed the sole basis for the felony murder count. However, the indictment charged Appellant for an attempted murder that occurred during the course of a robbery. It was the fact that the crime occurred during the commission of a robbery that triggered the felony murder charge. Robbery is one of the enumerated offenses within the felony murder statute. Appellant’s second assignment of error is also without merit and is overruled.

Conclusion

{¶22} Appellant argues that the sentencing statute in effect at the time he was sentenced did not authorize a sentence of life imprisonment without the possibility of parole. However, his sentence created a presumption of parole eligibility after twenty years and is not void. He additionally argues that he did not commit one of the enumerated offenses that form the basis for a felony murder charge. However, Appellant was properly charged with felony murder for attempted murder during the

course of robbery. Accordingly, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

DeGenaro, J., concurs.