

[Cite as *State v. Greenberg*, 2013-Ohio-1638.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 12AP-602
v.	:	(C.P.C. No. 01CR-12-7338)
	:	
Steven M. Greenberg,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on April 23, 2013

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*Ron O'Brien*, Prosecuting Attorney, and *Michael P. Walton*,  
for appellee.

*Steven M. Greenberg*, pro se.

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APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Steven M. Greenberg, pro se, appeals from the judgment of the Franklin County Court of Common Pleas denying his Civ.R. 60(B) motion for relief from judgment. For the following reasons, we affirm.

**I. BACKGROUND**

{¶ 2} On October 14, 2003, appellant pleaded guilty to one count of rape, a felony of the first degree, in violation of R.C. 2907.02; one count of attempted abduction, a felony of the fourth degree, in violation of R.C. 2923.02 and 2905.02; and two counts of corrupting another with drugs, felonies of the fourth degree, in violation of R.C. 2925.02. The trial court accepted appellant's guilty plea and sentenced him to prison for nine years and six months.

{¶ 3} Appellant subsequently filed a motion for judicial release, pursuant to R.C. 2929.20, and the trial court held a hearing on the motion on December 18, 2008. At the hearing, the trial court granted appellant judicial release and placed him on community control for a period of five years with special conditions of intensive supervision. In February 2009, the trial court added the following conditions: (1) appellant shall have no personal internet use at any time, and (2) appellant shall have no internet access at his place of residence.

{¶ 4} The probation department filed a request for revocation of community control on November 30, 2010, on grounds that (1) appellant possessed pornography through his personal email account, (2) appellant was involved with selling and purchasing sexually explicit material through the internet, (3) appellant failed to inform the probation department of intimate relationships conducted through dating websites, and (4) appellant had personal internet use that was verified through his Facebook and personal email account.

{¶ 5} The trial court held a community control revocation hearing on January 26, 2011. Appellant attended the hearing and was represented by counsel. The trial court acknowledged the internet restrictions it previously imposed on appellant and said that the restrictions "were agreed upon by the defendant and by his attorney." (Jan. 26, 2011 Revocation Hearing, 5.) Although appellant denied viewing pornography in his email account or trafficking in sexually explicit material through the internet, he stipulated that he violated the conditions of his community control by engaging in personal internet use and did not object to the added conditions. The trial court revoked appellant's community control and reinstated his prison sentence. The trial court journalized its decision in an entry dated February 4, 2011.

{¶ 6} Appellant did not appeal the trial court's decision to revoke his community control. On July 25, 2011, after the time to file an appeal expired, appellant moved for the trial court to reconsider its revocation order and suspend the execution of his prison sentence. The trial court denied appellant's motion. On January 6, 2012, pursuant to Civ.R. 60(B), appellant filed a motion for relief from judgment in which he argued that

the trial court was required to vacate its decision to revoke his community control. He claimed that the trial court could not have revoked his community control based on the additional internet conditions because he was not present at the proceeding when the trial court imposed the internet restriction as a community control condition.

{¶ 7} The trial court denied appellant's motion. It concluded that appellant was not entitled to relief because he improperly used Civ.R. 60(B) as a substitute for a timely appeal and concluded that the Civ.R. 60(B) motion was barred by res judicata because the claims in that motion could have been raised in a timely appeal.

## **II. ASSIGNMENTS OF ERROR**

{¶ 8} Appellant filed a timely notice of appeal and assigns the following as error:

I. Whether the trial court abused its discretion by failing to give fair notice requirements.

II. Whether the trial court abused its discretion in violating Appellant's due process rights.

III. Whether the trial court abused its discretion in applying the doctrine of res judicata.

## **III. DISCUSSION**

### **A. Third Assignment of Error**

{¶ 9} For ease of discussion and because it is dispositive, we begin by addressing appellant's third assignment of error, in which he claims that the trial court abused its discretion by denying his Civ.R. 60(B) motion on grounds that it was barred by res judicata. We disagree.

{¶ 10} "Civ.R. 60(B) provides that, under certain circumstances, a court may relieve a party from a final judgment, order, or proceeding." *PHH Mtge. Corp. v. Santiago*, 10th Dist. No. 11AP-562, 2012-Ohio-942, ¶ 6. An appellate court reviews a trial court's denial of a Civ.R. 60(B) motion under an abuse of discretion standard. *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, ¶ 7. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is

unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 11} The trial court concluded that appellant's Civ.R. 60(B) motion was barred by res judicata because the claims in that motion could have been raised in a timely appeal of the community control revocation order. Under the doctrine of res judicata, a final judgment bars a 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 the defendant raised or could have raised at trial or on appeal. *State v. Myers*, 10th Dist. No. 11AP-909, 2012-Ohio-2733, ¶ 5. *See also State v. Dodson*, 10th Dist. No. 03AP-306, 2004-Ohio-581, ¶ 13 (recognizing that any issues that a party raised or could have raised in a direct appeal are barred by res judicata in other proceedings). The doctrine of res judicata is applicable to Civ.R. 60(B) motions. *Coulson v. Coulson*, 5 Ohio St.3d 12, 17 (1983).

{¶ 12} Appellant contends that res judicata does not apply to his Civ.R. 60(B) motion because the trial court's revocation order was not a final judgment. However, an order, like the one from the trial court, that revokes community control and imposes a sentence is a final judgment. *State v. Parsons*, 10th Dist. No. 03AP-1176, 2005-Ohio-457, ¶ 7.

{¶ 13} Appellant also argues that res judicata is inapplicable because his reinstated prison sentence is void. Res judicata does not apply to a defendant's challenge to a void sentence. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 40. A void sentence is imposed by a court that lacks subject-matter jurisdiction over a case. *Id.* at ¶ 6-7. A sentence that is not in accordance with statutorily mandated terms is also void. *Id.* at ¶ 8. Appellant does not claim that the trial court lacked subject-matter jurisdiction over his case, nor does he specify a statutorily mandated term disregarded by the trial court. He instead claims that his prison sentence was erroneously reinstated because his community control should not have been revoked. In *State v. Webb*, 3d Dist. No. 9-08-58, 2009-Ohio-3412, ¶ 14, the court applied res judicata to a defendant's collateral attack claiming error in a trial court's decision to revoke his community

control and reinstate his prison sentence. We agree with the decision in *Webb* because, absent the circumstances we have already discussed, sentencing errors are not jurisdictional and do not render a sentence void. *Fischer* at ¶ 7. Consequently, appellant has failed to establish that his reinstated sentence is void. Therefore, regardless of whether his sentence is erroneous, it is subject to res judicata. *State v. Garnett*, 10th Dist. No. 12AP-594, 2013-Ohio-1210, ¶ 10.

{¶ 14} Having concluded that the exceptions to res judicata raised by appellant do not apply here, we now determine whether the trial court abused its discretion by holding that res judicata barred appellant's motion. In *Dodson*, this court recognized that res judicata bars a defendant's Civ.R. 60(B) motion when he could have previously argued the issues in that motion on direct appeal. *Id.* at ¶ 14-15. In *Nkurunziza v. Nyamusevya*, 10th Dist. No. 11AP-222, 2011-Ohio-6133, this court also held that a party's Civ.R. 60(B) motion was barred by res judicata because he could have previously raised the issues in his motion on direct appeal. *Id.* at ¶ 15. This court further noted the party was not entitled to relief because he could not "substitute his Civ.R. 60(B) motion for a direct appeal on those issues." *Id.* " 'If a Civ.R. 60(B) motion is premised upon issues which could have been raised on appeal, a trial court does not abuse its discretion by denying such motion.' " *Id.* at ¶ 12, quoting *Caron v. Manfreda*, 10th Dist. No. 98AP-1399 (Sept. 23, 1999).

{¶ 15} Appellant contends in his Civ.R. 60(B) motion that the trial court could not have revoked his community control based on the additional internet conditions because he was not present at the proceeding when the trial court imposed the internet restriction as a community control condition. Because appellant failed to file a direct appeal, res judicata bars his Civ.R. 60(B) challenge to the trial court's decision to revoke his community control. Similarly, as the court recognized in *Nkurunziza*, appellant cannot use his Civ.R. 60(B) motion as a substitute for a direct appeal. Accordingly, we find that the trial court did not abuse its discretion in denying appellant's Civ.R. 60(B) motion. We overrule appellant's third assignment of error.

**B. First and Second Assignments of Error**

{¶ 16} In his first and second assignments of error, appellant argues that the trial court abused its discretion and violated his due process rights by imposing the internet restrictions outside his presence. These arguments were the basis for appellant's Civ.R. 60(B) motion. However, we need not address appellant's first and second assignments of error because they are moot given our disposition of appellant's third assignment of error. App.R. 12(A)(1)(c).

**IV. CONCLUSION**

{¶ 17} Having overruled appellant's third assignment of error and rendered appellant's first and second assignments of error moot, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

KLATT, P.J., and DORRIAN, J., concur.

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