

[Cite as *State v. Fox*, 2010-Ohio-3030.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-1106
 : (C.P.C. No. 00CR06-3791)
 David G. Fox, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 30, 2010

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*,
for appellee.

David G. Fox, pro se.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, David G. Fox ("appellant"), pro se, appeals from a judgment of the Franklin County Court of Common Pleas denying his "Common Law Motion to Vacate Void Judgement [sic] and Sentence."

{¶2} By indictment filed June 22, 2000, appellant was charged with one count of aggravated murder in violation of R.C. 2903.01, with a firearm specification in violation of R.C. 2941.145. Following a trial, a jury found appellant guilty as charged in the indictment. The trial court sentenced appellant to a prison term of 20 years to life, with an additional three years on the firearm specification.

{¶3} Following sentencing, appellant timely appealed his conviction. On March 12, 2002, this court vacated the aggravated murder conviction, modified the conviction to one for murder, and remanded the matter for resentencing. *State v. Fox*, 10th Dist. No. 01AP-322, 2002-Ohio-1036. The Supreme Court of Ohio denied further review. *State v. Fox*, 96 Ohio St.3d 1466, 2002-Ohio-3910.

{¶4} On remand, the trial court found appellant guilty of murder with a firearm specification as directed by this court and sentenced him to a prison term of 15 years to life. Five years later, on July 25, 2007, appellant filed a motion for delayed appeal, which this court denied. *State v. Fox* (Sept. 18, 2007), 10th Dist. No. 07AP-594 (memorandum decision.) Appellant subsequently filed a motion for post-conviction relief, pursuant to R.C. 2953.21, claiming that he had new witnesses to support his defense. The trial court denied his petition based upon the doctrine of res judicata. On July 9, 2008, appellant filed a motion for leave to file a delayed motion for new trial pursuant to Crim.R. 33(B). Appellant asserted in his memorandum in support that he had new evidence from witnesses he knew at the time of the incident. The trial court denied this motion on July 22, 2008. This court affirmed that decision on March 24, 2009. *State v. Fox*, 10th Dist. No. 08AP-704, 2009-Ohio-1327. The Supreme Court of Ohio denied further appeal. *State v. Fox*, 122 Ohio St.3d 1507, 2009-Ohio-4233; *State v. Fox*, 123 Ohio St.3d 1494, 2009-Ohio-6015.

{¶5} On January 12, 2009, appellant filed the instant motion, contending that his conviction for aggravated murder is void because the verdict form on the aggravated murder charge did not include the statutory definition of aggravated murder set forth in R.C. 2903.01.

{¶6} By decision and entry filed October 31, 2009, the trial court denied appellant's motion, finding that the issue concerning the allegedly defective verdict form was barred by the doctrine of res judicata, and, in any event, was without merit. Appellant timely appeals, assigning five errors:

ASSIGNMENT OF ERROR I:

THE CONVICTION AND SENTENCE FILED BY THE FRANKLIN COUNTY COURT OF COMMON PLEAS ON FEBRUARY 16, 2001, FINDING DEFENDANT GUILTY OF AGGRAVATED MURDER, R.C. § 2903.01, WAS MADE CONTRARY TO LAW AND WITHOUT STATUTORY AUTHORITY, AND IS THEREBY A NULLITY AND VOID, AND A VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHT TO BE FOUND GUILTY OF ALL ELEMENTS OF A CRIME, UNANIMOUSLY BY A JURY, IN ORDER TO BE CONVICTED AND SENTENCED TO THAT CRIME.

ASSIGNMENT OF ERROR II:

TRIAL COURT ERRED WHEN IT STATED THAT DEFENDANT'S MOTION "IS CLEARLY BARRED BY RES JUDICATA" BECAUSE THE ISSUE WAS NOT BROUGHT UP AT TRIAL OR ON APPEAL FROM THAT TRIAL, CITING *STATE V. PERRY* (1967)[,] 10 OHIO ST.2D 175 IN SUPPORT.

ASSIGNMENT OF ERROR III:

TRIAL COURT ERRED BY CLAIMING THAT THE VERDICT FORMS IN THE CASE "WERE MORE THAN SUFFICIENT," THEN CITING OHIO JURY INSTRUCTIONS § 425.33 IN SUPPORT.

ASSIGNMENT OF ERROR IV:

TRIAL COURT ERRED, IN DENYING DEFENDANT'S MOTION FOR ASSISTANCE OF COUNSEL, WHEN IT REFERRED TO DEFENDANT'S MOTION AS A "POST CONVICTION PETITION[.]"

ASSIGNMENT OF ERROR V:

TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO ACCEPT JURISDICTION TO CORRECT DEFENDANT'S VOID SENTENCE. TRIAL COURT EXCEEDED ITS PROPER AUTHORITY BY ALLOWING A VOID SENTENCE TO STAND, IGNORING STATUTORY REQUIREMENTS AND ITS OBLIGATION TO FOLLOW THEM AND CORRECT A SENTENCE WHICH DOES NOT. [sic]

{¶7} Appellant's assignments of error collectively assert that the trial court's deficient verdict form violated his constitutional right to a jury finding of guilt on every element of aggravated murder; accordingly, the trial court should have granted his motion to vacate. In support of his contention, appellant cites *State v. Lampkin* (1996), 116 Ohio App.3d 771, contending that it holds that a verdict form must include the statutory definition of the crime with which a defendant is charged.

{¶8} As noted above, this court vacated appellant's conviction for aggravated murder and modified the conviction to that of murder. Upon this court's direction, the trial court found appellant guilty of murder. Because appellant's conviction for aggravated murder was vacated, his argument as to the validity of the verdict form pertaining to the aggravated murder conviction is moot.¹

{¶9} For the foregoing reason, appellant's "Common Law Motion to Vacate Void Judgement [sic] and Sentence" is moot. Accordingly, appellant's appeal is dismissed.

Appeal dismissed.

TYACK, P.J., and McGRATH, J., concur.

¹ We note that the trial court denied appellant's motion upon a finding that appellant's claim was barred by the doctrine of res judicata. However, having found that appellant's claim is moot, we need not address the trial court's determination.